

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P78/2024
PERMIT APPLICATION NO.TPA/55406

APPLICANTS	Danura Damith Miriyagalla & Sasika Sakura Miriyagalla
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	1A Kathleen Avenue MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	30 April 2024
DATE OF ORDER	30 April 2024

ORDER

- 1 In application P78/2024 the decision of the responsible authority is set aside.
- 2 In planning permit application TPA/55406 a permit is granted and directed to be issued for the land at 1A Kathleen Avenue Mount Waverley VIC 3149 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - Removal of one (1) tree on land affected by the Vegetation Protection Overlay Schedule 1.

Michael Nelthorpe
Member

APPEARANCES

For applicant	Mr Danura Damith Miriyagalla.
For responsible authority	Ms Sally Moser, Principal Planner/Appeals Advisor.



INFORMATION

Description of proposal	Removal of a Lemon Scented Gum in the front setback of a dwelling.
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 Zone Schedule 3 Vegetation Protection Overlay Schedule 1
Permit requirements	Clause 42.02-2: to remove, destroy or lop any vegetation specified in a Schedule to the Vegetation Protection Overlay.
Land description	This 259.8sqm lot is on the north side of Kathleen Avenue, Mount Waverley. A single dwelling set back between 4-5m of the frontage occupies the site.



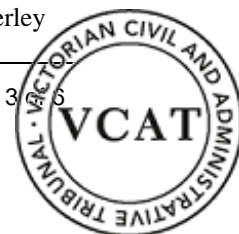
REMARKS

- 1 Mr and Mrs Miriyagalla ('the applicants') seek a review of the decision of the Monash City Council ('the council') to refuse to grant a permit allowing the removal of a 11-14m high Lemon Scented Gum in the front setback of the dwelling at 1A Kathleen Avenue, Mount Waverley.
- 2 They say that an independent arborist has found that the tree is in a restricted area and no longer has the space to grow. They expect that its retention will allow the existing damage to their dwelling to continue to the detriment of their property and their amenity.
- 3 They say that the protection of this non-indigenous tree on policy grounds is not justified given its impact on their dwelling. They say that their property will continue to contribute to the area's vegetated quality through the retention of a similar, but larger, tree in the property behind theirs.
- 4 The council says that the tree should be retained as it makes a significant contribution to the leafy character of the immediate area. It says that the site's proximity to the Damper Creek Conservation means that the tree aids in the protection of native flora and fauna.
- 5 It says that Kathleen Avenue has a distinctively treed character and that the tree in question is an important element in the streetscape. It says that the loss of the tree would diminish the street's existing vegetated character.
- 6 It says that replacing the tree with a suitable species is not acceptable given the time it would take for that tree to reach maturity.
- 7 It questions the independence of the arborist report, saying that the arborist appears to downgrade the tree's significance because it is not indigenous. It says that the arborist has not adequately demonstrated that remedial or protective actions are unreasonable or impractical.
- 8 It acknowledges that there is a risk to the Miriyagalla's property but says that the arborist has not demonstrated an unreasonable risk. It queries whether the tree has caused the evident damage to the Miriyagalla's porch and whether it has outgrown the available space.
- 9 It relies on general policies that promote and encourage the 'Garden City character' of the municipality and on decisions of other divisions of the Tribunal that have upheld its decision to refuse to grant a permit for the removal of mature trees.¹

MY FINDINGS?

- 10 I made my decision at the hearing. I will set the council's decision aside and direct that a permit be issued. A summary of my reasons follows:

¹ *Lee v Monash CC* [2019] VCAT 686 and P76/2024 relating to 24 Tarella Drive, Mount Waverley (oral decision).



- 11 I consider that the arborist engaged by the applicants is correct in saying that this tree is too large for the space available for its growth. This finding is based on his conclusions and on my experience.
- 12 I prefer this arborist's assessment to the 'tick the chart' assessment undertaken for the council by Tree Logic. I disagree with Tree Logic's finding that there is no evidence of property damage because of the photographs tendered at the hearing. These photographs show large roots heading towards the stairs, which have shifted, and the dwelling.
- 13 I accept that the risk assessment in the report of the arborist engaged by the applicants is confusing. It appears to refer to risks involved in retaining the tree. I consider that it does not relate to the key issue, which is that this tree is too large for the space available to it.
- 14 I distinguish my decision from the decision in *Lu v Monash CC* [2019] VCAT 686 on the basis that the tree in that case was mature and was a greater distance from the house, and because the dwelling had been poorly maintained. I accept that there were alternatives to removing that tree and uncertainty about its impact on the dwelling.
- 15 I distinguish my decision from the decision relating to tree removal at 24 Tarella Avenue given that the tree in question was a significant distance from the dwelling.
- 16 Regarding the council's submissions, I consider that policy must be applied with discretion based on the facts and circumstances that apply. I accept that the Monash Planning Scheme emphasises the retention of canopy trees however, the policies that emphasise this outcome must be applied to the individual facts and circumstances of each case.
- 17 I accept that the tree in question contributes to the streetscape but find that this does not outweigh the fact that this tree is too large for the space allocated to it. The only viable solution is to require a replacement tree to be planted. While the council's draft conditions call for a tree with a mature height of 10m, I am concerned that this could result in the same problem emerging twenty years from now. I consider that a tree with a mature height of 7m is more appropriate and will require this by a condition of permit.
- 18 I also note that the council's draft conditions refer to two trees being planted. I see no reason for this and will require only one.

Michael Nelthorpe
Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/55406
LAND	1A Kathleen Avenue MOUNT WAVERLEY VIC 3149

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Removal of one (1) tree on land affected by the Vegetation Protection Overlay Schedule 1.

CONDITIONS

- 1 Prior to the removal of the tree, plans are to be submitted detailing one (1) replacement tree to be planted. Details to be provided include:
 - (a) The location of 1 replacement tree within the subject site in the front setback area.
 - (b) Species of trees (must be Australian Native);
 - (c) The expected height at maturity of the replacement tree must be no less than 7 metres. The minimum canopy spread of the must be no less than 4 metres at maturity.
 - (d) The height at planting in which the replacement trees must be planted at a semi- advanced height of 1.5 metres or above.

All to the satisfaction of the Responsible Authority

- 2 The tree removal as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 3 Other significant trees within the subject site must not be removed or destroyed without the written consent of the Responsible Authority.
- 4 The replacement tree 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 being planted.
- 5 The replacement tree is to be allowed to grow to its full potential and not be pruned to prevent growth.
- 6 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.
- 7 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 –

