VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1818/2019Permit Application no. TpA/39124/C |
| CATCHWORDS |
| Section 81(1) of the *Planning and Environment Act 1987*; Review the refusal to extend the time within which development is to be completed; Monash Planning Scheme; Design and Development Overlay DDO12. |
| APPLICANT | Ngoc Linh Chau |
| responsible authority | Monash City Council |
| SUBJECT LAND | 65-67 Railway Parade North, Glen Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Sarah McDonald, Member |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 21 February 2020 |
| DATE OF ORDER | 14 April 2020 |
| CITATION | Chau v Monash CC [2020] VCAT 466 |

# 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:

Ngoc Linh Chau

1. Pursuant to section 85(1)(f) of the *Planning and Environment Act 1987*, I direct that the time within which the development described in permit No. KP-586/2004 is to be completed must not be extended.

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| **Sarah McDonaldMember** |  |  |

# Appearances

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| For applicant | David Quelch, town planner, Quelch Town Planning |
| For responsible authority | Maria Marshall, lawyer, Maddocks |



# Information

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| Description of proposal | Application to extend the time for completion of the development of a seven storey (plus basement) building.The permit allows the use of the building for five levels of restaurants, two levels of massage facilities, associated liquor license, and provision of car parking. |
| Nature of proceeding | Application under section 81(1) of the *Planning and Environment Act 1987* – to review the refusal to extend the time within which development is to be completed.  |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | Commercial 1 Zone (**C1Z**);Design and Development Overlay – Schedule 12 (**DDO12**);Vegetation Protection Overlay (**VPO**). |
| Land description | The subject land is located on the north side of Railway Parade North, Glen Waverley.It is within the Glen Waverley activity centre, approximately 60 metres west of Springvale Road and 150 metres east of the Glen Waverley train station.The land has a frontage to Railway Parade North of 12 metres, a depth of 33 metres and area of 391 square metres. The northern (rear) boundary abuts an unnamed laneway.Figure 1: Subject land and surrounding context[[1]](#footnote-1) |

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

## What is this proceeding about?

1. Ngoc Linh Chau (**applicant**) is seeking review of the decision of the Monash City Council (**responsible authority**) to refuse to extend the time within which the development of the land at 65-67 Railway Parade North, Glen Waverley, is to be completed.
2. Planning permit TPA/39124 was issued by the responsible authority on 4 July 2011 for a six storey (plus basement) mixed use development.
3. Two extensions of time for commencement of the development were approved by the responsible authority on 16 July 2013 and 28 May 2015.
4. The planning permit was amended on 30 October 2018[[3]](#footnote-3) and currently allows:

Development and use of a 7 storey plus basement building (with maximum total of 410 patrons at any one time) for the purpose of establishing 5 levels of restaurants (30 patrons ground floor and 80 patrons per levels 1-4) and 2 levels of massage facilities (30 patrons per level) with associated liquor licence and the provision of car parking in accordance with clause 52.06 of the Monash Planning Scheme (proposed hours of operation 7 am to 2am the following day, 7 days a week).

1. The additional storey approved by this amendment was achieved by lowering the floor to ceiling levels of the other floors and replicating the floorplate for one of the other levels, rather than comprising an entirely new design concept.
2. Condition 20 of the permit provides that the permit will expire if the development and use are not started before 14 July 2017 and the development is not completed before 14 July 2019.
3. There is no dispute that the development commenced prior to 14 July 2017. The responsible authority acknowledges that two footings were constructed prior to this date.
4. The applicant applied to the responsible authority in June 2019 to extend the time required for the development to be completed.
5. The responsible authority refused the application to extend the time for completion of the development on grounds relating to the original time limit being adequate, the permit having been previously extended twice for a total time of 8 years, significant changes in planning policies since the original permit was issued, the development being inconsistent with the current planning policies and objectives, and the development failing to comply with the requirements of the DDO12.
6. The applicant is seeking review of the responsible authority’s decision. Their grounds for review essentially counter the responsible authority’s grounds of refusal.
7. The Tribunal must decide whether an extension of time for completion of the development under this permit should be granted, and if so what timeframe for the completion of the development should be applied.
8. Having considered the submissions and statements of grounds and having regard to the relevant policies and provisions of the planning scheme, I have decided it is not appropriate to extend the time for the completion of the development. My reasons follow.

## What are the relevant considerations?

1. Both parties cite the principles established by Justice Ashley in *Kantor v Murrindindi Shire Council*[[4]](#footnote-4) as relevant factors in guiding the exercise of discretion when assessing a request to extend a permit under section 69 of the *Planning and Environment Act 1987* (**PE Act**).
2. The Kantor principles, as summarised by DP Dwyer in *Hotel Windsor Holdings Pty Ltd v Minister for Planning*[[5]](#footnote-5), are:
* whether there has been a change of planning control or planning policy since the permit was granted.
* whether the landowner is seeking to warehouse the permit.
* intervening circumstances which bear upon the grant or refusal of the extension request.
* the total elapse of time since the permit was granted.
* whether the time limit originally imposed was adequate.
* the economic burden imposed on the landowner by the permit.
* the probability of a permit issuing should a fresh application be made.[[6]](#footnote-6)
1. The responsible authority also cites the observations of DP Dwyer in the *Hotel Windsor Holdings Pty Ltd* in relation to the *Kantor* principles and applications to extend the time for completion of a development. In that decision DP Dwyer’s comments include:

In my view, it will commonly be the case that some of the *Kantor* principles will assume less relevance or significance in a case concerning the completion of a development that has already started, as opposed to a request for an extension of time to start the development. But that is not to say that the *Kantor* principles will be wholly irrelevant. Equally, whilst whether there has been a substantial commencement or significant commitment to the development will likely be relevant factors in a completion case, I do not consider that these are necessarily the only additional criteria. As the decision in *Kantor* itself says, each decision to extend time will depend on its own particular circumstances.[[7]](#footnote-7)

1. In that decision DP Dwyer set out what he considered may be relevant principles in a completion case, as follows:
* it is not appropriate to consider a request for an extension of time to complete a development solely by reference to the Kantor principles applicable to an extension of time to start development. Those factors may still be relevant, but some of them will assume less significance.
* the particular safeguards that a limitation on the time to start development is designed to achieve (particularly in relation to the warehousing of a permit) are quite different to the purpose and objectives of a limitation on the time to complete development. If a clear purpose can be ascertained for an expiry date in a permit for the completion of development, that purpose will be relevant. Such a purpose will be harder to ascertain if the permit simply contains a standard ‘default’ timeline (e.g. as in a standard 2 x 2 permit).
* a change in planning controls or planning policy will often be less relevant to the completion of a development, as opposed to a development that is not yet started. This may however depend on the significance of the change to the planning scheme - a material change to the pattern of land-use or zoning, for example, would likely be more important in a given context than, say, a relatively minor change to development controls. It may also be relevant if there has already been a previous extension of time granted to complete the development, which post-dates the change in planning controls, and with the development still not completed within that extended timeframe.
* a relevant and often important consideration in relation to a completion case will be the fact and nature of the commencement of development – whether there has been a substantial commencement, whether significant amounts of work have been carried out, or whether a significant commitment in terms of time and money has been demonstrated.
* if there is a reasonable explanation of why a landowner has been held up and left with insufficient time to complete the development, this will often be a compelling reason in favour of an extension.
* for a major project, the adequacy of time to complete the development must be realistic, and should take into account the need to obtain other relevant approvals, and the usual commercial requirements of builders and financiers. If an extension of time is granted, it should not be piecemeal, but should allow a sufficient time that is reasonably calculated and foreseeable in order that the permitted development can be completed within that time.[[8]](#footnote-8)
* related to the above, for a standard 2 x 2 permit with two years to start development and a further two years to complete development, it should not be automatically assumed that the contemplated construction timeframe is only two years. Theoretically, there are four years for the development to be completed from the date of issue of the permit. However, for a major project, where pre-commencement matters will foreseeably take up most (or all) of the two years allowed for the development to start, a reasonable completion date in a permit should ordinarily be calculated having regard to this factor.
* in considering a request to extend the date for completion, the critical period for consideration is the period of time allowed by the last extension (if any) and, in particular, the time that was available and has elapsed since the development started within that time. The period of time that elapsed between the issue of the permit and the start of development will be less relevant once the development has started.
* the views of a referral authority or objector are not relevant in a completion case, unless it can be demonstrated that there has been some material change of circumstance to warrant a different view to the one taken when the permit was granted.

## What are my findings?

### Has there been a change of planning control or planning policy since the permit was granted?

1. There is no dispute that there has been some change in the planning policies and controls that apply to the subject land and surrounding area. Amendment C120 to the Monash Planning Scheme (**planning scheme**) implemented the Glen Waverley Major Activity Centre Structure Plan policy at clause 22.14 and the DDO12 to the subject land. Notably the DDO12, introduced building height, setback, and design requirements.
2. What is in dispute is whether these are material changes to the planning policies and provisions, and the extent to which approved development is consistent with these provisions of the planning scheme.
3. I am satisfied that the changes introduced by planning scheme amendment C120 are of some significance and relevance. They implemented the structure plan for the Glen Waverley Major Activity Centre and introduced design objectives and building height, setback and design requirements. This amendment was not initially adopted by the responsible authority until September 2014 nor gazetted until January 2018, years after the planning permit for this development was issued.
4. My findings on how the approved development responds to these provisions are addressed in my consideration of the probability of a permit issuing should a fresh application be made.
5. I also note the other change to the planning scheme relating to the removal of the Parking Overlay that previously applied to the subject land. The responsible authority submits that the removal of the Parking Overlay raises complex legal questions, and that if a new permit application was made a different parking arrangement needs to be resolved for the site. The applicant submits that with a public car park opposites the subject land and the proximity of the land to the train station, a traffic report for a new application is likely to support a reduction in the car parking.

### Is the landowner seeking to warehouse the permit?

1. I am persuaded by the responsible authority’s submissions that the works have been barely commenced by the placement of two footings, and the footings were only constructed before July 2017 in order to achieve commencement. Since the two footings were constructed shortly prior to the date for commencement under the permit, no construction work for the development has progressed.
2. What did happen is that shortly after the commencement of the development the applicant applied to amend the permit on 10 July 2017 to construct an additional four storeys, for a total building height of 10 storeys. That application was refused by the responsible authority in December 2017. The applicant made a further application to amend the permit on 30 July 2018, which was approved by the responsible authority on 30 October 2018. This amendment allowed an additional storey to increase the building height to seven storeys.
3. Noting the amendment to the permit in October 2018, I may have been persuaded that there is a serious intent for the development to be progressed. However, given the lack of any substantive progress with the development since that time, I am less inclined to find this is the case.
4. My concern that the permit has been warehoused is not eased by the fact that while the development had commenced in 2017 the applicant was only receiving quotations for professional services and preparation of documentation shortly before the time for completion of the development on14 July 2019. The responsible authority cites various documents relied on by the applicant in support of their application for the extension of time. These document comprise fee proposals and quotations, which range in date between November 2018 and July 2019, with half of them dated in June and July 2019.
5. Even though some new documentation for the development would obviously be required (for reasons I outline below), I am not persuaded that seeking and receiving quotations for professional services and documentation some six months after the permit was amended can reasonably be considered significant amounts of work or a significant commitment to progressing the development. This is particularly so in the context of the impending expiry of the time for completion of the development.

### Are there intervening circumstances which bear upon the grant or refusal of the extension request?

1. The two applications to amend the permit in July 2017 and July 2018 are obvious intervening circumstances that provide some explanation of the delay in completing the development.
2. However, rather than being circumstances that were unexpected or out of their control, these amendment applications were at the instigation and for the benefit of the applicant / landowner.
3. While the amendment approved in October 2018 may be a compelling reason in favour of an extension of time for completion of the development, construction of the building has not progressed since the amendment was approved.

### What is the total elapse of time since the permit was granted?

1. Acknowledging the comments of DP Dwyer in *Hotel Windsor Holdings Pty Ltd* that the period of time that elapsed between the issue of the permit and the start of development will be less relevant once the development has started, I place limited weight on the fact that the permit was issued almost 9 years ago.
2. Rather, the more relevant period is the time allowed by the last extension of time in 2015, and the period that has elapsed since the development commenced in July 2017. When the current application to extend the time for the completion of the development was made in June 2019, four years had elapsed since the previous extension had been granted and at least two years had elapsed since the development had commenced.
3. Also of relevance is the time elapsed since the amendment of the permit and endorsement of the approved plans on 30 October 2018. The applicant places great emphasis on this amendment, saying that the “clock was reset” at that time due to the amendment being a considerable change to the development. It is notable however that the applicant did not seek an extension of time for the completion of the development at that time.

### Was the time limit originally imposed adequate?

1. As commented on by DP Dwyer in *Hotel Windsor Holdings Pty Ltd*, for a major project, “the adequacy of time to complete the development must be realistic, and should take into account the need to obtain other relevant approvals, and the usual commercial requirements of builders and financiers”.
2. I am not necessarily persuaded that this development can reasonably be categorised as a ‘major development’. However, as it was originally a six-storey and is now a seven-storey commercial building, I accept that it is a more complex development than, for example, a two to three storey development.
3. Even though the applicant has benefitted from two extensions of time since the permit was first issued, significantly increasing the overall amount of time for the completion of the development, these extensions of time precede the commencement of the development in 2017 and the amendment to the permit in 2018. Since the development commenced shortly prior to the permitted time for commencement in July 2017, the applicant had slightly more than two years in which to complete the development.
4. It is relevant that when the permit was amended in October 2018 there was less than nine months available for completion of the development by 14 July 2019 as required by the permit. While this timeframe is less than the standard two year timeframe provided for by the permit condition, this alone does not persuade me that the time was inadequate. Rather, it is relevant to consider the differences between the previously approved development and the amended development, and the implications of these for the completion of the development.
5. The responsible authority submits that this is not an amendment that required the applicant to “start over”, and that the amendment was less significant. The responsible authority cites the applicant’s report of July 2018 that identified “the most significant changes to the proposal include alterations to the facade, a new sixth floor and roof top terrace”[[9]](#footnote-9).
6. While externally the 2018 amendment is essentially a slight variation on the six-storey development that had commenced in 2017, albeit one with an additional storey, this is not the case for the internal layout of the building. On comparing the floor plans of the development endorsed in 2015 to those of endorsed under the 2018 amendment, it is clear to me that this amendment was more than simply adding an identical storey to the building and tweaking the design detail of the facade. Key differences in the internal layout of the building include relocating the lift cores of the separate passenger lift and goods lift, adding a second passenger lift, and relocating the toilet facilities on each level. Changes at the ground floor level also comprise the inclusion of a gas meter room and sub-station room. It is obvious that these internal layout changes may have implications for the structural design of the building and the building permit documentation.

### Is there any economic burden imposed on the landowner by the permit?

1. I am not persuaded by the applicant’s submissions that the permit is for a major development that requires significant work in terms of preparation to comply with complex building surveying and engineering requirements”.[[10]](#footnote-10) The preparation of detailed engineering and building construction plans and working drawings is a necessary aspect of any development of this nature.
2. While I acknowledge that amended building construction documentation may be required as a result of the October 2018 amendments to the plans, I do not consider this to be an economic burden that would necessitate a delay in completion of the development. There is no information or evidence that the design of the building or the circumstances of the site are unusual or require some unique or unusual building construction or engineering requirements beyond that which might normally be expected.
3. I do note however that condition 2 of the permit requires the owner of the land to enter into an agreement under section 173 of the PE Act for a payment for required car parking not provided on the land. This condition specifies an amount of $12,662.20 is payable for each car parking space, with the total amount payable being $1,648,998.30. While this might be considered a substantial amount, the applicant has not made submissions that this is a significant or unreasonable burden that has contributed to the delay in completing the development. Furthermore, my understanding is that the section 173 agreement has not yet been entered into nor the contribution paid, despite the development having commenced.
4. Importantly, the construction works that have been undertaken are minor, comprising only two footings. As such, I am satisfied that these do not predetermine the future development of the land.

### What is the probability of a permit issuing should a fresh application be made?

1. The responsible authority submits that, as a result of the building height and setback controls of the DDO12, it would not support the issue of a permit if a fresh application was made.
2. In considering whether the permit is appropriate in the current planning context it is notable that the DDO12 provisions relating to building heights and setbacks are not mandatory controls and rely on the exercise of discretion. The applicant places considerable emphasis on this.
3. Having regard to the provisions of the DDO12, I find that it is not obvious that a new permit application for the same development would be refused on the matter of the building height alone. The proposed building is only one storey and three metres higher than the upper limit of the preferred building height of 4-6 storeys and 15-22 metres under the DDO12.[[11]](#footnote-11) These are ‘preferred’ heights, so there is scope for buildings to exceed these provisions.
4. However, there is greater variance between the approved development and the DDO12 provisions for setbacks from the street. The DDO12 calls for a zero street setback up to a height of three storeys, with a 5 metre street setback for additional storeys. The approved development features a zero setback only at the second storey (first floor level). The front walls of the first and third storeys (ground floor and second floor levels) are splayed back from the front street boundary line up to approximately 1 metre. The additional four storeys above the third storey maintain the splayed setback of that storey. All six storeys above the ground floor level have balconies that protrude forward of the front boundary line and over the public footpath. While the setback provisions under the DDO12 are not mandatory provisions, I find that the difference between the setbacks sought by the DDO12 provisions and those of the approved development are substantial.
5. The responsible authority also cites other aspects of the development that it says fail to achieve various aspects of the Glen Waverley Structure Plan. These relate to achieving excellent architectural design details, preferred scale and form when viewed from the pedestrian network, contribution to the public realm, and surveillance of the laneway, among other things.
6. In combination, given the differences between the approved development and the new policy and provisions, it is not obvious that a permit would be granted for the development under the current planning scheme.
7. I have contemplated the implication of the fact that the policy at clause 22.14 and the DDO12 formed part of the planning scheme when the responsible authority approved the amendment to the permit and plans in October 2018.[[12]](#footnote-12) While it could be construed that the responsible authority considered the amended development was acceptable in the context of the DDO12 provisions, I am not persuaded that this is the only interpretation that can be drawn.
8. When considering the amendment to the plans in 2018 the responsible authority was considering an amendment to plans that had been approved and endorsed under a different planning framework. It was not a fresh permit application starting from first principles. Any assessment of the amended plans would necessarily be heavily influenced by the approved development. The responsible authority could not undo or retreat from the permit that had been issued in 2011 or the plans it endorsed in 2015, even if it considered the approved development was not consistent with the new provisions of the planning scheme.
9. I am satisfied that the amendments approved in 2018 can reasonably be considered minor in their context, rather than significant or transformative. The amendments to the permit plans approved in 2018 added an additional storey to the building by adjusting floor to ceiling levels of the other storeys and maintained (within only minor variations) the overall building height (in metres), street setbacks, and protruding balconies. The fact that public notice of the application to amend the permit at that time was not undertaken reinforces that the amendments were considered minor rather than transformative.
10. I am not persuaded by the applicant’s submissions that the development should also be considered in the context of the existing and prevailing building form in the surrounding area. In this regard the applicant cites the height, scale, and siting of other developments found to the north and south-west of the site. However, the land to the north and south of the subject land is in a different precinct under the DDO12 and different height controls apply in that precinct. Building heights in those adjacent precincts are expected to be higher than on the subject land, with the preferred building height for those precincts being more than 10 storeys.

## Conclusion

1. In balancing the various relevant matters discussed above, I find that it is not appropriate to extend the time for the completion of the development under this permit. In particular, my findings are influenced by the following:
2. The fact that the applicant has ‘run out of time’ to complete the development is a product of their delay in commencing and progressing the development.
3. While the October 2018 amendment to the permit and plans may be a compelling reason in favour of extending the time for completion of the development, there has been little progress with the development since that amendment was approved.
4. There has been a significant change in the applicable planning policies and provisions that apply to the subject land and it is not obvious that a permit would be granted for the development under the current planning scheme should a fresh application be made.
5. There is no demonstrable significant economic burden if the development does not proceed. The construction works that have been undertaken do not predetermine the future development of the land.

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| **Sarah McDonaldMember** |  |  |

1. Source: NearMap (Printed 6 April 2020). The subject land is identified by a green balloon. [↑](#footnote-ref-1)
2. The submissions of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. [↑](#footnote-ref-2)
3. The permit was also amended on 15 July 2011 to correct condition 2. [↑](#footnote-ref-3)
4. (1997) 18 AATR 285. [↑](#footnote-ref-4)
5. [2016] VCAT 351. [↑](#footnote-ref-5)
6. *Hotel Windsor Holdings Pty Ltd*, at [53]. [↑](#footnote-ref-6)
7. Ibid, at [56]. [↑](#footnote-ref-7)
8. Ibid, at [57]. [↑](#footnote-ref-8)
9. Final written submission on behalf of the responsible authority, at [74]. [↑](#footnote-ref-9)
10. Final written submission of the applicant, at page 9. [↑](#footnote-ref-10)
11. Clause 2.0 of the DDO12 schedule. [↑](#footnote-ref-11)
12. The two previous extensions of time to the permit pre-date the introduction of the policy at clause 22.14 and the DDO12. [↑](#footnote-ref-12)