

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P917/2021
PERMIT APPLICATION NO.TPA52295

CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Monash Planning Scheme; Commercial 1 Zone; Activity Centre; Built form; Height; Vehicle access.

APPLICANT	D & G Brothers Management Group Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
REFERRAL AUTHORITY	Head, Transport for Victoria
RESPONDENT	Suburban Rail Loop Authority
SUBJECT LAND	409 Clayton Road CLAYTON VIC 3168
HEARING TYPE	Hearing
DATES OF HEARINGS	26, 29 & 30 November and 1 December 2021 5 July and 14, 20 & 21 September 2022
DATE OF INTERIM ORDERS	2 & 13 December 2021 24 February, 18 March, 4 April and 14 September 2022
DATE OF ORDER	18 November 2022
CITATION	D &G Brothers Management Group Pty Ltd v Monash CC [2022] VCAT 1280

ORDER

- 1 In application P917/2021 the decision of the responsible authority is affirmed.
- 2 In planning permit application TPA52295 no permit is granted.

Bill Sibonis
Senior Member

Ann Keddie
Member



APPEARANCES

For D & G Brothers
Management Group
Pty Ltd

Ms S Brennan SC and Ms J Sharp of counsel,
instructed by Hall and Wilcox Lawyers. Evidence
was called from:

- Mr V Gnanakone, Traffic Engineer of One Mile
Grid Pty Ltd
- Mr M O'Dwyer, Architect of H2o Architects Pty
Ltd
- Mr J Talacko, Environmental Sustainability
Consultant of Ark Resources Pty Ltd
- Ms S Jordan, Town Planner of Sophie Jordan
Consulting Pty Ltd

The evidence of Mr D Fraher, visual image expert of
FKD Studio was tendered. Mr Fraher was not called
to give oral evidence.

For Monash City
Council

Mr D Vorchheimer, Lawyer of HWL Ebsworth
Lawyers. Evidence was called from:

- Mr T Biles, Town Planner of ratio:consultants pty
ltd

For Head, Transport
for Victoria

Mr P Vassiliadis, Town Planner

For Suburban Rail
Loop Authority¹

Mr C Townshend KC instructed by White & Case

¹ By order dated 14 September 2022, the Suburban Rail Loop Authority was joined as a party to the proceeding. Given our decision to refuse a permit, we do need to set out the reasons for this or any implications for development of the subject land. Further, we note that since the order, the Monash Planning Scheme has been amended by Amendment GC197 to include the land in the Specific Controls Overlay Schedules 14 and 15, both of which relate to the Suburban Rail Loop East.

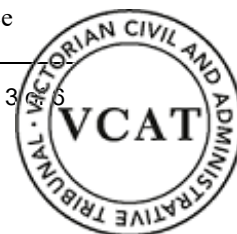


REASONS²

- 1 This application concerns a proposal to construct a 14 storey, mixed-use building on the subject land. Our order of 18 March 2022 sets out the background and details of the proposal. The order also provides the reasons for our finding that, subject to modification/s to ensure that at 2.00pm on the equinox the development would not cast shadow within 4.0 metres of the property boundary of sites on the eastern side of Clayton Road, the proposal could represent an acceptable planning outcome.
- 2 The order provided the applicant with the opportunity to prepare amended plans showing modifications to the building to address the shadow impact.
- 3 The applicant provided written confirmation that it wished to accept the opportunity to prepare amended plans. A further order was issued on 4 April 2022 detailing directions for the provision of the amended plans to the Tribunal and parties and providing the opportunity for the parties to make submissions addressing the amended plans.
- 4 The Council provided a submission responding to the amended plans. As a consequence of the matters raised in that submission, a Practice Day Hearing was held and the matter was scheduled for a further hearing, at which both the Council and applicant made submissions and called evidence³ addressing the amended plans. Prior to that hearing, the applicant circulated a set of what were referred to as ‘information plans’ showing additional modifications to the amended plans to address concerns raised by the Council. The applicant submitted that these additional changes could be addressed by permit conditions.
- 5 We must now assess whether the changes made firstly, address the solar access issue and secondly, result in a development which is an acceptable response to the site’s physical and strategic context.
- 6 Our order of 18 March 2022 did not prescribe how the building should be modified to address the shadow impact, other than observing that the preferable treatment would be some reconfiguration of the upper level. The order provided the applicant with the opportunity to review the design as a whole in order to achieve the required increase in solar access.
- 7 The principal change to the building shown on the amended plans is the removal of a segment of the building on the north-east corner (approximately 10 metres by 11 metres, being at Levels 6 to 13) in order to achieve the reduction in shadow specified in the order. This modification

² 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.

³ The applicant called evidence from Ms Jordan and Mr O’Dwyer. The Council called evidence from Mr Biles.



reduced the number of apartments by 15 and included a reorganisation or the removal of proposed communal open space.

- 8 The Council submitted that the applicant's response is unsatisfactory. It described the modifications made to the proposal as resulting in a building which relates poorly to its context. It submitted that the amended plans raise other issues in regard the overall appearance and that the design response no longer retains the positive attributes that the Tribunal relied upon in supporting the height of the initial proposal. The Council asserted that the proposal no longer achieves a high quality architectural and urban design outcome positively contributing to the neighbourhood character.
- 9 Mr Biles observed that whilst the erosion of the building in order to reduce the overshadowing is effective, the applicant appears to have ignored the impact on the overall design of the building. His evidence was that an improvement in both massing and detailed design is required to achieve a building which justifies the height and scale proposed.
- 10 Mr Biles contended that the reduction of mass does not provide a moderation of the overall scale and bulk of the building, as it will have no effect on how the building will appear as seen from the south or west. His assessment was that the discrete vertical components described in the design (an element supported by Mr O'Dwyer) will not articulate the building sufficiently to prevent its general appearance as 'flat and wide'. He considered that this contrast in detailing of the façades of the 'cut-out' and that of the remainder of the building make it all the more conspicuous.
- 11 The applicant submitted that, subject to conditions, the amended plans are an acceptable outcome and that the 'information plans' demonstrate how most of concerns raised by Council are easily addressed.
- 12 Mr O'Dwyer's evidence differed from that of Mr Biles. He considered that the amended plans, in addition to addressing the shadow impact, have 'appropriate neighbourhood character, context, built form, height, scale, materials, internal amenity and external amenity outcomes'.
- 13 He noted that a result of the excision to the building is the creation of a visual 'stepdown' to what is, coincidentally, the preferred height nominated in the Clayton Activity Centre Precinct Plan (**CACPP**) for development adjacent to the subject land to the west and north. He described the amended plans as a 'sympathetic high-quality design response with architectural excellence as required by the planning scheme and the precinct plan'. Mr O'Dwyer said that the lower corner form functions as 'a supporting and transition role' in relation to the adjacent 14 storey part of the building. He supported Mr Biles' suggestions for activating the 'cut-out' façades, maintaining the footprint of the retained apartments and incorporating noise attenuation measures to apartments close to communal open space.



- 14 Mr O'Dwyer also supports the further changes shown on the 'information plans' differentiating the lower built form from the higher portion by the use of balconies, roof appendages, materials and articulation to break down the mass of building, as do the changed window groupings and the introduction of the ribbed precast concrete material which relates to both the neighbouring Coles supermarket wall and the elevated train line which is under construction.
- 15 Having considered the amended plans, submissions and evidence, in addition to the 'information plans', we are not satisfied that the modified building is an acceptable response to its context. Whilst the 'podium' level shown in the amended plans represents an acceptable response to the street, the tower above it does not. By, in the Council's words, 'taking a scalpel to the building' to reduce the overshadowing, the applicant has failed to achieve a building that reflects an acknowledgement of the urban design responsibility inherent in the site. This requires a holistic consideration of the building from all aspects. Both the Planning Scheme and the CACPP seek good quality urban design and built form outcomes that make a positive contribution to the site's context.
- 16 The amended plans do not achieve this. The evidence in respect of the original design generally supported the urban design and architectural basis of the proposal. In assessing the amended plans, Mr Biles suggested some minor improvements which sought to integrate the appearance of the 'cut-out' with the rest of the building. The 'information plans' mostly adopted his suggestions.
- 17 However, these plans fail to address the design and massing of the proposal as a whole, made necessary most noticeably because of its prominent corner location. The building as shown on the application plans displays a cohesiveness and uniformity as an architectural piece which is no longer evident. The amended plans show a building that is unbalanced. The removal of a substantial section of the building is an unsympathetic and abrupt response which has unacceptably compromised the form and architecture of the structure. The building has lost its coherence and we are not persuaded by Mr O'Dwyer's evidence that this deficiency could be addressed at a future design development stage. It is a fundamental issue of the building's massing, not a more nuanced consideration of design detail or 'finessing'.
- 18 The basis within the Planning Scheme's policies and within the CACPP for seeking a high quality architectural and urban design outcome for this prominent site was set out in detail in our order. We will not repeat it here. As noted in our order, the building's architecture was a positive attribute that gave weight to the proposed 14 storey height.
- 19 The architecture of the building shown on the amended plans is no longer a positive attribute. It is poorly resolved. The substantial 'cut-out' of the

north-east corner, rather than presenting as a considered element of the overall architectural language, appears as something which has been included for a specific purpose without consideration of its impact on (or integration with) the overall building. We accept Mr Biles' evidence that in terms of both massing and design detail, it is not a solution that sits at ease with the architecture of the building as a whole.

- 20 While we accept that the modified massing has achieved the specified solar access to the opposite side of the street, the resultant built form and architecture is not acceptable. This is particularly so given its location at the entry to the activity centre and municipality, and also its proposed height which means it will have far-reaching visibility. We agree with the Council's submission that the amended proposal 'results in a poor resolution of the building façade, which appears abrupt, unbalanced and disproportionate to its context'. It will not make a positive contribution and does not justify the grant of a permit.
- 21 We will therefore affirm the Council's decision. No permit is granted.

Bill Sibonis
Senior Member

Ann Keddie
Member

