

# **VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

## **PLANNING AND ENVIRONMENT LIST**

VCAT REFERENCE NO. P894/2022  
PERMIT APPLICATION NO. MPS/2020/799

### **CATCHWORDS**

Merri-bek Planning Scheme; Minimal change area and policy at Clause 15.01-5L of the Merri-bek Planning Scheme; visibility and siting of development along the Merri Creek corridor; Environmental Significance Overlay 1 under the Merri-bek Planning Scheme; Standard B17 and Clause 55.04-1.

<b>APPLICANT</b>	Harrison St Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Merri-bek City Council
<b>REFERRAL AUTHORITY</b>	Melbourne Water
<b>RESPONDENTS</b>	Holy Protection Cathedral, Jane Ellison and others, Peter Mollison, Merri Creek Management Committee, Franco Paoletti
<b>SUBJECT LAND</b>	38 Harrison Street, Brunswick East
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	20, 21, 22 & 23 March 2023
<b>DATE OF ORDER</b>	13 April 2023
<b>CITATION</b>	Harrison St Pty Ltd v Merri-bek CC [2023] VCAT 398

### **ORDER**

- 1 In application P894/2022 the decision of the responsible authority is affirmed.
- 2 In planning permit application MPS/2020/799 no permit is granted.

**Michael Deidun**

**Member**



## APPEARANCES

For applicant	<p>Andrew Natoli, Solicitor of Equipe Lawyers</p> <p>He called the following witnesses:</p> <ul style="list-style-type: none"><li>• Daniel Soussan, Town Planner of Tract Consultants</li><li>• Bryce Raworth, Heritage Consultant of Bryce Raworth Conservation &amp; Heritage</li><li>• Paul Kelly, Ecologist of Paul Kelly &amp; Associates</li><li>• Rob Galbriath, Arborist of Galbraith &amp; Associates</li><li>• John Patrick, Landscape Architect of John Patrick Landscape Architects</li></ul>
For responsible authority	David Song, Town Planner of Song Bowden Planning
For referral authority	No appearance
For respondents	<p>Jane Ellison appeared in person and on behalf of her joint Respondents</p> <p>Damian Ford appeared on behalf of the Holy Protection Cathedral</p> <p>Luisa Macmillian appeared on behalf of the Merri Creek Management Committee</p> <p>Peter Mollison, and Franco Paoletti both appeared in person</p>



## INFORMATION

Description of proposal	The construction of seven townhouses, one at two storeys in height with a roof deck, and the others at three storeys in height with roof decks, in addition to an existing single storey dwelling
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Merri-bek Planning Scheme
Zone and overlays	Neighbourhood Residential Zone Environmental Significance Overlay 1 Heritage Overlay 90 Design and Development Overlay 1 Land Subject to Inundation Overlay Development Contributions Plan Overlay 1
Permit requirements	Clause 32.09-6 to construct two or more dwellings on a lot on land within the Neighbourhood Residential Zone Clause 42.01-2 to construct a building, construct or carry out works, and remove vegetation, from land to which the Environmental Significance Overlay applies Clause 43.01-1 to construct a building and construct or carry out works on land to which the Heritage Overlay applies 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 44.04-2 to construct a building and construct or carry out works on land to which the Land Subject to Inundation Overlay applies Clause 52.06-3 to reduce the standard car parking requirement
Relevant scheme policies and provisions	Clauses 02, 11, 12, 15, 16, 18, 32.09, 42.01, 43.01, 43.02, 44.04, 52.06, 55, 65 and 71.02.



Land description	The land is an irregular shaped allotment, with a frontage to Harrison Street of 33.73 metres, a depth of between 33.53 and 47.24 metres, and an overall area of 1362 square metres. The land has a rear abuttal to the reserve that runs alongside the Merri Creek. The land presently supports a series of single storey heritage structures.
Tribunal inspection	The Tribunal inspected the site and surrounding area prior to the hearing, on 8 March 2023, and again on 23 March 2023.



## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Harrison St Pty Ltd (the ‘Applicant’) seeks to review the decision of the Merri-bek City Council (the ‘Council’) to refuse to grant a planning permit for the proposed development of seven townhouses in addition to an existing dwelling, on land at 38 Harrison Street, Brunswick East (the ‘review site’).
- 2 The Council determined to refuse to grant a planning permit, after considering a recommendation from its officers that a permit should be granted for the proposed development. The Council’s grounds of refusal raise concerns in relation to the extent of tree removal proposed and the landscape outcomes to be achieved on site, as well as the impact on the habitat values of the site and the built form impacts on the adjacent Merri Creek corridor.
- 3 A number of nearby land owners have lodged Statements of grounds, and some of these people have become parties to the proceeding. In addition to the matters raised in Council’s grounds of refusal, these people raise concerns in relation to the loss and proposed relocation of heritage structures, the rate of car parking being provided on site, and a range of potential impacts on adjoining properties.
- 4 The issues or questions for determination are:
  - a. Is the proposal an appropriate response to its context?
  - b. Is the proposal an appropriate response to the heritage place?
  - c. Will there be any unreasonable off-site amenity impacts?
  - d. Is an appropriate level of internal amenity achieved?
  - e. Does the proposal appropriately provide for car parking and traffic movements?
- 5 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Merri-bek Planning Scheme, I have decided to affirm the Council’s decision, and direct that no planning permit be granted. My reasons follow.

### IS THE PROPOSAL AN APPROPRIATE RESPONSE TO ITS CONTEXT?

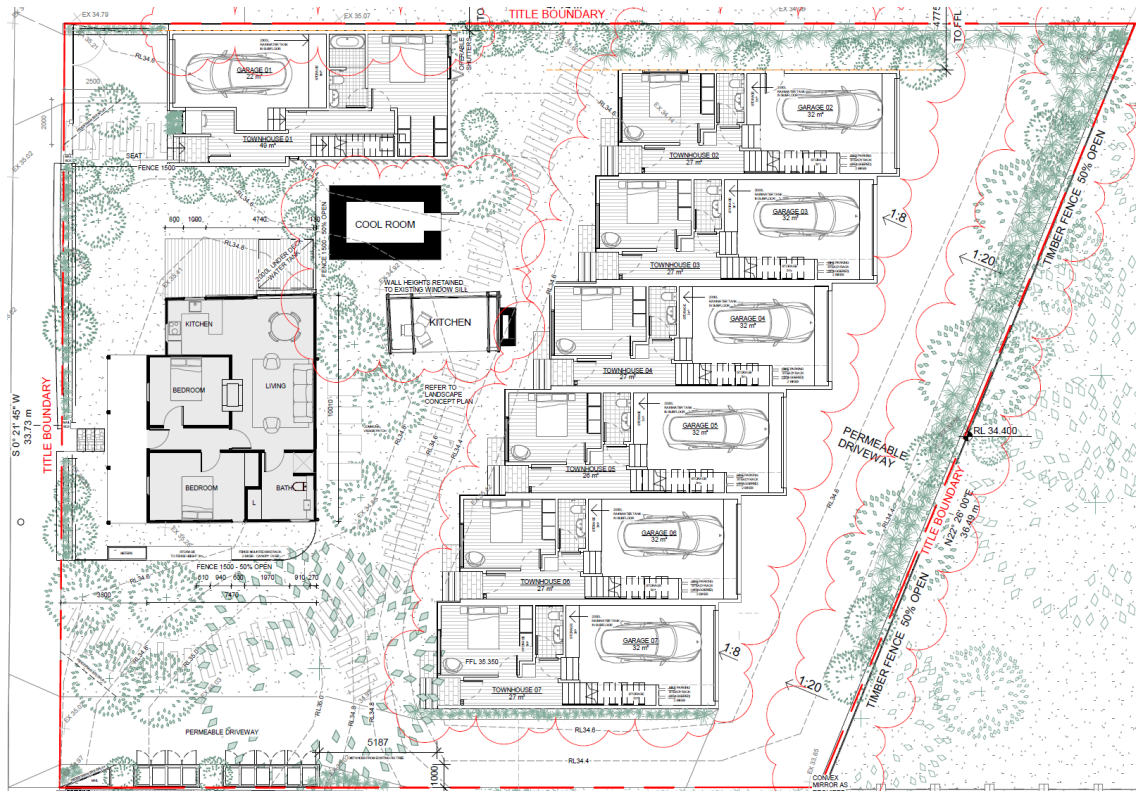
- 6 The application that is before me proposes the retention of heritage structures that either front Harrison Street, or are more centrally located on the review site. To the north of the heritage cottage is proposed a two storey townhouse (plus roof deck) that will sit adjacent to the Harrison

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<sup>1</sup> 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.



Street frontage and draw independent vehicular access directly from Harrison Street. To the rear of the review site are proposed a series of attached three storey townhouses (plus roof decks), that will sit adjacent to the Merri Creek corridor at the rear of the review site. A common driveway is proposed along the southern boundary of the review site, that then runs along the rear boundary providing vehicular access to garages in each of the three storey attached townhouses. This layout is depicted in the ground floor plan (A103) that is reproduced in part below.



- 7 The review site provides an interesting and diverse context that is challenging to decision makers such as myself, in determining what is an appropriate level and form of development on the review site. This interesting and diverse context requires an integrated decision making approach in weighing the different policy objectives that apply to the review site, in the interest of achieving a net community benefit. This interesting and diverse context comprises the following key opportunities and constraints that impact the review site:
  - a. The position of the review site in a well serviced suburban location which can support urban consolidation, activates policy at a State, Regional and local level that encourages urban consolidation and more diverse housing forms in such locations. In respect of the review site, that strong policy support is combined with the large proportions of the review site that lends itself to redevelopment;

- b. The existing character and extent of development created by the existing four storey apartment developments to the immediate north of the review site, and the place of worship to the immediate south of the review site that comprises large buildings and a high level of hard paved areas;
  - c. The expectation for limited new developed created by the more recent<sup>2</sup> designation of the review site as part of a minimal change area under the Planning Policy Framework of the Merri-bek Planning Scheme;
  - d. The abuttal of the rear boundary of the review site to the Merri Creek Corridor, and the application of the Environmental Significance Overlay to the review site, that identifies the environmental values of the creek corridor and the role that the review site is to play in protecting and contributing to those environmental values; and,
  - e. The heritage values of the review site, and the intent to retain and protect existing buildings on the review site.
- 8 In respect of these contextual elements, the following policy assistance is provided.

### **Housing policy**

- 9 The relatively recent development of land to the immediate north of the review site with apartment style development, is recognition of the proximity of the review site to a range of services and facilities. It is also a direct response to policy at a State level that encourages infill development achieving urban consolidation in well serviced existing suburbs. That policy encouragement continues today in a range of State and Regional policy. My choice not to quote those policies in these reasons does not reflect a decision to attribute less weight to that policy theme.
- 10 Since the construction of the apartment buildings at 42-44 Harrison Street and 46-48 Harrison Street respectively, there has been a change to the housing policies in the now Merri-bek Planning Scheme. That change has resulted in the review site and surrounding land being identified for minimal change, and therefore subject to the following policies from Clause 15.01-5L of the Merri-bek Planning Scheme.

#### **Minimal and incremental change areas**

This policy applies to planning permit applications in minimal and incremental change areas as identified on the Strategic Framework Plan: Housing at Clause 02.04 where an assessment against neighbourhood character is required.

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<sup>2</sup> That is, more recent that the approval of the four storey apartment buildings to the north of the review site, and the place of worship to the south of the review site.



### **Incremental and minimal change areas strategies**

Design development to provide an appropriate transition in building height where an increase above the prevailing building height is proposed.

Design development in rear yards to respect an existing character of open rear yards and garden outlooks.

Create or enhance a landscape character by designing and siting new development to integrate generous landscaping through the retention of existing canopy trees (where practical) and the planting of new canopy trees and vegetation.

### **Incremental and minimal change areas policy guidelines**

Consider as relevant:

- ...
- Designing development in rear yards to be single storey unless either:
  - The prevailing context is not one of open rear yards and garden outlooks.
  - The building envelope respects the existing character of open rear yards and garden outlooks through provision of:
    - Generous side and rear setbacks.
    - Private open space at ground floor that provides space for screen tree planting around the development.
    - Sensitive design of the upper levels with adequate articulation, setbacks and materials to minimise visual bulk impacts as seen from neighbouring rear secluded open spaces.

- 11 Policy at Clause 16.01-1L Homes in Merri-bek provides the following further guidance regarding the Minimal change areas:<sup>3</sup>

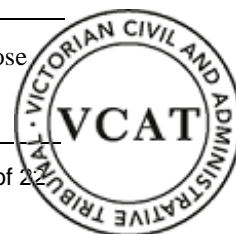
Encourage a mix of single dwellings and lower density multi-dwelling developments that contribute to a low density, open and landscaped character in areas identified as 'Minimal Housing Growth' on the Strategic Framework Plan: *'Housing'* at Clause 02.04.

- 12 In addition to this policy context, the review site is now within the Neighbourhood Residential Zone, where a mandatory two storey height limit applies. The proposal that is before me includes development at three storeys in height. This is proposed having regard to the following provision at Clause 32.09-10 of the Merri-bek Planning Scheme.

A building may exceed the applicable maximum building height or contain more than the applicable maximum number of storeys if:

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<sup>3</sup> Which are also sometimes referred to in policy as areas of Minimal Housing Growth, with those terms appearing to be interchangeable in the Merri-bek Planning Scheme.



- There are existing buildings on both abutting allotments that face the same street and the new building does not exceed the building height or contain a greater number of storeys than the lower of the existing buildings on the abutting allotments.
- 13 The Council report addresses this provision in the context of the review site in the following manner.

There are existing buildings on the lots abutting the subject site to the north and south which both face Harrison Street.

The apartment building at 42-44 Harrison Street is four storeys in scale and features a building height of 13.18 metres, while the place of worship at 3-7 Albion Street contains two storeys and is approximately 16 metres in height. The lower of the existing buildings abutting the site is the apartment building. The proposal has less storeys and is lower than the apartment building and can therefore be considered.

- 14 Therefore, while a three storey development can be considered for the review site, one also needs to carefully consider whether the siting and scale of such a development successfully achieves the policy intent for this minimal change area.

### **Merri Creek corridor**

- 15 The review site abuts the Merri Creek corridor adjacent to its rear (eastern) boundary. The following policy guidance from the Merri-bek Planning Scheme is relevant to the Merri Creek corridor and the development of adjacent sites.

Council seeks to improve and protect its environmental and landscape values by:

- Creating and protecting a diverse, connected and resilient environment of trees and other vegetation that will enhance urban ecology and greening in both the public and private realm.
- Protecting and enhancing habitat corridors in parks and along waterways.
- Protecting the ecological integrity of the Merri, Moonee Ponds, Edgars, Westbreen and Merlynston Creek corridors and remaining areas of remnant vegetation areas.
- Encouraging development to be sensitive to all open space, river and creek interfaces.<sup>4</sup>

Design and site development to maintain and enhance the natural environment of waterway systems by:

- Minimising the visual intrusion of development on the natural landscape views from major roads, bridge crossings, public open space, recreation trails and within waterway systems themselves.

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<sup>4</sup> Clause 02.03-2 of the Merri-bek Planning Scheme.



- Ensuring development is visually subordinate to the local landscape setting, including through the use of vegetation to filter views of development.
- Ensuring development adjacent to waterways adopts high quality materials and respectful design and siting.<sup>5</sup>

Protect environmentally sensitive areas with significant recreational value from development that would diminish their environmental conservation or recreational values. These areas include the Dandenong and Macedon Ranges, the Upper Yarra Valley, Western Port and Port Phillip Bay and their foreshores, the Mornington Peninsula, the Yarra and Maribyrnong Rivers and the Merri Creek, the Grampians, the Gippsland Lakes and its foreshore, the coastal areas and their foreshores, Alpine areas and nominated urban conservation areas, historic buildings and precincts.<sup>6</sup>

- 16 In addition, the review site is covered by Schedule 1 to the Environmental Significance Overlay (ESO1). The following guidance is provided by ESO1.

#### **Statement of environmental significance**

The Merri Creek and its tributaries form an environmental, heritage and recreation corridor. It draws its significance as much from its role as a continuous corridor as it does from the quality of individual reaches. All areas are important because they contribute to the linking of areas of environmental, heritage and recreation values along the creek.

The Merri Creek and its immediate surrounds host some of the most threatened ecosystems in Australia. The creek has a unique role to play in the preservation of threatened flora and fauna and the maintenance of vegetation communities that have almost been totally destroyed in other places.

The creek is the focus of a large number of pre and post-contact archaeological sites that, as a group, are highly significant. Many unknown sites are likely to exist. The areas likely to have the greatest density of these archaeological sites are sensitive to development.

Revegetation works and parkland development, including path construction, have created a linear park of outstanding quality and landscape character – one which plays an important role in the park system of the metropolitan region.

#### **Environmental objective to be achieved**

...

#### **Landscape character**

- To protect and enhance the natural and visual character of the waterway corridor.

<sup>5</sup> Clause 12.03-1S of the Merri-bek Planning Scheme.

<sup>6</sup> Clause 12.05-1S of the Merri-bek Planning Scheme.



- To ensure that the scenic qualities and visual character of the waterway corridor are not compromised by the inappropriate siting of buildings, the placement of fill or lack of screening vegetation.
- To restore those sections of the waterway corridor which have been modified to create artificial bed, banks and landforms to a more natural, visually attractive and ecologically diverse landscape.

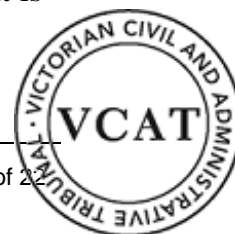
### **Decision guidelines**

- The views of the Merri Creek Management Committee, Melbourne Water or Aboriginal Affairs, Victorian Heritage Services Branch as considered appropriate by the responsible authority.
- Any adopted Open Space Strategy and, in particular, the relevant open space category and preferred recreational uses and development guidelines.
- The effect of the proposed removal of vegetation on the habitat value, wildlife corridor and long-term viability of remnant and revegetated areas along the creek corridor.
- The significance of the native vegetation area, including the significance of plant communities or animal species supported.
- The reasons for removing the vegetation and the practicality of alternative options which do not require the removal of native vegetation.
- The effect of the height, bulk and general appearance of any proposed buildings and works on the environmental values and visual character of the creek corridor.
- The need for landscaping or vegetation screening.
- ...
- The need to retain vegetation and natural features which contribute to the health and water quality of the creek and the visual character of the creek corridor.

- 17 The manner in which the proposed development responds to the context provided by the Merri Creek corridor is therefore a highly relevant consideration in my assessment.

### **Heritage context**

- 18 The review site is partly covered by Schedule 90 to the Heritage Overlay (HO90), which applies to an individual heritage place on the review site. I will undertake separately later in these reasons an assessment as to the potential impact on the heritage place from the proposed development of the review site. For the purposes of this current built form assessment, it is sufficient to recognise that the desire to retain an existing cottage, and



provide an open space curtilage around that cottage, is a constraint on the proposed development of the review site.

- 19 The part of the review site that is not covered by HO90 is covered by Schedule 1 to the Design and Development Overlay (DDO1), which is provided with the following Design objectives.

To protect and enhance the environment of heritage places.

To ensure that the character and appearance of heritage places is not adversely affected by the design of new buildings on adjoining land.

To ensure that building heights, building bulk and setbacks on sites adjoining heritage places are compatible with and enhance the character and appearance of heritage places.

### Assessment

- 20 The above analysis sets out the key elements of the surrounding context and policy framework that influence decision making for the review site.
- 21 The Applicant submits that the proposal will achieve an acceptable planning outcome and a net community benefit having regard to a wide range of matters, including: the large proportions of the review site; the review site's accessibility to a range of services and facilities; the existing character of larger development to the immediate north and south; planning policy support for urban consolidation; the provision of generous setbacks and landscaping opportunities on the review site, as well as the retention of a large canopy tree; the positive impact arising from the conservation and adaptation of existing heritage buildings; the high level of ESD measures incorporated into the building design; and the replacement of a largely exotic or weedy suite of vegetation, with indigenous planting that is more appropriate for this location adjacent to the Merri Creek.
- 22 It is the evidence of Mr Soussan that the proposal will have an appropriate interface with Merri Creek, having regard to the provision of proposed boundary planting, the proposed setbacks to Townhouses 2 to 7 inclusive, and the manner in which the mass is broken up into a series of facades through the staggered setbacks. He opines that the proposal is an appropriate response to the policies for this Minimal change area, as the proposed development will sit within a landscaped context, not exceed the prevailing height of the neighbouring properties, and be of an appropriate scale for the surrounding area. In respect of the extent of proposed development at the rear of the review site, Mr Soussan's evidence is that there is not an existing character of open rear yards in this part of Harrison Street, and that the apartment buildings to the immediate north of the review site have very limited open space to their respective rear boundaries. He opines that the rear setbacks are combined with, *"considerable planting along the rear boundary, will be consistent with the development outcomes on adjoining residential sites."*



- 23 I am not persuaded by these submissions and evidence, and I instead find that the proposed development is not an appropriate response to the context the review site, and the various opportunities and constraints that apply. I make this finding for the following reasons.
- 24 Before I come to the reasons for this finding, I need to acknowledge that, in theory, the review site provides a good opportunity for the provision of increased housing in a well serviced location. While the review site may not sit at the edge of an activity centre, it is nevertheless within a suburban location that enjoys a very high level of access to a range of services and facilities. These include the trams that terminate at nearby Nicholson Street, and the wide range of recreation and open space facilities that are literally on the doorstep of the review site.
- 25 In acknowledging this opportunity for increased housing, is also true to observe that the review site has considerable constraints, which ultimately result in the proposed development not being an appropriate response to its context. The first constraint is the siting of a heritage cottage at the front of the review site, that has resulted in the bulk of the proposed development being proposed in the rear portion of the review site. For reasons that are set out later in this decision, I accept from the evidence of Mr Raworth that this achieves an appropriate response to the heritage constraint, and an acceptable level of impact on the significance and character of this heritage place.
- 26 However, this design approach, which is quite reasonable from a heritage perspective, has certain implications on how the proposal responds to the other relevant site constraints. Those other site constraints are firstly, the designation of the site with an area of minimal change, highlighted by the intent for the review site to achieve certain character and landscape outcomes as encouraged by policy. And secondly, the abuttal of the rear boundary of the review site to the Merri Creek corridor and the application of the Environmental Significance Overlay to the review site, which together encourage a range of environmental and landscape outcomes, as well as a discouragement for prominent built forms.
- 27 I am not persuaded that the proposed development is an appropriate response to these two site constraints. I make this finding for the following reasons, and having regard to the following elements of the proposed design response.
- a. The height and scale of the proposed built form. The proposed townhouses 2 to 7 inclusive are arranged in an attached three storey form with roof decks, that produce a singular large mass as viewed from the adjacent Merri Creek corridor. This singular built form has a width of over 28.0 metres, and a height above the natural ground level of around 12.4 metres,<sup>7</sup> as viewed from the Merri

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<sup>7</sup> Derived from a digital dimensioning of the east elevation on plan A202.



Creek corridor. At this height, the proposed development is taller<sup>8</sup> than the visible three storey<sup>9</sup> scale of the apartments that are sited to the immediate north of the review site. That is an important distinction to be drawn, given that the apartments to the immediate north were approved prior to the designation of this area for minimal change, and are sited in a less sensitive position adjacent to the Merri Creek corridor.

I say the apartments to the north of the review site are in a less sensitive location as, firstly, the review site is adjacent to a 'pinch point' or narrower portion of the Merri Creek corridor, and secondly as the Merri Creek Trail approaches the review site from the north-east in an alignment that directs views towards the review site in a manner which does not apply to the adjoining properties. The properties hosting these adjacent apartment buildings are also positioned more distant from the Merri Creek Trail that generally follows the alignment of the Merri Creek. As such, the review site is in a more visually prominent location in the context of the main pedestrian path through the Merri Creek corridor, as compared to the nearby apartment buildings. Given the policies that seek to limit the visual intrusion of development on public open space and public recreation trails, this context would ordinarily lend itself to a development of reduced built form scale on the review site, not an increase in scale as is proposed.

The context of the review site and adjoining properties to the Merri Creek corridor is depicted in the aerial photograph on the following page.

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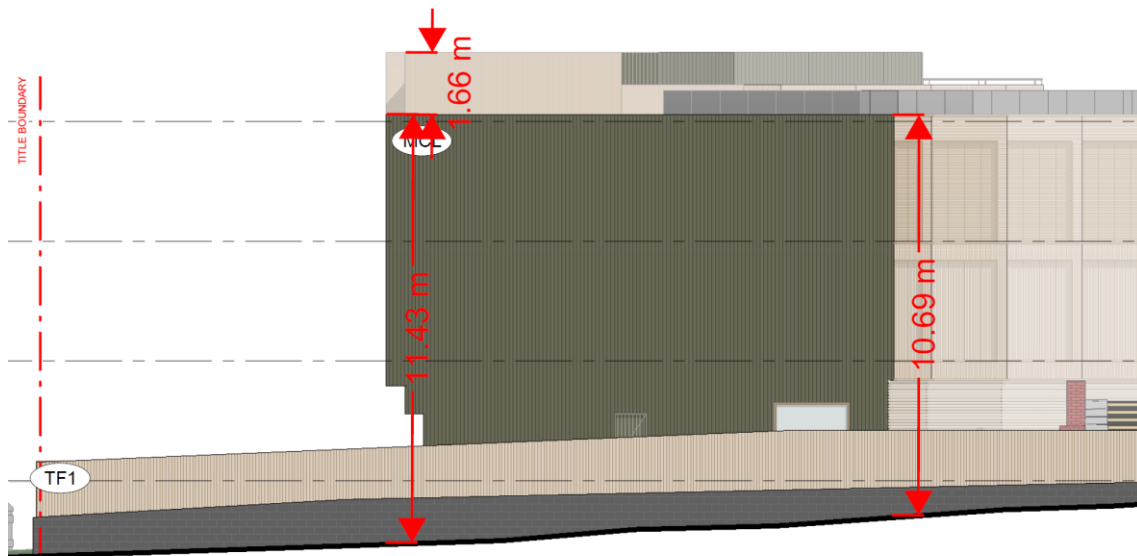
<sup>8</sup> The proposed development on the review site has a height of 45.95AHD to the solid component of the balustrade to the respective roof decks and 46.80AHD to the height to the protruding party walls between each townhouse, as compared to a surveyed (JRL Land Surveyors, 6 May 2020) height of the three storey component at 42-44 Harrison Street of 45.0AHD.

<sup>9</sup> Noting that the apartment building at 42-44 Harrison Street has a setback fourth storey, which is not visible from a number of viewing locations within the Merri Creek corridor.



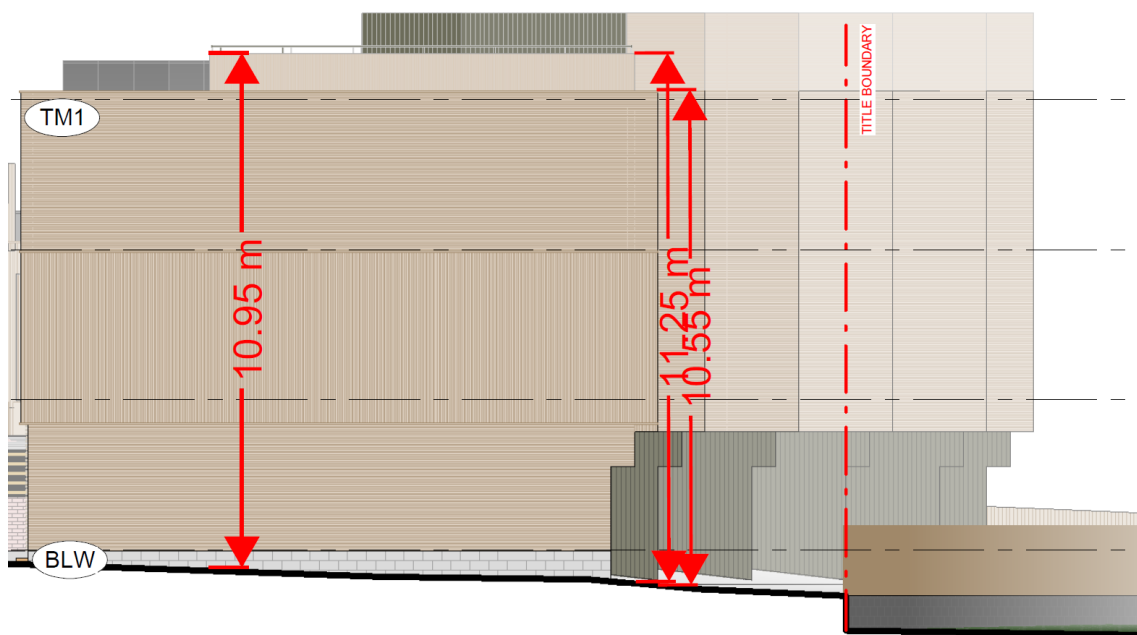


- b. The lack of articulation in the proposed built form. The east elevation of proposed townhouses 2 to 7 inclusive is articulated by a series of stepped setbacks from the angled rear boundary, however there is very little other articulation in the proposed built form. This results in a built form with a very poor level of articulation. I make this finding having regard to the manner in which the proposed first and second floors of each townhouse are in the same plane, and cantilevered towards the rear boundary as compared to the siting of the respective ground floors below. I also make this finding having regard to the repetitive arrangement of windows, framing elements, and roof decks to the eastern elevation of each of the proposed dwellings. This lack of articulation contrasts with the apartment building immediately to the north of the review site, where the building gradually peels back at each level in part, and is also eroded at each corner to further reduce the overall scale. Finally, the lack of any meaningful articulation in the proposed development for the review site is continued around to the expansive side boundary walls of the proposed attached three storey townhouses, which each comprise of a singular wall plane of a singular material and finish extending across the three levels, with the absence of any windows at the first and second floors. As a result, any view that is able to be gained to the side elevations of these attached three storey townhouses, would reveal a wall of some scale that is absent of any articulation, and which will therefore be a highly intrusive element into the surrounding landscape. These elevations are depicted on the following page.



## NORTH ELEVATION

1 : 200



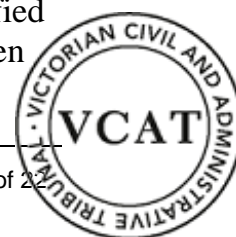
South elevation (with my dimensions added in red)

- c. The absence of appropriate side and rear boundary setbacks. None of the proposed side or rear boundary setbacks comply with Standard B17. Indeed, as set out in the table below the proposed development of townhouses 2 to 7 inclusive exceeds the heights and setbacks required by Standard B17 to a significant degree. This degree of exceedance of Standard B17 is an effective way of describing the overall scale of the proposed development, and the extent to which it will visually dominate the surrounding context.

These wall heights and setbacks, and the extent to which Standard B17 is exceeded, is symbolic of a built form outcome that could not be said to be consistent with the designation of the site for minimal change.

Boundary	Wall height	Proposed setback	B17 setback
Rear (balcony edges)	12.43 to 12.63 metres	5.09 to 6.72 metres	7.53 to 7.73 metres
Rear (party walls)	13.24 to 13.41 metres	4.52 to 6.05 metres	8.34 to 8.50 metres
Northern side boundary	10.69 to 11.43 metres	2.05 metres	5.79 to 6.53 metres
Southern side boundary (balcony edge)	10.95 to 11.25 metres	3.45 metres	6.05 to 6.35 metres

- d. The lack of landscaping opportunities within the rear setback. The proposed development proposes to site a common driveway occupying much of the rear setback between the proposed townhouses 2 to 7 inclusive, and the rear boundary of the review site, being the abuttal to the Merri Creek corridor. Adjacent to this common driveway is a landscaping strip along the very rear boundary that generally varies in width between 830mm and 1750mm, but which also includes an area in the south eastern corner of the review site, where the driveway directly abuts the rear boundary for a distance of around 5.0 metres. While Mr Patrick has done the best he can with this available landscaping strip, I am not persuaded that the depth of the landscaping or the limited landscaping opportunities that have been proposed along this rear boundary, are sufficient to respond to the breadth of the planning controls and policies that seek to encourage a different balance between landscaping and built form on land abutting the Merri Creek corridor. On my view, the proposed development presents a dominant and highly visible built form, that will substantially rely upon landscaping within the Merri Creek reserve itself, in order to achieve any meaningful extent of landscaped setting. I do not consider this outcome to be consistent with the encouragement for this location as set out in the Merri-bek Planning Scheme.
- e. The extent of built form change that would be visible from the Merri Creek corridor. As a result of the design elements identified above, the proposed development would replace an existing open



and landscaped rear yard, with a large building with limited articulation, and with limited landscaping opportunities within the review site itself. I do not regard the change in outlook that would occur from the Merri Creek corridor is one that could be said to comprise minimal change. Rather, I regard this proposal to represent a substantial level of change, that would introduce an overly large and continuous built form, with limited articulation and an unreasonably heavy reliance on the landscaping within the public realm itself.

- 28 As a result of these elements of the proposed design response, I find that the proposed development fails to achieve a number of the policy outcomes that are strongly encouraged in this location. In particular, the proposed development fails to ensure that the scenic qualities and visual character of the Merri Creek corridor are not compromised by the siting and scale of buildings,<sup>10</sup> fails to minimise the visual intrusion of the development on the Merri Creek corridor including the adjacent public open space,<sup>11</sup> and fails to contribute to a low density, open and landscaped character,<sup>12</sup> as is encouraged in this Minimal change area.
- 29 In response to the evidence of Mr Soussan, I find that:
- a. The proposal will not have an appropriate interface with Merri Creek, but rather will present an interface where the built form is unreasonably prominent, and the proposed landscaping contained within the rear setback of the review site is sparse. This contrasts with the guidance from the Merri-bek Planning Scheme, that encourages a more reasonable balance between built form and landscaping that is visible from the Merri Creek corridor, that ensures that, *“development is visually subordinate to the local landscape setting.”*<sup>13</sup> While the proposed development will be partly screened by vegetation within the public land along the Merri Creek corridor, I interpret policy as strongly advocating for an appropriate amount of landscaping to also be established on sites that abut the Merri Creek corridor.
  - b. The proposal will not comprise minimal change on views from Merri Creek, but rather will seek to introduce a large and imposing built form, with minimal articulation, that will actually appear larger and taller than the nearby four storey apartment building. Further, this is to occur on the review site which, due to the alignment of the Merri Creek and the public path, and the width of the reserve, is a more prominent and sensitive location as compared to the apartment sites to the immediate north. The proposal

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<sup>10</sup> A reference to the landscape character that is sought to be achieved by Schedule 1 to the Significant Landscape Overlay.

<sup>11</sup> A reference to policy at Clause 12.03-1S of the Merri-bek Planning Scheme.

<sup>12</sup> A reference to policy at Clause 16.01-1L of the Merri-bek Planning Scheme.

<sup>13</sup> Clause 12.03-1S of the Merri-bek Planning Scheme.



introduces a more substantial level of change to views from the Merri Creek corridor, in a location where this extent of change has no policy support.

- c. While there might not be a character of open rear yards on the properties to the north of the review site, there is also not a character of hard paving up to the rear boundary, which unreasonably constrains landscaping opportunities adjacent to the Merri Creek corridor. This proposal fails to recognise the sensitivity and importance of the Merri Creek corridor, and does not propose an appropriate balance between built form and landscaping in this sensitive location along the Merri Creek corridor.

- 30 For these reasons I find that the proposed development is not an appropriate response to its context, in that it fails to present a development comprising minimal change when viewed from the Merri Creek corridor, and fails to achieve an appropriate balance of built form and landscaping on land that is prominent along the Merri Creek corridor.
- 31 My ultimate task as a decision maker under the Merri-bek Planning Scheme is to consider whether a proposal achieves a net community benefit. I accept that this proposal will achieve a range of benefits, including those that were identified in Mr Natoli's submissions, some of which I have repeated at paragraph 21 of these reasons. However, appropriate neighbourhood character outcomes, and appropriate built form and landscaping outcomes adjacent to Merri Creek, are important policy outcomes that should be achieved alongside the provision of additional housing. For the reasons set out above, it is my finding that the proposal that is before me has not achieved the right balance between these policy objectives, and instead has proposed a development that achieves additional housing and protection of a heritage asset, but at the expense of the character, built form and landscaping outcomes strongly encouraged in this locality. As a result, it is my finding that a net community benefit is not achieved by this proposed development, and as a result, no planning permit should be granted.

## **WHAT ARE THE OTHER ISSUES?**

- 32 Given my findings above that the proposal does not provide an appropriate response to its context, I will only make the following brief findings and reasons regarding the remaining matters in dispute:
  - a. I am persuaded by the evidence of Mr Kelly and Mr Galbraith that the extent of tree removal on the review site is acceptable, given the individual health and condition of the trees to be removed, and their marginal habitat value to native wildlife. While I accept that the tree canopy and landscape character loss will be noticeable over a period of time, an appropriate form of redevelopment will



provide for appropriate replanting opportunities, and over time achieve an enhanced landscape and habitat outcome. For the reasons set out above, I find that the proposal that is before me fails to achieve an appropriate landscaped interface to the rear boundary and the adjacent Merri Creek corridor. However I consider that an amended layout could provide an appropriate landscaped setting, that can achieve appropriate outcomes even after having regard to the extent of tree loss that is proposed on the review site.

- b. I am also persuaded by the evidence of Mr Galbraith that the potential construction impacts on tree 4 can be appropriately limited, so as to ensure the successful retention of this tree. I make this finding having regard to the various construction methods described by Mr Galbraith that will limit the actual impact on the roots of this tree. The potential impacts will need to be carefully managed through the approval and implementation of a Tree Management Plan as a condition of any future approval.
- c. I am persuaded by the evidence of Mr Raworth that the extent of demolition that is proposed to the heritage assets on the review site, is an appropriate response to the elements of significance that occur in this heritage place. In particular, I agree that it is appropriate to demolish some of the outbuildings that currently exist on the review site, given the extent of alterations that have previously occurred to these buildings. As an example, the former stables has been modified by the likely application of a non-original roof form, by the addition of modern waterproof lining and weatherboards, and also currently has non-matching doors, meaning at least one is not original. The former stables is described by Mr Raworth as sitting on the site of an original structure, but which has been highly modified, and of limited interest and integrity. I am persuaded by this evidence.
- d. Schedule 90 to the Heritage Overlay requires a permit for the removal of trees for this heritage place. Unfortunately, it does so in the absence of any guidance from the relevant Statement of Significance as to what it is about the existing trees that has any heritage significance. A Landscape Heritage Assessment has been undertaken by John Patrick Landscape Architects, and oral evidence about this issue was provided by both Mr Raworth and Mr Patrick. I am persuaded by their evidence that none of the existing trees on the review site that are proposed for removal have any identifiable heritage significance, nor will their removal impact the significance of the heritage place. For these reasons, I would have been of a mind to grant a permit for the removal of these trees under the Heritage Overlay.
- e. I am also persuaded by the evidence of Mr Raworth that the proposed development will not unreasonably impact on the



significance and character of the heritage place, which is provided with the following Statement of significance.

38 Harrison Street is of local historical significance. It is representative of tradesmen's residences in the 1880s and retains a relatively large tract of land beside the Merri Creek.

As such, the significance of this heritage place relies on the retention and conservation of the existing cottage that fronts Harrison Street. I am persuaded by the evidence that an appropriate setback is achieved between this cottage and the proposed works on the review site, and that the relative height of the proposed new townhouses will not unreasonably impact on the character and significance of this heritage place. In making this last finding, I note that the proposed townhouse 1 is two storeys in height, so as to reduce its comparative prominence in the streetscape.

- f. I have already identified above the failure of the proposal to achieve compliance with Standard B17, and consider the height and setback of the boundary walls from the northern boundary of the review site has the potential to result in unreasonable levels of visual bulk from the apartments to the immediate north of the review site. I do not regard there to be other potential areas of off-site amenity impacts, noting that the proposed development will not unreasonably overlook the adjoining residential property, nor will it cast any shadow to the only residential abuttal to the north of the review site.
- g. As I set out during the course of the hearing to Mr Ford, I cannot consider his submission regarding the potential construction impacts on the adjacent place of worship. Instead, this is a matter to be considered as part of a future development, if and when a building permit is sought.
- h. None of the parties in this proceeding raise any concerns in relation to the standard of internal amenity to be provided for the future residents of the proposed dwellings on the review site. Following my own assessment, I find that an appropriate level of internal amenity will be provided to future residents. I make this finding having regard to the sizes of the individual rooms, their ability to receive solar and daylight access, and the convenient car parking facilities to be provided on-site, among other design considerations. Further, I am persuaded by the evidence of Mr Soussan that the roof decks are sufficiently accessible from the main living areas in each of the proposed townhouses, and are more than adequately supplemented by the excellent access to public open space that will be enjoyed by future residents of the review site.



- i. Traffic and car parking evidence was not provided at the hearing. Instead, the Applicant relies on a Transport Impact Assessment by Ratio dated 21 October 2021. It is proposed to provide one car parking space for each of the proposed townhouses, and no car parking for the retained heritage cottage. Additionally, no visitor car parking is to be provided on site. As six of the proposed townhouses comprise three bedrooms each, and one townhouse and the heritage cottage comprise two bedrooms each, a permit is sought to reduce the car parking provision by seven resident car parking spaces, and one visitor car space. Primarily, the Transport Impact Assessment justifies the reduction in car parking on the basis of the level of accessibility of public transport from the review site, the very good access to the surrounding bicycle network, the existing number of households residing in Moreland with zero cars, that 61% of households in Moreland in three bedroom dwellings have one car or less, and the availability of on street parking to supply visitor car parking for the site. The review site is in a location where there is a finite resource of on street car parking, that is in demand for users of the surrounding extensive public open space, that plays an important regional role. In a future proposal, I would desire to see a further analysis, or expert evidence, that demonstrates that the car parking demands generated by the proposed development of the review site would be unlikely to place an added demand on this finite resource of on street parking, that provides a more important regional role connected with the provision of public open space.
- j. The Transport Impact Assessment estimates that the proposed development of the review site would generate three vehicle trips in a peak hour. I am persuaded that this level of additional traffic, equating to one vehicle every 20 minutes in the peak hour, would barely be noticeable on the surrounding road network, and would not result in an unreasonable increase in traffic levels.

## CONCLUSION

- 33 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

**Michael Deidun**

**Member**

