

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P727/2019
PERMIT APPLICATION NO. GE/DP-32409/2018

CATCHWORDS

Glen Eira Planning Scheme; Elsternwick Structure Plan; Schedule 10 to the Design and Development Overlay Glen Eira Planning Scheme; consideration of height of building in a higher order activity centre; role and weight of a preferred height in a Design and Development Overlay; built form and shadow outcomes at an interface between commercial and residential zoned land; community benefits in a development weighed against height.

APPLICANT	Auyin Property Development Pty Ltd
RESPONSIBLE AUTHORITY	Glen Eira City Council
RESPONDENTS	N Jones and others, N Smith & J Dalziel, Glen Eira Historical Society Inc
SUBJECT LAND	7-15 Horne Street, Elsternwick
WHERE HELD	Melbourne
BEFORE	Michael Deidun, Presiding Member Lorina Nervegna, Member
HEARING TYPE	Major Case Hearing
DATE OF HEARING	16, 17, 18 & 19 September 2019
DATE OF ORDER	15 October 2019
CITATION	Auyin Property Development Pty Ltd v Glen Eira CC [2019] VCAT 1614

ORDER

- 1 In application P727/2019 the decision of the responsible authority is varied.
- 2 The Tribunal directs that planning permit GE/DP-32409/2018 must contain the conditions set out in planning permit GE/DP-32409/2018 issued by the responsible authority on 24 April 2019 with the following modifications:
 - (a) Condition 1(e) is amended to read:

The on-site car parking allocation reconfigured to include:

 - i Not less than one car space for each one or two bedroom apartment;
 - ii Not less than two car spaces for each three or more bedroom apartment;
 - iii Not less than 1.5 car spaces to each 100sqm of leasable floor area for the shops and food and drink premises; and



iv Not less than 2.0 car spaces to each 100sqm of net floor area for the office.

(b) Condition 1(g) is amended to read:

The first and second floor office windows and the third floor terrace facing the rear laneway to be screened to limit downward views to residential properties within 9 metres. The screening technique employed to the first and second floor office windows can however allow passive surveillance of the adjacent laneway.

(c) Condition 1(k) is amended to read:

The provision of at least 4 staff bicycle parking spaces for the shops and food and drink premises to be located within the building to the satisfaction of the Responsible Authority.

(d) Condition 1(m) is amended to read:

The width of the accessible car space and the adjacent shared area to be dimensioned on the plans and to be in accordance with the relevant Australian Standard.

(e) Condition 3(b) is amended to read:

The owner will maintain the shared space side laneway for not less than 1 year after the date of its completion to the satisfaction of Glen Eira City Council.

(f) Condition 7 is amended to read:

Concurrent with the endorsement of any plans pursuant to Condition 1, a Sustainability Management Plan (SMP), generally in accordance with the Sustainability Management Plan prepped by Sustainable Development Consultants and dated November 2018, must be submitted to the Responsible Authority for approval. The report must address Environmentally Sustainable Development (ESD) principles proposed for the site including, but not limited to, energy efficiency, stormwater collection (including the provision of water tanks) and reuse on the site for toilet flushing within the commercial toilets and for garden irrigation (note that Stormwater management must satisfy the requirements of Clause 53.18 of the Glen Eira Planning Scheme), and waste management and building materials. Any recommended changes to the building must be incorporated into the plans required by Condition 1.

Once approved, the SMP will be endorsed to form part of this permit and must be implemented to the satisfaction of the Responsible Authority. The SMP must not be varied except with the written approval of the Responsible Authority.

(g) Condition 8 is amended to read:

Before the development starts, the permit holder must prepare and have approved in writing by the Responsible Authority a Waste Management Plan (WMP) for the site, generally in accordance with the Waste Management Plan prepared by Ratio Consultants and dated



1 November 2018, with respect to the collection and disposal of waste and recyclables associated with the proposed uses on the site to the satisfaction of the Responsible Authority. The WMP must provide for the following:

- (a) The collection of waste associated with the uses on the land, including the provision of bulk waste collection bins or approved alternative, recycling bins, the storage of other refuse and solid wastes in bins or receptacles within suitable screened and accessible areas to the satisfaction of the Responsible Authority. Commercial waste bins being placed or allowed to remain not in view of the public, and receptacles not emitting any adverse odours.
- (b) Designation of methods of collection including the need to provide for private services. This method must incorporate recycling services and must comply with the relevant EPA noise guideline relating to the time of collection.
- (c) Appropriate areas of bin storage on site and areas of waste bin storage on collection days.
- (d) Details for best practice waste management once operating.

Once approved the WMP will be endorsed to form part of this permit and must be complied with to the satisfaction of the Responsible Authority and must not be varied except with the written approval of the Responsible Authority.

- (h) Condition 16 is amended to read:

This Permit will expire if:

- (a) The development does not start within four (4) years from the date of this Permit; or
- (b) The development is not completed within two (2) years of the commencement of the development.

The Responsible Authority may extend the time referred to if a request is made in writing before this Permit expires or within six (6) months after the expiry date if the use/development has not commenced.

If the development has commenced, the Responsible Authority may extend the time referred to if a request is made in writing within twelve (12) months of the expiry date.

- 3 The responsible authority is directed to issue a modified planning permit in accordance with this order.

Michael Deidun
Presiding Member

Lorina Nervegna
Member



APPEARANCES

For applicant

Ian Pitt QC, Solicitor of Best Hooper

He called the following witnesses:

- Mark Sheppard (urban designer) of David Lock & Associates
- Catherine Heggen (town planner and urban designer) of Message Consultants
- Stephen Hunt (traffic engineer) of Ratio Consultants
- Edmund Ng (visualisation) of 4D Studio

For responsible authority

Terry Montebello, Solicitor of Maddocks

He called the following witness:

- Robert McGauran (architect) of MGS Architects

For respondents

Anne Kilpatrick appeared on behalf of the Glen Eira Historical Society Inc

Natalie Smith and Nathan Jones both appeared in person



INFORMATION

Description of proposal	Construction of a 14 storey mixed use building above three levels of basement car parking
Nature of proceeding	Application under section 80 of the <i>Planning and Environment Act 1987</i> – to review the conditions contained in the permit.
Planning scheme	Glen Eira Planning Scheme
Zone and overlays	Commercial 1 Zone Design and Development Overlay 10 Parking Overlay 2-3 Environmental Audit Overlay
Permit requirements	Clause 34.01-1 to use land within the Commercial 1 Zone for dwellings where the frontage exceeds a width of 2 metres Clause 34.01-4 to construct a building and construct or carry out works on land within the Commercial 1 Zone Clause 43.02-2 to construct a building and construct or carry out works on land to which the Design and Development Overlay applies Clause 52.06-3 to reduce the standard requirement for car parking
Relevant scheme policies and provisions	Clauses 11, 15, 16, 17, 18, 21, 22.05, 34.01, 43.02, 45.03, 45.09, 52.06, 58, 65 and 71.02.
Land description	The land is a rectangular allotment with a frontage to Horne Street of 44.2 metres, a sideage to a laneway of 28.0 metres, and a rear abuttal to another laneway. The land has an overall area of 1239 square metres, and presently supports a range of commercial buildings.
Tribunal inspection	The Tribunal inspected the site and surrounding area prior to the hearing, on 13 September 2019

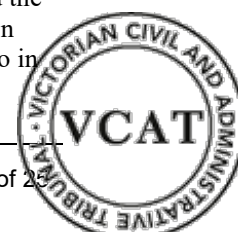


REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Auyin Property Development Pty Ltd (the ‘Applicant’) seek to review a number of conditions which have been applied to a planning permit by the Glen Eira City Council. The planning permit in question relates to an approval to construct a mix use development on land at 7-15 Horne Street, Elsternwick (the ‘review site’). Of the conditions under review, the most contentious is one that requires the overall height of the building to be reduced from 14 storeys to not more than 8 storeys.
- 2 At a Compulsory Conference the parties reached agreement in relation to modifications to a number of the conditions under review, being Conditions 1(e), 1(k), 1(m), 3, 7 and 8. As a result of this agreement, our decision must be to vary the Council’s decision, at least insofar as the agreed modifications are concerned.
- 3 At the Compulsory Conference, the parties also agreed to formally confine the matters in dispute in this proceeding to the remaining disputed conditions, being Conditions 1(b), 1(c), 1(g), 1(f) and 16. Broadly, these conditions address:
 - a. The overall height of the building;
 - b. The setback of the tower form from Horne Street;
 - c. The enclosure of some balconies as wintergardens;
 - d. The provision of screening to the office levels where they face the residential interface; and,
 - e. The length of time to commence the approved development.
- 4 We heard from the parties, comprising the Applicant for review, the Council, and Respondents. The Respondents, comprising a number of nearby residents and a historical society, raised matters that were both relevant to the conditions remaining under review, and some matters which are clearly not relevant. As a planning permit has been granted, and as we can only review those elements of the proposal that relate to the conditions in contest, we cannot turn our mind to those matters that fall outside of the changes sought by way of permit conditions.
- 5 The issues or questions for determination are:
 - a. Is the proposed height an appropriate outcome for this context?
 - b. Are the other elements of the proposed built form that are subject to permit conditions appropriate?

¹ 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.



- c. What time limit should apply to this proposed development?
- 6 The Tribunal must decide whether the Conditions sought to be applied to the permit by Council are required to achieve a reasonable and appropriate development outcome. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Glen Eira Planning Scheme, we have decided to vary the Council's decision, and modify some of the conditions in dispute. In relation to the key issue of building height, we find it appropriate to not modify the Council's condition, that requires a reduction in height of the building by six storeys. Our reasons follow.

IS THE PROPOSED HEIGHT AN APPROPRIATE OUTCOME FOR THIS CONTEXT?

- 7 The review site is located within the Commercial 1 Zone in the core of the Elsternwick Activity Centre, and within a very short walking distance of the Elsternwick Railway Station. As such, the review site draws considerable support from the Planning Policy Framework for the achievement of a high level of urban consolidation, including higher density housing. That policy support is captured in the following policy extracts.

Planning is to facilitate sustainable development that takes full advantage of existing settlement patterns and investment in transport, utility, social, community and commercial infrastructure and services.²

Develop a network of activity centres linked by transport; consisting of Metropolitan Activity Centres supported by a network of vibrant major and neighbourhood activity centres of varying size, role and function.

Create mixed-use neighbourhoods at varying densities, including through the development of urban-renewal precincts, that offer more choice in housing, create jobs and opportunities for local businesses and deliver better access to services and facilities.³

Build up activity centres as a focus for high-quality development, activity and living by developing a network of activity centres that:

- Comprises a range of centres that differ in size and function.
- Is a focus for business, shopping, working, leisure and community facilities.
- Provides different types of housing, including forms of higher density housing.
- Is connected by transport.
- Maximises choices in services, employment and social interaction.

² Clause 11 of the Glen Eira Planning Scheme

³ Clause 11.01-1R



Support the role and function of each centre in the context of its classification, the policies for housing intensification, and development of the public transport network.

Encourage a diversity of housing types at higher densities in and around activity centres.⁴

Encourage higher density housing development on sites that are well located in relation to jobs, services and public transport.⁵

Identify areas that offer opportunities for more medium and high density housing near employment and transport in Metropolitan Melbourne.

Manage the supply of new housing to meet population growth and create a sustainable city by developing housing and mixed use development opportunities in locations that are:

- ...
- Metropolitan activity centres and major activity centres.
- ...

Facilitate increased housing in established areas to create a city of 20 minute neighbourhoods close to existing services, jobs and public transport.⁶

- 8 The support for intensification of development within the Elsternwick Activity Centre continues at a local policy level. Elsternwick is identified as one of three urban villages, and one of four higher order activity centres within the Glen Eira municipality that are encouraged to be a focus of more intense development comprising significant change. This policy intent is made clear in the following policy extract.

Urban villages - Elsternwick, Carnegie and Bentleigh

An urban village is defined in the State Government's "Urban Village Project" report (August 1996), as "suburban centres of either 400 or 800m radius having a range of community facilities and activities, a mix of housing and substantial local employment, and linked to other suburban centres by public transport".

Urban villages are typically characterised by: mixed use areas; a pedestrian scale with increased casual surveillance; interconnected modes of public transport; public areas and open space; and a range of dwellings and higher density dwellings.

The historical town-planning concept of separation of uses has altered as a result of changing work habits, and the emergence of new inoffensive service businesses. There is a renewed interest in living, working, shopping, and recreating in the same area.

⁴ Clause 11.03-1S
⁵ Clause 16.01-2S
⁶ Clause 16.01-2R



These are secondary foci and Glen Eira's major retail foci (subregional shopping centres). The strategy proposes a complementary mix of smaller scale office and service uses so that the centres become more of a community focus. Higher density housing is encouraged within and adjoining the commercial zoning⁷

- Encourage a mix of housing types, increased residential densities and mixed use developments within urban villages and neighbourhood centres.
- Encourage residential development, where considered appropriate, subject to consultation with traders and the wider community, above or below existing car parks in urban villages and neighbourhood centres, whilst maintaining or enhancing the existing level of parking.
- Ensure that developments in commercial areas that adjoin residential areas are sensitively designed to protect residential amenity.
- Ensure residential development in commercial areas does not contribute to traffic and car parking problems.⁸

9 It is at this point that the Glen Eira Planning Scheme currently diverges to provide three different sets of guidance as to the preferred built form outcomes on the review site and surrounding land. We will address each of these sets of guidance under the three sub-headings that follow.

Policy at Clause 22.05

10 Clause 22.05 of the Glen Eira Planning Scheme contains the Urban Villages Policy. Clause 22.05-2 contains objectives that apply to all three urban villages, and these objectives include the following:

- To encourage increased densities within and around commercial/transport nodes which respects transition to the surrounding residential area.
- To ensure development respects the amenity of the surrounding area and provides a transition to surrounding residential uses.
- To promote residential and office use in upper levels of buildings within the retail hub.
- To protect and enhance the heritage, streetscape and pedestrian environment.
- To ensure future development is appropriate to the constraints of infrastructure and vehicular traffic movement (including parking).
- To create pleasant and safe public spaces.

⁷ Clause 21.03-5

⁸ Clause 21.04-2



- To encourage environmental sustainability and a reduction in green house gas emissions through the co-location of work, leisure, community and residential uses and developments.
- 11 Policies for the Elsternwick Urban Village identify the review site in Precinct 3, where it sits alongside the residential area to the west of the review site. The policies for this Precinct are as follows:

Where a permit is required for use or development, it is policy that:

- This precinct be encouraged as an area for higher density development at heights compatible with adjacent buildings.
 - Retail and commercial uses be limited to lots with frontage onto Horne Street, north of Rusden Street, with retail being encouraged to locate at the Glen Huntly Road end.
 - Any new developments not take the retail focus away from Glen Huntly Road.
 - Existing commercial premises in Horne Street may be developed with additional floors for commercial/residential activities.
 - Heights of buildings in Horne Street, north of Rusden Street, progressively decrease from the existing 5 storey building.
 - Site consolidation to facilitate increased densities in Ross Street be encouraged.
 - Increased densities not be at the expense of providing adequate on site car parking.
 - Residential buildings be located on lots fronting Nepean Highway.
- 12 It is fair to conclude that by grouping the review site with the adjacent residential neighbourhood in Precinct 3, despite it's commercial zoning, the policy at Clause 22.05 undersells the development potential of the review site. This is particularly the case where the review site is within a part of Horne Street where this policy seeks heights to decrease from the existing five storey building to the south-east of the review site. One reason for this conservative policy position is the age of this policy, which we understand dates from 1999, and therefore does not take account of successive redrafting of State policy which increasingly raises the bar for the extent of redevelopment expected in higher order activity centres.
- 13 While Clause 22.05 forms part of the Glen Eira Planning Scheme and must contribute to our decision making process, we choose to give it limited weight, given its inconsistency with the next two documents, and its failure to be revised in a manner consistent with the progress of State policy over time.



Elsternwick Structure Plan

- 14 The *Elsternwick Structure Plan, 2018-2031* (February 2018) has been adopted by Council and is a reference document to the Glen Eira Planning Scheme. The *Elsternwick Structure Plan* ('ESP') identifies the review site as within the Urban Renewal North area, which is described in the following terms.

URBAN RENEWAL NORTH

Urban renewal north is anchored by Glenhuntly Road, between Nepean Highway and the railway line.

It provides an opportunity to create a 'gateway' to Elsternwick that is complementary to the heritage character and scale to the east of the railway line. Although a distinct precinct that can accommodate change, the form and scale of this area will have regard for the prevailing scale of the Elsternwick activity centre.

The precinct will be an integrated medium to higher density neighbourhood with a mix of mixed-use and residential buildings. Development on Glenhuntly Road and Horne Streets will continue to provide a significant commercial presence and contribute to an activated pedestrian network. These sites will generate significant employment opportunities, and will contribute to commercial (non-retail) activity in Elsternwick.

Urban apartment areas within urban renewal north acknowledge a fine-grain subdivision pattern and residential setting. These sites will provide a mid-rise residential form in a transforming urban context. Pedestrian connections between Horne Street, Nepean Highway and Glenhuntly Road will support the integration of this changing precinct.

- 15 Under the ESP, the review site is identified as having a height of between 8-12 storeys. These heights are only expressed as storeys, and not as metres. It was the intention of Glen Eira City Council to implement the range of heights in a built form control, where the 8 storeys would be a discretionary height limit, and 12 storeys a mandatory height limit.
- 16 Under the ESP, the interface between the review site and the residential neighbourhood to the south-west is not identified as a location where it is sought to have a transition to a sensitive interface, as occurs at other locations where areas of higher and lower development abut.
- 17 It is fair to say that we have some concerns with the content and guidance contained in the ESP, which we summarise as follows:
- a. The ESP contains no urban design or built form analysis, and no meaningful strategic planning analysis, which explains how the recommended heights of 8-12 storeys are arrived at. The lack of any rigour or meaningful analysis in establishing these heights, lends us to give less weight to them.



- b. The ESP contains a series of eleven design principles, without explaining how these design principles are intended to interact with the recommended building heights. Relevant to the review site are the following two design principles.

1. Minimise overshadowing to existing residential sites

The form and scale of new development must be guided by minimising overshadowing impacts on existing residential sites. Development must satisfy the overshadowing objectives and standards of the Glen Eira Planning Scheme and may need to step down in scale towards residential sites in order to minimise overshadowing impacts.

5. Appropriate transition to existing residential areas

Taller buildings are encouraged on major roads/ transport routes and commercial streets. Development must step down to interfaces with residential areas and provide a landscape buffer where possible.

- c. The ESP contains a recommendation for further strategic work which at this stage has not been undertaken, as set out below.

NEXT STEPS

Changes to the Glen Eira Planning Scheme are required to facilitate and guide development in a way that addresses these principles as outlined. While the Structure Plan provides high level direction for the urban renewal precincts, further detailed analysis is required, to inform detailed development parameters and changes to the planning scheme. This may result in further refinement of the building heights and setbacks shown in Figures 15.0 and 16.0.

The following detailed analysis will be undertaken to inform new planning controls:

- > Site and urban form analysis, to ensure that development responds appropriately to sensitive interfaces such as existing residential areas (including overshadowing analysis).

- 18 The ESP therefore identifies the review site as part of an Urban Renewal Area, and identifies a range of heights to be encouraged. However, the ESP also sets out a need to deal with overshadowing of, and transition to, the residential area, and also identifies additional work needed to resolve the desired future built form.

Design and Development Overlay 10

- 19 As a first step in implementing the ESP, the Glen Eira City Council requested the Minister for Planning to implement an interim Design and Development Overlay (DDO) over the Elsternwick Activity Centre. While we have not seen the draft DDO schedule which the Council sought, it was



made clear to us that the Minister approved a different form of control to that sought by Council.

- 20 DDO 10 is the interim built form control that has been applied to the Elsternwick Activity Centre. Critically, the Council's intended 8 storey preferred and 12 storey mandatory height limit for the review site and surrounding commercially zoned land, turned into a discretionary height limit of 43 metres, comprising up to 12 storeys. In addition, DDO10 comprises required setbacks from the street frontage, and a series of design requirements, which can be varied with a permit. It also repeats the mapping contained in the ESP, which does not identify the interface between the review site and the residential properties to the south-west, as a location where a specified transition is required to a sensitive interface.
- 21 We have some concerns with the extent of weight to be given to the 43 metre discretionary height limit set out in DDO10. We accept that such discretionary height limits have an important role to play in guiding the reasonable expectations of applicants and the surrounding community, as to the likely extent of built form outcome on any particular site. We particularly accept that would be the case where the discretionary height limits set out in a built form control have been arrived at after an extensive program of strategic and urban design analysis. However, where the basis for the discretionary height limit is not known or understood, we consider that there is more work to be done for an applicant in demonstrating that a preferred height limit represents an appropriate built form outcome for any particular site.
- 22 In the case of the 43 metre discretionary height limit set out in DDO10, there are more questions, as opposed to answers, in relation to our understanding of the strategic support that exists behind such a height limit being applied to the review site. In particular, we note the following:
 - a. As we have already observed, the ESP is largely devoid of any urban design or strategic analysis that supports the heights set out in that structure plan, which appears to form the basis for the discretionary height limit set out in DDO10.
 - b. The ESP identifies the need for more analysis and assessment to be undertaken to further refine building heights, as well as the treatment of interface locations and the likely shadows to impact residential properties. It appears that none of this work has been undertaken prior to the introduction of DDO10.
 - c. DDO10 contains very little guidance to enable a decision maker to assess whether a building that is at or under the discretionary height limit, achieves an appropriate built form outcome for a particular site. We accept that a useful decision guideline exists for developments that seek to exceed the discretionary height limit. Decision guidelines and requirements also apply that relate to particular elements of a built form, such as the use of materials and



colours, the provision of entries, the placement and design of building services, the potential overlooking of nearby dwellings, the treatment of interfaces to heritage places, and the desired treatment of the lower levels of the building. However, when one comes to assess the appropriateness of the overall height and scale of a building, the extent of guidance is very thin, and amounts to not much more than the following statements, some of which are only somewhat relevant to the issue of building height and scale.

Reduce the visual impact of taller buildings by providing a consistent street wall height with upper floors recessed.

Provide adequate separation between towers of buildings to achieve a high level of internal amenity for existing and future occupants of adjacent towers and to avoid the appearance of a continuous built form when viewed from the public realm.

Buildings should minimise overshadowing impacts on existing and future open spaces, commercial footpath-trading areas and existing residential sites.

Incorporate a podium and tower form with detailing emphasised at ground floor to achieve a human scale with an active street level experience.

Provide separation between a low-scale podium and upper levels to assist in integration with traditional low-scale streetscapes and to assist in mitigating building bulk and overlooking (without reliance on privacy screens).

Consolidate upper setbacks to avoid a visible tiered form.

Where adjacent to sensitive interfaces, provide a transition in scale from larger buildings to areas of smaller scale.

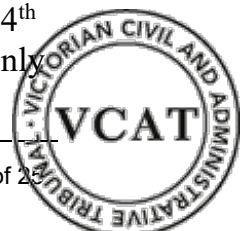
The extent to which proposed buildings respect the preferred scale and form of development, particularly when viewed from the pedestrian network.

Whether development in Precinct 5 or 6 demonstrates a high level of architectural quality and makes a positive contribution to the public realm.

- 23 For these reasons we consider that the Applicant has much work to do under DDO10 to justify the achievement of the preferred height limit, and then to further justify a building that exceeds the preferred height limit.

Assessing the proposal

- 24 The Council has granted a permit to use and develop the review site. The proposal being considered at the time of the grant of a permit, which the Applicant continues to pursue in this proceeding, comprises a 14 storey mixed use building. Due to the generous floor to floor heights employed throughout the building, the proposal reaches a height to the top of the 14th storey of between 49.56 and 52.3 metres. However, these heights will only



be apparent on the plans, or to those aware of the building's structure, as the tower form is to extend to a combined parapet and architectural feature, with an overall height of between 53.1 and 59.8 metres.

25 Condition 1(b) applied by the Council seeks the following.

The building height to be reduced to not more than 8 storeys, achieved through the deletion of six levels that contain apartments.

26 The effect of this condition is to shave 20.4 metres off the building heights and parapet/architectural feature heights set out above. This results in a height to the top of the 8th storey of between 29.16 and 31.9 metres, and a height to the combined parapet and architectural feature of between 32.7 and 39.4 metres.

27 The Applicant called urban design evidence from Mark Sheppard and Catherine Heggen. Both of these experts carried out an assessment comparing the height of the proposed building to both the 8 storeys sought to be permitted by Council, and the 12 storeys allowed under DDO10. They considered the comparative impacts on the adjacent residential neighbourhood, which they opined to be appropriate, particularly given this interface is not identified as a sensitive interface in either the ESP or DDO10. Both experts also identified the proposed building as achieving design excellence, and considered that the benefits associated with the proposal provided a basis for the achievement of additional height over the 43 metres or 12 storeys set out in DDO10.

28 Mr Sheppard opined that both the proposed height above the podium, and the shadowing impacts, are within reasonable expectations, as set by DDO10 and the structure plan. He argues that one should not expect the same tempering of development at this interface to residential properties, as occurs at the identified sensitive interfaces. It is the evidence of Mr Sheppard that it is the podium that has a really significant visual impact on the nearby residential properties, not the height of the tower.

29 Ms Heggen opined that a reduction in height to eight storeys blunts and laughs at the concept of a podium and tower form, and that the outcome would be clunky and undermining of all of the good work done by this proposed building at ground level. She also argues that the skyline contribution of the proposed building is lost at eight storeys, and that the effect of the coffered and tessellated treatment to the upper levels will be lost. Ms Heggen is of the view that such a reduction in height will impact the architectural excellence of the building.

30 This evidence was supported by the submissions of Mr Pitt. Mr Pitt submits that the proposed development is a reasonable response to the current critical problem of housing supply facing metropolitan Melbourne. He also argues that good architecture such as this should be seen, and that there is no problem with taller buildings in this context, aside from their amenity impact, which must be assessed according to the guidance provided in the Glen Eira Planning Scheme.



- 31 We are not persuaded by this evidence and submissions, and instead find that the proposed overall building, at either 12 or 14 storeys in height, would result in an inappropriate built form outcome for this context. We make this finding for the following reasons.
- 32 The proposed building is of a significant scale. As described in Prof McGauran's evidence, a building of up to 59.8 m in height is an equivalent height to a mixed use development of 18 or 19 storeys. In response to the Tribunal's questions, Ms Heggen agreed that the building is of a different order of height to those previously approved and constructed in this activity centre, whereas Mr Sheppard conceded that this building will be noticeably taller. As we put to the witnesses during the course of the hearing, the currently tallest approved and constructed buildings in this activity centre include three developments at either 11 or 12 storeys in height, that vary between 35.6 and 38.8 metres when measured to the respective parapet heights. This proposed building is about 50% taller again, noting that its overall height of 59.8 metres also expresses itself as a parapet height facing the spine of the activity centre.
- 33 This disparity between the height proposed for the review site, compared to that of other developments approved and constructed in this activity centre, is a relevant consideration. It is relevant as both the ESP and the current policy framework encourage development that has regard to the existing scale of development within this activity centre. This encouragement is reinforced by the range of heights encouraged by the ESP, and the 43 metre height limit encouraged by DDO10. We consider that a 43 metre height limit is not that dissimilar to the range of heights in existing approvals and constructed developments as described above.
- 34 We also consider it unlikely that this building will be read in the future amongst a cluster of buildings at a similar height. To the south of the review site will remain a group of three narrow properties which could be developed with a mid rise form. To the south of that is an existing five storey office building that may be unlikely to be demolished for a building of additional height. Further south of that are three very narrow properties before one arrives at a modern three storey mixed use development at the corner of Horne and Rusden Streets that is unlikely to be sold together.
- 35 North of the review site are a series of properties that include the land at 1-3 Horne Street, which was subject to a Tribunal decision in *The Lenner Group Pty Ltd v Glen Eira CC* [2018] VCAT 172 where a nine storey building rising to 29.4 metres in height was refused. While this Tribunal decision predated both the ESP and DDO10, given the constraints of that site, we consider it to be an unlikely candidate to host a building of the scale proposed for the review site. The various expert witnesses in this proceeding all agreed that the other available development sites in this part of the activity centre are relatively few. There is the site at 233-247 Glen Huntly Road which currently has an approval for a 12 storey building rising to 38.8 metres, and which could potentially go higher under the current



interim DDO, or a favourable permanent DDO. The only other significant development opportunity identified is the McDonald's convenience restaurant and adjacent service station located on the south-eastern corner of Glen Huntly Road and Nepean Highway. While this is an obvious candidate for a very tall building, the realisation of its development potential relies on the existing land holders.

- 36 A building of the height proposed for the review site will transform the built form environment in this activity centre. That may well be an acceptable outcome and response to the range of policies contained at a State level, that seek to further intensify development at both activity centres, and near major public transport routes. The review site, of course, is a candidate under both of these locational criteria. However, we are not persuaded that such a transformation of the built form environment in this activity centre, should occur under the existing planning framework.
- 37 Firstly, we form that view having regard to the absence of any genuine urban design or strategic analysis that supports the 43 metre discretionary height limit currently set out in DDO10. Secondly, we are also concerned that the existing DDO10 is an interim control, and that the more permanent planning controls and built form guidance for this activity centre are still being created. In the absence of a considered, tested and permanent set of built form controls for this activity centre, we are loath to approve a 14 storey 59.8 metre tall building on the review site, that will have the effect of permanently transforming in a significant manner the built form language for this activity centre.
- 38 Thirdly, we are concerned as to the extent that the proposed building, that peaks at a height of 59.8 metres, extends considerably above the interim discretionary height limit, having regard to the observations we make about this discretionary height limit set out above.
- 39 A building of this scale will also create a very awkward transition to the adjacent residential area. Before we describe that awkward transition, we need to make some observations of how the proposed building responds to the limited guidance that is available. We acknowledge that the adjacent residential area forms part of the urban renewal area identified in the ESP, albeit that the extent of urban renewal that can be expected to occur is significantly limited both by the application of a four-storey preferred height under the ESP, and the current zoning of this residential neighbourhood within the Residential Growth Zone with a 13.5 metre height limit.⁹ We also acknowledge that both the ESP and DDO10 do not identify the interface that the review site has with its adjacent residential interface as being a sensitive one where a particular transition is to occur. Where such sensitive interfaces are identified, both the ESP and DDO10 specify the tiered setback arrangement that is required to the mid and upper

⁹ Or 14.5 metres on sloping sites.



levels of a building. Where such sensitive interfaces are not identified, the common encouragement found under DDO10 applies as set out below:

Consolidate upper setbacks to avoid a visible tiered form.

- 40 We agree with the evidence of Mr Sheppard and Ms Heggen, and the submissions of Mr Pitt, that this and other guidance makes it clear that the planning framework for the review site encourages a podium and tower form, with the tower to comprise a singular element without increased setbacks at its upper levels.
- 41 Having regard to this context, we still observe that the proposed building, primarily as a result of its scale, creates a very awkward transition to the adjacent residential area. As we have already identified, the proposed building on the review site comprises a range of heights. Due to the slope of the land, it is the interface with the residential neighbourhood to the south west of the review site where the tallest heights are proposed. This is borne out in the elevations, where the south west elevation comprises of height that varies between 59.8 m at its 'northern' edge, and 55.0 m at its 'southern' edge. These building heights are proposed at a setback of 5.0 m from the south-western boundary of the review site, with a laneway width of 3.15 metres adding to the separation distance between the tower and the rear boundaries of the adjacent residential properties.
- 42 We appreciate that different typologies of building heights and setbacks are found at various interfaces between commercial and residential properties in activity centres. Different approaches are often adopted depending on a variety of factors, including whether the residential properties are within the boundaries of the activity centre, the nature of the residential zone that applies, the existing character of the residential area and the extent of change to that character that is encouraged, and the position of the activity centre within its hierarchy. Despite this acknowledgement that a number of different approaches occur across metropolitan Melbourne, we have struggled to identify another location where a building of this scale, would be setback at such a distance from the rear boundary of residential properties.
- 43 We acknowledge that a number of attributes of this adjacent residential neighbourhood lends itself to a relatively sharp transition. These include the location of the residential neighbourhood within a Residential Growth Zone with a four-storey height limit, and the designation of the residential neighbourhood as forming part of the urban renewal area within the ESP. However, there are also some attributes that argue against the extent of transition that is currently proposed. These include the size of the adjacent residential properties, and in particular their narrow depth from their front to rear boundaries of around 20 metres, that we consider will be a serious impediment to their attractiveness for redevelopment with higher buildings. It also includes the existing character of the immediately adjacent properties, that currently comprise modest one and two storey dwellings.



- 44 The attributes that argue against the extent of transition that is proposed, also includes the relationship between the review site and this residential neighbourhood, where the positioning of the residential neighbourhood to the south-west of the review site, means that there will be significant shadow impacts from a building of scale on the review site. While both Mr Sheppard and Ms Heggen made some inroads by comparing the extent of shadow that will occur from the proposed 14 storey building, with the eight storey outcome approved by Council, ultimately we are not persuaded by their evidence that the differences in the shadow impacts between the two options are not significant. In contrast, we consider that a building of the scale proposed for the review site clearly creates far more significant shadowing impacts on the adjacent residential neighbourhood, compared to the eight storey building approved by Council. That is particularly the case in relation to the few properties on the south-western side of Ross Street that will be considerably overshadowed in the morning at the equinox, but would experience a far reduced extent of shadowing impacts from an eight storey building.
- 45 This is also the case in relation to those properties that abut the laneway at the rear of the review site. When compared to the proposed 14 storey building, the development of an eight storey building on the review site would result in increased shadows at important times in the middle of the day at the equinox, and increase the shadows at other times of the year.
- 46 We also observe that there are elements of the proposed built form, which are not before us, but which add to the sense of height and scale of the proposed building. These elements include:
- a. The extruded tower form which provides a singular unbroken built form rising a number of storeys above the podium;
 - b. The use of vertical detailing in the tower form, which continues through to the very tall parapet/architectural detailing, and which emphasises the overall height of the building;
 - c. The chosen materials and colors, which clearly seek to draw attention to the proposed built form;
 - d. The overall footprint of the tower form, which we do not consider could be reasonably described as a slender form, when comparing it to the average size of development sites in this activity centre context;
- 47 Finally, in response to those submissions and evidence previously summarised that we haven't already addressed, we set out the following.
- a. We are not persuaded that reducing the overall height of the proposal will be fatal to the overall design language of the building, nor that the architecture is of such a high quality that it warrants support for the height sought at any cost. Further, as we do not consider that the proposed design achieves architectural excellence.



we do not agree with the evidence of Ms Heggen that a reduction in height will impact the architectural excellence of the building. While the building will now appear somewhat ‘out of proportion’, with a ‘squat’ tower element compared to the height of the podium, that is a result of this being a conditions appeal, and the fact that only certain conditions, and therefore only certain components of the overall design, are before us. If the entire proposal were before us, we would certainly choose to do something about the podium/tower relationship for a building of eight storeys in height. However, as the only relevant ‘lever’ we have to play with is the overall height, that is all we have the power to adjust.

- b. The architects have chosen a specific design language for the tower element – ostensibly a glazed curtain wall arrangement with vertical extrusions – that is historically typical for high and mid rise commercial building facades, but also utilised in low and mid rise business parks. In recent years curtain wall facades have been commonly approved for residential towers as they provide a low cost façade system in mid to high rise buildings. We consider that the specific design language chosen for the tower element will continue to be read and understood for the lower building height of eight storeys that we support. We therefore do not agree with the evidence of Ms Heggen that the effect of the architectural treatment to the upper levels will be lost with the reduction in height sought by Council.
- c. We do not understand or agree with the evidence of Ms Heggen that a reduction in height of the building to eight storeys undermines the positive aspects of this proposal in terms of its ground level design. The positive aspects of the ground level design will not be reduced or altered by a condition requiring a reduction in height to eight storeys. Further, while we agree that there are a number of public benefits associated with the ground level design, including the widening of the laneways and the provision of a public meeting space, we do not consider these benefits to encourage additional height on the review site to the extent sought by the Applicant.
- d. Finally, in response to the submissions of Mr Pitt, we agree that there is a critical housing shortage across Metropolitan Melbourne, that there is also a need to supply housing for population increases that are still to occur, and that the review site is well located to respond to these pressures. However, we do not consider that the policy framework as a whole supports a building of the scale sought on the review site, and nor do we think that the removal of six storeys, which contains a total of only 21 dwellings, will make a meaningful difference either way in terms of housing provision in this activity centre, and across Metropolitan Melbourne.



- 48 For these reasons we are not persuaded that it is appropriate to allow a 14 storey building rising to almost 60 metres in height in this context. We therefore support the application of Condition 1(b) to this permit. The question that is then before us, and it is a subjective one, is how many storeys need to be taken off this building to achieve an appropriate and acceptable outcome. This is often a difficult assessment to make, as the differences in height associated with a single storey often make an incremental difference to the impact and suitability of the proposed built form.
- 49 We also need to weigh the independent assessment of Council's officers that recommended the approval of a 12 storey building on the review site, having performed that same balancing considerations that are before us now.
- 50 Ultimately we have decided that the Council has got the balance right in requiring the deletion of six storeys from the proposed building, to result in an eight storey development on the review site. Such an outcome will produce a building that ranges in height to the top of the 8th storey of between 29.16 and 31.9 metres, and a height to the combined parapet and architectural feature of between 32.7 and 39.4 metres. We find this extent of reduction in height achieves the right balance having regard to the following matters:
- a. The expressed desire to have built forms comparable in scale to those already existing and approved in this activity centre. We consider that the scale of up to 39.4 metres will still be the tallest currently approved built form in this activity centre, but in the order of heights of other nearby approvals;
 - b. The manner in which elements of the proposed built form will continue to emphasise the overall height of the building, rather than mitigate or articulate its height as occurs on other nearby approvals;
 - c. The contextually based desire for a step in heights to the adjacent residential neighbourhood, particularly in the absence of a proposed built form model on the review site that provides additional setbacks at the upper levels;
 - d. The extent of shadows that will be cast on the adjacent residential neighbourhood; and,
 - e. The manner in which a building of this scale will be read in the future in a setting of buildings of similar or lower heights.
- 51 We choose to observe that, if the Council had determined to refuse to grant a permit for the proposed development, rather than condition a reduction in height by six storeys, we would have readily supported that decision that no permit be granted. We agree with the submissions of nearby residents, lead by Mr Jones and Ms Smith, that the proposed building results in a range of built form impacts, that will even be considerable with a reduction in height.



to 8 storeys. Unfortunately, we find ourselves in a position where a permit has been granted, and we are left to determine particular contested conditions, which only influence particular elements of the overall proposal. Having regard to the various considerations that we need to balance in our decision making task, we consider that the fairest outcome we can offer to all parties, is to support the Council's position in relation to building height.

52 For these reasons we will not be deleting or modifying Condition 1(b).

ARE THE OTHER ELEMENTS OF THE PROPOSED BUILT FORM THAT ARE SUBJECT TO PERMIT CONDITIONS APPROPRIATE?

53 The other contested conditions relating to the built form are as follows:

- (c) The front (north-eastern) setback of the tower element (third floor and above) to Horne Street increased to a minimum of 4.0 metres.
- (f) all sides of all balconies at the front of the building from the fourth to the seventh floors to be open with the deletion of wintergarden louvres and side walls.
- (g) The first and second floor office windows facing the rear laneway to be screened so that they will have not more than 25% clear openings to a height of at least 1.7 metres above floor level to limit views toward the Ross Street properties.

Condition 1(c) Front setback

54 Condition 1(c) requires the front (north eastern Horne Street) setback of the tower to be 4 metres. The Applicant submits that the front setback of the tower element is acceptable at 3 metres and does not believe that a further one metre setback is warranted, as it will not be visually discernible.

55 The purpose of tower setbacks from podiums are multi-faceted but can be distilled as follows:

- a. To enable a podium to be the most visually prominent element at street scale;
- b. To ameliorate or mitigate adverse environmental impacts (wind and solar access) of a high form (tower element) over the pedestrian experience and immediate environs;
- c. To break up a tower podium composition into distinct elements.

56 We find that whether a 3 or 4 metre setback is visually discernible to pedestrians at street level in close proximity of the proposal is, in this context, a moot point. Rather, what we need to consider is whether the proposal will undermine the purpose of podium and tower separation for the reasons stated above. In the case before us, the lesser setback will undermine the separation of the two elements and create a shallowness or flatness to the façade, which will result in other design consequences. These consequences include a lesser distinction between a podium and



tower form and the impacts that this will have on the relatively narrow width of Horne Street.

- 57 The Applicant submits that the loss of one metre within the tower footprint would result in a loss of apartments and that this should not be supported. We do not accept that the apartment layouts cannot be resolved with a greater setback but note that it will likely require a revision of apartment configurations. However, we do not believe this is a reason to maintain a minimal 3 metre separation when the result would reduce the effectiveness of the podium-tower dialogue, and the effect would be a greater visual prominence of the development at the front facade.

Condition 1(f) Deletion of wintergardens

- 58 Condition 1(f) seeks to open up the façade balconies that are proposed as wintergardens by removing them on them from all sides of the front of the building (i.e. the Horne Street elevation and the north-west unnamed laneway elevation) from the fourth floor and above. The Applicant submits that the wintergardens are an appropriate design response and serve to provide private outdoor spaces that are protected from wind exposure. They comprise a fixed glazed balustrade with adjustable louvres above.
- 59 We agree with the evidence of Prof McGauran where he states that the enclosure of the balconies as wintergardens ‘*amplifies the reading of the external skin of the building as a contiguous unbroken form when in closed position and even when open expressed as a ribbed transparent cladding...*’. We also consider that the removal of the wintergardens would improve the level of articulation and visual interest of the tower façade, as well as encourage street activation through greater visual connection from and to open balconies (versus the proposed wintergardens). For these reasons we find that the removal of the wintergardens is appropriate and will consequentially improve the amenity of future residents as well as provide activation at street level.
- 60 We also find that the opening up of the balconies will provide for a more articulated façade that is complimentary with the tower form expression at 8 storeys. This will lead to a different reading of the building overall, which we find is an improvement on what the Applicant proposes at 14 storeys.

Condition 1(g) Screening of downward views at the south west façade (rear)

- 61 Condition 1(g) applies to the screening of the first and second floor offices facing the rear laneway. This was not contested by the Applicant other than ensuring that alternative screening techniques could be employed rather than a 25% transparent screen up to 1.7 metres above finished floor level (FFL). Ms Heggen proposed an alternative wording for Condition 1(g), which allows a flexibility in the design of the screening, to ensure that viewing to the adjacent areas of secluded private open space is restricted, but that an outlook and passive surveillance of the laneway is achieved.



- 62 We agree that a design alternative that would concurrently address safety by design (i.e. allow for passive surveillance and downward views of the laneway for safety concerns) and limit views to the Ross Street properties is appropriate. By the end of the hearing it was apparent that all of the parties agreed to the wording suggested by Ms Heggen, which we have implemented in our orders.

WHAT TIME LIMIT SHOULD APPLY TO THIS PROPOSED DEVELOPMENT?

- 63 The applicant seeks a permit expiry condition that would allow them to commence the development within four years, rather than the usual two years. The Council says that three years to commence is reasonable and appropriate.
- 64 The time limits operate from the date of the grant of a planning permit. That occurred on 24 April 2019. As such, even if we agreed with Council and allowed a three year time limit to commence, in effect that would provide a period of around two and a half years to commence following our decision. We agree with the Applicant that there are a number of factors at play here that would reasonably require a longer period than normal to commence work on the approved development. Our decision to limit the building to eight storeys potentially adds to those factors, as the Applicant will now need to do some work to determine whether and how the development at eight storeys remains viable, and fits within their economic and financing modelling.
- 65 We also note that most of the submissions put forward by the Council and the Respondents against an extension of the commencement time limit, relate to the concern as to how a 12 or 14 storey building will compare to the permanent built form controls, once they are resolved for this activity centre. To a large degree, those concerns have now been addressed by our support of Council's condition limiting the height of the building to 8 storeys.
- 66 For these reasons, we agree with the Applicant's request to apply a four year time limit to the commencement of works associated with the approved development. Under these circumstances, we agree with the submissions of Mr Pitt that the time limit condition should also be amended to allow for a two year construction timeframe, rather than allow 6 years for completion of the development. The later of which could allow an unnecessarily protracted construction timeline, with impacts both on the amenity of the nearby residents, and the visual appearance of this part of the activity centre.



CONCLUSION

67 For the reasons given above, the decision of the responsible authority is varied. A permit is granted subject to conditions.

Michael Deidun
Presiding Member

Lorina Nervegna
Member

