VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment division

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| planning and environment LIST | | vcat reference No. P1784/2018  Permit Application no. TPA/48622 |
| CATCHWORDS | | |
| Section 77 of the *Planning and Environment Act 1987*, Monash Planning Scheme, General Residential Zone Schedule 2, Townhouse development, Car parking, Neighbourhood Character. | | |
| APPLICANT | Clayton Gardens Pty Ltd | |
| responsible authority | Monash City Council | |
| Referral Authority | Vic Roads - Metropolitan South East Region | |
| SUBJECT LAND | 115-119 Clayton Road, Oakleigh East | |
| WHERE HELD | Melbourne | |
| BEFORE | Tracey Bilston-McGillen, Member | |
| HEARING TYPE | Hearing | |
| DATE OF HEARING | 7 October 2019 | |
| DATE OF ORDER | 17 October 2019 | |
| CITATION | Clayton Gardens Pty Ltd v Monash CC [2019] VCAT 1607 | |

# Order

1. Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by amending the permit preamble to read:

Construction of 15 dwellings (6 x 2 storey and 9 x 3 storey) and alteration of existing crossover in a road zone.

1. In application P1784/2018 the decision of the responsible authority is set aside.
2. In planning permit application TPA/48622 a permit is granted and directed to be issued for the land at 115-119 Clayton Road, Oakleigh East in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:

* Construction of 15 dwellings (6 x 2 storey and 9 x 3 storey) and alteration of existing crossover in a road zone.

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| **Tracey Bilston-McGillen**  **Member** |  |  |

# Appearances

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| For applicant | Ms Roz Wilson, Solicitor & Urban Planner. She called the following witnesses:   * Mr John Patrick, John Patrick landscape design. * Mr John-Paul Maina, traffic engineer, Impact. |
| For responsible authority | Mr David DeGiovanni, town planning consultant, David DeGiovanni town planning. |
| For referral authority | No Appearance. |

# Information

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| Description of proposal | Construction of 15 dwellings (6 x 2 storey and 9 x 3 storey) and alteration of existing crossover in a road zone. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit. |
| Zone and overlays | General Residential Zone Schedule 2 (**GRZ2**). |
| Permit requirements | Clause 32.08-6. A permit is required to construct two dwellings on a lot. |
| Key scheme policies and provisions | Clauses 15, 16, 18, 21.01, 21.04, 21.08, 22.01, 32.08, 52.06, 52.29, 55 and 65. |
| Land description | The review site comprises of three allotments 115, 117 and 119 Clayton Road, Oakleigh East. Combined the lots have a frontage to Clayton Road of 53.04 metres, a side boundary of 41 metres and an overall site area of 2,174 square metres.  A 1.83 metre wide easement extends along the rear boundary.  Each of the lots accommodate a single storey dwelling. There is a scattering of vegetation on the site.  Development adjoining the site residential comprising of two storey town house developments or single dwellings.  Clayton Road is a busy four lane road. |
| Tribunal inspection | I inspected the site and surrounds. |

# Reasons[[1]](#footnote-1)

## What is this proceeding about?

1. This is an application to review the Monash City Council’s (**Council**) decision to refuse to grant a planning permit for the development on 115-119 Clayton Road, Oakleigh East for 15 dwellings and alteration to an existing road zone Category 1. The five grounds of refusal raise matters of policy at clauses 21.04 and 22.01, clause 55, vehicle access and clause 52.06 and the landscape character of the area.
2. In summary, the key concern of Council was the proposed intensity of the development being three storeys, how the development respects the character of the area and matters of vehicle access to parking spaces within the site.
3. The applicant submitted that the proposed development achieves planning policy in that it is a site that is located within the Monash National Employment & Innovation Cluster (**MNEC**), is zoned GRZ2 and respects the emerging character of the area.
4. Having considered the submissions and inspected the site and surrounds, I have concluded that the proposed development is acceptable. The site is zoned and located within an area that is designated for some level of change and growth. My reasons are set out below.

## Context

1. Both the Council and the applicant provided detailed submissions regarding the policy framework applying to the site. Both parties outlined the background of amendment c125 noting that the amendment had been split into two parts. Part 1 was gazetted and included (as relevant to this site), the deletion of clauses 21.02 and 21.03 of the Municipal Strategic Statement (**MSS**) as the policies were consolidated into clause 21.01. Clause 21.01 includes the *Monash Housing Strategy 2014* as a reference document. The housing strategy includes the site within Category 3 ‘Residential Land within the MNEC’.
2. Part 2 of amendment c125 has not yet been approved. As Part 2 applies to the site, it is proposed to be rezoned to General Residential Zone Schedule 3. The timing of the approval of Part 2 of amendment c125 remains uncertain. The applicant provided a summary of Tribunal decisions discussing the weight to be given to amendment c125 and submitted that whilst it is a seriously entertained planning policy, it is still one that is undergoing review. Following a review of the Tribunal decisions provided, I agree with the applicant that previous Tribunal decisions have given the amendment ‘no weight’ through to ‘little weight’ given the further strategic work that has been recommended by the Panel. In this case, both Council and the applicant submitted that they have largely relied on the current policy and zoning of the land when assessing the proposed development due to the level of uncertainty of amendment c125 Part 2. I adopt this approach and have reached my decision primarily based on the current planning scheme policies and controls.
3. What does planning policy inform us about the direction of the site and surrounds?
4. Clause 21.01-2 identifies that the MNEC ‘contains a critical mass of leading education, health, research and commercial facilities’. The clause also describes the Garden City Character of the municipality noting that Monash is known for its garden city character, which is a highly valued characteristic.
5. Clause 21.04 locates the site in Character area Type B – ‘Character derived from 1945-1965 development, flat topography and a grid subdivision pattern’. The *Monash Housing Strategy 2014* locates the site Category 3 – Residential land is the MNEC. The housing objective for this area is for ‘Housing change and diversification’ and ‘Development will respond to the broader context, taking into account both commercial design and residential character as relevant’. The future character is identified as:

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.

The Cluster will develop to create a ‘campus feel’, through developments set in open garden settings, as well as less intense development that presents a uniform presential to the street (often attached).

Provision of more affordable accommodation will be important, and a diversity of dwelling sizes will be encouraged, especially within the vicinity of the university or public transport.

Landscaping treatment to the streetscape will be important, as the native canopy tree setting is a major element of the attractiveness of the area.

1. The residential outcome is identified as (as relevant):

Lower density unit and townhouse style development at the interface with surrounding residential areas.

Potential for lower to medium density apartment development predominantly residential streets subject to careful design.

On larger sites, in suitable locations, increased density may be appropriate, subject to careful design and the provision of appropriate landscape setbacks.

1. The GRZ2 purpose encourages a diversity of housing types and housing growth particularly in locations offering good access to services and transport as well as development that respects the neighbourhood character of the area.
2. This is an area where change has commenced and clearly the area is changing from single detached dwellings on a lot to one of townhouse development of varying intensity. I agree with Council that from my site inspection, I observed the predominant form of new housing to be two and three unit developments on a lot. However, planning policy encourages a diversity of housing. Providing more of the same does not meet planning policy objectives of diversity and affordable housing. Planning policy identifies that new built form will comprise of a larger footprint with apartment buildings, town house and unit development occurring. I am persuaded by the applicant that the provision of 15 townhouses offering a combination of two and three storeys and two, three and four bedrooms is a genuine attempt to offer a diversity of housing. I find that the proposed development is supported by planning policy.

## Neighbourhood character

1. A key concern of Council was the proposed form of development and its failure to respect the character of the area. Council put to me that the emerging two storey character is in the form of traditional townhouse developments with ground level open space. Council submitted that the site is flanked by such developments including a three unit development to west and a dual occupancy to the north. Council submits that the character of the western side of Clayton Road (including the site) is largely entrenched and therefore not likely to change significantly.
2. As I stated above, I agree with Council that this side of Clayton Road accommodates unit development, typically two and three units of a site, two storeys in height. I also agree that the eastern side of Clayton Road accommodates some more robust forms of development. However, unlike Council, I find that the proposed development will sit comfortably within the neighbourhood for the following reasons.
3. Council submitted that the streetscape presentation to Clayton Road is that of narrow terrace style dwellings, with framed elements and separate roof forms suggesting six terraces face the road. Council highlighted that the area has been and is continuing to be developed with housing that is wide across allotments. Clause 22.01 states that ‘Building spacings and setbacks off side boundaries maintain the spacing and rhythm of existing dwellings to respect the built form character of the streetscape’. The proposed development has adopted the layout of the individual lots and has designed each lot with a row of townhouses. A vehicle access point is provided between each row of townhouses. The façade as it presents to the street is a series of gable ends. As seen in Figure 1, whilst the development will read as part of an overall development of the site, the separation between each row of townhouses results in each row having a separate presence to Clayton Road. Respecting neighbourhood character does not mean that development must replicate what exists. I find the proposal has adopted the rhythm of separate lot frontages and has developed a unit across the width of each lot. I find that whilst the development is designed with gable ends, it remains a modest form of two storey to Clayton Road using materials found elsewhere in the neighbourhood.



Figure 1: Montage view of the proposed development from Clayton Road.

1. Council raised concern with the level of hard stand surface and built form that cantilevers, without commensurate landscaping to soften the building. First to the level of hardstand. I find the accessways are not dissimilar to what is provided in the examples of unit developments that Council has highlighted. I therefore do not share Council’s concern. As to the landscaping, Council highlighted the design principles found in clause 22.01 which read:

Open space areas be of sufficient size and distribution that they encourage the planting of new canopy trees.

Landscaping be provided down both sides of driveways to reduce the visual impact of development.

1. Council submitted that the intent behind the varied Standard B28 is to implement landscaping outcomes that support the garden city principles imbedded in the Monash Planning Scheme. As an example of what Council is attempting to achieve, I was directed to a development at 123-125 Clayton Road. This is a five unit development. This example is a modest two storey unit development. However, policy encourages diversity and providing more of the same fails to achieve diversity.
2. Council put to me that the third level is visually dominating to Clayton Road due to its box like design. I am not persuaded by this submission. The third level is located within the centre of the site and is set back approximately 14 metres from Clayton Road. This is a generous setback and whilst the third level will be more visible from the oblique angle, I consider it to be a recessive form and will not be visually dominating to Clayton Road.



Landscape Plan prepared by John Patrick.

1. A landscape plan has been prepared by Mr Patrick (above) detailing the provision of a total of 14 trees including six native canopy trees within the generous front setback, three to the northern boundary and five to the western interface. The planting also includes gardens and underplanting within the private open space of units 5, 10 and 15 as well as in the front courtyard spaces to units 2, 3, 4, 12, 13 and 14. I am satisfied that the landscape plan prepared by Mr Patrick will contribute to the landscaping of the site and area. The landscaping concept provides a more intense level of planting, when compared to what is found in developments surrounding the site. The landscape concept is a genuine attempt to meet the landscape values identified in planning policy.
2. Council further criticised the garden hoops provided within the driveways/accessways noting they are subject to cantilevered forms above which limit the ability for planting. I am persuaded by the evidence of Mr Patrick and by the applicant, that the garden hoops have taken into account the cantilevered built form and have provided trees at the appropriate cut out area. I am also satisfied that overall, the planting provided is generous.

## Car parking

1. Council submitted that the main road location demands a well resolved car parking layout that is safe and efficient for its users. The key concern of Council includes the number of car space movements that conflict with planting zones, the need for correcting movements to access some spaces including the visitor space no. 15 and the southern driveway entry point.
2. The traffic evidence of Mr Maina provided swept paths for access to the garages as well as visitor car spaces. The swept paths, based on a B85 vehicle, detail that access to some spaces requires a correcting move. I am persuaded by the evidence of Mr Maina that in the case of the resident car spaces, a correcting move is generally accepted as the spaces are for regular uses i.e. residents of the units. They become familiar with the access. As to the visitor car space (adjoining unit 15), I am also persuaded that in this case, a correcting move is acceptable. This is given the anticipated low usage rate of this space. This visitor car space is the only one accessed from the northern driveway and it is likely that regular visitors will become familiar with it.
3. Mr Maina in his evidence suggested that the planting island/hoop located between units 14 and 15 be reduced in size. This is due to the fact that some car movements may require the car to overhang or use part of the hoop. These hoops provide green to the accessway. I therefore consider that to ensure that the level of green/garden area is maintained, this hoop can be retained as proposed but provided as a grasscrete or another permeable surface treatment. This ensures that it remains a permeable area, provides greenery but in the event that a car needs to edge over the hoop, it is acceptable.
4. Further concern was raised regarding the appropriateness of the southern vehicle crossing, not being at a 90 degree angle. I make the observation that Council’s Traffic Engineers or Vic Roads did not raise a concern with this issue. I am persuaded by Mr Maina that the proposed access is acceptable. Mr Maina submitted that the development will generate a total of 7 vehicle movements per hour (peak hour) and that the likelihood of conflict is minimal.

## Amenity

1. Council submitted that being in an area where there is a strategic direction for changes, does not justify inferior internal amenity outcomes. A number of amenity concerns were raised, which I will address.
2. Balconies looking out to Clayton Road – I do not share Council’s concern. Units 1, 6 and 11 are provided with a garden area within the front setback and a first floor balcony. It is not uncommon for balconies to front main roads.
3. Balconies of units 2, 3 and 4 look towards the rear of units 6 to 10 which is only 4.6 metres. The balconies of units 2, 3 and 4 are orientated to the north and do not require screening. I consider a north facing balcony with a balustrade of 1 metre is appropriate. This is also the case for balconies of units 7, 8 and 9 overlook units 11 to 15. Again, I do not share Council’s concerns given that, with the exception of unit 14, the balconies are north facing and do not require screening. Unit 14, in part requires screening to prevent overlooking to the habitable room window of the adjoining unit at 2/113 Clayton Road.
4. The living zone is compact in units 5 and 15 given they are four bedrooms. I agree that the living area is compact in these units relative to the number of bedrooms, but do not consider this a reason to refuse the development. It may be that one of the upper level bedrooms is used as a study or retreat adding to the living area available.
5. The amenity afforded to units 6 to 10 is poor. Council submitted that their front pedestrian entry points and front doors look onto a continuous row of five garages with no doorways or habitable room windows providing visual relief. Council further put that the layout creates noise issues and potential conflict between pedestrians and motorists. The proposed is similar to a mews style development. The entrances to units 7 to 10 are well designed with windows to studies providing for passive surveillance and a small garden area. As to issues of potential pedestrian conflict, this arrangement is not dissimilar to the provision of two or three units on a lot where pedestrians share the driveway with vehicles. I am persuaded by the applicant, that the proposed arrangement is acceptable.

## Conclusion

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

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| **Tracey Bilston-McGillen**  **Member** |  |  |

# Appendix A – Permit Conditions

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| Permit Application No | TPA/48622 |
| Land | 115-119 Clayton Road, Oakleigh East. |

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| What the permit allowS |
| In accordance with the endorsed plans:   * Construction of 15 dwellings (6 x 2 storey and 9 x 3 storey) and alteration of existing crossover in a road zone. |

## Conditions

1. Before the development starts, two copies of amended plans drawn to scale and dimensioned, must be submitted to and approved by the Responsible Authority. When approved the plans will then form part of the permit. The plans must be generally in accordance with the decision plans but modified to show:
   1. Provide a corner splay or area at least 50% clear of visual obstructions (or with a height of less than 1.2m), which may include adjacent landscape areas with a height of less than 0.9m, extending at least 2.0m long x 2.5m deep (within the property) to both sides of each vehicle crossing to provide a clear view of pedestrians on the footpath of the frontage road.
   2. The location of tree protection fencing around the nature strip trees.
   3. The western landscape hoop located between units 14 and 15 is to be constructed using grasscrete or another permeable surface treatment.
2. The development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.

### VicRoads’ Conditions (3 – 7)

1. Prior to the commencement of use of the development hereby permitted, sealed access crossovers and driveways, with edges of the crossovers angled at 60 degrees to the road reserve boundary at least for the first 3 metres from the edge of the road, must be constructed to the satisfaction of the Responsible Authority and at no cost to VicRoads.
2. Prior to the commencement of the use or occupation of the development, all disused or redundant vehicle crossings must be removed and the area reinstated to the satisfaction of the Responsible Authority and at no cost to VicRoads.
3. Prior to the commencement of the use or the occupation of the buildings or works hereby approved, the access crossover and associated works must be provided and available for use.
4. Vehicles must enter and exit the land in a forward direction at all times.
5. The level of the footpaths must not be lowered or altered in any way to facilitate access to the site.
6. Prior to the commencement of any buildings or demolition works, a Sustainable Design Assessment [SDA] must be submitted to and approved by the Responsible Authority. All works must be undertaken in accordance with the submitted and endorsed SDA to the satisfaction of the Responsible Authority.
7. Tree protection fencing that accords with AS.4970 to be erected around the two nature strip trees prior to the commencement of works. This fencing is not to be removed until completion of works to the satisfaction of the Responsible Authority.
8. Fence post locations are to be determined by a qualified arborist and noted on the endorsed plans to the satisfaction of the Responsible Authority.
9. 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 prior to the commencement of any works. The plan must be generally in accordance with the plan prepared by John Patrick Landscape Design dated Feb 2019 and show the proposed landscape treatment of the site including:-
   1. the location of all existing trees and other vegetation to be retained on site.
   2. provision of canopy trees with spreading crowns located throughout the site including the major open space areas of the development. The planting provision is to include tall trees that when grown will positively contribute to the upper level tree canopy of the area.
   3. planting to soften the appearance of hard surface areas such as driveways and other paved areas.
   4. a schedule of all proposed trees, shrubs and ground cover, which will include the size of all plants (at planting and at maturity), their location, botanical names and the location of all areas to be covered by grass, lawn, mulch or other surface material (semi-mature plant species are to be provided).
   5. the location and details of all fencing.
   6. the extent of any cut, fill, embankments or retaining walls associated with the landscape treatment of the site.
   7. details of all proposed hard surface materials including pathways, patio or decked areas.
   8. coloured concrete, paving or the like is to be utilised in the driveways.

When approved the plan will be endorsed and will then form part of the permit.

1. Before the occupation 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 then maintained to the satisfaction of the Responsible Authority.
2. The walls facing the boundary of adjoining properties shall be cleaned and finished in a manner to the satisfaction of the Responsible Authority.
3. The driveway and parking area is to be constructed to the satisfaction of the responsible authority.
4. The new vehicle crossing must be constructed in accordance with Council standards.
5. Any existing redundant crossings are to be removed and replaced with nature strip and kerb and channel to Council standards.
6. All on-site stormwater is to be collected from hard surface areas and must not be allowed to flow uncontrolled into adjoining properties.
7. Stormwater discharge is to be detained on site to the predevelopment level of peak stormwater discharge. Approval of any detention system is required from Council prior to works commencing.
8. Any new drainage work within road reserve requires the approval of the Council’s Engineering Division prior to the works commencing.
9. Once the development has started it must be continued, completed and then be maintained to the satisfaction of the Responsible Authority.
10. This permit as it relates to development will expire if one of the following circumstances applies:
    1. The development is not started within two (2) years of the issue date of this permit.
    2. The development is not completed within four (4) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987,* an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

### VicRoads’ Note:

No work must be commenced in, on, under or over the road reserve without having first obtained all necessary approval under the Road Management Act 2004, the Road Safety Act 1986, and any other relevant acts or regulations created under those Acts.

**– End of conditions –**

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. [↑](#footnote-ref-1)