

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NOS. P851/2021 & P921/2021
PERMIT APPLICATION NO. PA199/2019

CATCHWORDS

Mount Alexander Planning Scheme; Applications pursuant to sections 82 and 80 of the *Planning & Environment Act 1987*; Heritage Overlay; Removal of three trees, Two double storey dwellings; Contemporary appearance, materials and colours; Visual relationship with Castle House; Landscaping.

P851/2021

APPLICANTS

Alice Mathieson, Marli Wallace and Others

RESPONDENT

Nicola Loader

P921/2021

APPLICANT

Nicola Loader

RESPONDENTS

Alice Mathieson, Marli Wallace and Others

RESPONSIBLE AUTHORITY

Mount Alexander Shire Council

SUBJECT LAND

37A and 37B Farnsworth Street
CASTLEMAINE VIC 3450

HEARING TYPE

Hearing

DATES OF HEARING

24 January 2022, 9 and 10 May 2022

DATE OF CORRECTION ORDER

22 June 2022

CITATION

Mathieson v Mount Alexander SC (Corrected)
[2022] VCAT 600

ORDER

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Drawing Nos: TP01 to TP12 (12 sheets all dated 03.02.2022, prepared by Advantage Design Draft) and Job No 22-047-L, VCAT01 (one sheet dated 24 Feb 2022, prepared by John Patrick Landscape Architects Pty Ltd)
- 2 In applications P851/2021 and P921/2021 the decision of the Responsible Authority is set aside. No permit is granted.

J A Bennett
Senior Member

APPEARANCES

For Alice Mathieson, Marli Wallace and Others
(Applicants in P851/2021 and Respondents in P921/2021)

Mr Gareth Gale, Town Planner of Gareth Gale Consulting.

For Nicola Loader
(Respondent in P851/2021 and Applicant in P921/2021)

Mr Mitch Seach, Town Planner of Ratio Consultants Pty Ltd. He called expert evidence from:

- Ms Katherine White, Principal and Senior Heritage Planner of Lovell Chen Pty Ltd, Architects and Heritage Consultants.
- Mr Daniel McWilliam, Arborist of Tree Business Professional Arboricultural Services.

For Mount Alexander Shire Council

Ms Nicola McGowan, Town Planning Consultant.

INFORMATION

Description of proposal

Construction of two double storey dwellings, one each on two separate lots. Removal of three trees.

Nature of proceedings

Application under section 82 of the *Planning and Environment Act 1987* – to review the decision to grant a permit (P851/2021).

Application under section 80 of the *Planning and Environment Act 1987* – to review the conditions contained in the permit (P921/2021).

Planning scheme

Mount Alexander Planning Scheme

Zone and overlays

General Residential Zone – Schedule 1 (**GRZ1**).

Heritage Overlay – Schedule 668 (**HO668**).

Permit requirements

Clause 43.01-1 (demolish or remove a building and construct a building or construct or carry out works and removal of vegetation in HO668).

Key scheme policies and provisions

Clauses 02.02, 02.03, 02.04, 11, 12, 15, 16, 18, 32.08, 43.01, 52.06, 65 and 71.02.

Land description

The review site, which comprises two lots in a battle axe configuration, is located on the western side of the street. The combined area is 772 square metres with Lot 2 at the front having an area of 375 square metres and Lot 3 at the rear having an area of 397 square metres. The two lots were created following subdivision of a larger parcel of land creating three lots. Both lots are vacant save for five canopy trees.

Lot 1 which is not part of this application contains a heritage dwelling listed as a Category A building in a 1979 conservation survey and is now included on the Victorian Heritage Register as place number HO591.

The following is an extract from Mr Seach's submission. The large tree in the centre of the photograph is Tree 1 within Lot 2.

View of the existing site taken from Farnsworth Street (looking south-west)



Tribunal inspection

Unaccompanied inspections of the review site and the locality took place in January, February, and May 2022.

REASONS¹

TREES AND HOUSES

- 1 A planning permit is required to remove three trees and construct two double storey dwellings and associated works in Heritage Overlay No 668 – Camp Reserve and Environs. Written approval is also required to build outside the registered building envelope. There is no permit required under the General Residential Zone - Schedule 1.
- 2 Council has supported the proposal, but neighbours disagree with that decision and have sought to have it set aside. They object to the removal of the trees and to the scale and design of the two dwellings which require construction outside previously approved building envelopes. They also have other concerns about previous approvals and works that have occurred on the site. I record that there is a separate enforcement proceeding before the Tribunal (P147/2022) which has a scheduled compulsory conference on 15 August 2022.
- 3 The permit applicant/respondent has sought to review two conditions which it submits are unjustified or too vaguely worded. The first – condition 1(a) - requires a different roof form, increased articulation to reduce visual bulk and a reduction in height so that the top of the dwellings are lower than the parapet and ridge at the adjoining heritage dwelling. The second - condition 1(b) - requires a full schedule of materials, finishes and colours sympathetic to the heritage character of the area and consisting of organic materials but not the use of ‘shadow clad’ or similar lookalike material.
- 4 I also record that at the first day of the hearing on 24 January 2022, concerns were raised about the plans and application then before me. After hearing from parties, I issued an order dated 24 January 2022 requiring the preparation and re-notification of amended or new documents, including plans, witness statements and submissions. That is the material being considered in these reasons.

The trees to be removed

- 5 The three trees to be removed are:
 - Tree 1 (Yellow Gum on Lot 2 – height 26 metres, width 16 metres, diameter at breast height (DBH) 86 centimetres).
 - Tree 3 (Red Ironbark on Lot 3 – height 5 metres, width 3 metres, DBH 19 centimetres).
 - Tree 5 (Spotted Gum on Lot 3 – height 7 metres, width 4 metres, DBH 17 centimetres).

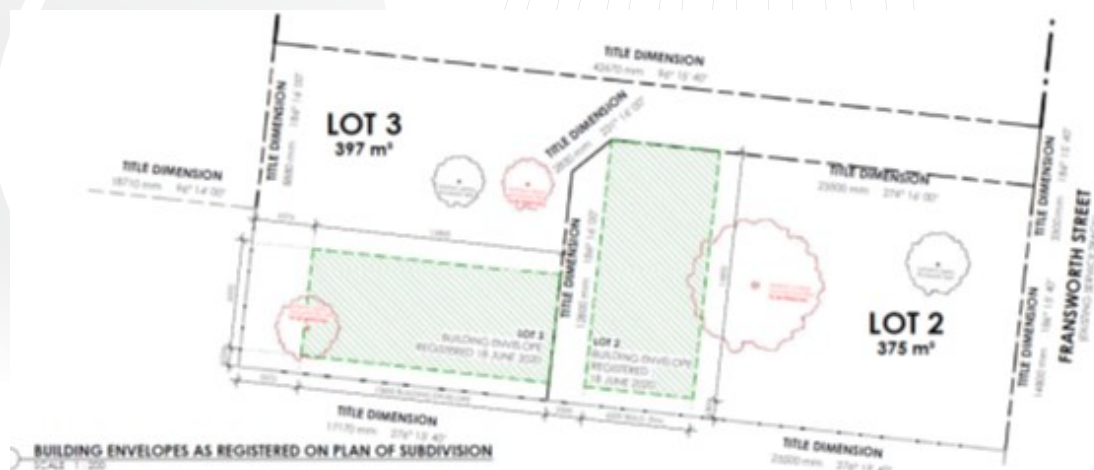
¹ The submissions and evidence of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

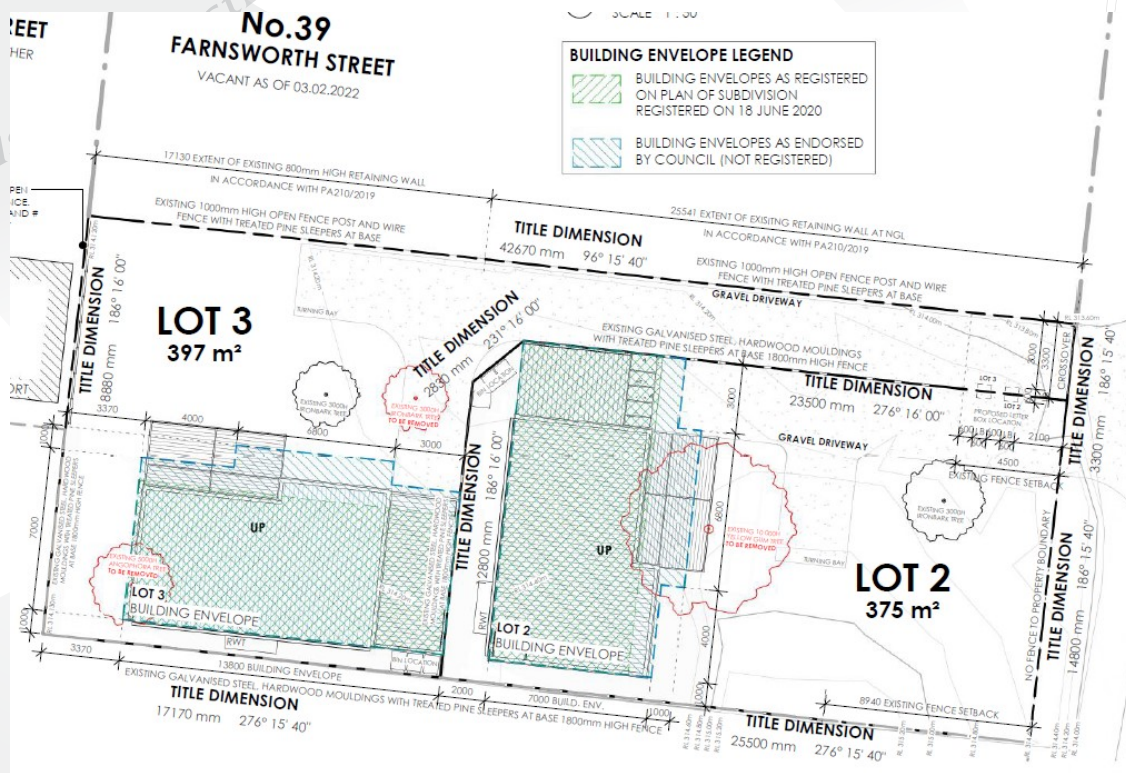
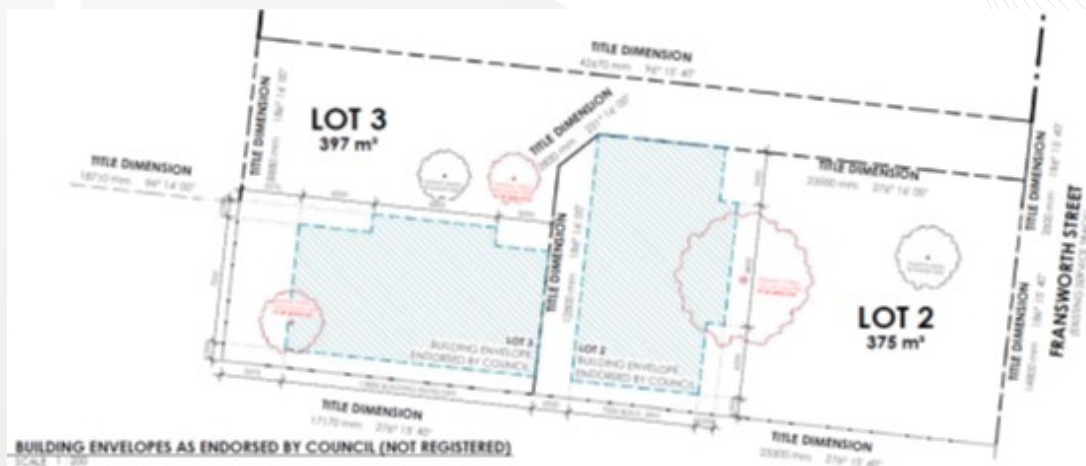
- 6 According to Mr McWilliam's assessment, Tree 1 is an indigenous mature tree, in poor health, poor structure, low useful life expectancy (ULE) and with a low amenity value.
- 7 Trees 3 and 5 are planted specimens, relatively young and in the opinion of Mr McWilliam able to be replaced with advanced nursery stock.

The houses and associated works

- 8 The two double storey dwellings have a contemporary, flat roofed and cubic form with vertical timber wall cladding with a natural oiled finish. Metal roofing is shale grey and associated downpipes, guttering and window frames are a darker colour. Maximum heights are 6.72 metres for the dwelling on Lot 2 facing Farnsworth Street and 6.66 metres for the dwelling behind, on Lot 3.
- 9 Each dwelling has similar floor plans at ground and first floors. Ground floor comprises a combined kitchen/dining area, separate lounge, laundry, bathroom/toilet, together with a 17 square metre deck off the kitchen/dining areas. These decks incorporate a double height, metal framing element.
- 10 First floor comprises three bedrooms with the main bedroom having a walk-in robe, and an ensuite which is also accessed by the other two bedrooms. Narrow balconies of 6 square metres in area are accessed from Bedroom 2 and the landing at the top of the stairs.
- 11 Both dwellings have a carport with space in front for tandem parking. Landscaping is proposed in accordance with the landscape plan prepared by John Patrick Landscape Architects Pty Ltd.
- 12 The footprints of the two dwellings and decks extend both outside the registered building envelopes on title and the larger envelopes shown on the plans endorsed by Council in December 2018.

The following three diagrams show the registered building envelopes, the endorsed plan envelopes and finally, a composite building envelopes plan showing the latest enlarged building envelopes superimposed over the registered and endorsed envelopes.





- 13 These diagrams are also helpful in understanding the physical proximity of Trees 1, 3 and 5 to the different building envelopes. It is obvious that Tree 5 at the western end of Lot 3 could never have been retained based on the registered building envelope for that lot. Retention of Tree 3 on that lot would also have been unrealistic given the likely location of a carport and driveway. It also seems questionable whether Tree 1 could have been realistically retained on the endorsed building envelope for Lot 2.
- 14 I further discuss tree retention later in my reasons.

THE PLANNING PROVISIONS AND SITE CONTEXT THAT HAVE INFORMED MY DECISION

- 15 Heritage Overlay HO668 introduces controls over external building fabric, external paint colours and trees. The area within HO668 was identified as part of the *City of Castlemaine Architectural and Historical Survey* undertaken by Perrott Lyon Mathieson in 1979. HO668 was described as:

This area is defined as extending from Forest Creek in the south to approximately George Street in the north and from Barker's Creek in the east to Bowden Street to the west, which is the originally surveyed area of the Camp Reserve. Topographically, it occupies the river flats and rising slopes to the west of Barker's Creek and is relatively sheltered by the ridge centred on and along Farnsworth Street.

Elements:

- This was the original area occupied in 1851 as the Camp Reserve for the Goldfields Commissioner and his Staff
- A number of remaining Camp Reserve buildings from 1850's era – the first Court House, Sheriff's Cottage and the Sergeant's Quarters
- Other houses (built late 1850s-1860s) of architectural and historical interest – for example, 31 Gingell Street and Gaulton Street
- Curvilinear road layout
- Recreation reserve and associated landscape elements
- The naturalistic environs of Barkers and Forest Creeks.

- 16 The statement of significance included in the 1979 survey is that:

This area is historically significant both in local and Statewide terms because of its links with the first official settlement on the Mount Alexander/Forest Creek goldfields. The remaining Camp Reserve buildings do not give much of an indication of the original layout of the Camp Reserve as most of the original buildings are now gone and the intervening street pattern has changed the orientation of this area. The curved street pattern in this area is a departure from the overall grid pattern of the rest of Castlemaine.

- 17 I accept Ms White's evidence statement that the area west of Bowden Street was not included in the original Camp Reserve and Environs Precinct, although the reference to *the ridge centred on and along Farnsworth Street* gives some clue as to why the land in the vicinity of the review site was ultimately included in HO668. Relevantly, Castle House was identified as a Category A building in the 1979 study.
- 18 I agree with Ms White that the significance of the Camp Reserve and Environs precinct is the historical association of the area with the government settlement on the Mount Alexander/Forest Creek goldfields. However, I also agree with her that many of the existing buildings and the

street pattern do not relate to this early settlement. Whilst land in Farnsworth Street within HO668 may have limited sensitivity given the 1979 description focuses on Camp Reserve and Forest and Barkers Creeks, the reference to *it occupies the river flats and rising slopes to the west of Barker's Creek and is relatively sheltered by the ridge centred on and along Farnsworth Street* draws attention to the role this higher land has to an appreciation of HO668. That role may be tempered by the distance from Camp Reserve and the river flats, but development on the review site must still respond appropriately to heritage provisions and policy.

- 19 The purposes of the Heritage Overlay at clause 43.01 are to:
 - To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - To conserve and enhance heritage places of natural or cultural significance.
 - To conserve and enhance those elements which contribute to the significance of heritage places.
 - To ensure that development does not adversely affect the significance of heritage places.
 - To conserve specified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.
- 20 The decision guidelines at clause 43.01-8 also require consideration of the Municipal Planning Strategy (MPS) and Planning Policy Framework (PPF) and, expressed in different ways, assessment of the impact of the location, bulk form and appearance of a proposed building on the character, appearance and significance of adjacent buildings and the heritage place. Relevantly, one of the decision guidelines requires consideration of *whether the lopping or development will adversely affect the health, appearance or significance of the tree*.
- 21 None of the decision guidelines require consideration of the amenity impacts such as those that are assessed under Clause 54 if a permit was required under the GRZ1. In the absence of a permit requirement under the GRZ1, those amenity requirements are assessed at the building approval stage. These would include overlooking which was mentioned in one of the original objections to Council.
- 22 It follows that it is only relevant parts of the MPS and PPF that need to be considered. Because a permit is also required for tree removal in HO668, policies concerning vegetation and landscape, including biodiversity, are also relevant.
- 23 As set out in submissions and evidence, these primarily include clauses 02.03-2, 02.03-5, 11.01-1R, 11.01-1L-02, 12.01.1L, 15.03-1S, 15.03-1L.

- 24 In terms of those policies for vegetation and biodiversity, they include creating building envelopes to protect areas of vegetation and protecting remnant native vegetation in and around Castlemaine.
- 25 Policies specific to heritage include encouraging residential development that respects the existing form and character of streetscapes and allows for contemporary architectural expression, managing the form and appearance of medium density and infill housing to protect the heritage and residential character of the Shire's towns, and ensuring an appropriate setting and context for heritage places is maintained or enhanced.
- 26 Strategies in local policy for new development, alterations and additions to a heritage place at Clause 15.03-1L seek to:

Encourage the design of development and alterations and additions to a heritage place or a contributory element to a heritage place to:

- Respect the pattern, rhythm, orientation to the street, spatial characteristics, fenestration, roof form, materials and heritage character of the surrounding historic streetscape.
- Be articulated and massed to correspond with the prevailing building form of the heritage place or contributory elements to the heritage place.
- Be visually recessive and not dominate the heritage place.
- Be distinguishable from the original historic fabric.
- Not remove, cover, damage or change original historic fabric.
- Not obscure views of principle facades.
- Be consistent with the architectural integrity and context of the heritage place or contributory element.

- 27 Development is to be designed so that:

Setbacks from the principal street frontage are similar to those of adjoining contributory buildings; where there are differing adjoining setbacks, the greater setback should be adopted.

Facade heights are similar to the adjoining contributory elements in the street. Where there are differing facade heights, the design should adopt the lesser height.

Ground level additions and any higher elements are located towards the rear of the site.

Ground level additions to contributory buildings are sited within the 'envelope' created by projected sight lines (see Diagram 1).

Upper level additions to heritage places are sited within the 'envelope' created by projected sight lines (for contributory buildings refer to Diagram 2 and for individually significant buildings refer to Diagram 3).

Additions to individually significant places are, as far as possible, concealed by existing heritage fabric when viewed from the front

street and to read as secondary elements when viewed from any other adjoining street.

Bright or clashing colours that draw particular attention to a building are not used.

28 In addition, strategies are provided for carports, car spaces, garages and outbuildings; front fences and gates; ancillaries and services; and signs.

29 Having regard to the policy aspirations set out above, I consider that the primary considerations are:

- Whether the location, bulk, form and appearance of the proposed dwellings will adversely affect the character, appearance and significance of the nearest significant building, being Castle House, as well as on the more extensive heritage place identified within HO668.
- Whether the street setbacks of the dwelling on Lot 2 is similar to, or greater than, that of Castle House.
- Whether the proposed façade heights are similar to Castle House and, where there are differing facade heights, whether the design has adopted a lesser height.
- Whether the proposed buildings respect the pattern, rhythm, orientation to the street, spatial characteristics, fenestration, roof form, materials and heritage character of the surrounding historic streetscape.
- Whether the new buildings have been articulated and massed to correspond with the prevailing building form of the heritage place or contributory elements to the heritage place.
- Whether the new buildings are visually recessive, not obscuring views of the principal façade of Castle House and not dominating of that building.

30 I now discuss tree removal and the proposed buildings in the context of the relevant provisions. But before discussing the two dwellings and associated works, I want to discuss the removal of three trees and replacement landscaping.

Tree removal

31 As I foreshadowed at the end of the hearing, I reluctantly accept that Trees 1, 3 and 5 need to be removed to allow construction of two dwellings on these small lots.

32 I cannot revisit the decision made in 2013 to permit the creation of these two lots incorporating building envelopes. I consider that the subdivision approval largely sealed the fate of the three trees sought to be removed. The need to protect the Structural Root Zone (**SRZ**) and Tree Protection Zone (**TRZ**) around each tree, and the height and width of the spreading canopy of Tree 1, suggest that these trees would have needed to be removed even

with the smaller building envelopes registered on title. This would have occurred to allow construction and, in the case of Tree 1, to protect future occupants from limb failure.

- 33 I have had regard to Mr McWilliam's assessment of the largest tree to be removed (Tree 1 - Yellow Gum) and accept that the tree is in poor health with multiple structural issues, has an estimated ULE of 5-10 years and is in decline. As I also noted at the hearing and confirmed on my latest inspection, the canopy of the tree extends over much of the building envelope on Lot 2 with potential safety issues arising from upper-level canopy failure. I agree with Mr Gale that the damage to Yellow Gum is irreversible.
- 34 The other two trees to be removed are relatively young and are planted specimens. The Red Iron Bark (Tree 3) is indigenous whilst the Spotted Gum (Tree 5) is native. I support their removal and observe that the landscape proposal prepared by John Patrick Landscape Architects Pty Ltd includes 8 canopy trees comprising Black Wattle, Drooping She oak, Yellow Gum and Red Stringybark. Vegetation to be planted also includes numerous shrubs, ground covers and climbers.
- 35 Whilst I agree with Mr Gale that they will take time to grow (*take some time to be realised*), the overall planting scheme would result in a significant improvement over the existing situation. Not only would new canopy trees be planted but there would be new mid and understorey planting which is presently absent from the site.
- 36 I now turn to discuss the dwellings and associated works.

Houses and associated works

- 37 I have earlier in paragraphs 8 to 12 described the proposed dwellings, including decks and carports. Whilst the following 3D perspective does not directly correlate to the architectural plans and elevations, it nevertheless helps in understanding the form, scale and appearance of the dwelling on Lot 2.

3D Perspective



- 38 Mr Gale submits that the scale of the buildings in combination with the solid existing fencing 'squeezes the life' out of the two sites and exacerbates the suburbanisation of these lots. He submits that the two large dwellings sit highly proximate to fenced boundaries (one metre to the southern boundary of both lots with carports attached to high solid fencing on another side boundary).
- 39 It is further submitted that the existing character of Farnsworth Street and HO668 is of traditional types of buildings, almost exclusively containing pitched roofs, not dominated by extensive fenestration and openings, and predominantly single storey in how they present to the streetscape. Mr Gale also submits that the dwelling on Lot 2 intrudes forward of the setback of Castle House, something which the original building envelopes sought to avoid. He also submits that the proposed buildings are not visually recessive and that a pitched rooftop single storey buildings, perhaps with accommodation in the roof space, may be a reasonable expectation.
- 40 Whilst the Council does not share Mr Gale's concerns about the overall scale and form of the dwellings, it has imposed a condition requiring changes to the roof form, increased articulation to reduce visual bulk and a reduction in height so that the top of the dwellings are lower than the parapet and ridge at the adjoining Castle House. As discussed during the hearing, the wording of condition 1(a) makes it difficult to interpret the built form outcome being sought. It was even suggested that it may result in some form of curved roof.
- 41 The permit applicant disagrees with these criticisms. Instead, it is Ms White's evidence that:

The design of the dwellings adopts a simple, contemporary approach which is responsive to the adjacent building of heritage significance at 37 Farnsworth Street in terms of its siting, height and massing, and utilises materials which are appropriate to the natural bushland setting in the western portion of the Camp Reserve and Environs Precinct (HO668).

The significance and prominence of the adjacent Elizabethan revival dwelling, together with its elaborate and unusual architectural detail and historical associations, will not be adversely impacted by the introduction of two new dwellings to the north. In addition, the significance and association of the Camp Reserve and Environs Precinct, as it relates to the early government settlement of the Mount Alexander and Castlemaine goldfields, will not be impacted. The new dwellings will be distinguishable as additions within the precinct context but incorporate materials and a landscape treatment that integrates the buildings with the bushland setting.²

²

Statement of Heritage Evidence, Katherine White April 2022 - page 4.

- 42 I understand Mr Gale's clients are concerned that the original approval in 2013 was predicated on Council's understanding, as set out in the officer's report that:

Though the application proposes two new lots, they are small and future development is restricted by registered building envelopes so that a sense of openness will remain.

- 43 Building envelopes, excluding open sided carports, were limited to 60 square metres, and were registered on title. The later endorsed plans approved larger building envelopes whilst the proposal I am considering increases the building envelopes to more than 100 square metres in area, including the space occupied by the carport.
- 44 Whilst there may have been an intention in 2013 that future development would result in two small dwellings contained within a bushland setting, the removal of three trees and construction of two larger, double storey, flat roofed and mostly sheer walled dwellings would result in a different built form outcome to that anticipated in 2013.
- 45 However, that does not automatically mean that the proposal is unacceptable. I have already explained that retention of the three trees to be removed was most likely unrealistic given their proximity to building envelopes and the extent of canopy spread of Tree 1. I have already commented that the proposed landscaping will, in time, provide an improved level of vegetation on these two lots.
- 46 What does concern me however is the form and scale of these dwellings. Not only have the footprints of each increased significantly to 100 square metres, but the first floors replicate those at ground level with no stepping back or articulation except for the narrow first floor balcony and the single storey carport. The two-level framing or pergola element at the front of each dwelling exacerbates the impression of height and extent of built form. I acknowledge that Mr Seach agreed these could be removed if they were of concern.
- 47 But removing these pergolas does not overcome my concerns about the physical and visual bulk created by ground and first floors effectively occupying the same sized footprint using double storey vertical walls without setbacks or articulation. Part of the lounge room of the dwelling on Lot 2 is positioned closer to the frontage than that part of the façade of Castle House which has the greatest street setback. As set out in paragraph 28, it is something that policy seeks to avoid.
- 48 I acknowledge that the proposed dwellings are physically well separated from Castle House and that a lesser street setback would be less obvious than in other parts of Castlemaine where buildings are physically much closer together. I also accept that the proposed dwellings would not obscure views of the principal façade of Castle House from the service road or the main carriageway of Farnsworth Street. However, it is inevitable that the new dwellings would form part of the overall setting and visual

appreciation of Castle House, even if they are to one side of the principal view line as a person approaches from the north.

- 49 In my opinion the design does not respond acceptably to the heritage character of the locality. From the photos tendered at the hearing and my inspection, existing dwellings have a consistent design in terms of the provision of pitched roofs and articulation of the first floors where they exist. Although there is variety in the dwellings and structures in this part of HO668, I am not persuaded the new dwellings have been articulated and massed to correspond with what I perceive to be the prevailing building form of the heritage place. These elements create a character which the proposed dwellings ignore.
- 50 Photos were tendered at the hearing of a contemporary flat roofed dwelling in the southern section of Farnsworth Street. I am not persuaded that the dwelling is a relevant example, as it is physically and visually remote from Castle House and the subject land, and it is outside the Heritage Overlay. As such, it may not have needed a planning permit.
- 51 Except for single storey decks, I do not support any built form being constructed beyond the already approved building envelopes.
- 52 The permit applicant has appealed condition 1 (b). In principle I support the colours and materials being used and do not find them unacceptable given the timber wall finishes and colours proposed. These will need to be reassessed with any new proposal.
- 53 I do not wish to be prescriptive about what might be an acceptable design response, but I would suggest that dwellings having first floors setback from ground floors (i.e. smaller first floor footprints), having some form of pitched roof (potentially with some form of attic style window treatment) and decks without double storey pergola elements would be a helpful starting point. Removal of Trees 1, 3 and 5 will provide opportunities to create an attractive landscape setting superior to what exists at present.

CONCLUSION AND DECISION

- 54 Based on my assessment of the proposal, I have not been persuaded that the proposed dwellings are an acceptable response to the heritage provisions or the site context. Whilst I support the removal of Trees 1, 3 and 5, the proposed buildings need to be scaled back with greater articulation and a different roof form to correspond with what I perceive to be the prevailing building form and character of the heritage place.
- 55 I will therefore set aside the Responsible Authority's decision. No permit is granted.

J A Bennett
Senior Member