

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1169/2020  
PERMIT APPLICATION NO. 57/2020/03P

### CATCHWORDS

Nillumbik Planning Scheme; Application under s. 79 of the *Planning and Environment Act 1987*; ACZ1; SLO1; Eltham Major Activity Centre; Proposal for six 3-storey dwellings; Response to preferred character and strategic context; Built form typology; Whether site responsive.

<b>APPLICANT</b>	Steven Gilbert
<b>RESPONSIBLE AUTHORITY</b>	Nillumbik Shire Council
<b>RESPONDENTS</b>	Carlota Quinlan, Anthea Cochrane, Timothy and Susan Evans, Sharon Bonga, Mark John McDonald, Eltham Community Action Group, John Puls, Alison & Norbert Dressel
<b>SUBJECT LAND</b>	22 Cecil St ELTHAM VIC 3095
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	17 and 18 February 2021
<b>DATE OF INTERIM ORDER</b>	5 March 2021
<b>DATE OF ORDER</b>	14 July 2021
<b>CITATION</b>	Gilbert v Nillumbik SC [2021] VCAT 768

### ORDER

- 1 In application P1169/2020 the decision of the responsible authority is affirmed.
- 2 In planning permit application 57/2020/03P no permit is granted.

Mary-Anne Taranto  
**Member**



## APPEARANCES

For Steven Gilbert	Mr John Cicero, lawyer, Best Hooper Lawyers He called the following witnesses: <ul style="list-style-type: none"><li>• Mr David Crowder, town planner of Ratio Consultants</li></ul> Mr Robert Thomson, landscape architect of Habitat
For Nillumbik Shire Council	Mr Jason Kane of counsel by direct brief
For Carlota Quinlan & Alison Dressel	Ms Carlota Quinlan, in person
For Anthea Cochrane, Timothy and Susan Evans, Sharon Bonga, Mark John McDonald & John Puls	In person
For Eltham Community Action Group Inc	Ms Lindsay Prunotto



## INFORMATION

Description of proposal	Construction of six dwellings that are 3-storeys in scale set one behind the other down the site in an attached formation. The dwellings are configured in a reverse living typology with cantilevered elements. Each is to contain two bedrooms and a single garage accessed via a common driveway cut in to the west side of the site. Balconies are proposed on the west side and these are to be supplemented by service yards cut into the site on the east side. The development has contemporary styling with various types of cladding, render and a skillion roof form.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987 (Act)</i> – to review the failure to grant a permit within the prescribed time. <sup>1</sup>
Zone and overlays	Activity Centre Zone schedule 1 ( <b>ACZ1</b> ) Significant Landscape Overlay Schedule 1 ( <b>SLO1</b> )
Permit requirements	Clause 37.08-5 – Construct a building or construct or carry out works in the ACZ1. Clause 42.03-2 – Construct a building or construct or carry out works within 5 metres from the base of any substantial tree.
Key scheme policies and provisions	Clauses 11, 12, 15, 16, 18, 21, 22.07, 52.06, 53.18, 55, 65 and 71.02.
Land description	This rectangular shaped 753.2sqm site has a frontage of 17.37m and maximum depth of 43.38m. It is located on the south side of Cecil Street, two lots west of Bible Street. The site is developed with a single storey weatherboard dwelling and outbuildings are located at the rear. The site is elevated above street level with a retaining wall across the frontage. It also has a noticeable fall of nearly 5m from the rear south-east corner towards the north-west.
Tribunal inspection	Unaccompanied subsequent to the hearing including a view from the rear of 24 Cecil Street and 23 Luck Street.

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<sup>1</sup> Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

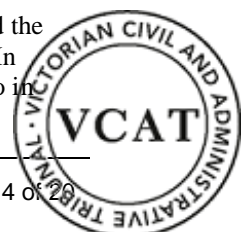


## REASONS<sup>2</sup>

- 1 Steven Gilbert (the **applicant**) is seeking a review of Nillumbik Shire Council's failure to determine a permit application for the construction of six 3-storey dwellings on a mid-block site in Cecil Street Eltham – a site within the boundaries of the Eltham Major Activity Centre (**Eltham MAC**).
- 2 Were it able to, the council would have refused to grant a permit.
- 3 The applicant relies on amended plans which I substituted for the permit application plans at the start of the hearing. Although it no longer opposes the development on the basis of insufficient resident car parking provision, the council maintains its opposition to the proposal and relies on a new ground relating to overlooking. In summary, the council says the proposal is contrary to the zone and overlay controls that apply due to its height, scale, verticality and continuous built form. It also takes issue with the amount of landscaping proposed, the amenity and presentation of the internal driveway areas and levels of internal amenity for future occupants. Overall, it says the proposal is an overdevelopment.
- 4 The objectors variously refer to the special character of Eltham as one which this proposal is said to not adequately respect and they largely support the council's submissions. They also say the proposal does not respect the preferred character and the role of vegetation in contributing to this character which they say is evidenced by the application of the SLO1 in combination with the ACZ1.
- 5 The applicant through its submissions and evidence on planning and landscaping matters say that the proposal is an acceptable one where the planning scheme explicitly encourages more intense forms of housing in a location which is undergoing considerable change. It says the site's development opportunities should be optimised in this strategic setting and that this proposal would have a scale, height, form and appearance which is to be expected with opportunities for acceptable levels of landscaping. On-site and internal amenity is also said to be acceptable.
- 6 The determinative issues in this case relate to:
  - development and use expectations for this strategic setting;
  - the acceptability of the built form response and its contribution to the preferred character;
  - on-site amenity; and
  - landscaping acceptability.

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<sup>2</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.



- 7 The parties referred to a number of decisions made by other divisions of the Tribunal involving land within the Eltham MAC.
- 8 I have considered them and refer to them as relevant to the issues in this proceeding.
- 9 Assisted by my inspection of the site and surrounds I have found that the proposal fails primarily because it would have an excessively bulky and dominant appearance and would not be consistent with the built form and preferred character outcomes sought for this site in this part of the activity centre.
- 10 My reasons follow.

**The physical context**

- 11 The site's location is shown in the cadastral plan below reproduced from Mr Crowder's statement of evidence.



- 12 The site has abutments with four properties. To its immediate east at No. 24 Cecil Street is a single storey timber dwelling with a carport set close to the street. Mature plantings with native and exotic feature surround the dwelling. A small courtyard is present on its west side close to the common boundary with the review site.
- 13 On the west side are two modestly proportioned single storey dwellings (No 1/20 and 2/20 Cecil Street) which can be described as a dual occupancy





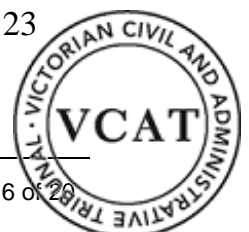
development with a very large eucalypt positioned between them. The front dwelling has a number of habitable room windows facing the review site. A large deciduous tree occupies the front garden.

- 14 The rear dwelling is positioned across the breadth of the site and has its private open space on its north side.
- 15 The abutting lot to the south at No. 25 Luck Street contains a dwelling converted to a dental clinic.
- 16 To its west at No. 23 Luck Street is an optometrist clinic with a 2-storey dwelling attached at the rear.
- 17 The site and its surrounding context are shown below.



Source: Nearmap – image captured 6 May 2021

- 18 There are numerous other examples of multi-dwelling developments on comparably sized lots in Cecil Street typically containing two to four dwellings that are single or double storey. These include recent developments that are frequently two storeys in scale with nearby examples at No. 14, 23 and 25 Cecil Street.



- 19 While dwelling styles vary, there is a predominance of pitched roof forms (tiled and metal) with external materials comprising timber and brick. Other unifying features are mature canopy trees in both the public and private realms comprising a mix of native and exotic trees. Gardens typically have an informal character and low or no front fencing.
- 20 The commercial core of the activity centre is located to the south-west based primarily along the Main Road spine and extending partially to the east and west between Luck and Dudley Streets. This includes specialty shops and supermarkets. The Eltham train station and other community facilities are also nearby and generally within a 300m to 600m radius of the site. Several recent apartment developments have been constructed in Pryor, Arthur and Dudley Streets.
- 21 Further north and east of Bible Street, detached housing interspersed with less intense medium density housing in a more heavily treed landscape context prevails.

### **Planning permissions required**

- 22 Before turning to my findings, it is firstly useful to summarise the permissions that are required and the effect of the exemption in the ACZ at clause 37.08-8 from notice and third party rights of review.
- 23 Beginning with permissions that are required:
  - Planning permission is required under the provisions of the ACZ1 for buildings and works.
  - Decision guidelines in the ACZ at clause 37.08-9 require a consideration of the objectives, standards and decision guidelines of clause 55. Further, clause 4.3 in Schedule 1 requires that a development must meet the requirements of clause 55.
  - Planning permission is required under SLO1 for buildings and works within 5m of a substantial tree. Substantial trees are defined in SLO1 as having a trunk circumference greater than 0.5m at one metre above ground level, and/or a height greater than 6 metres. In this case trees that meet this definition are on neighbouring land and are described as trees 1, 5, 6, 7 and 9 as identified in the applicant's arborist report dated May 2020.<sup>3</sup>
- 24 I note that no planning permission is required to use land for dwellings and none of the vegetation on the land invokes a permission for its removal.

### **Ambit of discretion and third party participation**

- 25 Third party participation is limited to the permissions invoked under the SLO1.

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<sup>3</sup> Report prepared by Nick Withers.



- 26 However, it also remains that my assessment of this proposal is undertaken in the context of this application under s.79 of the Act which is deemed to be a refusal to grant a permit. It is also a hearing *de novo*.
- 27 This can be distinguished from the more confined circumstances confronting the Tribunal in *Eltham Community Action Group v Nillumbik SC* [2018] VCAT 1952 referred to by the applicant. That application for review was one brought under s.82 of the Act.
- 28 I am also mindful that clause 65.01 operates to require that before deciding on an application, the Tribunal standing in the shoes of the responsible authority, must amongst other things, consider:
- the Municipal Planning Strategy and the Planning Policy Framework,
  - the purpose of the zone, overlay or other provision, and
  - orderly planning and the effect on the amenity of the area.
- 29 Notwithstanding, to the extent that third parties endeavoured to raise matters that were either not determinative or strayed beyond the scope of their review rights, I confirm that I made rulings on those matters as necessary during the hearing.

#### **Development and use expectations for the Eltham MAC**

- 30 The planning scheme identifies Eltham and Diamond Creek Activity centres as Major Activity centres in Nillumbik within which there is support for future housing growth, urban consolidation and expansion of community and commercial services. These locations are preferred to allow optimum use of established services rather than locations further afield which are less well serviced and more sensitive to the effects of development, consistent with other land use and development objectives for the protection of green wedge areas.
- 31 Development that builds upon, protects and enhances existing settlement patterns and neighbourhood character including building scale, the area's naturalistic features defined by its topography, vegetation cover and views are other important themes.
- 32 Key local policies are found at clauses 21.03 (Municipal Profile and Key influences), 21.04 (Vision-Strategic framework), 21.05-1 (Settlement and housing) and 22.07 (Eltham town centre policy).
- 33 Settlement and housing policies at clause 21.0-3-1 explain under the heading of 'Protecting and enhancing neighbourhood character' that:
- Accommodating future housing needs inevitably will include provision of housing other than detached dwellings. This will occur in a sensitive manner which will not compromise neighbourhood character. This is to be achieved by ensuring that multi-unit housing will occur within a local policy context including stringent design guidelines, Significant Landscape Overlays and setting clear direction in respect to desired future character.



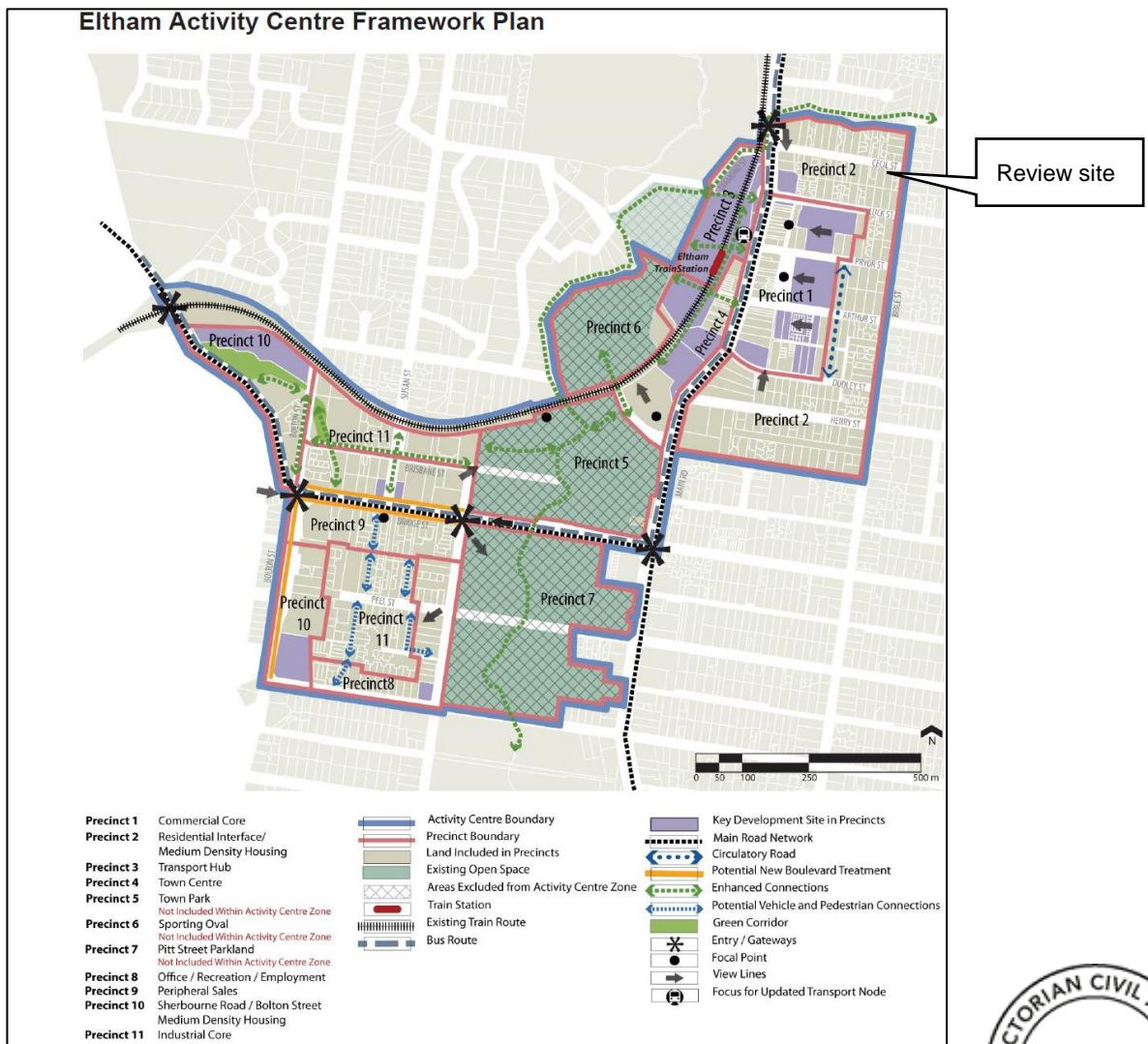


34 Settlement and housing objectives at clause 21.05-1 also seek:

To provide for a range of housing types to meet the projected increase in the number and type of households within the municipality, while respecting the neighbourhood character, and protecting the natural and cultural heritage values of the locality.

35 Other notable features of the strategic context are that:

- the Medium density housing policy at clause 22.01 and Neighbourhood character policy at clause 22.12 do not apply to land within the ACZ1;
- the Eltham Town Centre Policy at clause 22.07 has its policy basis and objectives grounded in the *Eltham Major Activity Centre Structure Plan (August 2004)*; and
- under clause 22.07, the site is within Precinct 2 (Residential Interface) in which medium density housing and ‘some small to medium scale office use’ is encouraged. These policies provide guidance on land use only and not development for this precinct. The Eltham Activity Centre Framework Plan is shown below from the ACZ1.



36 In terms of the site's location within the ACZ1, the site is within sub-precinct 2A as shown in the following map extracted from clause 5.2-1 of Schedule 1 to the ACZ. Land on the east side of Bible Street is within the Neighbourhood Residential Zone – Schedule 1.



37 A mandatory maximum height limit of 3 storeys (10.5m) applies to precinct 2A under the ACZ1 which is the only requirement that cannot be varied with a permit.



- 38 A preferred minimum setback of 5.5m in ACZ1 is also specified for precinct 2A which is met by this proposal, noting that for the purposes of this schedule, the front setback is measured from the roadside kerb.
- 39 In addition to encouragement for medium density housing and some small scale office use, relevant objectives specifically for precinct 2A are:
- To provide a transition in built form scale between the core commercial area and adjoining residential areas.
  - To ensure non-residential development maintains a residential appearance.
- 40 Precinct guidelines at clause 5.2-4 relevantly ask for the following:
- Buildings should be designed to preserve views from adjoining residential properties to the treed hilltops to the west.
  - Buildings with larger footprints should be designed with split levels to respond to the natural topography.
  - Main pedestrian entrances should be clearly legible from the street and demarcated with strong architectural and landscape features.
  - New development should appear to have domestic quality and respond to the residential character of the area.
  - Developments sited alongside boundaries should be massed in a staggered manner to avoid overlooking of adjacent properties and reduce overshadowing impacts.
  - Building siting should provide the opportunity for open space areas and allow for canopy tree landscaping to be integrated with the total development.
  - Consideration will be given to increased residential density on consolidated development sites of 1500 square metres or greater.
  - On-site car parking should be sited to the side and rear of dwellings behind the front façade.
  - New development should provide for open landscaped front yards and avoid high solid fencing.
- 41 Guidance for design and development is provided in discretionary terms for all precincts at clause 4.4 of the ACZ1 in relation to such matters that include roof pitch and forms, building height, setbacks, and landscape design to which I return.
- 42 In relation to the SLO1, the ‘Statement of nature and key elements of landscape’ in Schedule 1 to the SLO explains in introductory terms that:
- The *Eltham Major Activity Centre Structure Plan (August 2004)* recognises that the Eltham Town Centre has a distinctive character which in part is defined by the integration of the built form and vegetation, particularly canopy trees, which should be preserved and enhanced. The Eltham Town Centre is also a designated area of high change, where the development potential of sites is to be realised in accordance with the Eltham MAC Structure Plan. Future development



should thus seek to strike a balance between the retention and planting of vegetation and the accommodation of higher intensity development.

43 It then continues to provide a statement of preferred character as follows:

In the future, new development will contribute to a strong sense of place by reflecting the special qualities of the Eltham Town Centre through the achievement of the following preferred character:

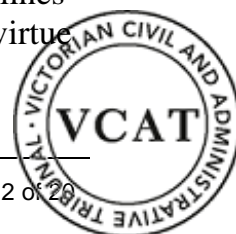
- New development will employ earthy muted tones, natural building materials and innovative design.
- Buildings will not exceed the predominant tree canopy height and while visible from the street, their appearance will be softened through landscaping.
- Building forms will be modest and compact in scale and avoid excessive bulk through the use of articulation, low roof pitches, and other design elements.
- Vegetation, both native and exotic canopy trees, will dominate long distance views, the skyline of streetscape views, and front gardens.
- There will be little physical evidence of the boundary between private and public property at the front of buildings, and no solid fences.

44 Landscape character objectives to be achieved in SLO1 are:

- To recognise, protect and enhance the contribution provided by canopy trees, particularly native trees, to the existing and preferred character of the Eltham Town Centre.
- To ensure that the health of existing canopy trees is not unnecessarily jeopardised by buildings and works.
- To restrict removal of vegetation to the minimum required to allow land to satisfy its development potential in accordance with the *Eltham Major Activity Centre Structure Plan (August 2004)*.
- To ensure that new development contributes to the achievement of the preferred character through additional landscaping, particularly canopy trees.
- To reinforce the indigenous planting regime within the Eltham Town Centre.

45 Both the *Eltham Major Activity Centre Structure Plan (August 2004)* and *Eltham Town Centre Design Guidelines Parts A & B 2014* are reference documents in the Nillumbik Planning Scheme.

46 I have considered these reference documents and have found them useful in assisting my understanding of the strategic framework. They are however distinguishable from a planning policy in the Planning Policy Framework which must be taken into account and given effect to while policy guidelines must be taken into account but are not required to be given effect to by virtue of the operational provisions at clause 71.02-2.





- 47 The parties also referred to the new *Eltham Major Activity Centre Structure Plan* (2020) (the **2020 Structure Plan**) which was adopted by council in July 2020. While I have also considered this document, and note that it provides directions for Council’s latest strategic thinking, it is not a policy guideline and nor is it a reference, background or incorporated document in the planning scheme. It therefore carries limited weight.
- 48 Overall, from my reading of the various policies and controls that apply, it is apparent that more intense forms of development up to 3 storeys in height comprising residential and some commercial uses are clearly anticipated within this part of the Eltham MAC described as Precinct 2A.
- 49 This will inevitably bring about some change to the character of this area.
- 50 At the same time, it is also apparent that a transition is intended to be achieved between more intense development within the core commercial area (where a discretionary building height of 5 storeys exists) and adjoining residential areas which I take to mean residential areas beyond the activity centre’s boundaries where one and two storey scaled development with greater vegetation coverage and a more spacious development pattern prevails. In the context of this site at the periphery of the activity centre, I find that character considerations assume a higher level of importance.
- 51 Further, development expectations for this Major Activity Centre are not the same as what might be otherwise regarded as acceptable in other more urban locations throughout metropolitan Melbourne. New development is required to reference, respect and respond to Eltham’s particular character including its naturalistic features of vegetation and topography.
- 52 As the Tribunal highlighted in *16 Taylor Pty Ltd v Nillumbik SC* [2020] VCAT 673,<sup>4</sup> ‘The ACZ is usually applied where more intense development is expected and where matters such as vegetation and landscaping are very much a secondary factor. However, the application of the SLO1 to the subject site along with the ACZ1 seeks a different approach.’
- 53 Thus, while the SLO1 unusually applies over land also within the ACZ1, an observation made by other divisions of the Tribunal,<sup>5</sup> this is deliberate.
- 54 To this I would add that while the inclusion of a statement of preferred character embedded within Schedule 1 to the SLO under the heading ‘Statement and nature and key elements of landscape’ is also unusual, it is an understandable approach in the context of the interplay between relevant planning scheme policies, controls and provisions.
- 55 I say this because:
- as previously highlighted, policies at clause 22.01 and 22.12 for the assessment of neighbourhood character and medium density housing are not invoked for land in the ACZ1;

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<sup>4</sup> [7]

<sup>5</sup> See for example *G3 Projects Pty Ltd v Nillumbik SC* [2019] VCAT 263 and *16 Taylor Pty Ltd v Nillumbik SC* [2020] VCAT 673.





- the SLO1 is a development based control and the statement of preferred character is capable of being applied to development involving not just residential but also commercial uses for which there is some encouragement;
- the statement of preferred character may be considered whether a permit requirement is triggered under SLO1 or not due to the operation of clause 65.01 which allows a consideration of the purpose of the zone, overlay or other provision and any matter;<sup>6</sup>
- for multi-dwelling developments, an assessment of objectives involving neighbourhood character under clause 55 variously call up decision guidelines<sup>7</sup> which require a consideration of:

Any relevant neighbourhood character objective, policy or statement set out in this scheme.

- 56 The site is also one that is visually removed from major development sites further to the west and south within the MAC and from precincts in which more intense development is anticipated within and closer to the commercial core. The Precinct 2 guidance for increased residential densities on consolidated sites of 1500sqm or more at clause 5.2-4 and encouragement for lot consolidation at clause 2.0 of the ACZ1 to assist in accommodating the visual and amenity impacts associated with more intense development are also influential.
- 57 The physical context is also one where the majority of the original lots in Cecil Street have already been developed with medium density housing, many recently. Their contribution to the area's domestic character with a scale of one and two storeys will remain unchanged for many years to come.
- 58 While there is no question in my mind that this 753sqm site is a suitable candidate for some form of medium density housing, I consider that all of these factors must temper development expectations and the amount of change that might be reasonably anticipated for this site.
- 59 I have assessed this proposal with these considerations in mind.

### **Acceptability of the design response**

- 60 There was no dispute that the height of the proposal meets the mandatory maximum requirement under ACZ1. The more contentious matters relate to the scale and appearance of the built form and the acceptability of the proposed response to the strategic framework and the physical context.
- 61 The council submits that the design response has not achieved an acceptable balance between the achievement of a sensitive design response and dwelling yield. It says the built form is monotonous, too robust and imposing with too little if any meaningful setbacks when viewed from the street and neighbouring properties. It is further asserted that the extent of built form

<sup>6</sup> See also *Zumpano v Banyule City Council* [2016] VSC 420 [53] – [60]

<sup>7</sup> For example at clause 55.02-1.

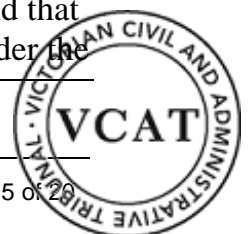


together with other features including the driveway and landscaping leaves insufficient space for landscaping to achieve an acceptable design response. The site's elevated position in the streetscape was said to accentuate these concerns despite the extent to which this development is cut into the site.

- 62 It was Mr Crowder's evidence that higher and larger built form is to be expected and is acceptable in this location if the strategic encouragement for additional development in the activity centre is to be properly realised. The centralised siting of the development with space for landscaping around the site's perimeter together with site coverage of 51% described as modest for this context were also said to be acceptable features. The architecture was also said to be a well resolved contemporary response with appropriate earthy toned materials and good levels of building articulation including the setting back of the two upper levels at the front of Unit 1 to create a recessed form when viewed from the street. The proposal was also said to respond to the site's sloping topography being cut in to the site to minimise building bulk with each dwelling also having stepped footprints that rise with the site's topography.
- 63 Submissions and evidence given at the hearing were supplemented by further submissions on the papers for which I granted leave to the council and applicant addressing the implications and application of the expression '3rd storey in a roof space' where appearing in the table in clause 5.2-3 in the Precinct requirements in Schedule 1 to the ACZ.
- 64 This was done in the context of the question of law determined some four years ago by SM Code in *Eltham Outlook Pty Ltd v Nillumbik SC* [2017] VCAT 675 (*Eltham Outlook*) noting that Schedule 1 to the ACZ has not changed since that time. Specifically the Tribunal found that:
- The expression '3rd storey in roof space' in the table to clause 5.2-3 of Schedule 1 to the Activity Centre Zone relating to sub-precinct 2A is not a mandatory requirement. Pursuant to clause 37.08-5 [as it was then] of the Activity Centre Zone, a permit may be granted to construct a building that is not in accordance with this requirement.
- 65 In summary,<sup>8</sup> SM Code made this finding on the basis that this expression:
- 'does not come within the ambit of building height because it does not concern or relate to the distance between natural ground level and the roof or parapet of a building';
  - is more properly characterised as one that relates to 'the built form or appearance of a particular storey, being the final dot point of authorised subject matter for "design and development" requirements' referred to in clause 37.08-6 which may be included in a schedule to the ACZ. [My underlining]
- 66 In submissions made by the applicant and council it was common ground that the expression '3<sup>rd</sup> storey in roof space' where appearing in the table under the

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<sup>8</sup> [17]



column headed ‘Mandatory height (excluding a basement)’ is not a mandatory requirement.

- 67 The parties also agreed that this expression should be treated as a discretionary requirement.
- 68 For the applicant’s part, it variously submits that the council does not take issue with the ‘general style’ of the roof form, its profile and ‘that the roof form as proposed is entirely acceptable.’<sup>9</sup>
- 69 The council’s primary submission is that the ‘overall intent of the Precinct Requirement is to reduce the bulk, the visual presence and impact of the third storey when viewed from both the public and private realms. This is achieved by ensuring the upper level has a smaller footprint than the levels below.’
- 70 The council further submits<sup>10</sup> that this expression has three other roles to play, namely to:
- a. allow more space for canopy vegetation at upper levels, as canopy vegetation is important to the preferred character of the centre
  - b. to reduce the visual bulk of upper storeys without creating a “wedding cake” effect
  - c. support a residential character in Precinct 2.
- 71 In support of its submissions, the council referred to the built form guidance contained in the ACZ1 and its reference documents. In particular:
- The Land Use and Development objectives to be achieved, the Precinct Guidelines for Precinct 2 and the Decision Guidelines contained in the ACZ1.
  - The built form guidance contained in the *Eltham Major Activity Centre Structure Plan 2004*.
  - The *Eltham Town Centre Design Guidelines Parts A & B 2014*.
- 72 Reference was also made to the 2020 Structure Plan.
- 73 The 2020 Structure Plan recommends removal of the ‘3rd storey in roof space’ expression from the ACZ1 and consideration given of how to better achieve a roof form through the ACZ1, which supports the preferred character. This strategic work has however yet to be implemented.

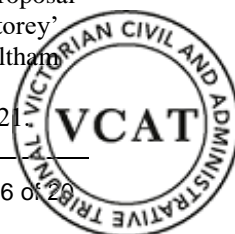
### Tribunal’s findings

- 74 I begin with the requirements of the ACZ1.

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<sup>9</sup> The applicant also submitted that it would not be opposed to the opportunity to redesign the proposal to include the third storey in roof space if I were to form the view that the ‘3<sup>rd</sup> storey in roof storey’ expression is a mandatory requirement. I do not disagree with SM Code’s determination in *Eltham Outlook Pty Ltd v Nillumbik SC*.

<sup>10</sup> Paragraph 6 of its submissions filed in response to the Tribunal’s interim order of 5 March 2021.



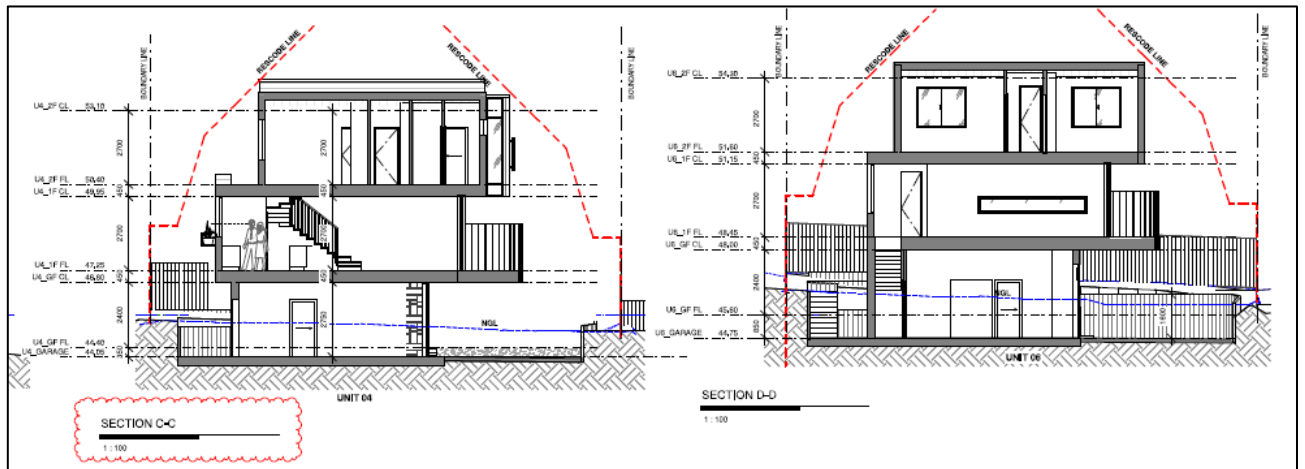
- 75 I fully concur that the expression ‘3rd storey in roof space’ where appearing in the table under the column headed ‘Mandatory height (excluding a basement)’ is not a mandatory requirement.
- 76 I also agree that this expression should be treated as a discretionary requirement.
- 77 As it stands, the expression ‘3rd storey in roof space’ remains within Schedule 1 to the ACZ and I must take the planning scheme as I find it at the time of making my decision. Further, neither party submitted that this expression ought not be considered.
- 78 Having considered the material referred to by the parties I concur with the council’s submissions that the ‘3rd storey in roof space’ expression is primarily intended as a built form measure that seeks to reduce the bulk, visual presence and impact of the third storey and to ensure that the upper level has a smaller footprint than the levels below.
- 79 I also agree with the other three roles that the council submits this expression is intended to play. Namely, to provide sufficient space for canopy trees at the upper levels of buildings, to avoid the design of buildings that take the form of a ‘wedding cake’ and to ensure that buildings adopt a domestic form and appearance being mindful also that office uses like their residential counterparts are encouraged in this precinct.
- 80 In my view, the design outcome sought is that of a recessive *building form* to the third level. I consider that this is the relevant test rather than that variously described in the applicant’s submission by reference to descriptors of the *roof* alone which it says has an acceptable appearance, profile, form and style.
- 81 When applied to the design of a proposal, I take these design directions to mean that buildings should be designed so that vertical wall planes and their horizontal form do not ‘fill the envelope’ over three levels.
- 82 I am fortified in my view about having also considered SM Code’s findings in *Eltham Outlook* that the contentious expression relates more properly to the ‘built form or appearance of a particular storey’.
- 83 Further, the Building Design Guidelines including Part A also explain that ‘generally, upper level of developments should be recessive in form and highly articulated’.<sup>11</sup>
- 84 I accept Mr Crowder’s evidence more broadly that the built form presents with some variation in setbacks and materials and these elements contribute to some articulation. Some recessing of the second and third levels of Unit 1 is also proposed on its north side and compliance with various numeric standards of clause 55 is largely achieved.
- 85 However, the typology adopted involves the cantilever of both the second and third storeys over the ground floor footprint to varying degrees, but

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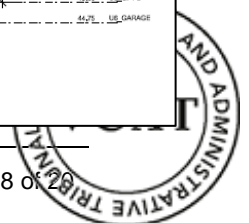
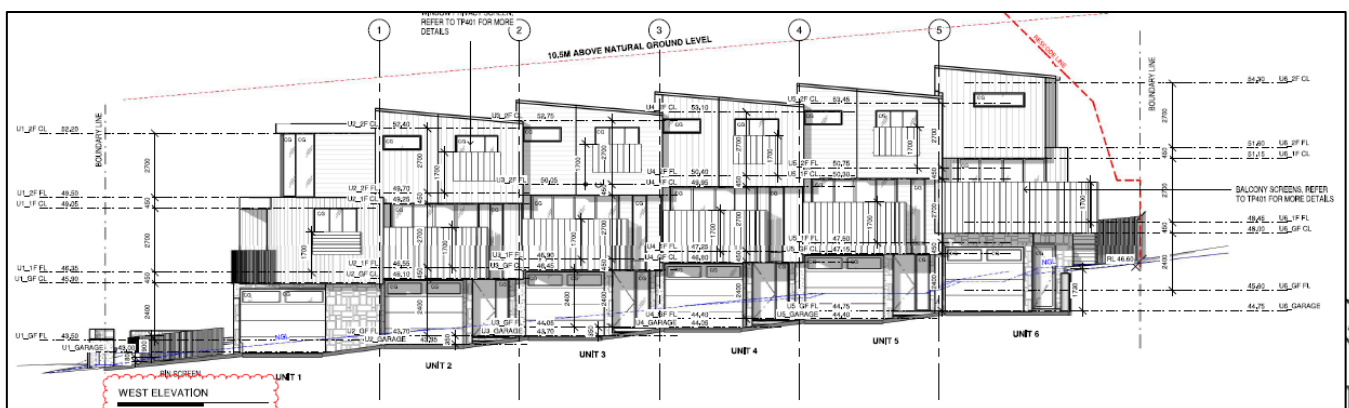
<sup>11</sup> Under BD01: Building height and form.



substantially on the west side over the driveway. This design response can be seen by reference to the plan sections shown below.



- 86 I am unable to find that this response is an acceptable one. Overall, the development will have an excessively bulky and dominant appearance, when viewed from surrounding land particularly when viewed in oblique views from the street from the east and west. I consider that the proposal's streetscape impacts are exacerbated by the site's elevated position in the landform. To illustrate, the upper edge of Unit 6's roof form will extend to a height of approximately RL55m. This compares to existing ground levels of between RL41.4 and RL41.6<sup>12</sup> diagonally opposite the site near the crossovers at No. 23 and 25 Cecil Street – a height difference in excess of 13m.
- 87 This is so even with extensive cutting throughout the site necessitating retaining walls throughout much of the site, rising up to 2m at the rear – an approach that I regard as not responsive to the natural topography – contrary to the neighbourhood character objectives for site responsive development at clause 55.02-1, the precinct guidelines at clause 5.2.4 in ACZ1 and decision guidelines at clause 7 of the ACZ1.
- 88 On the west elevation (as shown in the image below), the design and siting of upper levels are such that wall heights above the finished driveway level will consistently range from approximately 9m to 9.8m and up to 10.2m in an attached form over a distance of more than 32m. Screening devices up to 1.7m are proposed to the main west (and south) edge of balconies adding to the mass and volume of the development.





- 89 This design response results in a building whose horizontal and vertical proportions and overall volume will occupy a substantial envelope. It will read as one very large rectilinear building. I find this response to be too inconsistent with the built form outcomes sought for this precinct in the ACZ1 and whose objectives ask for a transition in built form scale between the core commercial area and adjoining residential areas. The proposal's proportions and unbroken form would not have a domestic quality that responds to the residential character of the area as sought by the precinct guidelines at clause 5.22 in the ACZ1. Nor would it have a form that avoids excessive bulk and nor is it modest and compact in scale as expressed in the statement of preferred character. It would not meet the neighbourhood character objective at clause 55.02-1 and design detail objective at clause 55.06-1.
- 90 While some change to the built form character of this location is clearly envisaged by the planning scheme, I consider that the proposed response is too aggressive for this elevated, mid-block location at the periphery of the activity centre boundary.
- 91 It is primarily for these reasons that I find that a permit must not be granted.
- 92 In light of this conclusion, I provide only brief findings on other issues.

#### **Internal and on-site amenity**

- 93 In terms of the reverse living typology, I have no in-principle difficulty with this arrangement. The execution of this typology on mid-block sites does however require additional care to avoid poor levels of internal amenity.
- 94 In this case, I find that the extent of screening required to balconies and windows together with their partial overhang by the level above will diminish the amenity and outlook available from main indoor living areas. The outlook from balconies is also constrained to all but angled north-westerly views.
- 95 On the appearance of the internal streetscape, I consider that it will have a harsh presentation, due to the combined amount of hard paving and number of garages in succession. The design of dwelling entries will offer limited transitional space and a sense of personal address, contrary to the dwelling entry objective at clause 55.05-2.

#### **Landscaping**

- 96 Landscaping is capable of being established in the spaces around the proposed building, however, I find that the landscape response is not proportional to the intensity of development and built form sought for this strategic context. More particularly, I am not persuaded that the spaces provided along the driveway will allow the establishment of suitably scaled canopy trees in a way that is integrated with the total development and which provides for the softening of built form.



## **Conclusion**

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

Mary-Anne Taranto  
**Member**

