VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P2153/2019  Permit Application no. tpA/50195 |
| CATCHWORDS | |
| Application under section 80 of the *Planning and Environment Act 1987*; Review the conditions contained in the permit; Monash Planning Scheme; Neighbourhood Residential Zone – Schedule 4 (Dandenong Valley Escarpment Areas); Two dwellings on a lot; Design detail; Stormwater. | |

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| APPLICANT | Mr Samuel Chunsum Tang |
| responsible authority | Monash City Council |
| SUBJECT LAND | 27 Ralton Avenue, Glen Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Sarah McDonald, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 16 October 2020 |
| DATE OF ORDER | 27 January 2021 |
| CITATION | Tang v Monash CC [2021] VCAT 58 |

# Order

### Conditions changed

1. The decision of the responsible authority is varied.
2. The Tribunal directs that planning permit TPA/50195 must contain the conditions set out in planning permit TPA/50195 issued by the responsible authority on 18 September 2019 with the following modifications:
   1. Conditions 1(a), 8, 9, 10 and 11 are deleted.
   2. New conditions are included as follows:

1(a) The detailed design of the building facades to be modified as follows:

* the moulding around the top of the ground floor level walls and the top of the first floor level walls (on the underside of the roof) to be removed; and
* the metal balustrade across the first floor level windows to be simplified to be straight vertical or horizontal rails or similar, or otherwise removed.

1(b) Roof eaves to be provided at either ground floor or first floor level.

* 1. A new condition is included as follows:

8 All stormwater generated from water falling on the impervious surfaces of the site must be collected and discharged, via an on-site stormwater retention system, into the point of discharge nominated by the responsible authority, and the rate of discharge must be limited to the design discharge for the site prior to development or redevelopment; or otherwise

All stormwater generated from water falling on the impervious surfaces of the site to be managed and drained to the satisfaction of the responsible authority.

* 1. Conditions in the planning permit are renumbered accordingly.

1. The responsible authority is directed to issue a modified planning permit in accordance with this order.

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| **S McDonald Member** |  |  |

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

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| For applicant | Mr How Ng, town planner,  Melbourne Planning |
| For responsible authority | Melissa Sahai, town planner, Monash City Council |

# Information

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| Description of proposal | Construction of two double-storey dwellings. |
| Nature of proceeding | Application under section 80 of the *Planning and Environment Act 1987* – to review the conditions contained in the permit. |
| Planning scheme | Monash Planning Scheme (**planning scheme**). |
| Zone and overlays | Neighbourhood Residential Zone – Schedule 4 (Dandenong Valley Escarpment Areas) (**NRZ4**) Vegetation Protection Overlay – Schedule 1 (**VPO1**). |
| Permit requirements | Clause 32.09-6: To construct two or more dwellings on a lot in the NRZ4. |
| Key planning scheme policies and provisions | Clauses 15, 21.04, 21.11, 22.01, 22.04, 32.09, 55, 65, and 71. |
| Land description | The subject land is located on the western side of Ralton Avenue, Glen Waverley. The land is rectangular, with frontage of 16.76 metres, depth of 45.21 metres, and area of 765 square metres.  The surrounding area is residential in nature, with a mix of single and double-storey dwellings. There is a mix of detached houses and multi-dwelling developments, with a variety of architectural styles. The original housing stock is typically modest single storey cream brick houses. More recent development typically comprises large double-storey detached houses or multi-dwelling development. |

# Reasons[[2]](#footnote-2)

## What is this proceeding about?

1. Mr Tang (the applicant) has obtained a planning permit to construct two double-storey dwellings on the land at 27 Ralton Avenue, Glen Waverley (the subject land). The proposed dwellings are neo-Georgian in style.
2. The applicant is seeking review of permit condition 1(a) and conditions 8 to 11. Condition 1(a) requires changes to the design detail of the façade and the roof of the proposed buildings to be modified. Conditions 8 to 11 relate to the management of stormwater on the subject land.
3. The submissions for the applicant are that condition 1(a) is excessive and unreasonable, and that conditions 8 to 11 are conditions that are the province of the Building Regulations.
4. The responsible authority submits that the conditions are necessary in order to achieve an acceptable character and amenity outcome for the neighbourhood and appropriate stormwater management infrastructure. It says that the conditions are reasonable and appropriate and should remain as conditions of the permit.
5. The Tribunal must decide whether these conditions should be varied. I must consider whether the proposal will produce ‘acceptable outcomes’,[[3]](#footnote-3) rather than optimal or preferable outcomes, in relation to the relevant policies and provisions of the planning scheme.
6. The key issues to be determined are:

* Is the design detail of the façade and roof of the buildings as proposed in the application plans acceptable?
* Are conditions 8 to 11 relevant conditions that should be included on the planning permit?

1. Having considered the submissions and statements of grounds, and the relevant policies and provisions of the planning scheme, I have decided to vary the decision of the responsible authority and direct that the conditions in the planning permit be modified. My reasons follow.

## Procedural issues & rulings

1. Prior to the hearing Mr Kenneth Tang, who has Power of Attorney for Mr Samuel Tang, sent to the Tribunal a letter (dated 7 October 2020) commenting on the responsible authority’s handling of the planning permit application and on another permit for a nearby property at 30 Ralton Avenue. This was addressed as a preliminary matter at the commencement of the hearing. I acknowledged that I would consider that letter as an addendum to Mr Ng’s submissions on behalf of the applicant.
2. After the hearing, Mr Kenneth Tang sent to the Tribunal[[4]](#footnote-4) a further letter (dated 26 October 2020). A copy of this letter was emailed to the responsible authority at the same time; however, it was unclear whether a copy of this letter was sent to Mr Ng as the applicant’s representative.
3. This letter comments on the hearing, my consideration of Mr Tang’s earlier letter, the responsible authority’s assessment of the permit application for the property at 30 Ralton Street, and Amendment C125 to the planning scheme. This letter also includes comments on the discussion at the hearing about potential changes to the building facade and roof eave and expresses Mr Tang’s preference for retaining the original facade design and his views on a ‘compromise second option’. Attached to this letter is a document (dated 6 October 2020) commenting on adjoining and nearby properties and including photographs of other dwellings in the surrounding area.
4. Having not sought or provided the opportunity for further submissions to be made after the hearing, I provided the responsible authority with the opportunity to respond to the matters raised in Mr Kenneth Tang’s letter of 26 October 2020.[[5]](#footnote-5) The responsible authority responded[[6]](#footnote-6) advising that it maintains its position that the proposal and the suggested changes by Mr Tang continue to be contrary to the policy provisions relating to mock historic buildings as outlined in policy 22.01 of the planning scheme.
5. I am satisfied that the responsible authority has had the opportunity to respond to both letters from Mr Kenneth Tang. I have had regard to both of Mr Kenneth Tang’s letters in addition to Mr Ng’s submissions on behalf of the applicant, as well as the responsible authority’s response to these.

## Is the design detail of the facade and roof of the buildings as proposed in the application plans acceptable?

1. Condition 1(a) requires the plans to be modified to show the following:

Deletion of Georgian accents and modification of facade treatments and window and introduction of eave elements along the ground floors of Units 1 and 2, to the satisfaction of the Responsible Authority.

1. Mr Ng’s submissions for the applicant include, in summary:

* The condition boils down to the issue of the eternal neighbourhood character that dominates the thinking of municipal planners.
* It is significant that the application requirements and decision guidelines at sections 6.0 and 7.0 of the NRZ4 Schedule make no reference to neighbourhood character.
* The only whinge that the Council has is the design detail of the Georgian elements of the design which it alleges do not integrate with the existing character of the area.
* Neighbourhood character being one of 48 objectives in ‘ResCode’ (clause 55) is on the last and lowest rung of the ladder of aesthetic control in the planning scheme, and is not the ‘be all and end all’ of planning for dwellings in the area.
* The site is not covered by a Heritage Overlay, Design and Development Overlay, or any other aesthetic overlay.
* The applicant has already come a long way to designing the facade of the front dwelling and changed the roof to a hipped roof.
* Adding eaves to the ground floors will destroy the impressive Georgian look and draw the design back to the 20th Century, a retrograde step in urban design.
* Based on the emerging neighbourhood character in the broader and localised area, the design will not detract from the character of the streetscape.

1. Mr Ng cites various decisions of the Tribunal and former planning review tribunals and boards in support of his submissions.[[7]](#footnote-7) I have had regard to these to the extent that they are relevant, noting that several of the decisions[[8]](#footnote-8) pre-date the introduction[[9]](#footnote-9) of clauses 55.01 (Neighbourhood and site description and design response) and 55.02 (Neighbourhood character and infrastructure) to the planning scheme.
2. Mr Ng’s submission includes numerous photographs of existing dwellings within Ralton Avenue, adjacent streets and the broader surrounding area, that reflect a Georgian design[[10]](#footnote-10) or have no ground floor eaves.[[11]](#footnote-11) He also relies on the permit for the development at 30 Ralton Avenue, diagonally opposite the subject land, which is of neo-Georgian style and has no roof eaves.
3. I find that the design detail of the facade and roof of the buildings as proposed in the application plans are not acceptable. I say this for the following reasons.
4. Various planning policies and provisions of the planning scheme seek to ensure development responds to its context and neighbourhood character. These include clauses 15 (Built Environment and Heritage), 16 (Housing), the purpose of the NRZ4 at clause 32.09, and the neighbourhood character objectives and Standard B1 at clause 55.02-1. These are echoed in the local planning policies, including clauses 21.04 (Residential Development) and 22.01 (Residential Development and Character Policy). It is not necessary for there to be an overlay applying to the land to give consideration of matters of neighbourhood character.
5. Of particular relevance to the issue in dispute is the policy statement at clause 22.01-3 of the local Residential development and character policy that seeks to ‘discourage reproduction or mock-historic building styles incorporating superficial detailing whilst promoting contemporary designs of the present era’. I find that the proposal is inconsistent with this policy. I say this for the following reasons.
6. I acknowledge that the applicant has already modified the original application plans[[12]](#footnote-12) of the proposal during the permit application process to remove some of the Georgian details.[[13]](#footnote-13) Despite the modifications from the original application plans, the proposed dwellings still retain Georgian details and a distinct neo-Georgian style.
7. Having regard to the plans and the submissions of the parties, I consider the Georgian details of the proposed buildings to be the window style, proportions and placements, the column details to the ground floor level facades, the dual band of moulding around the top of the ground floor level walls, the moulding around the top of the first floor level wall (on the underside of the roof), the parapet roofline of the ground floor level, the lack of roof eaves, and the ornate metal balustrades across upper floor windows. [[14]](#footnote-14) These elements give the proposed buildings a neo-Georgian style, albeit in a simplified way compared with the original application plans.
8. Condition 1(a) is seeking for further changes to be made to the detailed design, although it is not specific as to what ‘Georgian accents’ are to be deleted or the ‘modification of facade treatments and window’ that are required. It is not acceptable that the permit condition does not provide clarity or certainty as to what modifications are expected. The lack of specificity is of little assistance to the permit applicant or the Tribunal in seeking to understand what the responsible authority is seeking as an acceptable outcome.
9. I appreciate the applicant’s concerns (and frustration) that there are many examples of neo-Georgian style dwellings in the area, and with the apparent inconsistency of the responsible authority approving the development at 30 Ralton Avenue, while requiring changes to their proposal to remove the Georgian detailing and provide roof eaves.
10. I accept that there are several examples of neo-Georgian style dwellings in Ralton Avenue[[15]](#footnote-15) and surrounding streets, and even more in the streets north of Wilson Road.[[16]](#footnote-16) However, I am persuaded by the responsible authority’s submissions that this style is more prevalent in the streets north of Wilson Road. Based on the numerous examples of neo-Georgian style dwellings in the broader surrounding area identified by Mr Ng, it is apparent that this style is to the taste of many property owners.
11. I cannot ignore the fact that these neo-Georgian style dwellings do contribute to the character of the surrounding area, albeit to a lesser extent in Ralton Avenue than many other streets identified by Mr Ng. However, the amendments to the local Residential Development and Character policy in November 2019,[[17]](#footnote-17) which introduced the policy to discourage reproduction or mock-historic building styles, indicates that the responsible authority is seeking to achieve a different character outcome. Despite the existence of neo-Georgian style dwellings in proximity to the subject land, I cannot ignore this local policy.
12. The extent to which the character outcome being sought may be achieved is somewhat tempered by the fact that this local policy can only be applied to residential developments that require a planning permit. As such, single dwelling developments that do not require a planning permit will not be constrained by this policy.
13. For these reasons, while I find that the detailed design of the facades of the proposed buildings should be modified to remove some of the Georgian details, I am not persuaded that it is reasonable or necessary to remove every Georgian design element to provide an acceptable outcome in the subject land’s context. In this regard I note the following:
14. I am satisfied that it is not necessary to modify the window styles, proportions and placements, or the column details to the ground floor level facades. They are not out of place with contemporary development in the surrounding area.
15. I am satisfied that it is not necessary for the metal balustrade across the first floor level windows to be removed. Rather the design of these ornate Georgian style elements could be simplified to be straight horizontal or vertical rails, or similar.
16. I find that the moulding around the top of the ground floor and first floor level walls makes a distinct contribution to the neo-Georgian style of the buildings and should be removed.
17. Given the overwhelming prevalence of hipped roofs with eaves of both the remnant original housing stock and newer infill developments, I am satisfied that roofs with eaves is a prevailing characteristic within this area. However, I am not satisfied that a roof with eaves can be readily retro-fitted to the ground floor level of the proposed buildings. Nor do I think it is necessary from a character perspective. There are many examples of double-storey dwellings in the surrounding area that do not have hipped roofs or eaves at ground floor level.[[18]](#footnote-18) For this reason, I find that rather than prescribing that eave elements be provided to the ground floor level, roof eaves could be provided either at ground floor or first floor level.
18. I will amend condition 1(a) accordingly.

## Are conditions 8 to 11 relevant conditions that should be included on the planning permit?

1. Conditions 8 to 11 of the permit are:

8. All stormwater collected on the site from all hard surface areas must not be allowed to flow uncontrolled into adjoining properties or the road reserve.

9. All stormwater collected on the site is to be detained on-site to the predevelopment level of peak stormwater discharge. The design of any internal detention system is to be approved by the council’s Engineering Department prior to drainage works commencing.

10. The nominated point of stormwater connection for the site is to the south-west corner of the property where the entire site’s stormwater must be collected and free drained via a pipe to the Council pit in the rear easement of 33 Ralton Avenue to be constructed to Council Standards. Note: If the point of connection cannot be located then notify Council’s Engineering Department immediately.

11. Stormwater discharge is to be detained on site to the predevelopment level of peak stormwater discharge. Approval of any detention system is required by the Responsible Authority, prior to works commencing.  
Note: A drainage contribution may be acceptable in lieu of the installation of the detention system to the satisfaction of the Council’s Engineering Division.

1. Mr Ng submits that conditions 8 to 11 are conditions that are the province of the building regulations and should not “pad up a planning permit”. The applicant submits that these conditions should be deleted or simply replaced by a condition that requires the drainage to be to the satisfaction of the responsible authority.
2. In relation to the note at the end of condition 11 regarding a drainage contribution in lieu of the installation of the detention system, Mr Ng says that the Council cannot exact a financial contribution unless it has an approved development contributions plan in place pursuant to section 46N of the *Planning and Environment Act 1987*.
3. The responsible authority submits that the local policy for stormwater management clause 22.04 was modified (in 2004) to incorporate the findings of the Monash Drainage Development Contributions Plan (October 2002). It says this identifies voluntary levies that can be paid if on-site stormwater retention systems are not provided. It further submits that the levy only applies if there is an increase in impervious area above 35% of the site area. It says the proposal includes an area of approximately 63% of impervious surfaces and, as such, a drainage contribution is applicable in line with the policy provisions.
4. I acknowledge the applicant’s submissions that stormwater management and discharge are typically matters addressed under the relevant regulations as part of the building permit stage of development. It is not necessary or appropriate for planning permits to include conditions that address matters that are dealt with under other legislation or other permit processes. For example, it is not necessary for condition 10 to be included on the planning permit as the legal point of discharge for stormwater drainage is addressed through the building permit process.
5. However, the planning scheme includes a local strategic statement (clause 21.11 Physical Infrastructure) and local planning policy (clause 22.04 Stormwater management policy) that specifically address the matter of stormwater infrastructure and management.
6. The local stormwater management policy at clause 22.04-3 specifically seeks, among other things:

* Stormwater flows generated from increased impervious areas be managed by on-site retention systems.
* All stormwater generated from water falling on the impervious surfaces of a site be collected and discharged, via an on-site stormwater retention system, into the point of discharge nominated by the responsible authority.
* The rate of discharge be limited to the design discharge for the site prior to development or redevelopment.[[19]](#footnote-19)

1. The decision guidelines at clause 22.04-4 include, as relevant:

* Whether the proposed works will significantly add to the stormwater discharge or adversely affect water quality entering the drainage system.
* Whether on-site retention is provided. If it is not provided, whether a financial levy is appropriate in accordance with the levies indicated in the table to this clause.

1. The table to clause 22.04-4 specifies levy amounts[[20]](#footnote-20) for different catchment areas.
2. In these circumstances, I consider it acceptable that the planning permit conditions give effect to this policy. However, I am persuaded that conditions 8, 9 and 11 in their current form are not necessary to achieve this.
3. Condition 8 is superfluous in the context of conditions 9 and 11 that require the collection and detention of stormwater on the site prior to its discharge.
4. While conditions 9 and 11 give effect to the policy for stormwater to be managed by on-site detention, they duplicate each other. It is not necessary for both of these conditions to be included on the permit.
5. In relation to the notation to condition 11 regarding a drainage contribution, I acknowledge Mr Ng’s submission that the Council cannot exact a financial contribution unless it has an approved development contributions plan in place pursuant to section 46N of the *Planning and Environment Act 1987*. However, the local stormwater policy at clause 22.04 provides scope for a financial levy to be considered in circumstances where on-site stormwater retention is not provided, and the rate of any financial levy is prescribed in the policy. Based on the policy, a levy is not a mandatory requirement, it may only be payable if on-site retention is not provided. In the circumstances, I am not satisfied that it is necessary or appropriate to specify the payment of a levy as part of a planning permit condition, even as a notation.
6. For these reasons I will amend the permit to delete conditions 8 to 11 and replace them with a condition that requires the following:

All stormwater generated from water falling on the impervious surfaces of the site must be collected and discharged, via an on-site stormwater retention system, into the point of discharge nominated by the responsible authority, and the rate of discharge must be limited to the design discharge for the site prior to development or redevelopment; or otherwise,

all stormwater generated from water falling on the impervious surfaces of the site to be managed and drained to the satisfaction of the responsible authority.

## Are there any other issues?

1. At the hearing the applicant raised the contention that condition 16 of the permit duplicates the requirement of condition 1(f). These conditions require, in summary, corner splays to be provided on both sides of the vehicle crossing. This condition was not the subject of the application for review and the submissions of the parties did not address these conditions. As such, I have not addressed these conditions in this decision.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is varied to amend condition 1(a), delete conditions 8 – 11 (inclusive), and include a new condition regarding stormwater drainage.

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| **S McDonald Member** |  |  |

1. The hearing was held by telephone conference, with written submissions having been filed and served in advance of the hearing. [↑](#footnote-ref-1)
2. The submissions 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-2)
3. Having regard to the decision guidelines at clause 65 of the planning scheme. [↑](#footnote-ref-3)
4. Via email on 27 October 2020. [↑](#footnote-ref-4)
5. Via Interim Order of the Tribunal dated 12 November 2020. [↑](#footnote-ref-5)
6. Via email on 27 November 2020. [↑](#footnote-ref-6)
7. For example, Mr Ng cites “GSA Architects v City of Boroondara, Appeal No. 2000/090202”, (*GSA Architects v Boroondara CC & Ors [2001]* VCAT 766 (31 May 2001)), and “Vardaxis v City of Darebin, Appeal No. P1693/2004” (*Vardaxis v Darebin CC [2004]* VCAT 1742 (2 September 2004)). [↑](#footnote-ref-7)
8. For example, Mr Ng cites “Rae & Ruche v City of Darebin, Appeal No. 2000/000887”, (*Rae D & Ruche v Darebin CC [2000]* VCAT 1036 (30 April 2000)). [↑](#footnote-ref-8)
9. Via Amendment VC12, in operation from 24 August 2001. [↑](#footnote-ref-9)
10. For example, 4, 8 and 9 Ralton Avenue, and dwellings in Evelyn Street, Tobias Avenue, The Outlook, Glen Road, Olinda Street, and Panoramic Grove. [↑](#footnote-ref-10)
11. For example, 29, 36 and 38 Ralton Avenue. [↑](#footnote-ref-11)
12. Revision A plans dated 25/02/2019. [↑](#footnote-ref-12)
13. Revision B plans dated 31/05/2019. [↑](#footnote-ref-13)
14. The columns, moulding and balustrade details are on the east and south elevations of both buildings (dwellings 1 and 2). [↑](#footnote-ref-14)
15. For example, the double-storey dwelling at 8 Ralton Avenue, and the double-storey multi-dwelling developments at 4 and 9 Ralton Avenue. [↑](#footnote-ref-15)
16. I note that many of these are single dwellings, which would not typically require a planning permit. [↑](#footnote-ref-16)
17. Amendment C125 to the planning scheme. [↑](#footnote-ref-17)
18. For example, the nearby dwellings at 36 Ralton Avenue. [↑](#footnote-ref-18)
19. Clause 22.04-3 (Policy). [↑](#footnote-ref-19)
20. Specified as $/m2 of impervious area. [↑](#footnote-ref-20)