

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1240/2023  
PERMIT APPLICATION NO. TPA/46427/F

<b>APPLICANT</b>	Sam Gerges & Dimitra Sanetsis
<b>RESPONSIBLE AUTHORITY</b>	Monash City Council
<b>RESPONDENT</b>	Nader Sourial
<b>SUBJECT LAND</b>	803/6 Dalgety Street OAKLEIGH VIC 3166
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	1 May 2024
<b>DATE OF ORDER</b>	8 May 2024
<b>CITATION</b>	Gerges v Monash CC [2024] VCAT 407

## ORDER

### Permit amended

- 1 In application P1240/2023 the decision of the responsible authority is varied.
- 2 Planning permit TPA/46427/E is amended, and an amended permit TPA/46427/F is directed to be issued for the land at 803/6 Dalgety Street, Oakleigh. Conditions in the permit are amended as follows:
  - (a) New conditions are included in condition 1 as follows:
    - m) The provision of a 1.7 metre fixed obscure glass privacy screen on the western and eastern boundary of the proposed terrace of unit 8.01 (addressed as 803/6 Dalgety Street).
    - n) The screens referred to in condition 1m) to be consistent with architectural detailing of the existing balustrades.
    - o) A Structural Engineering Report in accordance with condition 50 of this Permit.
    - p) An Acoustic Report in accordance with condition 51 of this Permit.
    - q) The 1 metre high glass balustrade proposed along the southern boundary of the roof terrace to be set back a minimum of 1.5 metres from the southern boundary.
  - (b) New conditions are included as follows:
    50. Concurrent with the endorsement of plans pursuant to Condition 1, a Structural Engineering Report to the satisfaction of the



Responsible Authority must be prepared by a suitably qualified Structural Engineer and must be submitted to and approved by the Responsible Authority. When approved, the Structural Engineering Report will be endorsed and will form part of this permit.

The Structural Engineering Report must assess the current and proposed roof loads of unit 7.01 (addressed as 705/6 Dalgety Street), and detail what measures are required to enable the construction of the terrace.

51. Concurrent with the endorsement of plans pursuant to Condition 1, an Acoustic Report to the satisfaction of the Responsible Authority must be prepared by a suitably qualified Acoustic Engineer and must be submitted to and approved by the Responsible Authority. When approved, the Acoustic Report will be endorsed and will form part of this permit.

The Acoustic Report must detail what measures are required to enable the construction of the terrace of unit 8.01 (addressed as 803/6 Dalgety Street) without impact on the amenity of the dwelling below.

- 3 Conditions in the permit are renumbered accordingly.

**J Perlstein**  
**Member**



## APPEARANCES

For Sam Gerges & Dimitra Sanetsis	In person
For Monash City Council	Sally Moser, Appeals Advisor
For Nader Sourial	In person

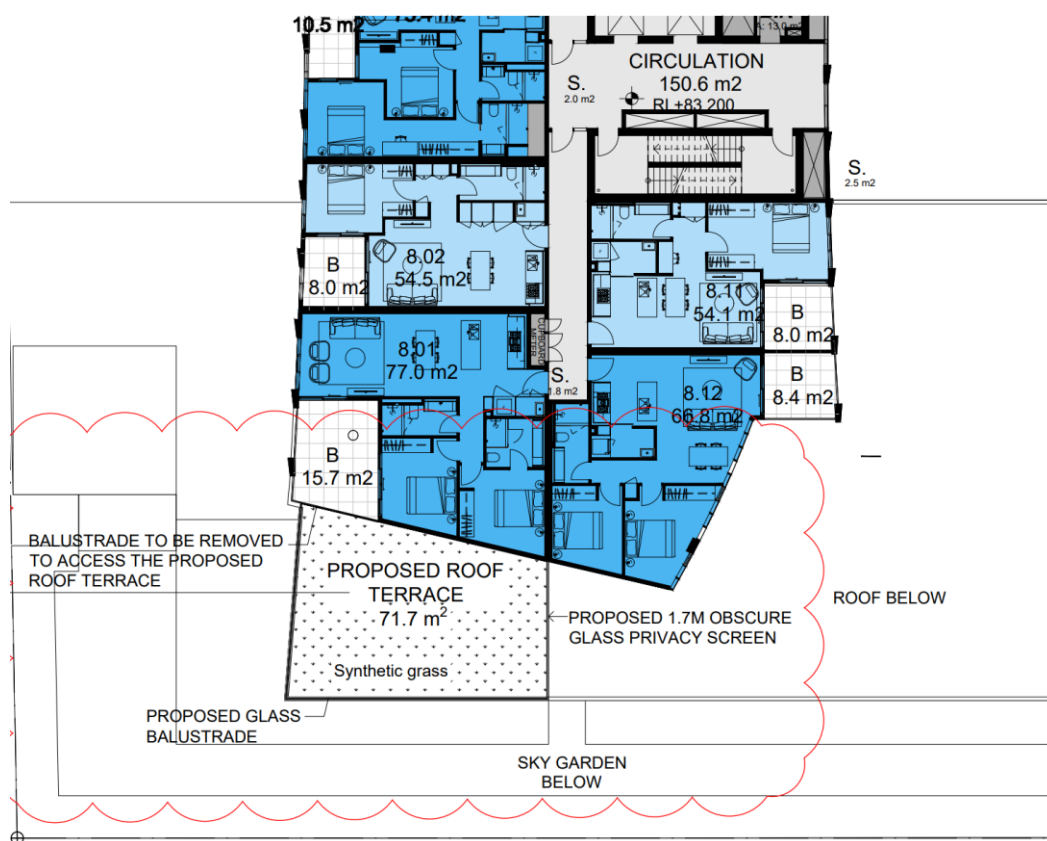
## INFORMATION

Description of proposal	Construction of a roof terrace attached to unit 8.01, within the Oros development at 803 Dalgety Street.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> (Vic) – to review the decision to grant a permit.
Planning scheme	Monash Planning Scheme.
Zone and overlays	Commercial 1 Zone ('C1Z'). Design and Development Overlay, Schedule 10 ('DDO10').
Permit requirements	Clause 34.01-4 - a permit is required to construct a building or construct or carry out works in the C1Z. Clause 43.02-2 - a permit is required to construct a building or construct or carry out works in the DDO10.
Land description	<p>The subject site within which unit 8.01 is located is a site of over 9,000 square metres bounded by Dandenong Road, Warrigal Road and Dalgety Street, as seen in the aerial image below.</p> <p>The development comprises several buildings facing each of the street frontages, with the Oros hotel and apartments located in a nine storey building fronting Dandenong Road, as well as a supermarket and gym.</p> <p>Unit 6/803 Dalgety Street (8.01) is located on level 8, in the south-west corner of the building.</p>



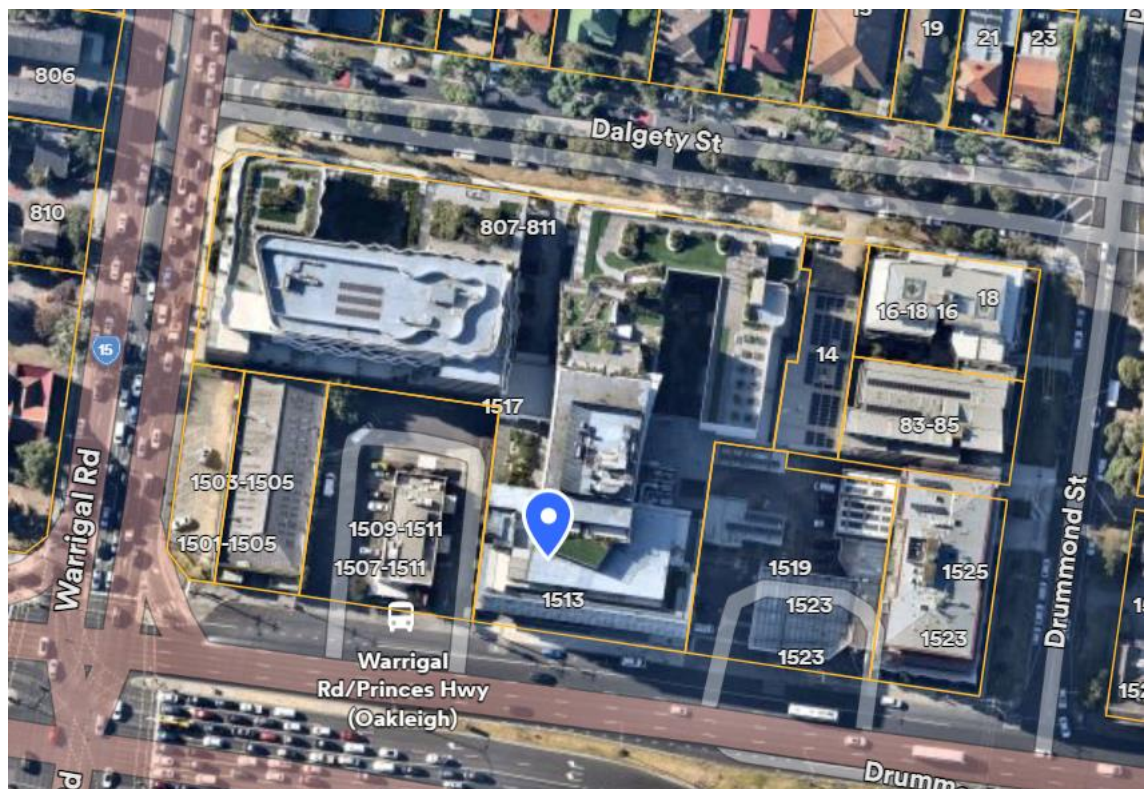
## REASONS<sup>1</sup>

- 1 This is an application to review the decision of the Monash City Council to grant a permit to amend the permit for the larger development on this site to allow construction of a roof terrace associated with unit 8.01. The proposal was described in the council submissions as follows, with the proposed plan included after the submissions:
  22. It is proposed to amend the endorsed plans to create a private terrace for unit 803/6 Dalgety Street Oakleigh (8.01).
  23. The terrace is located on common property on the roof above Level 7, and the objector's unit. It will have an area of 71.7 square metres and be surfaced with synthetic grass.
  24. The southern balustrade of the existing balcony will be removed to permit access to the terrace. New clear glass balustrading of 1.05 metres in height will be provided on the southern and western perimeters of the terrace. A 1.7 metre obscure glass privacy screen is proposed on the eastern edge.



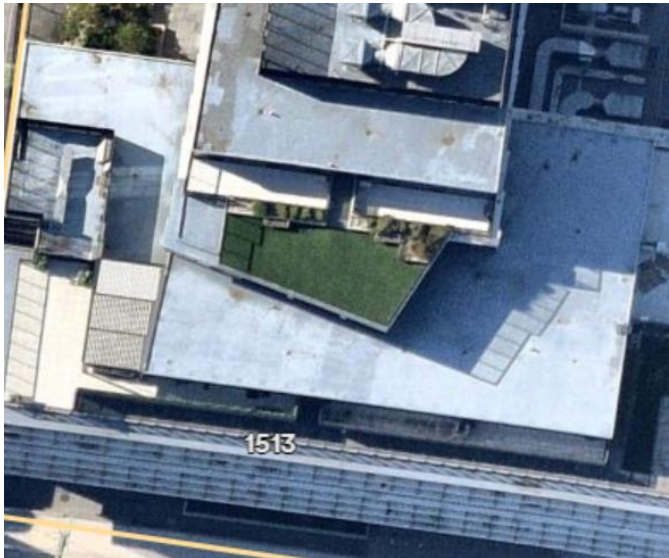
<sup>1</sup> The submissions of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. I note that additional correspondence with filed with the Tribunal following completion of the hearing. Leave was not granted to file any additional material and this material has not been considered by the Tribunal in reaching its decision.

- 2 The council's notice of decision included a condition requiring a 1.7 metre obscure glass privacy screen to be provided on the western as well as the eastern perimeter of the terrace. In addition, while the council's description, above, referred to a 1.05 metre glass balustrade, the plans show a 1 metre balustrade.
- 3 The applicants have applied to the Tribunal for review of the council's decision on several grounds, including loss of amenity and privacy; noise and vibrations; design discrepancies, inaccuracies, and non-compliance; and setting an unfavourable precedent.
- 4 This overall development is already established and operating. The matters relevant to the Tribunal decision are, therefore, focussed on the precise development proposed, which is the expansion of the existing balcony to create a roof terrace over a currently unused rooftop. I must consider whether this represents an acceptable planning outcome having regard to the relevant provisions of the Monash Planning Scheme ('Scheme') with respect to the specific and broader site context, which whether the proposal will detrimentally affect the occupants of the units below and adjacent to this unit, and also the common area above, and impact on the streetscape. The overall development is shown in the aerial image below,<sup>2</sup> with unit 8.01 located along the southern boundary in the area indicated by the blue marker.



<sup>2</sup> From nearmap.com, on 21 March 2024.

- 5 The applicants' unit sits below the proposed roof terrace, with their private open space located immediately below the roof, to the west and south. A vergola has been constructed adjacent to the western edge of the roof, to cover their primary area of private open space. This can be seen in the aerial image below. The uncovered area to the west of the vergola has been leased from the owner's corporation and is now used as an extension to their private open space. The grassed area visible in the aerial image is a 'sky garden' located on level 9, above unit 8.01.



- 6 The council considers that the proposal provides an acceptable response to the Scheme and site context, noting that a balance must be struck between privacy afforded to the applicants for review and amenity to be provided to the residents of unit 8.01, as well as having regard to the streetscape view of the development. The council considers the appropriate balance has been provided in this application. The respondent submits that the proposal is acceptable and that a planning permit should be granted.
- 7 There were several submissions made during the hearing that concern matters that are outside the considerations of the Tribunal in this application. The Tribunal consideration is limited to whether the proposal provides an acceptable response to the Scheme and site context.
- 8 The applicants for review raised concerns regarding their ongoing ability to service the vergola on their property if access to the roof above is removed due to the construction of a balcony screen. The plans endorsed to the planning permission issued for the vergola show the construction of the vergola on the applicants' property only, and do not extend to providing access to the roof area adjacent. There is no express or implied permission to use the adjacent roof in association with the vergola and I was not provided with any documentation suggesting there is a separate legal right for the applicants to have ongoing access to that area or that a planning permit cannot be issued for conversion of that space to a roof terrace associated with unit 8.01.

- 9 Submissions were also made concerning the obligations of the owners' corporation, areas of the rooftop containing anchor points, drainage and air vents, and the ability to clean the glass included within each of the screens/balustrades, as well as the fairness of such a significant change in the size of the apartment by the conversion of the roof into a private rooftop terrace. These are matters for the owners' corporation to consider, or to have considered, in granting permission for this area to be used privately by the residents of unit 8.01. They are not matters before the Tribunal.
- 10 From a planning perspective, it is relevant to consider the provisions of the zone and overlay, the requirements of clause 55, any relevant planning policies and the site context. The council noted that, despite the unit being part of an apartment development, clause 58 of the Scheme does not apply due to the transitional provisions concerning permit applications made before the approval date of Amendment VC136.
- 11 The purpose of the Commercial 1 Zone ('C1Z') is:
- To implement the Municipal Planning Strategy and the Planning Policy Framework.
  - To create vibrant mixed use commercial centres for retail, office, business, entertainment and community uses.
  - To provide for residential uses at densities complementary to the role and scale of the commercial centre.
- 12 The C1Z provides that, where clause 58 does not apply, the requirements of clause 55 continue to apply to a proposal.
- 13 The Design and Development Overlay, Schedule 10 ('DDO10') includes the following objectives, as relevant:
- To encourage development to contribute to the diversity of the urban character of the area by encouraging high quality and visually stimulating new development.
  - To ensure that the building scale and form in terms of height and bulk complements and does not visually overwhelm surrounding buildings.
- 14 The design requirements of the DDO10 include that:
- The visual mass of buildings should be minimised by articulation in both the horizontal and vertical planes so that long or high walls in a single plane are eliminated.
  - Development should feature articulation of facades, rooflines, variable colours and materials. Highly reflective building materials should not be used.

- 15 The applicable policy at the time of lodgement of the initial planning permit application included the *Guidelines for Higher Density Residential Development* (October 2004) ('guidelines'). In considering views to and from residential units, the guidelines state that views from residential units are desirable for the amenity of the occupants and are of value in providing passive surveillance of public spaces. However, it also states that, overall, the balancing of views needs to be carefully considered in order to maintain reasonable levels of privacy for occupants of dwellings within developments. At page 25, it provides as follows:
- The design of new developments should optimise visual privacy for all dwellings, including views to and from windows and private open spaces. To completely restrict views to adjoining properties as well as other dwellings within the development is unrealistic. However, the orientation and layout of buildings and internal spaces should encourage views of public and shared communal spaces, while avoiding directly facing private spaces in close proximity.
- 16 The objectives of the guidelines, with respect to this issue, are to maximise informal or passive surveillance of streets and other public open spaces, and to maximise residential amenity through the provision of views and protection of privacy within the subject site and on neighbouring properties.
- 17 Clause 55.04-6 includes the overlooking objective, which is to limit views into existing secluded private open space and habitable room windows. Standard B22 provides that, as relevant, a balcony or terrace should be located and designed to avoid direct views into the secluded private open space of an existing dwelling within a horizontal distance of 9 metres. A design measure to meet the standard includes that a balcony or terrace with a direct view should have sill heights of at least 1.7 metres above floor level.
- 18 The decision guidelines include the design response; the impact on the amenity of the secluded private open space or habitable room window; and the existing extent of overlooking into the secluded private open space of existing dwellings.
- 19 Clause 21.04 of the Scheme, concerning residential policy, seeks to:
- Ensure that new residential development provides a high level of amenity including internal amenity, privacy for occupants and neighbours, access to sunlight, high quality private and public open space, canopy tree cover, and effective traffic management and parking.
- 20 This application must be considered in the context of whether the proposed built form will be consistent with the Scheme, guidelines and existing built form, and the extent to which it will affect the amenity of neighbouring residents, as well as the increase in amenity to the residents of unit 8.01.



- 21 In terms of built form, the proposal includes a 1 metre high glass balustrade along the southern boundary, facing Dandenong Road. This is consistent with existing balconies on lower levels facing Dandenong Road. To the extent that it is visible from Dandenong Road, it will integrate with existing balconies and appear as if it was initially part of the building. The higher screens to be constructed to the east and west of the terrace will be perpendicular to Dandenong Road and are unlikely to be visible from Dandenong Road, or from other streets, given that level 8 itself is set back from the bulk of the building beneath it.
- 22 With respect to the amenity of other residents of the development, I agree with the submissions of the council, that the views from the sky garden on the level above will not be detrimentally affected by the provision of screens to secure the roof terrace. The council also noted that the new roof terrace will be overlooked by the sky garden, and that the permit applicant is aware of this. The increase to the amenity of residents of that unit by provision of the roof terrace will be outweighed by any lack of privacy within that area. The existing balcony within unit 8.01 will remain within the unit and under the sky garden, therefore maintaining privacy within that part of the private open space. I also do not consider there will be an unreasonable detrimental effect on the amenity of the neighbours to the east, in apartment 8.12, as they will maintain their views to the south and east. It is possible that they, too, will apply to construct a roof terrace on the adjacent portion of the roof, and any application to do so will need to be considered on its merits.
- 23 The applicant for review will be most affected by the construction of the roof terrace. On purchasing their unit they were aware of the roof space above which meant that they had no units directly above their unit and enjoyed substantial privacy from other residents of the development, particularly on the southern side of their private open space. There has always been views available from the balcony of unit 8.01 to the vergola area. However, the enclosed balcony meant that there were never any neighbours physically in close proximity to their unit.
- 24 The 1.7 metre screen proposed along the western side of the roof terrace meets the relevant standard B22 and will act to limit overlooking to their western open space in accordance with the objective. The decision guidelines in considering compliance with the objective and standard include the design response; the impact on the amenity of the secluded private open space or habitable room window; and the existing extent of overlooking into the secluded private open space of existing dwellings. Having regard to those decision guidelines and the guidelines for higher density residential development, I find that the proposed screen to the west will significantly, but not completely, limit overlooking of the western private open space belonging to the applicants, providing them with an



acceptable level of privacy, while also facilitating the roof terrace for the respondent.

- 25 To the south, however, I am persuaded by the applicants that while the width of the private open space area is narrow, it is a highly utilised area whose amenity would be significantly affected by the provision of a roof terrace immediately above. I consider that the 1 metre balustrade, however, is an appropriate response to the Dandenong Road streetscape and will provide significant amenity to the respondent and, therefore, should not be replaced with a higher screen. In order to achieve the appropriate balance in approving the roof terrace and maintaining some privacy for the applicants, I find that the southern balustrade should be set back 1.5 metres from the roof boundary. The proximity to the applicants' property below will therefore be reduced and the potential for overlooking limited in a manner not afforded in the current plans. The balustrade will be retained at a 1 metre height, to maintain consistency with the façade of the building generally, and to provide amenity to the respondent.
- 26 From a planning perspective, the proposal, with the conditions included in the council's notice of decision, and the additional setback from the southern boundary required by the Tribunal, provides an acceptable outcome having regard to the provisions of the Scheme in terms of built form, as well as residential amenity of both owners of unit 8.01 and its neighbours, adjoining, above and below.
- 27 For the reasons given above, the decision of the responsible authority is varied. An amendment to the permit is granted subject to conditions.

J Perlstein  
**Member**

