

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P4/2024
PERMIT APPLICATION NO.TPA/54761

CATCHWORDS

Monash Planning Scheme; overshadowing of solar panels from medium density housing; Building height of medium density development and height limit at Clause 32.09-11 of the Monash Planning Scheme.

APPLICANT	Steven Penna & Lany Penna
RESPONSIBLE AUTHORITY	Monash City Council
RESPONDENT	Bin Jian Lin
SUBJECT LAND	36 Alice Street MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	21 August & 14 October 2024
DATE OF ORDER	14 October 2024
CITATION	Penna v Monash CC [2024] VCAT 993

ORDER

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: R Architecture
 - Drawing numbers: TP01 to TP07, TP7.1, TP08, TP8.1 to TP8.5, TP09
 - Dated: 22 August 2024

Permit granted

- 2 In application P4/2024 the decision of the responsible authority is varied.
- 3 In planning permit application TPA/54761 a permit is granted and directed to be issued for the land at 36 Alice Street Mount Waverley in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - The construction of two dwellings on a lot

Michael Deidun
Member



APPEARANCES

For applicant	Steven & Lany Penna both appeared in person
For responsible authority	David Di Giovanni, Town Planner of David Di Giovanni Town Planning
For respondent	Andrew Clarke, Town Planner of Clarke Planning

INFORMATION

Description of proposal	The construction of two double storey dwellings, each above basement level garages
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	Neighbourhood Residential Zone 3 Vegetation Protection Overlay 1
Permit requirements	Clause 32.09-6 to construct two or more dwellings on a lot on land within the Neighbourhood Residential Zone
Relevant scheme policies and provisions	Clauses 02, 11, 15, 16, 32.09, 42.02, 52.06, 55, 65 and 71.02.
Land description	The land is a rectangular shaped allotment, with a frontage to Alice Street of 17.07 metres, a depth of 42.67 metres, and an overall area of 28 square metres. The land presently supports a single storey detached dwelling.



REASONS¹

- 1 Steven & Lany Penna (the ‘applicants’) seek to review the decision of the Monash City Council (the ‘Council’) to grant a permit for the development of two dwellings on land at 36 Alice Street, Mount Waverley (the ‘review site’).
- 2 The applicant’s grounds raise concern with the extent of overshadowing to solar panels, what they say is the three storey height of the proposed dwellings and the manner in which this influences the shadow impacts, and the potential damage to the applicants’ property from construction work.
- 3 I have decided to vary the Council’s decision and direct the grant of a planning permit subject to conditions. Reasons for my decision were given orally at the conclusion of the hearing. What follows is an edited version of those oral reasons.
- 4 As I have identified above, the applicant’s concerns focus on three issues, which I will address separately below.
- 5 Firstly, the applicant is concerned with the extent of overshadowing that will be caused to the solar panels on the roof of their neighbouring dwelling. This is a relevant concern, noting that one of the decision guidelines for the Neighbourhood Residential Zone at Clause 32.09-14 of the Monash Planning Scheme requires a consideration of:

The impact of overshadowing on existing rooftop solar energy systems on dwellings on adjoining lots in a General Residential Zone, Mixed Use Zone, Neighbourhood Residential Zone, Residential Growth Zone or Township Zone.
- 6 Clause 55.03-5 of the Monash Planning Scheme provides a further explanation of the relevant assessment. It does this through the following Standard and Decision guideline.

Standard B10

Buildings should be:

- Oriented to make appropriate use of solar energy.
- Sited and designed to ensure that the energy efficiency of existing dwellings or small second dwellings on adjoining lots is not unreasonably reduced.
- Sited and designed to ensure that the performance of existing rooftop solar energy systems on dwellings or small second dwellings on adjoining lots in a General Residential Zone,

¹ 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.



Neighbourhood Residential Zone or Township Zone are not unreasonably reduced. The existing rooftop solar energy system must exist at the date the application is lodged.

...

Decision guidelines

Before deciding on an application, the responsible authority must consider:

- The design response.
- The size, orientation and slope of the lot.
- The existing amount of solar access to abutting properties.
- ...
- The extent to which an existing rooftop solar energy system on an adjoining lot is overshadowed by existing buildings or other permanent structures.
- Whether the existing rooftop solar energy system on an adjoining lot is appropriately located.
- The effect of overshadowing on an existing rooftop solar energy system on an adjoining lot.

7 As is clear from the above quotes, and identified in the Council's submissions in this proceeding, the test is not whether there will be shadowing of existing solar panels, but rather whether the extent of sunlight to such solar panels is not unreasonably reduced. The expectation therefore is not that there will be no overshadowing at all.

8 The Council in its written submissions undertook a thorough assessment of whether the extent of shadowing that is expected to the applicants' solar panels is reasonable. This assessment includes the following.

105. To this end, drawing TP8.1 shows the adjacent solar panels are subject to no overshadowing from the proposal between 9am and 3pm at the September equinox.

106. The assessment of Winter shadows on drawings TP8.2 and TP8.3 demonstrate that:

- At 9am, some 45.1% of the solar panel is in shadow.
- At 10am, some 4.86% of the solar panel is in shadow.
- From 11am onwards (up until the drawn 3pm shadow but likely beyond this time), there is no overshadowing of the solar panels.

107. The August shadow assessment on drawings TP8.4 and TP8.5 shows that with the exception of some shadowing at 9am (18.1%) and 10am (1.9%), there is otherwise no further shadows throughout the day.



108. So in the worst case scenario (August / Winter), the adjacent solar panels are subject to shadowing between 9am and 10am. There is no further shadowing beyond this.
109. This means the solar panels receive uninterrupted access to sunlight in Winter from 11am onwards. This is in addition to the absence of any shadows in Summer and during the September equinox.
110. Whilst the Applicant has provided little details on the type of solar system (apart from them being photovoltaic panels), it is submitted the solar panels will be able to generate electricity without restriction for the significant majority of the year (Summer and September), and then in August and Winter, for the majority of the day.
111. In Council's view, this level of overshadowing is relatively modest, and reasonable.
- 9 The applicant submits that an unreasonable level of overshadowing will occur, on the basis that, "*In the winter equinox, June, July and August there will be up to approximately 50% shade cover over the solar array in the am hours.*" This quote makes the impact sound greater than is actually the case. As identified in the Council submission, the highest proportion of shadow at the solstice is 45% of the solar panels, that occurs at 9:00am on one day of the year. By 10:00am, this is down to 4.86%. By referring to the 'am hours,' the applicant is insinuating that the shadows extend across the entire morning, when this is clearly not the case.
- 10 Further, on 7 August at 9:00am (a date chosen by the respondent as the half way point between the winter solstice and the equinox) the extent of shadow covers 18.1% of the solar panels, which is not close to 50%.
- 11 I am persuaded to adopt the fair and balanced assessment undertaken by Council, which identifies that the proposed development on the review site will not significantly overshadow the applicants' solar panels, and they will continue to receive a reasonable level of solar access. For this reason I find that the proposal achieves Standard B10, having regard to the matters identified in the decision guidelines.
- 12 Secondly, the applicants submit that the proposed dwellings are three storeys each, and are therefore prohibited in the zone. In their written submission, while the applicants concede that the dwellings will each be only 9 metres or two storeys above the existing natural ground level (NGL), they argue that the extent of excavation proposed for parts of the review site should alter the starting point of the assessment, to a point lower than the existing NGL.
- 13 Orally, the applicants argued that the proposed building heights should be measured from the original contours of the land, prior to the construction of the existing dwelling and retaining walls. However, as the applicants have

not provided any detail or documentation of what they say are the original contours on the land, they have failed to provide me with any information that may allow a different height assessment, to that undertaken by Council and the permit applicant. As the applicants for review in this proceeding, the onus is on Mr & Mrs Penna to provide information that would support their position on the previously existing levels of the land. As no information aside from vague assertions were provided, I cannot give any weight to the oral submissions made by the applicant on this matter.

- 14 With respect, the approach advocated by the applicants in their written submission is not consistent with the approach set out in the Monash Planning Scheme, including the definition of Building height found at Clause 73.01. For this reason, and having regard to the building height analysis undertaken by both the Council and the applicant in their written submissions to this proceeding, I find that the proposed building height complies with the requirements of Clause 32.09-11, that forms a part of the Neighbourhood Residential Zone.
- 15 Thirdly, the applicants raise concerns regarding the method of building construction on the review site, and the protection of assets on their site. They request that the excavation on the review site occur after 6.0 metre concrete piles at 600mm intervals are installed along their boundary. While I acknowledge this concern as legitimate, it does not relate to the grant of a planning permit. Rather, this is a matter that will need to be considered if and when a building permit is sought for the proposed development of the review site.
- 16 The applicant has not raised any concerns relating to the suitability of the proposal to the surrounding neighbourhood character. In any case, it remains a live issue before me. I am grateful to the Council for providing detailed submissions setting out why, in their view, the proposal will achieve an appropriate neighbourhood character outcome. I have read those submissions, and have considered the context of the review site, the merits of the design response and the guidance provided by the Monash Planning Scheme. I also find the proposal represents an appropriate response to the surrounding neighbourhood character, and adopt as my reasons for this finding, the content of paragraphs 128 to 140 inclusive as contained in Council's written submissions in this proceeding.
- 17 The applicant requests the removal of tree 11 from the review site, describing it as dropping branches and unsafe. The amended plans substituted at the commencement of the proceeding is unclear as to the removal or retention of tree 11. The Council requests a permit condition that tree 11 be consistently shown as retained on the plans, and the permit applicant agrees to this approach. I will therefore regard the amended plans as continuing to propose the retention of tree 11.

- 18 The arboricultural report² lodged with Council during the permit application process describes tree 11 as having good health and a fair structure. In the absence of arboricultural evidence to the contrary, I am not prepared to give consideration to whether I have the power to require the removal of tree 11, by way of a permit condition.
- 19 The applicant has also not raised any concerns relating to matters of internal amenity in the proposed dwellings, nor any car parking or traffic concerns. I confirm from my own analysis that the proposal will achieve an appropriate level of internal amenity. This is evident having regard to the size of the individual rooms and the overall dwellings, the ability for habitable rooms to receive daylight and solar access, the size and orientation of the areas of secluded private open space, and the convenient car parking provided for each dwelling. I also confirm that appropriate car parking and access will be provided on the review site, noting the provision of a double garage for each dwelling, and the capacity for all vehicles to enter and exit the review site in a forward direction.
- 20 It therefore follows that I will vary the Council's decision, and direct the grant of a planning permit with conditions. I will adopt the conditions as drafted by Council and contained on their Notice of Decision to grant a permit, except that I will modify Condition 1 to refer to the amended plans that were substituted at the commencement of the proceeding.

Michael Deidun
Member

² Treespace Solutions Pty Ltd, 24 October 2022.



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/54761
LAND	36 Alice Street, Mount Waverley

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- The construction of two dwellings on a lot

CONDITIONS

- 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 R Architecture, Drawings TP01 to TP09, Revision 7 (dated 22 August 2024), but modified to show:
 - (a) The proposed electricity supply meter boxes and cabinet relocated behind the front façade of unit 1 and better incorporated into the retaining wall.
 - (b) The upper level of unit 1 setback from the north facing window of 38 Alice Street to comply with Standard B20.
 - (c) Provision of a privacy screen within the landscape garden bed on the northern boundary to prevent overlooking from the dining room window of unit 2 into the secluded open space of 34 Alice Street. The screen must obscure views within a horizontal distance of 9 metres (measured at ground level), have a maximum of 25% transparency, be affixed to a sturdy free-standing frame to comply with Standard B22 of Clause 55.04-6.
 - (d) A 1:50 sectional diagram detailing the proposed external screen referred to in condition 1c) and how it will limit overlooking into the adjoining area of secluded private open space.
 - (e) The north facing dining room window of unit 1 provided with a sill height of 1.7 metres above floor level or deleted.
 - (f) The window of bedroom 4 unit 1 screened in accordance with Standard B22.
 - (g) Corrections of window screen hatching errors in north and south elevations (unit 1 bedroom 4 and bathroom).
 - (h) Existing trees numbered as per the arborist report by Treespace Solutions dated 24 October 2022.



- (i) Trees 3 and 11 notated as to be retained.
- (j) A coloured materials and finishes schedule that utilises a palette which blends in with the creek environment.
- (k) The porous/permeable driveway and any other requirements detailed in the Water Sensitive Urban Design (WSUD) report.
- (l) A Landscape Plan in accordance with condition 4 of this Permit.
- (m) A Tree Management Plan (TMP) in accordance with condition 6 of this Permit.
- (n) A Water Sensitive Urban Design report in accordance with condition 8 of this Permit.

all to the satisfaction of the Responsible Authority.

- 2 The development as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 3 At all times what the permit allows must be carried out in accordance with the requirements of any document approved under this permit to the satisfaction of the responsible authority.
- 4 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. When endorsed, the plan will form part of the Permit. The Landscape Plan must be generally in accordance with the Landscape Concept Plan prepared by Peninsula Landscape Concepts, dated 1 July 2023 (Revision B) except that the plan must be modified to show:
 - (a) An overall planting theme for the Creek Environs that that visually dominates the built form including retaining walls, through an increased height and spread of underplanting species.
 - (b) The tree details from sheet L2 added to sheet L3, with L2 deleted or to contain consistent information in respect of planting, paving and service details as shown in sheet L3.
 - (c) Existing trees numbered as per the arborist report by Treespace Solutions dated 24 October 2022.
 - (d) The *acacia implexa* within the front setback replaced with an additional *eucalyptus melliodora* (or other tall canopy tree to Council's satisfaction).
 - (e) The 2 *allocasuarina littoralis* within the driveway southern landscape buffer relocated within the secluded open space of unit 1, with shrub planting provided in the driveway.



- (f) The planting between the driveway and northern retaining wall, and on top of the wall, to soften its height and the expanse of paving.
- (g) Planting to soften the privacy screen provided in accordance with condition 1 of this permit.
- (h) Any requirements of the WSUD.
- (i) Any other changes listed in Condition 1 of this Permit.

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

- 5 Before the occupation of any of the buildings allowed by this permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and thereafter maintained to the satisfaction of the Responsible Authority
- 6 Concurrent with the submission of amended plans required by Condition 1 and prior to any demolition or site works, a Tree Management Plan (TMP) must be submitted to and approved by the Responsible Authority. The TMP must be prepared by a suitably qualified and experienced Arborist and must set out recommendations and requirements in relation to the management and maintenance of trees numbered 1, 2 3, 4 and 11 as detailed in the Arborist Report by Treespace Solutions dated 24 October 2022.

The TMP must be approved by the Responsible Authority prior to the commencement of any works, including demolition and/or levelling of the site. The TMP must make specific recommendations in accordance with the Australian Standard AS4970: 2009 - Protection of Trees on Development Sites and detail the following to the satisfaction of the Responsible Authority ensuring the trees to be retained remain healthy and viable during construction:

- (a) A Tree Protection Plan drawn to scale that shows:
 - i Tree protection zones and structural root zones of all trees to be retained,
 - ii All tree protection fenced off areas and areas where ground protection systems will be used;
 - iii The type of footings within any tree protection zones;
 - iv Any services to be located within the tree protection zone and a notation stating all services will either be located outside of the tree protection zone, bored under the tree protection zone, or installed using hydro excavation under the supervision of the Project Arborist; and
 - v A notation to refer to the Tree Management Plan for specific detail on what actions are required within the tree protection zones.



- (b) Details of how the root system of any tree to be retained will be managed. This must detail any initial non-destructive trenching and pruning of any roots required to be undertaken by the Project Arborist.
- (c) Supervision timetable and certification of tree management activities required by the Project Arborist to the satisfaction of the responsible authority; and
- (d) Any remedial pruning works required to be performed on tree canopies located within subject site. The pruning comments must reference Australian Standards 4373:2007, Pruning of Amenity Trees and a detailed photographic diagram specifying what pruning will occur.

The recommendations contained in the approved tree management plan must be implemented to the satisfaction of the Responsible Authority.

- 7 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.
- 8 Concurrent with the endorsement of any plans pursuant to Condition 1, The Water Sensitive Urban Design Assessment (WSUD) prepared by Archi Sustainability, dated July 2023 must be modified to address Standard W2 of Clause 53.18 including:
 - (a) Achieving best practice performance objectives for stormwater quality as contained in the Urban Stormwater - Best Practice Environmental Management Guidelines (Victorian Stormwater Committee, 1999).
 - (b) Minimisation of the impact of chemical pollutants and other toxicants into the stormwater.
 - (c) Contribution to cooling, improving local habitat and providing attractive and enjoyable spaces.

The WSUD will be endorsed as part of the planning permit and the development and landscaping must incorporate the initiatives outlined in the WSUD report to the satisfaction of the Responsible Authority

- 9 The site must be drained to the satisfaction of the Responsible Authority. Stormwater must be directed to the Point of Connection as detailed in the Legal Point of Discharge report. Stormwater must not be allowed to flow into adjoining properties including the road reserve.
- 10 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.
- 11 Stormwater is to be detained on site to the predevelopment level of peak stormwater discharge. The design of any internal detention system is to be



approved by Council's Engineering Department prior to any stormwater drainage works commencing.

- 12 A plan detailing the stormwater drainage and civil works must be submitted to and approved by the Engineering Department prior to the commencement of any works. The plans are to show sufficient information to determine that the drainage and civil works will meet all drainage requirements of this permit. Refer to Engineering Plan Checking on www.monash.vic.gov.au.
- 13 All disused or redundant vehicle crossovers must be removed and the area reinstated with footpath, naturestrip, kerb and channel to the satisfaction of the Responsible Authority.
- 14 Any new vehicle crossover or modification to an existing vehicle crossover must be constructed to the satisfaction of the Responsible Authority.
- 15 Car spaces, access lanes and driveways shown on the endorsed plans must not be used for any other purpose, to the satisfaction of the Responsible Authority. All disused or redundant vehicle crossovers must be removed and the area reinstated with footpath, naturestrip, kerb and channel to the satisfaction of the Responsible Authority.
- 16 Prior to the occupancy of the development, all screening and other measures to prevent overlooking as shown on the endorsed plans must be installed to the satisfaction of the Responsible Authority. Once installed the screening and other measures must be maintained ongoing to the satisfaction of the Responsible Authority. The use of obscure film fixed to transparent glass or windows is not considered to be 'obscure glazing' or an appropriate response to screen overlooking.
- 17 Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.
- 18 This permit will expire if one of the following circumstances applies:
 - (a) The development is not started within two (2) years of the issue date of this permit.
 - (b) The development is not completed within four (4) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

– End of conditions –