

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P210/2022
PERMIT NO. TPA/47434

CATCHWORDS

Extension of time – completion of development – *Kantor* considerations – change to zoning and planning controls – delays associated with Covid-19

APPLICANT	Waringah Heights Nominees Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	298 High Street Road MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	30 May 2022
DATE OF ORDER	7 June 2022
CITATION	Waringah Heights Nominees Pty Ltd v Monash CC [2022] VCAT 628

ORDER

- 1 The decision of the responsible authority is set aside.
- 2 Pursuant to section 85(1)(f) of the *Planning and Environment Act 1987*, the time by which the approved development under planning permit No. TPA/47434 must be completed is extended to 24 April 2024.

Dalia Cook
Member

APPEARANCES

For applicant	Mr Reto Hoffman, Solicitor, Rigby Cooke He called Mr Nicholas Giasoumi, Solicitor and director of the applicant company to give sworn evidence
For responsible authority	Mr Nick Sissons, Solicitor, HWL Ebsworth



INFORMATION

Description of proposal	Request to extend time for completion of development of three townhouses
Nature of proceeding	Application under section 81(1)(a) of the <i>Planning and Environment Act 1987</i> – to review a refusal to extend time
Planning scheme	Monash Planning Scheme
Zone and overlays	Neighbourhood Residential Zone (Schedule 2) - NRZ(2)
Key scheme policies and provisions	Clauses 11.01-1R, 15.01, 16.01, 21.04, 21.13, 22.01, 22.05 and the matters in Clause 65
Land description	The subject land has an area of approximately 920 square metres. Is located on the edge of a golf course adjacent to a residential area with conventional housing. The land slopes significantly from High Street Road to the rear.



REASONS¹

INTRODUCTION

- 1 This application for review was heard in the Short Cases List. However, I advised that I needed to deliberate further instead of delivering a decision orally at the conclusion of the hearing. I now provide short form written reasons for my decision.
- 2 The planning permit in question was granted by the Tribunal in April 2018 following a contested hearing.²
- 3 Weeks after the permit was granted, Stage 1 of Amendment C125 to the Monash Planning Scheme (planning scheme) was gazetted. The zoning of the land changed from General Residential Zone (Schedule 2) to Neighbourhood Residential Zone (Schedule 2).
- 4 After reassessment by Council, the parties confirmed that the approved development commenced within time, shortly before the permit was due to expire.³ The works consisted of 30 bored holes filled with varying levels of cement to facilitate the provision of piers. Other works pertained to tree protection measures. No further work has occurred on site since.
- 5 Monash City Council (Council) submitted that it was not appropriate to extend the time for completion of the development since the applicable planning controls had changed substantially since the grant of the permit. It considered this factor outweighed other considerations relevant to the discretion to extend time.
- 6 The applicant submitted that the change in planning controls and policy was not significant, and that a fair assessment of all relevant considerations should lead to a two year extension of time to complete the development.

CONSIDERATION OF THE APPLICATION

Kantor case principles

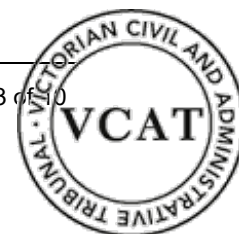
- 7 Both parties agreed that seminal case law considerations are set out in *Kantor v Murrindindi Shire Council*⁴ (Kantor).
- 8 I apply these to the facts in this proceeding below, supplemented by the principles expressed by the Tribunal in *Hotel Windsor Holdings Pty Ltd v*

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.

² *Waringah Heights Nominees Pty Ltd v Monash CC* [2018] VCAT 410.

³ Council erroneously considered that the development had not started in time but revised this position in advance of the hearing based on information provided by the applicant.

⁴ 18 AATR 285.



*Minister for Planning*⁵ pertaining to completion cases. A holistic exercise of discretion is required.

Has there has been a change of planning controls or policy since the permit was granted?

- 9 This is a key issue in the proceeding and the significance of this change in controls was disputed by the parties.
- 10 However, both parties accepted that, as a matter of law, the Tribunal could grant an extension to a permit for development that would be prohibited if a new planning permit was sought, following *AMV Homes v Moreland CC*.⁶
- 11 As mentioned, the land was rezoned soon after the grant of the permit. The land is now included in the Neighbourhood Residential Zone schedule pertaining to Creek Abuttal Areas.
- 12 The future character statement contemplates lower scale residential development, with modest dwellings to continue to be the prevailing character.
- 13 The character statement emphasises spacious garden settings, tall canopy trees and consistent built form. New development should complement established planting and topography with consistent front setbacks. Upper levels should be recessed and articulated to reduce visual dominance in the streetscape.
- 14 Vegetation should dominate the streetscape, with buildings being recessive or hidden from view. Larger rear setbacks should accommodate substantial vegetation including large canopy trees.
- 15 The following neighbourhood character objectives apply under Clause 1.0 of NRZ(2):
 - To emphasise the visual dominance of landscaping, particularly along the interfaces with the creek corridors.
 - To ensure new development transitions down in scale towards the creeks, respecting and reinforcing the natural topography.
 - To respect and enhance the existing character and functions of the open spaces along the creek corridors.
- 16 Relevant zone changes viz this particular proposal include the limitation on development to 2 storeys and 10 metres above natural ground level (for a sloping site such as this). The schedule to the zone also requires a minimum rear setback of 7 metres, whereas a minimum 5 metres is provided.
- 17 Mr Sissons for Council emphasised that existing housing stock was generally single storey in the immediate vicinity, with an open outlook to

⁵ [2016] VCAT 351.

⁶ (Red Dot) [2015] VCAT 1699.



the adjacent golf course on one side and tennis court on the other. He submitted that no other development on this side of the road could be developed to three storeys.

- 18 The zone controls also appear to now require a minimum lot size of 300 square metres for any subdivision. No exemptions would directly apply to the current proposal, although the parties disagreed as to whether any transitional provisions might apply if an application for subdivision was made.
- 19 The applicant submitted that when granting the permit, the Tribunal turned its mind to the impending changes associated with Amendment C125, including the change in zoning and policy. It considered that although there may be ‘technical noncompliance’ with the current controls, the proposal remained acceptable in this particular setting and still exhibited a high level of compliance with the requirements of the NRZ2.
- 20 It emphasised elements of the Tribunal’s original decision which found the development to be acceptable in its particular setting, including the fact it was on the edge of a residential area (not mid-block), there was existing diversity in the streetscape (including elevated dwellings on the opposite side of High Street Road), a generous front setback with landscape screening could be provided and the development proposed a moderated scale responsive to site topography. This was in combination with a permit condition requiring deletion of the third storey from the central townhouse.
- 21 The applicant emphasised that in light of decreasing site levels towards the rear of the block, the front townhouse would generally appear as double storey compared with the existing footpath level. It also submitted that the variations from the current controls had not been demonstrated to result in any unacceptable impacts on amenity or visual bulk or a change to the policy seeking reinforcement of the treed setting.
- 22 Mr Hoffman further submitted that the change in proposed subdivision controls is irrelevant to the discretion to extend the permit, since there is no application for subdivision and there may be a number of ways this development could achieve the requirement in any event (such as by using easements instead of creating common property).
- 23 As far as change to local planning policy is concerned, Part 2 of Amendment C125 was gazetted on 14 November 2019. It introduced new planning policies and gave effect to the neighbourhood character review of 2015.
- 24 Council explained how the character areas were differentiated as part of this process, with the subject land being included in a more discrete character area known as Creek Environs (Category 7) compared with the far broader Character Area C that applied when the permit was granted. The land is now identified in an area of ‘more limited development potential’.



- 25 The land remains within an ‘Accessible area’ in terms of its proximity to public transport. While there is a reduced focus on housing diversity in the NRZ compared with the GRZ, I agree with the applicant that there remains scope for townhouses as a suitable dwelling typology in this zone and having regard to the Creek environs character area.
- 26 Council did not submit that three dwellings were inappropriate for this site having regard to the planning merits.
- 27 I accept the applicant’s submissions that the change to subdivision controls is not directly relevant to this application. The planning permit does not authorise subdivision.
- 28 On one view, it could be said that the subdivision controls hint at acceptable levels of density, but there are no limitations on the number of dwellings or any density controls in the current provisions.
- 29 There may be a number of ways that this land could be subdivided to comply with applicable planning provisions of the scheme. In reality, the applicant carries the risk that the development it seeks to construct may not be capable of a conventional three lot subdivision with common property. This is an issue for another day.

Is the landowner is seeking to warehouse the permit?

- 30 There is no evidence that the landowner is seeking to warehouse the permit and Council did not make any submissions to the contrary.
- 31 Mr Giasoumi, a director of the permit holder, gave evidence that it was always the permit holder’s intention to complete the approved development and that it had taken steps to obtain relevant permission and finance to enable it to proceed. I accept this evidence.
- 32 In a practical sense, he explained that the company now intended to complete the development since a major apartment development it had completed in Strathmore had been finalised and all units settled.
- 33 Plans were endorsed under the planning permit and the building permit seems to remain current.

What are the intervening circumstances which bear upon the grant or refusal of the extension request?

- 34 The first intervening circumstance relied on by the applicant was the commencement of development.
- 35 Council submitted that although development had commenced, the works were confined (and reversible) and were only commenced for the purpose of keeping the permit alive.
- 36 This appears consistent with my understanding of the evidence of Mr Giasoumi who explained his son’s efforts to commence the development



within time, including obtaining a Stage 1 building permit for this work in advance of the remainder of the development.⁷

- 37 Nonetheless, the act of commencement has been established in case law, including the *Hotel Windsor*, as a relevant consideration in favour of the grant of an extension of time, even if the works are relatively minor.
- 38 The second set of intervening circumstances relied on by the applicant was the combination of Covid-19 trade shortages, finance and personal/medical considerations.
- 39 Council submitted that it would still have been permissible to continue construction on small projects such as this for much of the relevant period, notwithstanding Covid-19 related construction restrictions.
- 40 Mr Giasoumi explained the relevant timeline and constraints on the company's major project in Strathmore due to limitations on the capacity of workers on site.
- 41 I find that although there were Covid-19 related restrictions, there is no evidence that this or any shortage associated with trades or materials was directly responsible for the absence of works progressing on the subject land. Instead, I find that the main reason works did not continue on this site was due in part to the timing of the further building permit, but principally because of the time and resources invested by the company in its more substantial Strathmore project at the time.
- 42 However, in practice, I accept that the fact that decisions needed to be made as to where to expend time, energy and finances was itself an effect of Covid-19 restrictions, trade shortages and industry challenges. In the absence of these considerations, the construction process in Stathmore would likely have been more streamlined and efficient, and the proposal on the subject land was next in line.

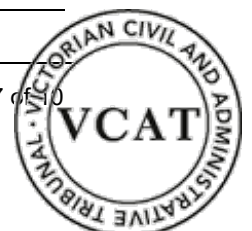
What is the total elapse of time since the permit was granted?

- 43 The permit was granted just over four years ago. This is the first request for an extension of time.

Was the time limit originally imposed adequate?

- 44 It appears that the conventional time limit, two years to start plus a further two years to complete a development of this scale in this location could have been adequate.
- 45 I accept that in reality it was not adequate for this particular permit holder given its particular circumstances and the broader impacts of Covid-19 on its development portfolio.

⁷ Stage 2 building permit was issued in October 2021.



What is the economic burden imposed on the landowner by the permit?

- 46 The applicant relied on the affidavit evidence of Mr Giasoumi which was supplemented by additional invoices referred to by Mr Hoffman in submissions.⁸
- 47 Mr Sissons submitted that the Tribunal's focus should be on the cost of the works undertaken on site, compared with the overall costs associated with obtaining and progressing the permit.
- 48 The applicant opposed this approach, suggesting that the costs expended to date would be thrown away if the extension was not granted.

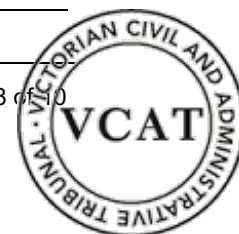
What is the probability of a permit issuing should a fresh application be made?

- 49 Council submitted, and the applicant accepted, that there is no prospect of a planning permit issuing for the approved development in its current form if a fresh application was made.
- 50 I agree on the basis of the plans endorsed to date. This is because the NRZ has a mandatory limit on two storeys, whereas Townhouse 1 was approved at three storeys.
- 51 While the tallest part of the building is dimensioned at 10.29 metres, I note that the maximum building height of 10 metres currently in the NRZ would still be complied with by reference to natural ground level immediately below (as referenced in the definition of maximum building height in Clause 73 of the planning scheme).

EXERCISE OF DISCRETION

- 52 Drawing together the considerations discussed above, I am influenced by the fact that:
- This is a first request for an extension of time, which would commonly weigh in favour of an extension.
 - However, a planning permit could not be granted for an identical development if applied for afresh – the third storey component of the front townhouse would exceed the maximum number of storeys and the rear setback would fall short. This is an intervening circumstance that would weigh against the grant of an extension of time.
 - It is relevant that the application concerns an extension to a development that has commenced. The commencement is more than tokenistic, which would tend to support an extension, even though the works are not substantial or advanced having regard to the scope of the permission granted.
 - There is an economic burden imposed on the landowner by the permit but the amounts incurred are typical for a development of this type.

⁸ The applicant provided further invoices with leave following the hearing.

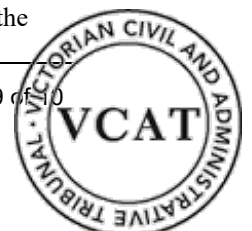


Not all costs would be thrown away if the permit was not extended. The cost of the works on site are valued at approximately \$20,000, but there was no evidence as to whether they could be repurposed if a new permit application was made.

- I accept that the period between commencement and completion was impacted by Covid-19 restrictions on this and related projects undertaken by the applicant or associated entities.

- 53 Ultimately, my decision turns on whether the approved development would undermine or offend the changed planning regime.
- 54 The change from the GRZ2 to the NRZ2 is undeniably significant. However, I consider the approval of for three attached townhouses in the current design remains an acceptable outcome for this particular site in its setting. It would not unreasonably diminish the character and built form outcomes sought by the current policies and controls.
- 55 I am influenced by the fact that the Tribunal at first instance considered the then applicable and proposed planning controls and policies in a thorough way when evaluating the appropriateness of this proposal.
- 56 While I accept that the proposal could not be approved under the current controls, only confined elements of the overall development (the confined upper level of the front townhouse and the depth of the rear setback) would offend the current controls.
- 57 The proposal would remain consistent with state and local policies seeking increased housing diversity and choice in accessible areas of the municipality.
- 58 Three townhouses could still be permitted under the NRZ and would be generally consistent with its purpose to recognise areas of predominantly single and double storey residential development and to respect character and landscape characteristics.
- 59 Importantly, the proposal would respond acceptably to localised neighbourhood character objectives to ensure new development transitions down in scale towards the creeks, respecting and reinforcing the natural topography.
- 60 In my opinion, there is still adequate scope in the approved design to achieve policy objectives for emphasis on the visual dominance of landscaping (especially given the substantial front setback).⁹ An amended landscape plan will need to be submitted to Council's satisfaction for

⁹ Noting that an amended landscape plan will need to be submitted for endorsement following the collapse of the liquidambar from the front setback in a storm.



endorsement, following the collapse of the liquidambar from the front setback in a recent storm.¹⁰

- 61 There is also a very high level compliance with ResCode objectives and standards in Clause 55 of the planning scheme.
- 62 There would be no unreasonable impacts on amenity, even with a comparatively reduced rear setback.
- 63 For these reasons, I consider that the change to the planning controls and policy do not outweigh the other considerations that would otherwise lean in favour of an additional extension of time for this development.
- 64 I am not persuaded by Council to grant a confined time for completion, such as an additional year. There are numerous decisions of the Tribunal explaining the need for realistic timeframes once approvals are granted. In this instance, a further two years to complete the development is reasonable and industry standard.

CONCLUSION

- 65 Balancing all relevant considerations, I consider that the applicant has made out its case for an additional extension of time to complete this development notwithstanding the change to planning controls and policy.

Dalia Cook
Member

¹⁰ It would be reasonable for Council to broadly reference the elements in Clause 6.0 of the NRZ2 in evaluating the adequacy of the replacement planting proposed.

