VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P387/2020  Permit Application no. TPA/47231 |

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| APPLICANT | Martin Xu |
| responsible authority | Monash City Council |
| SUBJECT LAND | 13-15 Packham Crescent GLEN WAVERLEY VIC 3150 |
| WHERE HELD | Melbourne |
| BEFORE | Judith Perlstein, Member |
| HEARING TYPE | Hearing[[1]](#footnote-1) |
| DATE OF HEARING | 3 July 2020 |
| DATE OF ORDER | 6 July 2020 |
| CITATION | Xu v Monash CC [2020] VCAT 736 |

# Order

### Amend VCAT application

1. Pursuant to section 127 of the *Victorian Civil & Administrative Tribunal Act 1998*, the application is amended from an application under section 81(1) of *the Planning and Environment Act 1987* to extend time within which the development permitted under Permit TPA/47231 may be commenced, to an application under section 81(1) of *the Planning and Environment Act 1987* to extend time within which the development permitted under Permit TPA/47231 may be commenced and may be completed.

### Orders

1. The decision of the responsible authority is set aside.
2. Pursuant to section 85(1)(f) of the *Planning and Environment Act 1987*, I direct that:
   1. the time within which the development described in Permit TPA/47231 is to be commenced is extended to 6 July 2021.
   2. the time within which the development is to be completed is extended to 6 July 2023.

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| **Judith Perlstein Member** |  |  |

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

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| For applicant | Russell Hocking of CityShire Planning P/L. |
| For responsible authority | James Turner, Principal Planner – Appeals Advisor of the City of Monash. |

# Information

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| Description of proposal | Permit issued for development of five double-storey dwellings. |
| Nature of proceeding | Application under section 81(1) of the *Planning and Environment Act 1987* – to extend time to commence and complete development. |
| Planning scheme | Monash Planning Scheme. |

# Reasons[[3]](#footnote-3)

### Overview

1. This is an application pursuant to section 81(1)(a) of the *Planning and Environment Act 1987 (Vic)* for review of the council’s refusal to grant an extension to Permit TPA/47231 for development of the land at 13-15 Packham Crescent, Glen Waverley, for five double-storey dwellings.
2. Although the original application was for a two year extension to commence development pursuant to the permit, the applicant, in its written submissions, confirmed that a 12 month extension from the date of the Tribunal Order would be sufficient.
3. The council determined to refuse the application for extension on the following grounds:

* The proposed extension of time is not considered appropriate having regard to the neighbourhood character objectives and design requirements of the General Residential Zone – Schedule 3 (**GRZ3**).
* The development does not provide sufficient rear setbacks as required by the GRZ3.
* The requested extension of time cannot be supported as Council would not support the development if a new application were to be made.

1. The applicant submits that it intends to commence development of the land and to do so within 12 months of the permit being extended but that it was unable to do so within the initial two year period, and that the changes to the Monash Planning Scheme (**Scheme**) affecting the land were considered in the initial application and do not warrant refusal of an extension.
2. Both parties referred to the decision of *Kantor v Murrindindi Shire Council[[4]](#footnote-4)* and the principles contained within it relating to extensions of time.
3. Having considered the submissions and evidence of the parties and having had regard to the Scheme and the relevant Court and Tribunal decisions, I find that an extension of time should be granted for commencement and completion[[5]](#footnote-5) of development pursuant to the permit. My reasons follow.

### Relevant principles to consider

1. I adopt the well-established *Kantor* principles for assessing applications for extensions of time, generally summarised as follows:
   1. whether there has been a change of planning policy;
   2. whether the landowner is seeking to “warehouse” the permit;
   3. intervening circumstances as bearing upon grant or refusal;
   4. the total elapse of time;
   5. whether the time limit originally imposed was adequate;
   6. the economic burden imposed on the landowner by the permit; and
   7. the probability of a permit issuing should a fresh application be made.[[6]](#footnote-6)
2. Additional principles were articulated in the decisionof *AMV Homes Pty Ltd v Moreland City Council[[7]](#footnote-7)*. I consider them to be a useful addition to the *Kantor* principles for the purposes of an assessment of whether an extension of time should be granted. They are:
   1. An applicant should advance good reasons as to why an extension should be granted; a request should not be approved simply because it has been asked for.
   2. The Kantor “tests” are not mandatory nor exhaustive.
   3. There may be other relevant considerations to those articulated in Kantor, including matters of natural justice and equity.
   4. That the approved development is now prohibited does not mandate a decision refusing to extend the time to commence a development. However, it is something that would usually be expected to be one factor weighing against an extension of time.
   5. Each case needs to be decided on its own facts and circumstances including whether and how the development in question would undermine or offend the changed policy or planning control regime.[[8]](#footnote-8)
3. With respect to the application currently before the Tribunal, it is agreed that the change in planning policy and the probability of a permit issuing should a fresh application be made are the relevant *Kantor* factors to consider.
4. I consider that the *AMV Homes* principle of ‘each case needs to be decided on its own facts and circumstances including whether and how the development in question would undermine or offend the changed policy or planning control regime’ aids in the consideration of this application.

### What is the change in planning policy?

1. Amendment VC110 was introduced on 27 March 2017, after the permit application was lodged but before it was determined. Amendment VC110 introduced the minimum garden area requirement into the Scheme but it was not required to be considered in the application for permit due to transitional provisions contained within the zone. However, the officer report recommending approval of the application confirmed that the 35.1% of garden area proposed for the site did meet the garden area requirement of 35%.
2. Since the grant of the permit, Amendment C125 (Part 2) (**Part 2**) was introduced into the Scheme in November 2019. The site is now zoned GRZ3 where it was previously included in Schedule 2 to the GRZ. Schedule 3 covers ‘Garden City Suburbs’ and several variations to the clause 55 standards are included. The key change with respect to this application relates to side and rear setbacks and provides that:

A new wall not on or within 200mm of a rear boundary should be set back at least 5 metres.

1. The council’s submission also refers to changes to the local planning policy framework through the gazettal of Part 2. These include the introduction of an amended clause 21.04 (residential development) and clause 22.01 (residential development and character policy).
2. The council contends that the gazettal of Part 2 represents a significant change in planning policy that would result in the refusal of a planning permit if this development was proposed now. The council relies heavily on the garden city character of the area including the ‘pleasant leafy framework’, generous setbacks, ‘rear setbacks that support a green corridor’ and the important contribution of landscaping to the garden city character.[[9]](#footnote-9)
3. The council contends that:[[10]](#footnote-10)

As well as failing to meet the 5m rear setback sought by the GRZ3 …the proposal [is] considered to be an unsatisfactory response to current policy guidance as there is insufficient space for landscaping within the proposed development to help integrate the development into the neighbourhood and achieve the green corridor sought by policy.

### What is the effect of the change in policy?

1. As pointed out by the applicant, the changes made by Part 2 were considered in the assessment of all planning permit applications received by the council from 2016 onwards. With respect to this application, this is evident in the initial officer’s report which includes the following reference to the, at the time, adopted but not gazetted amendment:

Under Council adopted Amendment C125 to the Monash Planning Scheme, the land would be zoned General Residential Zone – Schedule 3. Whilst the proposed development has greater compliance with the existing zoning it would still be consistent with desired future character statement for the area, which recognises an increase in housing density.[[11]](#footnote-11)

1. The report also refers to the Monash Housing Strategy 2014 which includes the site within the ‘Garden City Suburbs’.
2. In addition, the importance of the garden city character within the City of Monash was clear throughout the Scheme even before the introduction of Part 2 and was an element considered in applications throughout the municipality. In the council officer’s assessment of the initial application, the siting of the development to the rear and the requirement for a ‘green corridor’ was specifically addressed:

The proposed siting of the development deals appropriately with the orientation of the site in terms of side and rear setbacks. Although a minimum 3.0m setback should apply along the rear boundary to the ground floor and a minimum 3.5m to the first floor to Dwelling 5 to maintain a green corridor to the rear of the site.[[12]](#footnote-12)

1. Conditions 1(a) and (b) were applied to the permit (and not contested) requiring these minimum setbacks. Condition 4 requires a landscape plan to be prepared and approved and provision of canopy trees with spreading crowns located throughout the site.
2. The rear (eastern) setback spans 68 metres and abuts a 15 metre wide Melbourne Water Pipe Track. The pipe track abuts the David Crawford Reserve to its east, which is a grassed area of public open space with several large canopy trees.
3. The applicant has explained that, once the plans are amended to include the condition 1 changes, there will be varied setbacks from the rear boundary as follows:
   1. minimum of 3 metre setback - 49.7% of the rear boundary;
   2. minimum of 5 metre setback - 32.3% of the rear boundary; and
   3. no built form – 18% of the rear boundary.
4. In this context, the policy imperatives of garden character, landscaping, green corridors and vegetated rear setbacks are met but the permitted development does not provide a minimum 5 metres setback along the entire rear boundary.
5. Interestingly, the variation to standard B17 provides that ‘A new wall ***not on or within 200mm*** of a rear boundary ***should*** be set back at least 5 metres’. It does not mandate a 5 metre setback and also does not prohibit built form to the boundary
6. Although the council submits that it would not approve the development because of the Scheme changes, it is not a development that would be prohibited if a new application was now lodged. Additionally, I consider it relevant that the changes to the Scheme that have occurred since the grant of the permit were changes proposed and understood at the time the permit was granted and that, in determining to grant the initial permit, the council considered the development to be ‘consistent with desired future character statement for the area’.
7. When having regard to the context of this development on this site and the factors considered in determining the original application, I do not consider that the development ‘would undermine or offend the changed policy or planning control regime’ in any way. I consider that, despite the council’s submission with respect to the extension of time, and taking into account the changes to the Scheme, there would be a high probability of a permit issuing should a fresh application be made.
8. In conclusion, therefore, I find that an extension of time should be granted for 12 months to allow for commencement and completion of development pursuant to the permit.

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| **Judith Perlstein Member** |  |  |

1. Due to the Covid-19 pandemic and with the agreement the parties, the hearing was conducted entirely on the basis of documents, without any physical appearance by the parties or their representatives, pursuant to s 100(2) of the *Victorian Civil and Administrative Tribunal Act 1998*. [↑](#footnote-ref-1)
2. This hearing took place ‘on the papers’. As such, parties did not appear in person. The list of appearances includes details of the submissions filed in the proceeding. [↑](#footnote-ref-2)
3. The submissions of the parties 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-3)
4. (1997) 18 AATR 285 (***Kantor***). [↑](#footnote-ref-4)
5. In reviewing the application form lodged with the Tribunal in Application TPA/47231, I note that in the section requesting details of the proposed extension of time, the applicant has ticked the box to extend time within which ‘the development may be commenced’ but has not ticked the box requesting an extension of the time within which ‘the development may be completed’.

   The decision to grant an extension of time to commence development pursuant to the permit will not be effective if an extension of time to complete development is not also granted. I have therefore included orders to amend the application to include completion of the development. [↑](#footnote-ref-5)
6. *Kantor* at [287] [↑](#footnote-ref-6)
7. (Includes Summary) (Red Dot) [2015] VCAT 1699 (***AMV Homes***). [↑](#footnote-ref-7)
8. *AMV Homes* at [7]. [↑](#footnote-ref-8)
9. In its written submissions as [7.6-7.7]. [↑](#footnote-ref-9)
10. In its written submissions as [7.8]. [↑](#footnote-ref-10)
11. At page 10. [↑](#footnote-ref-11)
12. This recommendation was included in the permit conditions, which were not disputed by the applicant. [↑](#footnote-ref-12)