

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1245/2022
PERMIT APPLICATION NO. TPA/53584

CATCHWORDS

Section 82 of the *Planning and Environment Act 1987*; General Residential Zone - Schedule 6 'Monash National Employment and Innovation Cluster and Clayton Activity Centre'; Monash Planning Scheme; neighbourhood character; amenity.

APPLICANT	Tongdu Xu
RESPONSIBLE AUTHORITY	Monash City Council
RESPONDENT	Roger Rao
SUBJECT LAND	3 Faulkner Street CLAYTON VIC 3168
HEARING TYPE	Hearing
DATE OF HEARING	30 May 2023
DATE OF ORDER	22 June 2023
CITATION	Xu v Monash CC [2023] VCAT 706

ORDER

Waiver of compliance - time by which Respondent is to lodge statement of grounds

- 1 Pursuant to section 126(2)(b) of the *Victorian Civil and Administrative Tribunal Act 1998*, I determine that it is appropriate in these circumstances to waive compliance with order 3 of the Tribunal's order dated 7 October 2022 and the Respondent's statement of grounds dated 28 February 2023 is accepted.

Permit granted

- 2 In application P1245/2022 the decision of the responsible authority is varied.
- 3 In planning permit application TPA/53584 a permit is granted and directed to be issued for the land at 3 Faulkner Street Clayton VIC 3168 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - Construction of three (3) dwellings.

Susan Whitney
Member



APPEARANCES

For applicant	In person, assisted by an interpreter and accompanied by Mr Changbo Yang.
For responsible authority	Ms Aurora Jin, town planner, of Monash City Council.
For respondent	Mr Daniel Bowden, town planner, of Song Bowden Planning.



INFORMATION

Description of proposal	Construction of three double storey dwellings.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Monash Planning Scheme.
Zone and overlays	General Residential Zone – Schedule 6.
Permit requirements	Clause 32.08-6 – construction of two or more dwellings on a lot.
Land description	The subject land is rectangular in shape with a frontage of 15.24 metres, a depth of 43 metres and an area of 665m ² . The site contains a weatherboard dwelling with an existing crossover located on the south-east corner of the site, while there is a street tree located towards the south-west end of the site's frontage. There is an electricity pole 3 metres from the existing crossover.



REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

Overview of physical and planning context

- 1 The Applicant, Tongdu Xu, seeks the Tribunal's review of the decision by the Monash City Council ('**Council**') to approve the proposed construction of three double storey dwellings on the land at 3 Faulkner Street, Clayton ('**Land**').
- 2 The Land appears in the streetscape as follows:²



- 3 The Applicant owns and resides at 2/1 Faulkner Street, being the property located to the west of the Land as shown in the extract of the Feature and Level Survey,³ below left, and the aerial photo,⁴ below right.



- 4 The Land abuts Clayton Reserve/Meade Reserve to the north. The Land is 400 metres to Clayton Railway Station to the east and the Clayton Shopping Centre to the south-east, 600 metres to Monash Medical Centre to the

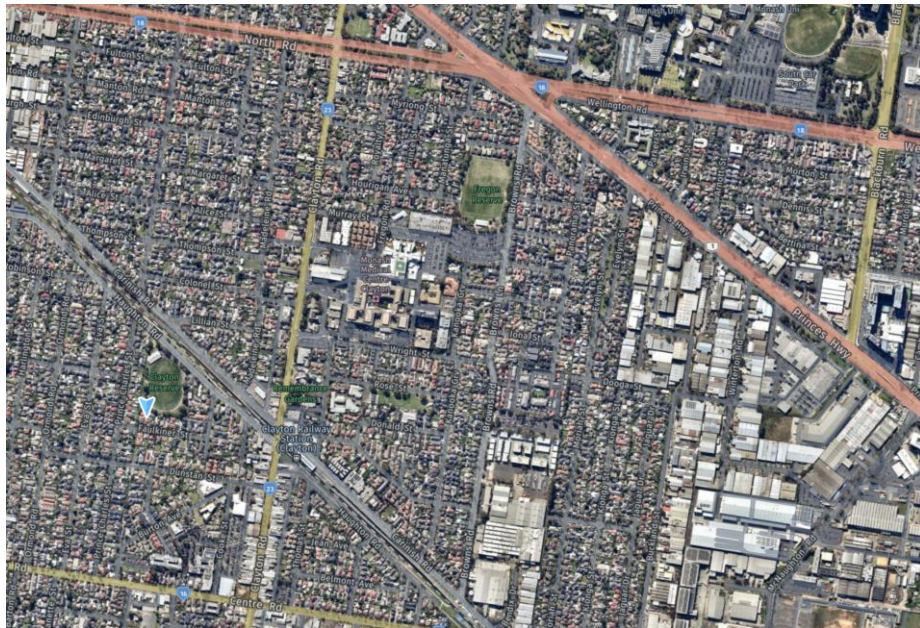
¹ The submissions of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

² Photograph extracted from the permit applicant's submission.

³ Note that the Applicant's property is incorrectly identified as 'No 1/2'; it should read 'No 2/1'.

⁴ Nearmap, 24 April 2023.

north-east and 1.7 kilometres from Monash University, Clayton Campus. The Land is within the Principal Public Transport Network. An aerial photograph of the Land in the context of the broader area is below.⁵



- 5 The Land is located in an area that contains a large extent of multi-dwelling development, as can be seen in the following image.



- 6 The Land is located in the General Residential Zone – Schedule 6 ‘Monash National Employment and Innovation Cluster and Clayton Activity Centre’ (‘GRZ6’) of the Monash Planning Scheme (‘Scheme’).

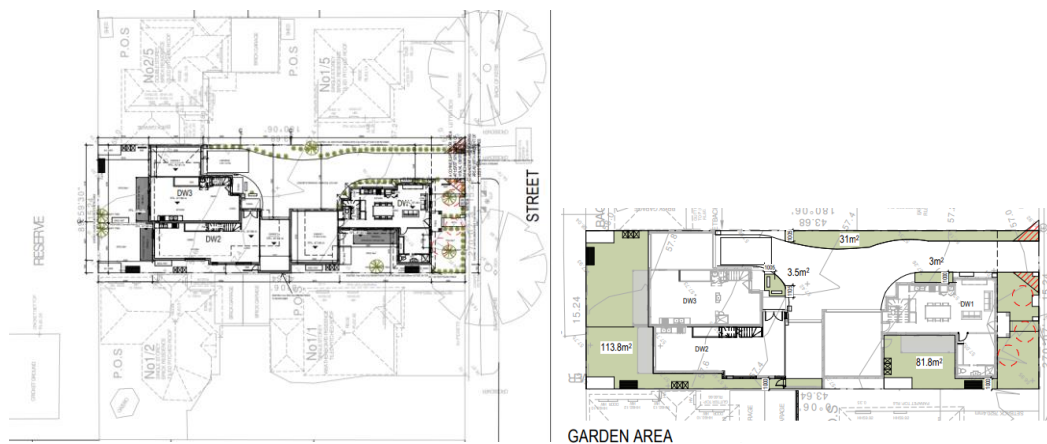
What is the proposed development?

- 7 The proposed development is the construction of three double storey dwellings on the Land, with one dwelling in the front half of the Land and

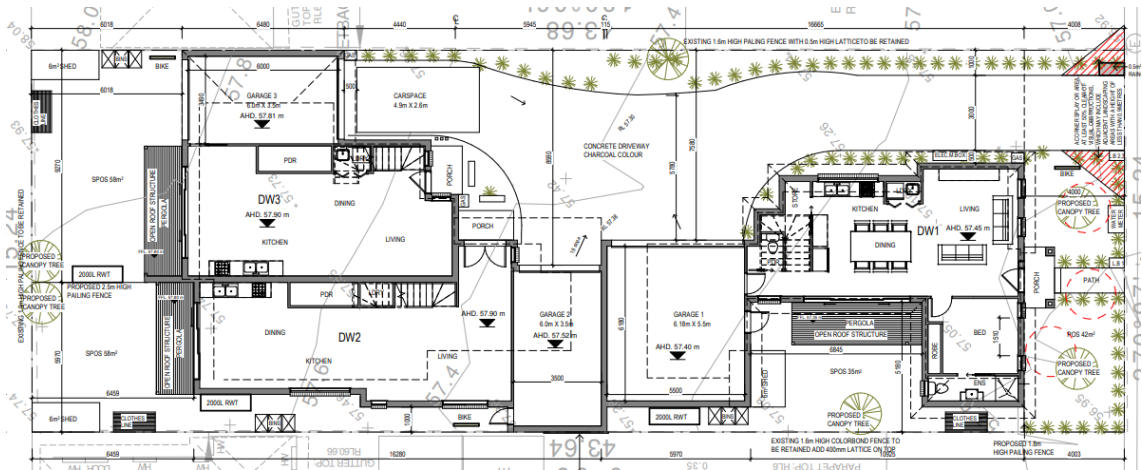
⁵ Nearmap, 24 April 2023.

the other two dwellings in the rear half of the Land, with those constructed in a side-by-side arrangement.

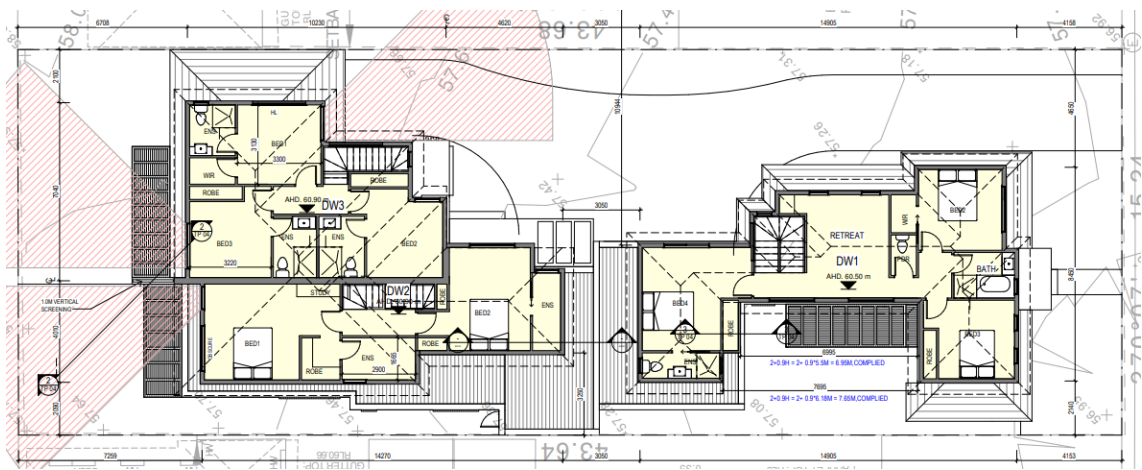
- 8 Dwelling 1 is at the front of the Land and contains four bedrooms (one on the ground floor and three on the first floor), an open plan kitchen, dining and living area on the ground floor and a retreat on the first floor. Two undercover carparking spaces are provided in a double garage. Secluded private open space ('SPOS') of 35m² is provided with a western aspect and accessible via the open plan area. Dwelling 1 provides total private open space ('POS') of 77m².
- 9 Dwelling 2 is at the rear of the Land and contains two bedrooms on the first floor and an open plan kitchen, dining and living area on the ground floor. One undercover carparking space is provided in a single garage. SPOS of 58m² is provided to the north of the dwelling, accessible via the open plan area. Dwelling 2 provides POS of 58m².
- 10 Dwelling 3 is also at the rear of the Land and contains three bedrooms on the first floor and an open plan kitchen, dining and living area on the ground floor. One undercover carparking space is provided in a single garage and a second carparking space is provided in a tandem arrangement. SPOS of 58m² is provided to the north of the dwelling, accessible via the open plan area. Dwelling 3 provides POS of 58m².
- 11 The footprint of the proposal as compared with neighbouring properties including the Applicant's is shown in the following extracts from the permit application plans:



12 The ground floor layout is as follows:



13 The first floor layout is as follows:



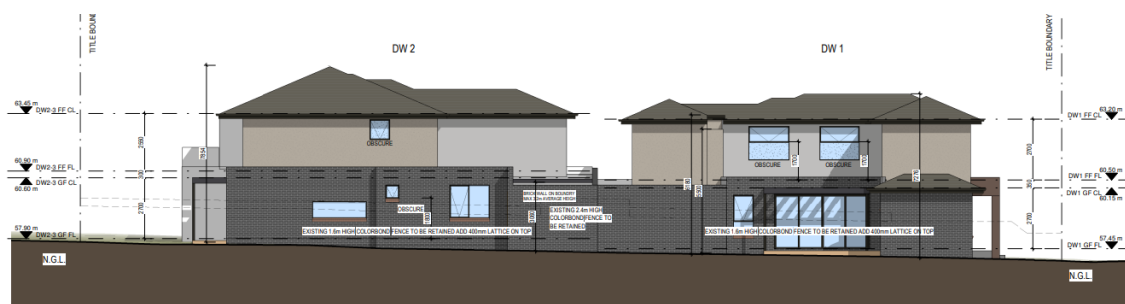
14 The south elevation from Faulkner Street is below to the left, with the north elevation to the right:



15 The east elevation is as follows:



16 The west elevation is as follows:



17 The Applicant will view the proposal from the west elevation.

Procedural issues

Request to remove Respondent as a party

- 18 I dealt with this matter at the hearing and made an oral ruling. The following briefly outlines this issue and my ruling.
- 19 The Applicant sought for the permit applicant/Respondent, being Roger Rao, to be removed as a party to this proceeding on the basis that his statement of grounds was lodged four months after the date required by order 3 of the Tribunal's order dated 7 October 2022. The Respondent's statement of grounds was lodged with the Tribunal on 28 February 2023.
- 20 The Applicant submits that the Respondent's statement of grounds is invalid as it was lodged after the required date. The Applicant submits that the Respondent has given up his right to respond and should not be allowed to attend the hearing and queries if any penalty will be imposed upon the Respondent. When asked, the Applicant stated that she was able to proceed with the hearing on the scheduled date; that is, it is not that she was unable to prepare for the hearing as a consequence of the late lodgement of the statement of grounds, although she would have liked the document to be lodged in accordance with the Tribunal's order.
- 21 At the hearing, the Respondent's representative explained that he was engaged late in the process and lodged a statement of grounds within days of being engaged on the matter. The Respondent submitted that there would be no prejudice to any party as a consequence of the late lodgement of the statement of grounds, given: his statement of grounds effectively just seeks to defend the permit application and uphold the Council's decision, which is what this application is actually challenging; and the extent of time between the lodgement of the statement of grounds and the hearing would have still enabled preparation for the hearing.
- 22 The Council stated that it was not prejudiced by the late lodgement of the Respondent's statement of grounds.
- 23 At the hearing, I explained that pursuant to section 83(4) of the *Planning and Environment Act 1987* ('Act') the Respondent, as the permit applicant,

is automatically a party to this proceeding brought under section 82 of the Act.

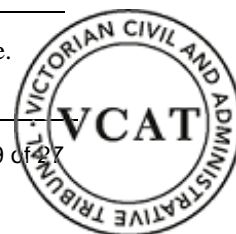
- 24 As such, if I was minded to give effect to the Applicant's request, I would need to remove the Respondent as a party to the proceeding pursuant to section 60A of the *Victorian Civil and Administrative Tribunal Act 1998*. Central to my consideration in such an application is the role of the party in the proceeding and the process, the reasons for the delay, and the prejudice that has been suffered as a consequence of the late lodgement.
- 25 At the hearing, I found that in the circumstances before me, whilst compliance with Tribunal orders is important in the administration of justice, I was not prepared to remove the Respondent as a party to this proceeding. This is because:
- a. it is the Respondent's permit application and I would be assisted in having the Respondent involved in this proceeding;
 - b. I do not regard that any material prejudice has been suffered by the parties in terms of their preparation for this hearing as a consequence of the late lodgement of the statement of grounds given the statement of grounds defends the approval of the permit application and in light of the period of time between that date and the hearing date; and
 - c. there were reasons as to why the statement of grounds was lodged when it was.
- 26 Accordingly, I have not removed the Respondent as a party to this proceeding and I have accepted the Respondent's statement of grounds.

Further material

- 27 At the hearing the Applicant relied on a Powerpoint presentation that was handed to the Tribunal in hard copy.⁶
- 28 The Applicant was directed to provide an electronic copy of the document by email to the Tribunal, following the hearing.
- 29 The Applicant has done this. The Applicant did not provide a copy to the other parties in the proceeding, despite this being a clear requirement.
- 30 The Applicant also sent another email to the Tribunal on 31 May 2023 that purported to address a 'new issue' that occurred to the Applicant after the hearing.
- 31 As communicated in the Tribunal's email to the Applicant⁷ dated 8 June 2023, as the Tribunal did not give leave to the Applicant (or to any party) to provide new material to the Tribunal, that material will not be taken into account in the making of the decision for this application. Accordingly, that material has not been taken into account in my decision-making.

⁶ Noting that this hearing was conducted in person at the Tribunal at 55 King Street, Melbourne.

⁷ Which was copied to all other parties.



WHAT ARE THE KEY ISSUES?

- 32 The Applicant raises concerns regarding overdevelopment, side and rear setbacks, overlooking, overshadowing, daylight to existing rooms, potential for impacts to on-street car parking, noise and safety issues.
- 33 Having regard to the nature of these concerns and the matters that the Tribunal needs to address, the key issues that I need to determine are:
- Does the proposal contribute to a preferred neighbourhood character?
 - Does the proposal create any off-site amenity impacts?
- 34 Having regard to the physical and planning context of the Land, the submissions of the parties and the relevant policies and controls of the Scheme, I have determined to vary the decision of the Council with the result that a planning permit is directed to be issued but on varied conditions. My reasons follow.

DOES THE PROPOSAL CONTRIBUTE TO A PREFERRED NEIGHBOURHOOD CHARACTER?

- 35 Whether a proposal constitutes an overdevelopment of a site is relative to the development expectations for that site, which in this instance is related to the preferred neighbourhood character as expressed in the Scheme.
- 36 For the Land, this is informed by the purposes and neighbourhood character objectives of the GRZ6, the policy aspirations for the Land and the variations to ResCode and those aspects of ResCode that remain unaltered.
- 37 The purposes of the GRZ are:

Purpose

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.

To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.

- 38 The identified neighbourhood character objectives of Schedule 6 are:

To facilitate housing diversity in the form of units, townhouses and apartment developments of high quality design and finish.

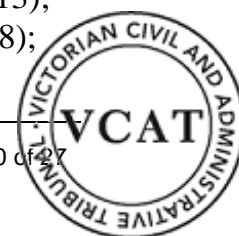
To provide an interface between the Clayton Activity Centre, the Monash Employment and Innovation Cluster, the housing growth area and the lower scale surrounding garden city suburban areas.

To encourage development that respects sensitive residential interfaces and minimises building mass and visual bulk in the streetscape through landscaping in the front setback and breaks and recesses in the built form.

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 ensure developments are constructed within an open garden setting through the retention and planting of vegetation, including canopy trees.

- 39 GRZ6 varies aspects of ResCode as contained in clause 4.0 of Schedule 6, being: minimum street setback (Standard B6); landscaping (Standard B13); side and rear setbacks (Standard B17); private open space (Standard B28); and, front fence height (Standard B32).



- 40 Clause 5.0 of Schedule 6 specifies a maximum height for a dwelling as being 11.5 metres and 3 storeys.
- 41 I agree with the Council that the effect of these variations to clause 55 is to encourage an increase in residential development and densification of the area.
- 42 The Council observed that the GRZ6 is applied to a relatively confined area and that the expectation is for more density in the GRZ6 area. In terms of the Land, the Council submitted that the site is not at the periphery of the GRZ6 but central within it and close to Clayton Major Activity Centre and Clayton Railway Station, which is also supportive of greater density than if the Land were on the edge and interfacing with a zone with lesser density expectations. I also agree with this observation.
- 43 In terms of preferred future character, clause 22.01 ‘Residential Development and Character Policy’ of the Scheme identifies the Land as being within the ‘Monash National Employment Cluster and Clayton Activity Centre – Housing Diversity Area’. Development in that area should respond to the applicable preferred future character statement, which is as follows:⁸

Monash National Employment Cluster and Clayton Activity Centre – Housing Diversity Area

The Clayton Activity Centre and the cluster more broadly are expected to experience major redevelopment, as one of the key areas for employment growth within Melbourne. As such, the core of the activity centre and the cluster are anticipated to accommodate growth and more diverse housing needs. This area also forms an interface to the surrounding garden city suburbs. New development should provide a transition between these areas.

New housing will generally comprise multi dwelling developments such as units and, where appropriate, low rise apartments. Front and rear setbacks will be less than those preferred in the garden city areas, however will still provide the opportunity for landscaping. Landscaping and open space within developments will remain an important feature for this character area. Canopy trees within developments and separation between buildings will provide visual and environmental amenity for occupants and the residents of existing dwellings. New developments will be designed and constructed to a high standard, ensuring they provide a positive architectural impact.

- 44 The Monash Housing Strategy was adopted by the Council in 2014. The Residential Development Framework Plan of the Monash Housing Strategy 2014 identifies areas with future redevelopment potential. The Land is included in a:

- a. Category 2 area – Accessible Areas, described as:⁹

Residential zoned land *generally* defined as being within reasonable walking distance from an Activity Centre, Neighbourhood Centre, railway station, public transport interchange or medium to large scale supermarkets. The boundaries have to be refined to take into consideration natural boundaries, non residential land uses, consideration (where relevant) of slope/walkability, and recognition of areas of recognising special context.

- b. Category 3 area – Residential Land in the Monash National Employment Cluster, described as:¹⁰

Residential land within the Monash National Employment Cluster (as designated by *Plan Melbourne*).

⁸ Clause 220.1-4 of the Scheme.

⁹ Monash Housing Strategy 2014, 70.

¹⁰ Ibid, 71.



- 45 In a Category 2 area the objective is for moderate housing change and diversification serving as a transition between commercial and residential areas, with development respectful of neighbourhood character and amenity, with greater emphasis placed on these objectives proportionate to a site's distance from commercial zones and transport nodes.¹¹ The residential outcome sought is for lower density unit and townhouse style developments at the interface with surrounding residential areas.¹²
- 46 In a Category 3 area the objective is for housing change and diversification, with development responding to the broader context, taking into account both commercial design and residential character as relevant.¹³ The residential outcome sought is for lower density unit and townhouse style development at the interface with surrounding residential areas, with a potential for lower to medium density apartment development in predominantly residential streets subject to careful design.¹⁴
- 47 These category areas were further defined as part of Amendment C125 to the Scheme, resulting in the introduction of the GRZ6 into the Scheme.
- 48 Clause 22.06 'Major Activity and Neighbourhood Centres' of the Scheme identifies the major activity centres as important locations for residential development.
- 49 Further, Faulkiner Street is identified in the Clayton Activity Centre Precinct Plan prepared by the Council dated 28 January 2020 as being in an area of residential intensification where building heights of between 3 and 5 storeys may be possible. It is acknowledged that this document does not form part of the Scheme, however, it is a document approved by the Council to which regard can be given pursuant to section 60(1A)(g) of the Act, albeit this carries less weight than the contents of the Scheme.
- 50 The Council considers that the Land is in an excellent location for development given its proximity within walking distance of the Clayton Major Activity Centre, with the full range of facilities available.¹⁵
- 51 The Council summarises the existing character as comprising a mix of single and double storey dwellings and multi-units, with generally pitched and hipped roofs and a mix of building materials, from brick to weatherboard and rendered surfaces. The Council observes that most properties have a larger setback on one side and a smaller setback on the other, with a single crossover per lot. Established street tree planting is evident.
- 52 The Council submits that the proposal meets both the existing and the preferred neighbourhood character, in that the proposal will provide an

¹¹ Ibid, 70.

¹² Ibid, 70.

¹³ Ibid, 71.

¹⁴ Ibid, 71.

¹⁵ Submissions by Monash City Council, [32].



outcome that is sought by the Scheme whilst being a good fit within the existing physical context.

53 The Council summarises its position on this matter as follows:¹⁶

44. The original character of the location is changing and what will ultimately evolve will be a range of diverse housing options with townhouses and apartments of up to three storeys in height.

45. The overall appearance of sites will therefore be, as a result of the different controls, be more intense than those occurring within the General Residential Zone Schedule 3 and Neighbourhood Residential Zones where lesser intense levels of change are expected. It is Council's position that the subject site provides an appropriate response to the site and its surrounds having regard to the outcomes sought in the Monash Planning Scheme which in turn reflect the favourable locational attributes of the area and state and local government policies.

54 I agree with the Council's assessment of the existing neighbourhood character and what is sought for the Land in terms of preferred neighbourhood character. The Land is in an area in which the Scheme clearly envisages increased housing density in the form of multi-dwelling developments, albeit mindful of that development being cognisant of minimising building mass and visual bulk in the streetscape through landscaping in the front setback and breaks and recesses in the built form. The Scheme also seeks to minimise hard paving, through limiting the length and width of accessways and limiting paving within open space areas, while ensuring development is constructed in an open garden setting through the retention and planting of vegetation, including canopy trees.

55 I agree with the Council that the proposal contributes to the preferred neighbourhood character whilst also appropriately integrating with the existing character and context.

56 The proposal employs pitched, hipped roofs, while the utilisation of brick and render in tones that integrate with the existing streetscape will result in the built form being in-keeping with what presently exists, notwithstanding the expectation for change.

57 The double storey construction will integrate with the streetscape, representing an increase in one storey from 1 Faulkner Street but akin to the double storey rear development at 2/5 Faulkner Street. In any event, an increase in one storey is not unexpected in a residential context and is even more expected in an area like this that is expected to change.

58 The layout of the built form into two components may create the impression of there being two dwellings on the lot when viewed from the streetscape, thereby minimising the intensity of development, again, notwithstanding the expectation for change.

59 The front setback will be noticeably smaller than either adjoining property but the 4 metre depth complies with the varied Standard B6; an example of

¹⁶ Ibid, [44]-[45].



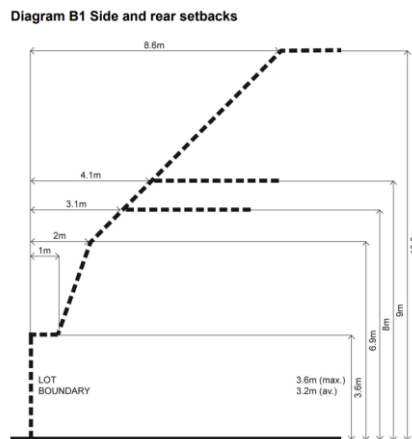
how the variation to clause 55 through the GRZ6 results in greater development intensity.

60 In terms of the side and rear setbacks, clause 55.04-1 seeks:

To ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings.

61 Standard B17 provides one way in which to meet this objective.

62 Standard B17 specifies certain setback distances which, if met, would result in the objective being satisfied. These are represented diagrammatically in Diagram B1 of clause 55.04-1, as follows:



63 The shape that the side elevation of the built form can take can mirror the shape of the above diagram, noting that whilst the GRZ6 varies Standard B17 it does so only in respect of the rear setbacks and not in respect of the side setbacks.

64 In terms of the side setbacks, the Standard B17 line was imposed on the elevations in the permit application plans. Standard B17 is met by the proposal, given the Respondent confirms that the encroachment of the eaves into the Standard B17 line measures less than the allowable encroachment of 500mm.

65 In terms of the rear setbacks, the rear setback for Dwelling 3 of 6.018 metres and for Dwelling 2 of 6.459 metres exceeds the rear setback requirement of 4 metres of the varied Standard B17. As such, to the extent that the amount of built form in the rear of the Land will be evident in oblique views obtained from the streetscape (and thereby contribute to neighbourhood character), what is proposed meets and exceeds what is sought for the Land.

66 As such, the proposal meets Standard B17 and the objective of clause 55.04-1 of the Scheme.

67 In terms of visual bulk, there will be a discernible break in the first floor built form between Dwelling 1 and Dwellings 2 and 3, when viewed from either 1 or 3 Faulkner Street, thereby minimising the visual bulk of the built form.

- 68 The driveway is curved with space for planting (including a canopy tree) along the side boundary fence and the charcoal grey is a colour that will integrate in the streetscape. Aside from the driveway, there is minimal paving across the Land. The front setback of Dwelling 1 is of sufficient area to accommodate two canopy trees along with understory planting, while the SPOS of each dwelling shows one canopy tree in each space but realistically is of a size that could accommodate more than one. The permit conditions seek the planting of at least five canopy trees across the POS of the Land but if more could be provided this is encouraged; I will leave this to the Council to assess when it reviews the landscape plan submitted for approval under the permit.
- 69 The POS for each dwelling meets the increased area requirement of 50m² pursuant to varied Standard B28, and the SPOS meets the increased area requirement of 35m² pursuant to varied Standard B28, where both of these changes go to the identified neighbourhood character objective in the GRZ6 to ensure development occurs in an open garden setting.
- 70 I disagree with the Applicant's assertion that this proposal will damage neighbourhood character. In making her assessment, the Applicant has focused on what she perceives to be the impact to sunlight to existing buildings caused by various new buildings constructed in the area. This observation does not go to the issue of whether the proposal is consistent with existing neighbourhood character or contributes to a preferred neighbourhood character.
- 71 Rather, the examples of new development provided by the Applicant reinforce the changing nature of the broader area and the preponderance of double storey multi-dwelling development of similar design and colourings to the proposal.
- 72 The Applicant's comparative analysis of the proposal and the Land with the site area of those newer developments and the number of dwellings constructed is not determinative of the acceptability (or lack thereof) of this proposal on the Land; those other sites might be larger than the Land but that does not mean that the development proposed on the Land is unacceptable.
- 73 Overall, for the above reasons I find that the proposal both contributes to a preferred neighbourhood character but will also respect the existing neighbourhood character.

DOES THE PROPOSAL CREATE ANY OFF-SITE AMENITY IMPACTS?

- 74 The Applicant's concerns regarding detrimental impacts to her amenity will be addressed in turn.

Overlooking

- 75 The Applicant is concerned that the west facing ground floor window of Dwelling 2 will be able to overlook her property.



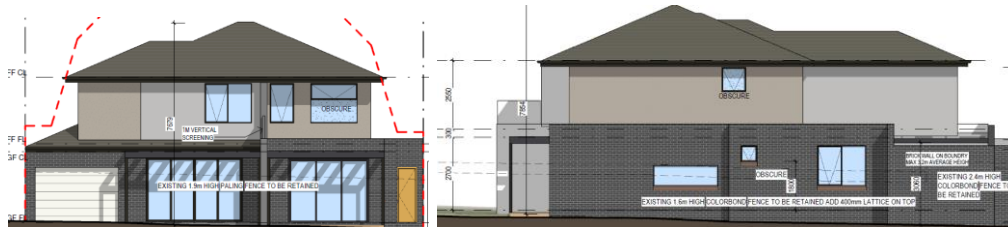
76 Clause 55.04-6 ‘Overlooking objective’ seeks:

To limit views into existing secluded private open space and habitable room windows.

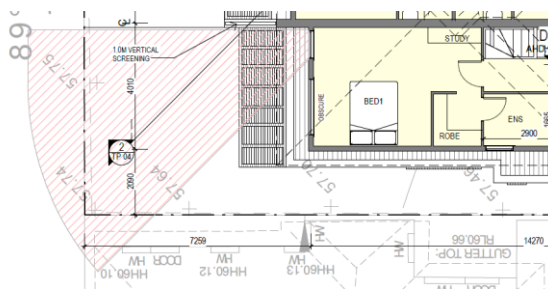
77 Importantly, the objective is to limit views rather than prevent them entirely. Further, the views that are to be limited are those into existing SPOS and habitable room windows.

78 Standard B22 provides a way in which this objective can be met. The measures suggested in Standard B22 include that window sill heights be constructed at least 1.7 metres above floor level and that there be permanently fixed external screens to at least 1.7 metres above floor level that are no more than 25 per cent transparent.

79 In terms of west facing and north facing upper floor windows, the permit application plans show these to be treated with obscure glazing in accordance with Standard B21 but for the rear eastern window of bedroom 1. This is shown in the following extracts (the rear elevation is to the left).



80 The Respondent submits that the rear eastern window does not require screening given there will be no potential for overlooking given the intervening boundary fence line, as shown below.



81 The Council’s assessment was based on the common boundary fence between the Applicant’s property and Dwelling 2 (and Dwelling 1, to the front of the Land) being 2 metres high. This was on the basis of the endorsed plans for planning permit 26085 that enabled development of the Applicant’s land showing a 1.6 metre high Colorbond boundary fence with 400mm trellis attached above, resulting in a fence measuring 2 metres high in total.

82 The Applicant and the Respondent confirmed that the existing fence only comprises the 1.6 metre high Colorbond boundary fence and the 400mm trellis is not present. This is aside from the existing 2.4 metre high

Colorbond fence section that is located adjacent the SPOS of 1/1 Faulkner Street. The existing condition is shown in the following photographs.¹⁷



Rear yard looking south from the parkland to the rear of the site



Looking west from the review site.

- 83 The permit application plans show that the proposal involves the installation of a 400mm trellis on the common boundary fence, so that the boundary fence will measure 2 metres high. The permit application plans are based on this being undertaken.
- 84 The Council assesses the finished floor level of both the kitchen and the living room window on the ground floor of the western elevation as being less than 800mm above the existing ground level. When this is combined with the proposed 2 metre high boundary fence, pursuant to Standard B22 these windows do not require screening.
- 85 The Applicant does not want the 400mm trellis to be installed as she is concerned about the impact that this will have on overshadowing of her property.
- 86 The Respondent was content to only install the trellis in selected areas; for instance, opposite the proposed living room window. However, if the trellis was to be installed as the Respondent had originally intended, and is shown in the plans, the Respondent submitted that there will be no meaningful change to the Applicant's experience of overshadowing. This is because, in large part, the current shadow caused by the existing boundary fence falls across much of the side setback during the morning hours on 22 September; in terms of the impact to Dwelling 2, installing the 400mm trellis will elongate that shadow so that it falls over a greater part of the building roof.
- 87 The Council wants the trellis to be installed across the fenceline and says that allowing something different through this permit would be at odds with planning permit 26085.
- 88 I agree with the Council that given the trellis is required by planning permit 26085, it would be inconsistent if a permit issued for the proposed development was based on parts of that trellis being absent. As an aside, I accept the submissions from the Respondent as to the change in overshadowing to the Applicant's property as a consequence but in any event, this is a situation that is created by planning permit 26085, which should have been complied with.
- 89 When the fence measures 2 metres high, and mindful of the finished floor level of both the kitchen and the living room window on the ground floor of

¹⁷ Photograph provided as part of the Respondent's submissions.

the western elevation being less than 800mm above the existing ground level, Standard B22 does not require screening of these windows.

- 90 In terms of the east facing upper floor retreat windows in Dwelling 1, the Council imposed condition 1(e) of the NOD to require that these windows include fixed obscure glazing, screens or sill heights to 1.7 metres above finished floor level, in order to comply with Standard B21.
- 91 Through condition 1(d) of the NOD, the Council has also sought for internal elevation drawings to be included with the plans to demonstrate that any overlooking impacts from the first floor east facing bedroom window in Dwelling 2 are to be minimised.
- 92 Overall, I am satisfied that the proposal complies with Standard B22 and meets the objective of clause 55.04-6.

Overshadowing

- 93 The Applicant is concerned that her decking and SPOS will be significantly overshadowed by the Dwelling 2 wall.
- 94 Clause 55.04-5 'Overshadowing open space objective' seeks:

To ensure buildings do not significantly overshadow existing secluded private open space.

- 95 Standard B21 provides a way in which this objective can be met. Standard B21 provides:

Where sunlight to the secluded private open space of an existing dwelling is reduced, at least 75 per cent, or 40 square metres with minimum dimension of 3 metres, whichever is the lesser area, of the secluded private open space should receive a minimum of five hours of sunlight between 9 am and 3 pm on 22 September.

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.

- 96 The shadow diagrams that form part of the permit application plans demonstrate compliance with Standard B21 in terms of all adjoining properties other than 1/1 Faulkner Street. The shadow diagrams are based on the common boundary fence measuring 2 metres high in total.
- 97 In order to address the non-compliance at 1/1 Faulkner Street, the Council has included conditions 1(a) and (b), being:
- a. The separation between the upper floors of Dwellings 1 and 2 is to be increased to 4.5 metres.
 - b. The setback of the western facade of upper floor bedroom 4 in Dwelling 1 to the western boundary is to be increased to 2.5 metres.
- 98 The effect of the changes made through these conditions is to create a larger space between the built form at first floor, and a greater setback of the built form from the common boundary, in order to create a space in the overshadowing that will benefit the SPOS of 1/1 Faulkner Street.
- 99 The Respondent has suggested that the wording of condition 1(a) be amended to clarify the location of the separation in order to ensure the



outcome that the Council is seeking; that is, that the increased setback is to be created through modification to Dwelling 2. I agree with this change.

- 100 The Applicant's concerns involve her SPOS. The following photograph¹⁸ shows that the Applicant's main area of SPOS is located to the north-west of her dwelling and is separated from the Land by her dwelling.



Private open space looking south east.

- 101 In any event, I find that the proposal complies with Standard B21 as regards the Applicant's property.

Daylight to existing windows

- 102 The Applicant's overriding concern involved the potential detrimental impact to sunlight reaching the bedroom windows of her house and the consequential detrimental impact on her amenity.

- 103 Clause 55.04-3 'Daylight to existing windows objective' seeks:

To allow adequate daylight into existing habitable room windows.

- 104 Standard B19 provides one way to address this objective. Standard B19 provides as follows:

Buildings opposite an existing habitable room window should provide for a light court to the existing window that has a minimum area of 3 square metres and minimum dimension of 1 metre clear to the sky. The calculation of the area may include land on the abutting lot.

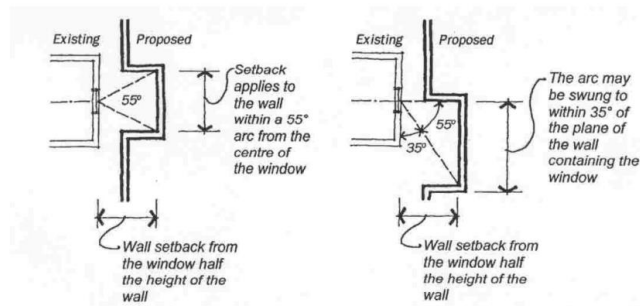
Walls or carports more than 3 metres in height opposite an existing habitable room window should be set back from the window at least 50 per cent of the height of the new wall if the wall is within a 55 degree arc from the centre of the existing window. The arc may be swung to within 35 degrees of the plane of the wall containing the existing window.

Where the existing window is above ground floor level, the wall height is measured from the floor level of the room containing the window.

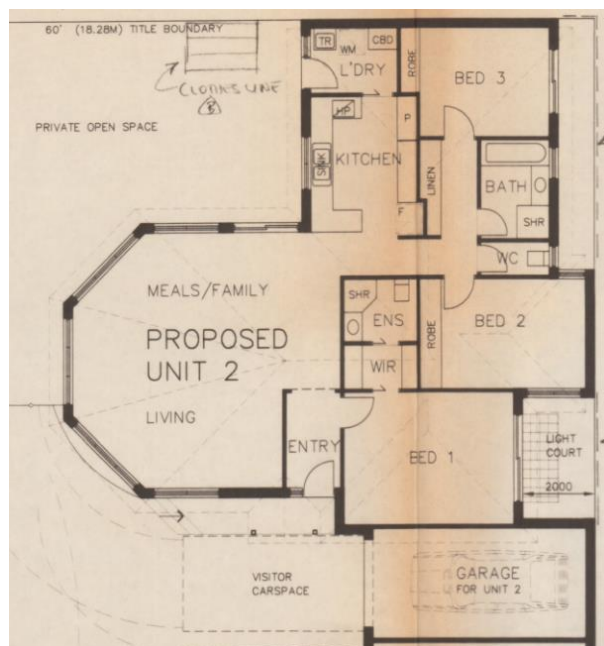
- 105 Diagram B2 shows the requirements of Standard B19:

¹⁸ Photograph provided as part of the Respondent's submissions

Diagram B2 Daylight to existing windows



106 The Applicant's windows that face the Land are shown in the following extract from planning permit 26085, noting that the Applicant confirmed that the labelling of each room in that plan is accurate and is how these rooms are presently being used.



- 107 This plan shows that the Applicant's windows that face the Land are as follows:
- two windows for bedroom 1 face the light court that measures 2 metres deep from the common boundary fence, with one of those windows not facing the Land but facing south;
 - one window for bedroom 2 that faces north and not towards the Land;
 - one window to the 'WC' (i.e. toilet);
 - one window to the bathroom; and
 - one window for bedroom 3 that faces the Land.
- 108 The windows to the toilet and bathroom are not habitable room windows as defined in clause 73.01 of the Scheme. As such, they are not governed by clause 55.04-3 of the Scheme.

- 109 The windows that do not face the Land are not ‘opposite’ the proposed development and are not covered by Standard B19.
- 110 The window that faces the Land but is also facing the light court on the Applicant’s property meets the requirements of Standard B19.
- 111 The window to bedroom 3 that faces the Land is not located opposite any proposed built form; rather, that window is located adjacent to the SPOS for Dwelling 2.
- 112 As such, I find that Standard B19 is met for the proposed development, as is the objective of clause 55.04-3.

Noise

- 113 The Applicant is concerned that the design will cause extreme noise impacts to her, through the sounds of people chatting, watching television or banging pots and pans. The concern arises given the kitchen and living room windows of Dwelling 2 being designed to face the Applicant’s property.
- 114 Clause 55.04-8 ‘Noise impacts objectives’ seeks:

To contain noise sources in developments that may affect existing dwellings.

To protect residents from external noise.

- 115 Standard B24 provides one way to address this objective. Standard B24 provides as follows:

Noise sources, such as mechanical plant, should not be located near bedrooms of immediately adjacent existing dwellings.

Noise sensitive rooms and secluded private open spaces of new dwellings and residential buildings should take account of noise sources on immediately adjacent properties.

Dwellings and residential buildings close to busy roads, railway lines or industry should be designed to limit noise levels in habitable rooms.

- 116 A permit condition has been imposed to ensure that any air conditioning units that are installed for Dwelling 2 are located on the shared boundary with Dwelling 3, meaning that such units will be located away from the Applicant’s property and interface.
- 117 Aside from mechanical devices (such as air conditioning units), Standard B24 deals with reverse amenity issues; that is, the impact that existing noise sources on adjacent sites might have on proposed development.
- 118 The matters about which the Applicant is concerned constitute normal urban noise that is to be expected from residential properties and part and parcel of living in an urban area. There is nothing that the Applicant has identified that is unusual about this proposed development that would result in non-compliance with the objective of clause 55.04-8 of the Scheme.

Safety

- 119 The Applicant is concerned that the set back between her house and Dwelling 2 is too close and that if something falls from the roof of Dwelling 2 it will damage her assets and threaten her life.



- 120 I agree with the Respondent that the Scheme and the planning process does not turn its mind to the concern raised by the Applicant; rather, this is something that can be managed in other ways.
- 121 To the extent that the Scheme does address safety, clause 55.03-7 and associated Standard B12 deal with different safety concerns, none of which are in issue in this proposal.

ARE THERE ANY OTHER ISSUES?

- 122 The Applicant's concerns regarding impacts to on-street car parking are not before the Tribunal in this proceeding. This is because the proposed development meets the statutory car parking requirements in clause 52.06 of the Scheme, including that it is not required to provide any visitor car parking spaces.
- 123 As such, any concerns that the Applicant might hold regarding the potential for an impact on parking in Faulkner Street are not able to be addressed through this proceeding.
- 124 The Applicant's concerns regarding 'intolerable' odour from rubbish bins on Dwelling 2 is partly addressed by permit condition 1(n) that relocates the bin storage area so that it is adjacent the existing garage wall of 2/1 Faulkner Street, meaning that the Applicant's garage wall will act as a barrier for the bin smell. Beyond this, again, the presence of bins and their storage is part and parcel of living in an urban area.

WHAT CONDITIONS ARE APPROPRIATE?

- 125 Following the discussion that took place during the hearing, I have made some amendments to the Council's proposed permit conditions.
- 126 I have also specified, for the purposes of condition 5(c), that the canopy trees are to be located in the POS of the dwellings, with at least one canopy tree in the SPOS of each dwelling.

CONCLUSION

- 127 For the reasons given above, the decision of the responsible authority is varied. A permit is granted subject to conditions.

Susan Whitney
Member



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/53584
LAND	3 Faulkner Street CLAYTON VIC 3168

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Construction of three (3) dwellings.

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 Bello design group marked Revision B and dated 8 June 2022, but modified to show:
 - (a) the separation between the upper floors of Dwellings 1 and 2 is to be increased to 4.5 metres;
 - (b) the setback of the western facade of upper floor bedroom 4 in Dwelling 1 to the western boundary is to be increased to 2.5 metres by modification to Dwelling 2;
 - (c) the internal dimensions of all bedrooms are to be noted on the plans;
 - (d) internal elevation drawings are to be included with the plans to demonstrate that any overlooking impacts from the first floor east facing bedroom window in Dwelling 2 are to be minimised;
 - (e) the east facing upper floor retreat windows in Dwelling 1 are to include fixed obscure glazing, screens or sill heights to 1.7 metres above finished floor level;
 - (f) the windows to include double glazing are to be noted on the plans, as outlined in the ESD report provided with the application;
 - (g) the gradients of all sections of the driveway are to be noted on the plans;
 - (h) the tandem car space proposed for Dwelling 3 is to have a maximum grade within a parking module measured parallel to the angle of parking of 1 in 20. Measured in any other direction is 1 in 16;
 - (i) the number of structures to be located in the primary secluded private open space area for Dwelling 1 are to be reduced and these structures



are to be relocated to another private open space area, adjacent to the dwelling;

- (j) 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";
- (k) 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;
- (l) a Landscape Plan in accordance with condition of this Permit;
- (m) deletion of the bicycle storage space;
- (n) relocation of the bin storage area for Dwelling 2 so that it is adjacent to the existing garage of 2/1 Faulkiner Street;
- (o) relocation of the shed for Dwelling 2 so that it is adjacent to the on-boundary construction of Unit 2/1 Faulkiner Street, Clayton;
- (p) relocation of the water tank for Dwelling 2 to the shared boundary with Dwelling 3; and
- (q) any air conditioning units must be located on the shared boundary with Dwelling 3.

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.

Environmentally Sustainable Design (ESD)

- 3 Upon approval the Sustainable Design Assessment will be endorsed as part of the planning permit and the development must incorporate the sustainable design initiatives outlined in the Sustainable Design Assessment to the satisfaction of the Responsible Authority.

Sustainable Management Plan

- 4 Concurrent with the endorsement of plans requested pursuant to Condition 1, a Sustainable Management Plan must be submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Sustainability Management Plan prepared by Starating dated 25 March 2022, except that the plan must be modified to show any changes required 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

- 5 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) 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) a minimum of five (5) canopy trees (minimum 1.5 metres tall when planted) in the private open space of the dwellings, with at least one canopy tree located in the secluded private open space of each dwelling. The canopy trees must have a minimum height of 7 metres and must have a spreading crown with a minimum width of 4 metres at maturity, or as otherwise agreed by the Responsible Authority;
 - (d) the location of any fencing internal to the site;
 - (e) provision of canopy trees with spreading crowns located throughout the site including the major open space areas of the development;
 - (f) planting to soften the appearance of hard surface areas such as driveways and other paved areas;
 - (g) canopy Trees / Significant Planting on adjoining properties within 3 metres of the site;
 - (h) the location of any retaining walls associated with the landscape treatment of the site;
 - (i) details of all proposed surface finishes including pathways, accessways, patio or decked areas; and
 - (j) landscaping and planting within all open areas of the site.

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



Tree Protection

- 6 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.
- 7 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
- 8 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

- 9 The site must be drained to the satisfaction of the Responsible Authority.
- 10 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.
- 11 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.
- 12 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.
- 13 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

- 14 Any new vehicle crossover or modification to an existing vehicle crossover must be constructed to the satisfaction of the Responsible Authority.
- 15 The following requirements must be met to the satisfaction of the Responsible Authority:
 - (a) driveway gradient to be no steeper than 1 in 10 (10%) within 5 metres of the frontage to ensure safety for pedestrians and vehicles;
 - (b) maximum grade of driveway of 1 in 4;



- (c) provision of minimum 2.0 metre grade transitions between different sections of ramp or floor for changes in grade in excess of 12.5% (summit grade change) or 15% (sag grade change);
- (d) grade changes greater than 18% or less than 3 metres apart are to be assessed for clearances in accordance with Appendix C of the Australian Standard for Off - Street Car Parking, AS/NZS 2890.1;
- (e) the maximum grade:
 - i within a parking module measured parallel to the angle of parking is 1 in 20; and
 - ii measured in any other direction is 1 in 16; and
- (f) the development must be provided with 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.

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.

Satisfactory Continuation and Completion

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

Permit Expiry

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

