

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P546/2023  
PERMIT APPLICATION NO. TPA/54835

### CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Monash Planning Scheme; Vegetation Protection Overlay; Removal of one tree.

<b>APPLICANTS</b>	Ronald Anton James Milne & Laura Capozzi
<b>RESPONSIBLE AUTHORITY</b>	Monash City Council
<b>SUBJECT LAND</b>	35 Lynden Grove, MOUNT WAVERLEY VIC 3149
<b>WHERE HELD</b>	Melbourne
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	31 July 2023
<b>DATE OF ORDER</b>	2 August 2023
<b>CITATION</b>	Milne v Monash CC [2023] VCAT 886

### ORDER

#### Permit granted

- 1 In application P546/2023 the decision of the responsible authority is set aside.
- 2 In planning permit application TPA/54835 a permit is granted and directed to be issued for the land at 35 Lynden Grove, Mount Waverley VIC 3149 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
  - The removal of one tree in the Vegetation Protection Overlay

**Joel Templar**  
Member



## APPEARANCES<sup>1</sup>

For applicant	Mr Ron Milne and Ms Laura Capozzi.
For responsible authority	Ms Sally Moser, town planner of Monash City Council.

## INFORMATION

Description of proposal	Removal of one tree, being a 15 metre high Liquidamber, located approximately 9 metres back front the front boundary and generally central on the site although positioned slightly to the east.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme
Zone and overlays	General Residential 3 Zone Vegetation Protection Overlay Schedule 1
Permit requirements	Clause 42.02-2 – to remove, destroy or lop vegetation specified in the schedule to the overlay. The schedule identifies that trees

---

<sup>1</sup> All appearances were via an online platform.



## Land description

The review site is located on the northern side of Lynden Grove, in Mount Waverley, almost directly opposite the intersection with Davison Street. It is generally rectangular in shape with a frontage of 17.6 metres, an average depth of 38.55 metres and an area of approximately 682 square metres. The front boundary has a slight angle to it being on the outer apex of a minor kink in the road reserve. The land is currently vacant following the demolition of a post War dwelling some time in late 2022.

The tree in question sits towards the front of the site, set back approximately 9 metres from the front boundary and 6 metres from the east boundary.



Aerial image of the review site with red arrow indicating tree to be removed.<sup>2</sup>

<sup>2</sup> Source: the council's submissions, page 4. Annotation by the council.

## REASONS<sup>3</sup>

- 1 This proceeding concerns the review by the applicants of the council's decision to refuse to grant a permit for the removal of one tree from the review site.
- 2 The applicants have demolished what was likely to have been an original house on the land from the post War era. They said they intend to build one dwelling on the land<sup>4</sup> and that the position of the tree in question makes it very difficult not only to build the dwelling they want, but would make the construction of any dwelling on the land a difficult exercise.
- 3 The council said that the tree is a significant contributor to the character of the surrounding area, is in good health and that there is ample policy support for the retention of the tree. It also said that the existing tree is a constraint on the land that a new design could overcome in order to retain it. The council also said that numerous other trees had been removed from the review site since the applicants purchased the property in mid-2022, some of which required planning permission but which was not obtained, and some that was exempt from the need for a planning permit. It also said that the relevant decision guidelines at clause 59.06 of the planning scheme require a decision maker to consider any vegetation either actually removed or permitted to be removed within the last 3 years.
- 4 At the hearing, I indicated to the parties that I would grant a permit for the removal of the tree, but that an additional three trees would need to be planted and would be included as conditions on the permit, with two required in the frontage setback and one in the rear, north-west corner. I did not provide reasons for my decision at the hearing but said that I would do so shortly afterwards in writing as part of my orders. These are the reasons for my decision.
- 5 There were various extraneous matters that were raised in both written and verbal submissions at the hearing, including what appears to be a lengthy and perhaps complicated set of circumstances surrounding previous permit applications for the removal of vegetation from the site. These have had no bearing on my decision because they relate to previous permit applications, as well as submissions that went to matters of critiquing the council's processes. The Tribunal's role is not ordinarily to review the council's handling of a permit application and certainly not in this case. That said, I acknowledge that these are real and important matters for the applicants. It is just that they are outside the scope of the Tribunal's role in this proceeding.

---

<sup>3</sup> The pre-filed written submissions and material of the parties, oral submissions at the hearing and any supporting exhibits tendered at the hearing 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.

<sup>4</sup> For which no planning permit is required under the current planning controls that apply to the site.



- 6 I acknowledge that there is some foundation in the planning scheme for the retention of this tree, based on the VPO1 control that triggers a permit for its removal, and associated considerations, including those in the VicSmart provisions at clause 56.09 of the planning scheme. However, there are competing factors in my view, that outweigh these.
- 7 The applicants provided an arborists report as part of the permit application and the council's own arborist reviewed it. There was not a lot of difference in the strict arboricultural assessment of the tree between the two: Fair health, Good Structure, Useful Life Expectancy of 15-30 years. In isolation, the condition of the tree might warrant retention of it.
- 8 However, the review site is zoned General Residential Zone, where residential development is expected.
- 9 I agree with the applicants that the position of the tree in a rather awkward location for future development of the land, whatever that might be. Of course, it could be designed around, it is not beyond the realms of possibility that this could occur. However, on balance, I find that the tree, being roughly at where a front setback might be expected at nine metres from the front boundary, and roughly one third of the way across the site, makes for a difficult situation.
- 10 In addition, the provision of three trees effectively as compensation for the removal, will obviously and eventually provide for an overall net increase in canopy vegetation, and will also allow them to be planted in locations to the satisfaction of the responsible authority such that they can complement the development proposed.
- 11 Although there is some risk that because no permit is required for the development which the applicants say they intend to undertake (a single dwelling), the granting of a permit may provide the opportunity to remove the tree but not develop the land how the applicants say they intend to. Things can change.
- 12 However, I have also required that three trees be planted to compensate for the removal of the tree. If the applicants 'take benefit' of the permit, that is, they remove the tree, then they will be required to comply with the conditions of it too, including the replacement planting and maintenance and retention of those trees.
- 13 Further, the removal and replanting of three trees, two in the front setback, also allows for a more considered approach to landscaping of the review site, in conjunction with the development of the land. This is not a new concept and is one that is often accepted by this Tribunal in cases where existing vegetation removal needs to be weighed against new development.

## **CONCLUSION**

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



Joel Templar  
**Member**



## APPENDIX A – PERMIT CONDITIONS

<b>PERMIT APPLICATION NO</b>	TPA/54835
<b>LAND</b>	35 Lynden Grove, MOUNT WAVERLEY VIC 3149

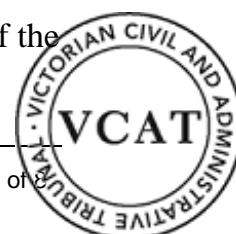
### WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- The removal of one tree in the Vegetation Protection Overlay.

### CONDITIONS

- 1 Before the vegetation authorised by this permit is removed, a site plan drawn to scale and correctly dimensioned must be submitted to and be to the satisfaction of the Responsible Authority. When approved, the plans will be endorsed and then form part of the Permit. The plan must show:
  - (a) The planting of:
    - i Two (2) trees that will have a minimum growth height of 10 metres with a canopy spread to match the species of the tree removed at maturity and located no more than 9 metres from the front boundary.
    - ii One (1) tree that will have a minimum growth height of five (5) metres, with a minimum canopy spread of three (3) metres at maturity located in the north-west corner of the site.
  - (b) The species of the trees required by condition 1(a), which must be to the satisfaction of the responsible authority. Information about the species must be shown including botanical and common name, likely height and canopy spread at maturity taking into account environmental factors, and proposed size at time of planting in accordance with condition 3.
  - (c) The specific position of trees required by condition 1(a) dimensioned from site boundaries.
- 2 The endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 3 One of the replacement trees required by condition 1(a)(i) must be a minimum height of 2 metres and be in a healthy state, and is to be planted within eighteen (18) months of the removal of the tree permitted to be removed under this permit.
- 4 The Responsible Authority must be notified within fourteen (14) days of the replacement trees being planted.



- 5 The replacement trees are to be retained and maintained to the satisfaction of the Responsible Authority to enable them to reach full potential growth for the respective species.

**Expiry of permit for development**

- 6 This permit will expire if the tree removal does not occur within two (2) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

– **End of conditions** –

