

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P708/2017
PERMIT APPLICATION NO. WH/2016/866

CATCHWORDS

Three storey building in commercial strip; Compliance with DDO4; Design of building does not fit in;
Car parking layout; Waste collection.

APPLICANT

D Meade

RESPONSIBLE AUTHORITY

Whitehorse City Council

RESPONDENT

Garrubba & Associates Pty Ltd

SUBJECT LAND

15 McKeon Road, Mitcham

WHERE HELD

Melbourne

BEFORE

Rachel Naylor, Senior Member

HEARING TYPE

Hearing

DATE OF HEARING

6 September 2017

DATE OF ORDER

13 November 2017

CITATION

Meade v Whitehorse CC [2017] VCAT 1854

ORDER

No permit granted

- 1 In application P708/2017 the decision of the responsible authority is set aside.
- 2 In planning permit application WH/2016/866 no permit is granted.

Rachel Naylor
Senior Member

APPEARANCES

For D Meade	Mr D Meade
For Whitehorse City Council	Mr D Um, planning consultant of Kontext Town Planning
For Garrubba & Associates Pty Ltd	Mr W Chow, planning consultant of Zoneworks

INFORMATION

Land description

The site forms part of a row of eight commercial properties (all occupied) located on the northeast corner of McKeon and Quarry Roads. The site is located mid-block in the row of commercial properties, all of which have single storey front facades. There is a rear two storey addition across the two premises immediately to the north of this site.

The site is 5.79m wide, 29.86m deep and has an area of 173sqm. It contains a single storey building used as a medical centre with one practitioner (an osteopath)¹. The rear portion of the site is vacant and enclosed by a chainmesh fence.

14 indented car spaces at 90 degrees are provided along the McKeon Road frontages of the shops. This means the shopfronts are set back from the road. At the rear (east) of the commercial properties is a 3.0 metre wide laneway that provides rear access to each of these properties.

Mr Meade's house is the middle of three townhouses located on the east side of the laneway that abuts part of the northern end of the laneway. In other words, his house is to the northeast of the site, separated by the laneway and the rear townhouse (a distance of between 27 and 30 metres due to the angle).

¹ Planning Permit NUN 3009 issued 14 November 1985 allows the use of the existing shop for the purpose of a naturopath clinic with one practitioner conducting consulting sessions at any one time.

Description of proposal	Alterations to the existing shop front and construction of a three storey building to be used as a medical centre (existing use) and two dwellings (one on each of the upper levels). Two car parking spaces are provided at the rear of the site in an off-set/split arrangement (one partly behind the other) so both can accommodate a car with space to open doors.
Nature of proceeding	Application under section 82 of the <i>Planning and Environment Act 1987</i> – to review the decision to grant a permit.
Planning scheme	Whitehorse Planning Scheme
Zone and overlays	Commercial 1 Zone (C1Z) Design and Development Overlay Schedule 4 – Neighbourhood Activity Centres (DDO4) The residential properties to the east of the laneway are zoned Neighbourhood Residential and are contained within a Significant Landscape Overlay (SLO6) that recognises the existing canopy vegetation in the neighbourhood
Permit requirements	Clause 34.01-4 To construct a building or to construct or carry out works in C1Z Clause 43.02-2 To construct a building in DDO4
Procedural matter	After the hearing, I issued an interim order giving the parties leave to make written submissions in response to VC139 that introduced new reference documents into clause 15.01-2, being the Apartment Design Guidelines and the Urban Design Guidelines. Submissions were subsequently received and they have been considered by me in deciding the outcome of this proceeding.

REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 Garrubba and Associates Pty Ltd seek planning permission to construct a three storey building on the land at 15 McKeon Road, Mitcham.
- 2 This site forms part of a small strip of commercial properties located within a residential neighbourhood. These commercial properties are all single storey along the street, have rear access via a laneway and a couple of the properties have two storey extensions at the rear adjacent to the laneway.
- 3 The proposed design is to make alterations to the shopfront and then build a three storey building. It will contain the existing medical centre and two upper level apartments (one apartment on each of the second and third floor levels). A car space will be provided for each of the apartments, accessible via the rear laneway. The Council supports this proposal.
- 4 Mr Meade seeks a review of the Council's decision to support this proposal. His principal concern is the three storey height of the building.
- 5 I have considered the reasons why planning permission is required, the relevant planning policies in the planning scheme and the submissions made by the parties. I have also inspected the site and the surrounding neighbourhood, including Mr Meade's street. For reasons explained below, a three storey building accords with the aspirations set out in the planning scheme, but this particular design is not acceptable. The design is not an acceptable response to the character of this commercial strip. Any redesign needs to ensure that the design of the car parking and waste storage/collection are suitably managed.

WHAT ARE THE KEY ISSUES?

- 6 The key issues I have considered in reaching my decision are:
 - Is a three storey building height in accordance with the planning scheme aspirations?
 - Are the setbacks acceptable?
 - Does the proposal create unreasonable overlooking?
 - Is the design of the two car spaces acceptable?

IS A THREE STOREY BUILDING HEIGHT IN ACCORDANCE WITH THE PLANNING SCHEME ASPIRATIONS?

- 7 Mr Meade's principal concern is that this proposal seeks permission for a three storey high building rather than the two storey high building. Mr

² 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.

Meade considers a two storey height is what is indicated as preferred in DDO4. The Council and the Applicant disagree with Mr Meade's interpretation of DDO4 and consider that the preferred building height in this case is three storeys.

Content of DDO4

- 8 DDO4 applies to Neighbourhood Activity Centres (NACs). It came into effect as a Ministerial planning scheme amendment to give effect to urban design guidelines prepared in 2014 for the NACs. Mr Meade points out there are very limited examples of three storey buildings in the NACs at present, and I agree with this. The effect of DDO4 has not yet been realised. It is obvious from DDO4 that the building height of these NACs will change over time to include three storey buildings.
- 9 DDO4's design objectives include 'to ensure new development is designed to respond to the immediate site environs, reflect the role of the centre and enhance the character of the surrounding residential areas'. Garrubba & Associates has focussed upon the preferred building height and setbacks in DDO4 to guide the design response. Whilst this is understandable, the above objective also makes it clear that new development needs to respond to its immediate context and the role of the centre. For reasons that I will explain, I am not persuaded this design fits in (responds) to its immediate context.
- 10 DDO4 contains a map categorising each of the NACs and a table setting out preferred maximum height, setbacks and built form outcomes for each category of NAC. Section 2.0 of DDO4 states buildings should not exceed the preferred maximum building height and should be in accordance with the preferred setbacks as set out in the map and table.
- 11 The parties all agree that this NAC is within Category 1A, which is 'small-medium neighbourhood centre on a standard width road'. This category is the lowest category in terms of the size of the centre and the road type. The relevant part of the table for this Category 1A is quoted in Appendix A to this decision.
- 12 The Council accepts that the drafting of DDO4 is clumsy and does create some uncertainty as to its intended outcome, particularly when the height and setback expectations set out in the table³ of DDO4 use differing terms such as residential zone, residential street, residential property and residential area.
- 13 Mr Meade considers the preferred maximum height is 7.5 metres (2 storeys) because this site is on a boundary adjoining a residential zone. Understanding the relevant preferred maximum height is difficult. This is because of the words in the DDO4 table and because of the planning scheme maps available online.

³ The DDO4 table is headed 'Table to Schedule 8' which is presumably an error.

The planning scheme maps

- 14 The planning scheme maps online have black solid lines around the extent of the Commercial 1 Zone. One of these lines encompasses the whole of the rear laneway, making it appear as though the entire laneway is the boundary between the commercial and residential zones. Having regard to the image available, it is understandable how a viewer may think that the commercial and residential zones abut each other.
- 15 The Council and the Applicant have relied on zoning maps extracted from the Council's computer system and from the State Government's land channel. Both of these show that the Commercial 1 Zone boundary is located in the centre of the adjacent roads (including the rear laneway). At the north end of the commercial strip, the boundary of the Commercial 1 Zone is the property boundary with the adjacent residential property.

A boundary adjoining a residential zone

- 16 The language in the preferred maximum height column of the table uses the term 'boundary'. The parties have interpreted the use of the term 'boundary' by reference to both a property boundary and a zone boundary. In this case, working out which height is preferred requires consideration of both.
- 17 Three storeys (11m) is the default position as this preferred maximum height contains no additional words in the table that limit its applicability.
- 18 Two storeys (7.5m) applies only in a particular circumstance. The use of the word 'boundary' needs to be considered in the context of a particular proposal, therefore it is reasonable to expect that the boundary to be considered is each boundary of the relevant property to determine whether the lower two storey height is the preferred maximum height. In the case of this site, none of its boundaries adjoin a residential zone as it is bounded to the front and rear by roads that are also partially zoned Commercial 1. In contrast this with the northernmost property in this NAC, as its northern side boundary does adjoin a residential property in a residential zone. In that circumstance the two storey preferred maximum height would be relevant. Therefore, the relevant preferred maximum height in this case is the 11 metres (three storey) height nominated in the DDO4 table.

Proposed Three Storey Height is Acceptable

- 19 This proposal contains three storeys and has a maximum building height of 10.73 metres, which accords with DDO4 and is therefore acceptable. However, the building height is not the deciding factor about the acceptability or otherwise of a design for a more intensive development on this site.

Are the setbacks acceptable?

- 20 The DDO4 table contains preferred front, side and rear setbacks as well as a built form outcome, which is:
- Development respects the low scale built form character of the surrounding residential areas.
- 21 DDO4 also specifies design objectives to be achieved, contains descriptive provisions relating to building setbacks, and contains decision guidelines to be considered in deciding whether to grant a planning permit. For reasons that I will explain next, I am not satisfied that this proposed design acceptably achieves the built form expectations contained in DDO4.

The frontage

- 22 The proposal is described as an addition to the existing building, yet there are quite substantial changes that effectively create a whole new street frontage presentation.

Upper level front setback

- 23 The front setback of the third storey does not comply with the DDO4 table. The table seeks a minimum 3 metre setback for upper levels over 7.5 metres in height (i.e. the third storey). The third storey wall is set back 2.93 metres, and the front balcony at this floor level is set back 0.81 of a metre. The setback descriptive provision in section 2.0 of DDO4 prefers 'recessed upper levels ... to reduce the appearance of building bulk'. Overall, the new building is very close to the street. The combination of the top two floor levels creates a building bulk that is at odds with the intact original single storey streetscape. As this is the first new development in this commercial strip and with no other identified constraints to the development potential of this site, I see no reason why a new building cannot and should not comply with this preferred front setback.

The Streetscape Presentation

- 24 As already mentioned, the front façade is proposed to be highly modified. There will be two doorways, one in a new glass shopfront and another providing separate residential access. This involves the loss of the front brick parapet. Garrubba & Associates submit this is an acceptable outcome as the existing parapet only makes sense for a single storey shop. As DDO4 encourages change, a different streetscape is acceptable.
- 25 I am not persuaded that DDO4 seeks an entirely changed streetscape. As already mentioned, the design objectives include that new development be designed to respond to the immediate site environs and to reflect the role of the centre. This is a low category NAC that is fully occupied with primarily commercial businesses. That is its role. It is also a low scale centre, that is cohesive because of its consistent single storey streetscape that comprises predominantly brick facades, shop fronts and brick parapets.

- 26 This proposal is not a good design outcome as it does not achieve this DDO4 design objective. The brick parapet is an existing consistent feature across the commercial frontages, and particularly those adjacent to this site. Greater effort should be made to incorporate as much of the original streetscape presentation as possible.
- 27 The first floor balcony is built to the street frontage and is constructed of a frosted glass balustrade. Whilst it appears there are no first floor frontage setback requirements in this case in DDO4, it is desirable to achieve either a setback or an improved design solution that provides for the retention of the existing brick parapet. More importantly, a design should respond to and where possible seek to retain the intact low scale streetscape presentation of this commercial strip.

Side setbacks

- 28 As this site does not abut a residential property, there are no preferred side setbacks specified in the DDO4 table.
- 29 The proposal abuts much of the side boundaries, which is both appropriate and acceptable. But, the design also includes some setbacks for parts of the second and third floor levels from the south side boundary with windows (including bedroom windows) facing across those setback areas. This is not acceptable as it places a burden upon the ability of the adjoining land to the south to develop to its full potential in accordance with DDO4. This is not a fair or equitable development outcome.

Rear setbacks

- 30 The rear setback of the third storey does not comply with the DDO4 table. It seeks upper levels over 7.5 metres in height to be set back a minimum of 5 metres from the rear ground level building footprint. In this case, the proposed ground floor is set back 1.0 metre from the rear boundary, so this means a setback of 6 metres is required for the third storey. The proposal provides 5.94 metres. The Council submits 6 metres should be provided. If this were the only area of concern, it may be acceptable if the built form presentation achieves the outcomes sought by DDO4 and if the reduced setback does not create any unreasonable amenity impacts.

DOES THE PROPOSAL CREATE UNREASONABLE OVERLOOKING?

- 31 Mr Meade is concerned about the potential for overlooking from the proposed rear facing windows at the upper levels. He points out that his townhouse, which is the middle of three dwellings, was required to screen its first floor windows to minimise direct overlooking.
- 32 DDO4 requires consideration of minimising amenity impacts. The Commercial 1 Zone requires consideration of overlooking and overshadowing where a proposed building adjoins residential zones (which does not technically apply in this case). The Commercial 1 Zone also requires consideration of the objectives, standards and decision guidelines

of clause 55 (which is how Mr Meade's townhouse would have been considered). In a residential zone, screening of windows is required to minimise overlooking of any private open space and habitable room windows that are within 9 metres of the proposed window.

- 33 In this case, private open space and habitable room windows do not exist within 9 metres of the proposed upper level windows. This means screening is unnecessary for these windows.

IS THE DESIGN OF THE TWO CAR SPACES ACCEPTABLE?

- 34 The Council imposed a condition requiring swept path diagrams to illustrate that the two car spaces shown at the rear of the ground floor are accessible. The two car spaces are effectively sitting alongside each other, but are also staggered so that one is located further within the site than the other. This is because each car spaces does not meet the minimum width dimension that would be required if they were alongside each other. The Applicant submitted a traffic engineering assessment with swept path diagrams and concludes that the accessibility of the spaces are acceptable. I was advised after the hearing that the Council's traffic engineers agree with this assessment. The Council's traffic engineers note the arrangement works because of the one metre ground floor setback of the building and because of the offset in the location of each of the car spaces. Given this information, I accept the design of the car spaces is acceptable.

ARE THERE ANY OTHER ISSUES?

- 35 One other relevant issue in this case are the waste collection arrangements. It appears to be an aspect of the proposal that is yet to be resolved, but its implications are such that it should be considered at the permit application stage and not as a condition of permit.
- 36 The rear of the ground floor contains a storage area for bins. When each of the car spaces are occupied, the bins will need to be taken across parts of these two car spaces to get out. It is not clear from the documentation provided to me whether the Council considers this to be an acceptable arrangement.
- 37 The Council's Engineering & Environmental Services referral comments about waste collection state that a waste management plan will need to indicate the area for bin placement in both McKeon & Quarry Roads and demonstrate that there is adequate space for collection without obstruction or causing danger. The comments go on to state:

If the criteria required for Council based collection services is unable to be met and renders this inoperable, then the waste management system for the development is to revert to a private waste collection service and the [Waste Management Plan] be resubmitted to Council to confirm this.

- 38 A private collection is a matter that needs to be incorporated into the design as well as in a waste management plan. As such, whether this is necessary is a matter that should be established in the permit application rather than as a condition of the permit.

CONCLUSION

- 39 For the reasons given above, the decision of the responsible authority is set aside. No permit is granted.

Rachel Naylor
Senior Member

APPENDIX A – EXTRACT FROM TABLE IN DDO4 FOR CATEGORY 1A

N'hood Activity Centre Category	Preferred maximum height	Preferred front (street) setback	Preferred rear setbacks	Preferred side setbacks	Built form outcome
1A	11m (3 storeys) 7.5m (2 storeys) on a boundary adjoining a residential zone	0m Set back upper levels over 7.5m a minimum of 3m from the front boundary	Where the rear of the lot abuts a residential property or street, set back buildings a minimum of 3 metres from the rear boundary. Where the rear of the lot abuts a laneway, setback buildings a minimum of 1 metre from the rear boundary. Set back upper levels over 7.5 metres a minimum of 5 metres from the rear ground level building footprint.	Where the side of the lot abuts a residential property, buildings over 7.5 metres should be set back 1 metre from that boundary.	Development respects the low scale built form character of the surrounding residential areas.