

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO.P853/2007
PERMIT APPLICATION NO. WH/2006/571

CATCHWORDS

Application for Review of a decision to grant a permit; Whitehorse Planning Scheme; Residential 1 Zone; proposal for development of additional dwelling on a lot and subdivision of the land into two lots; neighbourhood character; overdevelopment of site; overlooking of abutting property; visual presentation of development to abutting property; decision of responsible authority affirmed.

APPLICANTS	Karina and David Cleal
RESPONSIBLE AUTHORITY	Whitehorse City Council
SUBJECT LAND	399 Mitcham Road, Mitcham
WHERE HELD	Melbourne
BEFORE	Des Eccles, Member
HEARING TYPE	Hearing
DATE OF HEARING	29 June 2007
DATE OF ORDER	5 July 2007
CITATION	Cleal v Whitehorse CC [2007] VCAT 1214

ORDER

The Application for Review is not allowed and the decision of the responsible authority is affirmed. In Planning Permit Application No. WH/2006/571 a permit is granted and must be issued for the construction of an additional dwelling on the land at 399 Mitcham Road, Mitcham, and the subdivision of the land into two lots, in accordance with the conditions included in Notice of Decision to Grant a Permit WH/2006/571, save that the following amendments are made to that Notice:

Condition 1(b) is amended to:

Reduction in the height of the new dwelling by 300mm by reduction in finished floor levels at ground and upper floor levels (excluding the laundry, workshop, storage and garage areas),

such that the finished floor level at ground floor level is
RL144.35.

In Condition 1(f) the word “west” in the second last line is amended to “east”.

Des Eccles
Member

APPEARANCES:

For Applicant	Mr S Merrigan, Landscape Architect, Millar and Merrigan Pty Ltd
For Responsible Authority	Mr D Song, Town Planner, Aspect Town Planners Pty Ltd
For Respondents	Mr and Ms Cleal appeared in person

REASONS

1. These reasons follow a decision and outline of reasons given orally at the conclusion of the hearing.
2. The subject land is located on the east side of Mitcham Road, directly opposite Agra Street, and approximately 450 metres south of Whitehorse Road in Mitcham. It is generally regular in shape and has a frontage to Mitcham Road of 15.24 metres, a depth of 44.96 metres, and an area of approximately 700 square metres. It slopes from front to rear by approximately 3.0 metres.
3. The subject land is occupied by a single storey brick dwelling set back approximately 7.5 metres from Mitcham Road and approximately 24.5 metres from the rear boundary. A vehicle crossover is located close to the southern boundary and provides access to a single car weatherboard garage behind the dwelling and adjacent to the southern boundary. A weatherboard outbuilding is located in the north eastern corner of the land.
4. The Cleals live in the detached dwelling on the abutting property to the north, at 397 Mitcham Road. The dwelling has two storeys and is set back approximately 7.5 metres from Mitcham Road and 1.5 metres from the common boundary with the subject land. At the rear of this dwelling is a single storey section, on top of which is a deck which is unscreened and offers uninterrupted views across the rear yards of abutting properties. Unscreened windows at upper level also offer views across the subject land and other land.
5. The abutting land to the south at 401 Mitcham Road contains a single storey brick dwelling set back approximately 7.5 metres from Mitcham Road and approximately 2.5 metres from the common boundary with the subject land. A driveway is located in the side setback adjacent to the subject land.
6. The abutting land to the east at 30 Percy Street is occupied by a single storey detached dwelling set back approximately 18.0 metres from the common boundary with the subject land. Two outbuildings are located in the rear yard of this property, close to the common boundary fence.
7. It is proposed to retain the existing dwelling and construct a new two storey dwelling to its rear. The existing crossover and driveway are to be utilised in providing a common access way for both dwellings. No external changes are proposed for the existing dwelling, save for the demolition of the existing garage and outbuilding and the construction of a carport (required by Condition 1(c) of the Notice of Decision to Grant a Permit) at the rear of the dwelling and abutting the northern boundary. Secluded private open space of 43.5 square metres is to be located at the rear of the existing dwelling.

8. The new dwelling is to have open plan living, dining and kitchen areas and a study at ground floor level, with two bedrooms and shared bathroom at upper floor level. A two car garage with a laundry and workshop/storage area is to be located on the south boundary and extend along that boundary for a length of 9.02 metres. Secluded private open space of 56 square metres, accessed from the main living area, is to be located on the east side of the dwelling. Building materials are to comprise face brickwork at ground floor level and a rendered and weatherboard finish in muted tones at upper floor level (as per Condition 1(a) of the Notice of Decision to Grant a Permit).
9. The new dwelling is to be set back 2.5 metres from the north boundary at ground floor level and generally at least 3.5 metres from the rear boundary. Pursuant to Condition 1(a) of the Notice of Decision to Grant a Permit, at upper floor level on the north elevation the dwelling is to be stepped back 1.5 metres from the ground floor for the bathroom and 1.0 metre for Bedroom 2.
10. At upper floor level the new dwelling is to be a maximum of 6.0 metres wide and 7.8 metres long. On its northern elevation it is to have, pursuant to Condition 1(b) of the Notice of Decision to Grant a Permit, a wall height of 2.6 metres above the 2.5 metre hedge along the boundary (which is to be retained), increasing to 3.5 metres above the hedge at the eastern end of that wall (due to the slope of the land). The tiled, pitched roof is to slope away from the northern boundary.
11. The land is in the Residential 1 Zone pursuant to the Whitehorse Planning Scheme. No Overlays apply to it. A permit is required to construct an additional dwelling on the land and to subdivide land in the Residential 1 Zone. In assessing the proposed new dwelling the ResCode provisions at Clause 55 must be considered.
12. Mr and Ms Cleal submitted that the proposal would have an undesirable impact on neighbourhood character, be an overdevelopment of the site, result in overlooking of their rear yard, and present unreasonably intrusively to their property.
13. The proposed development would have no unreasonable impact on the character of the area. It would be barely discernible from Mitcham Road or Agra Street because the existing dwelling is to be retained. It would certainly be a good deal less intrusive in its presentation to the streetscape than the Cleals' house.
14. As to overdevelopment of the site, the proposal meets, and in quite a number of instances very comfortably exceeds, all the relevant ResCode standards. The site coverage of the land is to be only 38.29%, compared with the ResCode standard of 60%. The permeability is to be 38.29%, compared with the ResCode standard of 20%. The areas of secluded private open space proposed exceed the ResCode standard of 40 square metres.

15. Pursuant to Conditions 1(d) and (f), all north facing windows of the proposed development are to be screened via the use of fixed obscure glazing to a height of 1.7 metres above finished floor level, or, in the case of ground floor north and east facing windows, trellis must be attached to the boundary fencing to meet Standard B22 of Clause 55. The trellis would come into play as a screening device only if the 2.5 metre high boundary hedge were removed. There simply cannot be any unreasonable overlooking.
16. The new dwelling will not present unreasonably intrusively to the Cleals' property. I may well have come to a different conclusion if it were built on or close to the boundary, had sheer walls and little or no articulation, and were close to or higher than the ResCode standard of 9.0 metres. But none of these characteristics applies. It will be seen from the Cleals' windows, upper floor deck, rear verandah and rear yard. But that does not mean that it will have an unreasonable impact. It will be a change from what they now see. But this change will not be in the primary view corridor towards their back fence.
17. I have disallowed the Application for Review, affirmed the decision of the responsible authority, and ordered that a permit be issued in accordance with the Notice of Decision to Grant a Permit, but have amended two parts of Condition 1 in that Notice. Condition 1(b) relating to lowering of the development was expressed ambiguously and seemed to suggest that both ground and upper floors should be reduced to RL144.35. Condition 1(f) referred to north and west boundary fences instead of north and east boundary fences.
18. Objectors have the right to seek review of a decision by the responsible authority to grant a permit. The *Planning and Environment Act 1987* provides extensive rights to third parties. This is a feature of the Victorian planning system of which we can be justifiably proud. It protects the rights of local residents and leads to better decisions and better development. Normally, the parties to a review proceeding bear their own costs. The Tribunal has the power pursuant to s 109 of the *VCAT Act 1998* to award costs, but it is fair to say that this power is exercised rarely and only in unusual circumstances. It would be very rare for costs to be awarded against third parties. But review proceedings are serious proceedings. In this instance the effect of the Cleals lodging their Application for Review has been that the permit applicant has been delayed for close to three months from acting on the decision of the responsible authority. In addition, the aggregate cost of even a half day hearing, borne by the Council, the permit applicant and the public purse, is not negligible. In my opinion the Cleals' case was so weak that, in the particular circumstances which apply, if the permit applicant had applied for costs I would have given serious consideration to that application. I have not had to turn my mind to whether or not I would have awarded costs, and I have not included these observations to discourage objectors

from seeking review of Council decisions. But third party rights should be exercised responsibly, after careful examination of the relevant documents, including the plans of the proposed development, and in this case, the conditions included in the Notice of Decision to Grant a Permit, and after careful consideration of the extent to which a proposed development would have unreasonable impacts, as distinct from merely changing local conditions. I am not convinced that such careful consideration occurred in this case.

Des Eccles
Member