**Bramich v Moreland CC [2009] VCAT 1620 (10 August 2009)**

Last Updated: 19 August 2009

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

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| **PLANNING AND ENVIRONMENT LIST** | VCAT REFERENCE NO. P687/2009  PERMIT APPLICATION NO. MPS/2009/4 |

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| **APPLICANT** | Emily Bramich |
| **RESPONSIBLE AUTHORITY** | Moreland City Council |
| **RESPONDENT/OBJECTOR** | Zenna Saad |
| **SUBJECT LAND** | 23 Neil Street, Hadfield |
| **WHERE HELD** | Melbourne |
| **BEFORE** | Dr S. Mainwaring, Member |
| **HEARING TYPE** | Hearing |
| **DATE OF HEARING** | 30 July 2009 |
| **DATE OF ORDER** | 10 August 2009 |
| **CITATION** | Bramich v Moreland CC [[2009] VCAT 1620](http://www.austlii.edu.au/au/cases/vic/VCAT/2009/1620.html) |

**ORDER**

The decision of the Responsible Authority is set aside and a permit is granted for the construction of 2 double-storey dwellings and subdivision of the land into two lots at 23 Neil Street, Hadfield, in accordance with the endorsed plans and subject to the following conditions:

1. Before the development commences, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and three copies must be provided. The plans must be generally in accordance with the plans received by Council 2 February 2009 but modified to show :
   1. fences along southern, northern and western boundaries provided with trellis to bring fence heights to 1.7m;
   2. the south-facing bedroom window of Dwelling 2 and the north-facing windows of Dwelling 2 screened to a height of 1.7m in accordance with the ResCode standard;
   3. a plan of subdivision in accordance with the development plans received on 2 February 2009;
   4. the landscape plan modified in accordance with Condition 3 of this permit;
   5. a schedule of all proposed exterior decorations, materials, finishes and colours, including colour samples (3 copies in a form that can be endorsed and filed).
2. The development as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
3. The subdivision as shown on the endorsed plan must not be altered without the consent of the Responsible Authority.
4. The landscape plan must provide the following :
   1. a schedule of all proposed trees, shrubs and ground covers (including numbers, size at planting, size at maturity and botanical names), as well as sealed and paved surfaces. The flora selection and landscape design should be drought tolerant and based on species selection recommended in the Moreland City Council landscape Guidelines and Technical Notes;
   2. identification of any existing tree(s) and vegetation proposed to be removed and retained. Vegetation retainment must include strategies for the retainment (ie barriers and signage during the construction process);
   3. the provision of canopy trees within the front setback(s) to assist in the integration of the development within the existing streetscape;
   4. details of the location and type of all paved and sealed areas. Extensive hard surfaces are not supported. The adoption of porous/permeable paving, rain gardens and other water sensitive urban design features is encouraged.
5. Following completion of the development the areas designated as garden areas on the endorsed landscape plan must be maintained and used as garden areas.
6. All stormwater from the land, where it is not collected in rainwater tanks for re-use, must be collected by an underground pipe drain approved by and to the satisfaction of the Responsible Authority (Moreland City Council, City Infrastructure Department).
7. Prior to the occupation of the development, all boundary walls must be constructed, cleaned and finished to the satisfaction of the Responsible Authority.
8. All telecommunications and power connections (where by means of a cable) and associated infrastructure to the land must be underground to the satisfaction of the Responsible Authority.
9. Unless with the prior written consent of the Responsible Authority, any plumbing pipe, ducting and plant equipment must be concealed from external views. This does not include external guttering or associated rainwater down pipes.
10. A mailbox, with separate aperture for newspapers and other non-mail articles must be provided for each of the premises at the street frontage. The mailbox dimensions, placement and numbering must comply with the Australia Post – General Post Guide 2004 (Point G4.3) as published on its website to the satisfaction of the Responsible Authority.
11. The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity, gas and telecommunication services to each lot shown on the endorsed plan in accordance with the authority’s requirements and relevant legislation at the time.
12. All existing and proposed easements and sites for existing or required utility services and roads on land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
13. The plan of subdivision submitted for certification under the [Subdivision Act 1988](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1988153/) must be referred to the relevant authority in accordance with [Section 8](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1988153/s8.html) of the [Subdivision Act](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1988153/).
14. Prior to the certification of the plan of subdivision the owner of the land must –
    1. enter into an agreement with the Responsible Authority pursuant to [section 173](http://www.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s173.html) of the [*Planning and Environment Act* 1987](http://www.austlii.edu.au/au/legis/vic/consol_act/paea1987254/) (“the Act”) in a form satisfactory to the Responsible Authority in which the Owner of the land covenants amongst other things that the land will be developed in accordance with this planning permit (MPS/2009/4) (“the agreement");
    2. do all things necessary to enable the Responsible Authority to register the agreement with the registrar of titles in accordance with [section 181](http://www.austlii.edu.au/au/legis/vic/consol_act/paea1987254/s181.html) of the Act; and
    3. pay to the Responsible Authority its costs and disbursements incurred in relation to the negotiation, preparation, execution and registration of the agreement on the certificate of title to the land.

The requirement contained in this condition that the Owner of the land enter into the agreement may be waived by the Responsible Authority in its absolute discretion in the event that the development has at a time prior to certification of the plan of subdivision reached “lock-up stage” as that term is defined within [http://www.austlii.edu.au/images/displeft.png](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/1620.html?stem=0&synonyms=0&query=dbca1995275%20s40#disp0)[**Section 40**](http://www.austlii.edu.au/au/legis/vic/consol_act/dbca1995275/s40.html)[http://www.austlii.edu.au/images/dispright.png](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2009/1620.html?stem=0&synonyms=0&query=dbca1995275%20s40#disp2) of the “[*Domestic Building Contracts Act 1995*](http://www.austlii.edu.au/au/legis/vic/consol_act/dbca1995275/)*”.*

1. All civil works relating to the construction of drainage, footpath, crossing and the reinstatement of Council’s assets must be constructed or bonded to the satisfaction of the Responsible Authority.
2. Reticulated water, sewerage and electricity must be available to each lot shown on the endorsed plans to the satisfaction of the Responsible Authority prior to the issue of Statement of Compliance.
3. Each lot shown on the endorsed plans must be drained to the satisfaction of the Responsible Authority.
4. **Melbourne Water:** No polluted and/or sediment laden runoff is to be discharged directly or indirectly into Melbourne Water’s drains or watercourses.
5. **Melbourne Water**: Finished dwelling floor levels must be a minimum of 300mm above the applicable floor level.
6. **Melbourne Water:** Finished garage floor levels must be a minimum of 150mm above the applicable floor level.
7. **Melbourne Water**: Prior to the issue of a Statement of Compliance, the Owner shall enter into and comply with an agreement with Melbourne Water Corporation for the acceptance of surface and storm water from the subject land directly or indirectly into Melbourne Water’s drainage systems and waterways, the provision of drainage works and other matters in accordance with the statutory powers of Melbourne Water Corporation.
8. **Melbourne Water:** Prior to Certification, the Plan of Subdivision must be referred to Melbourne Water, in accordance with [Section 8](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1988153/s8.html) of the [Subdivision Act 1988](http://www.austlii.edu.au/au/legis/vic/consol_act/sa1988153/).
9. Permit conditions Nos 1 to 22 inclusive must be satisfied prior to the issue of a Statement of Compliance.
10. This permit will expire if one of the following circumstances applies :
    1. the development is not commenced within two (2) years from the date of issue of this permit;
    2. the development is not completed within four (4) years from the date of issue of this permit;
    3. the subdivision is not started within two years of the date of issue of this permit as evidenced by a Plan of Subdivision being certified by the Council within that time;
    4. the Certified Plan of Subdivision is not registered within five years from the date of the Certification of the Plan.

The Responsible Authority may extend the periods referred to if a request is made in writing before the permit expires or within three months afterwards.

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| Sylvia Mainwaring **Member** |  |  |

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| APPEARANCES: |  |
| For Applicant | Mr Darren Evans, Designer of the Project |
| For Responsible Authority | Ms Kathryn Pound, Town Planner |
| For Respondent Objector | No appearance by or on behalf of Ms Zenna Saad |

**REASONS**

INTRODUCTION

1. This was an application with respect to a refusal on the part of the Responsible Authority to grant a permit for 2 two-storey dwellings on land at 23 Neil Street, Hadfield. Council refused the proposal on the following grounds:
   1. The proposed development does not satisfy the objectives relating to Neighbourhood character at Clauses 22.10 and Clause 55.01-2 for the following reasons :
      1. Rear double storey form is inconsistent with the open rear yard character of the area.
      2. The front dwelling is oriented away from the street with its open space in the frontage and behind a high fence.
      3. The front dwelling is not integrated within the single storey streetscape due primarily to lack of upper storey setbacks.
   2. The proposal does not comply with Clause 55.02-5 Integration with the street objective as the front dwelling is oriented away from the street with its open space in the frontage and behind a high fence.
   3. The proposed development does not satisfy Clause 55.05-2 Dwelling entry objective as the entry of dwelling 1 is oriented away from the street and therefore lacks its own sense of identity.
   4. The proposal does not satisfy Clause 55.06-1 design detail objective as the lack of upper floor setbacks of dwelling 1 results in visual bulk that is unacceptable within the neighbourhood setting.
   5. No plan of subdivision has been provided and therefore there is insufficient information to adequately assess the application for subdivision of the land.

SITE AND SURROUNDING AREA

1. The subject site is located on the west side of Neil Street. It has a frontage of 15.24m and a depth of 40.23m, giving an overall site area of 613m2. A 2m wide easement runs along the western boundary.
2. The surrounding area is residential and characterised by single-storey post-war dwellings. There are, however, some multi-unit developments and two-storey dwellings in the southern section of Neil Street and in the wider area.

PROPOSAL

1. The proposal is for the construction of 2 two-storey dwellings on the land. Dwelling 1, as proposed, will have living areas at ground floor with two bedrooms above, and Dwelling 2 to the rear will have living areas and one bedroom at ground floor with two additional bedrooms at first floor level. Access is provided by way of the existing driveway along the southern boundary of the site to a single garage for Unit 1 on the northern boundary, and a double garage for Unit 2 on the southern boundary of the site. This second garage abuts the garage on the adjoining property to the south. The driveway arrangement enables vehicles to leave the site in a forward direction.
2. Dwelling 1, as proposed, has a setback from the street of some 7.6m. However, the private open space of this dwelling intrudes into the front setback some 3.4m for approximately half of the street presentation. This private open space area is proposed to be fenced with a 1.8m high brick pier and paling fence.
3. Excluding the garages, the setback of Unit 1 from the northern boundary ranges from 1.45m to 3.21m and that of Unit 2 from 2.58 to 4.17m. Unit 1 is set back some 5m from the southern boundary and the Unit 2 setback is 1.34m. The setback is the width of the easement ie 2m. A separation of 1.35m is provided between the two dwellings at ground floor increasing to some 11.7m at first floor. An additional setback of 1.34m is provided at first floor from the site frontage. A further setback of 3m is provided from the southern boundary at first floor level for Dwelling 2.

CONSIDERATION OF APPLICATION

1. The application was lodged in December 2008 and subsequently amended in February 2009. The proposal was advertised and one objection was received from Mrs Zenna Saad at No 50 Tassell Street to the rear on grounds of overlooking and loss of privacy.

PLANNING POLICIES AND CONTROLS

1. The subject site is located within a Residential 1 Zone. A permit is required for the construction of two or more dwellings on a lot within the zone. A further permit is required for the subdivision and under the Special Building Overlay which applies to the site.
2. The Responsible Authority referred the development to Melbourne Water which is a statutory referral authority under the Special Building Overlay applying to the land. Melbourne Water had no objection to the proposal subject to conditions.
3. The State Planning Policy Framework encourages medium density development. The level of support is particularly strong with respect to the subject site as it lies within a designated Urban Village where medium urban density development is specifically encouraged.

ISSUES

1. The Responsible Authority assessed the positive and negative aspects of the proposal and was of the view, on balance, that the proposal was inappropriate because it did not respond positively to the neighbourhood character of the area and, in particular, failed the dwelling entry objective of the ResCode.

CHARACTER

1. It was Council’s argument that the double-storey construction to the rear was inconsistent with the open rear yard character of the area and that the use of a high fence in the front setback was not consistent with the single-storey open garden nature of the area.
2. Council called upon their Neighbourhood Character Policy at Clause 22.10 which suggests that the preferred future character for residential character areas should limit development in rear yards to single-storey and further that rear setbacks should have regard to rear yard and garden outlooks characteristic of the precinct. It was Council’s view, in the present case, that an open backyard scape was typical of the section of Neil Street from Middle Street to No 9 Neil Street, where a multi-unit development is located. Council further noted that the setbacks to the west and south of Dwelling 2 were minimal and indicated an excessive built form on the site.
3. It is my view that the Council’s desire to preserve a rear backyard scape and a more prominent single-storey presentation to the street is not a reasonable expectation for a site that is located within an Urban Village precinct. It is my view that the precinct containing the subject site has been identified in the Planning Scheme as being an area suitable for medium density development. The consequence of this identification is that there will be a change in the character of the area over time and this change in character will include a number of multi-unit developments including two-storey developments which will, in all probability, occur towards the rear of residential sites.
4. The present proposal is considerate of the character of the area in its use of materials, it further meets the front setback standards of ResCode and has an overall modest footprint on the land. The proposal provides for good northern orientated private open space for each of the dwellings and a significant separation between dwellings at first floor level to give an open appearance to the site. The front yard and driveway occupy half of the street presentation and will be open and unfenced.
5. Given the above, I am of the view that the proposed development while representing the emerging character of the area will not seriously challenge the existing character.
6. With regard to the fencing of the section of the front setback, the Tribunal notes that the fence concerned will be pickets and brick pier and not inconsistent with similar fencing on the opposite side of the street. In addition, the fence will be set back some 3.7m from the street frontage and will only occupy half of that frontage providing ample opportunity for landscaping forward and alongside of the fence .

DWELLING ENTRY

1. Council was concerned about the failure of the proposal to meet the dwelling entry objective and the integration with the street objective of Res/code. It was Council’s view that the proposal effectively turned its back on the street and had an entry that was not easily identified. I agree that it is unusual to place the dwelling entry to the rear of the dwelling off the driveway. However, I accept that the intent of the designer was to maximise the north-facing private open space for each of the two dwellings. It is my view given the open driveway and unfenced front garden area that it will be clear to visitors that the entry to both dwellings is towards the centre of the site.
2. I am further of the view that the articulation and fenestration of the proposal is sufficient to ensure a satisfactory street presentation and the development cannot be interpreted as having turned its back on the street.
3. The other matters of concern to the Responsible Authority with respect to subdivision, storage, privacy and overlooking, are minor and can be dealt with by the imposition of conditions.
4. In conclusion, it is my view that this is a relatively modest development that is on all fours with State Planning Policy, will not impact on the amenity of adjoining neighbours and will provide excellent amenity to future residents. In particular, in my view, the proposal does not challenge the character of the area which is an emerging one as a function of the age of the dwellings and the site’s location within the environs of an urban village.

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| Sylvia Mainwaring **Member** |  |  |

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