VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1975/2019  Permit Application no. TPA/47156/A |
| CATCHWORDS | |
| Monash Planning Scheme; Application under section 82 of the *Planning and Environment Act 1987*; GRZ3; VPO1; Amendments to permit for two dwellings; Amendment C125 Part 2; Permit previously granted at direction of Tribunal; Off-site impacts. | |

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| APPLICANT | Ms Xin Zhang |
| responsible authority | Monash City Council |
| RESPONDENT | Alto Au |
| SUBJECT LAND | 31 Bennett Avenue MOUNT WAVERLEY VIC 3149 |
| WHERE HELD | Melbourne |
| BEFORE | Mary-Anne Taranto, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 24 June 2020 |
| DATE OF ORDER | 7 July 2020 |
| CITATION | Zhang v Monash CC [2020] VCAT 729 |

# Order

### Permit amended

1. In application TPA/47156/A the decision of the responsible authority is varied.
2. Planning permit TPA/47156/A is amended and an amended permit is directed to be issued for the land at 31 Bennett Avenue, Mount Waverley. The permit is amended as follows.
   1. The preamble to condition 1 is amended to read:

1 Before the development starts, plans drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans described as TP-01 to TP07 inclusive Project No. 19010 Revision B Dated 14 May 2019 prepared by AA Studio but modified to show:

* 1. Insert a new condition 1(e) as follows:

1(e) A notation to specify the three first floor windows of the North elevation of Unit 2 must have fixed, obscure glazing in any part of the window below 1.7 metres above floor level.

* 1. Insert a new condition 1(f) as follows:

1(f) The following planting is to be included in the landscape plan required by condition 5 of this permit:

* At least two canopy trees capable of reaching a mature height of at least 8m within the secluded private open space of Unit 2; and
* Shrub planting along the length of the north site boundary with a minimum mature height of 4m.

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| **Mary-Anne Taranto**  **Member** |  |  |

# Appearances

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| For applicant | Ms Xin Zhang |
| For responsible authority | Mr James Turner, Principal Planner – Appeals Advisor |
| For respondent | Ms Isabel Wang, town planner |

# Information

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| Description of proposal | Amendments to planning permit TPA/47156 for the construction of two double storey dwellings. |
| Nature of proceeding | Application under section 82 of the *Planning and Environment Act 1987* – to review the decision to grant (amendments to) a permit. |
| Zone and overlays | General Residential Zone – Schedule 3 (**GRZ3**)  Vegetation Protection Overlay – Schedule 1 (**VPO1**) |
| Permit requirements | Clause 32.08-6 – Construction of two or more dwellings on a lot in GRZ3  No permission is invoked under VPO1 |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 21.04, 22.01, 55, 65 and 71.02 |
| Land description | Located on the north side of Bennett Avenue, Mount Waverley, this 736sqm rectangular shaped site has a frontage of 17.37m and depth of 42.34m. The site is vacant and has been cleared of all vegetation. It has a 1.83m wide easement along the rear boundary. Surrounding land is residential. The applicant’s site is located north of the review site as depicted in the following image.    Applicant’s site  *Source: Nearmap* |
| Tribunal inspection | I have undertaken an unaccompanied inspection of the site and surrounds. |

# Reasons[[1]](#footnote-2)

## background

1. Alto Au, the permit applicant and respondent in this proceeding, has sought permission from Monash Council to amend plans of a development for two dwellings permitted under planning permit TPA/47156.
2. The following plan amendments are proposed:

* An increase in the floor to ceiling height at the ground level of both units from 2.7m to 3m;
* An increase in the width of a landscape strip between the east boundary and driveway from a predominant width of 0.5m to 1m;
* A reduction in the ground floor foot footprint of Unit 1;
* Provision of a 1.5m high brick and steel infill front fence;
* An additional window on the north side of Unit 2; and
* Reconfiguration of the internal layout including a consequential increase in first floor areas and altered boundary setbacks for both dwellings.

1. Ms Xin Zhang, (the **applicant**) is now seeking a review of council’s Notice of Decision to grant a planning permit (**NOD**) which would allow the amendments subject to one new permit condition which reads:

A notation to specify the three first floor windows of the North Elevation of Unit Two must have fixed, obscure glazing in any part of the windows below 1.7 metre above floor level.

1. The applicant’s statement of grounds cites concerns that are limited to proposed changes to Unit 2 which faces her backyard. More particularly, concerns are raised with reduced proposed building setbacks at ground and first floor level, increased building height and sun-glare from a new north facing upper level window.
2. I have considered the other proposed changes that are not in dispute and have found them to be acceptable. While I refer briefly to these un-contested issues later, I will focus on the key issues that require determination in this case.
3. They are:

* Whether the proposed changes to Unit 2’s setbacks from the north boundary and building height would cause unreasonable amenity impacts for the applicant.
* Whether the additional north facing window at Unit 2’s upper level will cause unreasonable sun glare.

1. Having considered the material filed and assisted by my inspection of the site and surrounding area, I have found the proposed amendments to be acceptable. My reasons follow.

## HEARING PROCESS

1. This proceeding was adjourned from its original fixture on 24 April 2020 due to the COVID-19 pandemic wherein face to face Tribunal hearings were adjourned. The hearing is conducted ‘on the papers’, with the agreement of the parties, pursuant to section 100(2) of the *Victorian Civil and Administrative Tribunal Act 1998*.

## PERMIT TPA/47156

1. The subject permit was issued at the direction of the Tribunal in *Xin v Monash CC* [2018] VCAT 1155 (**previous decision**), following Member Bilston-McGillen’s order varying the council’s decision to grant a permit.

## SCOPE OF ASSESSMENT

1. As the application was the subject of an earlier review to the Tribunal, this decision is a relevant consideration and I give it some weight.
2. This proceeding is not however strictly a repeat appeal, noting that only some elements of the original design and permission given are sought to be amended. This means that the ambit of my discretion is limited to the proposed modifications, rather than a consideration of the whole proposal afresh.
3. The principles relating to repeat appeals do however provide useful guidance in deciding whether it is appropriate to depart from the Tribunal’s earlier findings as relevant to the changes now proposed. These considerations include any changes to the physical context, the planning scheme, interpretation of the law and the proposal itself since the previous decision.
4. My task now is to decide whether the proposed modifications are acceptable. In doing so, I am mindful that the design now proposed, while different to that accepted by the Tribunal in the previous decision, is based on an application that is validly made and may be capable of achieving an acceptable outcome on its merits when tested against the relevant parts of the Monash planning scheme and the physical context.

## changes since the previous decision

### Physical context

1. Since the previous decision, the review site has been cleared of all vegetation and buildings. A large 2-storey dwelling at No. 35 Bennett Avenue and two 2-storey dwellings at No. 27 Bennett Avenue have also been constructed in the intervening period.

### Planning context

#### Amendments to the Victoria Planning Provisions

1. There have been numerous amendments to the planning scheme, affecting all Victorian planning schemes. These include changes to the format and content of the State and regional planning policies, particular provisions and definitions. For the purposes of the confined issues in this proceeding, I consider that these amendments are largely inconsequential.

#### Amendment C125 Part 2

1. In terms of amendments of a local nature affecting just the Monash planning scheme, of relevance is Amendment C125 Part 2 which was gazetted on 14 November 2019. The Amendment continued the implementation of the *Monash Housing Strategy 2014* and updated neighbourhood character policy. It also resulted in changes to policies at clauses 21.04 (Residential Development) and 22.01 (Residential Development and Character), and introduced and applied schedules 3, 5 and 6 to the General Residential Zone (**GRZ**).
2. Beginning with the zone controls, the site remains within the GRZ. Thus, the parent control with the same zone purposes apply. These purposes 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. Schedule 3 to the GRZ does however now apply whereas previously Schedule 2 was relevant. The schedule introduces neighbourhood character objectives, changes to the table of varied standards, application requirements and decision guidelines.
2. In Schedule 3, the newly introduced neighbourhood character objectives are:

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. In relation to the varied clause 55 standards, I firstly note that Standard B6 (front setback), Standard B28 (Private open space) and Standard B32 (Front fence height) appear in Schedule 3 as they did then in their varied form under schedule 2.[[2]](#footnote-3)
2. Relevant changes to standards in Schedule 3 that differ from those previously in Schedule 2 are as follows:

* Standard B8 – Site coverage of 50%
* Standard B9 – Permeability of 30%
* Standard B13 – Landscaping which includes the following:

New development should provide or retain:

* At least one canopy tree, plus at least one canopy tree per 5 metres of site width;
* A mixture of vegetation including indigenous species;
* Vegetation in the front, side and rear setbacks; and
* Vegetation on both sides of accessways.

A canopy tree should reach a mature height at least equal to the maximum building height of the new development.

* Standard B18 – Side and rear setbacks (rear setback varied only):

A new wall not on or within 200mm of a rear boundary should be set back at least 5 metres.

1. Decision guidelines include the following:

* Whether the development provides an appropriate transition to built form on adjoining sites.
* The robustness of proposed materials and finishes.
* The impact of the shape and dimensions of the lot on the ability of the development to meet any requirements of this schedule.
* The location and number of vehicle crossovers.
* The impact of the development on nature strips and street trees.
* The location, quantity and species of vegetation provided.

1. In terms of changes to local policies, I note that in relation to the Residential Development policy at clause 21.04:

* the Residential Framework Map from the Monash Housing Strategy is now included in this policy. It shows the site within Category 8 – Garden City Suburb with a Category 2 – Accessible area overlaid.
* Category 8 – Garden City Suburbs (formerly within Character Type ‘C’) is described as an area suitable for incremental change.
* Category 2 – Accessible areas are described as areas with future development potential.
* Policy objectives and strategies continue to reinforce aspirations for new development that complements and enhances the garden city character concept.
* Background documents are updated to include recent strategic reports, notably, the *Neighbourhood Character Review (February 2015)*[[3]](#footnote-4) and *Monash Housing Strategy (October 2014)*.[[4]](#footnote-5)

1. In relation to policy at clause 22.01:

* General policies ask for development that:
  + is consistent with preferred character statements;
  + respects the character of surrounding development including the maintenance of consistent setbacks and which allows vegetation and large trees to be planted in front side and rear setbacks;
  + provides rear setbacks that support the creation of green corridors of open space in backyards;
  + minimises the impact of visual bulk to neighbouring properties, through suitable setbacks from adjacent secluded private open space to enable the provision of screening trees, and scaling down of building form to the adjoining properties.
* Preferred future character statements have been varied and are expressed for each character type.
* In this case, ‘Garden City Suburbs (Northern)’ is applicable. I have considered this statement I do not recite it in full here. I relevantly note however that this statement anticipates that there will be changes to some of the houses within this area, including the development of well-designed and sensitive unit development within a pleasant leafy framework of well-vegetated front and rear gardens and large canopy trees. New development is also expected to complement the established buildings through consistent siting, articulated facades and use of materials and long expanses of blank wall will be avoided.

### Changes to the proposal

1. I summarise the proposed changes to Unit 2 in more detail as follows.

*Ground* *floor*

* Eastern protrusion: Previously setback 3m from north boundary with a length of 11.42m. Now proposed with a 2.345m setback and length of 7.48m.
* Western alfresco area: Previously setback 5.94m for a length of 5.95m yielding a secluded area of private open space (**SPOS**) of 35sqm. This area is now proposed with a setback of 5.915m and length of 7.3m, yielding 43.18sqm of SPOS.
* Floor to ceiling heights increased from 2.7m to 3m.

*First Floor*

* Retreat: Previously setback 3.967m for a length of 4.2m. Now proposed with the same setback of 3.967m with a reduced length of 3m.
* Master bedroom: Previously 6.375m for a length of 3.5m from north boundary with a 2.34m setback from east boundary. Now proposed with a 4.633m setback for a length of 3.5m from north boundary with a 3.14m setback from east boundary. A new window has been added to the north elevation which is shown with obscure glazing to a height of 1.7m above floor level.

*Building height*

* Overall building height increased from 7.42m to 7.71m.

## Vegetation Protection Overlay – Schedule 1 (VPO1)

1. The VPO1 was in place at the time of the previous decision. No planning permission was triggered under this overlay then and that remains the case now.
2. The statement of significance under Schedule 1 (Tree Protection Area) is however a relevant contextual consideration. I have taken this statement into account. Relevantly, vegetation in Monash including canopy trees is said to be a significant aspect of and contributor to the urban character of the municipality, particularly in residential areas.

## assessment of the amendments’ acceptability

### Applicant’s contentions

1. The statement of grounds lodged by the applicant states as follows:

* The setback of 2.445m is too close to my property compared with the previous 3m setback
* The building height of 7.7m is too high
* The combined effect of a decreased setback and increased building height will be too obstructing
* The master bedroom has been moved to the rear of Unit 2, extending a section of the first floor closer to the rear fence line, from 6.375m to 4.633m
* Unit 2’s first floor windows on the north elevation can cause a glare from the sun’s reflection.

### Tribunal’s findings

1. I begin with the changes proposed to setbacks and building height and how they may affect the applicant’s amenity.
2. I have approached my assessment on the basis that the applicant’s description of the development as ‘too obstructive’ relates to the proposal’s visual impacts from her backyard. This is said to be due to the combined effect of the additional building height and changed building setbacks from the rear boundary. The latter are in part, less than the 5m varied B17 standard at clause 55.04-1 of the planning scheme for side and rear setbacks.
3. While a standard *should* normally be met, I note that non-compliance with the numeric standard (B17) is not a reason in itself to reject a proposal. In contrast, it is the objective that *must* be met. This objective is:

To ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings.

1. In deciding whether the objective is met when departing from the numeric standard, relevant decision guidelines include:

* Any relevant neighbourhood character objective, policy or statement set out in this scheme.
* The design response.
* The impact on the amenity of the habitable room windows and secluded private open space of existing dwellings.

1. I firstly note that the 2-storey form of development was also an issue raised by the applicant in the previous case albeit in the context of neighbouring 2-storey development. The Tribunal said:

12 Ms Xin raised concern that her property is surrounded by two-storey developments, noting there are two-storey townhouse developments to her east and to the south-west corner of her site. On my site inspection I also made this observation from her rear yard. …

1. Whilst agreeing with this observation, in the remainder of this paragraph, the Tribunal then went on to say:[[5]](#footnote-6)

… However, visibility of built form and the number of other developments that have occurred in the area are insufficient reasons to refuse the proposed development. The review site is located within an area where a range of housing forms are being developed including two-storey townhouses.

1. As a guiding principle, I also agree with the sentiments expressed by Member Bilston-McGillen. Visibility alone is not the test of acceptability and since the previous decision two additional housing developments involving 2-storey scaled building forms have been completed. The physical context is one where 2-storey development forms are continuing to evolve, comprising both unit developments and single dwellings. The statement of preferred character for this precinct also envisages ongoing change.
2. On the issue of rear setbacks, the Tribunal considered not just the provisions of GRZ2 but also proposed Schedule 3. The Tribunal had this to say:

15 Council’s Planning Scheme Amendment C125 - Part 2 proposes to amend the schedule of the GRZ to Schedule 3. This zone includes variations to ResCode including front setbacks, site coverage, permeability, private open space and side and rear setbacks. Council submitted that C125 - Part 2 is a seriously entertained amendment and should be considered. Ms Xin noted that the proposed amendment requires a rear setback of 5 metres.

16 Dwelling 2 - the development proposes a northern boundary setback of a minimum of 3 metres to 5.9 metres to the ground floor and 3.96 metres to 6.3 metres for the first floor. Ms Livingstone put to me that the proposed rear setback is appropriate as it is setback from 3 metres to 5.9 metres and there is sufficient space for landscaping including the planting of canopy trees.

17 I am persuaded by the submissions of Ms Kellock and Ms Livingstone that the rear setback is appropriate having regard to the current zoning GRZ2 as well as having regard to the proposed GRZ3. I note the concerns of Ms Xin that the proposal is closer than the existing development and closer than 5 metres, but I am persuaded that the setback of 3 metres to 5.9 metres provides adequate area for landscaping including the provision of canopy trees. I note that the height of the proposal is a modest two-storey form which is part of the emerging character.

1. While observing that the rear setbacks complied with the planning scheme in force at the time, Amendment C125 Part 2 was considered by Member Bilston-McGillen in determining whether the proposal was acceptable. This included a consideration of the rear setbacks from the north boundary at both ground and first floor level which were both in part, less than 5m.
2. The Tribunal went on to find that the proposal would be consistent with the zone purposes and the vision for the area as expressed in the Planning Scheme ‘for modest growth but also providing a development with sufficient area within the site for landscaping and canopy trees to address Council’s landscape and ‘green’ vision for the area.’[[6]](#footnote-7)
3. Specifically, the Tribunal observed that sufficient space would be available for landscaping to soften the development along the rear boundary and that:

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* The first-floor element is recessed providing a stepped form.
* The proposed height is modest.
* At the first-floor level, dwelling 2 is set off the side (east and west) boundaries. This setback reduces the visual impact of the proposed built form.

28 Ms Kellock acknowledged that the proposed minimum setback of 3 metres fails to meet the proposed rear setback under Amendment C125 Part 2 requiring a setback of 5 metres. I am persuaded by Ms Kellock that despite the proposed 5 metre setback not complied with, the proposed 3 metres is appropriate given that it is a stepped setback where part of the building is increased to be setback 5.9 metres. I make the observation that there is sufficient space for landscaping.

1. Changes to ground level building setbacks now proposed comprise a portion of the footprint that will reduce from 3m to 2.445m. However, there is also a 4m reduction in the portion of this dwelling with this lesser setback and a converse increase (by 1.4m) in SPOS with the larger setback of 5.95m.
2. Similarly, at first floor level, while the master bedroom has come closer to the north boundary, there is also a reduction in the amount of built form (the retreat) with the smallest setback (3.967m) at this level by approximately 1.2m. The master bedroom’s setback from the east boundary has also increased by approximately 0.8m. The maximum overall building height (and ground floor walls) have increased by 0.3m.
3. In summary, while there has been some pulling closer of the built form to the north boundary, reductions in the amount of built form with the smallest setbacks at both levels is also proposed together with an increase in the area of SPOS and east boundary setback at the upper level.
4. I consider that taken as a whole, the net effect of the proposed changes will maintain the stepped and articulated building form described by Member Bilston-McGillen while continuing to provide adequate space for a suitable landscape response. As amended, the proposal would meet the objective for side and rear setbacks at clause 55.04-1 and achieve an acceptable outcome. I am also mindful that the development as a whole will benefit from improved levels of landscaping along the driveway, an increase in permeable surfaces and slight reduction in site coverage.[[7]](#footnote-8) While these elements were all previously found to be acceptable, they are nonetheless features that achieve greater consistency with the neighbourhood character objectives, decision guidelines in Schedule 3 to the GRZ and at clause 55.04-1, and latest planning scheme policies.
5. More particularly, when the design response and physical context are considered, I find that the proposed changes at the northern interface would be acceptable for the following reasons:

* The proposal responds to desired attributes of the preferred character by providing articulated building facades with stepped setbacks that avoid long expanses of blank walls and a development pattern that complements surrounding development.
* Setbacks and SPOS from the north rear boundary will provide adequate space for landscaping including canopy trees, that can contribute to the ‘green backyard corridor’ and garden city character concept. This outcome will contribute to the pleasant leafy framework described in the statement of preferred character.
* Unit 2 includes setbacks from both the east and west boundary which assists in moderating the visual impact of proposed built form – an outcome similarly observed by the Tribunal in the previous decision.
* The additional building height of 0.3m is not excessive. I consider that the resultant overall scale and height of the development sits within the range of acceptable building heights for this location, where surrounding development includes 2-storey forms of a commensurate scale and height.
* The amendments sought will not give rise to any additional amenity impacts related to overshadowing given the siting of the review site on the south side of the applicant’s property.
* The proposal is to be sited a considerable distance from any habitable room windows on the applicant’s site.
* To the extent that the proposal will be visible from the applicant’s backyard or indoor areas, space for new planting on the review site will be able to supplement the applicant’s existing screen planting along the common boundary while providing a further softening of any visible built form elements.

1. I should add that while I am satisfied that appropriate opportunities are available on the site for landscaping that meets the intent of planning scheme directions, a landscape plan has not been provided. I note that a landscape plan is however required under condition 5 of the permit. I also consider that it is appropriate to provide more specific guidance about preferred landscaping outcomes. I say this in the context of the varied planning scheme framework including changes to the clause 55 landscaping standard and decision guidelines in Schedule 3 to the GRZ that now apply. I will therefore include a new permit condition that requires the following planting to be shown on the landscaping plan:

* At least two canopy trees capable of reaching a mature height of at least 8m within the SPOS of Unit 2; and
* Shrub planting along the length of the north boundary with a minimum mature height of 4m.

1. This condition will be required to form part of condition 1.

### Sun glare from new bedroom window

1. There are no planning scheme provisions that require mitigation of potential sun glare from windows for proposals involving two dwellings.
2. In any event, I consider that to the extent that sun-glare may occur, I find that this would not be unreasonable in this suburban setting.

## other permit Conditions

1. In addition to the new landscaping condition that I will require above, condition 1’s preamble will need to be amended to refer to the amended plans under consideration.
2. These conditions will apply in addition to the council’s proposed new condition 1(e).

## Conclusion

1. The decision of the responsible authority is varied for the reasons I have set out above.
2. I will direct the grant of an amended permit which incorporates changes to the description of the plans and a further part to condition 1 which provides further guidance for landscaping along the north boundary.

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| **Mary-Anne Taranto**  **Member** |  |  |

1. The submissions and any supporting exhibits filed for 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)
2. As relevant to the particular attributes of this mid-block site and this proposal which relies on ground level areas of private open space. [↑](#footnote-ref-3)
3. Planisphere. [↑](#footnote-ref-4)
4. Planisphere. [↑](#footnote-ref-5)
5. Similar findings were expressed at paragraph 27. [↑](#footnote-ref-6)
6. [19] [↑](#footnote-ref-7)
7. Now 45.58% - previously 46%. The varied standard is a minimum of 50% with which this proposal would comply. [↑](#footnote-ref-8)