VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P1440/2019  Permit Application no. TPA/50270 |
| CATCHWORDS | |
| Section 77 of the Planning & Environment Act 1987; Monash Planning Scheme; General Residential Zone Schedule 2; Vegetation Protection Overlay Schedule 1 (VPO1); Removal of Vegetation. | |

|  |  |
| --- | --- |
| APPLICANT | Bridging Design Studio |
| responsible authority | Monash City Council |
| SUBJECT LAND | 25 Hunter Street GLEN WAVERLEY VIC 3150 |
| WHERE HELD | Melbourne |
| BEFORE | Alison Slattery, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 12 February 2020 |
| DATE OF ORDER | 8 April 2020 |
| CITATION | Bridging Design Studio v Monash CC [2020] VCAT 475 |

# Order

### Permit granted

1. In application P1440/2019 the decision of the responsible authority is set aside.
2. In planning permit application TPA/50270 a permit is granted and directed to be issued for the land at 25 Hunter Street, Glen Waverley in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:

* Removal of vegetation in a Vegetation Protection Overlay Schedule 1.

|  |  |  |
| --- | --- | --- |
| **Alison Slattery**  **Member** |  |  |



# Appearances

|  |  |
| --- | --- |
| For applicant | Ms Edelene Loke, town planner of Ratio Consultants Pty Ltd. She called arboricultural evidence from Mr Dean Simonsen of Treemap Arboriculture |
| For responsible authority | Mr James Turner, town planner |

# Information

|  |  |
| --- | --- |
| Description of proposal | Removal of vegetation. Tree 3 (of the Treemap report), a Magenta Cherry (Syzygium paniculatum) is proposed to be removed. The tree is located within the front setback, close to the frontage of the existing derelict dwelling. Tree 3 is located around 7-8 metres from the front boundary. It has a DBH of 57cm, a TPZ of 6.84m, an SRZ of 2.72m, a height of 12.5m and a width of 13m. Pursuant to the Treemap Arboriculture report, the health of the tree is fair, the structure fair to poor, and the tree is native to NSW. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit. |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone Schedule 2 (GRZ2).  Vegetation Protection Overlay Schedule 1 (VPO1) |
| Permit requirements | Clause 42.02-2 a permit is required to remove vegetation. |
| Relevant scheme policies and provisions | Clauses 22.01, 22.05, 42.02, and 65 |
| Land description | The site is located on the western side of Hunter Street, Glen Waverley opposite the intersection with Lily Street. The site is currently developed with a single storey weatherboard dwelling that is derelict. A crossover to the northern portion of the frontage leads to a garage. The site has an area of 725 square metres, is encumbered by an easement traversing the rear boundary, includes a slope from east to west of 2 metres, and includes several larger trees throughout the site.  Surrounding sites are residential in nature and generally include single and double storey dwellings of varied ages. Dwellings generally include carports or garages set behind the frontage of the dwellings. Multi unit development typology is clearly evident as the emerging typology, usually with two dwellings on a lot.  The site is well served with access to schools, parks and open spaces, and shopping facilities at Syndal. The site also has good access to community facilities and public transport is available by way of buses and Syndal train station to the south.  Vegetation in the area is relatively prominent with properties including some front and rear planting of canopy trees and lower storey planting. Street trees make a significant contribution to the vegetation in the streetscape. Overall, there is a sense of a backdrop of mature canopy in a garden setting, such that long views include scattered, but reasonably consistent canopy. |
| Tribunal inspection | The tribunal undertook an unaccompanied inspection of the site after the hearing |

# Reasons[[1]](#footnote-1)

## What is this proceeding about?

1. On 22 May 2019 Monash City Council issued a refusal to grant a planning permit for the removal of vegetation, being tree 3, the Magenta Cherry, at 25 Hunter Street, Glen Waverley.
2. The decision was based on Council’s view that there is inadequate justification for the removal of the tree under the Vegetation Protection Overlay or the local policies. It was submitted that the tree makes a significant contribution in the streetscape.
3. The review applicant, Bridging Design Studio, applied to the Tribunal to review this decision. The applicant, through Ms Loke disagrees with Council and asserts that the tree makes limited contribution to the streetscape, and that its retention renders the site virtually unusable. In this position she relied on the arboricultural evidence of Mr Dean Simonsen of Treemap Arboriculture. It was her contention that the tree removal within the Vegetation Protection Overlay is appropriate and that the state and local policies lend support to the proposal.

## What are the key issues?

1. The key issues for determination are:
   1. Is the tree removal an appropriate response to the neighbourhood character?
2. Is the proposal consistent with the purposes and decision guidelines of the Vegetation Protection Overlay?
3. The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions with regard to the applicable policies and provisions of the Monash Planning Scheme, I have decided to set aside the Council’s decision. My reasons follow.

**Is the tree removal an appropriate response to the neighbourhood character?**

1. Throughout the Monash Planning Scheme, local policy imperatives include (amongst other things) the protection of existing neighbourhood character through the promotion of the Garden City Character theme. Any tree removal needs to be respectful of these character considerations.[[2]](#footnote-2)
2. The Garden City emphasis is outlined within the Residential Development and Character Policy[[3]](#footnote-3) which states:

* *The Garden City Character, as identified in the Municipal Strategic Statement, is a core value held by the community and Council as a significant and important consideration in all land use and development decisions in most residential areas.*

1. Clause 22.01 also seeks to encourage new development that responds to the character of existing residential areas, integrating the theme of Garden City with maintenance of a highly vegetated environment. Specifically Clause 22.01 seeks:

* *To build upon the important contribution that landscaping makes to the Garden City Character of Monash.*
* *To encourage new development to achieve architectural and urban design outcomes that positively contribute to the neighbourhood character having particular regard to the desired future character statement for the applicable residential Character Type.*

1. Additionally, relevant residential policy at Clause 22.01-3 includes to:

* *Preserve and enhance the treed character of Monash;* and
* *Retain or plant canopy trees, particularly within front setbacks to soften the appearance of the built form and contribute to the landscape character of the area.*

1. Reinforcing this thrust of Garden City and vegetation protection, Clause 22.05-3 of the Monash Planning Scheme seeks, wherever possible, to ensure the retention of “*existing semi-mature and mature canopy trees*” in order to “*ensure maintenance of the tree canopy*.”
2. Mr Turner submitted that the policy[[4]](#footnote-4) seeks to maintain and enhance the streetscape character of ‘Garden City’ through the retention of canopy trees. He submitted that the subject tree was able to be seen from distant vantage points, such as from the Syndal Railway Station, a raised platform station, around 120 metres to the south of the site. Additionally, he noted views of the tree from Shirley Avenue to the west. In this way, he submitted, due to views, albeit limited, from distant points, that the presence of the tree was significant in a wider realm, as well as the Hunter Street streetscape. I disagree.
3. I am satisfied that the proposal represents an appropriate response to the objectives and policy in Clause 22.01 Neighbourhood Character Policy and Clause 22.05 Tree Conservation. I say this for the following reasons:

* The removal of the vegetation will allow for a dwelling that includes a front setback consistent with that found in the streetscape. In Hunter Street, front setbacks vary from around 7.5 to 9 metres. If Tree 3 was to be retained, the TPZ of the tree would require a front setback of 13.5 metres, close to double that already found in the street. This does not promote consistency of front setback to visually unify the streetscape as sought within Clause 22.01.
* If Tree 3 was to be retained, the TPZ would extend across the frontage of the site, such that any new driveway would need to employ techniques for root protection that are both prohibitively expensive and difficult.
* Any new dwelling on the site, if reasonably set back in line with the 7.5 to 9 metre front setback evident in Hunter Street, can include provision of a spacious and well vegetated front open space that is capable of supporting a canopy tree to soften the appearance of the built form and contribute to landscape character. The conditions of this permit require the planting of two canopy trees, of which at least one must be located in the front setback.
* At page 15 of his submission, Mr Turner for Council referred to the arboricultural report of Mr Miller submitted with the town planning application, relying on this report to ascertain the health and SULE of the tree, submitting that the tree is of fair health with a life expectancy of 10-20 years. However, it has been demonstrated, on the basis of the evidence of Mr Simonsen, and the confirmation email of Mr Robert Mineo of Senior Arborist of Council, that the report of Mr Miller did not characterise the tree correctly. Indeed, the species of the tree was not correctly identified. As such, it is not possible to rely on the veracity of the report prepared by Mr Miller.
* I find the evidence of Mr Simonsen, with the species of the tree correctly identified, and with cross examination completed, far more compelling than the unexaminable and incorrect report of Mr Miller.
* Having conducted a site inspection, I agree with Mr Simonsen that the tree in question is a Magenta Cherry, or Syzygium paniculatum. This is a tree that is not native to Victoria. Rather, it is a New South Wales subtropical rainforest species that enjoys far richer soils than are available on the review site.
* I agree that this is a tree that has significant fruit drop, which Mr Simonsen suggested attracts possums. Mr Simonsen also suggested that these trees do not fare well once infested with possums. I have no reason to doubt this.
* I agree that the SULE of the tree is likely less than specified in the Miller report. Perhaps even somewhere short of 15 years, due to the inappropriate location of a tree of this species. Considering it is the intention of the landowner to develop the site with a dwelling, it would be prudent to include vegetation that might ‘last the distance’ of the usability of the dwelling, which presumably is greater than 15 years. To that end, I am satisfied that the inclusion of a new canopy tree to grow with the life of the new dwelling is preferable.
* I find the representation that the tree is significant due to its visibility from Syndal Train Station and from Shirley Avenue is overstated. There are glimpses of the tree canopy from these vantages, rather than the tree forming a significant part of the landscape. I am satisfied, due to the prevalence of significant street trees and other canopy trees in the private realm, including on the review site, that the loss of this tree will not be readily perceived from either vantage point.
* In Hunter Street, the perception of the tree is somewhat diminished by the location of the street trees and planting in the private realm to the north and south, and on the review site. I note the retention of the Liquidamber in the frontage will limit the appreciation of the loss of the vegetation.

1. I acknowledge that the loss of the tree will be appreciated. However, this is a tree that will diminish opportunities to appropriately develop the site, lacks longevity, is an inappropriate species, and has limited presence in the immediate or wider realm. For these reasons, I am satisfied that the tree removal represents an appropriate response to local policy requirements at Clauses 21.04, 22.01 and 22.05 along with state policy requirements.

**Is the proposal consistent with the purposes and decision guidelines of the Vegetation Protection Overlay?**

1. The review site is located with the Vegetation Protection Overlay Schedule 1 (VPO1). Relevant to this proposal, the Vegetation Protection Overlay (VPO) has as its objectives the following:

* *To implement the Municipal Planning Strategy and the Planning Policy Framework.*
* *To protect areas of significant vegetation.*
* *To ensure that development minimises loss of vegetation.*
* *To preserve existing trees and other vegetation.*
* *To recognise vegetation protection areas as locations of special significance, natural beauty, interest and importance.*
* *To maintain and enhance habitat and habitat corridors for indigenous fauna.*
* *To encourage the regeneration of native vegetation.*

1. Schedule 1 to the Vegetation Protection Overlay has the following Statement of nature and significance of vegetation to be protected

*The significance of vegetation in Monash is in its contribution to the urban character of the municipality, particularly in residential areas. The Municipal Strategic Statement and tree conservation policy recognise the importance of canopy trees as a significant aspect of urban character. Canopy trees unify the streetscape in residential areas, avoid the impression of visual clutter, and provide a strong naturalistic image and a sense of enclosure within a street.*

*Existing on-site canopy trees contribute to the Garden City Character of Monash. Retention of canopy trees helps integrate new development into the existing urban form and reduces the impact of higher densities or larger buildings on neighbourhood character.*

*The tree canopy presents a “special” leafy character valued by the community in terms of consistent and visible vegetation and the opportunity for residents to live in a treed, predominantly low density, detached house environment. Retention of existing canopy trees is necessary to complement any new development.*

*The highest concentration of trees is to be found in the creek valley reserves and within private and public land adjacent to creeks and over old drainage lines and other easements.*

*The western slopes of the Dandenong valley are known for having a dense canopy of native trees. While most of these are due to planting that has occurred since development, there are some large remnant trees throughout the area.*

*Monash City Council is committed to conserving, continuing and extending the Garden City Character and all its elements throughout Monash.* *To ensure that development is in keeping with and contributes to the Garden City Character as set out in the Municipal Strategic Statement, Council is following a policy of retaining the existing tree canopy on private and public property.*

1. I am satisfied that the proposed development responds well to the objectives and decisions guidelines of the Vegetation Protection Overlay Schedule 1. I say this for the following reasons:

* Much of the statement of significance for this schedule revolves around the density of development; a matter not applicable here. This is an application for the removal of vegetation and such considerations for medium density are hypothetical. That said, it was noted that the landowner has an intention to build a single dwelling on the lot.
* As noted above, the practicality of retaining the tree is low. The retention of the tree would result in a front setback that is discordantly large, and would require complicated and technical solutions to the provision of a driveway in the TPZ. Neither of these outcomes are warranted by a tree that has limited SULE and limited meaningful presence in the streetscape.
* As noted previously, I am satisfied that the impact that the loss of tree will be minor. The tree does not have a prominent impact in the streetscape and its loss will not reduce the valued special leafy character of Hunter Street.
* I agree with Mr Simonsen having regard to the appropriateness of the tree species, its likely longevity and its fruit dropping. All of which serve to diminish the need to retain this tree.
* It is not viable to relocate the tree.
* The site is not located within any creek valley.
* The tree does not serve to conserve important flora and fauna.
* The tree is not rare, nor was it put that it supports rare species of flora or fauna or forms part of a wildlife corridor.
* The removal of the tree will have limited effects on ground water recharge.
* The site slope does not exceed 20%
* The site is not within 30 metres of a waterway or wetland.
* The site is not subject to soil erosion, slippage or salinisation.
* The removal of the tree will not adversely affect the integrity or long term preservation of an identified site of scientific, nature conservation or cultural significance.
* The site is not of heritage or cultural significance.

1. I am satisfied that the proposed tree removal will not have a deleterious impact on the vegetated character of the area.

## what conditions are appropriate

1. During the hearing conditions were discussed and I make the following responses:
   1. Condition 1 seeks the replanting of two canopy trees. I find this a reasonable request noting that Council advised that only one tree is required in the front setback, with another to be provided to the rear open space (1(d)). No changes to conditions.
   2. Condition1(b) requires the trees to be native. Ms Loke suggested that this was unreasonable given the VPO1 does not specify native vegetation. This is not quite correct. I note the header clause of the VPO includes references to native vegetation n the decision guidelines. I am inclined to retain the requirement for native vegetation given the emphasis on the inappropriateness of the existing tree, a tree that is from NSW. Indeed it would be far better should the tree be indigenous, but that is a matter for the landowner, rather than a stipulation I am prepared to include. No changes to conditions.
   3. Condition1(d) requires a setback of at least 3 metres to buildings and boundaries. I think this is reasonable given the likely tree canopy width that will result from a tree with a minimum 10 metre height at maturity. No changes to conditions.
   4. Condition 3 requires the replacement tree to be planted within 6 months of the removal of the tree, and notification to Council within 14 days of the planting. I am satisfied that this is sufficient time to plant a replacement tree and to notify Council. If there is some reason why this cannot be complied with, condition 2 provides relief by way of the opportunity to apply to amend these times, should the need arise. No changes to conditions.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is set aside. A permit is granted subject to conditions.

|  |  |  |
| --- | --- | --- |
| **Alison Slattery**  **Member** |  |  |

# Appendix A – Permit Conditions

|  |  |
| --- | --- |
| Permit Application No | TPA/50270 |
| Land | 25 Hunter Street GLEN WAVERLEY VIC 3150 |

|  |
| --- |
| What the permit allowS |
| In accordance with the endorsed plans:   * Removal of vegetation in a Vegetation Protection Overlay Schedule 1. |

## Conditions

1. Prior to the removal of the tree, a plan is to be submitted detailing two (2) replacement native canopy trees to be planted on site, to the satisfaction of the Responsible Authority. Details to be provided include:
   1. Location and species of the tree to be removed;
   2. Species of the proposed native canopy tree;
   3. Height of the trees at planting and maturity (minimum 10 metres); and,
   4. Location of the planting to be no closer than three (3) metres to any building or property boundary; one to be planted within the front setback, and one within the rear setback.

When approved, the plan will be endorsed and will then form part of the permit.

### No Alteration or Changes

1. The tree removal as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
2. The replacement tree(s) must be planted, and in a healthy state, within six (6) months of the removal of the tree and the Responsible Authority must be notified within fourteen (14) days of the replacement tree(s) being planted.

### Permit Expiry

1. This permit will expire in accordance with section 68 of the Planning and Environment Act 1987, if the tree is not removed before two (2) years from the date of issue.

In accordance with section 69 of the Planning and Environment Act 1987, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within six months of the permit expiry date, where the development allowed by the permit has not yet started; or within 12 months of the permit expiry date, where the development has lawfully started before the permit expires.

**– End of conditions –**

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. [↑](#footnote-ref-1)
2. Clause 21.04 [↑](#footnote-ref-2)
3. Clause 22.01-1 [↑](#footnote-ref-3)
4. Clause 22.01-3 [↑](#footnote-ref-4)