VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P11747/2021  Permit Application no.TPA/52478 |

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| **Applicant** | Rana Ghosh |

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| **Responsible Authority** | Monash City Council |
| **Respondent** | Nikhil Shah |

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| SUBJECT LAND | 26 Pamay Road,  MT WAVERLEY VIC 3149 |

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| HEARING TYPE | Hearing |

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| DATE OF HEARING | 20 June 2022 |

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| DATE OF ORDER | 12 September 2022 |

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| CITATION | Ghosh v Monash CC [2022] VCAT 1059 |

# Order

### Amend permit application

1. Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

* Prepared by: West Urban
* Drawing numbers: TP5-D, TP6-D, TP7-D, TP8-D, TP9-D
* Dated: 16 May 2022[[1]](#footnote-2)

### No permit granted

1. In application P11747/2021 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/52478 no permit is granted.

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| Peter Gaschk  **Member** |  |  |

# Appearances

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| For applicant | Chris Mackenzie, Director with Planning Appeals Pty Ltd |
| For responsible authority | Peter English, Town Planner with Peter English & Associates Pty Ltd |
| For respondent | No appearance[[2]](#footnote-3) |

# Information

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| Description of proposal | The proposal seeks to construct two double storey dwellings on a lot. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit. |
| Planning scheme | Monash Planning Scheme (**Scheme**) |
| Zone and overlays | General Residential Zone - Schedule 3 (**GRZ3**)  Vegetation Protection Overlay - Schedule 1 (**VPO1**) [[3]](#footnote-4) |
| Permit requirements | Clause 32.08-6: To construct two or more dwellings on a lot. |
| Relevant scheme policies and provisions | Clauses 11.01, 11.01-1S, 11.01-1R, 11.02-1S, 15, 15.01-1S, 15.01-1R, 15.01-2S, 15.01-4S, 15.01-4R, 15.01-5S, 16, 16.01-1S, 16.01-1R, 16.01-2S, 21.01-1, 21.04, 21.04-1, 21.04-3, 22.01, 22.05, 32.08, 42.02, 52.06, 55, 65.01 and 71.02 |
| Land description | The subject land at 26 Pamay Road, Mount Waverly (**review site**) is situated on the eastern side of Pamay Road, approximately 100m to the north of the Kendall Street intersection. The land is irregular in shape with a frontage of 12.19m, a depth of 46.9m and width of 30.4m (rear of the site). The overall site area is approximately 926.3sqm.  The site currently contains a single storey detached brick dwelling with a pitched tiled roof. A free-standing brick garage is at the rear of the dwelling adjacent to the northern boundary.  The land has a fall of approximately 1.5m from the rear to the front. A 1.8m wide drainage and sewerage easement is located along the southern boundary.  Vehicle access to the site is by a single access point adjacent to the northern boundary.  Vegetation is scattered throughout the site. However, none is of any significance.  Adjoining the site to the north, south and east are low scale residential dwellings of varying architectural styles, generally one to two storeys, with areas of secluded private open space (SPOS) generally to the rear.  The surrounding neighbourhood includes residential development comprising single and double storey detached dwellings, with contemporary multi-unit developments emerging.  The review site is within walking access to Tally Ho Reserve off Kendall Street and Highbury Park, local shops and East Burwood Primary School on Blackburn Road, with East Burwood Plaza providing higher order shopping 800m to the north. |
| Tribunal inspection | Unaccompanied on 19 August 2022. |

# Reasons[[4]](#footnote-5)

## What is this proceeding about?

1. This is an application for review by Rana Ghosh (**applicant**) against the decision of Monash City Council (**council**) to refuse to grant a planning permit for the construction of two dwellings on the review site (Planning Application No. TPA/52478) (**the application**). The applicant seeks review under s77 of the *Planning and Environment* Act 1987 (**the Act**).
2. The application details are provided below:

* Demolition of the existing single storey dwelling and outbuildings.
* Construction of two double storey dwellings in a tandem, L shaped format.
* Each dwelling will be provided with living areas and a single bedroom at ground level and three bedrooms and open retreat area at first floor.
* Vehicle access will be from a single vehicle crossing adjacent to the northern property boundary.
* Each dwelling is provided with a double garage.
* Secluded Private Open Space (SPOS) will be provided to the rear of each dwelling with direct access to an internal living area.
* Materials incorporate render to the façades with roofing materials in concrete tiles.

1. Ground and first floor layouts and elevations are shown below:







Figure 1: Ground and first floor layout and elevations – Source: Substituted Plans

1. Council refused the application on five grounds:

1. The proposed development is out of character with the existing development in the area in particular with regard to mass, bulk and scale.

2. The proposed development is not appropriate for the locality and will cause adverse impact on the streetscape and general neighbourhood character.

3. The proposed development will have an adverse impact on the amenity of adjoining properties.

4. The proposal does not adequately satisfy the objectives and design standards of Clause 55 with regard to Neighbourhood Character, Landscaping, Site Layout and Private Open Space.

5. The proposal will result in a poor level of internal amenity for future residents of Dwelling 1.

1. Council says the proposal generally meets urban consolidation policies which aim to increase residential densities in well serviced areas. However, it says the proposal simply seeks too much development on the site, resulting in a combined building form that will unreasonably impact the streetscape and neighbouring properties.
2. A Statement of Grounds was submitted to the Tribunal by Nikhil Shah who resides at 20 Pamay Road. The respondent was unable to attend the hearing but wanted concerns considered, including:

* Res Code Non-Compliances
* Unresponsive to Neighbourhood Character/ Design
* Lack of Landscaping/ Vegetation
* Inadequate Plans

I have considered these as part of the proceeding.

1. The applicant does not agree with council and submits the proposed development provides a suitable response to the GRZ3. It says the proposed built form sits comfortably within the emerging double storey form in the area. It says the development features:

* Front and back layout with single driveway as the preferred format.
* Street setback that comfortably exceeds the 7.6m benchmark and provides front garden setting.
* Site coverage less than 50% and permeability above 30%.
* Front fence (1.2m) that meets preferred design expectations.
* Two storey form that is articulated, site responsive and appropriate.
* Parking recessed behind the buildings and not prominent in the street.

## What are the key issues?

1. In determining the key issues arising from this proposal, I must decide whether to grant a permit and, if so, what conditions should apply to a permit. I must address whether the permit application will produce an acceptable outcome, having regard to the relevant built form, amenity and supporting provisions in the Scheme.
2. Clause 71.02-3 also requires the decision-maker (in this case the Tribunal) 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. Having regard to the relevant matters under the Scheme, including submissions, supporting material and documents put to me by the parties, I consider the key issues in dispute are:

* Does the proposed development provide a satisfactory response to neighbourhood character?
* Will the proposal result in adverse amenity impacts?

1. Having considered the submissions and supporting documents and material from the parties, including observations from my site inspection, I find the proposed development will result in an unsatisfactory design response to the physical setting of this irregular shaped lot. In particular, the development provides insufficient width and area to side boundary setbacks to ensure the new dwellings sit within *well vegetated* landscaped areas. This includes an important opportunity for some canopy tree planting within these side setbacks.

## PLANNING POLICY FRAMEWORK AND PHYSICAL CONTEXT

### Planning Policy Framework (PPF)

1. I have set out above the relevant PPF that applies to this proposal. I have considered these policy settings in my assessment. I am satisfied the review site is located within an area that can accommodate some modest form of medium density development as proposed. This is not a matter that is contested between the parties.
2. I have provided a list of key planning policy provisions that apply to the proposal. In summary:

* Clause 21.01-1, the City of Monash is known for its *garden city character*, consisting of leafy, low-rise suburbs with well vegetated private gardens and wide streets with street trees. This characteristic is highly valued by the community and visitors to the municipality.
* Clause 21.01-2 policy objectives include:
* To build upon the important contribution that landscaping makes to the garden city character of Monash.
* To encourage new development to achieve architectural and urban design outcomes that positively contribute to neighbourhood character having particular regard to the applicable preferred future character statement for the area.
* The Residential Development Framework Map at clause 21.04-1 identifies the site is within Category 8 – Garden City Suburbs (Northern).
* The future preferred character of Garden City Suburbs (Northern) is set out in clause 22.01-4. Relevant extracts of the preferred character statement are provided below:

Although there will be changes to some of the houses within this area, including the development of well-designed and sensitive unit development and, on suitable sites, some apartment development, these will take place within a pleasant leafy framework of well-vegetated front and rear gardens and large canopy trees….

Setbacks will be generous and consistent within individual streets….

New development will complement the established buildings through consistent siting, articulated facades and use of materials….

Architecture, including new buildings and extensions, will usually be secondary in visual significance to the landscape of the area when viewed from the street….

Buildings will be clearly visible through these low garden settings, and non-existent or transparent front fences. Additional vehicle crossovers will be discouraged.

(Tribunal emphasis added)

### Zones and Overlays

1. The review site is within a GRZ3. Relevant zone purposes include:

* To encourage development that respects the neighbourhood character of the area.
* To encourage a diversity of housing types and housing growth particularly in locations offering good access to services and transport.
* To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.

1. Schedule 3 includes the following relevant neighbourhood character objectives:

* To support new development that contributes to the preferred garden city character through well landscaped and spacious gardens that include canopy trees.
* To promote the preferred garden city character by minimising hard paving throughout the site by limiting the length and width of accessways and limiting paving within open space areas.
* To support new development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks, landscaping in the front setback and breaks and recesses in the built form.
* To support new development that locates garages and carports behind the front walls of buildings.

1. A VPO1 also applies to the review site. However, this does not trigger permit approval for this development as none of the vegetation reaches the 10.0m height threshold for VPO1 protection.
2. Clause 55 provisions are of relevance to this matter and have been considered in my assessment.
3. I take from the respective zone and schedule objectives and preferred character statement and policy objectives outlined in the above clauses, that new residential development should generally support and provide for appropriate setbacks that enable landscaping that is consistent with the preferred Garden City Suburbs (Northern) character setting. This is best encapsulated in the following extracts from the preferred character statement:

New development will complement the established buildings through consistent siting, articulated facades and use of materials.

….. Architecture, including new buildings and extensions, will usually be secondary in visual significance to the landscape of the area when viewed from the street.

1. I agree with submissions from council that while the GRZ3 encourages a modest level of change, this is to be tempered and managed to ensure building bulk and massing, impacts to neighbouring properties and appropriate built form transition and architecture is focused on enhancing garden character setting.
2. I note the applicant references these general character and design response settings in its submission. However, it says the primary landscape focus should be to both the front and rear setbacks. I do not agree with this submission.
3. Policy objectives under clause 22.01-3 deal specifically with side and rear setbacks for new built form. Objectives include:

* Provide side setbacks that maintain an open, spacious streetscape character and separation of dwellings.
* Design buildings to reflect the spacing and rhythm of existing streetscapes.
* Provide side and rear setbacks capable of supporting canopy trees.
* Provide rear setbacks that support a green corridor of open space created by backyards in the neighbourhood.
* Minimise the impact of visual bulk to neighbouring properties, through suitable setbacks from adjacent secluded private open space to enable the provision of screening trees and scaling down of building form to the adjoining properties.
* Provide a separation between dwellings constructed on the same site to break up built form and support additional landscaping.

1. Policy objectives under clause 22.01 focus consideration of new built form within side setbacks, as well as front and rear setbacks. This is an important distinction and one that I find the design response has not appropriately addressed.

### Physical Setting

1. I accept the neighbourhood character descriptions provided by the parties in their respective submissions. I observed a range of single and double storey dwellings in the immediate neighbourhood, combined with emerging contemporary double storey form, often included in a two dwelling development setting. However, the primary character setting is focused on lower scale built form with some emerging double storey form.
2. This is reflected in the immediate setting of the review site where a single storey dwelling abuts to the south and a double storey dwelling to the north.
3. This existing built form setting requires appropriate transition of any new built form proposed on the review site. It is significant in my assessment that the proposed development includes the introduction of two double storey dwellings into this physical setting. That is not to say the zone controls do not enable double storey; simply, that the double storey form must be appropriately transitioned to all abutting boundaries.
4. The review site is within comfortable walking distance to Tally Ho Reserve off Kendall Street and Highbury Park, local shops and East Burwood Primary School on Blackburn Road. East Burwood Plaza which provides higher order shopping is located a further distance from the review site, being some 800m to the north.
5. Council sought to highlight the area is primarily low scale form and therefore was concerned the proposed double storey development contained excessive *verticality* between ground and upper level forms. My inspection revealed the area has an emerging double storey form, that in my view included strong vertical built form presentation to the street. I accept this is part of an emerging built form.
6. I therefore do not consider the proposed double storey form on the review site is inconsistent with this emerging form. However, I agree the minimal side setbacks proposed to the two dwellings reduces the opportunity to provide more generous side setbacks. More particularly, these side setbacks play an important character role to provide mature landscape treatment that would help transition and filter views of proposed double storey form on this site.

## Key issues

### Does the proposed development provide a satisfactory response to neighbourhood character?

1. As I noted above, Schedule 3 to the GRZ contains important neighbourhood character objectives which aim to support development that minimises building mass and visual bulk in the streetscape through generous front and side setbacks and landscaping.
2. I agree with the applicant that there are some positive elements of the design that respond to the varied GRZ3 character provisions. This includes:

* Front setback that exceeds 7.6m (7.9m) and 5.0m rear setback that enables canopy tree plantings.
* Site coverage below 50% (41.7%).
* Permeability above 30% (52.8%).
* Private Open Space (POS) – Dwelling 1: 39sqm of SPOS and 127sqm of POS. Dwelling 2: 143sqm SPOS and 152sqm of POS.
* 1.2m front fence.
* Vehicle access confined to one crossover to the street.
* Double storey form. Noting the default height position under the GRZ3 enables up to three storeys (or 11.0m) in this area.
* Contemporary architecture and materials are used as observed in the area by emerging residential development.

1. However, I find the design response fails to satisfy the preferred neighbourhood character outcomes in respect to side setbacks. The triangular shape of the lot with a narrow frontage to the street (12.19m), fanning out to a 30.4m rear boundary, provides significant design challenges in this regard. The design has sought to address this lot shape by proposing an L shaped layout for the two double storey dwellings. However, the design has resulted in narrow side setbacks that provide minimal landscape opportunities that are sought through policy.
2. I also find the upper levels of both dwellings are too expansive and have minimal first floor recession to reduce their visual massing to side setbacks. The lack of wider eave forms to these dwellings exacerbates this built form and lack of visual articulation between the respective levels. The proposed dwellings on the review site therefore do not sit within a landscaped setback along either side setback.
3. I find the design approach results in unnecessary built form massing to the single storey dwelling to the south (28 Pamay Road). I acknowledge an improved setback is achieved for the SPOS of Dwelling 1. However, a minimum 2.0m side setback is provided along much of this interface. This will not enable the planting of canopy trees to filter and reduce visual massing to this interface.
4. Visual massing is also evident toward the double storey dwelling at 24 Pamay Road. I acknowledge an increased 3.8m setback has been achieved between the existing dwelling to the north and Dwelling 1. However, this setback is reduced to 1.0m for Dwelling 2. Additionally, meaningful landscaping with canopy tree planting opportunity is not possible along most of the northern interface due to the location of the vehicle accessway. This is a missed design opportunity that would help filter the side and oblique views of the double storey dwellings on the review site.
5. I accept submissions from the applicant that the proposed side setbacks technically comply with the relevant clause 55 standards (B17 and B18). However, the combination of a fanned shaped lot and double storey form, with minimal side setbacks, results in an unacceptable built form massing that cannot be appropriately screened along these side boundaries. The lack of upper level articulation also exacerbates the appearance of these dwelling walls, appearing as a relatively flat face built form to these interfaces.
6. I find this design outcome does not achieve the respective objectives of clauses 55.04-1 and 55.04-2 of the Scheme; nor does it satisfy key objectives of the character objectives set out in clause 22.01 and expressed in the preferred character statement. Given the physical setting and challenges of the review site I have described above, the adaption of the design to provide for meaningful side setbacks is a critical omission.
7. As I noted above, I find there is appropriate opportunity for meaningful landscaping to the front and rear of the review site. This is consistent with relevant landscaping objectives in clause 22.01. However, this is not the case along the side setbacks. The lack of meaningful and significant side setbacks is a significant shortcoming in the design overall.
8. I have not been persuaded by the council that the extent of built form width of Dwelling 1 to the street frontage is excessive. The setback of Dwelling 1 to the front exceeds the required setback required under clause 55. Limiting the vehicle access and crossover to one on the site also provides area for landscape treatment in the frontage that can accommodate canopy tree planting that helps to filter views of the double storey form to the street.
9. However, I find the proposed design response does not achieve a satisfactory response to preferred neighbourhood character settings sought along the side boundaries of the review site. This is not a matter that can be addressed by minor changes to setbacks through permit condition. The side setbacks and overall siting of the proposed buildings requires rethinking and redesign. I find this is a determinative matter.

### Will the proposal result in adverse amenity impacts?

1. The applicant submits there are no unreasonable amenity impacts created by the proposed development on the review site. It notes that overshadowing and overlooking design treatments satisfy relevant clause 55 standards and objectives. Having reviewed these matters, I accept these matters have been appropriately addressed under the relevant clause 55 provisions.
2. The applicant also submits that the substituted plans have addressed council’s concerns in respect to the solar access to Dwelling 1’s courtyard by:

* Lowering the overall height of Dwelling 1 by 150mm, thereby reducing wall heights and shadowing.
* Setting the Dwelling 1 garage 500mm further forward, thereby increasing the SPOS depth to increase the amount of direct sun beyond the garage shadow line.
* In-setting the Dwelling 1 first floor on the west-side, thereby reducing the extent of afternoon shadow cast into the SPOS.

1. Council acknowledges the changes have improved the design response but maintains its concerns in respect to solar access to the POS associated with Dwelling 1. Council says that better solar access should be provided when a new development is proposed on the review site.
2. I agree with the council that north-side SPOS is generally the preferred design response for new residential development. In certain circumstances, south-side SPOS can also achieve an appropriate level of solar access for future occupants. I accept the SPOS of Dwelling 1 achieves the required amount of solar access sought across the day under the relevant standard. Nevertheless, given a redesign of the proposal is required to address inadequate side setbacks, an opportunity also exists to improve the location of SPOS proposed on the site for future occupants.

## Are there any other issues?

1. The application proposes two double storey dwellings in total. Each dwelling is at least three bedrooms. Car parking requirements under clause 52.06 for each dwelling are therefore two spaces each. Each dwelling has been provided with two spaces in the form of an attached double garage. The garages are also located on the site to ensure they do not form a dominate feature to the street.
2. As the proposal is for two dwellings, there is no visitor car parking requirements. I am therefore satisfied the proposed car parking meets the relevant provisions of clause 52.06 of the Scheme.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

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| Peter Gaschk  **Member** |  |  |

1. As corrected by the applicant’s advocate at the hearing. [↑](#footnote-ref-2)
2. Nikhil Shah contacted the Tribunal and advised he was unable to attend the hearing due to illness. His Statement of Grounds was considered as part of the proceeding. [↑](#footnote-ref-3)
3. No planning permit is triggered under the VPO1 for the proposal on the review site. [↑](#footnote-ref-4)
4. 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-5)