

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1360/2022  
PERMIT APPLICATION NO.TPA/53341

### CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*; Monash Planning Scheme; General Residential Zone Schedule 3, Vegetation Protection Overlay Schedule 1, Construction of four dwellings, planning policy, neighbourhood character, amenity impacts, traffic and parking arrangements, protection of trees on neighbouring reserve.

<b>APPLICANT</b>	Awesome Investment Company Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Monash City Council
<b>RESPONDENTS</b>	Yi Chi Fan & Takehiro Tomita
<b>SUBJECT LAND</b>	9 Pamay Road MOUNT WAVERLEY VIC 3149
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	2 May 2023
<b>DATE OF ORDER</b>	13 July 2023
<b>CITATION</b>	Awesome Investment Company Pty Ltd v Monash CC [2023] VCAT 792

### ORDER

#### Amend permit application

- 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: Fusion Archj Pty Ltd
  - Drawing numbers: T01 Rev A and T02 to T09 inclusive all Rev P01
  - Dated: 20 March 2023

#### No permit granted

- 2 In application P1360/2022 the decision of the responsible authority is affirmed.
- 3 In planning permit application TPA/53341 no permit is granted.

Katherine Paterson  
**Member**



## APPEARANCES

For applicant	Andrew Grey, Town Planner, Grey Kinnane Pty Ltd
For responsible authority	Peter English, Town Planner, Peter English and Associates Pty Ltd
For respondents	Yi Chi Fan, in person

## INFORMATION

Description of proposal	Construction of four dwellings on a lot. Each dwelling will be two storey and contain four bedrooms. A double garage has been provided for each dwelling, accessed via a single crossover to Pamay Road.
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 3, Vegetation Protection Overlay Schedule 1.
Permit requirements	Clause 32.08-6 – Construct two or more dwellings on a lot.
Land description	The subject site has an area of 1,496 square metres and contains two dwellings and some garden plantings, including some weeds identified in the schedule to the VPO3. None of the vegetation on the subject site requires a planning permit to be removed. The site adjoins the Tally Ho Reserve to the rear, which includes a number of large trees close to or overhanging the boundary with the subject site which would require a planning permit under the provisions of the VPO3 to be destroyed, lopped or removed.
Tribunal inspection	2 May 2023



## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

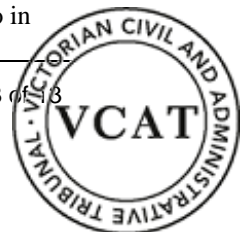
- 1 The Awesome Investment Company Pty Ltd wishes to construct four dwellings on land at 9 Pamay Road Mount Waverley. Following the decision of Monash City Council to refuse to grant a planning permit for the development, they have requested that the Tribunal review this matter.
- 2 The Council refused the application on a number of grounds, but are primarily concerned that the proposed development is inconsistent with the preferred neighbourhood character for the area, will have an unreasonable impact on the amenity of the adjoining properties through visual bulk, overlooking and overshadowing, has not responded appropriately to the reserve, will provide a poor level of internal amenity for the future occupants for the dwellings, and the access arrangements are complicated and will not provide convenient parking for the residents of the dwellings, particularly for the occupants of dwelling 4.
- 3 Yi Chi Fan and Takehiro Tomita share Council's concerns with respect to the access arrangements but are also concerned that the density of the proposed development is excessive in this location and that there is insufficient space for the placement of rubbish bins.
- 4 The Tribunal also received a statement of grounds from Adam Borstelj, who elected not to become a party in this proceeding. He shares the concerns raised by Yi Chi Fan and Takehiro Tomita with respect to the number of dwellings proposed by the development and the parking and traffic impacts of the proposal.

### What are the key issues?

- 5 Having considered all the submissions and evidence and inspected the subject land and its locality, I consider the key issues in this proceeding are:
  - Is the construction of four dwellings on this site consistent with the planning policy framework for this site?
  - Is the design of the proposed development consistent with the neighbourhood character of the area?
  - Will the proposal result in any unreasonable amenity impacts on the amenity of adjoining properties?
  - Does the proposed development provide an acceptable response to the adjoining reserve?

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<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.



- Are the parking and access arrangements acceptable?
- Will the proposal provide an acceptable level of amenity for the future occupants of the dwellings?

### Summary of findings

6 I have decided to refuse to grant a planning permit, as I find the design has failed to respond appropriately to the neighbourhood character of the area or its context, and finally would lead to a poor amenity outcome for both the future occupants of the dwellings and the neighbouring property at 40 Bennett Avenue. My reasons follow.

### IS THE CONSTRUCTION OF FOUR DWELLINGS ON THIS SITE CONSISTENT WITH THE PLANNING POLICY FRAMEWORK FOR THIS SITE?

7 Planning Policies for metropolitan Melbourne at Clause 11.01-1R of the Monash Planning Scheme seeks to create mixed-use neighbourhoods at varying densities to offer more choice in housing and deliver better access to services and facilities. These policies are echoed at Clause 16.01-1R of the scheme which seek to facilitate increased housing within the established area of Melbourne to create a city of 20 minute neighbourhoods close to existing services, jobs and public transport.

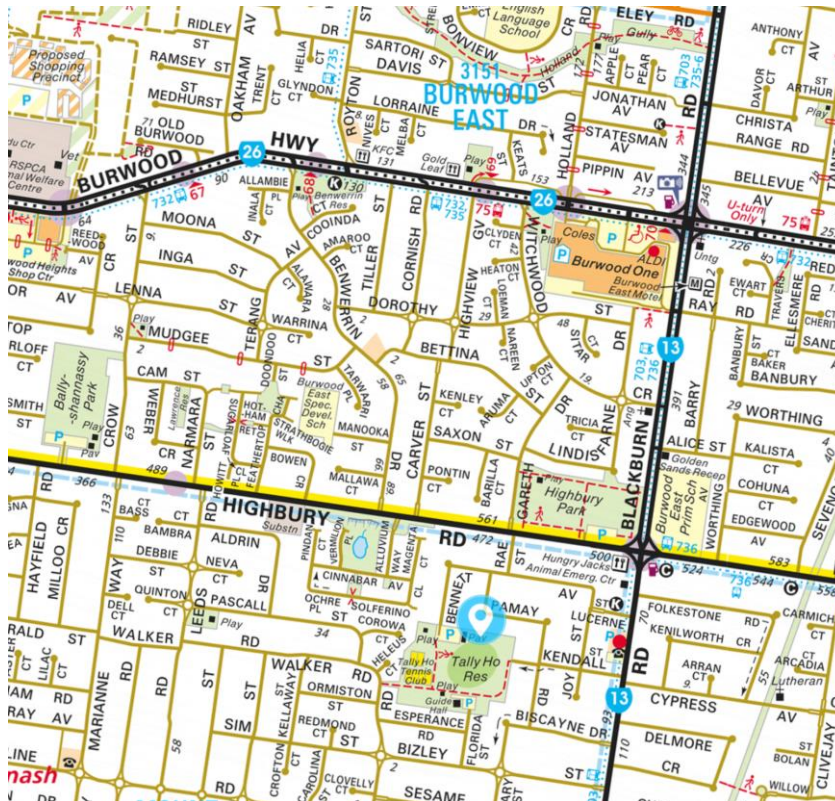


Figure 1 – Extract from Melways online <https://online.melway.com.au/melway/> retrieved 7 July 2023

- 8 As can be seen from the above extract from Melways Online, the subject site is located approximately 500 metres from a small group of shops in Blackburn Road, and 1.1 kilometres (a 14 minute walk) from the Burwood East Activity Centre, which is identified as a Category 3 Neighbourhood Activity Centre at Clause 21.06-1 of the Whitehorse Planning Scheme.
- 9 Nearby public transport is in the form of buses which operate along Blackburn Road and Highbury Road, linking the site with Brighton, Monash University and Mitcham with the nearest bus stop located 500 metres from the subject site. A tram service operates along the Burwood Highway, providing a connection between Docklands, Melbourne's CBD and Vermont South, with the nearest stop located approximately 1.2 kilometres (a 15 minute walk) from the subject site. As such I find that the site is within a location where the planning policy framework would encourage the establishment of additional housing.

### **Local Planning Policy Framework**

- 10 Clause 21.01-1 states that the population of Monash is expected to grow from 189,000 residents in 2016 to 215,000 by 2031, with the number of dwellings expected to grow from 70,600 to 82,000 over this period.
- 11 To accommodate that growth the Residential Development Policy at Clause 21.04 divides the municipality into various categories, with the subject site included within Category 8, Garden City Suburbs. These areas are identified as being suitable for incremental change.
- 12 Clause 22.01-4 further divides the municipality into various character areas, with the subject site included within Garden City Suburbans (Northern) area. The preferred character statement indicates that housing change is expected within this area, including the development of apartment style development on suitable sites.
- 13 I find that the development of medium density housing on this site is supported by the Local Planning Policy Framework.

### **IS THE DESIGN OF THE PROPOSED DEVELOPMENT CONSISTENT WITH THE NEIGHBOURHOOD CHARACTER OF THE AREA?**

- 14 The subject site has been included within a GRZ3, the purposes of which include:
  - To implement the Municipal Planning Strategy and the Planning Policy Framework.
  - To encourage development that respects the neighbourhood character of the area.
  - To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.

15 Clause 55.02-1 seeks to ensure the design of medium density housing respects the existing character of an area or contributes towards a preferred character. The schedule to the GRZ3 includes the following Neighbourhood Character Objectives:

- To support new development that contributes to the preferred garden city character through well landscaped and spacious gardens that include canopy trees.
- To promote the preferred garden city character by minimising hard paving throughout the site by limiting the length and width of accessways and limiting paving within open space areas.
- To support new development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form.
- To support new development that locates garages and carports behind the front walls of buildings.

16 The schedule to the zone varies some of the requirements of Clause 55. Clause 22.01 provides additional guidance with respect to the design outcomes sought for the Garden Suburbs (Northern) areas, which include a preferred character statement for the area, which is:

Although there will be changes to some of the houses within this area, including the development of well-designed and sensitive unit development and, on suitable sites, some apartment development, these will take place within a pleasant leafy framework of well-vegetated front and rear gardens and large canopy trees.

Setbacks will be generous and consistent within individual streets. Building heights will vary between neighbourhoods. Neighbourhoods with diverse topography and a well-developed mature tree canopy will have a larger proportion of two storey buildings. In the lower, less wooded areas, buildings will be mainly low rise unless existing vegetation or a gradation in height softens the scale contrast between buildings. New development will complement the established buildings through consistent siting, articulated facades and use of materials. New development will consider energy efficiency and sustainability principles. Long expanses of blank wall will be avoided, particularly when adjacent to public parks, reserves and other open space areas, where the building should address the public area.

Architecture, including new buildings and extensions, will usually be secondary in visual significance to the landscape of the area when viewed from the street. New development will be screened from the street and neighbouring properties by well planted gardens that will ensure the soft leafy nature of the street is retained.

Gardens will consist of open lawns, planted with a mix of native and exotic vegetation and trees. Existing mature trees and shrubs will be

retained and additional tree planting within streets and private gardens will add to the tree canopy of the area.

Buildings will be clearly visible through these low garden settings, and nonexistent or transparent front fences. Additional vehicle crossovers will be discouraged.

The built-form will be visually unified by well-planted front gardens that contain large trees and shrubs and street tree planting. Trees within lots to be redeveloped will be retained wherever possible to maintain the established leafy character.

Landscape elements such as remnant indigenous vegetation and the large old coniferous wind-rows will be retained until trees are no longer healthy or safe.

- 17 Council submitted that the overall size of the proposed development, particularly the proposed upper level components of the proposed design would result in unreasonable presentation of visual bulk to both the street and neighbouring properties. They also consider that the design of the proposed front dwelling, which has been sited at an angle to the frontage its overall design would be inconsistent with the surrounding built form.
- 18 I agree with Council that the “side” presentation of dwelling 1 to the street will result in a development that does not provide an appropriate level of integration to Pamay Road. Whilst I find that the use of one access point for this site and the location of the garage for dwelling one is generally acceptable, it would be better if dwelling 1 was orientated more directly with the street, particularly its front entry. I do not share Council’s concerns with respect to the two storey height of the proposed development, I find that a two storey form may be accommodated within this streetscape, particularly given the two storey form of dwellings on the neighbouring property at 11 Pamay Road.
- 19 Council also submitted that the attached form and extent of form throughout the site meant that the site could not achieve the level of landscaping anticipated by planning policy and the GRZ3.
- 20 The schedule to the GRZ3 states that:
  - New development should provide or retain:
    - At least one canopy tree, plus at least one canopy tree per 5 metres of site width;
    - A mixture of vegetation including indigenous species;
    - Vegetation in the front, side and rear setbacks; and
    - Vegetation on both sides of accessways.

A canopy tree should reach a mature height at least equal to the maximum building height of the new development

- 21 The subject site is an irregular shaped allotment, but at its widest point the subject site is approximately 51.26 metres. Based on this width, the schedule would require the provision of 11 canopy trees on the site.
- 22 A landscape plan prepared by John Patrick Landscape Architects accompanied the application. This plan indicates that 11 canopy trees may be accommodated on the site with heights ranging from 8 to 12 metres. I find that the landscape plan demonstrates that the site may be landscaped in a manner desired by the schedule to the zone and planning policies applying to the site.

**WILL THE PROPOSAL RESULT IN ANY UNREASONABLE AMENITY IMPACTS ON THE AMENITY OF ADJOINING PROPERTIES?**

- 23 Council submitted that the scale form and height of the proposed dwellings would adversely affect the amenity of the four adjoining properties through visual bulk, overlooking and overshadowing. I will consider the impact of each adjoining property in turn. The properties are shown on the aerial image below:



Figure 2 – Nearmap Aerial Image dated 24 April 2023.

**11 Pamay Road**

- 24 11 Pamay Road contains three dwellings which are laid out around a driveway along the common boundary. As a result of this layout, only one dwelling is likely to be affected by the proposed development, being the two storey dwelling located in the south west corner of the land known as 3/11 Pamay Road.
- 25 This dwelling does not have any windows which face the subject site but does have an area of secluded private open space running along the rear of the dwelling. The secluded private open space for this dwelling has an area





of 55 square metres and a width of the just over 3 metres. The updated shadow diagrams indicate the existing shadows cast into this space exceed those specified at Standard B21 of Clause 55.04-5.

- 26 Due to the setback of the development from the rear boundary, the development is unlikely to have an impact on this space through visual bulk, and there are no windows with an outlook to this space. However, the shadow diagrams indicate that the proposed development will cast additional shadow into the private open space from 2:00pm in the afternoon of the equinox. The application is therefore seeking a variation to Standard B21, which states that ‘if existing sunlight to the secluded private open space of an existing dwelling is less than the requirements of this standard, the amount of sunlight should not be further reduced.’
- 27 Before deciding on an application, the planning scheme requires me to consider:
- The design response.
  - The impact on the amenity of existing dwellings.
  - Existing sunlight penetration to the secluded private open space of the existing dwelling.
  - The time of day that sunlight will be available to the secluded private open space of the existing dwelling.
  - The effect of a reduction in sunlight on the existing use of the existing secluded private open space.
- 28 Given that the proposal will not will not cast additional shadow into this space for five hours between 9:00am to 1:00pm, I am satisfied that the impact on the amenity of this space is acceptable.

### **38 & 40 Bennett Avenue**

- 29 40 Bennett Avenue is a single dwelling which has its primary area of secluded private open space adjoining the dwelling. It also has some vegetation along its boundary which may be affected by the proposed development, however the arborist report which accompanied the application made no findings with respect to these trees. The site has a habitable room window with an outlook towards the site, located approximately 12 metres from the boundary. I share Council’s concerns that the proposed development may appear overly bulky from this area of secluded private open space and the built form needs to respond better to this interface.
- 30 Only oblique views will be possible from 38 Bennett Avenue, to the proposed development and I find that this proposal is unlikely to affect the amenity of this property through visual bulk. The upper floor window to dwelling four has been screened ensuring that the amenity of this space is protected from overlooking.



## 7 and 7B Pamay Road

31 These properties share a common property driveway close to its southern boundary and each dwelling has its private open space located towards the north, away from the subject site, with the exception of a small utility space located at the rear of the garage for 7B. I am satisfied that the proposal is unlikely to affect the amenity of these properties through visual bulk. The dwellings do have windows which face the subject site, the closest of which is located 6.19 metres from the boundary. The overlooking diagrams submitted with the application indicate that the proposal will not overlook these windows, although will overlook the driveway which I find to be acceptable. Due to the orientation of the two properties, the proposal development will not be affected by shadows cast by the proposed development. I am also satisfied that the proposal will not result in an unreasonable loss of daylight to these windows due to the setbacks of the both the existing and proposed dwellings.

### **DOES THE PROPOSED DEVELOPMENT PROVIDE AN ACCEPTABLE RESPONSE TO THE ADJOINING RESERVE?**

- 32 The subject site adjoins the Tally Ho reserve, which is a large reserve which includes tennis club, soccer oval and walking tracks, and is designated as a dog off leash area. The site adjoins the section of the reserve which contains a car park and the rear of a pavilion and water tank. As such its interface with the reserve is somewhat restricted, and from a character perspective I find that the proposed development will have little to no impact on the proposed function of the reserve.
- 33 However, within the reserve along the common boundary is a series of mature eucalyptus trees which require a planning permit to be removed, lopped or destroyed under the provisions of the VPO3.
- 34 These trees, identified as trees 19 to 24 (inclusive) in the arborist report which accompanied the application, overhang the subject site and may require lopping to accommodate the proposed development, although the application does not clearly identify if this is the case.
- 35 Whilst the Tree Protection Zones and Structural Root Zones of the trees are shown on the plan, a calculation of the level of encroachment into each tree has not been provided either on the plans or within the arborist report, although the trees where a calculation is provided indicates that the level of encroachment is less than 10 per cent. Surprisingly the trees are not even shown on the landscape plan. It is very difficult to assess the level of impact of the development on these trees in these circumstances. Given the significance of the trees to the landscape character of the area and the protection afforded to them under the VPO3, any redesign needs to ensure that the development provides appropriate protection to these trees and needs to clearly show the proposed impacts to the trees including any lopping.



## ARE THE PARKING AND ACCESS ARRANGEMENTS ACCEPTABLE?

- 36 The application plans indicate that a double garage is proposed for each dwelling, accessed via a curving driveway and a shared crossover to Pamay Road. Council was critical of the proposed access arrangements, particularly the angled garage for dwelling 4 which they submitted was awkward, the proposed curved driveway and access for dwelling 1.
- 37 The residents raised concern that the proposed access arrangements, traffic generated by the proposed development and waste collection arrangements would have an unreasonable impact on the amenity of the area.
- 38 I am satisfied that the provision of parking complies with the requirements of Clause 52.06 of the planning scheme.
- 39 Turning now to the proposed access arrangements. The amended plans were accompanied by a letter prepared by Traffix Group dated 21 March 2022. The letter states that vehicles will be able to exit and enter the site in a forward direction which is in accordance with Clause 52.06-9. The clause also requires the provision of a corner splay to provide a clear view of pedestrians on the footpath of the frontage road. The letter states that whilst this is not able to be achieved on both sides of the accessway within the subject site, the objective can be achieved as the shared driveway arrangement with 7 Pamay Road and location of the footpath mean that the required splay can be achieved within the road reserve prior to the footpath, as demonstrated in the photo below:



Clause 52.06-9 Design Standard 2 – Car Parking Spaces

Figure 3 – Photograph showing sight triangles provided within the letter from Traffix Group dated 21 March 2022.

- 40 In terms of access to the spaces, the swept path diagrams included within the letter from Traffix Group indicate that corrective manoeuvres are required to enter and exit the garage for dwelling 1, exit dwelling 2, enter and exit dwelling 3, and exit dwelling 4, with vehicles required to park on an angle within this garage. A number of the swept paths appear to either

touch or go beyond the walls of the dwellings themselves, and indicate that the access arrangements are very tight, and that the design requires modification to ensure that vehicles can enter and exit the site in a manner which is consistent with the requirements of Clause 52.06 and the Australian Standard AS2890.1- 2004. Whilst some of the required changes are minor and may have been addressed via conditions, I agree with Council that the proposed access arrangements, particularly the angled parking arrangement for dwelling 4 is an indication that this proposal has failed to respond to the constraints of the site.

- 41 In terms of traffic generated by the proposed development, the Traffix Group indicated that the proposed dwellings will generate 6-7 vehicle trips per dwelling per day, or up to 28 per day with up to 3 vehicles within the peak hour (or 1 every 20 minutes). I agree with the conclusions of the Traffix Group that the traffic generated by the proposed development is low and is unlikely to have an adverse impact on the amenity of the area.
- 42 In terms of waste collection, the small area of nature strip at the front of the site appears to be used by a number of properties. Despite this existing arrangement I am satisfied that there is sufficient room within the road reserve to accommodate the bins generated by the proposed development on collection day. The plans indicate that outside of collection day the bins are to be stored within each individual property which I find acceptable.

**WILL THE PROPOSAL PROVIDE AN ACCEPTABLE LEVEL OF AMENITY FOR THE FUTURE OCCUPANTS OF THE DWELLINGS?**

- 43 Council was critical of the private open space arrangements for the dwellings, which they submitted were an afterthought. They were particularly critical of the secluded private open space for dwellings 2 and 3, which they submitted did not comply with standard B29.
- 44 The schedule to the GRZ3 requires the provision of an area of 75 square metres of private open space per dwelling, with an area of secluded private open space of 35 square metres with a minimum dimension of 5 metres and access from a living room.
- 45 Each dwelling has been provided within the excess of 100 square metres of private open space, with a minimum of 35 square metres of secluded private open space with a minimum area of 5 metres.
- 46 I agree with the Council that the main area of secluded private open space for dwelling 2 will be in shadow and does not comply with B29. Although the space extends beyond the alfresco area, where it would comply with standard B29 this section of space is less than 5 metres wide and is not as useable as the main area accessed via the living room. It is another indication that the design of this development needs to be rethought.
- 47 The arrangements for dwelling 3 are more problematic, as the width of the space is significantly less than the standard for the entire useable area of



secluded private open space for this dwelling and would have a significant impact on its amenity. Whilst it is true that this site backs onto a large reserve, which would provide for some of the recreational needs of the residents, I find that the lack of solar access to the secluded private open space of this dwelling would have a significant impact on its amenity.

## **CONCLUSION**

- 48 Whilst the development of medium density housing on this site is supported by planning policy, the proposed design response has failed to respond appropriately to the neighbourhood character of the area or its context and would lead to a poor amenity outcome for both the future occupants of the dwellings and the neighbouring property at 40 Bennett Avenue.
- 49 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Katherine Paterson  
**Member**

