Introduction

1. This submission is made on behalf of Monash City Council (Council), the Responsible Authority under the Planning and Environment Act 1987 (Act) for the administration and enforcement of the Monash Planning Scheme (Scheme).

2. This submission is made following the referral of a question of law by the Tribunal arising out of a hearing on the merits of an application for review before Member Sibonisi on 12 March 2019.

3. The application for review was lodged by the Applicant under s 77 of the Planning and Environment Act 1987 (Act) to review the Responsible Authority’s decision to issue a Notice of Decision to refuse to grant a permit to construct 15 dwellings and to alter access to a road in a Road Zone Category 1 (RDZ1) on land at 115-119 Clayton Road, Oakleigh East (Subject Land).

4. The Council refused the application on 5 grounds, as follows:

   The proposal is inconsistent with the Residential Development Policy at Clauses 21.04 and 22.01 of the Monash Planning Scheme as it fails to achieve architectural and urban design outcomes that positively contribute to the neighbourhood character having particular regard to the desired future character for the area.

   The proposal does not adequately satisfy the objectives and design standards of Clause 55 of the Monash Planning Scheme with regard to neighbourhood character, site layout and building massing, setbacks, front fencing, access provision, amenity impacts, private open space provision and detailed design.

   The proposal does not adequately satisfy the requirements on Clause 52.06 of the Monash Planning Scheme with regard to vehicle access.
The proposed development would adversely affect the landscape character of the area.

The proposed development is considered a poor design outcome for the site.

5. The issue of the minimum garden area requirement (a mandatory requirement at clause 32.08-4 of the Scheme) (garden area) was not the subject of any of Council’s refusal grounds.

6. The issue of the interpretation of garden area arose as a preliminary matter raised by the Applicant, and the merits hearing was subsequently adjourned to consider the applicable question/s of law.

7. By the Tribunal’s order of 12 March 2019, the parties were required to:

   ..file with the Tribunal agreed question/s of law in respect of the application of clause 32.08-4 (minimum garden area requirement) of the Monash Planning Scheme to the proposal.

8. Following the filing and serving of separate questions of law, the matter was considered at a Practice Day Hearing before Deputy President Gibson on 12 April 2019, where an agreed set of questions to be considered were presented and determined by the consent of both parties.

Questions of law

9. The provision that is at the heart of the issue in this case is the proper interpretation of the minimum garden area requirement in clause 32.08-4 of the planning scheme. It states:

   Minimum garden area requirement
   An application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area as set out in the following table:

<table>
<thead>
<tr>
<th>Lot size</th>
<th>Minimum percentage of a lot set aside as garden area</th>
</tr>
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<tbody>
<tr>
<td>400 - 500 sqm</td>
<td>25%</td>
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<tr>
<td>Above 500 - 650 sqm</td>
<td>30%</td>
</tr>
<tr>
<td>Above 650 sqm</td>
<td>35%</td>
</tr>
</tbody>
</table>

10. At the heart of the issue is the meaning of the words “an application to construct or extend a dwelling or residential building on a lot.

11. Essentially, the Tribunal will need to determine whether the requirement that follows, that is the requirement to provide the minimum garden area requirement, applies to the lots forming part of the application of the permit, or whether the requirement applies to the planning unit in respect of which the application for permit is made?
12. As will be seen later, the main Tribunal decisions on this matter appear to take the view that the requirement applies to the lots forming part of the application for permit rather than the planning unit involved in the application for permit.

13. Council will submit that the correct approach to interpretation is to regard the requirement as applying to the planning unit as that interpretation better serves the mischief that the provision was aimed at.

14. Our arguments tend to be against the tide of the Tribunal decisions. However, it is noteworthy that if Council’s argument were correct, then the application for permit currently before the Tribunal would at least be able to be determined on its merits whereas otherwise, there is a prospect it could be prohibited. Accordingly, Council has no axe to grind in making this submission.

15. The provision at the heart of the issue as a VPP standard form provision is common across all municipalities so therefore, the Tribunal’s decision in this case is likely to have some broader interest than merely this case. Furthermore, the provision not only appears in the General Residential Zone but also the Neighbourhood Residential Zone of planning schemes.

16. The questions of law in respect of the application of clause 32.08-4 (minimum garden area requirement) of the Monash Planning Scheme which are required to be determined by the Tribunal in this proceeding, as originally framed and agreed, are as follows:

1. Is the meaning of and interpretation to be given to clause 32.08-4 dependent upon the context and the facts of the application under consideration, in which case the way that the minimum garden area requirement is to be applied is dependent upon the type of application and the composition of the planning unit?

2. If the answer is Yes, then how is clause 32.08-4 to be applied in the following example?
   - The subject land in the application comprises one or more lots (planning unit). The application is for a multiple townhouse/unit type proposal. Specifically, is the garden area requirement to be applied to the planning unit or is each lot comprising the planning unit required to meet the minimum requirement as they existed at the time of the application?

3. If the answer to Question 2 is that garden area is to be applied to each lot (rather than the planning unit), can the minimum garden area requirement be met with a permit condition requiring consolidation of multiple lots?

4. Can the minimum garden area requirement be met if the application proposes a permit condition requiring consolidation of multiple lots?

17. Notwithstanding how the questions were framed, the issue at the heart of the question is the proper interpretation of the requirement and in particular what land is it that has to comply with the requirement.
Subject Land

18. For the purposes of this submission, it is important to note the Subject Land in this case, like many cases that come to the Tribunal for a multi-unit development is comprised of three individual lots with a combined site area of 2174.64 square metres. The three lots are unconsolidated and have the following legal descriptions:

18.1 Lot 5 on Plan of Subdivision 024719 (Certificate of Title Vol 8079 Fol 103) known as 119 Clayton Road, Oakleigh East

18.2 Lot 6 on Plan of Subdivision 024719 (Certificate of Title Vol 11632 Fol 542) known as 117 Clayton Road, Oakleigh East

18.3 Lot 7 on Plan of Subdivision 024719 (Certificate of Title Vol 8093 Fol 005) known as 119 Clayton Road, Oakleigh East

19. The lots are illustrated diagrammatically below (as taken from the architect’s existing site plan – TP2.00):
The Proposal

20. The proposal before the Tribunal is as follows:

21. From the facts of the case, it is apparent that the middle lot would struggle to meet the garden area requirements if the approach taken to date by the Tribunal were the correct interpretation. On the other hand, if the correct interpretation were to be the approach that Council submits ought to be taken, the application can proceed to be considered on its merits.

22. Essentially, Council will submit to the Tribunal that the requirement ought to be read as if it means any permit granted for a dwelling or residential building on any land must provide the following minimum garden area requirements. In order to reach this interpretation from the actual words set out in the planning scheme, we submit that

22.1 the Tribunal should interpret the word ‘lot’ as if it read ‘lots’ [that is the singular should be read as including the plural]; and

22.2 further, to the extent that it is necessary to do so, the Tribunal should construe the words an application for a permit as properly referring to A permit granted in respect of any lots. After
all it is not an application for a permit that impacts anything including garden area but rather it is the grant of a permit. Such a construction would be more consistent with other similar requirements in the planning scheme such as the requirement for a permit to be generally in accordance with a development plan, a precinct structure plan or similar.

23. To make good the arguments, we wish to refer the Tribunal to relevant background material and other material.

**Background to the introduction of the minimum garden area requirement**

24. The minimum garden area requirement (garden area) was introduced into the General Residential Zone (GRZ) and the Neighbourhood Residential Zone (NRZ) last year through VC110 in an effort by the State Government to give effect to the recommendations of the Managing Residential Development Advisory Committee (July 2016).

25. The explanatory report accompanying VC110 (VC110 Explanatory report) provides:

   The new garden area requirement ensures the green open character of our neighbourhoods will be protected, by requiring a mandatory minimum garden area be provided when land is developed.

26. Then in May 2018, VC143 was gazetted into all Victorian Planning Schemes.

27. The explanatory report accompanying VC143 (VC143 Explanatory report) outlined the rationale for the amendment (as it relates to garden area) as follows:

   Amendment VC143 also improves the operation of the minimum garden area requirement by:

   • Amending the current definition of garden area to clarify inclusions and exclusions. In particular, the revised definition specifies that eaves and outbuildings up to 10 square metres of gross floor area are included as garden area.

   • Enabling the garden area requirement to be switched off in the General Residential Zone for areas identified for more intensive residential development to achieve housing diversity and affordability objectives in locations close to jobs and services, urban renewal and strategic redevelopment sites.

   • Clarifying the application of, and exemptions to, the minimum garden area requirements for subdivision and development in the General Residential Zone and Neighbourhood Residential Zone to:

     o Reduce duplication for subsequent or combined applications to subdivide and develop land.

     o Create exemptions where significant strategic planning has been undertaken and areas or sites have been identified for more intensive housing outcomes on smaller lots or designated medium density housing sites. This includes, precinct structure plans, incorporated plans and development plans.

   • Providing exemptions to the application of the minimum garden area requirements in relation to existing buildings that did not comply with the minimum garden area prior to the introduction of VC110.
28. The VC143 Explanatory report provides:

The Amendment implements these objectives by making changes to the residential zones which will enable proper application of the zones and improve the operation of the minimum garden area requirement. This will ensure the fair and orderly development of land through the amended provisions.

29. Simultaneously, Planning Practice Note 84 (May 2018) (PPN84) was published by the Department of Environment, Land, Water and Planning (DELWP). It offers (some) guidance regarding the application and interpretation of the control in the GRZ and NRZ.

30. However, while PPN84 explains garden area applies and must be met when:

30.1.1 constructing or extending a dwelling or a residential building;

30.1.2 subdividing land to create a vacant residential lot less than 400 square metres in area.

it offers no real clarity on whether garden area applies to each lot that forms part of an application for a permit or to the planning unit (which may comprise more than one lot).

31. The extent of its guidance on this point is that the minimum garden area requirement applies to applications for 2 or more dwellings on a lot as per the below ¹:

Where an application proposes two or more dwellings on a lot, the minimum garden area does not need to be equally distributed to each dwelling. For example, an upper floor apartment does not need to provide any minimum garden area as the garden area requirement relates to the original lot.

32. This guidance on one view is unhelpful to the interpretation we are contending. However, it may be the case that the draftsperson of the practice note was also referring to the planning unit which may have comprised one or more original lots.

Tribunal's Consideration of Garden Area to this point

33. Since early in 2018, the Tribunal has considered the application and interpretation of the minimum garden area requirement.

Guler v Brimbank CC (Red Dot) [2018] VCAT 646 (Guler)

34. Guler v Brimbank CC (Red Dot) [2018] VCAT 646 (Guler) was the first decision of the Tribunal, a decision of Member Halliday which focused on what's included and what is excluded from the calculation of garden area.

35. In Guler, the Tribunal determined the areas underneath the eaves and extended roofline of a proposal were excluded from calculating the garden area because they did not constitute

¹ At page 11
‘uncovered outdoor areas’ and were ‘roofed areas’ within the ordinary meaning of those terms. As such the decision does not assist the issue in this case.

**Sargentson v Campaspe SC (Red Dot) [2018] VCAT 710 (Sargentson)**

36. In **Sargentson v Campaspe SC (Sargentson) (Red Dot) [2018] VCAT 710**, the permit applicant and Council submitted two divergent approaches in determining the meaning of the term ‘lot’ in the context of the minimum garden area requirement.

37. The application sought planning permission for both the development of the land and an associated subdivision.

38. The council submitted the minimum garden area should be assessed in relation to each resulting lot accommodating a dwelling or residential building, whereas the permit applicant argued the requirement should be assessed in relation to the entire planning unit at the time the application was lodged.

39. The Tribunal disagreed with both interpretations.

40. The Tribunal concluded the proper approach to assessing garden area was by determination of the meaning given to the word *lot*. The Tribunal approached its analysis, as follows:

   “Lot” is defined in clause 72 of the Scheme to mean:

   A part (consisting of one or more pieces) of any land (except a road, a reserve, or common property) shown on a plan, which can be disposed of separately and includes a unit or accessory unit on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan.

   Clause 32.08-4 of the Scheme requires that a lot must provide the minimum Garden area. At the time that the planning permit application was lodged, the “lot” is the part of land that can be disposed of separately – *i.e.* **it is the initial layout or lot configuration of the land**.

   In the present situation, the planning unit for the proposed development is comprised in two lots:

   - Lot 1 on TP678452R, which measures 20,120.00mm x 50,300.00mm (or 20.120 metres x 50.300 metres); and
   - Lot 2 on TP678452R, which measures 920mm x 26,370.00mm (or 0.920 metres x 26.370 metres).

   The area of Lot 1 is 1,012.036m² whilst the area Lot 2 is 24.260m², with the total area of the planning unit for this development being 1,036.296m².

   Taking the reference to “lot” as being to the initial lot layout, clause 32.08-4 requires that:

   - 35% of Lot 1 be provided as Garden area, equating to 354.213m²; and
   - 0% of Lot 2 be provided as Garden area, given its area is less than 400m².

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2 [18] - [24]
So a total of 354.213m² is required to be provided as Garden area on Lot 1 on TP678452R. Given the size of Lot 2 on TP678452R (being 24.260m²), no Garden area is required to be provided on that lot.

As an aside, a parallel can be drawn between this approach and how the planning permit application is assessed under ResCode – i.e. it is assessed under the clause 55 objectives and standards on the basis that the application is for the construction of two dwellings on a lot, despite the fact that the planning permission will result in subdivision of the planning unit into two newly configured lots, with one dwelling on each new lot. We do not analyse the planning permit application against the objectives and standards of clause 54, despite the outcome of this planning permit application being the creation of two newly configured lots.

41. After exploring the merits of the various approaches advanced before it, the Tribunal determined that the correct approach is to assess the requirement against each lot as at the time the application for a planning permit is lodged.

On the face of the language, the correct interpretation would have to be that the lot is taken to be the lot at the time the application for planning permit is lodged.

42. In declining not to adopt the planning unit approach advanced by the Permit Applicant, the Tribunal said:

Whilst I can see the appeal of measuring the Garden area in relation to the total planning unit, this interpretation is not supported by the language used in clause 32.08-4 and as such I cannot see a justification for basing the calculation on the area of the entire planning unit, where the planning unit in this case is comprised in two lots that could conceivably be disposed of separately. As such, I do not adopt that approach.

43. It was nonetheless a clear observation of the Tribunal that the various interpretations highlighted the lack of clarity surrounding the intention of the requirement. The Tribunal observed it is unclear whether the requirement should be measured against the area of the resulting lot that is to contain the dwelling or residential building, or the area of the original lots when it is clear the location and layout of the dwelling or residential building will not align with those original lots. The Tribunal concluded on its commentary on the garden area provision by stating:

As a final comment, it is somewhat perplexing to me that this extent of analysis is required in order to determine whether a mandatory provision of the Scheme is or is not met. Perhaps consideration could be given to some of the matters raised above and further clarity provided.

44. Lastly, it is of relevance to note that in embarking and arriving upon its ultimate conclusion, the Tribunal sought to deduce a purpose of the provision, which while not found within the text of the Scheme itself, was ascertained by a review of intrinsic material. The Tribunal said:

...it strikes me that the purpose of introducing a minimum garden area requirement for a lot is to ensure that the lot retains a minimum percentage of it as uncovered space that is either garden or of a nature that regularly keeps company with a garden, in order to contribute to a

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3 At [34]
4 At [33]
5 At [89]
6 At [60]
perception of openness or space around the built form when viewed from outside the site, whether or not this openness or space is given over to plantings. This openness or space can then contribute to the open garden character of neighbourhoods.

**Post Sargentson: Tribunal’s consideration of garden area**

45. Subsequent to Sargentson, the garden area requirement has been considered in the following cases before the Tribunal:

45.1 *Dromana Beach Pty Ltd v Mornington Peninsula CC* ([Dromana Beach Pty Ltd](https://example.com)) [2018] VCAT 666

45.2 *Terrigal Crescent Development Pty Ltd v Yarra Ranges SC* ([Terrigal Crescent Development](https://example.com)) [2018] VCAT 1253

45.3 *Win 88 Pty Ltd v Manningham CC* [2019] VCAT 499 ([Win 88](https://example.com))

45.4 *Xiong v Whitehorse CC* [2019] VCAT 678 ([Xiong](https://example.com)), most recently in a decision of Member Watson issued on 9 May 2019.

46. With the exception of the decisions in Guler and Sargentson, the other decisions issued have been by non-legal members of the Tribunal. For completeness, the Tribunal can be taken through these decisions.

*Dromana Beach Pty Ltd v Mornington Peninsula CC* ([Dromana Beach Pty Ltd](https://example.com)) [2018] VCAT 666

47. The decision of *Dromana Beach Pty Ltd*, a decision of Member Carew, issued days after the Sargentson decision echoes the Tribunal’s struggles with the interpretation of the garden area provision. The Tribunal stated:

The wording of the provision at 32.08-4 requires that a **lot must provide the minimum garden area** and the term "lot" is specifically defined in the planning scheme at Clause 72 as follows:

A part (consisting of one or more pieces) of any land (except a road, a reserve, or common property) shown on a plan, which can be disposed of separately and includes a unit or accessory unit on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan.

The review site is included within five lots, four of which can be disposed of separately. The review site is over 650m² requiring 35% garden area if taken as a whole. However, if the garden area requirement is applied to each lot as set out below (as opposed to the planning unit as a whole) then the mandatory garden area requirement is not met as shown in Figure 3 below.

This matter was addressed in Sargentson v Campaspe SC (Red Dot) [2018] VCAT 710. In that decision, the Tribunal found that the assessment must be undertaken on the basis of the lots at the time of the decision rather than the planning unit, although acknowledged that the application of clause 32.08-4 of the Scheme could result in three different outcomes, based on three different interpretations, highlights the confusion that is caused by the manner in which the provision is drafted.

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7 This is not an exhaustive list, but a list nonetheless which we draw on to illustrate or to provide ‘commentary identifying and seeking to interpret the provision as it relates to its application to the planning unit or on a per lot basis.

8 [90]–[93]
I agree that the provision as drafted appears to apply to the lot rather than the planning unit. On this basis the proposal does not meet the mandatory garden area requirement. Mr Scally indicated that the application was in the process of consolidating the lots. Had I been of a mind to grant a permit on the merits, I would have given further consideration to whether there was an alternative means of addressing this issue.

... 

Like the Tribunal in Sargentson, I consider that the interpretation of Clause 32.08-4 requires clarification.

Terrigal Crescent Development Pty Ltd v Yarra Ranges SC (Terrigal Crescent Development) [2018] VCAT 1253

48. In Terrigal Crescent Development Pty Ltd v Yarra Ranges SC (Terrigal Crescent Development) [2018] VCAT 1253, the Tribunal (constituted by Member Carew) continued to grapple with whether the garden area should be calculated on a per lot basis or based on the planning unit. In referring to the Sargentson decision, the Tribunal said:

In Sargentson v Campaspe SC (Red Dot) [2018] VCAT 710 the Tribunal found that the assessment must be undertaken on the basis of the lots at the time of the decision rather than the planning unit, although acknowledged that the application of clause 32.08-4 of the Scheme could result in three different outcomes, based on three different interpretations, highlights the confusion that is caused by the manner in which the provision is drafted.

Since the time of that decision the provisions of the mandatory garden area requirement were amended, however the relevant part of the provision that refers to the lot has not changed. Rather, the position of the Tribunal in Sargentson that the calculation should be undertaken on the basis of the original lot appears to have been reinforced within PN84 which states that:

Where an application proposes two or more dwellings on a lot, the minimum garden area does not need to be equally distributed to each dwelling. For example, an upper floor apartment does not need to provide any minimum garden area as the garden area requirement relates to the original lot.

49. The Tribunal went onto say:

I agree with the Tribunal in Sargentson that application of the provision in this manner is not consistent with the usual approach of an assessment based on the “planning unit”. It has significant implications for applications across multiple lots. It is particularly problematic where a planning scheme (such as in DDO8 in this case) might encourage consolidation of lots to achieve greater design flexibility. Where possible developers should consolidate lots prior to seeking planning approval.

50. The Tribunal then turned its mind to the matter of consolidation, and whether this could be a matter addressed by permit condition. The Tribunal commented:

I did consider whether a condition requiring consolidation of lots prior to the commencement of development would address compliance as suggested by the applicant.

A condition requiring amended plans to demonstrate compliance with the mandatory garden area has been accepted by the Tribunal in recent times and I think this is an acceptable approach. However, I do not consider that it a condition to consolidate the allotments can

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9 In its order dated 7 September 2018.
10 From paragraph 22
11 [25]
12 From paragraph 26
achieve compliance because this would be seeking to alter the basis of the assessment of the garden area that is mandatory provision of the planning scheme.

The condition requiring consolidation is also not required as this will be required to be addressed before any subsequent building commencing in any event.

Even if I am wrong in respect to this point, I have found that that on the merits, some changes to the plans are warranted in accordance with the discussion plans submitted by the applicant to address the extent of hard paving and garages centrally to the site (see my findings below). As a consequence, I would have required a reduction in built form on the planning merits regardless of the mandatory garden area.

51. More recently, the Tribunal has issued 2 decisions which appear to follow the Tribunal’s analysis in Sargentson. The first of these is Win 88 Pty Ltd v Manningham City Council [2019] VCAT 499 (Win 88).

Win 88 Pty Ltd v Manningham [2019] VCAT 499 (Win 88).

52. In Win 88, the Tribunal (constituted by Member Gaschk) was considering a multi-unit development application across 2 lots both of which exceeded 650 square metres.

53. To achieve compliance with garden area, the Tribunal stated it was necessary that a minimum 35% garden area be provided for each lot at ground level. The Tribunal said:

Clause 32.08-4 of the Scheme requires that an application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area of 35% for lots greater than 650sqm. It is therefore a mandatory requirement that must be satisfied in order for any permit to issue.

The review site consists of two separate lots, each over 650sqm, that are also zoned GRZ1. I find the proposed development clearly falls under the provisions of clause 32.08-4 and a minimum 35% garden area at ground level is required to each lot on the review site.

54. In determining the garden area had not been provided, the Tribunal concluded the proposed development was a prohibited one:

On the basis of the submissions made by the parties, I find that 35% of each lot has not been set aside on the substituted plans as Garden Area under clause 32.04-4. The proposed development is therefore prohibited and a permit cannot be granted.

Xiong v Whitehorse CC [2019] VCAT 678 (Xiong)

55. The most recent decision relating to garden area is that of Member Watson’s decision in Xiong v Whitehorse CC [2019] VCAT 678 (Xiong), a decision issued on 9 May 2019.

56. The proposal concerned the construction of 4, 2 storey dwellings on a single lot, although the decision refers to a strip of Council owned land that the Applicant sought to purchase from the Council to increase the size of the developable land. Further, the decision refers to the

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13 [14]-[15]
14 [19]
15 Referred to in the decision as a laneway, described legally as ‘road’.

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[7846371: 24357425_1] page 12
fact that the proposed development plans had been prepared on the basis that the approximately 1.8 metres-wide strip of Council owned land forms part of the subject site.

57. While the proposal before the Tribunal did not satisfy the mandatory garden area requirement in any event (and was therefore the determinative factor), the Tribunal also sought not to entertain the inclusion of the additional strip of land into the planning unit.

In this case, the Council owned strip of land is a ‘road’ and is thus not part of the lot (that is, it is not part of the subject site). As I have already mentioned, the current non-compliance with the mandatory 35% garden area was not disputed by Mr Livingston.

Because the mandatory 35% garden requirement is not met, the development is prohibited. I cannot issue a conditional permit for a prohibited development. In other words, I disagree with Mr Livingston’s suggested solution of only allowing the development to commence conditional upon the land purchase.

58. In appearing to follow Sargentson, Member Watson emphasises the term ‘lot’ in concluding the proposal did not satisfy the provision referring to the words of the Scheme stating:

Clause 32.08-4 of the planning scheme requires that the ‘lot’ must provide a minimum garden area of 35%. As this is a mandatory requirement, it is unlawful to issue a permit allowing a lesser amount. A ‘lot’ is defined by Clause 73.01 of the planning scheme to be:

A part (consisting of one or more pieces) of any land (except a road, a reserve, or common property) shown on a plan, which can be disposed of separately and includes a unit or accessory unit on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan.

Planning controls

Clause 32.08-4 – Construction or extension of a dwelling or residential building

Minimum garden area requirement

59. Under clause 32.08-4:

An application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area as set out in the following table:

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</tbody>
</table>

16 [10]
60. The provision then goes on to state:

This does not apply to:

- An application to construct or extend a dwelling or residential building if specified in a schedule to this zone as exempt from the minimum garden area requirement;
- An application to construct or extend a dwelling or residential building on a lot if:
  - The lot is designated as a medium density housing site in an approved precinct structure plan or an approved equivalent strategic plan;
  - The lot is designated as a medium density housing site in an incorporated plan or approved development plan; or
- An application to alter or extend an existing building that did not comply with the minimum garden area requirement of Clause 32.08-4 on the approval date of Amendment VC110.

SUBMISSIONS

General approach to statutory interpretation

61. In Council’s submission, when interpreting a word or phrase within any Act or subordinate instrument (the planning scheme is a subordinate instrument), the principles of statutory interpretation must be applied.

62. The modern approach to statutory interpretation essentially requires considering the text, purpose and context\(^\text{17}\) (purposive approach).

63. The purposive approach was endorsed by Deputy President Gibson in *Melbourne CC v Minister for Planning (Includes Summary) (Red Dot)* (*Melbourne CC*) [2015] VCAT 370: \(^\text{18}\)

... the principles of statutory interpretation which must guide me in the interpretation of this provision. They are not in dispute.

- The relevant starting point is the words of the legislative text.\(^\text{19}\)
- The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute.\(^\text{20}\)

\(^{17}\) *Melbourne CC v Minister for Planning (Includes Summary) (Red Dot)* [2015] VCAT 370

\(^{18}\) [33]-[35]

\(^{19}\) *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at paragraph 4 per French J and paragraph 47 per Hayne, Heydon, Crennan and Kiefel JJ.

\(^{20}\) *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at paragraph 69 of the majority judgment of McHugh, Gummow, Kirby and Hayne JJ.
• It should be noted that the context (including the mischief which the statute was intended to remedy) is to be considered at the first instance – not only in cases of ambiguity.21

• The duty of a court is to give words of a statutory provision the meaning that the legislature is taken to have intended them to have.22

• The application of rules of statutory interpretation will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of the statute is not something that exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.23

• A construction that would promote the purpose or object underlying the Act or subordinate instrument shall be preferred to a construction that would not promote that purpose or object.24

In relation to the interpretation of subordinate instruments, including planning schemes, there is an additional principle, namely that they are to be interpreted bearing in mind their use by practical people skilled in a particular industry. Therefore they ought be construed in light of practical considerations. An interpretation which leads to a reasonably practical result is to be preferred.25

In essence, the task of construction requires consideration of text, context and purpose.

[our emphasis]

64. The language used, as understood within its legislative context (context being considered in its widest sense), will guide how the intended purpose or object of the provision may be discovered.26

65. The Tribunal has also said the Scheme should be interpreted without recourse to exotic legalism27. In Gaist v Campaspe SC (Includes Summary) (Red Dot) (Gaist) [2015] VCAT 1662, the Tribunal said28:

It is well established that the planning scheme is to be interpreted in a less legalistic manner than Acts of Parliament…a common sense meaning should be applied that laypeople would generally understand.

[our emphasis]

66. Applying a purposive approach, the meaning of the provision must be determined by applying a ‘common sense’ meaning in the context of the Scheme.

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22 see Project Blue Sky paragraph 78
23 Lacey v Attorney-General of Queensland [2011] HCA 10 at paragraph 44.
24 Section 35(a) Interpretation of Legislation Act 1984 (Vic).
25 See Pearce and Geddes Statutory Interpretation in Australia, 8th edition, at pages 167 - 168
28 At paragraph 30
67. This task is to construe the provision under consideration, not to rewrite it, in light of its purpose or object.\(^{29}\)

68. Importantly, s 35 of the Interpretation of Legislation Act 1984 (Vic), also encapsulates the purposive approach to statutory interpretation, providing that when interpreting a provision of an Act or subordinate instrument:

   a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object\(^{30}\);

69. With these considerations in mind we turn to the text of clause 32.08-4, including its context.

Planning Scheme Analysis

Minimum garden area requirement

70. The part of Clause 32.08-4 of the Scheme the subject of these proceedings states:

   Minimum garden area requirement

   An application to construct or extend a dwelling or residential building on a lot must provide a minimum garden area as set out in the following table:

   ...

Planning Scheme definitions

71. The terms underlined above, that being garden area and lot as referred to in clause 32.08-4, are defined under clause 73.01 General Terms of the Scheme. These definitions are set out below:

72. Clause 73.01 provides a definition of garden area (as amended by VC143) reading as follows:

   Any area on a lot with a minimum dimension of 1 metre that does not include:

   (a) a dwelling or residential building, except for:
      • an eave, fascia or gutter that does not exceed a total width of 600mm;
      • a pergola;
      • unroofed terraces, patios, decks, steps or landings less than 800mm in height;
      • a basement that does not project above ground level;
      • any outbuilding that does not exceed a gross floor area of 10 square metres; and
      • domestic services normal to a dwelling or residential building;
   b) a driveway; or
   c) an area set aside for car parking.


\(^{30}\) Melbourne CC v Minister for Planning (Includes Summary) (Red Dot) [2015] VCAT 370
73. The amended definition is more detailed than the former definition which read:

An uncovered outdoor area of a dwelling or residential building normally associated with a garden. It includes open entertaining areas, decks, lawns, garden beds, swimming pools, tennis courts and the like. It does not include a driveway, any area set aside for car parking, any building or roofed area and any area that has a dimension of less than 1 metre.

74. Lot is defined (at clause 73.01) as:

A part (consisting of one or more pieces) of any land (except a road, a reserve, or common property) shown on a plan, which can be disposed of separately and includes a unit or accessory unit on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan.

**Relevant Planning Policies**

75. In undertaking an exercise in statutory interpretation (and reviewing the Scheme as a whole) it is generally appropriate to have regard to the relevant policies of the Scheme. Having examined the various policies in the scheme relevant to built form or housing such as the following:

75.1 Clause 11 – Settlement, which provides that planning is to ‘recognise the need for, and as far as practicable contribute towards … health, wellbeing and safety’ and ‘a high standard of urban design and amenity’.

75.2 Clause 15.01-2S Building design which calls upon the achievement of building design outcomes that contribute positively to the local context and enhance the public realm.

75.3 Clause 15.01-5S – Neighbourhood character which has the strategy ‘to ensure development responds to its context… by emphasising the … underlying natural landscape character and significant vegetation’.

75.4 Clause 16.01-2S – Location of residential development which calls on new housing to be located in areas that offer good access to jobs, services and transport.

Strategies to the achievement of these objective include:

- Increase the proportion of new housing in designated locations within established urban areas and reduce the share of new dwellings in greenfield and dispersed development areas.

- Ensure an adequate supply of redevelopment opportunities within established urban areas to reduce the pressure for fringe development.

- Identify opportunities for increased residential densities to help consolidate urban areas.

we submit that the policy does not really assist in construing the provision.
Similarly, we do not think that much turns on local policy given that the provision is a state standard provision which must be understood in the context of a range of different expressions of local policy.

Statutory interpretation of clause 32.08-4 of the Monash Planning Scheme

Text

77. The text refers to ‘an application to construct or extend a dwelling or residential building on a lot’.

78. The provision attaches a mandatory obligation by requiring that an application to construct or extend a dwelling or residential building on a lot ‘must’ provide a minimum garden area for which a prescribed formula based on the area of the lot applies.

79. In interpreting clause 32.08-4, it is necessary to review and apply the definitions of the Scheme. But, we submit that this needs to occur cautiously having regard to the purpose and in context^31.

Purpose

80. In Council’s view, the purpose of the provision is a simple one (albeit it not being stated expressly in the Scheme itself). The provision seeks to increase the provision of area for garden purposes^32.

81. The purpose of the provision can also be construed from intrinsic material, particularly the Explanatory reports associated with the amendment^33.

82. We have earlier set out background to the provision’s introduction as we submit it is relevant to a consideration of its purpose.

83. It is understood from the VC110 Explanatory report that the intent of the provision is to increase the amount of area set aside for garden purposes as part of any residential redevelopment. In this regard, what is of more concern to the policy makers is the resultant outcome and not the starting point of an application. This is consistent with ensuring that the garden area requirement applies to the resultant outcome being the planning unit and not the lots in the application.

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^31 Applying Melbourne CC v Minister for Planning (Includes Summary) (Red Dot) [2015] VCAT 370

^32 It is for example, important to note that a minimum dimension of 1 metre is required in order to be considered garden area.

^33 Particularly VC110 Explanatory report which introduced the provision, but also subsequent explanatory reports, such as VC143.
84. The purpose of the provision is about facilitating additional space in new developments to contribute to the garden character of a suburban area. In that context, what is more important is where one lands after a redevelopment. In this regard it is not logical or helpful to the outcome to look at a series of lots forming part of an application individually especially where policy encourages consolidation as is the case in many municipalities.

85. The provision as drafted does not expressly distinguish between a scenario involving a single block of land or lot, as compared to an application where a consolidation of multiple lots forms the basis of the permit application. This is the case even though it is common for redevelopment to encompass one building or a number of buildings over multiple lots. In this regard does one assume that the draftsperson simply failed to consider such a common scenario?

Context

86. A contextual consideration warrants the Scheme to be read as a whole.

87. First, it is clear by its inclusion in the GRZ and NRZ (and absence from Zones such as the RGZ and ACZ) that clause 32.08-4 is aimed at achieving a garden suburban character within existing urban areas, and serves to increase the area dedicated to garden purposes in residential neighbourhoods. By contrast, it intends to serve no role in enhancing the garden character in a high density setting, such as within an activity centre or high growth designated area.

88. Secondly, within the zone in which it is found\textsuperscript{34}, we observe the use of the term lot is identical in reference to that which appears as a permit trigger for the construction of two or more dwellings on a lot at clause 32.08-6.

89. The use of the same term is important. It appears to us to be utilised at clause 32.08-4 by the draftsperson for consistency in the language within the zone\textsuperscript{35}. This advances the proposition that its application and interpretation should be identical also. As was discussed by the High Court in Project Blue Sky Inc v Australian Broadcasting Authority (1998) \textit{(Project Blue Sky)} 194 CLR 355, the words of the provision are to be given the meaning that the legislature is taken to have intended them to have.

90. The industry has long worked on the basis, that, in practice, the application of clause 32.08-6 is applied based on the composition of the planning unit, not on a per lot basis.

\textsuperscript{34} Be it the GRZ or the NRZ.

\textsuperscript{35} This is to be distinguished from alternative language used elsewhere in the Scheme to describe land, such as reference to site area being a term used at clause 55.03-3 \textit{Site coverage objective} or clause 55.03-4 \textit{Permeability and stormwater management objective}.
91. Thus, and as endorsed by the Tribunal in *Melbourne CC*, an interpretation which leads to a reasonably practical result is to be preferred 36.

92. It is not the case when Councils process applications under clause 32.08-6 for land comprising multiple lots, that they require, or indeed obtain, multiple permit applications based on a per lot basis. This is because of the well accepted understanding of the concept of the planning unit and it being aimed at a common sense outcome.

93. In *Mornington Peninsula Shire Council v Lindsay Edward Fox & Paula Fox & W Everton Park Pty Ltd & Ors (Fox)* [2003] VCAT 772 the planning unit was described as follows37:

> A planning unit is the area of land used for a particular purpose in relation to which planning permission might be required. It is frequently co-extensive with the title boundaries, but it is not necessarily so constrained. A planning unit may be part of an allotment, or a number of allotments, or a portion of several allotments.

94. Consistent with a purposive approach, we submit that a common interpretation of the term in the same zone should be preferred.

95. We submit that it is curious for the word lot to be interpreted in the singular as in *Sargentson*, as compared to how that same term is applied at clause 32.08-6 (when considering whether a planning permit is triggered for two or more dwellings).

**The preferred approach.**

96. Council’s primary position is that the correct approach to the requirement is the approach that the Tribunal rejected in *Sargentson*, namely the planning unit approach. Thus, noting that there are three lots which are part of the application but the proposal is for a development across the ‘consolidated’ lots, the garden area requirement should be measured against what is proposed, namely the planning unit.

97. This approach is also consistent with interpreting the word lot, which is drafted in the singular, as if it was referring to lots in the plural. The *Interpretation of Legislation Act 1984* provides at section 37 that:

> In an Act or subordinate instrument, unless the contrary intention appears—

> (c) words in the singular include the plural; and

> (d) words in the plural include the singular.

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36 At [33]
37 At [35]
98. We submit that there is no contrary intention in the scheme. Indeed, we submit that having regard to the overall context, the intention appears to be that the requirement applies to the resultant outcome – the planning unit.

99. Accordingly, if this approach were adopted, then the requirement would read as follows:

an application to construct or extend a dwelling (or dwellings) or residential building on a lot or lots must provide a minimum garden area as set out in the following table:

100. Under this approach, what is more relevant is the area of the combined lots that is to be devoted to garden area.

101. This approach also has the benefit of providing for an approach more consistent with other requirements in the zone, for example that relating to the subdivision which creates vacant lots. In relation to those cases, which are subject to a similar requirement but drafted differently, the issue is the minimum garden area in the resultant lot pattern. In the same way, with the approach to the interpretation of the provision that Council contends for, the approach is to look at the ultimate outcome rather than the starting position.

**Legal Question No. 1**

102. The first of the four legal questions is posed as follows:

Is the meaning of and interpretation to be given to clause 32.08-4 dependent upon the context and the facts of the application under consideration, in which case the way that the minimum garden area requirement is to be applied is dependent upon the type of application and the composition of the planning unit?

103. Our answer to this question is ‘yes’.

104. We do not here seek to provide an examination of all of the possible development permutations. Ultimately, each case has to be determined on its facts applying appropriate principles of statutory interpretation.

105. However, we note that not all lots sought to be part of a future consolidation will be identical in site area. It is conceivable that 2 lots will be, from time to time, of different land area in a way where by one example might comprise:

105.1.1 1 lot could be under 400 square metres (Lot A); and

105.1.2 1 lot could be over 400 square metres (Lot B).

106. Adopting the approach urged by Council in this case would make it inconsequential what the area of the original lots are, as garden area would be calculated on the ultimate outcome –
the total of all lots or the planning unit. This would result in 35% of the total being dedicated to garden area (in instances where the total site area exceeds 750 square metres).

107. It is also conceivable that a permit applicant may present an application proposing the ultimate consolidation of a number of small lots each less than 400 square metres at the time the application is made.

108. On the basis of the 2, 3, 4 or more lots in this scenario, a reading of clause 32.08-4 of the Scheme as occurred in the Sargentson decision, would lead to an outcome where No garden area was attributed to this future development. Yet this scenario might well be within an established part of a suburban area, zoned GRZ, but would escape contributing more widely to the garden area of the city because it is not calculated by adopting the planning unit approach.

109. We respectfully submit this cannot be to the advancement of the purpose of the provision when one reads the Scheme as a whole.

Legal Question No. 2

110. The second of the four legal questions is:

If the answer is Yes, then how is clause 32.08-4 to be applied in the following example?

- The subject land in the application comprises one or more lots (planning unit). The application is for a multiple townhouse/unit type proposal.

Specifically, is the garden area requirement to be applied to the planning unit or is each lot comprising the planning unit required to meet the minimum requirement as they existed at the time of the application?

111. In Council's submission, for the reasons already advanced, the application of the minimum garden area requirement for an application for a permit to construct a multi-unit development across multiple lots should be calculated based on the composition of the planning unit.

112. The facts of the case at hand is a reasonably common scenario. It involves an application for a development over a number of lots which in the developed outcome would appear to be one development on a large lot. We submit that in this common developmental scenario the adoption of a meaning which is consistent with the outcomes which are commonly measured by the Tribunal is a preferred outcome.

113. In Sargentson, the Tribunal appears to place undue emphasis on a component of the definition of lot at clause 73.01, that being:

which can be disposed of separately
114. However, even the reference to these words does not do any harm to the approach suggested in this submission. A planning unit comprising of more than one lot can be sold as a parcel of land comprising multiple lots thus meeting the requirement that the consolidated lot can be sold separately.

**Legal Questions No. 3 & 4**

**Can Consolidation be a condition of permit?**

115. The need to answer questions 3 and 4 falls away by the answer to the earlier questions.

**CONCLUSION**

116. Council submits:

116.1 the modern principles of statutory interpretation ought be adopted by the Tribunal to assist in the construction of clause 32.08-4 of the Monash Planning Scheme;

116.2 applying the modern principles of statutory interpretation, the Tribunal must adopt a purposive approach to the interpretation of the Scheme and must read the Scheme as whole;

116.3 adopting a purposive approach to the interpretation of the provision leads to a conclusion that the answers to the questions of law in this matter, are, as follows:

1) Yes

2) The garden area requirement is to be applied to the planning unit, not on a per lot basis.

3) It is unnecessary to answer this question.

4) It is unnecessary to answer this question.

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Maddocks
Terry Montebello
Lawyers for the Respondent
19 June 2019