

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P76/2024
PERMIT APPLICATION NO.TPA/55476

CATCHWORDS

APPLICANT	Robert Dakers Lindsay
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	24 Tarella Drive MOUNT WAVERLEY VIC 3149
HEARING TYPE	Hearing
DATE OF HEARING	22 February 2024
DATE OF ORDER	22 February 2024
DATE OF WRITTEN REASONS	8 May 2024
CITATION	Lindsay v Monash CC [2024] VCAT 428

ORDER

No permit granted

- 1 In application P76/2024, the decision of the responsible authority is affirmed.
- 2 In planning permit application TPA/55476, no permit is granted.

J Perlstein
Member

APPEARANCES

For applicant	Robert Lindsay, in person
For responsible authority	Jack Gleeson, assisted by Sally Moser, both of Monash City Council



REASONS

Oral reasons were delivered at the conclusion of the hearing on 22 February 2024. Written reasons were then requested by the council on 27 February 2024. Section 117(2) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) provides that if the Tribunal gives oral reasons, a party may request the Tribunal to give written reasons within 14 days. The council request was made within this time frame. Section 117(3) provides that the Tribunal must comply with such a request within 45 days after receiving it.

Unfortunately, the Tribunal member was not provided with the request made on 27 February 2024 and written reasons were not provided. The council made a further request on 2 May 2024, which was provided to the member on 3 May 2024 and actioned immediately.

The following is an edited transcript of the oral decision delivered at the conclusion of the hearing.

- 1 This is an application for review of a decision by Monash City Council to refuse to grant a permit for the removal of one tree on land affected by the Vegetation Protection Overlay, Schedule 1 ('VPO1').
- 2 Council refused the proposal, in summary, on the basis that the tree makes a significant contribution to the street and the Garden City Character of Monash and that the removal of the tree is not justified having regard to the VPO and its schedule 1, the decision guidelines of clause 59.06 and the council's tree conservation policy at clause 22.05.
- 3 The tree in question is a lemon scented gum (*Corymbia citriodora*) located adjacent to the northern boundary and within the front setback of the subject site. 24 Tarella Drive, for planning purposes, is located in the General Residential Zone 3 ('GRZ3'), and is in close proximity to the Damper Creek Conservation Reserve.
- 4 Planning permission is required under the VPO1 to remove vegetation that has a trunk circumference greater than 500mm, at 1200mm above ground level, and is higher than 10 metres. This tree is approximately 25 metres high and has a trunk diameter of 800mm and a canopy of 16 metres.
- 5 I agree with the council's assessment of the tree's value to the area as set out in paragraph 28 and 29 in its submissions as follows:

The tree makes a significant upper canopy contribution to the site, the streetscape and the locality. It is visually prominent in the landscape surrounding the subject land where other similar trees are also found. This canopy is evident in the aerial photographs of the location and the canopy provides vegetation linkages to land in the Damper Creek Reserve. This in turn creates important bird habitat and the loss of such significant vegetation is of concern.

It is evident from photographs of the subject tree (Attachment 16), that the loss of this significant tree would contribute to the erosion of the



municipality's garden city character in this location, and thus conflicts with the intentions of the above planning policy.

- 6 I understand that the applicant views the tree differently, as does his neighbour, and sees it more as a nuisance in terms of shedding bark, leaves, gum nuts and small branches. The applicant is concerned that he will be sued in the future if the tree causes damage to people or property, and he is found to not have taken reasonable care for the safety of the tree. He considers that ongoing maintenance and trimming of the tree is unreasonable and onerous and submits that the tree should be permitted to be removed.
- 7 The VPO provides the planning permit trigger for removal of the tree. Clause 42.02 of the Monash Planning Scheme ('Scheme') provides that an application to remove one tree is considered a VicSmart application and must be assessed against the provisions of clause 59.06 of the Scheme.
- 8 Clause 59.06 includes several decision guidelines which must be assessed by the responsible authority, in this case the Tribunal, before determining whether or not to grant a permit. I will go through each of the relevant guidelines shortly.
- 9 The final guideline refers back to the guidelines in the VPO and its schedule, which as the council noted, includes reference to the suite of local policies within the Scheme.
- 10 It is relevant that, in addition to the specific protection afforded to large canopy trees within the VPO, throughout Monash local policy it is clear that the Garden City Character of the municipality is highly valued, with particular value placed on retention of mature canopy trees and a specific tree conservation policy at clause 22.05, which includes, within its objectives, to promote the retention of mature canopy trees and encourage the planting of new canopy trees with spreading crowns throughout the municipality.
- 11 It is the Tribunal's role today to consider the application against the decision guidelines and determine whether the removal of the tree on the subject site is acceptable. While I understand the frustration of the permit applicant, and the burden that is placed on him by having this tree on his property, having assessed this proposal against the decision guidelines as required, and having heard the submissions of both parties, I conclude that a permit should not be granted for removal of this tree.
- 12 What I will do now is go through each of the decision guidelines that are relevant to this application and explain my reasoning.

The statement of significance and the objectives contained in the schedule to the overlay and whether the proposal will adversely affect that significance or the objectives.

- 13 Schedule 1 to the VPO includes the following, in its statement of nature and significance of vegetation to be protected:

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.

...

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 Planning Strategy, Council is following a policy of retaining the existing tree canopy on private and public property.

- 14 The objectives of this overlay include to conserve significant treed environments.
- 15 This tree clearly contributes to the Garden City Character, is proximate to the Damper Creek Conservation Reserve, and assists in the continuation of the leafy character found within that reserve. While the applicant submits the removal of one tree won't make a difference, it is this tree when combined with others of similar character, such as the tree within the frontage of number 30 Tarella Drive, that combine to create and enhance this valued character. While there is other vegetation on this site, including the spruce tree within the canopy of the lemon scented gum, removal of the gum with its height and expansive canopy, will create a hole in this essential character, which is adverse to the statement of significance and objectives.

Whether the tree proposed to be removed, destroyed or lopped, contributes to the significance of the area and whether the proposal would adversely affect that significance.

- 16 This guideline is similar to the first guideline, and I have already noted the contribution I consider the tree makes to the significance of the area. I do



concur with the council's submissions at paragraph 32 though, where council says that the tree 'visually dominates the streetscape, is actively contributing to the Garden City Character and provides a significant contribution to the tree canopy of the area'. I agree with the council that should a permit be issued for its removal, these contributions would be lost. Any proposed replacement tree or planting would take several years to achieve the significance that the subject tree brings to the streetscape and character of the area.

Whether the removal or lopping of the tree is needed because of the health of the tree.

The reasons for removing the tree including the health of the tree to be removed.

17 The arborist report provided by the applicant to the council states the health and structure of the tree is fair, and the retention value medium, with the useful life expectancy of 15 to 40 years.

18 In the discussion section, the arborist states as follows:

Tree 1 is poorly positioned between Gas and Water meters and Adjacent to High Voltage (HV) and Low Voltage (LV) power lines.

The tree has outgrown the position and space that it currently occupies.

Power line clearance has not occurred over the lines and now overextended branches with extensive terminal weight are growing out over the street.

There is a history of past failures where branches have caused power outages in the street.

More than 30% of the canopy is over the top of power lines. If pruning over the power lines was an option, the remaining canopy, over the residence, would be exposed to wind shear it has not been previously exposed to.

Target pruning large scaffold branches over power lines would mean that sections of the tree would need to be removed well over tolerable sizes. Pruning large scaffold branches from the tree would result in stress for the tree, and epicormic production.

Previous failures in that section of the tree over the residence are a factor in determining the argument for removal.

The chance of future damage to water and gas pipes being ruptured from the expansion of the root plate, combined with power outage repairs and reinstatement of services far outweighs the cost of removal of the tree.

19 The arborist then recommends the removal of the tree for the following reasons:

The poor positioning of tree 1 around underground services, combined with the extensive pruning that would need to occur to reduce terminal weight, contribute to a tree that has outgrown its position.

Removal of this tree is recommended as alternative arboricultural strategies for management, would more than likely result in more branch failures and decline in the tree health.

- 20 The reasons provided by the applicant include that the tree is not suitable for a suburban block, and that falling branches have and will cause damage. The applicant is concerned about not only property damage to his property, adjoining properties, vehicles, power lines, gas or water meters but also the potential, perhaps, for injury to people. The applicant says regular trimming and maintenance of the tree overseen by an arborist would be onerous and unreasonable. He says that roots of the tree cause damage to the footpath and is concerned about being sued for damage outside of the subject site.
- 21 The applicant made several submissions about safety and about the health of the tree and issues that may occur if the tree is pruned rather than removed. While an arborist report was submitted with the application, no arborist was called to give evidence, so it is not possible to ask questions of an expert about these matters. In the absence of expert advice, I cannot make determinations about these matters of safety and what may occur as a consequence of pruning.
- 22 The arboricultural assessment supplied included opinions such as that the chance of future damage far outweighs the cost of removal of the tree. This is unusual information to find in an arboricultural report which would generally be confined to an assessment of the health of the tree.
- 23 In fact, many of the things I read are very unusual to find in an arboricultural report, given there is discussion about opinions that the tree has outgrown its position and history of past failures where there is no information about these past failures or explanation as to the details of the problems.
- 24 The actual assessment though, does not determine that removal of the tree is required because of the health of the tree. It provides a practical assessment of a tree that is poorly positioned and may have outgrown its location. The tree itself, however, has been assessed as being in reasonable condition with a considerable useful life expectancy. It is not identified as a low value tree or one that should be removed for arboricultural reasons. There is no identification within the report of the tree posing a danger to people or property, and, while there is commentary about what may occur as a result of pruning, this is not supported by any actual information or advice from the arborist. As such, I cannot conclude that regular pruning and maintenance of the tree would lead to safety issues.
- 25 With respect to the decision guidelines that I am considering, I find the removal of the tree is not required due to the health of the tree. In terms of

the reasons provided for the removal of the tree, I am not satisfied that the concerns raised are substantiated by evidence and I don't have information to determine that the concerns cannot be alleviated by regular maintenance and pruning.

- 26 I also concur with the comments of the Tribunal in the recent decision of *Kumar v Monash*:¹

I can appreciate that the payment for mitigation options may be considered to be an unpalatable expense for a household budget. Trees are an asset on a property and a part of property maintenance that landowners are required to bear costs from time to time.

- 27 As noted by the council also, clause 42.02-3 of the VPO does contain an exemption from the requirement for planning permission to remove a tree, where that tree presents an immediate risk of personal injury or damage to property. It does state that only that part of the vegetation that presents an immediate risk may be removed, destroyed, or lopped under this exemption. I don't have any information before me that this is the case here.

If the tree is a native tree, its role in conserving flora and fauna and whether the proposal will adversely affect the conservation of flora and fauna of the area.

- 28 The council submitted that this is a native tree, and that it considers that vegetation in proximity to the Damper Creek Reserve supports native fauna of the reserve. As such, the removal of the tree would adversely affect the conservation of flora and fauna of the area.

Whether provision is made to plant a new tree elsewhere on the land.

- 29 I acknowledge that new trees could be planted and that there are existing trees on the land, as set out by the applicant. Any replacement planting for this tree would take several years to grow to a height and canopy that mirrors the existing one and can make the contribution to the streetscape that the existing tree makes.

Conclusion

- 30 In conclusion, when considering all of the decision guidelines as required by clause 59.06, it is clear that this tree makes a significant contribution to the area and is consistent with the council's desire to retain and enhance the Garden City Character and the value that is placed on mature canopy trees.
- 31 The information before me establishes that the tree is in good health and condition and is likely to be able to be continually managed by the landowner through regular maintenance and pruning.
- 32 It is clear that, although the tree does create a personal burden for the landowner in terms of maintenance required, it makes a significant

¹ *Kumar v Monash CC* [2024] VCAT 131, [27].

contribution to the canopy of the area and, consistent with the overlay and the policy throughout the Scheme, the tree should be retained.

- 33 For these reasons, the decision of the council is affirmed, and no permit is granted.

J. Perlstein
Member