VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

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| planning and environment LIST | vcat reference No. P959/2018Permit Application no. TPA/47245 |
| CATCHWORDS |
| Section 77 of the *Planning and Environment Act 1987*; Monash Planning Scheme; General Residential Zone; sloping site; neighbourhood character; building bulk; internal amenity of open space; landscape response. |

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| APPLICANT | Nitesh Jain |
| responsible authority | Monash City Council |
| RESPONDENT | Yimin Ma |
| SUBJECT LAND | 13 Gordon RoadMOUNT WAVERLEY VIC 3149 |
| WHERE HELD | Melbourne |
| BEFORE | Frank Dawson, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 28 November 2018 |
| DATE OF ORDER | 6 March 2019 |
| CITATION | Jain v Monash CC [2019] VCAT 246  |

# Order

1. In application P959/2018 the decision of the responsible authority is affirmed.
2. In planning permit application TPA47245 no permit is granted.
3. No order as to costs.

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| **Frank Dawson****Member** |  |  |

# Appearances

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| For applicant | Ms Effie Tangalakis, town planner of Ask Planning Services. |
| For responsible authority | Ms Adrianne Kellock, town planner of Kellock Town Planning. |
| For respondent | Mr Yimin Ma, in person. |

# Information

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| Description of proposal | The proposal in this proceeding is to construct three dwellings, two double storey and one triple storey, at 13 Gordon Road, Mount Waverley. Dwellings 1 and 2 contain four bedrooms and dwelling 3 contains three bedrooms. Each dwelling has a large living and dining area and dwellings 1 and 3 also contain rumpus areas. Dwelling 3 contains a home office on the ground floor. Two car spaces are provided for each dwelling in double garages for dwellings 1 and 3 and a two car stacker for dwelling 2.The three dwellings are attached as a single structure over the lower level and separated at the upper levels. The building footprint covers 39% of the site and the garden areas occupy 43%.At ground level, the proposed dwellings are set back between 7.7 metres and 8.3 metres from the frontage and between 5 metres and 6.8 metres from the rear. The maximum height of the proposal development is approximately 9 metres on a sloping site.The proposed design is contemporary, with external finishes of face brickwork, timber and metal cladding. The roof design is a combination of flat and pitched roof forms. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.  |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone – Schedule 2 (GRZ2).Vegetation Protection Overlay – Schedule 1 (VPO1). |
| Permit requirements | Clause 32.08-6 (a permit is required to construct two or more dwellings on a lot). |
| Land description | The subject land is located on the northern side of Gordon Road and has a north-south orientation. The land has an irregular shape with a curved frontage of 19.33 metres and a rear boundary width of 33.69 metres. The eastern boundary is 39.49 metres and the western boundary is 4436 metres. The land area is 1069m2. There is a 1.83 metre drainage easement along the northern rear boundary and a 6.1 metre wide easement down the eastern side to accommodate the overland flow of water from the reserve to the north. In total, easements occupy approximately 27% of the land. The land slopes down across the site from west to east and from north to south. The fall from northwest to southeast is approximately 5 metres.The land is occupied by a single storey detached dwelling surrounded by low shrubs and some medium sized trees within the rear garden.Surrounding land use consists of single detached dwellings to the east, west and northwest and a public reserve to the northeast. The land is opposite the campus of the Mount Waverley Secondary College.Due to the slope of the land, dwellings appear prominent along the northern side of Gordon Road to the extent that large dwellings, generally double storey, define the character of the street.Public transport is available along Stephensons Road and the Mount Waverley railway station is approximately 1 kilometre to the south. |
| Tribunal inspection | The Tribunal inspected the subject land and the surrounding area within Gordon Road and Marianne Way.  |

# Reasons[[1]](#footnote-1)

## What is this proceeding about?

1. In March 2018, Monash City Council determined to refuse a planning application for three dwellings at 13 Gordon Road, Mount Waverley on grounds that I summarise as:
* An inadequate design response in terms of neighbourhood character, dwelling entry, amenity and landscaping.
* Visual bulk when viewed from adjoining properties.
* Failure to maintain and enhance the garden city character of the neighbourhood.
* An inappropriate car parking layout in the context of Clause 52.06 of the planning scheme.
1. The permit applicant requests the Tribunal to review the Council decision.
2. Mr Yimin Ma, is an objector to the proposal who resides in an adjoining property. Mr Ma is concerned that the building bulk of the proposal is out of character with the surrounding dwellings and considers the bulk and height of the proposal will diminish the enjoyment of his private open space. Mr Ma also expresses concern regarding the extent of earthworks required for the proposed development, given the slope of the land.
3. On 1 October 2018, the Tribunal conducted a Directions Hearing at the request of the Council, seeking an adjournment of the hearing for the preparation of amended plans and the notification of those plans to adjoining owners and occupiers. My order arising from the Directions Hearing on the 1 October 2019 granted an adjournment and directed notification of the amended plans. By way of background and explanation, I paraphrase the following comments from my order:

 The reasons for the adjournment are:

i. The responsible authority has identified that the description of what is being applied for is incorrect. The application is for the construction of two double storey dwellings and one triple storey dwelling.

ii. The owners/occupiers of 4 Marianne Way, Mount Waverley were not notified in the original notification process.

At the directions hearing on the 1 October 2018, the Tribunal substituted amended plans for the permit application plans.

My order of 1 October 2019 directs the amended application be notified to all of the persons in the original list of names for public notification plus the owners/occupiers of 4 Marianne Way, Mount Waverley.

1. At the subsequent hearing of the matter on 28 November 2018, Council acknowledged that the amended plans have improved the proposal. In particular, Council “does not have concern” regarding;
* the front setback and streetscape response,
* the amount of open space provided for each dwelling,
* the colours and materials of the external finishes.
1. In relation to carparking, Ms Kellock informed me at the hearing that amendments to the arrangement of car parking and the selection of a car stacker that does not require an underground pit will address Council’s concerns regarding vehicle access and flooding. Accordingly, Council no longer pursues the car parking issues raised in the grounds for refusal.
2. From Council’s perspective, I assess the remaining issues in contention to be:
* The excessive and uncharacteristic size of the proposed development towards the rear of the site.
* The building bulk of proposed dwellings 2 and 3, particularly in relation to the adjoining property to the east.
* The practicality of the secluded private open space areas due to the necessity for extensive retaining structures and the changes in level required as a result of the sloping terrain.
* Reduced solar access to the secluded private open space for dwelling 1 due to the bulk of dwellings 2 and 3 to the north.
* The light restriction to the secluded private open space for dwelling 2 due to the height of the northern retaining wall.
* The constraint on garden space for canopy tree cover within the rear of the development due to easements and retaining structures.
1. In supporting the proposal, the permit applicant submits the proposed development responds to housing need and is an appropriated design for the character of Gordon Road. Ms Tangalakis notes that from a streetscape perspective, the setback of the proposal allows ample space for landscaping and although a multi-dwelling development, will appear from the street as a double storey building (during my inspection, I observed there are many large dwellings along the northern side of Gordon Road).
2. Overall, the permit applicant submits;

..the proposed development provides for high levels of visual interest and articulation. The built form is broken up at first floor and the ground floor includes recesses and garden beds and large private open space areas throughout to alleviate bulk and mass impacts. Adequate areas are provided for landscaping and the inclusion of a pitched roof further assists with a more traditional appearance.

1. Having heard the submissions and viewed the surrounding area, I have concluded that although the design input is considerable, the attempt to locate three large dwellings on this sloping site constrains the ability to achieve a balanced outcome. Most notably in my assessment, the size of the development results in;
* a limitation on useable private open space,
* a large area of continuous building form,
* an awkward arrangement of internal spaces, and
* insufficient space for landscaping other than within the front setback.
1. Despite the fact that the proposal meets the site coverage (39%) and private open space design guidelines of schedule 2 to the General Residential Zone, I find the shortcomings I have identified above are the outcome of a design that tries to extract too much from this site. Unfortunately, I cannot conclude that restoring the balance to achieve an acceptable site response can be practically addressed by conditions. I must therefore affirm the Council decision and refuse the grant of a permit. My reasons follow.

## What are the key issues?

1. I consider the key issues in this proceeding derive from the symptoms of overdevelopment that I have identified earlier.
2. I acknowledge that this proposed development has a number of attributes. For example:
* The front setback is consistent with the planning scheme guideline and allows for sufficient space to achieve canopy vegetation within the front garden.
* The proposed development presents as a single (albeit large) dwelling to the street.
* The roof forms and external materials are contemporary in style, but respect the character and materiality of dwellings along Gordon Road.
* Parking is addressed with the provision of two on-site spaces per dwelling with a single access crossover.
1. However, as I have mentioned earlier, I find the attempt to establish three large dwellings on the site fails to achieve a ‘balanced’ site response. The design elements that contribute to this conclusion are discussed below.

## private open space

1. The proposed design contains three secluded private open space areas (SPOS). The SPOS for dwelling 1 is on the western side of the building, open to the western boundary but overshadowed at various times of the day by dwellings 2 and 3 to the north. Dwelling 1 has a north facing deck attached to the living area. The shadow diagrams show that more than half of the SPOS for dwelling 1 is in shadow at the equinox from early morning through to mid-afternoon.
2. The SPOS area for dwelling 2 is around the north-west corner of the building and due to the need for retaining structures along the northern and western sides of the dwelling, the SPOS is in a ‘sunken’ area and dominated by an outdoor deck with access from the living area. The SPOS is split on different levels, joined by stair access. Despite having a northern exposure, the SPOS for dwelling 2 is enclosed by a retaining wall nearly 2 metres high, and above that, a rear boundary fence behind landscaping. As a consequence, the SPOS is significantly in shadow at the equinox during the afternoon. Most of the private open space for dwelling 2 is located above the retaining wall along the northern and western boundaries, which also accommodates a drainage and sewerage easement.
3. Dwelling 3 also has a north facing outdoor deck, located at the north-east corner of the dwelling. The deck is not constrained by a retaining wall, but is separated from the adjacent garden area by a six step stair case.
4. The separation of levels creates practical considerations of access and useability, but these are not in themselves determinative issues. Of greater significance in my assessment is the amount of secluded private open space available to all three dwellings. I consider these spaces are disproportionately small relative to the outdoor recreation needs of a dwelling with 3-4 bedrooms. Overall, the outdoor space may be considered adequate, however, in this case, there are the multiple constraints of enclosed areas, overshadowing, changes in level and accessibility.

## building form

1. The proposed development steps up the site from the double storey façade facing the street to a three storey element at the rear. The building form is contiguous at the lower levels, with separation between the first floor elements of dwellings 1 and 3, then with a higher second floor to create a two storey structure at dwelling 2 and a three storey structure at dwelling 3. The variability in height is partly due to the terrain. The visual effect is a three storey building at the rear of the site, accentuated by the slope of the land.
2. Despite being set back from the boundaries, I find the upper level of this development will dominate the surrounding rear garden spaces in Marianne Way and at 11 Gordon Road. The presence of a large rear building form is not characteristic of dwellings in Gordon Road or the adjacent Marianne Way. I consider a less ambitious proposal that uses the slope of the land to create a stepped single and double storey design at the rear of the site is likely to achieve a more sympathetic design response.

## internal design

1. Initially, Council identified a concern that the entrances to proposed dwellings 2 and 3 lacked a ‘sense of address’. I note that the amended plans have addressed the ‘sense of address’ issue by creating a more prominent and visible entry area for dwelling 2 by the use of a portico and a window space illuminating an internal entry ‘lounge’. The entrance to dwelling 3 at the rear of the eastern driveway has a corner entry and window that also improves the identification of the entrance and allows for surveillance of the driveway.
2. Both dwellings 2 and 3 have entry from the eastern driveway. As dwelling 2 is located behind dwelling 3, a long entry passage is required for dwelling 2, with stairs rising to the ground floor living area located on the higher ground to the rear. The arrangement of spaces in dwellings 2 and 3 is illustrated in the extract from the ground floor plan reproduced below.
3. I acknowledge that floor levels are required to be raised due to the potential for storm water flooding from the adjacent reserve and that this, combined with the slope of the site, has an impact on the internal and external arrangement of spaces. This is not a matter that has determined my decision, however, I consider the combination of access and the changes of level diminishes the internal amenity of these dwellings. I suggest a less intensive development would have greater scope to accommodate the terrain of the site.



Extract from the ground floor plan dated 29/8/18 Rev. B – 13 Gordon Road

### Car parking

1. The use of double car stacker for the parking needs of proposed dwelling 2 derives from the need for two car spaces for each dwelling and insufficient space for three double garages with side by side parking. The inclusion of a two car stacker is unusual in a residential development of three dwellings and Council engineers have a concern that the requirement for a pit may have flooding implications from the overland flow path that runs down the proposed driveway. At the hearing Ms Tangalakis drew my attention to amended plans circulated in November 2018 showing an alternative stacker design (*Klaus Single Vario-2061*) that does not require a pit. As mentioned earlier, Council no longer contests ground of refusal # 6 concerning car parking.
2. I find the revised arrangement is acceptable given the above ground stacker does not significantly affect building height and is recessed behind proposed dwelling 1, adjacent to one of the double garages.

## landscaping

1. Due to the continuous form of the proposed building, landscaping within the development is confined to the perimeter areas adjacent to the site boundaries.
2. All three private open space areas provide for one canopy tree, and in the case of dwellings 2 and 3, the trees are located outside of the rear easement. Due to the retaining structures, the amount of rear setback and the location of the easement, these trees will have limited scope to perform a significant canopy function. The Council submission identifies the two rear trees as *Eucalyptus* ‘Little Snowman’ that achieve a height of 5-7 metres with a canopy spread of 3-5 metres.
3. The landscape proposal retains one existing tree on the site, that being a Leyland cypress at the north-west corner of the site.
4. Within the easements along the northern and eastern boundaries, Lilly Pilly hedge planting to a height of 4 metres is proposed.
5. As mentioned in the preliminary information, the proportion of site area (estimated to be 27%) given to easements on this site is unusual. In particular, the 6.1 metres wide drainage easement along the eastern side of the site is intended to allow for the passage of overland flow from the reserve to the north. This means that a significant proportion of the site is unavailable for significant canopy vegetation. Clearly, it is logical for the driveway to be located within this easement, however, the fact remains that the amount of land for meaningful landscaping is reduced. This is further exacerbated by the extent of the building footprint and the extensive use of retaining walls.
6. Overall, I find the ability to landscape this site commensurate with the landscape character of the surrounding area is restricted by a combination of site constraints and the continuity of building form.

## Conclusion

1. I find the proposal for three large dwellings on this site, when considered in the context of a sloping site and the need for extensive retaining structures, does not allow for a balanced outcome. In particular, I find that the useable private open space is disproportionately small for the needs of large households requiring 3 or 4 bedrooms. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

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| **Frank Dawson****Member** |  |  |

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. [↑](#footnote-ref-1)