

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1504/2022
PERMIT APPLICATION NO.TPA/53913

APPLICANT	SP18 Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
REFERRAL AUTHORITY	Melbourne Water
SUBJECT LAND	7-9 Nicholson Court CLAYTON VIC 3168
HEARING TYPE	Hearing
DATE OF HEARING	11, 12 and 13 April 2023
DATE OF ORDER	1 May 2023
CITATION	SP18 Pty Ltd v Monash CC [2023] VCAT 463

ORDER

- 1 Pursuant to section 127 of the *Victorian Civil and Administrative Tribunal Act* 1998 the application is amended by changing the name of the applicant to:

SP18 Pty Ltd

- 2 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act* 1998, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

- Prepared by: Pitard Group
- Drawing numbers: Job 2203, Revision 4 – TP02, TP03a, TP03b, TP04-TP21
- Dated 3 February 2023

- Prepared by: John Patrick Landscape Architects Pty Ltd
- Drawing numbers: Job 22-769-VCAT 01, Ground Floor for VCAT and Fourth Floor for VCAT
- Dated: 20 February 2023



- 3 In application P1504/2022 the decision of the responsible authority is set aside.
- 4 In planning permit application TPA/53913 a permit is granted and directed to be issued for the land at 7-9 Nicholson Court Clayton VIC 3168 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
- Construction of a five storey apartment building in a Special Building Overlay

Jane Tait
Member

APPEARANCES

For SP18 Pty Ltd

Jarryd Gray, Minter Ellison. He called the following witnesses:

- John Patrick, John Patrick
Landscape and Design Pty Ltd
- Maugan Bastone, Urbis

For Monash City Council

Mark Bartley, HWL Ebsworth

For Melbourne Water

No appearance



INFORMATION

Description of proposal	To construct of a five-storey apartment building in a Special Building Overlay.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	Residential Growth Zone – Schedule 3 (RZG3) Special Building Overlay (SBO)
Permit requirements	Clause 32.07-5 to construct two or more dwellings on a lot. Schedule 3 varies clause 55 Standards B6, B13, B17, B28 and B32. Clause 44.05 to construct a building or construct or carry out works.
Land description	<p>The subject site is on the west side of Nicholson Court, 93 metres south of Haughton Road, Clayton. It comprises two lots that have a frontage of 30.4 metres, depth of 45.6 metres and site area of 1402 square metres. There is a 1.22 metre carriageway easement along the west (rear) boundary. Directly south is a three metre wide laneway that connects through to McGregor Street (west). This laneway also connects through to the rear of commercial properties facing Clayton Road.</p> <p>Both sites contain a single storey detached house. Abutting properties include three dwellings to the north and detached houses to the west and south.</p>
Tribunal inspection	An unaccompanied site inspection was conducted on Day 2 of the hearing.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 SP18 Pty Ltd (the ‘applicant’) applied to Monash City Council (the ‘Council’) to construct a five storey apartment building containing 29 apartments on the subject site. The proposal includes one level of basement car parking that is accessed via a single crossover in the south-east corner of the site. There are four levels of apartments and roof top communal open space. The building has a maximum height of 16.39 metres. Excerpts from the plans are provided in Figures 1-4.

Figure 1- Ground Floor²

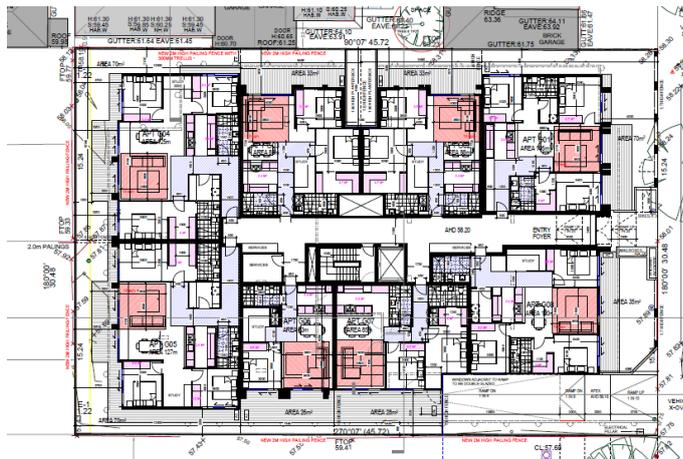


Figure 2 – First Floor³



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- 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.
 - 2 TP-05 Revision 4.
 - 3 TP-06, Revision 4.

Figure 3- Level 5 – Roof top terrace⁴

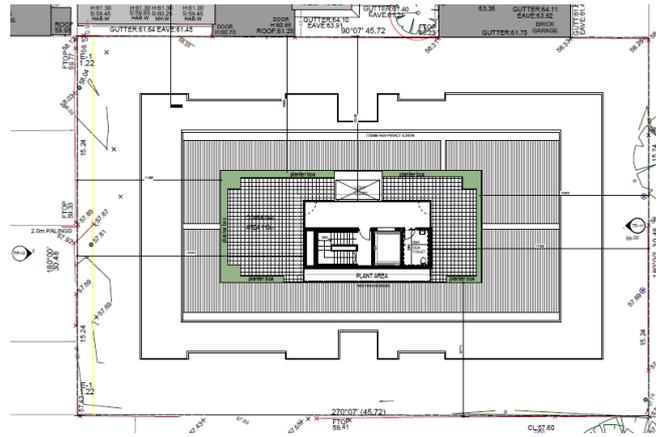


Figure 4 – 3D Image of building⁵



- 2 Council refused the application on eight grounds. These include the proposal is inconsistent with zone and local policies regarding the preferred neighbourhood character, building height and scale, landscaping, private open space, front fencing, and design detail. It also refused the application on grounds that it failed to provide sufficient opportunity for landscaping to allow the building to sit within an open garden setting.
- 3 Other grounds are that the proposal will result in unreasonable visual bulk impacts to the adjoining properties, there will be a poor level of internal amenity for future residents, and the waste management will be ineffective to cater for the scale of the development.
- 4 Council submits whilst the site is in Residential Growth Zone 3 (RGZ3), which has an expectation for development up to five storeys, the proposal has not achieved a high-quality landscape and built form outcome. It says the proposal is not sufficiently respectful of the streetscape, landscape, traffic, and waste expectations of the Planning Scheme.

⁴ TP-09, Revision 4.

⁵ TP-03b, Revision 4.

- 5 The applicant argues the proposal seeks to realise the expectations of the Planning Scheme as it meets the purpose and objectives of the RGZ3 and local policies. It relies on the evidence of Mr Bastone who considers the development enjoys substantial strategic support across both State and Local policy frameworks. It also relies on the evidence of Mr Patrick to support its argument that the development and landscaping respond to the 'garden city' character of Monash.
- 6 Planning decisions do not seek ideal outcomes, or outcomes which respond positively to every relevant policy. Rather, acceptable outcomes are the measure by which decisions are to be made. I must decide whether the proposed sign will produce an acceptable outcome having regard to the relevant policies and provisions in the Planning Scheme. Clause 71.02-3 requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
- 7 I have decided to set aside Council's decision and direct a permit be issued as I am satisfied the development responds positively to the purpose and design objectives of the RGZ3, it will maintain the open garden character of the municipality and it will not cause unreasonable amenity impacts on adjoining properties. My reasons follow.

WHAT ARE THE KEY ISSUES?

- 8 Having undertaken an inspection of the subject site, abutting properties and wider area, and taking into consideration the submissions and evidence regarding the applicable policies and provisions of the Monash Planning Scheme, the key issues arising in this matter are:
 - Does the proposal respond to its zoning and policy context?
 - Does the development respond to the preferred neighbourhood character?
 - Have sufficient landscape opportunities been provided to achieve an open garden setting?
 - Will the building unreasonably impact the amenity of nearby properties?
 - Will the proposal result in a poor level of amenity for future residents?
 - Will the development cause waste management and parking impacts?

PROCEDURAL ISSUES

- 9 After the application for review being lodged, the permit application has been amended, through the substitution of amended plans. The amended proposal included increased basement setbacks to the south and west boundaries, increased deep soil planting in the north-west corner,

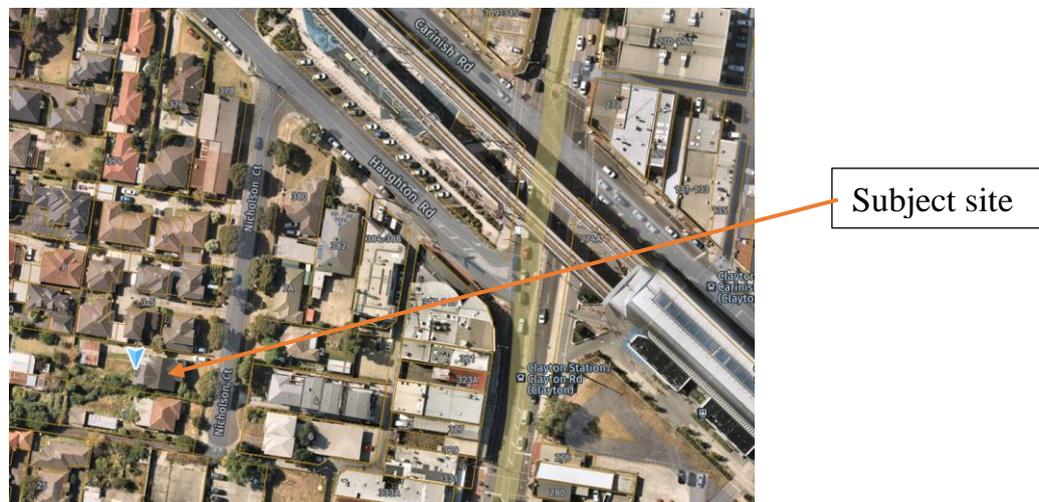


replacement of the ground floor communal area with a three bedroom apartment, deletion of second floor west facing balconies, deletion of the fourth level floor apartment with a communal area and modifications to the articulation of the façade and north elevation. No party or other person has objected to the amendment. Council did not amend any of its grounds of refusal in response to these plans.

WHAT IS THE PHYSICAL CONTEXT OF THE SITE?

- 10 Nicholson Court is a dead-end street that is approximately 100 metres long. It has vehicle access to the western end of the Clayton Road shopping centre via a laneway that abuts the south boundary. The commercial area contains two supermarkets, office supplies and a community centre. The site is also within 200 metres of Clayton Railway Station that has grade separation. The context of the subject site is shown in Figure 5.

Figure 5 – Aerial⁶



- 11 The surrounding residential area is mixed in character as it includes single and double storey detached houses and multi-dwelling developments. Nicholson Court contains some newer developments including eight, three storey apartments, two storey town houses and single storey villa units.
- 12 Directly north are three dwellings at 3-5 Nicholson Court. These dwellings are in a tandem arrangement and have brick garages abutting the common boundary. To the west are the rear yards of two single storey dwellings at 12 and 14 McGregor Street and to the south is a single storey unit, detached dwellings, and a paved car parking area to the rear of a medical centre.

⁶ Nearthmap – 16 February 2023.

DOES THE PROPOSAL RESPOND TO ITS ZONING AND POLICY CONTEXT?

- 13 The subject site and immediate area are in a RGZ3 - Clayton Major Activity Centre and Monash National Employment and Innovation Cluster (NEIC). Clause 1.0 - Design Objectives include:
- To facilitate housing growth in the form of apartment developments of a high quality design and finish.
 - To ensure developments are constructed within an open garden setting through the retention and planting of vegetation, including canopy trees.
 - To ensure that the height, scale and form of development respects any sensitive residential interfaces and minimises the appearance of visual bulk.
- 14 The site is also within a Special Building Overlay (SBO). The SBO, through clause 44.05, is not a specific point of dispute in this proceeding.
- 15 Relevant policies in the Planning Policy Framework (PPF) include Clause 11.01.1R (Settlement – Metropolitan Melbourne). This clause identifies the NEIC as a focus for investment and growth places of state significance. Plan Melbourne 2017-2050 identifies the Monash NEIC and acknowledges the opportunities for medium-higher densities in areas designated NEIC.
- 16 There are various policies in the PPF⁷ that encourage increased residential densities, including apartment buildings. Specifically, Clause 11.02-1S provides for the consolidation and intensification of existing land uses and Clauses 16.01-1S and 16.01-1R encourage housing diversity. The PPF also contains clauses to achieve an appropriate balance between responding to the existing and preferred neighbourhood character and amenity impacts on neighbouring properties at Clauses 15.01-5S and 15.01-2S and 11.02-1S.
- 17 There are also various clauses in the Local Planning Policy Framework (LPPF) that reiterate the above themes in the PPF. This includes Clause 21.04 – 1 that includes the Residential Development Framework Map. This map shows the subject site is in a Housing Growth Area-Clayton Major Activity Centre and Monash NEIC.
- 18 Clause 21.04 – Residential Development describes where growth will be directed and how it will be managed. This is expanded upon in Clause 21.06 – Major Activity and Neighbourhood Centres, that identifies Clayton as one of three Major Activity Centres (MAC) with redevelopment and construction of activity encouraged. This clause also refers to:
- Ensuring that new development minimises any loss of amenity to adjoining residential properties.

⁷ Clauses 11.01-1R, 11.02-1S, 11.03-1S, 11.03-1R, 15.01-4R and 16.01-1R.



- Addressing streetscape and neighbourhood character issues in any new development or redevelopment.
 - Encouraging creative design solutions for new development that enhances the quality of streetscapes particularly in relation to bulk of buildings, outdoor advertising, provision of open space and setbacks to ensure quality landscaping of frontages.
- 19 Clause 21.06 also contains the strategic directions that refer to Clayton as a primary focus for apartments, and a location where medium rise development is encouraged.⁸ Clause 22.01 – Residential Development and Character Policy states that residential growth should be directed to the NEIC. It contains a preferred future character that I will discuss further in my findings below.
- 20 Council also directed me to the *Monash Housing Strategy 2014* (MHS) which is a background and reference document in the Planning Scheme. It nominates the subject site in Category 3 – Residential Land in the Monash NEIC.
- 21 Another relevant document is the adopted *Clayton Activity Centre Precinct Plan 2020* (the ‘Precinct Plan’). The subject site is in Precinct 3. The Precinct Plan outlines specific requirements for new buildings including front setbacks of 4 metres and 3 metres for upper levels above 9.9 metres, rear setbacks of 3 metres, side setbacks of one metre and a preferred height of three to five storeys.
- 22 Council acknowledges the Clayton Activity Centre Precinct Plan has not yet progressed to a scheme amendment as it is on hold given uncertainties associated with the Suburban Rail Loop project. It says further strategic work is currently being undertaken.

Policy arguments

- 23 Council submits that it supports intensification of development on the subject site but considers the proposal does not meet the objectives of the Precinct Plan in terms of setbacks, landscaping, and design detail. It submits the policy context of ‘garden city’ and Clause 21.01-3 seek side setbacks to maintain an open, spacious streetscape character. It argues that this has not been achieved in this proposal.
- 24 The applicant says the housing growth areas nominated in the RGZ3 and Clause 22.01-4 are relatively small. It notes the land surrounding the subject site is also within this zone. It highlighted the site is in an area of State and National significance (i.e. NEIC) and the PPF and LPPF contain character policies specific to this housing growth area.

⁸ At Clause 21.06-3.



- 25 It says the proposal realises the expectations of the Planning Scheme, which is a view supported by Mr Bastone.

Tribunal findings

- 26 The suite of policies in the PPF and LPPF lead me to the conclusion that intensification is expected and sought at this location. I concur with the findings of *David Pai C/- Pai Property Consultants Pty Ltd v Monash CC* that Clayton MAC is in a process of transition. I agree with the applicant that the site is not in a residential hinterland where the balance between respecting neighbourhood character and promoting growth are vastly different. It is centrally located in the RGZ3 and there is no necessity to provide a transition in built form to an abutting General Residential Zone (GRZ).
- 27 I also acknowledge the guidance provided by the Precinct Plan. This is consistent with recent findings⁹ of the Tribunal that has given it some weight as a relevant document that outlines the policy aspirations for built form change in this area.
- 28 I accept that State and local policies call for residential growth in high quality buildings that respect residential interfaces and incorporate landscaping that responds to the garden city character of the municipality. My review of the proposal against these policies leads me to the conclusion that the proposed built form, setbacks, design of the apartments, and the associated landscaping, respond appropriately to the policy aspirations of the Planning Scheme. My reasons follow.

DOES THE DEVELOPMENT RESPOND TO THE PREFERRED NEIGHBOURHOOD CHARACTER?

What is the preferred neighbourhood character?

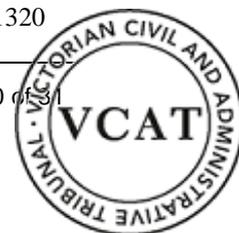
- 29 Clause 22.01 – Residential Development and Character Policy contains a preferred future character which is:

The scale of new residential development will generally comprise larger footprint apartment development of a high-quality design and finish. Some infill town house and unit development will also occur.

Where possible on larger sites, developments will be multi-level, and set in open gardens. Although setbacks from all boundaries will be less than is common in other parts of Monash, the developments will ensure the incorporation of well-maintained landscaping to address the garden city character, albeit in a more urban form.

- 30 The MHS also describes the future character for Category 3 as:

⁹ *Pechlivanidis v Monash CC* [2020] VCAT 753, *Mangiavillano v Monash CC* [2021] VCAT 1320 and *Wang v Monash CC* [2022] VCAT 1085.



Development within the cluster will respect the changing built form within the commercial areas. The scale of new residential development will generally comprise larger footprint apartment development of a high quality design and finish. Some infill development, town house and unit development, will also occur.

- 31 The applicant relies on the evidence of Mr Bastone who considers that no weight should be given to the existing neighbourhood character as substantial built form change is envisaged for this area. He says the proposal should not be criticised for being the first in the street as the Planning Scheme recommends larger building footprints for apartments.
- 32 Council argues this will be the first apartment building in the street that is responding to the changes in expectations for the character of the area. It says the proposal fails to respond to the setbacks, landscaping and built form expectations of the Planning Scheme. I will address these issues separately below.

Height

- 33 The building proposes an overall height of approximately 16 metres. The RGZ3 does not specify a maximum height but the default discretionary height in the parent provision is 13.5 metres.
- 34 The applicant argues the fifth storey has a very small footprint, is recessed from the floors below on all sides, and will make minimal contribution to the overall scale of the building. Mr Bastone considers that no transition in height to the lower scale buildings is required given the central location of the site in a RGZ3.

Tribunal findings

- 35 I note that Council has not made submissions opposing the height of the building but focused on the impact of the building scale in the streetscape. I find the height acceptable as the amended plans have removed the top floor and replaced it with a recessive communal area that is set back over 10 metres from the north and south boundaries, 18 metres from the rear boundary and 13 metres from the frontage. This level will have negligible impact on the streetscape and wider area. I also note the five storey height is consistent with the policy aspirations and height guidelines in the Precinct Plan.

Setbacks

- 36 Council argues that greater setbacks are required for the entire building to provide more room for landscaping. It also says that whilst the upper level setbacks meet the varied standards in the zone, there are several encroachments which reflect a need to reduce the overall footprint of the building.



37 The applicant argues the profile of the building meets the objectives of Clause 58 and the built form is responsive to the preferred neighbourhood character. It relies on the evidence of Mr Bastone who considers the proposal achieves a high degree of compliance with the built form requirements of this clause, as varied by the RGZ3.

Tribunal findings

38 I agree with Mr Bastone that the proposal is consistent with the built form aspirations for the area in terms of the heights and setbacks from boundaries, as expressed in the Planning Scheme, MHS Strategy and the Precinct Plan. I acknowledge that Clause 55 does not apply to this application as it contains five storeys, but the varied standards are a useful guide for a development that is primarily a four storey building with a small fifth floor component.

39 I find the building setbacks are acceptable for the following reasons:

- The ground floor frontage setback exceeds the minimum 4 metre requirement of Standard B6 and the Precinct Plan (i.e. 4.35 metres to 4.56 metres);
- The ground floor rear setback exceeds the minimum setback requirements of Clause 55 (i.e. 3.35 metres to 3.7 metres);
- The upper levels are stepped back from the front, side, and rear elevations to reduce the visual impact and provide articulation of the built form facing the street and abutting properties. These setbacks are greater than those recommended in varied Standard B17; and
- The narrow side setbacks are consistent with the preferred neighbourhood character that acknowledges side setbacks will be less than other residential areas, such as the GRZ.

40 I find the proposal meets the objectives of Clause 58.04-2 (Standard D14-Building Setbacks) as the setbacks will contribute to the preferred future development of the area.

Bulk/Articulation/Design

41 Council argues that despite the changes in the amended plans, it has concerns about the presentation of the façade. It considers the unbroken use of brickwork across the façade accentuates the width of the building, as shown on Figure 6. It says the removal of the brickwork over and above the entry at ground and first floor levels is one possible way to address the overall appearance of the building.



Figure 6 - East (front) elevation¹⁰



- 42 The applicant refutes this proposition and relies on the evidence of Mr Bastone. He considers the proposal is designed to present a transition down to the lower scale development to the north by use of face brickwork. He says this will frame the lower levels of the building and the distinct fourth floor cap that has a different architectural response.

Tribunal findings

- 43 I find there is no reason to modify the design of the façade for the following reasons:

- The strategic policy direction is for larger, apartment buildings, that will inevitably be constructed over two or more lots. Consequently, larger building footprints, with wider frontages, are expected in this zone;
- The design has sufficiently broken up the façade with framed verandas constructed in face brickwork at ground, first and part second floor levels;
- The northern side of the second floor includes a light-coloured framed veranda. This provides visual interest and a lighter material closest to the adjoining two storey dwellings; and
- The top floor is well recessed and includes dark cladding.

Frontage/Streetscape

- 44 The application proposes to include secluded open space for the ground level apartments in the frontage setback behind a 1.7 metre brick and steel picket front fence.
- 45 Under the RGZ3, a maximum front fence should be 0.9 metres.
- 46 Council argues there is conflict between the use of frontage for private open space and the desire to have an open character for front gardens. It says Clause 21.01-3 says private open space should be well located and maintain the open streetscape and low fencing patterns. This clause seeks to retain

¹⁰ TP-03a, Revision 4.

views of the architecture of the building, ensure buildings address and connect with the street, and facilitate passive surveillance and social interaction between front yards and the dwelling.

- 47 Council submits the frontage setback is insufficient to provide privacy to the secluded open space without non-compliance with the RGZ3. It says the proposal will cause an unacceptable degradation of the character of open streetscapes and low fencing patterns.

Tribunal findings

- 48 I am satisfied that the location, setbacks of the building and height of the front fence are an acceptable response to the preferred character of this area. I have come to this conclusion for the following reasons:

- The frontage setback of 4.3 metres to 4.5 metres allows sufficient space for the planting of canopy trees, as shown on Mr Patrick's landscape plan. This will maintain the garden character of the streetscape;
- The setback is consistent with a range of setbacks found in the street (i.e. 3.8 metres to 7.6 metres);
- The site is located at the end of a dead-end street and abuts a laneway. Therefore, there will be limited visibility of the built form and fencing in the wider area;
- The provision of private open space in the frontage for an apartment is a common occurrence and allows for the efficient use of the site in a RGZ3;
- The inclusion of steel pickets in the fence allows some visibility of the front garden in the streetscape; and
- The height of the fence is proportional to the height and scale of the building in the streetscape.

- 49 I therefore agree with the applicant that the design and height of the front fence and location of private open space strikes the right balance. I consider the proposal meets the design objectives of the RGZ3 and it will provide reasonable privacy for future occupants. I will discuss internal amenity issues further below in my findings.

HAVE SUFFICIENT LANDSCAPE OPPORTUNITIES BEEN PROVIDED TO ACHIEVE AN OPEN GARDEN SETTING?

- 50 The Design objectives of the RGZ3 are to ensure developments are constructed within an open garden setting through the retention and planting of vegetation, including canopy trees.

- 51 Council argues the proposal fails to provide sufficient landscaping opportunities to allow the building to sit in an open garden setting. It



submits the basement footprint does not allow for sufficient deep root planting and further landscaping. It says that increased side setbacks are required for the entire building to provide for further landscaping, including a second area for deep root planting in the south-west corner of the site.

- 52 It also says the frontage setback is compromised by the podium framing element that extends into the frontage setback, site services and front fence. This prevents the front garden from visually unifying the streetscape and soften the appearance of the built form.
- 53 The applicant submits the proposal contains elements of the ‘garden city’ as there is landscaped open spaces on all sides of the building and landscaping across the frontage. It relies on the evidence and landscape plan prepared by Mr Patrick. This plan proposes 12 new trees, with an expected height of 7 metres or more, including five canopy trees across the frontage and six canopy trees across the rear of the site. It says there is no hard paving outside the building envelope and the recess in the north elevation, provides for the planting of a canopy tree in a raised planter box.

Tribunal findings

- 54 I find the landscape plan prepared by Mr Patrick meets the design objectives of the RGZ3 and will make a positive contribution to the garden city character. I have come to this conclusion as the plan includes the following features:
- The frontages of apartments G01 and G08 are proposed to be planted with three Pears (12 metres at maturity), a Water Gum (7 metres) and a Smooth Barked Apple Gum (12 metres). These trees, in association with the understorey landscaping, will provide a landscaped interface to the streetscape, whilst providing amenity for future occupants;
 - The inclusion of the Small Barked Apple Gum in the north-east corner of the site is an appropriate specimen as it will provide strong canopy presence when viewed south down Nicholson Court;
 - The basement ramp, set back one metre from the south boundary, is to be planted with Orange Jessamine hedging (3 metres at maturity) and Copper Laurel hedging (4 metres). This planting will provide some screening of the built form adjacent to the laneway and will grow above the fence-line to provide some visible landscaping along the side boundary. The hedging will also provide amenity for the occupants of ground floor apartments G05, G06 and G07;
 - The western (rear) setback includes six Pears and a Lilly Pilly hedge (4 metres at maturity). This planting is outside the curtilage of the basement and will filter views of the built form from the adjoining rear yards to the west;



- A Lilly Pilly hedge is proposed along the north boundary that will assist in screening views for the adjoining units in 3 Nicholson; and
- The indented planter box is to be planted with a Crepe Myrtle (7 metres at maturity) which will provide some canopy tree cover in the northern setback;

55 I acknowledge the decking in the frontage of Apartments G01 and G08 reduces the area for landscaping. However, it provides permeable areas within the tree protection zone of the Melaleuca street tree, which will maintain consistency in the streetscape.

56 I do not consider additional landscaping is required in the north-west corner, as suggested by Council. The provision of the two Pears, lawn and hedging provides a suitable landscape response to the adjoining properties at 4/3 Nicholson Court and 12 McGregor Street.

WILL THE BUILDING UNREASONABLY IMPACT THE AMENITY OF NEARBY PROPERTIES?

57 The RGZ3 contains a design objective to ensure the height, scale, and form of development respects any sensitive residential interfaces and minimises the appearance of visual bulk.

Visual bulk

58 Council refused the application on grounds the proposal will result in unreasonable bulk impacts to adjoining properties to the north, west and south.

59 Mr Bastone considers the northern interface non-sensitive as the three dwellings at 4/3, 5/3 and 6/3 Nicholson Court ‘turn their back’ on the subject site. He says the placement of balconies, windows and materials are varied and provide visual interest to break up the built form. He considers the increased upper floor setbacks to the south and west are appropriate.

Tribunal findings

60 I disagree with Mr Bastone that the dwellings to the north have non-sensitive interfaces. Whilst there are brick garages on the boundary, the development will partially face the rear yard of 5/3 Nicholson Court (Figure 7) and two habitable room windows in the south elevation of 4/3 Nicholson Court (Figure 8).

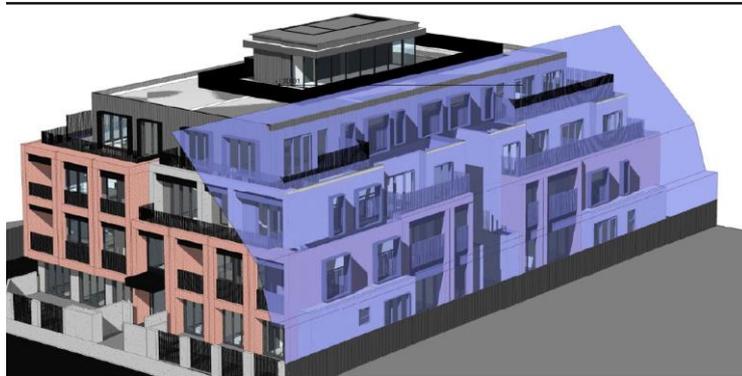
Figure 7 – Secluded open space of 5/3 Nicholson Court¹¹

Figure 8 – South elevation of 4/3 Nicholson Court¹²



61 I am satisfied the development will not result in unreasonable visual bulk impacts to the north as the building is set back generally in accordance with the side setback profile described in the RGZ3, as shown on Figure 9.

Figure 9 – 3D render of proposal will semi-transparent overlay of RGZ3 setbacks to north boundary¹³



62 I acknowledge there is a minor incursion for the fourth floor balconies, but I consider these will be recessed back from the neighbouring windows and rear yard and are lightweight balcony screening structures only. I find the ground floor setbacks (i.e. 2 metres to 3.7 metres) are adequate to provide space for screen landscaping, which has been shown on Mr Patrick’s landscape plan. The siting of the recessed planter box provides additional relief in the built form as it is generally opposite the rear yard of 5/3 Nicholson Court.

¹¹ Source- photograph taken by Mr Bastone on his site inspection.

¹² Ibid.

¹³ Source – Figure 10, applicant submission.

- 63 Whilst the south elevation is set back 2-3.5 metres from the boundary at ground floor level, this elevation is facing a three metre wide laneway that acts a buffer to the rear yards of the dwellings to the south. The west elevation is facing the rear yards of two dwellings at 12 and 14 McGregor Street. This elevation is set back 3.3 metres from the rear boundary and screen landscaping and canopy trees are proposed to be planted in this setback. The planting, absence of walls on boundaries, stepping back of the built form at the upper levels, and variety of materials responds appropriately to the southern and western residential interfaces.
- 64 Council made no submissions regarding other amenity impacts, such as overlooking and overshadowing. I therefore accept the evidence of Mr Bastone that there will be only minor overshadowing impacts and overlooking has been satisfactorily addressed through screens on balconies and fencing.

WILL THE PROPOSAL RESULT IN A POOR LEVEL OF AMENITY FOR FUTURE RESIDENTS?

- 65 Council refused this application on the ground the proposal will result in a poor level of internal amenity for future residents due to the location of the secluded open space in the frontage and absence of ventilation to bedrooms in apartments G07 and G08 adjacent to the basement ramp.

Secluded Open Space

- 66 Council argues that open space in the frontage of apartments G01 and G08 does not provide sufficient space for privacy for occupants. It also says the amount of open space is insufficient for apartment G01.
- 67 I have already made findings on the appropriateness of the front fence in relation to the preferred future character for this precinct. I am comfortable for open space to be provided in the frontage for these apartments given the fence will provide some degree of privacy due to its height, brick elements and landscaping. I find the amount of open space for apartment G01 satisfactory (i.e. 70 square metres) as it is directly accessible from the living room and will provide residents with a useable area for recreation
- 68 I agree with the applicant that there is no requirement in Clause 58 for apartments to provide ‘secluded’ open space, as required by Clause 55.

Ventilation

- 69 Council argues the proposal fails to meet the objectives of Clause 58.07-4 (Standard D29 – Natural Ventilation). It says the bedroom in G07 and G08 have no direct access to ventilation from other rooms as they are adjacent to the basement ramp.
- 70 The applicant clarified that the bedrooms contain windows with double glazing and the upper panes will be openable for ventilation purposes.



- 71 I am satisfied the objectives of Standard B29 can be met. I will include conditions on the permit for the plans to clearly show the upper portion of the bedroom window for these dwellings is openable.

WILL THE DEVELOPMENT CAUSE WASTE MANAGEMENT AND PARKING IMPACTS?

Basement Layout

- 72 Council submits that the proposed configuration of the car spaces has poor internal amenity for future residents. It says car space '1' requires multiple manoeuvres for ingress and egress as the standard one metre turning recess at the end of the lane has not been provided.
- 73 The applicant relies on the traffic report submitted with the application. This report states there is no requirement in Design Standard 1 of Clause 52.06 for a turning recess at the end of an aisle as the proposal is not a public car park.

Tribunal findings

- 74 Council's Traffic Engineer has reviewed the basement layout and traffic report and raised no objections. I note the traffic report has included swept path diagrams that shows a vehicle can appropriately exit a typical end car space. Whilst this can occur with more than one manoeuvre, I find this is acceptable as the residents will become familiar with the layout of the basement.

Waste Management

- 75 Council refused the application on the ground the proposal does not provide for effective waste management to cater for the scale of the development. It acknowledges the amended plans are a significant improvement to the original application in terms of addressing waste management. However, it has concerns about the manoeuvrability of waste trucks in the basement to access to the bin storage area. It says there is little margin for error to avoid basement columns.

Tribunal findings

- 76 I am not persuaded by Council's arguments as the applicant has submitted a traffic report with the application that includes swept path diagrams for a Mini Rear Loader. These diagrams indicate that a rubbish truck can enter and exit the basement in a forward direction. I also note that Council's Traffic Engineer has found waste truck manoeuvrability tight, but acceptable, in the basement.

WHAT CONDITIONS ARE APPROPRIATE?

77 Conditions were discussed at the hearing and any changes to the permit conditions contained in Appendix A of this order reflect those discussions plus further consideration by the Tribunal.

CONCLUSION

78 For the reasons given above, the decision of the responsible authority is set aside. A permit is granted subject to conditions.

Jane Tait
Member



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/53913
LAND	7-9 Nicholson Court CLAYTON VIC 3168

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Construction of a five storey apartment building in a Special Building Overlay

CONDITIONS

Amended Plans Required

- 1 Before the development and use commences, amended plans drawn to scale and correctly dimensioned must be submitted to the satisfaction of and approved by the Responsible Authority. When approved, the plans will be endorsed and then form part of the Permit. The plans must be generally in accordance with the plans prepared by Pitard Group drawing numbers TP01 to TP03 dated 15/02/2023 (Revision 4), TP03A dated 06/02/2023 (Revision 4), TP03B dated 15/02/2023 (Revision 4) and TP04 to TP12, TP20 and TP21 dated 06/02/2023 (Revision 4) but modified to show:
 - (a) Details of fencing to satisfy Melbourne Water's requirements.
 - (b) Details of tree protection techniques for the street tree.
 - (c) Any required fire services, electricity supply, gas and water meter boxes to be screened to complement the development.
 - (d) Confirmation that the upper portion of the windows of bedroom 1 of apartment G07 and bedroom 3 of apartment G08, which are adjacent to the ramp, is operable.
 - (e) A Landscape Plan required by Condition 3 of this Permit.
 - (f) A Waste Management Plan required by Condition 4 of this Permit.
 - (g) A Wind Assessment Report required by Condition 5 of this Permit.
 - (h) A Sustainable Management Plan required by Condition 6 of this Permit.
 - (i) An Acoustic Report required by Condition 7 of this Permit.All to the satisfaction of the Responsible Authority.



Layout Not to be Altered

- 2 The development and use as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.

Landscape Plan

- 3 Concurrent with the endorsement of any plans requested pursuant to Condition 1, a landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When endorsed, the plan will form part of the Permit. The Landscape Plan must be generally in accordance with the Landscape Concept Plan prepared by John Patrick Landscape Architects Pty Ltd, dated 20/02/23 except that the plan must be modified to show:

- (a) Any changes as required by Condition 1 of this Permit.
- (b) Compliance with Melbourne Water's Planting Guidelines

Before the occupation of any of the buildings allowed by this permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and thereafter maintained to the satisfaction of the Responsible Authority.

Waste Management Plan

- 4 Concurrent with the endorsement of plans required pursuant to Condition 1, a Waste Management Plan must be submitted and approved by the Responsible Authority showing:

- (a) Any changes required by Condition 1 of this Planning Permit;
- (b) Purpose as stated in the City of Monash MUD and Commercial Developments WMP Guide for Applicants (last page of this checklist) must be added to the WMP;
- (c) Correct waste volume calculation to include food organics;
- (d) Correct calculation of glass waste;
- (e) Correct calculations of bins requirement, including for food organics and glass waste;
- (f) Bin cleaning equipment, clean washing details and bin storage areas within the basement in the Waste Management Plan;
- (g) Accessibility for the collection truck, supported with swept path within the basement in the Waste Management Plan;
- (h) Hard waste, e-waste and clothing textile waste storage and collection point, including a coloured legend indicating each bin type in the basement storage area;
- (i) A communication strategy for occupiers;



- (j) Clearance heights; and
- (k) Collection times in accordance with the City of Monash Local Law and EPA Guidelines;

The provisions, recommendations and requirements of the endorsed Waste Management Plan must be implemented and complied with to the satisfaction of the Responsible Authority.

Pedestrian Wind Level Assessment

- 5 Concurrent with the endorsement of any plan requested pursuant to Condition 1, an amended pedestrian wind level assessment prepared by a suitably qualified Wind Engineer must be submitted to and approved by the Responsible Authority. The study must be generally in accordance with the Desktop Environmental Wind Assessment prepared by Mel Consultants Pty Ltd dated 22 February 2023 except that the plan must be modified to show:

- (a) Any changes required by Condition 1 of this Planning Permit.

The provisions, recommendations and requirements of the endorsed Wind level Assessment must be implemented and complied with to the satisfaction of the Responsible Authority.

Sustainable Management Plan

- 6 Concurrent with the endorsement of plans requested pursuant to Condition 1, a Sustainable Management Plan must be submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Sustainability Management Plan prepared by Energy Water and Environment Dated 3 August 2022, except that the plan must be modified to show:

- (a) Any changes required by Condition 1 of this planning permit.

Upon approval the Sustainable Management Plan will be endorsed as part of the planning permit and the development must incorporate the sustainable design initiatives outlined in the SMP to the satisfaction of the Responsible Authority.

Acoustic Report

- 7 Concurrent with the endorsement of plans requested pursuant to Condition 1, an Acoustic Report must be submitted to and approved by the Responsible Authority. The report must be generally in accordance with the report prepared by Acoustic Logic 17 August 2022, except that the plan must be modified to show:

- (a) Any changes required by Condition 1 of this planning permit.

Upon approval the Acoustic Report will be endorsed as part of the planning permit and the development must incorporate the design initiatives outlined in the report to the satisfaction of the Responsible Authority.



Construction Management Plan

- 8 Prior to the commencement of construction, a Construction Management Plan (CMP) must be submitted and approved by the Responsible Authority. No works are permitted to occur until the Plan has been endorsed by the Responsible Authority. Once endorsed, the CMP will form part of the permit and must be implemented to the satisfaction of the Responsible Authority. The CMP must address the following issues:
- (a) Appropriate measures to control noise, dust and water and sediment laden runoff;
 - (b) Appropriate measures for the prevention of silt or other pollutants from entering into the Council's underground drainage system or road network;
 - (c) Appropriate measures relating to removal of hazardous or dangerous material from the site, where applicable;
 - (d) A plan showing the location and design of a vehicle wash-down bay for construction vehicles on the site so as to prevent material leaving the site and being deposited on Council's road network;
 - (e) A program for the cleaning and maintaining surrounding road surfaces;
 - (f) A site plan showing the location of any site sheds, on-site amenities, building waste storage and the like, noting that Council does not support the siting of site sheds within Council road reserves;
 - (g) Measures to provide for public Safety and site security;
 - (h) A plan showing the location of parking areas for construction and sub-contractors' vehicles on and surrounding the site, to ensure that vehicles associated with construction activity cause minimum disruption to surrounding premises. Any basement car park on the land must be made available for use by sub-constructors/tradespersons upon completion of such areas, without delay;
 - (i) A Traffic Management Plan showing truck routes to and from the site;
 - (j) A swept path analysis demonstrating the ability for trucks to enter and exit the site in a safe manner for the largest anticipated truck associated with the construction;
 - (k) Appropriate measures to ensure that sub-contractors/tradespersons operating on the site are aware of and adhere to the requirements of the CMP;
 - (l) The provision of contact details of key construction site staff; and
 - (m) Include a requirement that except with the prior written consent of the Responsible Authority, a requirement that demolition, excavation or



construction works must only be carried out during the following hours:

- i Monday to Friday (inclusive) – 7.00am to 6.00pm;
- ii Saturday – 9.00am to 1.00pm;
- iii Saturday – 1.00pm to 5.00pm (Only activities associated with the erection of buildings that does not exceed the EPA guidelines)
- iv No works are permitted on Sundays or Public Holidays.

The provisions, recommendations and requirements of the endorsed Construction Management Plan must be implemented and complied with by all contractors to the satisfaction of the Responsible Authority.

Privacy screens

- 9 Prior to the occupancy of the development, all screening and other measures to prevent overlooking as shown on the endorsed plans must be installed to the satisfaction of the Responsible Authority. Once installed the screening and other measures must be maintained ongoing to the satisfaction of the Responsible Authority. The use of obscure film fixed to transparent glass or windows is not considered to be 'obscure glazing' or an appropriate response to screen overlooking.

Landscaping Maintenance

- 10 All landscaping works shown on the endorsed landscape plan(s) must be maintained and any dead, diseased or damaged plants replaced, all to the satisfaction of the Responsible Authority.

Tree Protection

- 11 No building material, demolition material, excavation or earthworks shall be stored or stockpiled within the Tree Protection Zone (TPZ) of the Council street tree to be retained during the demolition, excavation and construction period of the development hereby permitted without the prior written consent of the Responsible Authority.
- 12 No vehicle access or parking within the Tree Protection Zone of any tree to be retained.

Hours for Waste Collection

- 13 Waste collection only to be carried out within hours prescribed by the City of Monash Local Law and EPA guidelines.

No Waste Bin in View

- 14 No bin or receptacle or any form of rubbish or refuse shall be allowed to remain in view of the public and no odour shall be emitted from any receptacle so as to cause offence to persons outside the land.

Ongoing Architect Involvement

- 15 As part of the ongoing consultant team, The Pitard Group or an architectural firm which is acknowledged to have comparable skill and expertise to the satisfaction of the Responsible Authority must be engaged to:
- (a) oversee design and construction of the development; and
 - (b) ensure the design quality and appearance of the development is realised as shown in the endorsed plans or otherwise to the satisfaction of the Responsible Authority.

Plant / Equipment or features on roof

- 16 No equipment, services, architectural features or structures of any kind, including telecommunication facilities, other than those shown on the endorsed plans shall be permitted above the roof level of the building unless otherwise agreed to in writing by the Responsible Authority.

Car Parking and Driveways to be Constructed

- 17 Before the use starts or any building is occupied, areas set aside for parked vehicles and access lanes as shown on the endorsed plans must be:
- (a) constructed to the satisfaction of the Responsible Authority;
 - (b) properly formed to such levels that they can be used in accordance with the plans;
 - (c) surfaced with an all-weather sealcoat to the satisfaction of the Responsible Authority;
 - (d) drained, maintained and not used for any other purpose to the satisfaction of the Responsible Authority;
 - (e) line-marked to indicate each car space and all access lanes to the satisfaction of the Responsible Authority.

Parking areas and access lanes must be kept available for these purposes at all times.

Use of car parking spaces and driveways

- 18 Car spaces, access lanes and driveways shown on the endorsed plans must not be used for any other purpose, to the satisfaction of the Responsible Authority.

Lighting of carparks and accessways

- 19 Low intensity / baffled lighting must be provided to ensure that car park areas and pedestrian accessways are adequately illuminated without any unreasonable loss of amenity to the surrounding area, to the satisfaction of the Responsible Authority.

Drainage & Stormwater

- 20 The site must be drained to the satisfaction of the Responsible Authority. Stormwater must be directed to the Point of Connection as detailed in the Legal Point of Discharge report. Stormwater must not be allowed to flow into adjoining properties including the road reserve.
- 21 No polluted and/or sediment laden stormwater runoff is to be discharged directly or indirectly into Council's drains or watercourses during and after development, to the satisfaction of the Responsible Authority.
- 22 Stormwater 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 Council's Engineering Department prior to any stormwater drainage works commencing.
- 23 A plan detailing the stormwater drainage and civil works must be submitted to and approved by the Engineering Department prior to the commencement of any works. The plans are to show sufficient information to determine that the drainage and civil works will meet all drainage requirements of this permit. Refer to Engineering Plan Checking on www.monash.vic.gov.au.

Melbourne Water Conditions (REF: MWA-1255409)

- 24 Prior to the development plans being endorsed, amended plans must be submitted to Council and Melbourne Water addressing Melbourne Water's conditions. Plans must be submitted with amendments as follows:
 - (a) Finished ground floor levels of the building must be constructed no lower than 58.18 metres to Australian Height Datum (AHD) which is 300mm above the applicable flood level of 57.88 metres to AHD.
 - (b) Entry apex to the basement must also be constructed no lower than 58.18 metres to AHD which is 300mm above the applicable flood level of 57.88 metres to AHD.
- 25 All openings, vents or other entry and exit points that may allow for entry of floodwaters to the basement must be set no lower than 58.18 metres to AHD which is 300mm above the applicable flood level of 57.88 metres to AHD.



- 26 Solid obstructions such as earth fill, retaining walls, solid fencing/ gates, raised solid landscaping will not be permitted within locations lower than the applicable flood level of 57.88 metres to AHD.
- 27 Fencing/ gates including boundary and internal fencing of the property at locations lower than the applicable flood level of 57.88 metres to AHD must be of out of an open style (50% open) design. Boundary fencing are permitted to be standard paling style of construction).
- 28 Build over - Formal approval from Melbourne Water must be obtained prior to any construction of permanent or temporary structures, demolition of structures existing structures or tree removal within 5m of Melbourne Water's asset. Hence a Build Over application must be submitted online for Melbourne Water's review prior to finalising plans: (Please note: upon further assessment a legally binding Build Over Agreement may be deemed necessary)
- (a) Details to be submitted for permanent structures must include:
- i Plans showing the lateral relation of the proposed works to the Melbourne Water Asset.
 - ii The building/structure including footings, eaves etc. must be set outside any easement or a minimum 2.6 metre laterally clear of the outside edge of the Melbourne Water Asset, whichever is greater. NOTE: No overhangs or eaves are permitted within the lateral clearance zone.
 - iii The depth of the footings must be adequate to satisfy the angle of repose relative to the drain as per Melbourne Water's specification. See attached Standard Drawing: 'Angle of Repose – Footing Design'
 - iv <http://www.melbournewater.com.au/Planning-and-building/Forms-guidelines-andstandard-drawings/Documents/Angle-of-repose-diagram.pdf>
 - v Melbourne Water's preference is for concrete piers to allow for any future excavation work necessary to be undertaken by Melbourne Water that may affect or abut the footing. If screw piles are to be adopted, evidence will need to be supplied by a qualified engineer indicating that the footing will not be affected from any excavation work undertaken by Melbourne Water abutting the screw pile.
 - vi A work method statement or an arborist report is required for any proposed tree removal within 5m laterally of any Melbourne Water asset.

- vii A work method statement from a suitably qualified engineer will be required if any demolition is proposed and should include details of machinery access.
- viii Note no additional loading is to be placed on the asset

For more information please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-nearour-assets-or-easements/building-requirements>

- (b) Details to be submitted for temporary structures (e.g.: Light weight sheds, fences, paving) must include:
 - i Structures are to be designed as a simple pinned connection that facilitates for ease of removal within a reasonable time of <4 hrs for two people;
 - ii Method for removal of the structure must not require the use of plant and equipment such as cranes, scaffolding or elevated work platforms;
 - iii Footings must not exceed a 600mm x 600mm square pad footing, and maintain a minimum lateral clearance of 500mm from the outside edge of the drain;
 - iv Footings must be independent and self-supporting;
 - v Please note the following are classified as *Permanent structures* and not permitted in the lateral clearance zone: water tanks, air-conditioning units, hot water systems.

For more information please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-nearour-assets-or-easements/building-requirements>

- 29 Asset Locating - The exact location of Melbourne Water's underground drain must be located by a licensed surveyor to a level B as per MW's Asset Proving Standard; Results of drain survey are to be included on plan drawings, noting setbacks from the outside edge of Melbourne Water's drain and drain survey must be sent to Melbourne Water for review. For more information on asset proving please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-nearour-assets-or-easements/check-if-assets-are-near-you-0>

- 30 Landscaping - Any new landscaping will need to comply with Melbourne Water's Planting Guidelines. Details of any landscaping to be located within the easement are to be forwarded to Melbourne Water for approval. If a Build Over application is also being made then Landscaping can be assessed under the Build Over application.



Details to be submitted shall include:

- (a) Species and locations of trees to be planted
- (b) Details of any hardstand areas, including paved and concrete areas
- (c) Fencing details including footings/posts
- (d) For more information please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-nearour-assets/planting-guidelines>

- 31 Storm Water - Any new stormwater connection shall be made to Council's drainage system. In the event that connection cannot be made to Council's system a separate application is necessary for any new or modified stormwater connection or alteration to Melbourne Water's drainage system (i.e. junction pits) and shall require approval from Melbourne Water. Evidence will need to be provided by Council regarding the legal point of discharge. For more information please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-near-ourassets-or-easements/stormwater-connection-guidelines>

- 32 Utility Installation - No services are to be installed across any Melbourne Water Asset or within any easements that are in favour of Melbourne Water unless approval in writing has been granted by Melbourne Water. A separate Utility Installation application will need to be submitted. For more information please refer to:

<https://www.melbournewater.com.au/planning-and-building/work-or-build-nearour-assets-or-easements/utility-installation-guidelines>

- 33 Ground Anchors - Ground anchors must be designed to be a minimum of 5m clear of the outside edge of the drain (above, below, side) and must be de-stressed at completion of works. Prior to further assessment being undertaken by Melbourne Water the following shall be submitted:

- (a) Design drawings of the ground anchors detailing the proved and surveyed location of the Melbourne Water drain and clearance from Melbourne Water drain.
- (b) Cross-section detail drawing of the Melbourne Water drain detailing location of the ground anchors.
- (c) Design to detail when / how de-stressing of the anchors will occur.

Time for Starting and Completion

- 34 In accordance with section 68 of the *Planning and Environment Act 1987*, this permit will expire if one of the following circumstances applies:

- (a) The development has not started before 3 years from the date of issue.



- (b) The development is not completed before 5 years from the date of issue.

In accordance with section 69 of the *Planning and Environment Act 1987*, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or:

- i within six (6) months afterwards if the use or the development has not commenced; or
- ii within twelve (12) months afterwards if the development has not been completed.

Council and the Victorian Civil and Administrative Tribunal are unable to approve requests outside of the relevant time frame.

– **End of conditions** –

