VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P1324/2020  Permit Application no. TPA/51166 |
| CATCHWORDS | |
| Application pursuant to Section 80 of the *Planning & Environment Act 1987*; Monash Planning Scheme; General Residential Zone; two dwellings; permit conditions; size of dwellings; tension between substantial change and neighbourhood character | |

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| **Applicant** | Leo Zhou |

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| **Responsible Authority** | Monash City Council |

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| SUBJECT LAND | 4 Longbourne Avenue  NOTTING HILL 3168 |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 30 April 2021 |
| DATE OF ORDER | 7 May 2021 |
| CITATION | Zhou v Monash CC [2021] VCAT 452 |

# Order

1. The decision of the responsible authority is varied.
2. The Tribunal directs that planning permit TPA/51166 must contain the conditions set out in planning permit TPA/51166 issued by the responsible authority on 20 July 2020 with the following modifications:
   1. Condition 1 is amended to read:

1 Before the development starts, plans drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans submitted with the Prepared by Leo Zhou dated 4/12/2020 Revision B but modified to show:

a) The kitchen window located along the ground floor northern elevation of Dwelling 1 to comply with the provisions of Standard B27- Daylight to new windows.

b) The bedroom 4 window located on the western elevation of Dwelling 1 to be provided with fixed obscure glazing up to a height of 1.7m above the finished floor level.

c) The ground floor wall of Dwelling 2 to be setback a minimum of 5m from the western boundary and the first floor wall of Dwelling 2 to be setback a minimum of 6m from the western boundary.

d) A notation of 6 cubic metres for the storage shed for Dwelling 2.

e) The bedroom 4 and retreat window located on the northern elevation of Dwelling 2 to be provided with fixed obscure glazing up to a height of 1.7m above the finished floor level.

f) A note on the plans that adjoining trees, including street trees are to be protected as per the recommendations of the Arborist report prepared by Sherrin Bishop dated 9 March 2020 or any further addendums.

g) A notation that all walls will be constructed of brick or brick veneer. Any alternate materials such as rendering or feature cladding to be placed on top of brick to comply with Covenant B091295.

h) The location and design of any proposed electricity supply meter boxes. The electricity supply meter boxes must be located at a distance from the street which is at or behind the setback alignment of buildings on the site or in compliance with Council’s “Guide to Electricity Supply Meter Boxes in Monash”.

i) The development must be provided with a corner splay or area at least 50% clear of visual obstruction (or with a height of less than 1.2m) extending at least 2.0 metres long x 2.5 metres deep (within the property) on both sides of each vehicle crossing to provide a clear view of pedestrians on the footpath of the frontage road.

j) A double door (minimum width 1.8 metres) is to be installed on the rear of the unit 2 garage to allow for drainage maintenance requests.

1. The responsible authority is directed to issue a modified planning permit in accordance with this order.

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| **Christopher Harty**  **Member** |  |  |

# Appearances

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| For applicant | Mr Russell Hocking, Town Planner from CityShire Planning Pty Ltd |
| For responsible authority | Mr Peter English, Town Planner from Peter English and Associates Pty Ltd  James Turner and Michael Edwards from Monash City Council observed |

# Information

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| Description of proposal | Construction of two (2) double storey dwellings. |
| Nature of proceeding | Application under section 80 of the *Planning and Environment Act 1987* – to review the conditions contained in the permit. |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone Schedule 3 – *Garden City Suburbs* (**GRZ3**)  No overlays |
| Permit requirements | Clause 32.08-6 to construct two or more dwellings on a lot |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 21.01, 21.04, 22.01, 22.05, 32.08, 52.06, 55, 65 and 71.02 |
| Land description | The land at 4 Longbourne Avenue, Notting Hill (site) is located on the north-western corner of Longbourne Avenue and Rosings Court. It is irregular in shape, relatively flat, with frontage to Longbourne Avenue of 17.12 metres and a depth of 27.94 metres to Rosings Court. The overall site area is 690 square metres. The site is occupied by a single storey dwelling with crossover to Rosings Court. There is no significant vegetation on the site apart from garden plantings.  The surrounding area is residential characterised predominantly by single storey dwellings. Infill development has begun to occur in the broader area including large double storey-built form and townhouse development, however the dominant form in the immediate neighbourhood comprises single storey detached dwellings. |
| Tribunal inspection | 6 May 2021 unaccompanied |

# Reasons[[1]](#footnote-2)

## What is this proceeding about?

1. Planning Permit No. TPA/51166 was issued by Monash City Council (**Council**) on 20 July 2020 for the construction of two (2) double storey dwellings at 4 Longbourne Avenue, Notting Hill (**site**).
2. The proposed dwellings are described by Council as very large with each containing seven (7) bedrooms with ensuites. It included Condition 1 on the permit requiring amended plans to show various changes to the design to reduce the size and visual bulk and form of the two dwellings.
3. Council says that, rather than refusing to grant the permit, it sought to impose the condition to reduce the overall size of the two dwellings. It says this would ensure a better fit with the garden city suburbs character of the neighbourhood and achieve a more respectful built form transition to the neighbouring single storey detached dwellings that abut the site to the north and west.
4. Leo Zhou (**applicant**) seeks a review of the following parts of Condition 1 by the Tribunal:

a) The upper level separation between Dwelling 1 and Dwelling 2 to be increased to a minimum of 6m.

b) The upper storey southern wall of bedroom 7, Dwelling 1, be setback an additional 1.9m.

c) The eastern wall of bedroom 7, Dwelling 1, be setback 800mm

d) The lower storey parapet walls include a 500mm eave for both dwellings.

e) The eastern portion of the bedroom 6, Dwelling 1 wall adjacent to the Ensuite for bedroom 6 be deleted

f) Ensuite 6, Dwelling 1 be deleted.

g) Bedroom 3 and Ensuite 3 of Dwelling 1 to be deleted.

h) A retreat area with a minimum width of 3.6m and a minimum area of 12sqm to be provided within the upper storey of Dwelling 1 with any subsequent screening measures to windows.

i) Windows located along the ground floor northern elevation of Dwelling 1 to comply with the provisions of Standard B27- Daylight to new windows.

j) The bedroom 4 window located on the western elevation of Dwelling 1 to be provided with fixed obscure glazing upto a height of 1.7m above the finished floor level.

k) The eastern wall of Bedroom 6, Dwelling 2 be setback a further 900mm from the eastern boundary.

l) The western wall of Dwelling 2 to be setback a minimum of 6m from the western boundary.

m) A retreat area with a minimum width of 3.6m and a minimum area of 12sqm to be provided within the upper storey of Dwelling 2 with any subsequent screening measures to windows.

n) The laundry areas for Dwelling 2 to be relocated to within the dwelling to the satisfaction of the Responsible Authority.

o) 6 cubic metres of storage space for Dwelling 2 which is to be located outside the secluded private open space area.

p) The Bedroom 4 and Retreat window located on the northern elevation of Dwelling 2 to be provided with fixed obscure glazing up to a height of 1.7m above the finished floor level.

1. The applicant says Council gave no forewarning about the condition and considers its decision is inconsistent with the direction in the Monash Planning Scheme for substantial change in an area proximate to the Monash National Employment Cluster. It says the extent of changes sought are unnecessary and does not achieve an improved outcome regarding the garden city suburbs neighbourhood character.

## What are the key issues?

1. Within the context of this review the issues relate generally to the tension between policy outcomes that encourages change in residential areas close to the Monash National Employment Cluster whilst respecting the garden city suburbs neighbourhood character.
2. Having heard the submissions and inspected the site and locality, the key issues arising from this proposal are:

* Whether the proposal appropriately responds to streetscape character?
* Are impacts to the neighbouring property to the west unreasonable?
* Are impacts on internal amenity acceptable?
* Is overlooking an issue?
* Are internal services appropriately provided?

1. In approaching this matter, I have grouped the sub-conditions of Condition 1 under each of the above questions.
2. I must decide whether the contested sub-conditions of Condition 1 should be amended, and will any change produce an acceptable outcome having regard to the relevant policies and provisions in the Monash Planning Scheme. Net community benefit is central in reaching a conclusion. Clause 71.02-3 - *Integrated Decision Making* of the planning scheme requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.
3. I must decide whether Conditions 1(a), 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), 1(h), 1(i), 1(j), 1(k), 1(l), 1(m), 1(n), 1(o), and 1(p) should be deleted, retained or amended. Having considered all submissions presented with regards to the applicable policies and provisions of the Monash Planning Scheme and inspected the site and locality, I have decided to vary the decision of Council and that a permit is granted subject to an amended Condition 1. My reasons follow.

## Whether the proposal appropriately responds to streetscape character?

1. With respect to streetscape character, Conditions 1(a), (b), (c), (d), (e), (f), (g) and (k) are relevant.
2. These conditions (apart from 1(d) which relates to eaves for the ground storey) would result in a reduction in the upper-level footprint of the dwellings with the loss of some bedrooms whilst retaining large living areas.
3. This matter reflects a tension that arises from planning policy in the Monash Planning Scheme over this site. Tension lies between encouraging more intense residential development in an area close to the Monash National Employment Cluster and respecting Council’s garden city suburbs neighbourhood character.
4. The site is a corner location in the General Residential Zone Schedule 3 – *Garden City Suburbs* (**GRZ3**) with no overlays. It is relatively large with a combined road frontage of over 100 metres. Council says this makes any redevelopment of the site likely to have a high exposure to the streetscape in this neighbourhood.
5. Schedule 3 to the GRZ and policies at Clause 15.01-5S - *Neighbourhood Character*, Clause 21.04 - *Residential Development*, Clause 22.01 - *Residential Development and Character Policy* and Clause 22.05 - *Tree Conservation Policy* all place a strong emphasis on respecting, enhancing and positively contributing to neighbourhood character and particularly to garden city character. Much of this relates to ensuring space for landscaping including the retention or planting of canopy trees.
6. Regarding policy, there is tension and some uncertainty highlighted between Map 3 - *Residential development framework map* in Clause 21.04-1 which shows the site located within Category 3 - *Residential land in the Monash National Employment Cluster* and Map 1 - *Residential character types* in Clause 22.01-4, which shows the site located within *Garden City Suburbs Northern Areas*. The former encourages future residential development, the latter encourages incremental change subject to considering neighbourhood and garden city character.
7. Council and the applicant were at odds regarding how this should be considered, with Council saying there is a need for some balance to be exercised when redeveloping residential land in the Monash National Employment Cluster area with the garden city suburbs neighbourhood character. In contrast, the applicant considers the presence of the site within the area of the Monash National Employment Cluster reflects an expectation for substantial change to occur.
8. The Monash Planning Scheme recognises, which I acknowledge, the garden city character and its importance in Monash. Much of this character is made up from leafy canopy trees either in the street or in private gardens.
9. Relevantly, the policy under Clause 21.04-1 with respect to neighbourhood character includes the statement that:

New development should be carefully designed and sited to satisfy the intent of the preferred future character statement for each residential character type as identified. Garden City character, within all residential areas should be maintained and enhanced.

1. Council says the concept and design of the proposal is generally acceptable. However, the overall size of the buildings results in an unreasonable impact on both the streetscape and neighbouring properties. The existing streetscape in Longbourne Avenue and Rosings Court generally incorporates low scale single storey detached dwellings with reasonable setbacks with garden landscaping. Canopy trees are present both within front and rear yards and as street trees. Council anticipates more intense development; however, it considers that, what is proposed, is at odds with the prevailing character.
2. Council says the overall area of the site at 690 square metres and with a total built form footprint of 558 square metres is representative of an overlay dominant and bulky development that is over scaled in the context of what surrounds the site. Hence, the requirements for changes to be made to the approved development via Condition 1 of the permit.
3. The effect of Conditions 1 (a), (b), (c), (e), (f), (g) and (k) would be to:

* Minimise the level of bulk at the upper level of each dwelling.
* Provide for improved separation between the upper levels of the dwellings from each other and the streetscape and side and rear boundaries.
* Provide a better level of transition between the development and the neighbouring single storey dwellings.
* Reduce the upper floor area to increase the visibility of the ground floor roof component and assist in separation between the upper and lower elements of the development.

1. Condition 1(d) would seek to provide a more consistent form to the edge of the lower-level roofline between the dwellings.
2. The applicant says such changes are unnecessary because the impact on neighbourhood character has already been addressed through compliance of the proposal with the standards set out in Clause 55 of the planning scheme as well the variations to standards under Schedule 3 to the GRZ. The applicant considers this level of compliance, particularly with respect to site coverage, site permeability, front, side, and rear setbacks[[2]](#footnote-3) and garden areas allows sufficient space for landscaping including canopy trees to demonstrate a respectful response to the garden city suburbs neighbourhood character.
3. I note that the site is relatively large and located on a corner. Such site characteristics, combined with its location near the Monash National Employment Cluster, makes it a candidate for some degree of change in built form. The applicant says there is no numerical indication of overdevelopment. The proposal is for two large dwellings, as apart from possibly four smaller dwellings. I do not see this as problematic given the planning scheme’s recognition of the site’s location.
4. I do not agree with Conditions 1(a), (b), (c), (d), (e), (f), (g) and (k) and they are deleted. They appear to have been imposed by Council to reduce the upper floor level and alter the ground floor level parapet wall and roofline when the design of these elements show compliance with the requirements of Clause 55 and the GRZ3. I find this does not improve on the level of respect for the streetscape character of the neighbourhood than what the current design provides for.
5. The upper-level separation of 4 metres between Dwellings 1 and 2 is reasonable. It provides an adequate sense of break between the two dwellings and does not warrant being increased to 6 metres as proposed by Condition 1(a).
6. The setbacks from Longbourne Avenue of 7.7 metres for Dwelling 1 and 3.6 metres for Dwelling 1 and 3.8 metres for Dwelling 2 from Rosings Court are reasonable. The setbacks provide space for landscaping including planting of canopy trees. I find this is consistent with the garden city suburbs policy of the planning scheme and an appropriate response to streetscape character.

## Are impacts to the neighbouring property to the west unreasonable?

1. Condition 1(l) requires the setback of the western wall of Dwelling 2 to be increased to 6 metres. I note that the condition is not specific with respect to ground or first floor walls. Council and the applicant made submissions on various aspects of the development.
2. Council says the purpose of this increase is to simply push back the upper level further away from the common boundary and increase the level of articulation and improve the transition of built form with the neighbouring dwelling and its private open space.
3. The applicant considers this excessive ‘tinkering’ with the design and an attempt to reduce the extent of encroachment of the Tree Protection Zone (TPZ) of the neighbouring tree to the west of the site by Dwelling 2. The applicant believes there is no impact on the tree’s TPZ because a soil report prepared by Soil Test Melbourne Engineering on 20 March 2020 appears to have not identified the presence of any tree roots in this part of the site. Hence, there would be no effect on the neighbouring trees.
4. I find Condition 1(l) is relevant and is varied to require setbacks of both floor levels of Dwelling 2 from the western boundary.
5. I find the soil test report is not focused on tree roots and their presence or location, but more about soil condition for foundation design. I note that it includes descriptions of boreholes, however it also specifically excludes matters associated with trees. Accordingly, I am not convinced that this type of report is appropriate for establishing the presence or otherwise of tree roots from an arboricultural perspective.
6. I note the arborist report submitted in support of the permit application, indicates that Dwelling 2 will encroach into the TPZ of the neighbouring tree to the west by 17 per cent. This exceeds the recommended 10 per cent extent of encroachment under AS4970-2009 – *Protection of Trees on Development Sites*.
7. Increasing the setback of Dwelling 2 from the western boundary will have the benefit of achieving improved consistency with the garden city character by ensuring space from rear boundaries and retention of existing trees on neighbouring properties. It will reduce the extent of TPZ encroachment, whilst also reducing the visual bulk of Dwelling 2 on the neighbouring property’s private open space. I defer to the variation of Standard B17 in Schedule 3 to the GRZ, which requires a setback from rear boundaries of 5 metres. I consider this is appropriate and that Condition 1(l) be varied to require a setback of the ground floor wall of Dwelling 2 from the western boundary of 5 metres and that the first-floor wall of Dwelling 2 be setback from the western boundary by 6 metres. I find these changes will ensure an appropriate level of recession of the building footprint of Dwelling 2 from the neighbouring property and its private open space and trees and ensure impacts on the neighbouring property to the west are not unreasonable.

## Are impacts on internal amenity acceptable?

1. Conditions 1(i), (h) and (m) seeks to improve internal amenity and liveability by improving daylight access to the north facing kitchen window of Dwelling 1 and to provide for an adequate secondary internal open space for both dwellings in the form of a retreat area.
2. Council says the kitchen window of Dwelling 1 is located facing across the one (1) metre separation between both dwellings and the wall of Dwelling 2. As proposed, the one metre clearance to the sky is not provided because of the eaves over this window and is not compliant with Standard B27 of Clause 55.05-3. Council says the purpose of the condition is simply to increase the available daylight to the kitchen to a level envisaged under the standard.
3. The relevant window is the only window to the kitchen, with the closest compliant window at the opposite side of the dining room. Given the location of the room internally within the dwelling, and the inability to provide another direct source of daylight, Council says that a minimum, the standard should be satisfied.
4. The applicant accepted this was one of the few non-compliances with the proposal and conceded that the condition should remain.
5. Accordingly, I agree, and the Condition 1(i) is varied to refer to the kitchen window.
6. Regarding Conditions 1(h) and (m) relating to the two retreat rooms, I note that Council conceded that it applied the condition using Standard B46 of Clause 55.07-12 which is a provision that relates to apartment development. It used the standard as a guide to establish what would be a reasonable form and size for the retreat rooms to provide a useable secondary living space for each dwelling. The applicant submitted this is not relevant to a development such as the proposal.
7. I agree with the applicant and find Conditions 1(h) and 1(m) are not relevant and are deleted.

## Is overlooking an issue?

1. Conditions 1(j) and 1(p) seek to ensure that overlooking is managed for the bedroom 4 window located on the western elevation of Dwelling 1 and the bedroom 4 and retreat window located on the northern elevation of Dwelling 2.
2. The applicant submitted that views of the adjoining private open space areas of the adjoining properties to the west and north may not be possible, however, conceded that habitable room windows of the adjoining dwelling to the north may be affected.
3. I agree with Council and consider the conditions are to remain to ensure overlooking is managed in accordance with the purposes of Clause 55.04-6.

## Are internal services appropriately provided?

1. Conditions 1(n) and 1(o) relate to the proposal for a laundry in the garage of Dwelling 2 to be relocated to a more convenient location within the dwelling and for the storage space for Dwelling 2 to be located outside the private open space with a 6 cubic metre capacity.
2. The applicant says relocating the laundry from the garage into the dwelling is non-sensical. I agree and find it is unnecessary as the proposed laundry will be accessible from the living room of Dwelling 2. Condition 1(n) is deleted.
3. Regarding the storage area for Dwelling 2, Council conceded that it has been appropriately provided for and agreed that it would be appropriate to require a notation on amended plans showing the storage shed with a 6 cubic metre capacity.
4. I agree and the condition is varied to require a notation regarding capacity.

## Conclusion

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

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| **Christopher Harty**  **Member** |  |  |

1. 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)
2. Regarding the rear setback variation in Schedule 3 to the GRZ, I note an aspect of non-compliance with Dwelling 2, which, although provides a 5 metres setback from the northern boundary (a side boundary given the orientation of Dwelling 2), has a setback from the rear western boundary of 2 and not 5 metres. [↑](#footnote-ref-3)