

1.2 39 MACKELLAR AVENUE, WHEELERS HILL - EXTENSION OF TIME- DEVELOPMENT OF THREE (3) DOUBLE STOREY DWELLINGS

TPA/45595

Responsible Director: Peter Panagakos, Director City Development

EXECUTIVE SUMMARY:

An application has been received for an extension of time to Planning Permit TPA/45595 for the development of three (3) double storey dwellings.

The original permit was issued on 19 August 2016.

The permit has been extended on three (3) previous occasions.

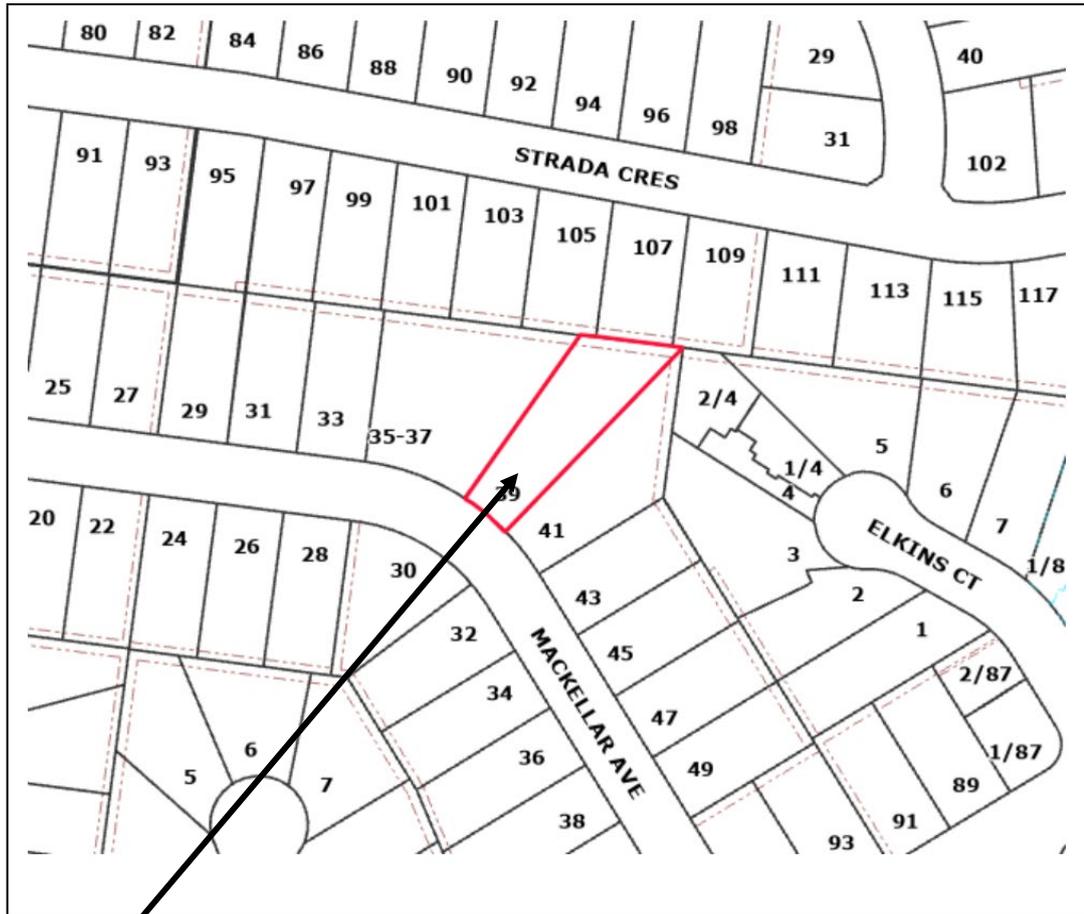
Construction of the development has not commenced. The current permit will expire on 19 August 2023. The reason for presenting this report to Council is this is the fourth extension of time request sought for this permit; and the period of time sought to extend the permit exceeds 6 years.

The proposed extension of time is considered consistent with the relevant provisions of the Monash Planning Scheme and appropriate; and it is recommended that a further two (2) year extension to the permit be granted to commence the development.

RESPONSIBLE DIRECTOR:	Peter Panagakos
RESPONSIBLE MANAGER:	Catherine Sherwin
RESPONSIBLE PLANNER:	Danielle Loh
WARD:	Mulgrave
PROPERTY ADDRESS:	39 Mackellar Avenue, Wheelers Hill
ZONING:	General Residential Zone – Schedule 3
OVERLAY:	No Overlays
EXISTING LAND USE:	Dwelling
RELEVANT POLICY:	<p><u>Planning Policy Framework</u> Clause 11 – Settlement Clause 15 - Built Environment Clause 16- Housing Clause 19- Infrastructure</p> <p><u>Local Planning Policy</u> Clause 21.04- Residential Development Clause 22.01 – Residential Development and Character Policy</p>

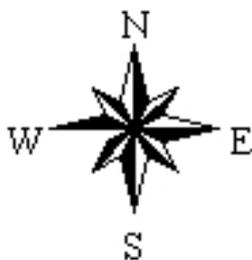
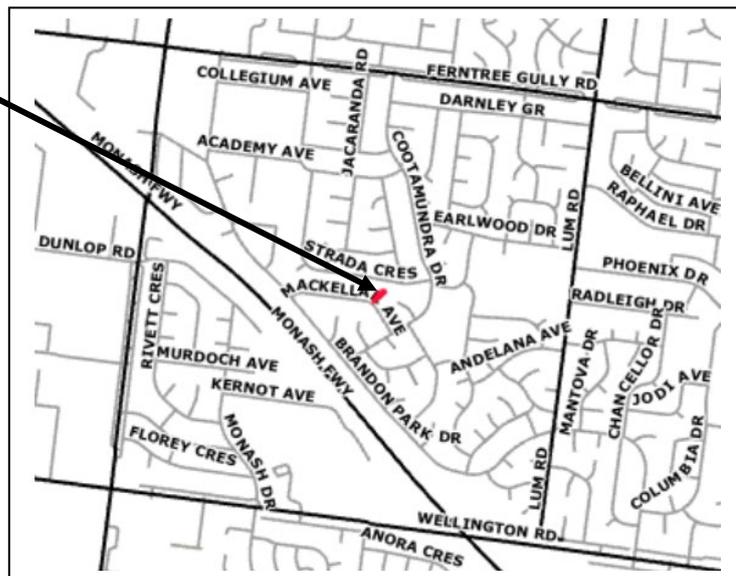
	<p>Clause 22.04- Stormwater Management Policy</p> <p>Clause 22.13- Environmentally Sustainable Development Policy</p> <p><u>Particular Provisions</u></p> <p>Clause 55- Two or more dwellings on a lot and residential buildings</p>
RELEVANT LEGISLATION:	Section 69 of the Planning and Environment Act 1987

LOCALITY PLAN



SUBJECT SITE

NEIGHBOURHOOD PLAN



RECOMMENDATION:

*That Council resolves to issue an **Extension of time to Planning Permit No. TPA/45595** for the development of three (3) double storey dwellings at 39 Mackellar Avenue, Wheelers Hill, pursuant to the provisions of Section 69(2) of the Planning and Environment Act 1987:*

- 1. That in accordance with Section 69(2) of the Planning and Environment Act 1987, the time for the commencement of the development be extended for a further 2 years. Accordingly, the development must be commenced by 19 August 2025 and completed by 19 August 2027.*
- 2. That the applicant be advised that a further request for extension of time may not be granted given the time that has elapsed since the original permit was granted.*

BACKGROUND:**History**

Planning Permit TPA/45595 was issued on 19 August 2016, for the development of three (3) double storey dwellings.

The original application was decided under delegation and Development Plans and a Landscape Plan were later endorsed on 6 September 2016.

The permitted timeframe for commencement has been extended on three previous occasions: March 2018 (1 year extension); March 2019 (2 year extension); and February 2021 (2 year extension). The current expiry date for commencement of the development is 19 August 2023.

The current extension of time request was made on 28 February 2023, which is before the expiry date of the permit and in accordance with the requirements of the *Planning and Environment Act 1987*.

The Site and Surrounds

The site is located on the north side of Mackellar Avenue in Wheelers Hill. The site is irregular in shape having a frontage of approximately 13 metres, a depth along the eastern title boundary of approximately 63 metres, a depth along the western title boundary of approximately 49 metres and a rear boundary of approximately 25 metres. The total area measures approximately 984 square metres. A 2.44 metre wide easement spans the rear (northern) title boundary.

A single-storey brick dwelling with a tiled roof occupies the subject site.

Surrounding land to the north, south and east is an established residential area. The area can be characterised as detached brick dwellings with pitched tiled roofs in a garden setting. A Council reserve adjoins the land to the west.

PROPOSAL:

The applicant has requested an extension of the permit start and completion dates by a further two (2) years stating grounds of delays due to financial constraints compounded with recent cost increases as a consequence of inflation and the COVID-19 pandemic.

DISCUSSION:

Pursuant to the provisions of Section 69(1) of the *Planning and Environment Act 1987*:

“Before the permit expires or within six months afterwards, the owner or the occupier of the land to which it applies may ask the responsible authority for an extension of time”.

The request was made on 28 February 2023, which is before the development is due to be commenced. Accordingly, Council is able to consider a further extension to the commencement and completion date for the development under the *Planning and Environment Act 1987*.

ASSESSMENT:

The Supreme Court decision *Kantor v Murrindindi Shire Council 18 AATR 285 (1997)* established the following tests to determine if a permit should be extended:

- Whether there has been a change of planning policy.
- Whether the landowner is seeking to “warehouse” the permit.
- Intervening circumstances bearing on the grant or refusal of the extension.
- The total elapse of time.
- 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.

These tests must be considered on balance, meaning that an application does not necessarily need to meet all tests.

These tests are considered in detail below.

Whether there has been a change of planning policy.

Since the permit was issued there have been significant state, regional and local amendments affecting the land.

Mandatory garden area and height requirements have been introduced by State-wide Amendment VC110, which was gazetted on 27 March 2017. Amendment C125 Part 1 & 2 (gazetted April 2018 and November 2019) also introduced new policies in Clause 21.04 Residential Development and Clause 22.01 Residential Development and Character Policy. This amendment also rezoned the land from General Residential Zone – Schedule 2 to General Residential Zone 3 (GRZ3).

The changes introduced by Amendment VC110 are mandatory to the consideration of a development. The proposal meets the mandatory height requirement of 11 metres or 3 storeys as the proposal is limited to double storey and a height of 7.9 metres. An assessment of the garden area calculation equates to 34% which is marginally under the requirement of 35% for lots over 650 square metres.

The GRZ3 introduced a number of changes to the schedule to the zone including front setback, site coverage, permeability, landscaping, side and rear setback, canopy tree provisions, private open space and front fence height requirements. An assessment of the proposal against the changes to the schedule is provided below:

	Requirement GRZ3	Approved Development	Compliance of GRZ3 requirements
Minimum Street Setback	At least 7.6 metres from the front street.	Complies	Yes
Site Coverage	Should not exceed 50%.	39%.	Yes
Permeability	Should be at least 30%.	39%	Yes
Landscaping	Provide or retain at least one canopy tree plus at least one canopy tree per 5m of site width.	The proposal has the provision to plant at least five canopy trees within the development, with two trees within the front setback area.	Yes
Side & Rear Setbacks	A new wall not on or within 200mm of a rear boundary should be setback at least 5 metres.	Generally complies.	Yes- side setbacks. No – rear setback – see discussion below.
Private Open Space	A dwelling or residential building should have private open space consisting of an area of 75 square metres with one part of the private	Each dwelling contains a private open space of more than 75 square metres with a secluded private open space	Yes

	open space to consist of secluded private open space at the side of the rear of the dwelling or residential building within a minimum area of 35 square metres, with minimum dimension of 5 metres and convenient access from a living room.	area exceeding 35 square metres.	
Front Fence	Should not exceed 1.2 metres in height	No front fence proposed.	Yes

Rear setback

The schedule to the zone has the following objectives, relevant to the 5 metre rear setback requirement:

- To ensure new development transitions down in scale towards the creeks, respecting and reinforcing the natural topography.
- To ensure development is defined by its spacious and generous garden settings, tall canopy trees and consistent built form and setbacks.

The current approval provides for a varied rear setback ranging between 2.44 metres to 6 metres, due to the irregular nature of the site. This includes an area greater than 35m² with a minimum width of 5m provided towards the south-east corner of the site. This area will provide opportunity for the planting of canopy vegetation along the rear boundary.

As the rear setback maintains sufficient landscaping opportunities at the rear of the site and does not impose unreasonable visual bulk to surrounding properties, this variation is not considered of significant magnitude to warrant the refusal of the extension of time application.

Overall, building bulk and massing, landscaping opportunities, car parking, private open space and amenity impacts are considered appropriate and in keeping with the area and the objectives of the zone.

Whether the landowner is seeking to "warehouse" the permit.

Warehousing is the obtaining of permits with no intention of acting on them in the foreseeable future to obtain a windfall by selling the land. Whilst a considerable period of time has passed since the original approval, it is acknowledged that the COVID-19 pandemic since early 2020 has caused significant delays in building constructions. The increase in building costs is also a contributing factor to the delay in commencing any approved building works.

In light of the existing context, it would be difficult to show that the owner has no intention of commencing and completing the development.

Intervening circumstances bearing on the grant or refusal of the extension.

The development has been unable to commence within time due to delays owing to the COVID-19 pandemic and increased construction costs.

The total elapse of time.

The total elapse time to commence the development has been 6 years and 8 months. This is not fatal to the application in isolation, given the broad compliance with current planning policy.

Whether the time limit originally imposed was adequate.

The original time limit imposed was two years for commencement, which is a standard condition of approval and considered adequate for this development.

The economic burden imposed on the landowner by the permit.

It is not considered that any conditions of the permit would have placed additional economic burden that could have affected the commencement of construction. The conditions are standard for this sort of development.

The probability of a permit issuing should a fresh application be made.

It is likely that a permit would issue should a fresh application be made, considering the proposal is broadly consistent with current planning policy as discussed above. Some changes would be required to accommodate new policy changes, including increasing garden area by 1% and increasing the rear setback.

However, it is considered that these changes would easily be accommodated on the site.

CONCLUSION:

It is considered appropriate to grant a further extension of time to the permit.

The proposal on balance meets the tests established in the Supreme Court decision *Kantor v Murrindindi Shire Council (1997)*, including consistency with current planning policy objectives. The development outcome is appropriate, the built form is consistent with the neighbourhood character and objectives of the zone.

It is recommended the Council approves an extension of two years for the commencement of the development until 19 August 2025; and completion to 19 August 2027. However, considering the elapsed time, the applicant be advised a further extension of time will likely not be granted.

