VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P862/2021  Permit Application no.TPA/51734 |
| CATCHWORDS | |
| Application under Section 77 of the *Planning & Environment Act 1987* to review refusal to grant a permit; Monash Planning Scheme; Neighbourhood Residential Zone 2 – *Creek Abuttal Areas*; second dwelling to the rear of existing dwelling; Gardiners Creek interface and landscape character and response | |

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| **Applicant** | Pina Pepe |

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

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| SUBJECT LAND | 84 High Street Road  ASHWOOD VIC 3147 |

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| HEARING TYPE | Hearing |

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| DATE OF HEARING | 20 August 2021 |

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| DATE OF ORDER | 1 October 2021 |

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| CITATION | Pepe v Monash CC [2021] VCAT 1134 |

# Order

1. In application P862/2021 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/51734 no permit is granted.

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

# Appearances

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| For Pina Pepe | Ms Sarah Thomas, Town Planner from SJB Planning |
| For Monash City Council | Ms Adrianne Kellock, Town Planner from Kellock Town Planning Pty Ltd |

# Information

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| Description of proposal | The construction of a second dwelling to the rear of the existing dwelling and alteration of access to a road in a Road Zone Category 1. |
| 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 |
| Zone and overlays | Neighbourhood Residential Zone Schedule 2 – *Creek Abuttal Areas* (**NRZ2**)  Vegetation Protection Overlay Schedule 1 – *Tree Protection Area* (**VPO1**) |
| Permit requirements | Clause 32.09-6 to construct a dwelling if there is at least one dwelling existing on the lot.  Clause 52.29 to alter access to a road in a Road Zone Category 1. |
| Relevant scheme policies and provisions | Clauses 11, 15, 16, 18, 21.04, 22.01, 32.09, 52.06, 52.29, 55, 65 and 71.02. |
| Land description | The subject land is located on the south side of High Street Road, Ashwood (**site**) and immediately abuts the western side of the Gardiners Creek reserve. The site is a rectangular shaped lot with a frontage width of 16.76 metres and depth of 48.77 metres and with an overall area of 817 square metres. It has a fall of approximately 2 metres from the north-west corner to the south-east corner and has an easement of 1.83 metres across the southern rear boundary. The site contains an existing single storey brick and tile dwelling with access along the eastern boundary (adjacent to the Gardiners Creek reserve). A high timber paling fence has been constructed across part of the frontage of the site setback 3 metres from the front boundary and which also runs along the western side of the driveway to the dwelling effectively enclosing the front yard. The site contains 2 trees which are proposed to be removed.  The surrounding area comprises residential development of single storey dwellings dating to around the 1950-60s with newer redeveloped properties comprising a mix of single and double storey form and older single storey unit developments. |
| Tribunal inspection | 29 September 2021 unaccompanied |

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

## What is this proceeding about?

1. Pina Pepe (**applicant**) seeks to construct a double storey dwelling at the rear of an existing dwelling at 84 High Street Road, Ashwood (**site**). Monash City Council (**Council**) determined on 26 March 2021 to refuse to grant a permit. The applicant has lodged a review of Council's decision.
2. Council's grounds for refusing the permit were primarily that the proposal failed to provide an acceptable design response to the site and policy contexts for the area. Council considered:

* The building bulk and mass will not integrate successfully into the neighbourhood.
* The contemporary design of the new double storey dwelling is not in keeping with the preferred character of the neighbourhood.
* The layout does not provide sufficient landscaping space to maintain and enhance the valued garden city character of the neighbourhood, which is associated with the vegetated and open nature of the adjoining Gardiners Creek reserve.
* The development will adversely impact trees on neighbouring land to the east within the Gardiners Creek reserve and to the west.

1. The applicant submits the proposal represents an acceptable planning outcome, complies with the relevant elements of the Monash Planning Scheme, and should be supported.

## What are the key issues?

1. The issues raised within the context of this review relate generally to the proposal's design responsiveness to the site and policy context of the area and particularly the design response to the location of the site abutting the Gardiners Creek reserve and its landscape character. Having heard the submissions and inspected the site and locality, the key issue arising from this proposal is:

* Does the proposal appropriately respond to the site and policy context of the area?

1. I must decide whether the proposal will 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 - *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.
2. With this proposed development I must decide whether a permit should be granted and, if so, what conditions should be applied.
3. Having considered all submissions presented with regards to the applicable policies and provisions of the Monash Planning Scheme, I find the proposal does not represent an acceptable outcome.
4. The proposal fails to respond to the policy outcomes sought under the planning scheme with respect to its setting adjacent to the Gardiners Creek reserve and its landscape character. The built form of the proposal is too close to the Gardiners Creek reserve to allow sufficient space for landscaping including the planting of sufficient canopy trees. The proposal fails to satisfy the decision guideline under Schedule 2 of the Neighbourhood Residential Zone of contributing to ‘buildings in a bushland setting’, which is the preferred character for the creek interface areas.
5. I have decided to affirm the decision of Council and that no permit is granted. My reasons follow.

## Does the proposal appropriately respond to the site and policy context of the area?

1. The physical context of the site and surrounds, and the policy context affecting the site interplay to produce what is a relatively clear outline as to the acceptable outcomes sought for it with regards to residential development.

### The site context

1. The site is a residential lot fronting High Street Road in Ashwood containing an existing 1960s style single storey brick and tile dwelling with a large setback of 9.3 metres from the front street boundary and a large, relatively open backyard, with a direct side abuttal to the Gardiners Creek reserve (refer to Figure 1). The reserve is in the Public Park and Recreation Zone (**PPRZ**) and contains Gardiners Creek (in the form of a concrete channel with a walking trail and substantial plantings including canopy trees, shrubs, and grassed areas.
2. The side abuttal of the site to the reserve is unique in this locality because other residential properties on both sides of High Street Road have their rear boundaries abutting or backing onto the Gardiners Creek reserve. The site is the only one with a sideage abutting the reserve.
3. The side boundary abuttal of the site to the creek reserve heightens the sensitivity of this interface. Compared to properties that back onto the creek reserve with a rear boundary, the site experiences a longer length of abuttal to the creek reserve (at nearly 50 metres compared to say around 16/17 metres). The presence of a driveway along part of the side boundary adjacent to the creek reserve also heightens this sensitivity by limiting opportunities for landscaping. The driveway access creates issues for protection of existing canopy trees located within the creek reserve that are close to the boundary and the limited space for additional canopy tree planting.



Figure 1: Aerial image of the site and the abutting Gardiners Creek reserve

### The policy context

1. The other unique attribute affecting the site is that it is in the Neighbourhood Residential Zone Schedule 2 – *Creek Abuttal Areas* (**NRZ2**). The NRZ2 affects this site where it fronts High Street Road and abuts the reserve. Residential properties further south and on the north side of High Street Road that directly adjoin the Gardiners Creek reserve are also in the NRZ2, while beyond these areas to the west and east, properties are in the Neighbourhood Residential Zone Schedule 3 – *Creek Environs Area* (**NRZ3**). The changes in the zone schedules reflect differences in the physical context of sites that abut the Gardiners Creek reserve compared to those that don’t. The objectives in the NRZ2 include a stronger reference to the interfaces along the creek corridors and have stricter site coverage, site permeability and greater rear setback requirements[[2]](#footnote-2).
2. The purposes of the NRZ refer to areas of predominantly single and double storey residential development and that development is managed and ensures that identified neighbourhood character and landscape characteristics are respected. To assist, Schedule 2 to the NRZ includes the following neighbourhood character objectives:

* To emphasise the visual dominance of landscaping, particularly along the interfaces with the creek corridors.
* To ensure new development transitions down in scale towards the creeks, respecting and reinforcing the natural topography.
* To respect and enhance the existing character and functions of the open spaces along the creek corridors.

1. The NRZ2 also includes detailed decision guidelines addressing, amongst other matters:

* Contribution to ‘buildings in bushland setting’ which is the preferred character for the creek interface areas.
* Provision of sufficient and well-located open space to provide for large trees either retained or planted within front, side and rear setbacks.
* Provision of sufficient setbacks of built form and vegetation along any boundary abutting a creek reserve including a side boundary.
* Minimising hard paving by limiting driveway widths and lengths and providing landscaping on both sides of driveways.
* Recessed and articulated built form as viewed from the creek reserve to reduce visual bulk and ensure vegetation provides the more dominant element when viewed from the creek reserve.
* Housing that recedes into a continuous backdrop of canopy trees, avoiding dominant upper storeys, tall roof forms and visually intrusive built form and large blank walls.
* Use of materials that blend with the surrounding natural environment.

1. Clause 21.04 – *Residential Development* identifies how residential development will be provided and recognises the need to reduce pressure on the less accessible areas[[3]](#footnote-3) to allow their garden city character to be preserved. The policy identifies that residential growth within those areas identified to be of special character, such as the creek environs will be further restricted, to ensure this character is protected and enhanced. The policy reinforces the *Monash Housing Strategy, 2014* (a background document under Clause 21.04-4) and identifies various residential character types of which the site falls within an area of limited development potential in *Category 7 – Creek environs*.
2. The policy seeks *to protect and contribute to the special character of the creek environs*. It includes the strategy to *ensure that development contributes to the naturalistic character of the creek environs*.
3. Regarding the creek environs area, the Monash Housing Strategy states:

Development will be well landscaped retaining the ‘open landscape character’ of the nearby creek environment and will taper down in scale closer to the boundaries of the creek, respecting and reinforcing the natural topography. It will visually connect to the adjacent creek environment.

The character of the area will be notable for its spacious garden settings, tall canopy trees, consistency in front setbacks and the maintenance of larger setbacks from the boundaries of the creek which will provide areas for planting and sustaining taller trees. Expanses of blank or continuous walls and visually dominant building forms, will be discouraged, particularly when adjacent to the open space areas of the creek.

1. The theme of protecting and enhancing the special character of the creek environs is reinforced in policy under Clause 22.01 – *Residential Development and Character Policy*, which references larger setbacks for canopy tree planting, including side boundaries being capable of supporting canopy trees. The policy includes residential character statements for various residential areas in the municipality and seeks development to respond to the preferred future character statements.
2. The site is identified within residential character type *Creek Abuttal Areas*, which has the following preferred future character statement, in conjunction with the *Creek Environs Area*:

The neighbourhood character of this area will be defined by its spacious garden settings, tall canopy trees and consistent built form. New development will be designed to complement the established planting patterns and topography. There will be consistency in front setbacks and the maintenance of larger setbacks from the creek which will provide areas for planting and sustaining larger trees. Vegetation will dominate the streetscape and buildings will be recessive and normally hidden from view behind vegetation and tall trees. The larger rear setbacks will accommodate substantial vegetation, including large canopy trees. The landscape will be complemented by street trees and a lack of front fencing. Regular front setbacks and side setbacks from at least one side boundary will reinforce the consistent setback patterns along the street, allow views between buildings and provide space for landscaping.

New dwellings will complement the older 1950s and 1960s building styles through the use of simple details, low building scale and articulated facades. They will be well-designed, energy efficient and adhere to sustainability principles. Long expanses of blank wall will be avoided, particularly when adjacent to public parks and open space areas. In this instance, the building should address the public area. Upper levels will be recessed and articulated to reduce visual dominance in the streetscape.

Design emphasis should be placed on promoting the preferred neighbourhood character by responding to the landscape setting.

This area will continue to provide lower scale residential development. Modest dwellings, with simple pitched rooflines and articulated facades, will continue to be the prevailing character.

New development will be well landscaped retaining the ‘open landscape character’ of the nearby creek environment and will taper down in scale closer to the creek. Development will visually connect to the creek environment through the use of colours and materials for buildings and fencing that blend with, rather than contrast with it.

Given the important recreational and ecological functions of the creek corridors, development on adjoining residential sites should seek to respect and enhance the existing character of these open spaces.

### The Tribunal’s findings

1. I acknowledge that whilst the construction of a second dwelling on the site satisfies urban consolidation and housing choice objectives in an area that is well located with respect to services and is a modest addition to the housing offer, it is a design that is not responsive to what the Monash Planning Scheme calls for with respect to the location of the site abutting the Gardiners Creek reserve.
2. The applicant has argued that the side boundary abuttal of the site is not a typical situation that the policy framework seeks to address. The applicant contends the rear boundary setback variation of 7 metres in the NRZ2 is not as relevant given the side boundary abuttal of the site to the creek reserve. They say the positioning of the open space area adjacent to the creek reserve, together with the provision of one large canopy tree within the front setback and three medium sized canopy trees along the rear and side boundaries around the secluded private open space area provides an acceptable design response.
3. I am not convinced that this does represent an acceptable outcome.
4. Council have undertaken a deliberate strategic review of its planning scheme with the rezoning of the site from the previous General Residential Zone (GRZ) to the NRZ2 in 2018[[4]](#footnote-4), and reinforced by amended policies at Clauses 21.04 and 22.01 introduced through Amendment C125 Part 2 in 2019[[5]](#footnote-5). These changes have introduced a planning direction which is now reiterated in various parts of the planning scheme.
5. I find the proposal does not appropriately respond to the emphasis of the planning scheme on protecting and enhancing the Gardiners Creek reserve’s landscape character, nor the preferred future character statement for the creek abuttal character type.
6. I accept that the siting of the existing dwelling is not being altered. However, the proposed second dwelling (refer to Figure 2) creates significant issues with respect to how it responds to the creek abuttal landscape character, namely:

* The extension, along the side boundary, of the driveway and car parking access areas with the expansion of hard paved surfaces abutting the creek reserve. This exacerbates potential detrimental effects on the Tree Protection Zones (**TPZ**) of the existing canopy trees within the Gardiners Creek reserve[[6]](#footnote-6).
* The ground floor setback from the eastern side boundary of the second dwelling by 1.281 metres to the proposed deck area of the secluded private open space of the new dwelling and a setback of 3.719 metres to the ground floor wall of the new dwelling. The small setback for the deck is also inconsistent with the policy under Clause 22.01 which calls for limiting decks that occupy a large proportion of private open space areas.
* An upper-level setback of 5.28 metres from the eastern side boundary, which allows for a recessed wall setback of 1.561 metres from the ground floor bedroom 1 and 280mm from the ground floor living room.



Figure 2: Suggested landscape plan showing the proposed layout

1. These design features limit the opportunity for space for landscaping and the planting of additional and larger canopy trees adjacent to the boundary with the creek reserve. This reduces the ability to achieve what the planning scheme seeks for the creek reserve interface, which is more treed vegetation that acts as a transition between the new proposed built form and the vegetated character found within the creek reserve.
2. It also leaves little variation between the living room and upper-level bedroom 3 of the proposal when viewed from the creek reserve into the site.
3. The setbacks from the eastern side boundary and the extent of hard paved areas adjacent to the creek reserve are asking too much in terms of providing a more sensitive interface with the creek reserve.
4. These interface issues are also somewhat exacerbated by the provision of a 1.8 metre timber paling fence along the eastern boundary which offers a stark interface with the creek reserve and highlights the need for greater landscaping that can soften and integrate with this interface.
5. Reflective of the problems with the design response is the failure, albeit marginal, with satisfying the 40% site coverage at 42% and 40% site permeability at 37%. These non-compliances make it more difficult to accept the design response as appropriate given the sensitive juxtaposition between the site, the proposal, and the Gardiners Creek reserve.
6. I note the applicant considers planting four canopy trees satisfies the variation of Standard B13 under Clause 55.03-8 relating to *Landscaping* under the NRZ2. However, I find this is a minimum requirement.
7. The design response is lacking when the NRZ2 calls for housing that visually recedes into a continuous backdrop of canopy trees, avoiding dominant upper storey-built form.
8. It is also inconsistent with Guideline 5.2 of the *Monash Urban Landscape and Canopy Vegetation Strategy, December 2018[[7]](#footnote-7)*, which seeks side boundary setbacks to plant medium to large canopy trees to break up built form rooflines.
9. I am not as concerned with the failure to achieve a rear boundary setback of 7 metres, because this is not the sensitive boundary. It is the lack of space along the eastern side boundary for canopy tree planting that undermines the proposal.
10. The new dwelling requires a greater setback from the eastern side boundary and more space for more than two medium sized canopy trees.
11. I also find that the contemporary design of the second dwelling is at odds with the predominant architectural form of the existing dwelling and dwellings in the neighbourhood. Usually, newer, and more contemporary built form design can present as an acceptable outcome reflecting on the more contemporary built form as an expression of modern architecture.
12. I acknowledge that the design utilises articulated facades and recessed upper levels with acceptable materials and finishes. However, the preferred future character statement is clear, and reinforced by both policy and decision guidelines in the NRZ2, which amounts to a strong emphasis on what is sought from any design response. I find this has not been satisfied by the proposal.

## Conclusion

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

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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-1)
2. Site coverage of 40% compared to 50% under the NRZ3, site permeability of 40% compared to 30% in the NRZ3 and rear setbacks of 7 metres compared to 5 metres in the NRZ3. [↑](#footnote-ref-2)
3. Compared to areas such as the activity centres, boulevards, and the Monash National Employment Cluster. [↑](#footnote-ref-3)
4. Through Amendment C125 Part 1 approved on 19 April 2018. [↑](#footnote-ref-4)
5. Through Amendment C125 Part 2 approved on 14 November 2019. [↑](#footnote-ref-5)
6. The three trees on the adjacent creek reserve would experience encroachments of 13%, 11% and 18% respectively. [↑](#footnote-ref-6)
7. The applicant drew my attention to this document to demonstrate the level of compliance the suggested landscaping of the proposal would have with Council’s strategic aspirations relating to landscaping. However, although it has been adopted by Council, it is not an incorporated or background document in the Monash Planning Scheme. [↑](#footnote-ref-7)