

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P737/2007  
PERMIT APPLICATION NO. PPO6/00652

### CATCHWORDS

Application for Review of order; Residential 1 Zone; proposal for three dwellings on a lot; Order amended.

<b>PERMIT APPLICANT</b>	TSA Architects
<b>RESPONSIBLE AUTHORITY</b>	Boroondara City Council
<b>APPLICANTS FOR REVIEW OF ORDER</b>	R and M Stewart and C and P Wong
<b>SUBJECT LAND</b>	11 Winfield Road, Balwyn North
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Des Eccles, Member
<b>HEARING TYPE</b>	Hearing of an application pursuant to s.120 of the <i>Victorian Civil and Administrative Tribunal Act 1998</i>
<b>DATE OF HEARING</b>	30 November 2007
<b>DATE OF AMENDING ORDER</b>	4 December 2007
<b>CITATION</b>	TSA Architects v Boroondara CC [2007] VCAT 2334

### ORDER

The Application for Review is allowed and the order of the Tribunal in *TSA Architects v Boroondara City Council* (P737/2007) dated 14 August 2007 is amended as follows:

Condition 1 is amended to read:

Before the commencement of the development, amended plans to the satisfaction of the responsible authority must be submitted to the responsible authority for its approval, and when approved shall be endorsed and then form part of the permit The plans must be generally in accordance with the plans prepared by Merrigan Land Development Consultants Drawing Nos. 12797 TP05, TP06, TP07, TP08, TP09A, TP09B and TP09C, but modified to show:

- a) Ramp grades for the garage and basement car park demonstrated as complying with Clause 2.5.3 of AS/NZS 2890.1:2004;
- b) The entries of Dwellings 2 and 3 modified to provide entry porticoes similar in design/presentation to the entry of Dwelling 1;
- c) The balconies at upper floor level with balustrades and either internal planter boxes or fixed external horizontal louvres to prevent unreasonable overlooking in accordance with Standard B22 of Clause 55 of the Boroondara Planning Scheme, save that the western edge of the upper floor balustrade of Dwelling 3 is shown as being moved a metre to the east with a planter box on the outside of the balustrade;
- d) Modifications to the design of the crossover adjacent to the north boundary so that it is at least 1.5 metres from the trunk of the street tree in the road reservation adjacent to the northern crossover.

The Planning Permit issued in accordance with the Tribunal's order dated 14 August 2007 is amended accordingly.

Des Eccles  
**Member**

**APPEARANCES:**

For Permit Applicant	Mr S Merrigan, Landscape Architect, Millar Merrigan Land Development Consultants
For Responsible Authority	Ms C Rae, Planning Appeals Coordinator, Boroondara City Council
For Applicants for Review of Order	Mr B Stewart

## REASONS

1. These reasons follow a decision and outline of reasons given orally at the conclusion of the hearing.
2. Following a hearing conducted on 10 August 2007, I made an order dated 14 August 2007 setting aside the refusal of the responsible authority and granting a permit, subject to conditions, for the development of three dwellings on the land at 11 Winfield Road, Balwyn North. The land is in the Residential 1 Zone pursuant to the Boroondara Planning Scheme.
3. The responsible authority had refused to grant a permit without first giving notice of the permit application pursuant to s 52 of the *Planning and Environment Act* 1987. Following the lodging of the Application for Review by the permit applicant, the Tribunal required that notification be given pursuant to s 83B of the *Planning and Environment Act*. Following the giving of notice, Mr Bernard Stewart of 24d Napier Street, South Melbourne informed the Tribunal by letter dated 8 May 2007 that Robert and Maree Stewart of 32 Cumberland Avenue and the occupiers of 34 Cumberland Avenue and 9 Winfield Road wished to be heard and that he, Mr Bernard Stewart, would be representing them. The Registrar wrote to Mr Bernard Stewart on 10 May 2007 informing him that the signatures of the parties he was claiming to represent were not included in his letter and until they were provided the objection would proceed in his name only. The address to which the Registrar's letter was sent was 11 Winfield Road, Balwyn North, the address of the subject land.
4. The notice of the hearing of the review of the responsible authority's refusal to grant a permit was also sent to Mr Bernard Stewart at the wrong address of 11 Winfield Road, Balwyn North. Not surprisingly, in retrospect, Mr Stewart did not attend the hearing. Because he did not attend the hearing I had not made him a party, nor had I made a party any of the persons he claimed to represent. Mr Stewart only became aware that the hearing had been conducted and that I had made an order granting a permit for the development when he rang the Tribunal in mid October. By that time the permit had been issued.
5. On 15 October Mr Stewart wrote to the Principal Registrar informing him that he had not been notified of the hearing because the relevant notice had been sent to the wrong address and asking for advice as to his rights. The Senior Registrar replied in a letter dated 19 October, acknowledging that correspondence had been sent to the incorrect address, offering his apologies, and advising that Mr Stewart could apply, pursuant to s 120 of the *VCAT Act*, to re-open the Order. By letter dated 30 October Mr Stewart requested the Tribunal to re-open the matter so that he could be heard.
6. Section 120 of the *VCAT Act* provides that an application to the Tribunal may be made by a person in respect of whom an order has been made for a review of the order if the person did not attend and was not represented at the

hearing. The time limit within which an application is to be made is specified in the *VCAT Rules* as 14 days after the applicant becomes aware of the order, unless the Tribunal extends time. In this instance, if 14 days elapsed between when Mr Stewart became aware of the order and when he lodged his request pursuant to s 120, the circumstances are such that I extend that time limit.

7. Clearly, it is only fair and reasonable that Mr Stewart should be given an opportunity to be heard. He provided me with signed authorisations from Mr R Stewart and Ms M Stewart, his parents, who reside at 32 Cumberland Avenue, and Mr and Ms Wong, who reside at 34 Cumberland Avenue. Having heard his submission, should I exercise the discretion in s 120(4) to amend or revoke my order? I have come to the conclusion that I should exercise the discretion to amend the order.
8. Mr Stewart was concerned about the presentation to his “clients” of the development which I approved, and instances of potential overlooking. He pointed out that the plans referred to in my Order did not show finished floor levels and that in the absence of such data it was not possible to adequately assess the degree of intrusive presentation and potential overlooking that may result from the development.
9. The elevations included with the plans referred to in my order provided a basis for establishing finished floor levels. However, I concede that it would be far better to have those levels specified. Mr Merrigan tabled plans which his firm had prepared as part of the process of finalising plans to be submitted for approval and endorsement pursuant to Condition 2 of my Order and pursuant to Condition 2 of the issued permit. Those plans show finished floor levels and the great majority of the eighteen amendments required by my Order to the plans accompanying the permit application. Condition 1(q) of my Order required trellis at least 300mm high above the north boundary fence adjacent to the living room of Dwelling 2. Mr Merrigan’s plans show 600mm trellis above the northern boundary fence.
10. On balance I agree with Mr Stewart, having examined the photographs he tabled, that the upper floor balcony for Dwelling 3 would present unreasonably intrusively to the rear yard of his parents’ property at 32 Cumberland Avenue. I agree with him that the balustrade on the west side of that balcony should be moved to the east by a metre and that a planter box should be placed in front of the balustrade. I do not agree with him that the proposed development would be insufficiently responsive to its neighbourhood context and therefore that the order should be revoked and the permit issued pursuant to it cancelled.
11. In summary, I have concluded that my order should be amended to “tie” the permit to the plans prepared by Mr Merrigan’s firm. These plans show finished floor levels and the great majority of the amendments required by my original order. I have therefore amended my order to do that. My amended order requires still further amendments to those plans, including those specified in my original order but not shown on Mr Merrigan’s plans, and an

additional amendment relating to the setback of the balustrade on the western side of the upper floor balcony for Dwelling 3. As a permit has been issued in accordance with my original order, I have also ordered that the permit be amended accordingly.

Des Eccles

**Member**