VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P2069/2019 |
| CATCHWORDS | |
| Section 77 of the *Planning & Environment Act 1987*; Monash Planning Scheme; General Residential Zone Schedule 3; Vegetation Protection Overlay Schedule 1; Restrictive Covenant; Planning Policy; Neighbourhood Character; Backyard Character; Design; Traffic; Internal Amenity; External Amenity | |

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| APPLICANT | Two The Close Pty Ltd | |
| responsible authority | Monash City Council | |
| respondents | Roger Langdon, Mark and Clare Hickey, Carolyn Berriman, David Forde, Maria Annal | |
| SUBJECT LAND | 2 The Close MOUNT WAVERLEY VIC 3149 | |
| WHERE HELD | Melbourne | |
| BEFORE | Teresa Bisucci, Deputy President  Katherine Paterson, Member | |
| HEARING TYPE | Hearing | |
| DATE OF HEARING | 27 and 28 October 2020 | |
| DATE OF ORDER | 14 December 2020 | |
| CITATION | | Two the Close Pty Ltd V Monash CC [2020] VCAT 1406 |

# Order

**Amend permit application**

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:

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| --- | --- |
| Prepared by: | Fd Architects Pty Ltd |
| Drawing numbers: | TP01B to TP10B inclusive |
| Dated: | 17 February 2020 |

1. In application P2069/2019 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/50453 no permit is granted.

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| **Teresa Bisucci**  **Deputy President** |  | **Katherine Paterson**  **Member** |

# Appearances

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| For Two The Close Pty Ltd | Phillip Rygl, town planner, of Connect Town Planning. He called the following witnesses:   * Andrija Ziranovic, traffic engineer * Nick Withers, arboricultural and landscaping consultant |
| For Monash City Council | James Turner, town planner |
| For Roger Langdon & Maria Annal | In person |
| For Mark and Clare Hickey | In person |
| For Carolyn Berriman | In person |
| For David Forde | In person |

# Information

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| Description of proposal | Construction of three dwellings on the land. Each dwelling will be two storeys in height. Dwellings 1 and 2 will contain three bedrooms and dwelling 3 will contain two bedrooms. A double garage has been provided for dwelling 1, a single garage with tandem space for dwelling 2 and a single garage for dwelling 3. Several trees are proposed to be removed to accommodate the proposed development, including a street tree, with the trees protected by the Vegetation Protection Overlay, Schedule 1 retained. |
| 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 3; and Vegetation Protection Overlay, Schedule 1 |
| Permit requirements | Clause 32.08-6 – Construct two or more dwellings on a lot |
| Land description | The subject site has an area of 975 square metres and contains a detached single storey dwelling, associated outbuildings, and a large amount of vegetation. The subject site is burdened by a restrictive covenant that requires dwellings to be constructed from brick, stone, concrete or brick veneer and be no less than 1,500 square feet (139.4 square metres) in size. |
| Tribunal inspection | 4 November 2020 by Member Paterson, from the public realm only due to COVID-19 restrictions. |

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

1. Two The Close Pty Ltd (**applicant**) wishes to construct three dwellings on land at 2 The Close Mount Waverley (**subject site**). Following the decision of Monash City Council (**Council**) to refuse to grant a planning permit for the development, they have requested that the Tribunal review this refusal.
2. Council refused the application on the following grounds:

* inconsistency with Council’s local planning policy;
* its poor response to the neighbourhood character of the area;
* it would adversely affect the amenity of neighbouring properties; and
* would lead to a poor level of internal amenity for the future occupants.

1. Following the circulation of amended plans, it raised concern that the proposed development may also be inconsistent with the restrictive covenant that applies to the subject site. However, subsequently the Council advised that it was satisfied that the revised proposal would not be in breach of the restrictive covenant.
2. This view is not shared by the respondents, who remain concerned that the proposed development will result in a breach of the restrictive covenant. Whilst they share Council’s concerns with respect to the neighbourhood character, amenity and internal amenity, they are also concerned that the access arrangements for the dwellings are unacceptable and will lead to unreasonable traffic implications for the street including on street parking and increased traffic volumes.
3. As outlined at the hearing, the question as to whether the proposed development is consistent with the restrictive covenant will be considered by Deputy President Bisucci. The merits of the application will be considered by Member Paterson. Our reasons follow.

## restrictive covenant

1. The subject site is encumbered by a restrictive covenant contained in Instrument of Transfer D80433 (**restrictive covenant**) dated 1 March 1968. The restrictive covenant was registered on the certificate of title volume 8660 folio 955 on 17 May 1968. As relevant to this application, the restrictive covenant provides *inter alia*:

ALL THAT PIECE OF LAND BEING Lot 15 on Plan of Subdivision No. 75561 Parish of Mulgrave County of Bourke and being part of the land more particularly described in Certificate of Title Volume 8652 Folio 516 [now = whole C/T 866/955] AND we the said John George Ronnie McArthur and Beverly Ann McArthur for ourselves our respective heirs executors administrators and transferees the registered proprietor or proprietors for the time being of the land hereby transferred and of every part thereof do hereby covenant with the said FAIRBROTHER CONSTRUCTIONS PTY. LIMITED and other registered proprietor or proprietors for the time being of the said land comprised in the said Plan of Subdivision and of every part thereof (other than the land hereby transferred) that we **will not erect or allow to be erected on the said lot any dwelling or outbuilding not constructed of brick, stone, concrete or brick veneer and that any dwelling so erected will not be of an area less than 1,500 square feet**\* and it is hereby agreed as follows that the above covenant shall appear as an encumbrance on the Certificate of Title to issue in respect of the land hereby transferred and shall run with the land hereby transferred.

**\***Tribunal emphasis

1. The necessity to interpret the restrictive covenant arose because the Council relied on an additional ground of refusal, after it received amended plans from the applicant. By email on 24 September 2020, the Council advised the Tribunal and all parties that it would seek to argue that the floor area of dwelling 3 did not comply with the requirements of the restrictive covenant.
2. However, at the commencement of the hearing, the Council submitted that it no longer sought to rely on the additional ground of refusal as it had reviewed the memorandum of advice filed with the applicant’s submissions and agreed with that memorandum.
3. Notwithstanding the Council’s position, some respondents pursued submissions that the proposed development contravened the restrictive covenant. In summary, the respondents submitted the following:
4. the restrictive covenant only permits a single dwelling to be constructed on the subject site;
5. the proposed materials contravene the restrictive covenant; and
6. the floor area of the garage should not be included in the calculation of the area for the dwelling.
7. During the applicant’s submission Bisucci DP asked the applicant to address whether the use of a render finish to the external walls at the first floor level breached the restrictive covenant.
8. The three matters set out above require interpretation of the restrictive covenant and are questions of law[[2]](#footnote-2), accordingly they have been decided by Bisucci DP, being a legal member of the Tribunal.
9. In summary, I find as follows:

* the restrictive covenant does not restrict the number of dwellings that can be constructed on the subject site;
* the area of the garage can be included in the calculation of the floor area in the proposed development; and
* the use of proposed materials including Autoclaved Aerated Concrete (**AAC**) or Hebel and render do not contravene the restrictive covenant.

1. My reasons follow.

### Construction of restrictive covenant

#### Number of dwellings

1. There have been many cases of the Supreme Court of Victoria (**Court**) and of the Tribunal that have dealt with the interpretation of restrictive covenants, including whether such restrictive covenants limit the number of dwellings.
2. The restrictive covenant in this case does not explicitly state the number of dwellings to be constructed on the subject site. Instead, I was encouraged by the respondents to interpret the word ‘any’ to mean ‘one’. In other words, the restrictive covenant would read as follows:

…will not erect or allow to be erected on the said lot **one** dwelling or outbuilding not constructed of brick, stone, concrete or brick veneer and that **the one** dwelling so erected will not be of an area less than 1,500 square feet…

1. I was taken to two decisions by the applicant to assist me in the interpretation of the restrictive covenant by the applicant. In *Tonks v Tonks*[[3]](#footnote-3), (***Tonks case***) the Court dealt with the interpretation of a restrictive covenant whose terms are set out below:

‘…will not erect or cause or permit to be erected on the land hereby transferred or any part thereof any building other than a dwelling house…’

1. At paragraphs 8 and 9 the Court stated:

[8] The object of interpretation is to discover the intention of the parties as revealed by the language they used in the document in question. Although both the plaintiffs and the defendants in this case filed affidavits, counsel conceded that the Court was not entitled to approach the task of construction by reference to evidence as to what the parties to the original contract of sale, the present proprietors of the relevant property or, for that matter anyone else thought the covenant meant. The matter is purely a question of construction, approached against the background of the facts which existed at the time the contract was entered into.

[9] Mr J Brett, of counsel for the defendants, submitted that one's immediate impression upon reading the covenant was that it would prohibit more than one house being built on lot 3. He sought support for this submission from the Oxford English Dictionary which, not surprisingly, defined "a" as variously "one", "some" or "any" and also, in a more definite sense as "one" or "a certain"…

1. And then at paragraph:

[17] Attractive as Mr Brett’s argument appears, I am unable to accept it. If the parties to the original covenant had wished to restrict the number of dwelling houses built on each of these lots they could have done so very simply and definitively by replacing the word "a" in the covenant with the word "one", or by making some similar simple amendment. ... The covenant says nothing, in my opinion, as to the number of dwelling houses which might be built. To import a restriction as to the number of houses which might be built on lot 3 into the covenant would extend its effect beyond the words used by the parties without any warrant for doing so.

1. I was also taken to a decision of the Tribunal in *De Sousa v Monash CC*[[4]](#footnote-4) (***De Sousa case***) where the restrictive covenant being considered stated (as relevant):

‘…any dwelling house constructed of other than brick or brick veneer…’

1. In the *De Sousa case* the parties agreed that the restrictive covenant related to materials rather than dwelling numbers and consequently, the Tribunal simply accepted arguments that the restrictive covenant did not limit the number of dwellings that could be constructed.
2. The word ‘any’ is defined in the Macquarie Dictionary (online at 26 November 2020) as:

adjective

**1.** one, a, an, or (with plural noun) some, whatever or whichever it may be: if you have any witnesses, produce them.

**2.** in whatever quantity or number, great or small: have you any butter?; have you any blank disks?

**3.** every: any schoolchild would know that.

**4.** (with a negative) none at all.

**5.** a great or unlimited (amount): any number of things.

pronoun

**6.** (construed as singular) any person; anybody

**7.** (construed as plural) any persons: he does better than any before him; unknown to any.

**8.** any single one or any one's; any thing or things; any quantity or number: I haven't any.

adverb

**9.** in any degree; to any extent; at all: do you feel any better?; will this route take any longer?

1. The interpretation of a restrictive covenant requires one to examine the language of the document to ascertain the intention of the parties, at the time the document was created. In other words, I am to ascertain the *purpose* and *intention* of the parties to the restrictive covenant. Further, the interpretation should be governed by tenets of ordinary language without recourse to any technical or legal understanding.[[5]](#footnote-5)
2. The purpose of this restrictive covenant is to establish a particular and cohesive character. This character is one of substantial or large homes constructed of strong, sturdy and quality materials.
3. I was told by the respondents that their understanding of the restrictive covenant and those that burden their respective land included that it limited the number of dwellings to be constructed on the subject site to one dwelling. Presumably, that is support for an interpretation of what the language means to an ordinary person. By this I mean a person not trained to interpret documents.
4. Whilst the understanding of the respondents is important to them, I must turn to the language of the restrictive covenant.[[6]](#footnote-6) I find that the use of the word ‘any’ in this restrictive covenant is used as an adjective and more particularly to mean ‘every’ rather than as a determiner of the number of dwellings. Further, if the intention of the restrictive covenant was to restrict the number of dwellings to be constructed on the subject site, the language used would have made that clear. The term ‘any’ that can have many different meanings would not have been used.
5. To adopt the approach of the Court in the *Tonks case* in the restrictive covenant before me and replace the term ‘any’ with ‘one’ simply does not make any sense grammatically. In the *Tonks case*, the simple replacement of ‘a’ with ‘one’ made sense grammatically. However, the Court refused to accept that even with that simple replacement, the restrictive covenant was intended to restrict the number of dwellings.
6. In this case, to construe the restrictive covenant as prohibiting the number of dwellings to be constructed on the subject site, I would need to replace the term ‘any’ with ‘more than one’.
7. Given the operative words of the restrictive covenant commence using language that prohibits certain actions, it would have been very simple indeed to make it clear that no more than one dwelling was to be constructed on the subject site. The restrictive covenant does not do so.
8. Therefore, the restrictive covenant does not restrict the number of dwellings that can be constructed on the subject site and it follows that the proposed development is not in breach of the restrictive covenant.

#### Area of the dwelling

1. There is no dispute amongst the parties that the restrictive covenant requires a dwelling to be constructed with a total area of *no less than* 1,500 square feet or 139.35 square metres (**m2**).
2. Proposed dwellings 1 and 2 exceed this requirement in that they are 178 and 172m2 respectively. Dwelling 3 is 118m2 without the garage being included in the calculation and 142m2 if the area of the garage is included.
3. The applicant submitted that the total area of dwelling 3 includes the garage and thus the development does not contravene the restrictive covenant. The respondents submitted that the garage is not part of the dwelling and cannot be included in the floor area calculation. Therefore, the proposed development is in breach of the restrictive covenant and a planning permit cannot be granted as there is no application before me to vary or remove the restrictive covenant.
4. The applicant submitted that the garage is not separate or removed from the dwelling and is *part of the integrated whole*.[[7]](#footnote-7) The applicant relies on the ordinary definition of ‘outbuilding’ derived from a number of dictionaries and said that commonalities in the definition of ‘outbuilding’ include:
   1. the proximity to, and relationship with the larger or main building; and
   2. separation from the main building.
5. Mr Langdon refers to the definition of ‘outbuilding’ in the several dictionaries including the Australian Concise Oxford dictionary[[8]](#footnote-8) which states:

a detached shed, barn, garage etc within the grounds of a main building; an outhouse.

1. The Macquarie dictionary (online at 26 November 2020) defines outbuilding as:

a detached building subordinate to a main building.

1. In support of its submissions that the garage is part of the dwelling and not a separate building, the applicant relied upon the following:

* the garage for dwelling 3:
  + forms part of the ground floor;
  + serves partly as the front and rear external walls;
  + shares a common internal wall with dwelling 2;
  + will be integrated into the design and support of the first floor of dwelling 3;
  + shares the roof of the first floor; and
  + shares the roof of the ground floor (in part).

1. Further, the applicant submitted that as the garage is not an outbuilding having regard to the ordinary meaning of outbuilding, and is integrated with dwelling 3, it is part of the dwelling, and thus should be included in the floor area calculation.
2. Mr Langdon submitted that if the garage is included in the floor area calculation because it is considered part of the dwelling, then it cannot be a garage. This would mean that the dwelling would not have a place to park a vehicle and would require off street parking.
3. What is clear from the various definitions of ‘outbuilding’ relied upon is that an outbuilding is a *detached or separate building*. The garage of dwelling 3 is not separate nor is it detached from the main building.
4. I find that the garage:

* is not an outbuilding because it is not detached from the dwelling (or main building); and
* forms part of the dwelling because it is part of the integrated whole as set out by the applicant. The reasons supporting this are contained in paragraph 30 of these reasons.

1. I reject the submissions of the respondent that if the garage is part of the dwelling it cannot be used for parking a car. It is irrelevant for the purposes of the restrictive covenant what occurs inside the dwelling so long as the garage is part of the dwelling. This is consistent with my findings that the purpose of the restrictive covenant is to establish a character of substantial or large homes to be constructed of strong, sturdy and quality materials.
2. The character intended to be established by the restrictive covenant is maintained if the garage forms part of the dwelling that is, there is the appearance of a large home.

#### Materials

1. The plans depict the upper first floor of the proposed development to be constructed of rendered AAC or otherwise described as Hebel panels. The Hebel product guide[[9]](#footnote-9) for Hebel states:

Hebel is the name of the autoclaved aerated concrete (AAC) developed, manufactured and marketed by CSR Building Products (CSR)…

**WHAT IS AAC?**

Autoclaved aerated concrete (AAC) is a solid yet lightweight building material that’s widely used in construction throughout the world…

In the AAC manufacturing process water and readily available dry ingredients – sand, lime and cement – are mixed with an expansion agent to form a semi-liquid mix called slurry which is poured into a mould. If panels are being produced then steel mesh reinforcement will be appropriately placed in the mould before the slurry pour.

Chemical reactions occur between the ingredients causing hydrogen to form, which in turn causes the slurry to rise. This is called the pre-curing stage. The hydrogen gas then dissipates leaving extremely small, finely dispersed air spaces. This is the essence of why AAC is much lighter than traditional concrete, yet strong and solid with excellent thermal properties.

The solid but still soft mix is separated from the mould and cut to form the right-sized blocks or panels for the batch… The uncured AAC panels are ‘baked’ under elevated heat and steam. The blocks and panels are ready when they’re hardened or cured. [[10]](#footnote-10)

1. Concrete is defined in the Macquarie dictionary (online at 26 November 2020) as:

…

7. a mass formed by coalescence or concretion of particles of matter.

…

9. an artificial stone-like material used for foundation, etc by mixing cement, sand, and broken stone, etc., with water, and allowing the mixture to harden.

1. In the updated memorandum of advice filed with supplementary submissions, the applicant submitted that AAC is ‘virtually indistinguishable from, or in fact a type of, concrete’.
2. Mr Langdon disputes that AAC satisfied the term ‘concrete’ in the restrictive covenant because *it is a cheaper and a more lightweight construction method than using brick veneer or concrete which would require sturdier foundations, steel lintels and the like*.[[11]](#footnote-11)
3. The fact that AAC is more lightweight and would not require sturdy foundations is beside the point. The purpose of the restrictive covenant is to provide a character of large quality-built homes. The construction of less sturdy foundations is not seen by anyone, once the dwelling is completed, and do not contribute to the character. The use of AAC being a concrete product as set out in the product guide is consistent with the restrictive covenant. The aerated nature of AAC to create a lightweight product does not detract from it being concrete and thus its use is not in breach of the restrictive covenant.
4. Having made this finding, I now turn to the use of a render finish applied on the AAC. The words of the restrictive covenant require the dwelling and outbuilding to be *constructed of brick, stone, concrete or brick veneer*. The proposed development if approved, will be constructed of brick and concrete and will have a render finish applied. Given that the construction is proposed to be with materials that do not contravene the restrictive covenant, the application of a finish to those materials does not breach the covenant. I further add that the finish created by the application of a render will be similar to the use of a coloured concrete, from a character perspective.
5. Throughout the hearing, I also asked the applicant whether the phrase ‘dwelling or outbuilding’ should be read conjunctively or disjunctively that is, should both the dwelling and outbuilding be constructed with the materials in the restrictive covenant or is it only the outbuilding that must be so constructed.
6. I agree with the submissions of the applicant, and I have already found that the purpose of the restrictive covenant is to establish a specific character and thus it follows that both the dwelling and the outbuilding are to be constructed using the specified materials.
7. For the above reasons, the proposed development does not contravene the restrictive covenant.

## PLanning Merits

### What are the key issues in this proceeding?

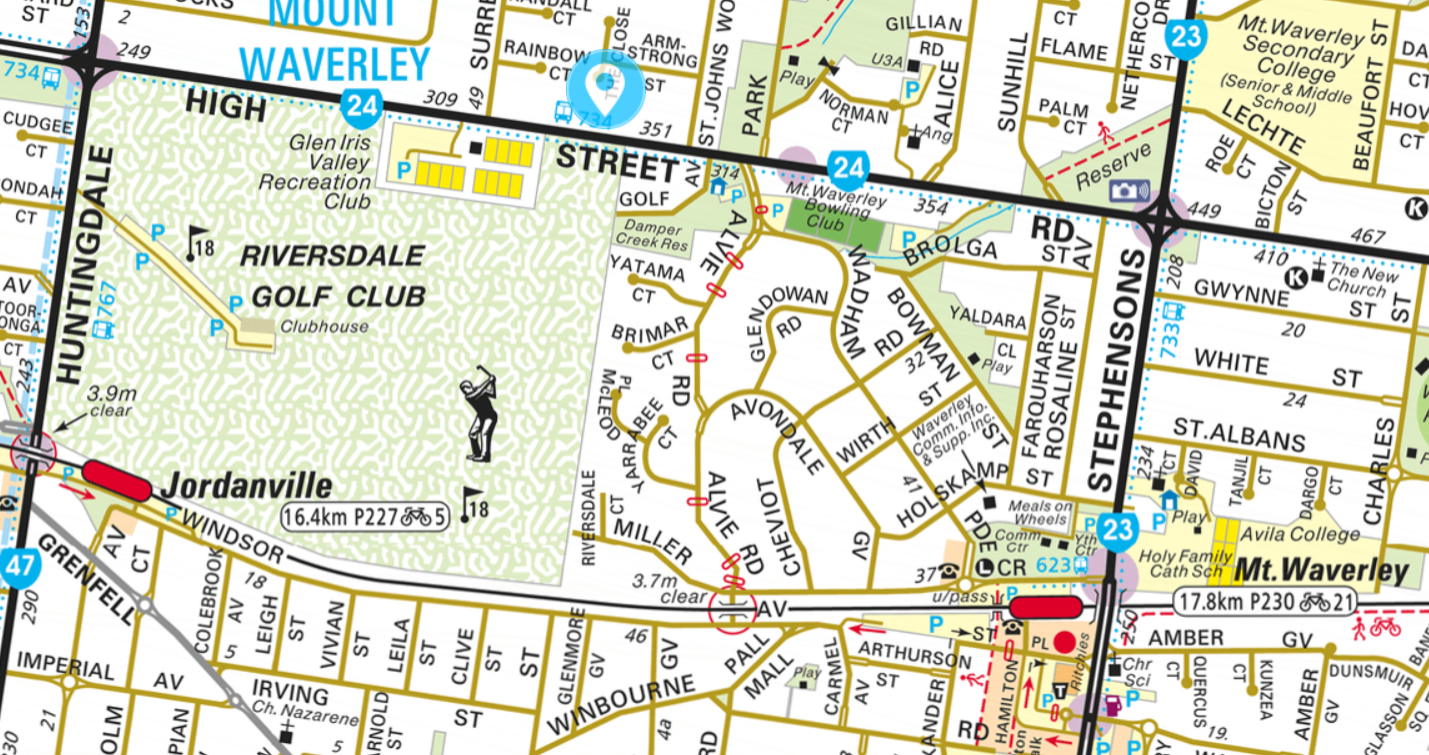
1. Having considered all the submissions and evidence and inspected the subject site and its locality the Tribunal considers that the key issues in this proceeding are:

* Is the construction of three dwellings on this site supported by planning policy?
* Is the proposal respectful of the neighbourhood character?
* Does the proposal create unacceptable amenity impacts?
* Does the proposal provide adequate car parking?
* Will the proposal provide a reasonable level of internal amenity for the future occupants of the dwellings?

1. I, Member Paterson, will consider each issue in turn.

### Is the construction of three dwellings on this site supported by planning policy?

1. Clause 16.01-R of the Monash Planning Scheme (**scheme**) seeks to facilitate increased housing in established areas to create a city of 20 minute neighbourhoods close to existing services, jobs and public transport. At the same time, the policy recognises the need to identify minimal, incremental and high change residential areas to balance the need to protect valued areas with the need to provide additional housing to meet the demand generated by population growth and changing household types.



1. As can be seen in the above extract from Melways On Line, the subject site is located approximately 1.4 kilometres, or a 19 minute walk from the Mount Waverley Activity Centre, which includes the Mount Waverley train station and is identified as a Major Activity Centre in Plan Melbourne.[[12]](#footnote-12) A bus service operates along High Street Road, with the nearest located approximately 350 metres from the site, providing a link between Glen Waverley and Glen Iris. It is a location that the Tribunal finds is generally supported by the planning policy framework for more intensive housing forms.

#### Local Planning Policy

1. Clause 21.01-1 states that the population of Monash is expected to grow from an estimated 189,000 people in 2016 to 215,000 by 2031, with a need for an additional 82,000 dwellings over the same time period.
2. To guide the location of the new housing, Clause 21.04 has divided the municipality into eight categories, each with differing development potential, reflecting the approach suggested at Clause 16.01-R of the scheme. The subject site is included within Category 8 Garden City Suburbs, which Clause 21.04 identifies as being suitable for incremental change.
3. To further guide the location of development, Clause 22.01-4 divides the municipality into residential character types, with the subject site included within a Garden City Suburbs Northern Area. The preferred character statement for the northern area indicates that new development anticipated for the precinct includes unit developments and even some apartment developments, provided these are consistent with the character of the area:

Although there will be changes to some of the houses within this area, including the development of well-designed and sensitive unit development and, on suitable sites, some apartment development, these will take place within a pleasant leafy framework of well-vegetated front and rear gardens and large canopy trees.

#### General Residential Zone Schedule 3 (GRZ3)

1. Further guidence as to the level of change anticipated for this site through the application of the GRZ3 to this site, the purposes of which include:

* To encourage development that respects the neighbourhood character of the area.
* To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.

1. The schedule to the zone provides neighbourhood character objectives to be achieved, which do not include a reference to a preferred typology for this area.
2. The Tribunal finds that the proposed development comprising three dwellings on the subject site is generally consistent with the planning policy directions for housing on this site, given its proximity to services and location within an incremental change area. However, the scheme also places strong emphasis on ensuring that the design of medium density housing is respectful of the neighbourhood character of the area. I will consider this aspect of the proposal next.

### Is the proposal respectful of the neighbourhood character?

1. Clause 55.02-1 seeks to ensure that the design respects the existing neighbourhood character or contributes to a preferred neighbourhood character.
2. The GRZ3 contains the following Neighbourhood Character objectives:

* To support new development that contributes to the preferred garden city character through well landscaped and spacious gardens that include canopy trees.
* To promote the preferred garden city character by minimising hard paving throughout the site by limiting the length and width of accessways and limiting paving within open space areas.
* To support new development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form.
* To support new development that locates garages and carports behind the front walls of buildings

1. The schedule to the zone contains a number of variations which seek to ensure that new medium density development is consistent with these character objectives.
2. Whilst the architectural style of the front dwelling is generally consistent with the character of the area, the application is seeking a variation to a number of the requirements of the GRZ3 including the front, side and rear setback requirements. Thses variations are an indication that the proposed development is seeking to do too much with this unusual site.
3. One example is the design choice to provide a five metre setback to the boundary with 2/343 High Street Road and to the northern boundary of the subject site, rather than what is the actual rear boundary of the subject site which is the boundaries with the properties at 335, 339 and 341 High Street Road. This choice has resulted in a development that fails to respect the backyard character of the area, particualrly as the long access way will not enable the planting of canopy vegetation that would soften the impact of the development on the long range vistas that are possible from The Close over the Riversdale Golf Course, and be a more sensitive response to the garden city character of this location.
4. Another is the 900mm setback to the boundary of 2 Armstrong Street, which is inconsistent with the requirements of Standard B17 of Clause 55.04-1 and is incompatible with the objectives of the schedule to the zone which is calling for generous side setbacks. Given the objective of the zone, and the context of this site, which is one of large homes nestled within established gardens, compliance with the standard should be achieved.
5. Furthermore, I agree with Council that the use of a long accessway is contrary to the neighbourhood character objectives.
6. Whilst the use of attached forms through the centre of a site is understandable as it is in response to the setback and private open space requirements of the zone, this choice may have an adverse impact on the amenity of the adjoining properties. I will consider this aspect of the proposed development next.

### Does the proposal create unacceptable amenity impacts?

1. The proposed built form may adversely affect the amenity of the adjoining properties through visual bulk, loss of light, overlooking, overshadowing and impact to existing vegetation. I will consider each in turn.

### Visual Bulk

1. During the hearing, Mr Langdon raised concern that the amenity of his, and the other adjoining properties, would be unreasonably affected through visual bulk. Whilst there are gaps provided at the first floor, it was his view that these are insufficient, and what would be seen from his property would be built form for its entire length. It was his view that this impact would be further compounded by the topograpghy of the area.
2. The subject site shares a boundary with eight other properties, all of which have the potential to be adversely affected by the proposed development.
3. I agree with Mr Langdon that the properties at 1 The Close , 335 High Street Road and 339 High Street Road will be adversely affected through visual bulk and a greater recession is required at the first floor for dwellings 1 and 2 as well as a greater separation at ground floor between dwellings 1 and 2 to migitate this impact. Council submitted that whilst this is desirable, it may not be possible to provide the separaton by reducing the size of the dwellings due to the restrictive covenant that applies to the subject land. I agree that whilst this may be the case, the visual bulk impacts of the proposed development are another indication that this proposal has not appropriately responded to its context.

### Loss of light

1. Mark and Clare Hickey raised concern that their dwelling at 3 The Close was not correctly shown on the plans, and that the proposal would result in loss of light to their dwelling.
2. A key concern was that a window to the entry and front door which faces towards the subject site was not shown on the plans. In submissions it became apparent that this door opened up into the front entry of the dwelling, which is not considered a habitable room using the definitions of Clause 73.01, as it would be classed as a “lobby”. However, even if it was classed as a habitable room, I am satisfied that the distance between the proposed built form and the window (a minimum of 10.2 metres) is sufficient to ensure that the window will still receive adequate light.

### Overlooking

1. Whilst unreasonable overlooking of adjoining properties can be prevented by applying the requirements of Standard B22 of Clause 55.04-6, these methods should be applied carefully, because they have a significant impact on the internal amenity of a dwelling.
2. In this case, it appears that screaning devices have been applied with little thought to the impact that these might have on the internal amenity of the dwellings. If a redesign is contemplated, it should consider the use of alternative methods such as blades or fins which allow an outlook whilst preventing downward views into adjoining properties, and then only used where required to prevent the unreasonable overlooking of the adjoining properties.

### Impact on vegetation

1. There are a number of existing trees that are located within the surrounding neighbouring properties that may be affected by the proposed development including an immature street tree.
2. The street tree will need to be removed to acccomodate the proposed crossover. Whilst Council initially opposed its removal, at the hearing it conceded that if a permit was granted that it would support its removal subject to its replacement. This matter would be addressed via a separate process.
3. With respect to the neighbouring trees, arboricultural evidence was provided to the Tribunal by Nick Withers, Arboricultural and Landscape Consultant. Based on his evidence, in addition to the street tree, there are three neighbouring trees that may be affected by the proposed development of the subject site being Trees 11, 13 and 15. Trees 5 and 7, which are proposed to be retained on the subject site may also be affected. With the exception of Tree 11, all these trees require a permit to be removed or lopped under the provisions of the Vegetation Protection Overlay Schedule 1 (**VPO1**), the objective of which is to:

To conserve significant treed environments and ensure that new development complements the Garden City Character of the neighbourhood.

#### Tree 5

1. Tree 5 is a 11 metre Golden Rain Tree, which is protected under the provisions of VPO1 and will require canopy pruning (less than 15% of its existing canopy) to accommodate dwelling 3. Mr Withers calculated that dwelling 3 would encroach into approximately 10% of the Tree Protection Zone (**TPZ**) of this tree, which is consistent with the definition of a minor encroachment under the Australian Standard *AS4970-2009 for the Protection of Trees on Development Sites*. I accept Mr Wither’s evidence that the impact on this tree is acceptable and this tree should be able to be retained as shown on the plans.

#### Tree 7

1. Tree 7 is a 15 metre Sily Oak located close to the boundary of the subject site with 341 High Street Road. The plans indicate that dwelling 3 will result in an encroachment of 17% into the TPZ of the tree, which is a major encroachment under the *Australian Standards*.
2. The impact compromises 13% from the proposed dwelling 3 with an additional 4% from the deck. The plans indicate that the deck will encroach within the structural root zone of the tree, and may therefore have an impact on the structural integrity of tree..
3. Whilst The Tribunal accepts that there are methods such as posts, screw piles or the use of canterlivered decks to ensure the works can occur in a manner that ensures the longevity of the tree, the fact that the works are to occur within the structural root zone of a significant tree, protected by a vegetation protection overlay, is another indication that the proposed development is seeking to do too much with this site.

#### Trees 11 and 13

1. Tree 11 is a 9 metre Argle Apple located within the property at 3 The Close. The plans indicate that the level of encorachment into the TPZ of this tree is 9%, a minor encroachment under the standards, and on this basis I am satisfied that the works will not have a significant impact on the health of the tree.
2. Tree 13 is a row of trees located within the properties of 339 High Street Road and 341 High Street Road. The plans indicate a 10% encroachment, also a minor encroachment. However, I am concerned that this calculation has not taken into account any works such as retaining walls required for the creation of the access way, which may increase the level of encroachment, and certainly increases the potential for these trees to be adversely affected by the works. Any redesign needs to clearly detail all works in the vicinity of the trees to assist the decision maker in assessing the impact of the development on the neighbouring trees.

#### Tree 15

1. Tree 15 is a 10 metre Narrow Leaved Black Peppermint located on the boundary between 1 The Close and 2 Armstrong Street. The plans indicate that the tree currently has an encroachment of 8% by the existing dwelling, with the proposed development increasing the level of encroachment by 3% to a total of 11% (a major encroachment). Mr Withers evidence was that this was acceptable, particuarly as 1.5% of the existing encroachment would be returned to permeable area for the tree and the new impact was minor. Based on this evidence, the Tribunal accepts that the impact on this tree is acceeptable.

#### Conclusion on vegetation

1. Whilst the Tribunal accepts that the existing and neighbouring trees are likely to be retained, the potential impact on Trees 7, 11 and 13 is of concern, and another indication that this is a design that has failed to consider its context. Another concern of the Tribunal is that the plans do not clearly show the placement of retaining walls and the like which may be required for the accessway and creation of secluded private open space areas. These elements may also have an impact on the health of the trees and should be clearly shown and any impact assessed as part of any future application.

### Does the proposal provide adequate car parking?

1. Five car parking spaces are proposed for the proposed development, which is consistent with the requirements of Clause 52.06-5 of the scheme. Concern was raised by the parties that due to the slope of the subject site and the layout of the dwelling, access to the spaces would be diffcult, resulting in the residents parking on the street.
2. Traffic evidence was provided to the Tribunal by Andrija Zivanovic. It was his evidence that subject to changes to some of the proposed landscaping beds, which would need to have landscaping less than 150mm, a vehicle could enter and exit each space in a forward direction, albeit with some corrective manoeuvres.
3. The most difficult garage to access is that proposed for dwelling 3, which will require a ‘reverse corrective manoeuvre’ after negotiating the steep driveway. The swept path diagrams indicate that this manoeuvre will need to encroach underneath the canopy of tree 13, in an area Mr Zivanovic encourages the low level planting within the garden bed beneath the trees. Whilst this manoeuvre will occur on a relatively flat portion of the subject site, I agree with the other parties that the arrangement is difficult and not convenient for the future occupants of the dwelling, particuarly as the occupant needs to negotiate the neigbouring vegetation, the wall of dwelling 2, the slope the land, and their own dwelling in order to exit the dwelling.
4. In terms of traffic impacts, I accept Mr Zivanovic’s evidence that the amount of traffic generated by the proposed development is low and will be comfortably absorbed into the existing street network. This application has not been refused on the basis of traffic generation. Similarly, it has not been refused on the basis of waste collection, which can occur through Council’s usual service.
5. A key concern of Mr Langon was that the proposed removal of the existing crossover would adversely affect the access arrangements to his property, as he needs to use the existing double crossover to access his garage which has been constructed on an angle. Ultimately, the removal and reinstatement of a crossover is at Council’s discretion. However, it is open to Mr Langdon to have a discussion with the Council about the future design of the crossover, if a development is approved in the future, proposing a crossover in a similar location to that proposed for this application. Again, the Tribunal has not refused the application on this basis.

### Will the proposal provide a reasonable level of internal amenity for the future occupants of the dwellings?

1. In terms of internal amenity, the Tribunal finds that the proposed dwellings will provide an acceptable living environment for the future occupants of the dwellings. Each dwelling has been provided with north facing secluded private open space, and easily identifiable entry and habitable rooms of usable size. The Tribunal has not refused this applictaion on the basis of internal amenity.

## Conclusion

1. For the detailed reasons set out earlier, the proposed development does not contravene the restrictive covenant. However, whilst the intensification of this site is supported by planning policy, the proposed design has failed to respond to the neighbourhood character of the area, will result in unreasonable impacts on the amenity of adjoining properties, particularly through visual bulk, and has failed to respond appropriately to the considerable constraints on this site being the slope of the land and existing vegetation. Whilst a medium density housing development may be supported on this site, the design needs to be rethought to better respond to the constraints of this site.
2. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

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| **Teresa Bisucci**  **Deputy President** |  | **Katherine Paterson**  **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)
2. *Prowse v Johnstone & Ors* [2012] VSC 4 at [53] where Cavanough J makes reference to other cases and states *‘Generally speaking, the proper construction of an instrument intended to have legal effect is a question of law, not fact’*. [↑](#footnote-ref-2)
3. [2003] VSC 195. [↑](#footnote-ref-3)
4. [2014] VCAT 1201. [↑](#footnote-ref-4)
5. *Re Marshall and Scott’s Contract*[[1938] VicLawRp 22](http://www.austlii.edu.au/au/cases/vic/VicLawRp/1938/22.html); [[1938] VLR 98](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%5b1938%5d%20VLR%2098?stem=0&synonyms=0&query=Clare%20and%20Bedelis) and *Ex parte High Standard Constructions Limited* [[1928] NSWStRp 107](http://www.austlii.edu.au/au/cases/nsw/NSWStRp/1928/107.html); [(1928) 29 SR (NSW) 274](http://classic.austlii.edu.au/cgi-bin/LawCite?cit=%281928%29%2029%20SR%20%28NSW%29%20274?stem=0&synonyms=0&query=Clare%20and%20Bedelis). [↑](#footnote-ref-5)
6. *Tonks v Tonks* [2003] VSC 195 at [8]. [↑](#footnote-ref-6)
7. See memorandum of advice attached to the applicant’s submissions. [↑](#footnote-ref-7)
8. No edition is cited. [↑](#footnote-ref-8)
9. Prepared by CSR, January 2019. [↑](#footnote-ref-9)
10. At page 3. [↑](#footnote-ref-10)
11. See Mr Langdon’s submissions dated 6 November 2020, building materials at [2]. [↑](#footnote-ref-11)
12. A background document to the scheme as listed at Clause 72.08. [↑](#footnote-ref-12)