VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. p790/2020Permit Application no. TPA/50902 |

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| APPLICANTs | Rohit & Rajeev Sharma |
| responsible authority | Monash City Council |
| RESPONDENTs | Roger & Lesley Langdon and Alistair & Sharon Woodard |
| SUBJECT LAND | 5 Armstrong Street, Mount Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Michael Nelthorpe, Member |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 24 August 2020 |
| DATE OF ORDER | 2 September 2020 |
| citation | Sharma v Monash CC [2020] CAT 951 |

# Order

1. The decision of the responsible authority is varied.
2. The Tribunal directs that planning permit TPA/50902 must contain the conditions set out in planning permit TPA/50902 issued by the responsible authority on 22 April 2020 with the following modifications:
	1. Conditions 1a), 1b), 1c), 1d), 1e) and 1f) are deleted.
	2. Sub-conditions in Condition 1 of the planning permit are renumbered accordingly.
3. The responsible authority is directed to issue a modified planning permit in accordance with this order.

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| Michael Nelthorpe |  |  |
| **Member** |  |  |



# Appearances

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| For applicant | Mr Stephen O’Brien, town planner of Universal Planning. |
| For responsible authority | Mr James Turner, Principal Planner – Appeals Advisor |
| For Roger & Lesley Langdon | Mr Langdon. |
| For Alistair & Sharon Woodard | Mr Woodard |

# Information

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| Description of proposal | Two double-storey dwellings (with a basement) in a one-behind-the-other layout. |
| 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 |
| Zone and overlays | General Residential Zone Schedule 3 |
| Permit requirements | Clause 32.08-6: to construct two or more dwellings on a lot.  |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 21.04, 22.01, 32.08, 52.06, 55, 65 & 71.02. |
| Land description | This rectangular site is located mid-block on the north side of Armstrong Street. It has a 17.68 metre frontage, a 45.72 metre depth and an area of 808 square metres. A dwelling occupies the site. |

# Remarks

## What is this proceeding about?

1. Rohit & Rajeev Sharma **(‘the applicants)** seek a review of six sub-conditions of Condition 1 of Planning Permit TPA/50902 as granted by the Monash City Council **(‘the council’)**. The permit allows the development of two double-storey dwellings at 5 Armstrong Street, Mount Waverley.
2. The Langdons and the Woodards have joined this review.
3. The disputed conditions are:

1. Before the development starts, three copies of 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 submitted with the application but modified to show:

a) Delete Dwelling 1’s ground floor media room;

b) Delete Dwelling 1’s balcony and replace with pitched rooves;

c) Northern façade of Bedroom 2 of Dwelling 1 recessed a minimum of 1 metre from ground level;

d) Eastern façade of Dwelling 1 recessed a minimum of 1 metre from ground level;

e) Delete Bedroom 2 of Dwelling 2; and

f) Delete first floor ensuite and WIR of Dwelling 2.

1. The council contends that these conditions are necessary to ensure that the Planning Scheme’s neighbourhood character and amenity objectives are met.
2. Mr Langdon and Mr Woodard support the council’s position although they believe that further excavating the basement and increasing the west side setbacks are required.
3. The applicants contend that no changes are required to the proposal.
4. This is a ‘repeat appeal’ given that a division of the Tribunal constituted of Member Watson previously refused to grant a permit for a similar proposal on this site.[[1]](#footnote-1)

## What are the key issues?

1. There are two key issues in this review.
* What weight should I give to Member Watson’s decision?
* Are the contested conditions necessary to ensure an acceptable planning outcome?
1. I will address these matters in turn.

## what weight should i give to member watson’s decision?

#### Background

1. I recently addressed this question in another decision.[[2]](#footnote-2) As background, I stated the following:

[13] I note that a long-standing principle of Victorian planning practice is to have regard to a previous decision that relates to a site so that order fairness and consistency in decision-making is achieved.

[14] For most of the past decade, Deputy President Dwyer’s decision in *Sprut* was followed. It set the following expectation:

[18] Irrespective of whether the repeat appeal is in the nature of a classic or correcting repeat appeal, the role of the Tribunal is not to determine the proposal before it would have satisfied the earlier (and perhaps differently constituted) Tribunal, nor to summarily determine the matter solely by reference to the Reichart principles. This is a sometimes misunderstood notion. … the role of the Tribunal is to still consider the new application before it on its merits but in doing so, to give great weight to the tribunal’s decision on the earlier application having regard to the usual principles that have evolved for this purpose.[[3]](#footnote-3) (My emphasis)

[15] More recently, Garde J. in *Zumpano* departed from this. He found that:

[29] Planning decisions in earlier applications affecting the subject or surrounding land are often relevant considerations in the assessment of a later application. They will almost certainly be relevant when the same use and development of the same land is sought in both the earlier and later applications. It is for the later decision-maker to determine what weight should be given to the earlier decision. Assessment of the significance of correcting features in the context of a proposed use and development is pre-eminently a planning and not a legal matter.[[4]](#footnote-4) (My emphasis)

[16] Accordingly, it is up to me to determine what weight should be given to Member Watson’s decision.

#### Member Watson’s decision

1. I find that Member Watson’s decision only required changes to Dwelling 2. Her reasons were that the neighbourhood had an ‘open backyard character’ with the only other two-storey dwelling in a rear yard being far more modest in scale.[[5]](#footnote-5)
2. She stated that:

[15] This is a challenging site as it has abuttals with two properties which front Armstrong Street, one property which fronts The Close and a further dwelling which has a St Johns Wood Road address. This means that proposed Dwelling 2 has a direct visual impact on the secluded private open spaces and outlooks of four existing residences. Arguably the siting and design of Dwelling 2 (including the 8 metres upper level building break between it and Dwelling 1) mitigates its visual impact when viewed from the rear secluded private open spaces of nos. 3 and 7 Armstrong Street. However, the other proposed setbacks, particularly from the western side boundary, are unacceptable.

1. I interpret this paragraph as saying that Dwelling 2’s visual impact when viewed from 3 and 7 Armstrong Street was acceptable, while its impact on the Woodards’ property and the single-storey dwelling to the north was not.
2. Separately, she found that the streetscape presentation of Dwelling 1 was acceptable in this setting of robust, two-storey dwellings. She did not comment on other aspects of Dwelling 1’s mass or siting except for what I have noted above.

#### My findings

1. I give great weight to Member Watson’s decision. She heard submissions from the same parties (apart from Mr Langdon) and she inspected the site and surrounds, including the Woodard’s property.
2. I find that changes to the planning framework do not warrant a departure from Member Watson’s decision. The neighbourhood character objectives of Schedule 3 to the General Residential Zone address the issues that were before Member Watson.
3. I also find that the policy statements at clause 22.01 relied on by the council were at play when Member Watson made her decision. I consider that the impact of new developments siting and mass and the preference for a break between buildings are the relevant issues. These were matters that Member Watson considered.
4. I find that the applicants have corrected the flaws in Dwelling 2 identified by Member Watson.
5. On the western boundary, the former 12.9 metre unbroken elevation with a 1.9 metre setback is replaced by a more recessive and articulated outcome. The ground floor is now in two planes with the plane closest to the Woodard’s property being setback 3.01 metres. The upper floor is now in three planes with setbacks of 3.12 metres, 4.23 metres and 6.19 metres respectively.
6. These setbacks satisfactorily reduce Dwelling 2’s impact on the Woodard’s property. The spacing at ground floor provides space for a hedge of up to three metres that was not possible under the previous scheme. The upper floor setbacks are very generous when compared to the ResCode standards and acceptably reduce the sense of enclosure of the Woodard’s open space.
7. On the northern boundary, an extension to the dining area has been removed, leaving a consistent setback of five metres or more. The length of upper-storey wall is also reduced at the western end. These changes reduce the sense of enclosure for the single-storey dwelling to the north.
8. On this point, I am not persuaded that the first floor ensuite and walk-in-robe of Dwelling 2’s master bedroom must be deleted to ensure an acceptable outcome for the dwelling to the north. The length of the first-floor form of Dwelling 2 is considerably reduced from what was before Member Watson. This, in combination with the larger rear yard, is an acceptable response.
9. I note that Member Watson called for setbacks similar to the rear dwelling at 11 Armstrong Street. Having studied the form of that dwelling, I am persuaded that the ground and first floor setbacks of Dwelling 2 are comparable. They are not the same but that is because the siting and massing differs. However, I am satisfied that Dwelling 2 has greater northern setbacks and greater first floor eastern setbacks than 11 Armstrong Street. I find that its lesser western setbacks are reasonable given that it must respond to four sensitive interfaces whereas the rear dwelling at 11 Armstrong Street must respond to only three.
10. In making these findings, I disagree with Mr Langdon’s submission that the plans have barely changed. The floor area of Dwelling 2 has changed from 319 square metres (including the basement) to 267 square metres, which is close to a 20% reduction. This is considerable.
11. I am not persuaded that Member Watson expected Dwelling 2 to be single storey. Rather, she compared its intensity to the only other two-storey dwelling in a rear yard in this neighbourhood.
12. I recognise that the Woodard’s lose the open view to the east that they currently enjoy. However, I am not persuaded that deleting Bedroom 2 of Dwelling 2 will resolve or mediate this loss. Bedroom 2 is not directly in front of the Woodard’s open space area, and the revised design provides a relatively open view of sky to the north-east. I find this balance is an acceptable response to Member Watson’s concern.
13. On a separate matter, I find that it would be contrary to fair and consistent decision-making to require changes to Dwelling 1. She says that the proposal’s streetscape response is acceptable in this setting of robust, two-storey dwellings. I am not persuaded that the marginal increase in Dwelling 1’s height changes this finding.
14. Due to this finding, I cannot support the inclusions of Conditions 1a) to 1d) because they all relate to Dwelling 1.

## Are the contested conditions necessary to ensure an acceptable planning outcome?

1. Based on my findings outlined above, I do not consider that the contested conditions are necessary to ensure an acceptable planning outcome.
2. I recognise that Mr Langdon and Mr Woodard both contest the height and size of the dwellings. I find the use of basement car parking for both dwellings allows for this. Due to the basements, space at ground level is available for living areas and bedrooms. In all, I find that the ground floor footprints are of a reasonable size in proportion to the 808 square metre size of this lot.
3. I accept that Dwelling 1 has a high sub-floor facing the street however, the new dwelling at 7 Armstrong Street has a similar sub-floor. It is not as high as Dwelling 1’s yet this is due as much to the slope of the land as it is to the basement.
4. I am not persuaded that removing the front balcony of Dwelling 1 would improve the appearance of its façade. It is an uncovered balcony so, in effect, it is a void at the front of the building. I do not accept Mr Langdon’s submission that the use of the balcony would detract from the neighbourhood’s character. I see no loss to the character of Armstrong Street by an increased level of activity on the balcony. It would only be discernible by neighbours walking past the site, and this is not enough to warrant its removal.
5. I am not persuaded that greater eastern first-floor setbacks are required on Dwelling 1. Its considerable setback from 7 Armstrong Street satisfactorily reduces its impact on that dwelling and it is sufficiently articulated to provide a sense of separation between the dwellings.
6. Regarding the deletion of Dwelling 1’s media room, I am satisfied that its single-storey form with a hip roof that recedes from the boundary shared with 3 Armstrong Street retains an adequate sense of amenity for that dwelling.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is varied by deleting Conditions 1a) to 1f).

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| Michael Nelthorpe |  |  |
| **Member** |  |  |

1. Sharma v Monash CC [2019] VCAT 544 [↑](#footnote-ref-1)
2. *Barette v Moreland CC* [2020] VCAT 740 [↑](#footnote-ref-2)
3. *Sprut Pty Ltd v Stonnington CC* [2012] VCAT 1675. [↑](#footnote-ref-3)
4. *Zumpano v Banyule City Council* [2016] VSC 420. [↑](#footnote-ref-4)
5. At paragraphs 14 and 12 respectively. [↑](#footnote-ref-5)