

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P2556/2015
PERMIT APPLICATION NO. PP11/0169

CATCHWORDS

Section 82 of the *Planning & Environment Act 1987*; Boroondara Planning Scheme; application to amend existing permit which provides for the construction of five dwellings and altered access to a road zone category 1, permit not yet acted upon, new owner of subject land wishes to make certain amendments to permit; Council supports these changes but the owners of one of the abutting units to the south has objected and sought the Tribunal's review of Council's support, extent of proposed changes fairly constrained; key issue of whether or not two extra bedrooms would be acceptable and whether the visitor car parking dispensation and minor changes to the façades would be reasonable; permit approved.

APPLICANTS FOR REVIEW	Andrey Golikov & Inna Krakov
RESPONSIBLE AUTHORITY	Boroondara City Council
RESPONDENT	David de Giovanni
SUBJECT LAND	902 Burke Road, Canterbury
WHERE HELD	55 King Street, Melbourne
BEFORE	Philip Martin, Member
HEARING TYPE	Hearing
DATE OF HEARING	1 June 2016
DATE OF ORDER	20 June 2016
CITATION	Golikov v Boroondara CC [2016] VCAT 1016

ORDER

1. Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil & 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: Winston Yong Architects

2. The decision of the Responsible Authority is varied.
3. In planning permit application No. PPII/0169, planning permit No. PPII/01069 (**Permit**) is amended and an amended Permit is directed to issue for the land at 902 Burke Road, Canterbury, incorporating the following modifications:
 - In the opening paragraph of Condition 1 of the Permit, delete the words “...submitted on 14 February 2012” and substitute “...dated 8 April 2016 prepared by Winston Yong Architects...”
 - With the bullet points in Condition 1 of the Permit, all of the bullet points (a) to (o) are deleted. Instead insert a new Condition 1(a) which reads “An updated Landscape Plan in accordance with Condition 10 of this permit”. Also insert a new Condition 1(b) which reads “A revised Schedule of Colours and Finishes, including colour samples” plus a new Condition 1(c) which reads “A new notation added to each of the architectural plans confirming that any opaque windows must utilise actual opaque glass, rather than clear glass with a film.”
4. The Responsible Authority is directed to issue a modified permit in accordance with this order.

Philip Martin
Member

APPEARANCES

For Applicants for Review	Andrey Golikov & Inna Krakov appeared in person
For Responsible Authority	Ms Emily Blyth (Council planner)
For Respondent	Mr David De Giovanni (consultant planner)

INFORMATION

Description of Proposal/Proceeding	Application under Section 72 of the Planning and Environment Act 1987 to amend an existing planning permit
Zone and Overlays	General Residential Zone Schedule 5
Relevant Scheme policies and provisions	Clauses 9, 11, 15, 16, 18, 19, 21.01, 21.05 and 22.07
Land Description	The review site is located on the eastern side of Burke Road, just south of the intersection with Mont Albert Road. It is improved by a rather tired looking single detached dwelling. There is a mix of local buildings and uses in this area, including a three unit double storey building abutting to the south, a church close to the north and local schools. Burke Road is a busy main road and there is a strip of shops on the opposite side of the road.

REASONS

What is this proceeding about?

1. With respect to the subject land at 902 Burke Road, which is currently improved by a single detached dwelling, there is a mix of uses and different buildings in this locality, including a three unit double storey development which abuts to the south. The zoning is General Residential Zone with no overlays and Burke Road is a busy main road. The main features of the site, the local area and the relevant planning framework are otherwise set out further above.
2. Several years ago, it was proposed that the subject land be redeveloped for five double storey dwellings in a 'front and back' layout, which would sit above a basement car park. At least by the time of the Tribunal hearing, the front and the two rearmost proposed dwellings would have three bedrooms each, but the other two would only have two bedrooms (although 10 parking spaces were provided in the basement).
3. Council supported the proposal but it came to the Tribunal as:
 - One of the abutting unit owners to the south (Mr Golikov and Ms Krakov) sought review of Council's Notice of Decision to Grant a Permit.
 - The Permit Applicant initiated a conditions appeal against certain conditions.
4. As the Member allocated to deal with the hearing that occurred on 27 March 2013, I heard submissions from all parties at that hearing, plus I received the expert traffic and parking evidence called by the Permit Applicant. After the hearing I conducted a site inspection of both the subject land and the unit of the Applicants for Review. In my resulting decision dated 24 May 2013, I affirmed that a permit should issue, including the final modified version of the draft permit conditions that I considered to be appropriate. My findings included that I accepted that it was reasonable that there be car parking dispensation for one visitor parking space.
5. The resulting planning permit No. PPII/0169 (**Permit**) was first issued by Council on 4 July 2013 and endorsed plans were issued under the Permit.
6. I understand that since then the ownership of the subject land has changed, and that enquiries have been made with a view to obtaining a building permit for the approved development. This in turn has led to the new owner seeking a formal modification of the Permit pursuant to Section [72](#) of the [Planning and Environment Act 1987](#).
7. Paragraph 24 of the Council written submission usefully summarises the proposed changes as follows:
 - *Alteration to basement and pedestrian path grades;*
 - *Increased landscape buffer to northern boundary;*

- *Deletion of verandah forward of Dwelling 1;*
 - *Roller door to garage area replaced with gates;*
 - *Alterations to the internal layout of the basement and minor realignment of the walls;*
 - *Inclusion of service/utility cupboards within the basement;*
 - *Reduction of secluded private open spaces to Dwelling 1 by 2 sqm with no change to boundary setbacks;*
 - *Dwellings 2 and 3 increased from 2 to 3 bedrooms with no change to boundary setbacks;*
 - *Continued waiver of one parking space;*
 - *Car park exhaust riser in basement;*
 - *Alterations to internal levels with no change in overall building height;*
 - *Altered colours and materials schedule;*
 - *Alterations to window locations, size and configuration on all elevations;*
 - *Open panel roof pergola to the area of secluded private open space to each dwelling;*
 - *Front fence of between 1.6m and 2.2 m in height;*
 - *Provision of individual garage doors;*
 - *Concrete piles around the perimeter of the basement level; and*
 - *Emergency exit from basement.*
8. In addition it was put by Mr De Giovanni and not contested by any other party that the façades of the new building would be of a considerably higher quality and standard of finish, compared to the less elaborate treatment of the façades as currently shown in the endorsed plans under the Permit,
 9. Two objections have been received but Council supports the changes. The same abutting neighbours to the south, Mr Golikov and Ms Krakov, have sought the Tribunal's review of this support,
 10. This fresh hearing came before me on 1 June 2016. I indicated that I had a good memory of visiting the subject land and objecting neighbour's property from the 2013 hearing and that over the intervening period I had continued to pass through this area from time to time.
 11. Over the day I heard submissions from the parties shown above. Whilst no expert witness was called, there was discussion of a fresh Traffic Report prepared O'Brien Traffic consultants. This report includes fresh parking surveys of available relevant nearby on-street car parking and supports there continuing to be parking dispensation for one visitor space.

12. For the record, where the Applicants for Review during the hearing challenged Mr De Giovanni's right to participate in the hearing because this is a Section 82 review brought by an affected neighbour, I regard this as a quite misguided approach. The Planning and Environment Act 1987, its associated Regulations and the relevant VCAT Practice Notes (which are all accessible on-line) have all been drafted on the basis that Permit Applicants have a right to participate in the hearing of a planning merits review brought by a neighbour. In addition, to my knowledge it has been the practice of all Victorian planning Tribunals from the 1960s onwards that a permit applicant is a key stakeholder in any planning merits review and it is fair and reasonable that she or he be heard at planning merits hearings initiated by a neighbour.
13. The key issues I see arising here are:
 - Understanding what issues raised at the hearing are outside of the scope of this planning merits review.
 - Understanding that of the various proposed design changes, most are minor/cosmetic and essentially uncontested.
 - Dealing with the handful of proposed design changes where I accept that there is at least 'a planning debate to be had'.
14. My overall finding is that, subject to adding one or two more sensible planning permit conditions, I accept that the proposed changes are appropriate and acceptable. Hence, I have made orders that an updated permit shall issue.
15. My findings follow.

What Matters Raised at the Hearing Fall Outside of the Tribunal's Proper Discretion?

16. Although I have already dealt with this with my verbal comments during the hearing, I confirm that there is nothing improper or inappropriate in any one permit holder seeking fresh planning permission to amend their existing permit. Whilst I acknowledge that Mr Golikov and Ms Krakov might find it annoying/frustrating to be drawn back into the planning review process, it is quite common in the Victorian planning system for a permit holder to over time seek to amend their own permit. If there was no capacity for this to occur, all planning permits would be 'frozen in time' and this would be an unworkable planning situation. At least in Victoria there is broad third party involvement, in the sense that more significant changes have to be publicly advertised again and may end up being reviewed at the Tribunal (as has occurred here).
17. Apart from the point I have addressed above, it seems fair to say that the Applicants for Review also spent considerable time during their presentation objecting to aspects of the overall design that are unaffected by the changes now proposed. As I said at the beginning of the hearing, the Tribunal is not here in this fresh proceeding to effectively re-run the debate which has already occurred at the 2013 hearing and been resolved. The Tribunal here needs to do nothing more or less than resolving whether the particular design changes now being put forward would be an acceptable planning outcome.
18. For example, whilst the Applicants for Review might be unhappy that the new units will have their side-walkway running alongside the common boundary fence, this issue was resolved in the

previous hearing and this aspect of the design is unchanged. Likewise where I found in my earlier design that no real weight should be given to the Boroondara 'Residential Design Policy' dated 1 December 2003. This finding has been made and there is no legitimate ability to revisit it now.

Most Proposed Design Changes are Very Minor and Essentially Uncontentious

19. It is worth noting that the physical context here is essentially unchanged since the 2013 Tribunal hearing. Similarly, whilst the primary zoning has changed from Residential 1 to General Residential Zone, it was put by Ms Blyth and not challenged by any other party that this change has occurred in a fairly neutral way. Both in 2013 and now, there are no overlay controls affecting the subject land.
20. Turning now to the fresh proposal, it was put to me by Mr De Giovanni (and not disputed in itself by any other party) that in most respects the design changes being put forward are of a very minor or cosmetic nature, in the situation where there is a new owner of the subject land and it has been realised that certain minor design modifications are needed to obtain a building permit for the new building.
21. I have set out above Council's summary of the design changes being put forward, which runs to 18 bullet points. The case against the proposal being put forward by the Applicants for Review in practice does not query most of these minor proposed changes. If one also excludes the various frustrations raised by the Applicants for Review which are outside of the scope of my role here, the key design changes of relevance which I consider the Applicants for Review has taken issue with are:
 - Most particularly, the proposed extra upstairs bedroom in each of Dwellings 2 and 3;
 - The car parking dispensation for a visitor space; and
 - The revised windows and choice of materials for the southern façade.
22. My findings on each of them follows.

Are Two Extra Bedrooms a Reasonable Planning Outcome?

23. I find that the proposed extra upstairs bedroom for each of Dwellings 2 and 3 is an acceptable planning outcome, for the following reasons.
24. It is important that the relevant setbacks of the upper level of the new units are no bigger with the revised plans – in fact at least one or two are marginally more generous. Similarly if one compares the size of the total upstairs floor area of the five units as shown in the endorsed plans to the fresh proposed plans, by the end of the fresh hearing, even the Applicants for Review conceded the total upper floor area shown in the fresh proposed plans would be a marginal reduction in size.
25. In summary, the extra upper bedroom for Dwellings 2 and 3 has been achieved simply by more efficiently re-organising the upper inside areas of the two proposed dwellings in question. Yes two more bedrooms means there may well be marginally more people living in the whole dwelling complex, but the important point is that the degree of bulk and scale that the building will present remains essentially unchanged. Subject to my comments below about the proposed revised

window treatment and colours for the intended southern façade, in particular I consider that the proposed revised southern side of the new building will present to the objecting neighbour's own abutting property in an amenity-neutral way compared to the previous approved design,

26. Where there might be marginally more pedestrian movement up and down the southern side walkway of the new building, this change would be in my view very minor and barely perceptible.
27. Where the change from 'two to three bedrooms' means that Dwellings 2 and 3 would each require two rather than one on-site car spaces, there is (subject to my comments below about 'visitor car parking dispensation') the benefit that the basement already provides all five of the new units with two car parking spaces. Otherwise, it is a plus for this aspect of the proposal that Dwellings 2 and 3 each have a good level of internal space and the benefit of private outdoor open space that is north-oriented and of a good size.

Is it Still Acceptable that there be Dispensation for One Visitor Car Parking Space?

28. The issue here is not 're-inventing the wheel' with my earlier finding about 'visitor car parking', but more reviewing whether anything has changed since my 2013 decision which might lead to a different finding.
29. In this regard, I am satisfied that it remains an acceptable and sensible outcome that car parking dispensation be given for one visitor car parking space. To my knowledge the situation with the local 'on-street car parking availability' remains essentially unchanged since my 2013 decision.
30. However extra comfort is provided by the fact that the Permit Applicant with this fresh application has procured the fresh traffic report by O'Brien traffic consultants dated 21 April 2016. It includes fresh parking surveys of the available nearby on-street parking. I accept that these recent surveys indicate that there is a significant level of spare nearby on-street parking, at least during those more off-peak times when visitors are realistically more likely to be visiting the proposed units. I also remain of the view that the likely peak parking times for the nearby schools and church are different to the likely more busy times when persons might drive to visit an occupant of one of these new units.

Is the Proposed Revised Southern Façade an Acceptable Outcome?

31. As mentioned, during the hearing Mr De Giovanni put to me that the revised building would involve more upmarket use of external materials, and this was not contested in itself. The revised elevation plans show that the southern façade would feature greater use of timber and metallic materials and a greater colour mix ie the colours of 'white', 'light grey' and 'dark grey' would be used.
32. Although they did not query this revised colour treatment, the Applicants for Review were very critical of the proposed revised south-facing window treatment. They argued that such treatment would either cause greater privacy impacts or at least cause more 'perceived overlooking'. This was contested by Mr Di Giovanni.
33. Dealing first with the issue of the revised windows, I am satisfied that the Applicants for Review will have little (if any) direct interface with the proposed ground level south-facing windows

because of the very high boundary fence in between. On this point, I accept that all the indications are that this existing fence/brick wall is very high and that the proposed new paling fence would also be unusually high at 2.2 metres above natural ground level.

34. With the proposed revised upper level south-facing windows, I acknowledge that they are somewhat bigger in area per se than the equivalent south-facing windows approved in 2013. However, the more important point is that in both cases, all upper level windows higher than 1.7 metres above the finished floor level would be either highlight windows or have opaque glass up to 1.7 metres. This means that even if the proposed revised windows in question are be marginally bigger per se, I accept that the new situation in practice is still suitably respectful of the privacy of the abutting courtyards to the south by ensuring there is no viewing opportunity below 1.7 metres. This is in the situation where this 1.7 metre designated height figure comes straight from ResCode in the Planning Scheme.
35. With respect to the issue of 'perceived overlooking', my view is that this line of thinking carries little weight. That is, I agree with Mr De Giovanni that any possible privacy impacts need to be assessed objectively and to my knowledge the Tribunal has essentially discarded the notion of 'perceived overlooking' and moved on.
36. Finally, I see a sensible outcome with the 'use of colours' to be that there is a new permit condition still requiring a revised set of plans to be put forward for endorsement, which simply requires the preparation and implementation of a 'Colours and Finishes Schedule'. Although I am certainly not a supporter of 'boring architecture', I suggest that this Schedule could incorporate a somewhat more muted choice of colours for the proposed southern façade. However, I have no problem with the use of metallic finishes and timber per se.
37. As a courtesy to the Applicants for Review and out of completeness, I have also inserted a new permit condition confirming that all new windows shows as opaque glass need to use actual opaque glass, not clear glass with a film.

Conclusion

38. For the reasons set out above, I have allowed the proposed changes to the Permit, but with some final minor tweaks.

Philip Martin
Member