VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P335/2020
PERMIT APPLICATION NO. WH/2016/1172/A

CATCHWORDS

Whitehorse Planning Scheme; Residential Growth Zone, Schedule 2; Significant Landscape Overlay, Schedule 9; Special Building Overlay; Garden Suburban Precinct 13; Apartment development; Amendment or transformation of existing permit; Permit issued as a result of a compulsory conference; Change in policy; Increase in density; Height; Massing; Visual bulk; Materials; Neighbourhood character; Tree retention and landscaping.

APPLICANT	Frankcom Street Blackburn Pty Ltd
RESPONSIBLE AUTHORITY	Whitehorse City Council
REFERRAL AUTHORITY	Melbourne Water
RESPONDENTS	Elisa D'Alessandro, Blackburn Village Residents Group Inc., The Blackburn & District Tree Preservation Society Inc., Jo-Ann Lewis, Robyn Nicholls
SUBJECT LAND	9-13 Frankcom Street BLACKBURN VIC 3130
HEARING TYPE	Hearing
DATE OF HEARING	16, 17 & 18 November 2020
DATE OF ORDER	31 March 2021
CITATION	Frankcom Street Blackburn Pty Ltd v Whitehorse CC [2021] VCAT 310

ORDER

Amend permit application

1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

- Prepared by: Hayball
- Reference: VCAT Amended Plans
- Dated: September 2020

No amendment of permit

2 In application P335/2020 the decision of the responsible authority is affirmed.

3 Planning permit WH/2016/1172 must not be amended.

Judith Perlstein
Member

APPEARANCES[1]

For Frankcom Street Blackburn Pty Ltd	John Cicero of Best Hooper. He called the following expert witnesses: • John Patrick of John Patrick Landscape Architects Pty Ltd. • Lloyd Elliott of Urbis Pty Ltd.
For Whitehorse City Council	Darren Wong of Planology.
For Melbourne Water	No appearance.
For Elisa D'Alessandro	Renzo D'Allesandro.
For Robyn Nicholls	In person.
For Jo-Ann Lewis	In person.
For The Blackburn & District Tree Preservation Society Inc.	David Berry, President.
For Blackburn Village Residents Group Inc.	David Morrison, Secretary.

INFORMATION

Description of proposal	Multi-storey residential building.
Nature of proceeding	Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.
Planning scheme	Whitehorse Planning Scheme
Zone and overlays	Residential Growth Zone, Schedule 2 (**RGZ2**); Significant Landscape Overlay, Schedule 9 (**SLO9**); Special Building Overlay (**SBO**).
Permit requirements	Clause 32.07-5 - construction of two or more dwellings on a lot in the RGZ2. Clause 44.05-2 - construction of a building and works in the SBO. [2]

[1] Via online forum.

[2] Prior to the hearing, it was considered that planning permission was required for tree removal under the SLO9. However, during the hearing the council submitted that the combination of the exemption in the SLO9 for 'A tree outside the minimum street setback requirement in the Residential Growth Zone', combined with the varied minimum street setback for an apartment building in clause 58.04-1, resulted in a situation where all trees on the site are exempt from the SLO9. The reasoning for this is included in the Tribunal decision of *Frankcom Blossom Pty Ltd*

Relevant scheme policies and provisions	Clauses 11, 12, 15, 16, 18, 21.03, 21.05, 21.06, 22.03, 22.04, 22.10, 32.07, 42.03, 44.05, 52.06, 58, 65 and 71.
Land description	The subject site is located on the eastern side of Frankcom Street and comprises three lots taking up the southern end of the Street as it meets the railway line. The site is currently improved with two single-storey dwellings. Although both Laburnum and Blackburn Railway Stations are in close proximity to the site, there is no access provided from the dead-end streets north of the stations and the walking distance is approximately 730 and 950 metres, respectively. The site has a total frontage of 61.44 metres to Frankcom Street and a southern boundary of 63.42 fronting the railway reserve. It has an overall site area of 3,275 square metres with a fall of approximately 8 metres from the north-west to the south-east corner of the site. A large portion of the south-east of the site is encumbered by a drainage easement and by the Blackburn Drain/Creek Corridor. As can be seen in the aerial image below, that section of the site is heavily vegetated, and was identified in an arborist report prepared in 2019 to include 71 trees. An aerial and street view photo of the subject site is included below. The subject site comprises the three lots starting at the location marker down to the railway line.[3]
Tribunal inspection	Following the hearing, I undertook an unaccompanied inspection of the subject site and surrounding area.

Whitehorse CC [2019] VCAT 1790 at [8-17]. The permit triggers are therefore limited to those found in the RGZ2 and SBO.

[3] From www.nearmap.com.au, taken on 8 November 2020, and Google maps, May 2019.


Frankcom St
Frankcom St
Downing St
Downing St
Downing St
Railway Rd


Frankcom St

REASONS[4]

WHAT IS THIS PROCEEDING ABOUT?

1 Planning permit WH/2016/1172 was issued by the Whitehorse City Council (**council**) on 19 December 2017 following a negotiated agreement at a compulsory conference at the Tribunal, for the land at 9-13 Frankcom Street. It permits construction of a residential apartment building comprising 35 dwellings within a building of up to 5 storeys above two levels of basement car parking.

2 This is an application for review of the council's refusal to grant an amended permit, initiated pursuant to section 72 of the *Planning and Environment Act 1987* (**PE Act**). The amendment application seeks to amend the permit by proposing a new apartment building with a height of up to 6 storeys above two levels of basement car parking and an increase to 50 dwellings.

3 This application brings up several issues, including the question of whether the proposal is an amendment of the approved application or a transformation, the way in which a mediated outcome is viewed and the consequences of overturning such an outcome, and the merits of the proposal itself. The council articulated its position as follows:[5]

> 44.1 the Amendment Application is a transformation of what is allowed under the Permit, rather than an amendment to the Permit. The Tribunal therefore does not have the power to consider the proposal under section 72 of the Act and the application for review ought to be rejected on that basis;
>
> 44.2 if power exists, the Tribunal should not lightly amend the Permit, which gives effect to an agreement by parties to settle earlier proceedings at the Compulsory Conference. There is no sound justification for the Amendment Application and it represents an attempt to win back elements conceded at the Compulsory Conference; and
>
> 44.3 from a merits perspective, the proposed changes do not achieve an acceptable planning outcome in terms of setbacks and built form, ground level access, landscaping, noise impacts, private open space, storage space, functional layout, cross-ventilation and bicycle storage.

4 The objector parties, who include neighbouring residents and the Blackburn Village Residents Group (**BVRG**) and the Blackburn & District Tree Preservation Society (**BDTPS**) support the council's position and each provided their own perspectives on the matters in dispute.

---

[4] 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.

[5] In its written submissions.

5 The applicant submits that the proposal is an amendment to the permit and able to be processed as such, that just because an outcome was mediated does not mean an amended permit cannot issue and that the proposal as amended represents an acceptable planning outcome for the subject site.

6 I must determine the following key issues:

a. Is the application an amendment of the existing permit or a new application?

b. Does the amendment application undermine the mediated outcome?

c. Does the proposal represent an acceptable response to the Whitehorse Planning Scheme and site context?

7 The first question is essentially a threshold question, as is the second, if an affirmative answer would result in the refusal to grant a permit. For the reasons provided later in this decision, after much consideration, I have found that the application can be considered an amendment of the current permit and that, although the amended proposal will undermine the mediated outcome if approved, this does not preclude a consideration of the application on its merits and a decision to grant a permit if the proposal is found to be acceptable.

8 Finally, I considered the merits of the amended proposal. As agreed by all parties, it is evident from the approved permit and the provisions of the Whitehorse Planning Scheme (**Scheme**) that the subject site is appropriate for substantial change. The question is whether the degree and form of change proposed from that which has been approved is acceptable. I agree with the evidence of Mr Elliot[6] that the following matters must be considered:

- Whether the updated design response is aligned with policy and is suitable to the site and its physical context.
- Whether the additional storey is appropriate and aligns with the policy intent for the review site.
- Whether the massing and setbacks are appropriate and responsive to the site surrounds.
- Whether the updated design provides for acceptable internal and external amenity outcomes.

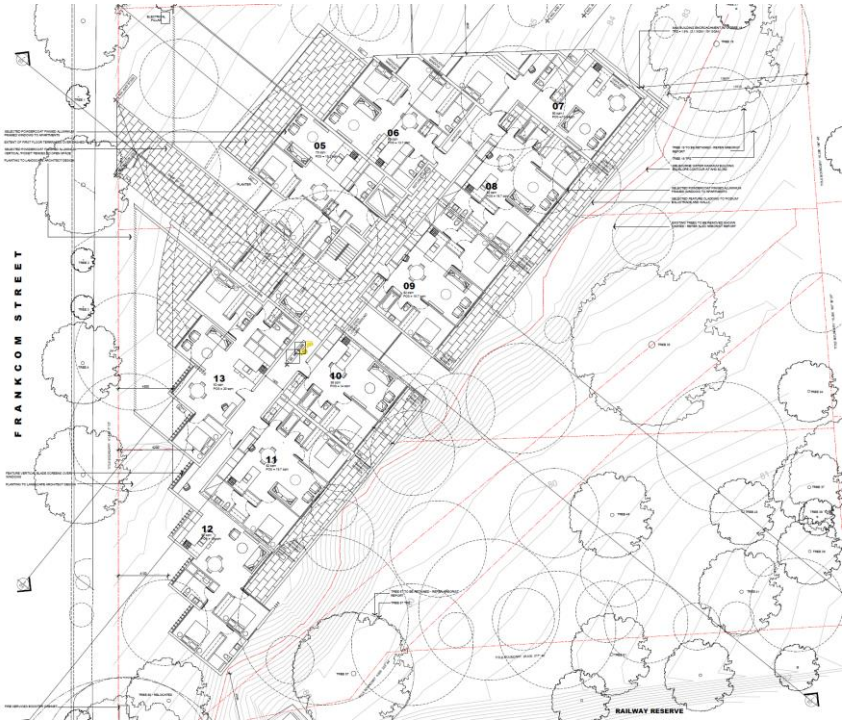
9 Having considered these matters, I find that the amended proposal does not provide an acceptable response to the Scheme and the site context. My reasons follow.

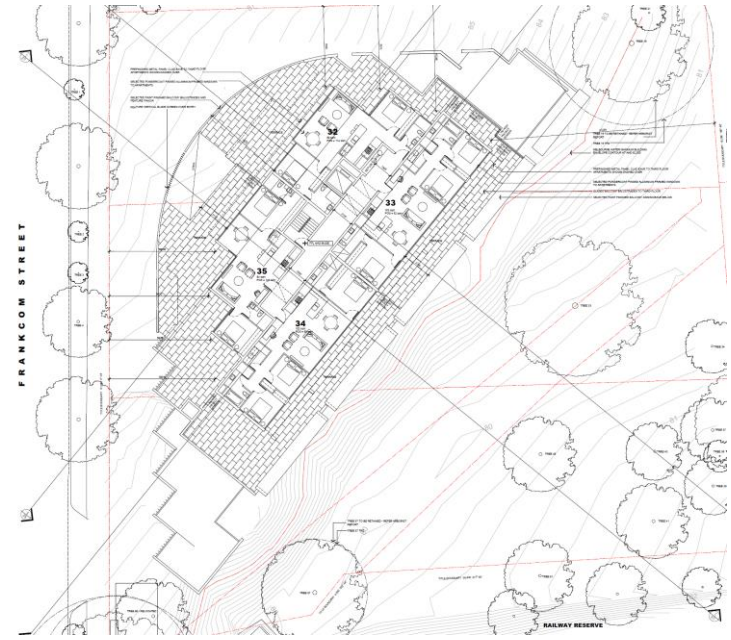
[6] In his written report at [5.1].

WHAT IS THE PROPOSAL? WHAT HAS BEEN APPROVED?

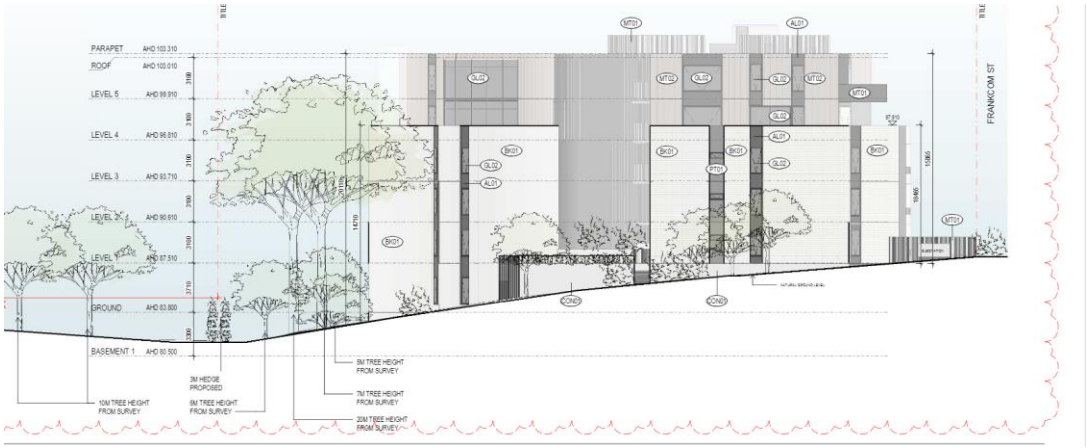
10 On 19 December 2017, the council, at the direction of the Tribunal following an agreed outcome at a compulsory conference, issued permit WH/2016/1172. The permit allows construction of a residential apartment building comprising up to 35 dwellings. The approval was based on plans prepared by David Watson Architect and dated December 2017. These plans include a five storey residential apartment building including four storeys above ground and one at lower ground floor plus 50 car parking spaces in two basement levels. A three storey street wall is provided to Frankcom Street, and the 35 dwellings are comprised of 6 one bedroom apartments, 26 two bedroom apartments and 3 three bedroom apartments.

11 The north elevation, ground floor plan and third floor (fifth level) plan from the December 2017 plans are included below, as well as a perspective image titled 'view from north west' from the original December 2016 plans showing the curved form of the building.

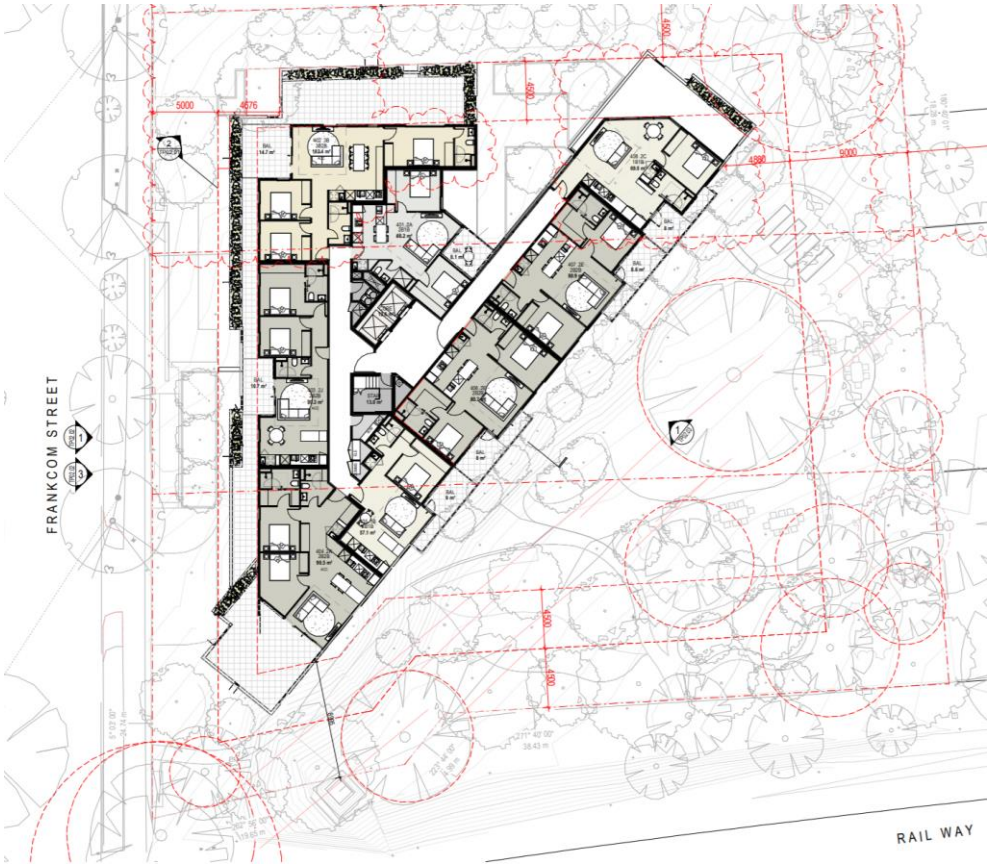




12 The proposed amended plans have been prepared by Hayball Architects and are dated 25 September 2020.[7] The north elevation, ground floor plan, fourth floor (fifth level) plan and a perspective image titled 'northwest view' from the 2020 plans are included below.



7 Modifications were made to the plans initially submitted with the application to council for amendment under section 72.



13 The council, in its written submissions, summarised the differences as follows, including the fact that the 2020 plans have been prepared by a different architect:

51.1 the number of dwellings has increased from 35 to 50;

51.2 the building height has increased from four and five storeys to six storeys;

51.3 the proposal will now present as six storeys from the south-east and five storeys from the north, with a podium of four storeys;

51.4 the site coverage has increased from 35% to 37.5%;

51.5 the mix of dwelling types has changed, now comprising 7 one bedroom apartments, 37 two bedroom apartments and 6 three bedroom apartments;

51.6 the building footprint takes on a completely new configuration;

51.7 the configuration of the basement and ground level is different, with the number of car parking spaces increased to 56, the number of visitor parking spaces decreased from 4 to one (shared space with waste vehicle) and the number of bicycle parking spaces decreased from 33 to 15;

51.8 the external appearance of the development is qualitatively different, with a new vertical, rectilinear façade scheme proposed to replace the original curved design;

51.9 there is a new vertical break along the northern elevation;

51.10 the internal layout has been completely re-worked;

51.11 the materiality has changed, with a brick podium, exposed concrete base, metal cladding and aluminium balustrades now proposed; and

51.12 the setbacks to the eastern, western and southern property boundaries have been revised.

14 The subject site is within the Residential Growth Zone, Schedule 2 (**RGZ2**) and affected by a Significant Landscape Overlay, Schedule 9 (**SLO9**) and a Special Building Overlay. Under the RGZ2 and the SBO, planning permission is required to construct two or more dwellings on a lot and to construct a building or carry out works. These are the same permissions that were required at the time of the grant of the permit. No permission is, or was, required for use of the land for dwellings.

IS THE APPLICATION AN AMENDMENT OF THE EXISTING PERMIT OR A NEW APPLICATION?

15 Section 72 of the PE Act provides as follows:

> **Application for amendment of permit**
>
> (1) A person who is entitled to use or develop land in accordance with a permit may apply to the responsible authority for an amendment to the permit.

16 Amendment is defined at section 3 of the PE Act as 'includes addition, deletion or substitution'.

17 Section 73 of the PE Act provides:

> **73 What is the procedure for the application?**
>
> (1) Subject to this section, sections 47 to 62 (with any necessary changes) apply to an application to the responsible authority to amend a permit as if—
>
> (a) the application were an application for a permit; and
>
> (b) any reference to a permit were a reference to the amendment to the permit.
>
> (1A) Section 47(1)(ab), (1A) and (1B) do not apply to an application to the responsible authority to amend a permit.

18 The question of whether a proposal comprises an amendment to a permit that has been issued or, rather, a transformation of that permit into something different, has been considered by the Tribunal on many occasions.

19 The applicant in this matter submits that the concept of 'transformation' is a legal construct which has evolved over time and is at odds with the wording of section 72 of the Act which allows for an amendment to a permit which can include addition, substitution and deletion. In addition, the applicant submits that the inclusion of section 73 in the Act requires the application for amendment to, essentially, be processed as if it were an application for permit including notification of the application to residents and referral authorities. In this way, it submits that affected parties are not prejudiced by the application as they are able to object and be involved in the process in the same way as would occur if this were a fresh application for permit.

20 The council submits that this proposal is not an amendment but a different proposal for consideration and that, therefore, the Tribunal lacks jurisdiction to amend the existing permit under section 72 of the Act:[8]

> Council acknowledges that some of the differences between what is approved under the Permit and the Amendment Application may, in isolation, constitute an amendment rather than a transformation.
>
> Cumulatively, however, the proposed amendments will transform the Permit into something different to what was originally granted. The Amendment Application is not simply adding to, expanding or altering what has been previously allowed.
>
> In this regard, there is not one aspect of the new proposal that does not require reassessment. The scope of the amendments is so great that it calls for a complete and full assessment of the proposal from first principles. Such an outcome highlights that what is before the Tribunal is a proposal for an entirely new development as opposed to an amendment to the previous approval. The approved proposal has been replaced with a new and different development.
>
> Accordingly, Council submits the Tribunal lacks jurisdiction to amend the Permit as the Amendment Application results in a transformation.

21 I accept that the proposal now before the Tribunal has followed the process required by section 73 of the PE Act. This means that all interested and affected parties have been notified of the proposal and have had the opportunity to participate in the application for review. It is the case that, with respect to this site, the applicant, the council and most of the respondents have been through a process that resolved with a compulsory conference in 2017, a process during 2019 and 2020 that has involved a compulsory conference and three day hearing, and has involved time, resources and angst for all concerned. If the Tribunal were to determine that it did not have jurisdiction to consider this application because it was not an amendment, the process would begin again, with a fresh application being lodged by the applicant.

22 Section 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998 (***VCAT Act***)* provides that the Tribunal 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit'. The requirement for 'as little formality and technicality' does not reduce the requirement for compliance with the VCAT Act and PE Act or a proper consideration of the matters.

23 While I agree that a resolution to this process would be preferred, the fundamental question remains as to whether this is an amendment to an existing permit. If it is not an amendment, I am unable to grant the permission requested.

---

[8] In the council's written submissions at [53-56].

24 While many of the Tribunal decisions considering amendments to permits include a change of use, this application does not (and use is not a permit trigger in any case). Nor does it propose a different planning concept to that approved by the existing permit. However, it is a different building to that which has been approved. It has been designed by a different architect with a different composition, height and setbacks to the plans on the basis of which the permit was issued.

25 The definition of amendment in the PE Act includes addition, deletion or substitution and is clearly extremely broad. However, to amend something implies that something remains of the original proposal. The proposed building, in this case, is substantially different. In a planning sense, though, the proposed use (dwellings) is the same, the proposed permit triggers (construction of two or more dwellings, construction of buildings) are the same, and the proposed permit conditions and preamble are very similar.

Court and Tribunal decisions

26 With respect to determining whether something is an amendment, most Tribunal decisions on this subject refer to the following words of Justice Brooking in *Addicoat v Fox (No 2)*[9]:

> In my opinion, a power to grant a permit subject to conditions authorises the responsible authority to grant a permit for a use or development which differs from the use or development the subject of the application for a permit, provided that the difference is not so radical as to enable it to be said, viewing the matter broadly and fairly, that to grant a permit on the supposed conditions would not be to grant the permit applied for with modifications, but to grant a different permit. This is plainly a matter of degree, and indeed it is almost one of impression. In my view, the changes made may be considerable without necessarily bringing it about that the permit granted is a different as opposed to a modified permit. Whether more may be countenanced by way of limiting the development or use, as opposed to extending it, before the point is reached at which alteration ceases to be modification and becomes transformation, is a question which I find it unnecessary to decide. On this question fairness and convenience may point towards one conclusion and logic towards another.

27 The Tribunal in *Bestway Group Pty Ltd v Monash CC (Red Dot)*[10] considered an application under section 87 of the PE Act to amend a permit issued at the direction of the Tribunal to include a new primary consent. In doing so, Deputy President Gibson, as she then was, discussed the changes that had been made to introduce the process for amendment applications that remains in place today:

---

9 [1979] VR 347; [1979] VicRp 37.
10 [2008] VCAT 860.

16 In my view, changes made to the *Planning and Environment 1987* through the introduction of Division 1A, especially section 72(3) about what a permit includes, are indicative of the concept of a permit as a comprehensive document containing all consents relevant to a piece of land and evolving over time as circumstances change, a business expands or alters, and as further development occurs. As a matter of principle, I see nothing more special about an application for a new permit compared to an application for an amendment to a permit. The processes are the same and eligible third persons have the same rights to notice and review in each case. On this basis, I see no reason why a permit may not be amended under Division 1A to include new primary consents.

17 For similar reasons, I consider there is no reason why amendments to permits under section 87A may not also include new primary consents. Whilst not so explicit as the provisions of Division 1A, nevertheless the rights of affected persons to be given notice and to particulate in the decision making process are safeguarded by the provisions of section 90(2), which enable the Tribunal to give "any other person who appears to it have a material interest in the outcome of the request an opportunity to be heard at the hearing of the request."

18 Permits are an integral aspect of Victoria's planning system. They are the means by which most use or development of land allowed under a planning scheme is authorised. They are documents of significant commercial value to their holders; they define rights and obligations; and they may be enforced by a responsible authority or any person. The resources that are invested by permit applicants, responsible authorities, referral authorities and third parties in the grant of permits are considerable in terms of time, effort and money, and the process can be most complex. I do not consider that the Tribunal should add unnecessarily to that complexity where it can be avoided. It is important to recognise that the practical administration of the planning permit process must occur within the context of the real world. As the Tribunal said in Mentone Mansions Pty Ltd v Kingston CC [10]:

> [14] ... Most planning projects undergo a design and development process which takes a considerable time, and the planning approval phase is early in that process. As a consequence, after planning approval the development of a design for construction purposes, and the construction process itself, can result in a need to amend the development no matter how well resolved the development is at the planning stage. ...

> 19 The planning system needs to be able to cope efficiently with such changes or other subsequent changes to the use or development of a site for whatever reason. It is important that changes are handled in a way that addresses their substantive merits; ensures that when eligible third persons may be genuinely affected, they are notified and given an opportunity to be heard; and that applications are processed and decisions are made about changes efficiently and in a timely way. The reforms to the *Planning and Environment Act 1987* by the introduction of Division 1A and section 87A enables these objectives to be achieved by focussing on the proposed changes, rather than re-opening debate about the whole proposal. Importantly, what happens on a site, can be managed through a single permit document, which is a more transparent process and less likely to result in inconsistencies than having multiple permits for the same site accumulate over time.
>
> …
>
> 23 If a proposed use or development is totally unrelated to the permit as it exists and would entail completely new conditions, I consider that the amendment process would be inappropriate. There would be no point in attempting to amend a permit in such circumstances where nothing would be left of the original permit. An application for a new permit should be made. However, where the permit is not transformed but retains significant elements of its previous content, and simply adds to, expands or alters what has been previously allowed, I consider that amending a permit, rather than always having to apply for a new permit, is now clearly contemplated by the provisions in the Act.
>
> [10] [2000] VCAT 1947.

28 In *Coles Property Group Developments Limited v Boroondara CC (Including Summary) (Red Dot)* [2014] VCAT 342 (1 April 2014), an application to amend a permit had been made under section 87A of the PE Act. In that decision, Deputy President Gibson referred to many of the above paragraphs from *Bestway*, which outline the broad nature of what can be considered an amendment, but also clarified that where the changes result in a different proposal, a different permit is required:

> 55 However, where the ambit of changes proposed result in a completely different proposal – a transformation – the structure of the Act contemplates that a new permit application will be made. If this were not so, then a single permit issued for one thing could be constantly changed over time for other things having little or nothing to do with the previous use or development permitted. This has implications for existing use rights and for compliance with current provisions of the planning scheme. In our view, it is contrary to the purpose of the Act as evidenced by the framework for dealing with permits set out in the Act.

29 In the *Coles* decision, the Tribunal found that 'the requested changes will remove all residential components, the restaurant and the office space, and convert seven individual shop tenancies into single supermarket. The proposed built form is completely different in scale, design and typology'.[11] Although the applicant encouraged the Tribunal to have regard to the similarities between the two proposals rather than the differences, the Tribunal found no similarities between the proposal authorised by the permit and the new proposal in terms of mix of uses or the form and scale of the development, apart from the fact that each development would include the use 'shop'. Consequently, it found that the extent of changes would result in a different permit as opposed to a modified permit and therefore it had no power to make the changes proposed.

30 Another area of the PE Act dealing with amendments is section 50. This provides for the amendment of an application at the request of an applicant before notice is given. It provides as follows:

> (1) An applicant may ask the responsible authority to amend an application before notice of the application is first given under section 52.
>
> **(2) An amendment to an application may include—**
>
> **(a) an amendment to the use or development mentioned in the application; and**
>
> **(b) an amendment to the description of land to which the application applies; and**
>
> **(c) an amendment to any plans and other documents forming part of or accompanying the application.**
>
> …
>
> (4) Subject to subsection (5), the responsible authority must amend the application in accordance with the request.
>
> **(5) The responsible authority may refuse to amend the application if it considers that the amendment is so substantial that a new application for a permit should be made.**
>
> (6) The responsible authority must make a note in the register if any amendment is made to an application under this section.
>
> (My emphasis added.)

31 Sub-section 5 allows the council, in considering a proposed amendment to an application for permit that has not yet been advertised, to require a new application to be lodged if it considers the amendment to be so substantial that this is required. This is despite the fact that sub-section 2 allows an amendment to include substantial changes to an application.

---

[11] At [57].

32 Even at this early stage of an application, there is clearly a point at which an amendment is no longer an amendment. However, there remains a question as to where that line is drawn.

Tribunal consideration

33 With respect to the current application, the council has maintained its view that the proposal is not an amendment and an application should have been made for a new permit. The applicant contends that the proposal remains that of a residential apartment building but has different heights and setbacks and built form to the plans on which the approval was based.

34 There is an incredibly broad scope to what may be included in an amendment, as has been illustrated through the definition of amendment in the PE Act, the wording of section 50, the process of dealing with an amendment as outlined in section 73 and the relevant Court and Tribunal decisions.

35 To determine whether the application currently before the Tribunal is an amendment to an existing permit or would result in a different permit, I return to the words of Justice Brooking as cited earlier:

> This is plainly a matter of degree, and indeed it is almost one of impression. In my view, the changes made may be considerable without necessarily bringing it about that the permit granted is a different as opposed to a modified permit.

36 The initial impression, on seeing the 2020 plans, is of a new building with a new architectural design response, different heights, different setbacks, different entrances and different presentation to the street, the railway and to its neighbours when compared to the approved proposal. However, on reflection, it remains a permit for a large multi-dwelling apartment building with basement car parking.

37 The applicant has clearly stated that it would prefer to proceed with development based on the 2020 design as opposed to the 2017 plans. While it could have kept the existing permit on foot and applied for a new permit on the basis of the 2020 plans, this would have led to confusion on the part of the neighbours and objectors and potentially multiple permits being issued for the site and uncertainty as to future development. By applying to amend the existing permit the applicant has been transparent with its intentions and retains a single planning permit.

38 While there are significant changes to the building form, the fundamental nature of the development has not changed. I find that, although the initial impression is of a new proposal, and an assessment of the plans requires consideration of the new plans in their entirety, there are elements of the approved proposal that remain. The use and development is the same. The area set aside for landscaping and tree protection is essentially the same.

39 The applicant noted that, in applying for an amendment rather than a new permit, it was able to rely on the already considered and approved documentation concerning matters such as tree removal and drainage and habitat corridors. Matters such as waste management, car parking and traffic have already been considered for a large multi-dwelling apartment building. Although these matters will need to be reviewed to account for the increase in dwellings and change in building form, the relevant documents will need to be modified rather than considered anew.

40 I find that, although the amendments to the plans are substantial, they provide for a modified form of the type of apartment building already approved and can be viewed as an amendment to the current proposal rather than a completely different proposal requiring a new permit.

DOES THE AMENDMENT APPLICATION UNDERMINE THE MEDIATED OUTCOME?

41 The council has urged the Tribunal to be cautious of approving this amendment application because '*it is impossible to entertain the substantive changes to the Permit without undermining the integrity of the mediated settlement reached at the Compulsory Conference*'.[12]

42 It was specifically noted by each of the objectors present at the compulsory conference held in 2017[13] that they had been, surprisingly, satisfied with the mediation process and had felt that the outcome was one which had been reached by compromise on both sides to achieve a result that sat comfortably with each party. They were disappointed to receive notice of the application for amendment of the outcome reached. As articulated by Mr Morrison of the BVRG in the introduction to his written submission:

> There was significant time invested by residents in reaching a good faith agreement signed off by VCAT. Concessions were made by both sides. Residents are now understandably cynical about the lack of regard this amendment gives to the mediation process.

43 The Tribunal decision of *Marone Pty Ltd Joint Venture v Glen Eira CC & Ors*[14] (***Marone***) addresses an application made pursuant to section 87A of the PE Act to the Tribunal to amend a permit issued at the direction of the Tribunal following a successful mediation. It was made shortly after the decision of *The King David School v Stonnington CC & Ors* (***King David***)[15] which also concerned an application under section 87A following a decision made by the Governor-in-Council. The following passages of the *Marone* decision discuss the concerns with amending a proposal that has been granted as an outcome of a mediated process:

---

12 In the council's written submissions at [57].
13 Being Ms Nicholls, Ms Lewis and Mr Morrison of the BVRG.
14 *(includes Summary) (Red Dot)* [2011] VCAT 1650.
15 *(includes Summary) (Red Dot)* [2011] VCAT 520.

10 The *King David* decision emphasises the importance of finality and public confidence in the planning system and from that perspective says:

- The flexibility afforded by Section 87A should not be used to undermine the intent of the original Tribunal decision unless there is some sound justification for doing so.
- A degree of caution should be exercised by the Tribunal under Section 87A in making substantive changes to key permit conditions upon which an original Tribunal decision was predicated - at least in the immediate period following the original Tribunal decision and in the absence of a change of circumstance or some other good reason that makes it "appropriate" to do so.

11 Mr Connor sought to distinguish Tribunal orders post-mediation that he said are not a reasoned decision of the Tribunal in the same manner as accompanies a Tribunal order after a full merits hearing where the issues have been debated and findings made. There are differences. However, The King David decision discourages substantial amendments that undermine key or core components of a Tribunal determination including a mediated outcome. That is, it seeks to protect the integrity of the original Tribunal decision, including if that was by way of a mediation or consent order.

12 That is for a sound reason. Mediation plays an important role in the resolution of planning disputes in an efficient, cost effective and fair manner. Public confidence in appropriate dispute mechanisms such as mediation is essential in their success. People who have participated in good faith should have confidence that agreements will be honoured. Consistent with The *King David* decision, in the absence of a good and sound reason, key components of mediated settlements should generally not be undone via a Section 87A application.

44 As distinct from an application under section 87A, where the Tribunal may cancel or amend a permit issued at its directions if 'it considers it appropriate to do so',[16] the current application was made under section 72 of the Act and followed the requirements of section 73 which include notice provisions. Each of the original objectors were able to lodge their objection to the amendment proposal filed with the council and were involved in the entirety of the Tribunal proceeding, including attendance at the compulsory conference held prior to the hearing, notice of the modified version of the amended plans substituted for those initially files and the ability to make submissions during the hearing about the plans proposed by the applicant.

[16] As per the wording of section 87A(1).

45 While they, and the council, maintained that the application should not be treated as an amendment and, if treated as an amendment, should not be allowed because it would undermine the mediated outcome, they also, as appropriate, voiced their specific concerns about the application itself.

46 Unlike the *Marone* and *King David* matters, a period of more than two years has elapsed between the issue of the permit for this proposal and the application for amendment. During that time, the Whitehorse Residential Corridors Built Form Study (**RC Study**) dated December 2018, was adopted by the council on 29 January 2019. The RC Study specifically reviewed alternative outcomes for the subject site. This is not a case where the applicant did not negotiate in good faith and immediately sought to change the mediated outcome. Rather, it is a situation where a development had not yet commenced, the RC Study was adopted with an indication that the council would be open to a consideration of greater heights, lesser setbacks and an increased site coverage, and the applicant has chosen to take advantage of that by applying to amend the permit.[17]

47 In *Marone*, the Tribunal found that most of the amendments were acceptable. Senior Member Baird then considered how the amendments impacted upon the integrity of the mediated outcome. The Tribunal ultimately found that:[18]

> Aspects of the amendment application are acceptable. However, some of the proposed changes depart significantly from the mediated agreement and result in some poorer planning outcomes. On balance, I find the application is not appropriate. Consequently, I will not amend the Permit. If the Applicant does not wish to proceed with the project, there remains the avenue for a fresh proposal to be considered via a new permit application.

48 The Tribunal also noted that, when considering whether an amendment impacts on the integrity of a mediated outcome, a matter to consider is whether the amendment affects a benefit gained by another party. In doing so, an example is given of window or balcony screening agreed at mediation even though it would not be required based on the standards included in clause 55 of the planning scheme. [19] There are several elements of the current proposal that could be described as undermining the mediated outcome achieved in 2017. The proposal reintroduces an additional level that was removed through the mediated agreement. It proposes 50 dwellings where 43 dwellings were proposed in the original plans and reduced in the mediated agreement to 35 dwellings. Also significant are the building form and materials. Ms Lewis explained:[20]

---

17 In its written submission, the applicant provided additional reasons for the amended proposal which included the Plan Melbourne refresh, removal of visitor car parking, the application of the SLO9 and the introduction of the Better Apartment Design Standards. I do not consider that any of those documents, without the RC Study, would have supported an amendment to the plans.

18 *Marone* at [41].

19 *Marone* at [13].

20 At page 2 of her written submission.

> With regard to building materials, concerned residents met with the developer at the last Compulsory Conference and agreed to an acceptable outcome regarding building materials which were more sympathetic to the site's context. This included the use of timber, bluestone cladding and green walls. While we were hopeful of a reduction in size of the development, we compromised, working with the developer to reach this agreement.
>
> The new design has completely abandoned this aesthetic and instead reverted to the use of materials such as steel, white render and white brick which only reinforces our view that it is more in keeping with a commercial development, not a residential building.

49 The BVRG set out the changes from the mediated outcome as follows:[21]

> By many measures, the proposed amendment varies by more than a third from the VCAT approved plan.
>
> It fails for the substantive measures of height, building mass, number of dwellings, number of bedrooms, car spaces and most importantly for nearby residents, loss of visual amenity through overlooking, building bulk and inadequate setbacks. Substantial changes include:
>
> - 4 to 6 storeys - 33% increase in height and building mass.
> - 35 to 50 apartments - 30% increase in dwellings.
> - 35% to 37.5% site coverage - 7% increase.
> - 67 bedroom development to 98 bedroom development – 32% increase.
> - Car spaces per bedroom from .75 cars per b/r to .57 cars per b/r - 24% decline.
> - Visitor car spaces from 7 to 1 – 75% decrease.
> - The architectural and landscape plans, setbacks, configuration, and access ways are now incorporated into a very new and different set of plans.

50 I am sympathetic to the experience of the respondents who considered that the design was resolved and agreed in 2017. However, the planning scheme allows for change, even to an approved development, and provides the process at section 73 of the PE Act to ensure that change does not occur without notice being provided to those that may be affected.

51 I consider that all parties attended the compulsory conference in 2017 in good faith. The lapse of time and adoption of the RC Study allowed the applicant to reconsider the proposal and apply to amend it in line with the outcomes of the RC Study.

[21] At section 6 of the BVRG written submission.

52 The application has been refused by the council and the role of the Tribunal is now to review that decision and consider, having regard to the matters included in section 60 of the PE Act, the Scheme, the site context and the submissions of the parties, whether the amended proposal is acceptable.

53 As noted in *Marone*, it is the case that 'Public confidence in appropriate dispute mechanisms such as mediation is essential in their success'. However, in the same paragraph the Tribunal notes that 'Mediation plays an important role in the resolution of planning disputes in an efficient, cost effective and fair manner'. In this case, the applicant has applied to amend the permit. I am satisfied that all interested and affected parties have been able to review the proposed amendment and provide their submissions for the Tribunal's consideration. Planning disputes are expected to be resolved in an efficient, cost effective and fair manner, consistent with section 98 of the VCAT Act which was cited earlier in this decision. In this matter, the most efficient, cost effective and fair outcome is for the Tribunal to consider the merits of the proposal and the submissions made by all parties, rather than requiring the applicant to lodge a fresh application for permit and commence the entire process again.

54 While the result may undermine the mediated outcome, the Scheme allows for this by permitting amendments to permits, and the elapse of time and adoption of the RC Study, as well as the participation of all parties in the current proceedings means that all relevant matters will be considered.

55 I note that the *Marone* and *King David* decisions were also considered in *Teperman v Boroondara CC*[22], and the Tribunal similarly confirmed that, despite an amendment being contrary to a mediated outcome, the planning merits must be considered and assessed and a decision made on that basis:

> 29 … I have empathy for Dr and Mrs Teperman as they entered into this agreement in good faith, but agreements reached at mediation and compulsory conferences about planning disputes need to be understood in the context that circumstances can and do change. It is important that the opportunity to respond to changes is available subject to consideration of the merits and impacts of the changes.
>
> 30 In this case, there are no unreasonable amenity impacts in terms of visual bulk, overlooking or overshadowing that arise from this proposed amendment. The concern about noise is understandable but not sufficient reason in this case to refuse this amendment. There are no other reasons from a planning merits perspective to refuse this amendment. As such, despite this amendment been clearly contrary to the agreed outcome, there are no reasons from a planning merits perspective to refuse this amendment.

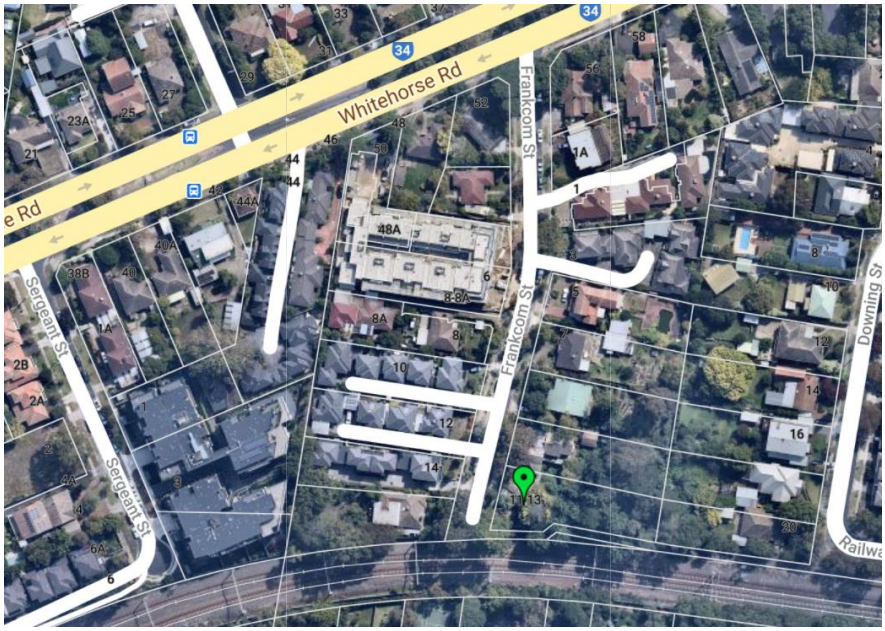
[22] [2016] VCAT 180.

DOES THE PROPOSAL REPRESENT AN ACCEPTABLE RESPONSE TO THE WHITEHORSE PLANNING SCHEME AND SITE CONTEXT?

The site context

56 As explained earlier, although the consolidated site is over 3,000 square metres in area, development is significantly constrained in the south-east portion of the site which is encumbered with a drainage easement and flood prone land. This area of the site, in particular, is currently covered with substantial vegetation and significant large trees. The area available for development is, therefore, limited. The site also has a considerable slope from west to east and north to south.

57 The surrounding area is a mix of single dwellings, both single and double storey, multi-unit developments (many of which are double-storey dwellings one behind the other) and large residential developments that have been approved since the introduction of the RGZ to this area, as is evident from the aerial image below. These can be seen at 1 Sergeant Street (a part four and part five storey apartment development), 4-6 Frankcom Street and 48A Whitehorse Road (a three storey apartment development currently under construction) and 48-52 Whitehorse Road (an approved permit for a five storey apartment development not yet constructed).



58 Across the road from the site, to the west, and sitting higher than the subject site, is a single dwelling at 16 Frankcom Street, and a series of double-storey unit developments at 10, 12 and 14 Frankcom Street. To the north at 7 Frankcom Street is a single storey dwelling, and to the south is the railway line. To the east, sitting lower than the subject site, are double storey dwellings at 16 and 16A Downing Street and single storey dwellings at 18 and 20 Downing Street.

59 In the streetscape view below[23], the subject site comprises all of the land on the left hand side of the photo, from the power pole down to the end of the street which terminates at the railway reserve.

Relevant policy and controls

60 The subject site is located in the Residential Growth Zone, Schedule 2 (**RGZ2**). The purpose of the RGZ includes:

> To provide housing at increased densities in buildings up to and including four storey buildings.
>
> To encourage a diversity of housing types in locations offering good access to services and transport including activity centres and town centres.
>
> To encourage a scale of development that provides a transition between areas of more intensive use and development and other residential areas.

61 A planning permit is required to construct two or more dwellings on a lot. An apartment development of five or more storeys, excluding a basement, must meet the requirements of clause 58 of the Scheme.

62 The RGZ provides that a residential building must not exceed the maximum building height specified in a schedule.

63 It states that if no maximum building height is specified in a schedule, the building height should not exceed 13.5 metres (or 14.5 metres if the site has a significant slope such as the subject site). There is no maximum building height in the schedule.

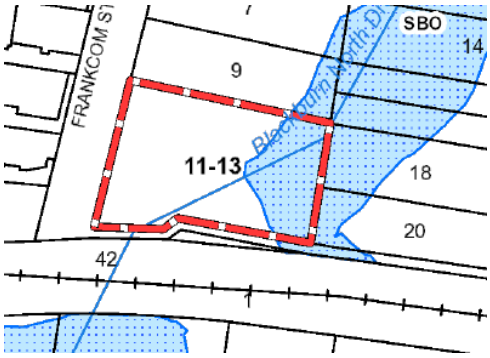
64 The RGZ2 provides that the site is included in the 'Substantial Change B' area and requires that the following decision guidelines be considered:

[23] From Google Maps, taken in 2019.

- Whether the development provides for an appropriate built form transition to residential properties in the Neighbourhood Residential Zone and General Residential Zone.
- Whether the vegetation in the street setback will contribute to the preferred neighbourhood character and the public realm.
- The potential impact on the amenity of existing adjoining residential dwellings in the Residential Growth Zone.
- How the proposal responds to the requirements of any relevant adopted Structure Plan or Urban Design Framework.
- Development should provide for the retention and/or planting of trees, where these are part of the character of the neighbourhood.

65 The permit allows a five storey building with a height of 15.3 metres, which is above the preferred height in the RGZ. The proposed increase is to a six storey building with a maximum height of 20.11 metres.

66 A permit is also required to construct a building or carry out works within the Special Building Overlay (**SBO**). As can be seen below, the SBO applies only to the eastern portion of the site, in the vicinity of the drainage easement, and that area of the subject site is comprised mostly of the communal open space for the dwellings, similar to the existing permit.



67 The inclusion of the site within the SLO9 has occurred since 2017 and applies to 'Neighbourhood Character Areas'. The landscape character objective to be achieved includes:

- To retain and enhance the canopy tree cover of the Garden and Bush Suburban Neighbourhood Character Areas.
- To encourage the retention of established and mature trees.
- To provide for the planting of new and replacement canopy trees.
- To ensure that development is compatible with the landscape character of the area.

68 However, as acknowledged by the council, although the intention of the SLO9 was to provide controls on tree removal on sites within the overlay, the combination of the drafting of the SLO9 and clause 58 which applies to residential development of five storeys or more results in no tree controls applying to this site.

69 The applicant submitted that clause 58 did not apply to the existing proposal but now applies to the current proposal. The council submitted that it considered clause 58 in the assessment of the original proposal and that it has done so again for this proposal. Given the design has completely changed, a fresh assessment of the plans pursuant to clause 58 is necessary for all of the dwellings.

70 Clause 21.06 of the Scheme explains that, on the basis of the *Housing Strategy 2014* and the *Neighbourhood Character Study 2014* the municipality was divided into separate areas to accommodate both growth and preservation of the city's valued neighbourhood character.

71 The subject site has been placed in both the substantial change area and garden suburban area. Clause 21.06 explains that:

> Substantial Change areas provide for housing growth with increased densities, including inside designated structure plan boundaries and opportunity areas, in accordance with the relevant plans as well as around most train stations, adjoining tram routes and around larger activity centres.

72 Clause 22.03 places the subject site in the Garden Suburban 13 (**GS13**) area, with the relevant elements of the preferred character statement included below.

> The area will retain its classic garden suburban characteristics of low set, pitched roof dwellings set in spacious garden settings, with a backdrop of large native and exotic trees. The established pattern of regular front and side setbacks from both side boundaries will be maintained, allowing sufficient space for planting and growth of new vegetation.
>
> Infill development including unit developments will be common, however new buildings and additions will be set back at upper levels to minimise dominance in the streetscape. Low or open style front fences will provide a sense of openness along the streetscape, and allow views into front gardens and lawn areas.
>
> …
>
> Areas with good access to the train stations at Laburnum and Blackburn (Substantial Change) will accommodate more dwellings with slightly more compact siting than the remaining residential areas, but with space for large trees and gardens.

The RC Study

73 As noted earlier, the RC Study has also been adopted by the council since the grant of the permit. On 29 January 2019 the council resolved to adopt the RC Study and seek authorisation from the Minister for Planning to prepare and exhibit an amendment to the Scheme to implement its recommendations through a new schedule to the Design and Development Overlay, to be applied to all RGZ land within the study area.

74 Although a request for authorisation was submitted on 11 October 2019, the council has not yet received authorisation to prepare the amendment or any feedback on the document. As a result, the proposed built form controls have not been exhibited for public comment, subject to any external consideration or oversight, or been incorporated into the Scheme.

75 Section 60(1)(g) provides that, before deciding on an application, the responsible authority may consider any strategic plan, policy, statement, code or guideline that has been adopted by a council. In the two years that have passed since the RC Study was adopted by the council, there has been no progress in terms of commencing to prepare an amendment. There is, therefore, a distinct lack of certainty that the contents of the RC Study will be implemented into the Scheme. As a result, I consider very little weight should be given to its contents.

76 On 30 January 2020, the Tribunal considered this very question in *Qi Yong 6 Pty Ltd v Whitehorse CC* [2020] VCAT 97, on a site also included within the RGZ2:

> The RGZ2 decision guidelines also require consideration of any relevant 'adopted structure plan or urban design framework'. Clause 21.06 sets out housing policy that includes designated activity centres with structure plans or urban design frameworks. The site is not included in one of these designations of the planning scheme. There is a '*Whitehorse Residential Corridors Built Form Study – December 2018'* that I was advised has been adopted by the council in January 2019, but has not yet proceeded to be implemented into the planning scheme through an exhibited planning scheme amendment.
>
> Both the council and the applicant's planning witness acknowledged this study but concluded I should give it little weight given its current preliminary approval status. I agree with this position although I note that a number of the principles of the study are of little consequence in assessing the proposal as they appear to simply reiterate, or slightly expand on existing neighbourhood character policy already in the planning scheme at clause 22.03 and the RGZ2 decision guidelines. This includes the need for recessed upper levels and landscape settings. The study establishes some numeric provisions for height and setbacks that I have little regard to given they are yet to be tested through a planning scheme amendment process.

77 The plans the subject of this proposal have been designed to align with the built form outcomes of the RC Study, which include, with respect to this site, a maximum four storey podium height and a maximum building height of six storeys.[24]

78 The applicant submitted that the proposal is responsive to both the existing and preferred character of the area, given that it:[25]

---

[24] Detailed information about the contents of the RC Study as they apply to the site is included at Appendix A of this decision.

[25] In the applicant's written submissions at [34].

a. Contemplates a design which is in closer alignment with the outcomes sought for this site within current policy, as illustrated in the case study within the Built Form Study; and

b. Results in improved internal and external amenity outcomes, and responds to the site's interfaces.'

79 Given that I have determined that the RC Study should be given little weight in this matter, I do not agree with the applicant that the case studies included in the RC Study can be used to describe current planning policy for this site. As explained by the council:[26]

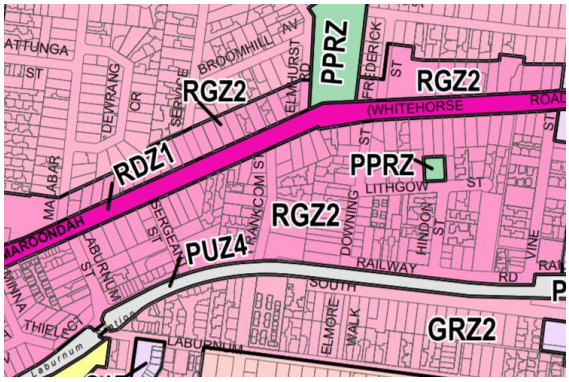
> The case study is not intended to have any retrospective operation. It is not seeking to provide strategic support or encouragement to amend what has already been approved. Nor is it claiming that the built form outcome for the Subject Land as reflected in the Permit is inappropriate or unsuitable.
>
> It is simply a comparative tool designed to show how the proposed standards, if applied to other sites in the future, might achieve a different built form outcome while not overly restricting the housing objectives of the zone.

80 Interestingly, following the case studies in section 4.0, the RC Study itself noted that, with respect to Frankcom Street, 'change to the built form requirements for this area are not warranted'. The full analysis in context is included in Appendix A.

81 Therefore, I must consider if the amended design response is supported by the current Scheme policy and provisions, and the site context.

Does the amended proposal provide an acceptable response to the Scheme and site context?

82 The location of the site within the RGZ2, the SBO and the GS13 character area remain unchanged since the 2017 proposal. The RGZ clearly states its objective of providing housing at increased densities in buildings up to and including four storey buildings. The whole of Frankcom Street, and the surrounding streets north of the railway line, are included in the RGZ2, as seen in the Scheme map below.



26 In the council's written submissions at [74-75].

83 As such, residents of the area should, and do, expect new development at increased densities up to four storeys. However, in accordance with clause 21.06 and clause 22.03, such development should also be mindful of the preferred character of the GS13 precinct, which anticipates change occurring with an attentiveness to 'classic garden suburban characteristics'.

84 This includes an understanding that infill development will be common, but that new buildings and additions will be set back at upper levels to minimise dominance in the streetscape. There is an expectation that low or open style front fences will provide a sense of openness along the streetscape, and allow views into front gardens and lawn areas, and that areas, such as the subject site, with good access to the train stations at Laburnum and Blackburn will accommodate more dwellings with slightly more compact siting than the remaining residential areas, but with space for large trees and gardens.

85 The relevant decision guidelines of the RGZ2, included earlier, require consideration of whether vegetation in the street setback contributes to the preferred neighbourhood character and the public realm, whether provision has been made for retention and/or planting of trees and of the potential impact on the amenity of existing adjoining residential dwellings in the RGZ. Clause 58.02 requires consideration of the RGZ and the GS13 through the following urban design objectives:

- To ensure that the design responds to the existing urban context or contributes to the preferred future development of the area.
- To ensure that development responds to the features of the site and the surrounding area.

86 With respect to the existing urban context and responsiveness of the development to features of the site and the surrounding area, it is important to recognise the constraints and opportunities provided by this site, which include the large section of encumbered land that cannot be easily developed and is readily utilised for communal open space, the significant slope of the land which affects both the relative height of any building and the way it will be perceived by those viewing it from areas which sit higher or lower than the subject site, and the largely non-sensitive interface with the railway reserve to the south. These elements were all considered in the context of the existing approval.

87 The matters I must consider in this proceeding are whether the increased height (to a maximum of 20.11 metres and six storeys), the reduced setbacks, the change in massing, the change in landscaping treatments and streetscape presentation and the proposed design also meet those objectives and policy guidelines and represent an acceptable amendment to the approved permit.

88 I find that, for a combination of reasons, outlined in detail below, the amended proposal does not represent an acceptable outcome in this context.

Height, massing and setbacks

89 The height, massing and setbacks together combine to form a building that does not fit comfortably within its site or Scheme context.

90 The proposal is for a six storey building to a maximum height of over 20 metres. Along most of the rear, eastern elevation, there is no setback at upper levels and the entire six storeys will be visible from the communal open space and the properties in Downing Street, although at an oblique angle. On the elevation included below, the height of the visible built form from the rear, not including the roof parapet, is 20.11 metres.

91 At its closest, the building will sit 11.35 metres from the properties at 16 and 16A Downing Street, extending to 13.88 metres. As noted, the building sits at an angle from these properties and veers away from them. However, a building that is 20 metres high across a length of over 45 metres[27] presents a significant incursion into the neighbourhood and will present an imposing figure to those dwellings nearby and remain visible even at a distance. Visibility is not an issue in itself. This is a context where three storey built form currently exists (at 13 and 15 Downing Street), four storey is anticipated and five storey has been approved.

92 However, the approved five storeys are at a maximum height of 15.3 metres and set back 21.25 metres from the shared boundary with 16 and 16A Downing Street. This building will be nearly 5 metres higher than that approved, nearly 6 metres higher than the preferred height in the Scheme and 10 metres closer to the Downing Street properties. The slope of the land, down to those properties, means that the visual impact will be even greater.

93 Built form above four storeys has also been approved at 1 Sergeant Street and 48 to 52 Whitehorse Road. The buildings at 1 Sergeant Street are visible from the subject site and five storeys were approved.

[27] The full length is over 55 metres but is set back from the north-east and south-west sides at levels 5 and 6.

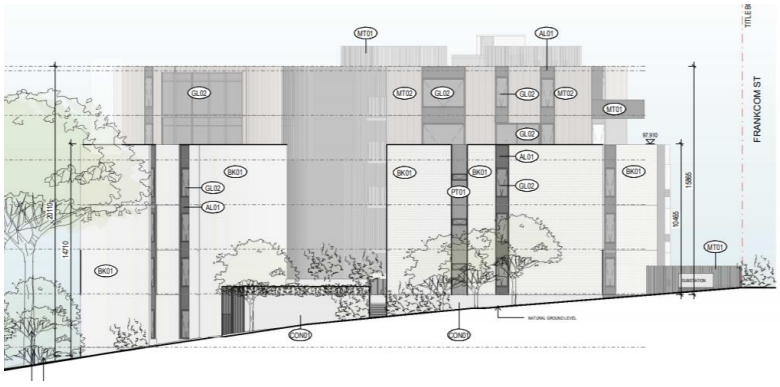
94 However, the southern building, where the slope is greatest, does not rise above four storeys and most of the development, taking into account the slope of the land, is within the 14.5 metre preferred height.[28]

95 In the decision to approve a fifth level at 48 to 52 Whitehorse Road, the Tribunal made the following comments:[29]

> The Residential Growth Zone does not prohibit buildings of more than four storeys, and this building only 2 metres taller than the Zone's preferred maximum height of 14.5 metres. An additional two metres does not transform the building from being acceptable to being overwhelming and dominant.
>
> I agree with Mr Glossop that the issue with additional height is how it is managed in its physical context. In this case, the contentious fifth level is small, separated into two forms, recessed above the three-storey podium and fourth level, and clad in muted tones. I do not consider it to be a dominant element of the building.

96 Although the railway reserve is a non-sensitive interface and there is the potential to provide higher built form towards the south, the other constraints of the site in terms of flooding and drainage preclude the opportunity to build along most of the southern boundary and therefore the significant height of the building runs from the north to the south of the site with significant visual impact to the east, north and west. Unlike the Whitehorse Road development, the fifth and six levels of this proposal form a significant element and sit proudly within the building, at a height far greater than the preferred maximum of the RGZ.

97 The northern elevation of the proposal is reproduced below. The property to the north is currently improved with a single storey dwelling.



98 This is relevant because although the land is within the RGZ and substantial growth is supported, the decision guidelines of clause 58 include considering the potential impact on the amenity of existing adjoining residential dwellings and the response to the features of the site and the surrounding area.

---

28 I was provided with the endorsed plans for that development. Only along the southern elevation, where the slope is greatest and the interface is with the railway reserve, does the height exceed 14.5 metres, and then only by one storey.

29 *Frankcom Blossom Pty Ltd v Whitehorse CC* [2019] VCAT 1790 at [20-21].

99 The development at 1 Sergeant Street had a maximum height of 11.3 metres along its northern elevation, proximate to existing dwellings. The approved proposal for the subject site curved away from the northern boundary. Both of these proposals had regard to existing conditions and to the slope of the land which slopes downward from north to south and west to east.

100 The proposed building will range in heights of between 10.465 and 14.71 metres, at a distance of 4.5 metres from the northern boundary. The immediate interface with the private open space of the dwelling to the north is to a four storey sheer wall comprised mostly of a single material and colour, exceeding the preferred maximum height of the RGZ. Beyond the four storey wall, a distance of 9 metres from the shared boundary, the building height increases to a minimum height of 15.865 metres proximate to Frankcom Street and a maximum height of 20.11 metres as the land slopes down to the east.

101 While the applicant considers that the visual bulk is adequately mitigated by 'a deep vertical break adjacent to the north boundary'[30], the break does not cut through the entire building and provides direct views to the 20 metre high built form beyond the walls facing the boundary. I do not consider that the break provided will, in fact, mitigate the considerable visual bulk of the built form along that elevation.

102 The west (streetscape) elevation is reproduced below.

103 The response to the streetscape and landscaping will be discussed in more detail below. However, in terms of height, massing and setbacks, the proposal sits along the frontage of the site, generally at a setback of 5 metres from the site frontage. This is a significant change from the approved building which sits at an angle facing the north-west corner of the site and curves away from the street frontage. The built form closest to the north-west at ground floor sits between 10 and 20 metres away from the street frontage, reducing to just over 4 metres at the southern end of the building closest to the train line.

104 The approved proposal includes a three storey podium facing Frankcom Street and the northern neighbour with a fourth floor set back a minimum of 7.87 metres from the remainder of the frontage.

[30] Applicant's submissions at [35].

105 The current proposal also includes a three storey podium that sits parallel to the entire frontage of Frankcom Street with a setback of only 1 metre to the level four and five balconies and 3 metres to the dwellings themselves. Mr Elliot opined that the footprint of the two upper floors, including the setback behind the podium line, and the material treatment of the upper floors, downplays their prominence and allows them to read as a lightweight, secondary element.[31] When assessing the height of the building, the slope of the street and the dark colour of the balcony balustrade, I consider that the upper levels will be highly visible and imposing in the streetscape, as will the three storey form at the front. The addition of the substation in the north-west corner of the site has also reduced the ability for softening the built form at, arguably, its most sensitive interface.

106 In the Tribunal decision of *Frankcom Blossom Pty Ltd v Whitehorse CC* [2017] VCAT 1794, the Tribunal considered whether a three storey proposal was acceptable for Frankcom Street. That is the development currently being constructed at 4-6 Frankcom Street. In determining that the presentation to the street was acceptable, the Tribunal made the following comments:[32]

> The 7 metre setback will not disrupt a consistent alignment of front setbacks evident in the street.
>
> The upper level that is setback between 8.6 and 10.7 metres and recessed from the levels below, avoids an overwhelming built form.
>
> The angled frontage that means the setback will not appear uniform within the site.
>
> The setback provides opportunity for landscaping to the frontage that will strengthen the garden setting, an objective in the GS13 precinct.
>
> The front setback can accommodate four canopy trees capable of reaching a minimum mature height of 8 metres, (as shown on the landscape plan prepared as part of Mr Schutt's evidence), which meets the varied standard for landscaping in Schedule 2 to the RGZ.
>
> The support for increased dwelling density makes it arguable that a greater front setback compromises efficient use of the site.
>
> The three storey height (overall height is 9.8 metres) proposed will clearly be higher than the single storey dwellings adjoining the review site. Given the built form change sought for this area and the four storey height provided for in the purpose of the RGZ and in the GS13 precinct (where the land is in a Substantial Change Area), I find the height proposed acceptable. To the street, the design achieves a stepping effect through upper level setbacks to both side elevations thereby providing a graduated response to the existing buildings.

31 In his written report at [5.3.1].
32 At [33].

107 While similar considerations could be said to have been applied to the proposal that has been approved for this subject site, the proposed amended design does not appear to take into account the existing street, the GS14 area or the overwhelming nature of a four to six storey building in the streetscape.

108 The applicant submits that the six storey height and the way it is distributed and massed aligns with the RC Study outcomes, and mitigates external amenity outcomes by providing generous setbacks to surrounding residential properties with generous canopy planting, the 'deep vertical break' adjacent to the northern boundary, recessed upper levels and cascading plants which soften the form.

109 I consider that the building does align with the RC Study outcomes but, as already noted, I do not consider they have great relevance to this proposal. While numerical standards were applied to approved developments in the study, it does not appear that regard was had to the specific site context and interfaces. It was not the intention of the study to consider the detail of a proposal of that nature. The study simply illustrated how a design may have been proposed if those controls were in place. It also noted that in Frankcom Street there are limited remaining development opportunities and that a change to the built form requirements for this area is not warranted.

110 I do not consider that the upper levels are significantly recessed or that the setbacks to surrounding properties are generous when faced with a building that spans over 55 metres in length and rises to a height exceeding 20 metres, in an area where the preferred height is 14.5 metres and the character sought is one where buildings are set back at upper levels to minimise dominance in the streetscape and a sense of openness is valued. The break provided along the northern elevation does not diminish the dominance of the building other than possibly to its northern neighbour and the introduction of cascading plants is not sufficient to ameliorate the significant visual impact of the building within Frankcom Street and its neighbouring properties.

Streetscape, built form and landscape response

111 As described by Mr Elliot, the street setback of the proposed building generally runs parallel to the street edge in line with the outcome envisaged under the RC Study. He considers that:

> The proposed setbacks respond to characteristics of Frankcom Street by aligning with the front setback character of the area. The well-articulated face of the podium provides visual interest and contrasts with the 'quieter' architectural language of the upper floors, which adopt a similar appearance. The front setbacks proposed also assist in achieving the housing yield contemplated within policy for this site,

> whilst allowing sufficient space for landscaping which ties in with front setback landscape character along Frankcom Street.[33]

112 I do not agree with Mr Elliot's assessment that the proposal responds to the characteristics of Frankcom Street or provides sufficient space for landscaping within the front setback. I find that the streetscape presentation does not provide an acceptable response to the site context or the GS13 character area.

113 The location of the substation significantly disrupts the streetscape and the opportunity for landscaping at, arguably, the most sensitive interface of the north-east corner. Given that Frankcom Street is a dead-end street and there is no pedestrian access to the railway stations along the railway reserve, the effect of the new building within Frankcom Street will be most visible at this corner. A perspective image of the 'northwest view' of the development was included earlier in this decision. Although there is an opportunity for planting behind the substation, the presentation to the street at this point is of built form only.

114 As it continues down the site, the presentation to the street is one of built form, interspersed with landscaping, rather than a design that strengthens the garden setting and provides relief from the extensive built form.

115 This is to be contrasted with the building at 4-6 Frankcom Street, which, as described in the citation above, not only provides far more significant setbacks at each level of the building and only reaches a maximum height of three storeys, also makes space for four canopy trees within the front setback which is approximately 34 metres in length. Within a frontage of over 60 metres and building heights as described earlier, the proposed design for the subject site includes only three canopy trees reaching a maximum height of 8 metres within the frontage of the site.[34]

116 This is due to several built form constraints within the frontage, including a pedestrian ramp entry sitting parallel to the building for entry into the raised first floor of the building, services including gas, water and fire sitting prominently along the frontage to the south of the ramp and a driveway entry south of the services area. This leaves little space for 'planting and growth of new vegetation' as intended within the GS13 areas. It also does not respond to the features of the site and surrounding area which includes open front gardens and landscaping within the frontage, rather than a reliance only on street tree planting.

117 The change in the landscape proposal to Frankcom Street from the approved plans is significant and can be seen clearly in a comparison of both plans, as included below.

---

33 In Mr Elliot's written report at page 14.

34 The landscape plan also shows a eucalyptus tree to be planted in the vicinity of other trees to be retained in the south-west corner of the site, where the land slopes down towards the railway reserve. This will not be perceived to be within the street frontage of the site.

118 Not only does the approved permit include significantly more canopy trees within the street frontage, the plans show the differing treatment in each proposal to the north-west corner of the site. As noted by the council, the approved design for the subject site had 'a very different building footprint, was lower in height, proposed a lower street wall and had an overall less forceful presentation to Frankcom Street'.[35]

119 When considering the proposed built form, landscaping and tree planting, the large areas of hard surfaces within the frontage, the height of the building and its presentation to the street, I find that the proposal will have a dominance that is overwhelming in its context and is not acceptable, even in this substantial change area.

Internal amenity

Communal open space

120 Clause 58.03-2 includes, as its objective, to ensure that communal open space is accessible, practical, attractive, easily maintained and integrated with the layout of the development.

121 Standard D7 provides that communal open space should be located to provide passive surveillance opportunities, provide outlook for as many dwellings as practicable and avoid overlooking into habitable rooms and private open space of new dwellings. It should minimise noise impacts to new and existing dwellings, be designed to protect any natural features on the site, maximise landscaping opportunities and be accessible, useable and capable of efficient management.

35 In the council's written submission at [107].

122 Due to the constraints of development of the subject site, the proposal is provided with a large area of communal open space. This allows for a substantial planting area and the potential for creative use of the open space as well as retention of trees and planting of new trees, to ensure good outcomes for future residents of the building.

123 However, it is extremely unfortunate that the design does not consider the benefits of being able to easily appreciate and interact with this space. In this way, I find that the objective of clause 58.03-2 is not met. Rather than taking advantage of the open space afforded by the site, the design provides a circuitous route to the space, makes it awkward to access and difficult to appreciate from common areas. It is also inferior to the approved plans, which provided direct access through double doors from the lower ground floor of the building to the communal open space and views from the lobby entry at ground floor where a void was provided over the lower ground floor lobby and a double storey glass curtain wall to showcase the large garden space.

124 The amended plans include a wall of apartments facing the open space at every level, which is positive for those dwellings with an outlook to the space, but does not provide any visual connection between the common areas and the open space. In fact, the common areas have been significantly reduced and there is no longer a substantial 'lobby' area. Mr Elliot considered that the proposal provides a good level of internal amenity and noted that:

> The access point to the communal open space leverages the architectural concept of compression and release, and has been designed in a way to balance amenity considerations of adjoining apartments whilst ensuring clear, convenient access.

125 However, in assessing the plans, it was difficult to find any access point to the open space from within the development. There is a pathway from Frankcom Street at the southern end of the site near the railway reserve. This pathway was proposed by the applicant to be open to the public with the potential of providing a future through link to the railway station. However, it would require future residents of the building to leave the building in order to enter the communal open space.

126 The elevation plans do not show any internal access to the open space. However, the ground floor plan (which sits at lower ground) does appear to include single access doors at either end of the building. The way in which it appears that the open space can be accessed is described in the council's submission below, as is the council's submission on the accessibility and useability of the space as a result, with which I agree.

> 136. Council acknowledges that the Applicant says that access is available to the communal open space through the Ground Floor. When carefully examined, Council considers that this access arrangement is poor and fails to achieve an acceptable outcome.

> The access would appear to be an after thought rather than providing access between the building and the communal open space area to facilitate and encourage use of the communal open space. As proposed, the access is limited through a single door, past the bin store area and services areas, along the vehicle accessway providing access to the basement car spaces and then across the electric vehicle space and/or the waste truck space.
>
> …
>
> 138. Council also acknowledges that there is an access door on the northern side of the building from the Lower [sic] Ground Level. Again, this is a convoluted route that fails to deliver the type of genuine connectivity that should be expected in such a development.

127 The way in which access to the open space has been provided renders it not easily accessible and not integrated with the layout of the development as required.

Private open space

128 Over half of the balconies within the proposal fail to meet the minimum dimensions required by the standard in clause 58.05-3.

129 While this can be resolved by condition, it is not reflective of a proposal that, according to the applicant, improves internal amenity.

Cross ventilation

130 There were also concerns raised by the council with respect to cross-ventilation within the dwellings. Several of the dwellings are not provided with any cross ventilation and I share the council's concerns about some of those dwellings that have been indicated to include effective cross-ventilation, such as apartment type 2A, with the ventilation shown in blue hashed lines. I do not consider that this apartment would provide effective cross-ventilation.

131 Clause 58.07-4 has the objective of encouraging natural ventilation of dwellings. Standard D27 provides that at least 40% of dwellings should provide effective cross ventilation. It was agreed that, including apartment type 2A, 42% of the proposed apartments provide effective cross-ventilation. Once apartment type 2A is removed from that figure, only 32% can be said to provide effective cross-ventilation. I find that neither the standard nor the objective of this clause is met.

Traffic and parking

132 While the car and bicycle parking provided meets the current requirements of the Scheme, there was discussion about the location of the bike racks and the benefit of providing bicycle car parking spaces at ground floor that could be utilised by visitors as well as residents, rather than only at basement level. There was also discussion concerning the location of the electric vehicle charging point behind a pillar, making it potentially inaccessible, and concern around a shared visitor parking space and waste pick up zone. Although changes could be made via condition to improve these outcomes, questions were raised as to whether the objective of clause 58.06 - to ensure that communal open space, car parking, access areas and site facilities are practical, attractive and easily maintained – was met.

Conclusion on the merits of the proposal

133 For the combination of reasons provided, I find that the proposal does not provide an acceptable response to the Scheme and the site context.

CONCLUSION

134 In application P335/2020 the decision of the responsible authority is affirmed. I order that the existing planning permit must not be amended.

Judith Perlstein
Member

APPENDIX A – THE WHITEHORSE RESIDENTIAL CORRIDORS BUILT FORM STUDY (RC STUDY)

1 The subject site is included within Study Area 2, described as follows:

> This part of the study area is within the Garden Suburban Precinct 13 which also covers the adjacent General Residential Zone and is described as:
>
> - predominantly 1-2 storeys in height, mostly detached with semi-detached (units, terraces and townhouses) and attached (apartments) infill thought out including heights up to 3 storeys closer to Whitehorse Road;
> - front setbacks generally range from 5-8 metres with 1-3 metres side setbacks (from at least one boundary). Some new developments have reduced front and side setbacks (3-5 metres to the street) and 0-1 metres to the side boundary;
> - front fences are non-existent, planted with vegetation or low in height (up to 1.2 metres), and usually constructed of brick or timber;
> - road treatments are sealed, generally within upstanding kerbs and footpaths on both sides; and
> - street trees are regularly planted with mixed species and sizes.

2 Section 4.0 of the RC Study is termed 'Built form testing', which is explained as follows:

> The case studies are drawn from applications received and permits issued within the Study Areas over the last 5 years. The case studies were selected by Council officers to demonstrate the range of higher density applications received, with some determined by Council and some through a VCAT process. The case studies were tested against the proposed standards and demonstrates the alternative outcome should the proposed standards have been applied to the site.

3 The built form standards for testing including heights of 6 storeys (19 metres), street setbacks of 5 metres with a 3 metre upper level setback above 4 storeys, side setbacks of 4.5 metres and rear setbacks of 9 metres. The results of the testing informed the draft built form guidelines and controls that are then included in section 5.0.

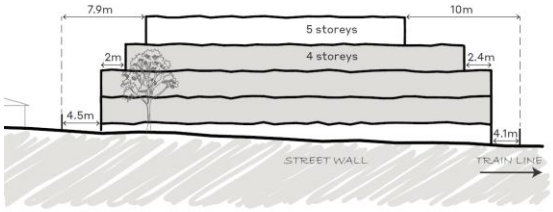
4 The approved permit for the subject site was included in the case studies. The comparison between the approval and what would have been possible if the built form guidelines were incorporated into the Scheme was shown in pictorial form and is included below.

5 The result is a development with a height proposed to be the maximum allowable within the guidelines (19 metres), with the preferred height being 5 storeys or 16 metres. The information also suggests that the site coverage of the approved permit is 15% of the site area and the proposed standards allow more than double the current site coverage, at 34%.

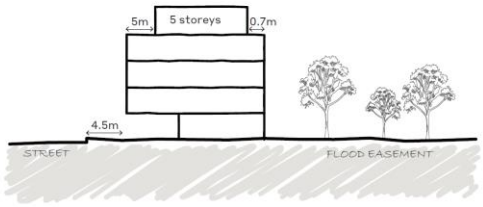
6 However, the plans on which the current approval were based state that the site coverage is 35%.

PROPOSED SETBACKS STANDARDS

PERMIT APPLICATION



Front Elevation - Diagrammatic Representation - 9 Frankcom Street Permit Application

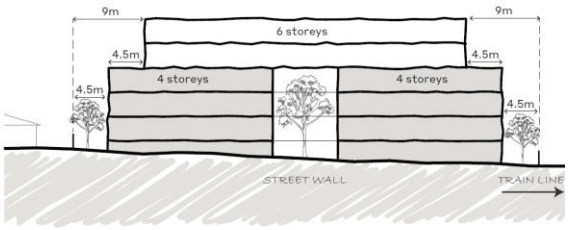


Side Elevation - Diagrammatic Representation - 9 Frankcom Street Permit Application

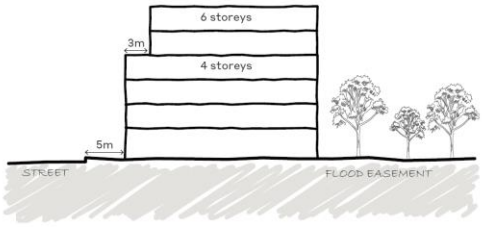
N.B. Only large and medium trees are depicted in the diagrammatic representations

PROPOSED BUILT FORM STANDARDS

(with Cl. 58 requirements)



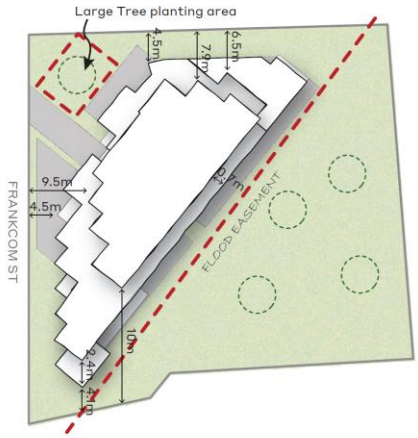
Front Elevation - Proposed Side Setback Standards



Side Elevation - Proposed Front and Rear Setback Standards

SITE COVERAGE AND GREENING

PERMIT APPLICATION

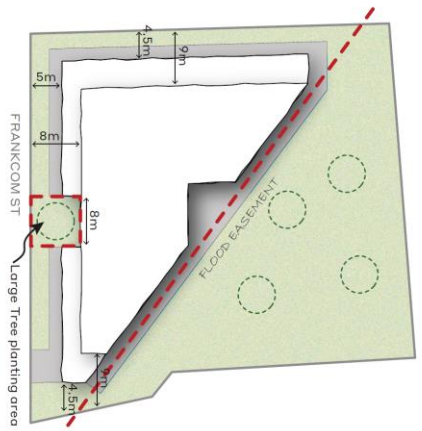


Plan (Diagrammatic Representation) - 9 Frankcom Street Permit Application

N.B. Only large trees are depicted in the diagrammatic representations

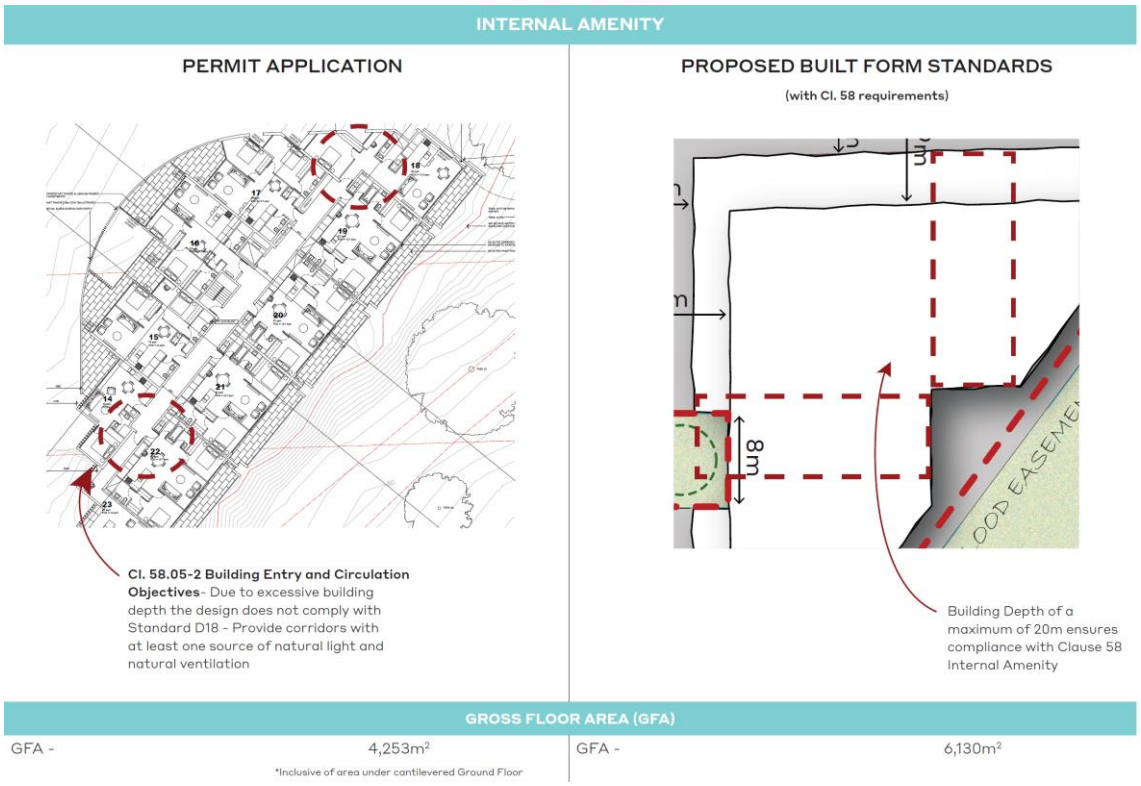
PROPOSED BUILT FORM STANDARDS

(with Cl. 58 requirements)



Plan (Proposed Standards for Testing Diagram) - 9 Frankcom Street

Site Coverage -	520m² (15%)	Site Coverage -	1,123m² (34%)
Open Space -	2,380m² (72%)	Open Space -	2,198m² (66%)
Large Tree Area -	Due to an extensive flood easement applied to the rear of the site, there is a significant area for the planting of large trees	Large Tree Area -	Due to an extensive flood easement applied to the rear of the site, there is a significant area for the planting of large trees



7 Following the built form comparisons, the RC Study considers development opportunities within the RGZ and specifically notes that changes to the built form requirements within Frankcom Street are not warranted. In doing so, it is clear that the council did not consider that an application would be made to amend the current permit to accord with the built form guidelines and controls in the RC Study:

> The site testing for Frankcom Street and the analysis demonstrates that there are sites that are already developed and there are limited remaining development opportunities without consolidation.
>
> In addition the introduction of Clause 58 to the planning scheme has introduced additional requirements that will improve the outcome for the remaining site/s. Therefore change to the built form requirements for this area are not warranted. Strategically given the street's close proximity to transport, it should remain within the Residential Growth Zone however, resolution of vehicle turns at the end of the street and improved access to the railway is required. Resolution of this issue will require investigation to determine whether a turning circle can be accommodated on public land or whether a portion of private land would be required. There may be an opportunity to negotiate an outcome in the latter circumstance.