

Daylight Assessment at VCAT

The following cases are instructive of VCAT's most recent positions on equitable development, internal and external amenity with regard to assessing daylight.

Nguyen v Darebin CC [2016] VCAT 665

Shepherd v Yarra CC [2016] VCAT 588

Denson v Boroondara CC [2016] VCAT 504

Lifestyle Living Pty Ltd v Knox CC [2016] VCAT 446

G3 Projects Pty Ltd v Yarra CC (Red Dot) [2016] VCAT 373

CBD Developments Pty Ltd v Moreland CC [2016] VCAT 325

11-15 Brunswick Road Pty Ltd v Moreland CC [2016] VCAT 67

Third Street Pty Ltd v Stonnington CC [2015] VCAT 1768

Jezmac Pty Ltd v Glen Eira CC [2015] VCAT 1074

Gesher Pty Ltd v Yarra CC [2015] VCAT 506

Internal Amenity

In **Nguyen**, the tribunal upheld that the appeal and application process is not the appropriate place for significant redesigns. The application was refused due to the degree of change which would be required to achieve acceptable internal amenity.

In **Shepherd**, a distinction was drawn between daylight and direct sunlight, having been misunderstood by an objector. This emphasizes the importance of communication with non-practitioners over issues of language.

In **Denson**, an applicant sought relaxation on internal amenity requirements. Due to proximity to a university, the applicant suggested that dwellings may be used as student accommodation. The tribunal noted that some applications are explicitly for student accommodation, but in this development dwellings could be occupied by anyone, and thus no concessions should be made.

In **G3 Projects**, the tribunal stated that the appropriate measures for best practice are derived from reference documents such as BESS in the Yarra scheme. With regards to best practice, it should be pursued where it does not have a significant adverse effect on other design elements. More broadly, a proposal's response to ESD objectives should be assessed with regard to the constraints it faces.

In **CBD Developments**, the tribunal used modelling provided by Dr Phillip Greenup in the absence of consistent state policy. Contrasting this with **G3 Projects** builds a strong case for putting assessment tools into local policy.



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External Amenity

While ResCode does not provide strict standards when assessing external amenity impacts in a C1Z, the tribunal regarded it as useful guidance in *Shepherd*

In another C1Z development, *11-15 Brunswick Road*, the tribunal found that in areas with high development potential, such as Commercial 1 Zones, buildings cannot reasonably expect secondary outlooks to be protected from development.

Equitable Development

In *Lifestyle Living*, council suggested that a future neighbouring development which mirrored the height and light courts of the review site would not be able to provide for equitable development of the neighbouring site. The tribunal accepted that it is reasonable to expect a neighbouring site to adopt similarly configured if not mirrored light courts, and to take advantage of sections of blank wall on the review site.

In *CBD Developments*, the tribunal expressed a preference for contextual responses to equitable development, rather than adhering strictly to setbacks, enabling constrained sites to be developed, with neighbouring less constrained sites shouldering a greater burden of amenity.

Given this, it is important to refer to this practice when assessing less constrained sites to ensure that an appropriate overall level of amenity is found, otherwise less constrained sites will be allowed to satisfy bare minimum requirements, and more constrained sites will fail to meet even those.

In *Third Street*, the tribunal found that where a site is particularly constrained, there is a need for clever design solutions to approach this. In the applicant's proposal the tribunal found this lacking and refused to grant a permit.

In *Jezmec*, an adjoining lot was subject to an application to develop at three storeys, and this three storey development would provide acceptable amenity to both sites. Tribunal held however that three storeys was "not the reasonable potential of the adjoining property". Given the location in an activity centre, and other development nearby, a neighbouring development of six to eight storeys was considered a real possibility, which would result in unacceptable amenity for the review site. As a result of this VCAT affirmed the decision of the responsible authority to refuse a permit.

Principles of Equitable Development

As summarized in *Gesher*, the guidelines for assessing equitable development rights are:

1. *Equitable does not mean equal.*
2. *Development should not be too dependent on borrowing from neighbouring sites for its amenity.*
3. *Development should not unreasonably fetter redevelopment opportunities on adjoining sites.*
4. *The site size, proportion and context will influence how amenity can be equitably shared between adjoining sites.*
5. *In the absence of a specific proposal for an adjoining property, development should not have to satisfy a speculative or hypothetical worst case scenario on an adjoining property.*

This last point on development scenarios for adjacent properties was raised again in *Jezmec*, and based on that it seems the key words are "speculative or hypothetical", in *Jezmec* a standard of "reasonable potential" is applied to assess against future development.

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