1.3 MONASH PLANNING SCHEME
POTENTIAL UNINTENDED USE AND DEVELOPMENT EXEMPTIONS IN THE RESIDENTIAL ZONE PROVISIONS

(Author: ML File No.)

Responsible Director: Peter Panagakos

RECOMMENDATION

That Council:

1. *Notes that in a recent VCAT Direction, VCAT questioned whether a planning permit is required for the construction of a dwelling on land already containing a Rooming House.*

2. *Notes that there are potential unintended use and development exemptions in the Residential Zone provisions arising from recent State Government changes to the planning provisions for Rooming House, Residential Building and other accommodation uses, in particular the potential exemption from a planning permit where a dwelling is proposed to be constructed on land containing an existing rooming house or residential building.*

3. *Resolves to write to the Minister for Planning alerting him to the question posed by VCAT and potential unintended consequences arising from the current drafting of the planning scheme and request an urgent Ministerial amendment to all Victorian planning schemes to ensure that construction of a dwelling on land where there is an existing residential building/rooming house requires a planning permit.*

BACKGROUND

Planning permit TPA/27878 was issued on 20 December 2001 for the construction of an additional dwelling on the land 36 Waverley Road, Chadstone. The land was subdivided into two lots in 2003 and the land in question became known as 1/36 Waverley Road.

In 2019, a building permit issued for the demolition of the existing dwelling on lot 1, and in the same year a building permit was issued for the construction of a new building to be used as a shared house, now classified as a rooming house under the planning scheme.

In September 2020, Council received a planning permit application seeking permission to construct a 3 bedroom, double storey dwelling to the rear of the now existing rooming house building.

The application was refused under delegation and the permit applicant applied to VCAT seeking review of Council's refusal.

The matter is currently before VCAT and VCAT has identified a question as to whether the Scheme contains a permit trigger for a dwelling on a lot with an existing rooming house. There are permit triggers for a dwelling on a lot with other dwellings and for construction or extension of a rooming house.

CURRENT VCAT PROCEEDING

The matter was listed before VCAT in late October 2021. VCAT raised an issue at the hearing as to whether there was a permit trigger under the residential zone controls. Put simply, the issue identified by VCAT is that if the existing residential building on the land is not characterised as a "dwelling", no planning permit for either the use or the buildings and works associated with any new dwelling on the lot will be required.

It may be that the circumstances of this case have not been anticipated by the Scheme, that is where a dwelling is added to an existing rooming house. The matter has been stood down while parties make further submissions to the Tribunal on this issue.

A review of the material prepared and released at the time of the changes to Community Care units, Crisis Accommodation and Shared Housing confirms that the intention was to limit the changes to those uses and given the dire need and importance of these types of accommodation to the community as a whole, exempting these uses from planning permit process, subject to meeting new definitions and standards.

Specifically, the shared accommodation term was replaced with the term Room House. The changes then made it clear that no planning permit would be required for "domestic scale" rooming houses.

As the focus of the amendment was on clarifying the exemptions for those particular uses, unfortunately there appears to have been no assessment undertaken of the consequences of 'as of right" development occurring in conjunction with other accommodation uses, particular dwellings.

It is reasonable to conclude, given the amendment changes were focused on Rooming house and other forms of accommodation, that there was no intention for the changes to provide or create the circumstances where the construction of a dwelling on the same land as a rooming house would be exempt from obtaining a planning permit as a second dwelling.

In accordance with Tribunal Order dated 17 January 2022, Council has now filed and served its submission relating to the permit trigger for the Proposal. In this submission we state and give reasoning that a permit is required

under Clause 32.08-6 of the Monash Planning Scheme to construct the proposed dwelling because:

a) The existing building could be considered as an existing dwelling on the subject land, or alternatively if this argument is not accepted;
b) Because the works are for an extension to the existing residential building on the subject land.

Refer to **Attachment A** for a copy of the Order.

The permit applicant has also filed a written submission to VCAT, a copy of which has also been served on Council. The permit applicant is now contending that there is no trigger for a planning permit for the proposed development and use of the land for the purpose of a dwelling, notwithstanding that before this issue was raised by the Tribunal, the permit applicant was plainly of the view that a permit was required.

There remains an outstanding matter with regard to the compliance of the rooming house, and officers will assess and take any necessary action on that separately to this proceeding.

POLICY OBJECTIVES

Council considers that the purpose of Clause 32.08 (Residential Zone provisions) and Clause 55 (ResCode) will not be promoted if the Tribunal holds that no permit is required under the residential zone provisions to construct the proposed dwelling.

It is considered that this may create a loophole where land may be used and developed for the purpose of a rooming house first, followed by development of an additional dwelling without the requirement for a planning permit, despite such built form having the same character and amenity impacts as a proposal for the construction of two dwellings.

This is significant for Council given the nature and size of allotments in its residential zones, the number of rooming houses or residential buildings in its municipality and given the presence of a number of higher education institutions in its municipality.

Furthermore, having regard to what has occurred on the site the subject of the VCAT proceeding, an implication of a VCAT decision that no permit trigger applies in this case would be to provide an opportunity for landowners to construct a rooming house on one part of an allotment, utilising the Scheme exemptions to do so without a planning permit and then, once constructed construct a single dwelling on the allotment with a planning permit not being required for that second structure. This would in effect create an opportunity for dual occupancies to be built in stealth.

DISCUSSION

It is arguable that VCAT has identified a loophole in the Scheme. To avoid any doubt, and to ensure the objectives sought by the residential zone and ResCode provisions are met, it is requested that this matter be brought to the attention of the Minister and clarification be sought from the Minister for Planning on this matter.

Should the Minister for Planning confirm a loophole exists, it is recommended that the planning provisions be amended as a matter of urgency in order to rectify this issue and ensure that the spirit of the residential zones is preserved within the provisions of all residential zones of the Planning Scheme.

Effectively, should this identified loophole not be rectified, the unintended consequence would be a density of housing without consideration to an appropriate site response and Clause 55 assessment. Council does not believe that this is the intent of the current provisions.

Refer to **Attachment B** for a copy of the draft letter to the Minister.

CONCLUSION

Whilst the matter is currently before VCAT, it is prudent for Council to write to the Minister for Planning seeking clarification on the question posed by VCAT and alerting him to the issue that there may be a potential unintentional consequence as a result of the drafting of the planning scheme. If it is determined by the Minister that this potential loophole exists, the Minister should urgently rectify the situation through any necessary changes to the Planning Scheme.