# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

# administrative DIVISION

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| planning and environment LIST | vcat reference No.P1790/2015 Permit Application no.D/300/2013  |

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| CATCHWORDS |
| Application under Section 77 of the Planning and Environment Act 1987 (the Act) to review a decision to refuse a permit. |

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| APPLICANT | Anthony Bafunno  |
| RESPONSIBLE AUTHORITY | Darebin City Council |
| RESPONDENTs | J Lewis & S Barlow, S Nash & Chalmers, J Geron, L Robbins, R Gibbs, N Azorakos, S Azorakos, E Azorakas, D & T Wensing, J Weir, Phia Kang & D Malcolm, Dr P Stokes & J Doyle |
| SUBJECT LAND | 136-138 Plenty Road and 37 Flett Street, Preston |
| WHERE HELD | Melbourne |
| BEFORE | Laurie Hewet, Senior Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 7 March 2016 |
| DATE OF ORDER | 18 April 2016 |
| CITATION | Bafunno v Darebin CC [2016] VCAT 591 |

# Order

1. The decision of the Responsible Authority is affirmed.
2. In permit application D/300/2013 no permit is granted.

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| **Laurie Hewet****Senior Member** |  |  |

# APPEARANCES

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| For Applicant | Mr James Livingstone, town planner |
| For Responsible Authority | Mr Andrew Clarke, town planner |
| For Respondents  | Ms J Lewis appeared on her own behalf and on behalf of a number of objectors to the application whose names were provided to me at the hearingMs J Doyle |

# INFORMATION

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| Land Description | The site is located on the south east corner of Plenty Road and Flett Street, Preston. It comprises five lots, one of which fronts Plenty Road and two lots that front Flett Street. There are two additional lots that are part of a discontinued right of way.The site has a frontage to Plenty Road of 10.95m and to Flett Street of 38m. The site has an area of 632m2. A two storey commercial building occupies the Plenty Road lot. The Flett Street lots are vacant. A row of single storey commercial buildings abut the site to the south in Plenty Road. A Heritage Overlay affects these buildings. A double storey mixed use development occupies the site on the north east corner of Plenty Road and Flett Street. Commercial buildings continue to the north along Plenty Road. Opposite the review site on the western side of Plenty Road is a mix of single and double storey commercial buildings. The side street, Flett Street, is a narrow residential street. Double storey town houses abut the eastern boundary of the Flett Street lots. Further to the east, the residential area is low scale and fine grained. Predominantly single fronted cottages occupy the south side of the street. The north side of Flett Street comprises the rear yards of dwellings that have a frontage to Brighton Avenue to the north. Two infill developments on this side of Flett Street have taken advantage of the lot’s dual frontages and rear access to Flett Street. The Plenty Road and High Street Junction is located to the south. This is an area that is undergoing substantial redevelopment in accordance with Council policies and planning scheme provisions.  |
| Description of Proposal | Construction of a five storey building on the Plenty Road lot, comprising a small ground floor shop and fifteen dwellings. A three storey building, comprising three dwellings is proposed on the Flett Street lots. Car parking is proposed in a combination of at grade parking spaces and car stackers, accessed from Flett Street.  |
| Nature of Proceeding | Application under Section 77 of the *Planning and Environment Act* 1987 – to review the refusal to grant a permit.  |
| Zone and Overlays | Clause 34.01: Commercial 1 Zone (Plenty Road lot).Clause 32.08: General Residential 1 Zone (Flett Street lots).Clause 45.03: Environmental Audit Overlay.Clause 45.06: Development Contributions Overlay.Amendment C137 has been adopted by the Council. The amendment proposes, among things, to apply a Design and Development Overlay (DDO3) to the Plenty Road lot.  |
| Permit Requirements | Clause 32.08-4: Construct two or more dwellings on a lot in the General Residential Zone.Clause 34.01-1: Use land for a dwelling in the Commercial 1 Zone (frontage at ground floor level exceeds 2 metres).Clause 34.01-4: Buildings and works in a Commercial 1 Zone. Clause 52.06-3: Reduction in the provision of car parking (3 residential visitor spaces and 1 space for the shop).Clause 52.07: Waive the requirement to provide a loading bay.  |
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# REASONS[[1]](#footnote-1)

## What is this proceeding about?

1. This is an application to review the decision of the Responsible Authority to refuse permission for the construction of a five storey building and a three storey building at 136-138 Plenty Road and 37 Flett Street, Preston. The Responsible Authority issued a Notice of Refusal to Grant a Permit for the following reasons:

The proposal fails to meet the following standards of the Darebin Planning Scheme:

* Building height
* Site Coverage
* Site Permeability
* Side and rear setbacks
* Wall on boundaries
* Overshadowing of open space
* Daylight to new windows
1. The application was refused notwithstanding the Council officer’s recommendation to grant a permit.
2. The proposal involves the construction of a five storey building on a narrow site fronting Plenty Road, and a three storey building to the rear, on residentially zoned lots fronting the side street, Flett Street.
3. The review site is located in, or adjacent to, an area known as The Junction – South Preston in which the Council is actively encouraging redevelopment for a mix of commercial and high density residential uses. The Plenty Road corridor extending north from the Junction is similarly identified for redevelopment.
4. The redevelopment of the review site for a mix of commercial and high density residential uses is therefore encouraged by both the existing provisions of the planning scheme and by adopted amendments to the planning scheme.
5. The Council, in facilitating the redevelopment of the Junction and the Plenty Road corridor more generally, has sought to introduce a range of controls and policies intended to achieve specific built form outcomes. These outcomes are encompassed within Amendment C137 to the planning scheme, an amendment that introduces a Design and Development Overlay (DDO3) along Plenty Road (including the review site), supported by a range of associated policies. There is a strong emphasis in proposed DDO3 and the policies, on site responsiveness in the design of new developments. There is a strong emphasis on designs achieving a transition in height, scale and bulk, to lower scale abutting residential areas. There are specific provisions relating to corner sites and the treatment of the interface between new buildings and adjoining residential areas.
6. In this case, the applicant has sought to achieve a transition to the Flett Street residential area, primarily through the insertion of a three storey building on the residential lots abutting the proposed five storey building on Plenty Road.
7. The Council’s strategic direction for the Junction and Plenty Road more generally, presents a bold vision for the future of this important corridor. The implementation of the strategic direction will proceed incrementally as individual sites become available for redevelopment. The successful implementation of the strategic vision will largely depend on the quality of the design of each individual building, and on the thoughtful assessment of each proposal by the Council in order to ensure that proposals are responding in a meaningful way to desired built form outcomes.
8. For the reasons I elaborate on below, the proposed design response in this case does not successfully achieve the desired transition between the building on Plenty Road and the Flett Street residential hinterland.
9. There are also aspects of the design and layout of the three storey building that are not acceptable.
10. My reasons are set out below.

## basis of decision

1. The area around the Plenty Road and High Street intersection to the south of the review site, an area known as the Junction, has for many years been identified by Council for mixed commercial and higher density residential developments. DDO3 was applied to the Junction in 2006 to encourage development of varying heights of up to 24m.
2. More recent strategic work by the Council has led to the preparation of a planning scheme amendment (C137) which, among other things, proposes to extend a reworded version of DDO3 to the north of its existing boundaries along Plenty Road. Proposed DDO3 contemplates development of up to six storeys (20m) for sites along Plenty Road in this part of the Junction. Amendment C137 has been exhibited, submissions to it considered by a Panel and the Council has adopted it with changes to the exhibited version. The amendment is currently with the Minister for Planning awaiting approval. Amendment C137 is a seriously entertained planning proposal that I am prepared to accord weight.
3. In reaching my conclusion on the weight to be given to Amendment C137, I acknowledge the decision of the Tribunal in *RF Nominees Pty Ltd v Darebin CC[[2]](#footnote-2)*. In that decision the Tribunal expressed reservations about the status of Amendment C137 because at that time (June 2015) the Council had not adopted the amendment and there appeared to be significant differences between the exhibited version of the amendment, the Panel’s recommendations and the version presented to the Council for adoption. The Tribunal in that matter therefore quite appropriately gave limited weight to the Amendment. Circumstances have however changed subsequent to that decision. The Council has now adopted Amendment C137 with changes to the exhibited version. Not all of the Panel’s recommendations have been adopted but I am satisfied that proposed DDO3 provides me with reasonable guidance about the built form outcomes contemplated by the Council for the Junction.
4. I hasten to add that policy support for the redevelopment of this site is not dependant on the ultimate approval of DDO3. The existing provisions of the planning scheme offers support for the redevelopment of the site, but proposed DDO3 is influential in understanding how the Council’s strategic objectives for the Junction are intended to be achieved.
5. Proposed DDO3 encourages high quality urban redevelopment and higher residential densities via lot consolidation, in the Junction. The provisions of DDO3 are consistent with the broad policy framework of the planning Scheme that identifies the Junction (and the Plenty Corridor to the north) as areas in which substantial redevelopment is to be encouraged.
6. That is not all that proposed DDO3 seeks to achieve. Its design objectives, emphasise issues around design quality and, importantly, recognises that the Plenty Road sites have an interface with established low scale residential areas. The treatment of that interface is the subject of specific provisions in the DDO, all of which are intended to achieve a transition in scale between new developments and the character of adjoining residential sites to the rear. For corner lots, there is a specific design objective encouraging developments to provide a transition in scale along the side street frontage.
7. The design of the proposal falls short of meeting these objectives.
8. Proposed DDO3 contains general building envelope requirements, building height, setback, building design and other requirements intended to give effect to the design objectives. Relevantly, the consolidation of sites is encouraged as a means of enabling higher densities and the creation of favourable conditions for high quality development outcomes. Proposed DDO3 requires that land in the Commercial 1 Zone should have a minimum frontage of 15m and where this not achieved, applicants are required to demonstrate how the proposal achieves “exemplary design outcomes”. Where the minimum lot width is not achieved, proposed DDO3 states that developments may not be eligible to build to the maximum height. That part of the review site in the Commercial 1 Zone fronting Plenty Road has a frontage of 10.95m. I acknowledge that the proposal does not seek to achieve the maximum 6 storey (20m) height on this site (15m is proposed) but the site’s narrow frontage does impact on the site’s development potential and in particular on its capacity to achieve a design that responds acceptably to relevant design objectives and design requirements.
9. Proposed DDO3 specifies rear building setbacks that seek to give effect to the design objectives. I am satisfied that the proposal’s setback at ground floor is acceptable. In this case, there is a 3.0m wide drainage and sewerage easement located between the Plenty Road property and the Flett Street property. The 3.0m setback between the Plenty Road property and the Flett Street property (incorporating the easement) is sufficient to comply with the ground floor setback requirement. Above the ground floor however, the setbacks do not comply. At first floor a setback of 5.5m is required and above that a 45 degree setback envelope is required (measured perpendicular to the adjoining residential site’s boundary from a height of 3 metres above NGL taken from the middle point of the adjoining site’s width. The 45 degree setback envelope therefore is required to be measured from the abutting Flett Street property.
10. The five storey building on the Plenty Road property proposes a sheer east facing wall to a height of about 15m. Because of the applicant’s decision not to incorporate the staggered setbacks called for by the proposed DDO3, the five storey building presents to the side street (Flett Street) in a manner that has no transition in scale to either the side street or the residential area to the rear. There is a degree of articulation in the side street presentation created by the use of materials and setbacks at the upper levels, but this is not successful in compensating for my concerns about the building’s lack of scale transition.
11. This built form outcome conflicts with the design objectives of proposed DDO3 as they relate to sites on corners and with respect to the objectives about the transition in scale to the character of residential areas to the rear more generally.
12. I acknowledge that the review site’s physical context provides some scope for a design that departs to some degree from the specified setbacks and the 45 degree setback envelope discussed above. I am not persuaded however that the total avoidance of the setbacks as proposed achieves an outcome that responds acceptably to the design objectives of proposed DDO3.
13. The applicant submits that in this case, the incorporation of the three storey building on the Flett Street lots, is sufficient to achieve the transition to the low scale residential area to the east, sought by proposed DDO3.
14. I am not persuaded however, that this design response has been successful in achieving the intended outcome. The proposed three storey building has no meaningful influence on the five storey building’s presentation to the side street. There is no sense of transition in scale in that building.
15. Mr Livingstone in his submission attempted to demonstrate that the 45 degree setback envelope should be measured from the dwelling to the east of the proposed three storey building. There is no basis in the planning scheme for adopting this position.
16. There are also aspects of the three storey building that are not acceptable. The three storey building is located in the General Residential Zone, and developments of two or more dwellings on a lot must meet the requirements of Clause 55. Several standards of Clause 55 are not met by the proposal. Of course, compliance with the standards of Clause 55 is not mandatory but compliance with all of the objectives of Clause 55 is mandatory. Where a standard is not met the Council (and on review the Tribunal) must be satisfied that the objective is met.
17. In this case the number of non-compliances and in some instances the magnitude of some of those non-compliances does raise concerns about the acceptability of the proposed building. I acknowledge that not all of the non-compliances are fatal to the application and in some instances, the relevant objectives are met. But not in all instances. The proposed building has a 90% site coverage and 8% permeability[[3]](#footnote-3). The objective of Clause 55.04-2 is:

To ensure that the location, length and height of a wall on a boundary respects the existing or preferred neighbourhood character and limits the impact on the amenity of existing dwellings.

1. In relation to the east boundary, there is a 29.01m boundary wall proposed. This exceeds standard B18 by 3.75m, a non-compliance that cannot be dismissed as “technical”. It is a substantial non-compliance. The proposed boundary wall extends over a distance of 7.0m adjacent to the secluded private open space of the neighbouring dwelling. Above the boundary wall the first floor rises to a height of 6.0m opposite the secluded private open space of the neighbouring dwelling (albeit setback 2.8m from the common boundary). The second floor truncates at a point where it does not directly interface with the secluded private open space of the neighbouring property, except for a 1.7m balcony balustrade.
2. The property to the east and the south will be subject to overshadowing. The applicant advised that it would accept a condition requiring changes to the building so that overshadowing complies with standard B21. As the proposal is presented, the overshadowing impact is not acceptable and the objective of clause 55 is not met. Any redesign of the proposal to should address this issue and achieve compliance with the standard. It is not an outcome appropriately achieved by way of permit condition.
3. The three storey building therefore presents a significant level of visual bulk to its eastern neighbour (35 Flett Street). The applicant sought to justify the level of visual bulk on the basis of the site’s physical and strategic context, i.e. the review site and its immediate environs are located in or adjacent to an area identified for redevelopment. As I have discussed above however, the proposed DDO3 that is intended to give effect to Council’s designation of this area for redevelopment, places significant emphasis on achieving built form outcomes that respond to residential interfaces and the residential hinterland behind the Plenty Road corridor.
4. In this case, the dwelling at 35 Flett Street is two lots removed from the Commercial 1 Zone. It does not have an interface with properties zoned Commercial 1 or which will be affected by proposed DDO3. Yet the property at 35 Flett Street is confronted with an interface treatment that is arguably more robust than that which would be expected had no.35 been located adjacent to the Commercial 1 Zone. Had no.35 Flett Street been located directly adjacent to the Plenty Road property, it would enjoy the benefit of a 3.0m setback at ground floor level, and the additional setbacks above ground level, discussed above. The interface treatment in this case cannot even demonstrate compliance with Clause 55 standards.
5. I observe that the interface treatment encompassed within DDO3 does incorporate setbacks and other requirements that surprisingly exceed those that apply in residential areas (Clause 55) and this does create some anomalies in the consideration of interface treatments, including in this case. These are the requirements that the Council has adopted and it is the Council’s responsibility (and on review the Tribunal’s) to implement those requirements, anomalies notwithstanding.

## other matters

1. A number of other matters were raised during the course of the hearing. The objectors expressed concerns about the impact of additional traffic in Flett Street and the lack of car parking in the street.
2. Flett Street is a narrow street and on street car parking does appear to be heavily used at particular times of the day. The proposal however is self sufficient in terms of resident parking with a waiver sought for three visitor spaces and one space for the shop.
3. Having regard to this site’s locational attributes, I am satisfied that a waiver of parking is warranted. I am also satisfied that on street parking is available in the wider area to accommodate the occasions when overflow visitor parking may be generated.
4. Concerns were also expressed about the impact the proposal would have on the Council’s streetscape improvement plans for Plenty Road and the Flett Street intersection. As I indicated at the hearing a redevelopment of the review site may necessitate a revision of the streetscape improvement plans but this is not a basis for refusing to grant a permit for an appropriate redevelopment.

## Conclusion

1. For the reasons explained above, the decision of the Responsible Authority is affirmed. No permit is to issue.

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| Laurie Hewet**Senior Member** |  |  |

1. I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I do not recite or refer to all of the contents of those documents in these reasons. [↑](#footnote-ref-1)
2. [2015] VCAT 816 [↑](#footnote-ref-2)
3. The relevant standards of Clause 55 specify 60% site coverage and 20% permeability. [↑](#footnote-ref-3)