

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1601/2017
PERMIT APPLICATION NO. WH/2017/169

CATCHWORDS

Section 79 of the *Planning and Environment Act 1987*; Whitehorse Planning Scheme; Neighbourhood Residential Zone, Significant landscape Overlay (SLO2 Blackburn Area 2); proposed two double storey dwellings; design response to neighbourhood character and protection of trees.

APPLICANT	Damian Coad
RESPONSIBLE AUTHORITY	Whitehorse City Council
RESPONDENT	Hock Peng Lee
SUBJECT LAND	150 Central Road, Nunawading
WHERE HELD	Melbourne
BEFORE	Christina Fong, Member
HEARING TYPE	Hearing
DATE OF HEARING	23 January 2018
DATE OF ORDER	5 February 2018
CITATION	Coad v Whitehorse CC [2018] VCAT 136

ORDER

- 1 In application P1601/2017 the decision of the responsible authority is affirmed.
- 2 In planning permit application WH/2017/169 no permit is granted.

Christina Fong
Member

APPEARANCES

For applicant	Kim Belfield, town planner, Belfield Planning Consultants
For responsible authority	Morgan Livingstone, town planner, SongBowden Planning
For respondent	Hock Peng Lee in person.

INFORMATION

Description of proposal	Construction of two double storey side-by-side attached dwellings.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. ¹
Planning scheme	Whitehorse Planning Scheme
Zone and overlays	Neighbourhood Residential Zone (NRZ1) and Significant Landscape Overlay (SLO 2 Blackburn Area 2).
Permit requirements	Clauses 32.09-6 for development of two or more dwellings in the zone, and 42.03-2 for buildings and works in the SLO 2.
Relevant scheme policies and provisions	Clauses 9, 11, 12, 15, 16, 21.05, 21.06, 22.03, 22.04, 52.06, 55 and 65.
Land description	<p>The land is on the south side of Central Road between Springvale Road and the Blackburn Lake & Sanctuary, Nunawading. It is almost regular in shape, with a frontage, of 23.16 metres, a depth of 56.78 metres on the western boundary, 47.43 metres on the eastern boundary, a rear boundary of 22.99 metres, and an area of 1176.98 square metres. It contains a single storey single dwelling across the land setback a minimum of 17.159 metres from the street.</p> <p>It also contains some fairly tall trees in the front setback area and more trees near the rear boundary.</p> <p>Adjoining the land to the east is a dual occupancy of two single storey side-by-side dwellings, to the west a single storey single dwelling, and to the rear a single storey single dwelling at 5 Patterson Street, the respondent's dwelling.</p>
Tribunal inspection	24 January 2018, not accompanied by the parties.

¹ Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 This is a review against council's failure to grant a permit to develop the land for two double storey dwellings within the prescribed time. Were it in a position to determine the application, it would have issued a refusal, on the grounds that it fails to achieve housing, landscaping, and neighbourhood character policies; insufficient tree and landscape opportunities around the development in accordance with clause 22.03-5 and SLO2; the proposed crossover for unit 1 compromising existing trees in the front setback area and the nature strip; the two crossovers and driveways not respectful of the SLO; eventual lot size not achieving a minimum of 650 sq m sought by policy; and not meeting several areas in clause 55.

WHAT ARE THE KEY ISSUES?

- 2 The key issues of this review are the proposal's design response to the housing and character policies of the planning scheme; its response to the context of the site; and impact on existing trees.

WHETHER THE PROPOSAL RESPONDS TO THE HOUSING AND CHARACTER POLICIES OF THE PLANNING SCHEME, AND WHETHER THE DESIGN IS AN ACCEPTABLE RESPONSE TO THE CONTEXT OF THE SITE?

- 3 The site is in the Neighbourhood Residential Zone (NRZ 1 Bush Environment Areas). This zone recognises the predominant single and double storey residential development in an area, and this zone is to manage and ensure that development respects the identified neighbourhood, heritage, environmental or landscape character of an area.
- 4 There are several variations to ResCode standards in the schedule to the zone, such as a maximum site coverage of 40%, a minimum permeability of 40%, a minimum of two canopy trees per dwelling that have the potential to reach a minimum mature height of 12 metres, increased requirement for side and rear setbacks, and an increased amount of private open space.
- 5 The schedule to the zone also has the following decision guidelines:
 - Whether the vegetation in the street setback will contribute to the preferred neighbourhood character and the public realm.
 - The potential for trees and vegetation to be provided between dwellings on the same site.
 - Whether there is sufficient permeable space that is not encumbered by an easement to enable the planting of canopy trees.

² The submissions 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.

- Development should provide for the retention and/or planting of trees, where these are art of the character of the neighbourhood.
- 6 The site is also affected by the Significant Landscape Overlay (SLO2 Blackburn Area 2). The stated significance of this area is:
- Statement of nature and key elements of landscape**
- The significance of the area is attributed to the quality of the environment, which includes vegetation notable for its height, density, maturity and high proportion of Australian native trees.
- This in turn contributes to the significance of the area as a valuable bird and wildlife habitat.
- 7 The landscape character objectives of this overlay are:
- To retain the dominance of vegetation cover in keeping with the bush character environment.
 - To encourage the retention and regeneration of native vegetation for the protection of wildlife habitat.
 - To ensure that a reasonable proportion of a lot is free of buildings to provide for the planting of tall trees in a natural garden setting.
 - To encourage the development of sympathetic buildings within an envelope, which ensures the maintenance of a tree-dominated landscape?
 - To ensure that buildings and works retain an inconspicuous profile and do not dominate the landscape.
 - To ensure that development is compatible with the character of the area.
- 8 The schedule to the overlay also sets out ‘as-of-right’ design elements, such as a 2 storey or 9 metres height, setback at least 9 metres from the front boundary for a single storey building and 11 metres for a two storey building, wall heights; the floor area of the ground floor to be less than 33% of the site area and first floor less than 25 % of the site area; setback 4 metres from any vegetation requiring a permit to be removed; and less than 17% of the site area for hard paved surface and impervious areas.
- 9 This overlay has the following decision guidelines:
- Whether the proposed building is set back a reasonable distance from the property boundaries to provide for landscaping.
 - Whether the proposed building or works retain an inconspicuous profile and do not dominate the landscape.
 - Whether a reasonable proportion of the lot is free of buildings and available for tree planting, landscaping and open space use.
 - The impact of the proposed development on the conservation of trees.

- The impact of the proposed development on natural ground levels and drainage patterns which may have a detrimental impact on the health and viability of surrounding trees.
- The species of vegetation, its age, health and growth characteristics.
- The location of the vegetation on the land and its contribution to the lot garden areas, neighbourhood and streetscape character.
- Whether the tree is isolated or part of a grouping.
- The potential to achieve an average density of one tree reaching a height of over 15 metres to each 150 sq metres of site area.

10 In terms of policies, clause 21.05 (Environment) in the MSS is about protection of the natural environment. Clause 21.05-5 sets out the implementation measures to achieve this environmental goal, which include applying a Significant Landscape Overlay over the Blackburn Lake and Sanctuary area, which is the case in this review. This clause also calls for the application of clause 22.03 (Residential Development Policy) and 22.04 (Tree Conservation) to supplement ResCode for the assessment of residential application. Clause 21.05-4 made reference to a consideration *“that lot sizes in the area affected by the Significant Landscape overlay are generally in accordance with the prevailing minimum lot size of 650 square metres”*.

11 Clause 21.06 (housing) sets out the hierarchy of intensity of housing changes in Whitehorse. Under this clause, the land is in a Limited Change area.

12 Local planning policy clause 22.03 (residential development), explains what is a limited change area. It is where development is to be of a scale, form and character that is consistent with the area, and which would predominantly comprise of detached dwellings or semi-detached dwellings. In this policy, the land is located in the Bush Environment Precinct. The preferred character for a Bush Environment precinct is:

The streetscape will be dominated by vegetation with subservient buildings frequently hidden from view behind vegetation and tall trees. The buildings will nestle into the topography of the landscape and be surrounded by bush-like native and indigenous gardens, including large indigenous trees in the private and public domains. Buildings and hard surfaces will occupy a very low proportion of the site. They will be sited to reflect the prevailing front, rear and side setbacks. The larger rear setbacks will accommodate substantial vegetation including large canopy trees. The bushy environs are complemented by street trees and a lack of front fencing.....

13 Another relevant local policy is clause 22.04, which is about retaining and protection of existing trees and tree regeneration.

- 14 In not supporting the proposal, council's submission is that the development is trying to achieve too much from a site that is in the 'Bush Environment' area. It identified the following weaknesses in the design:
- The resultant lot size for each dwellings is under the average of 650 square metres referred to in clause 21.05-5.
 - The dwellings are unashamedly large and imposing that will sit "heavy" in the landscape and in the streetscape and when viewed from adjoining properties. The first floor occupies 25.19% of the site with long expanses of first floor to the east and west side boundaries.
 - There is limited side setbacks to provide sufficient opportunity to meaningfully landscape the site to soften the built form. The building utilises 21.1 metres of the site's 22.3 metre width (94.6%).
 - Extensive area is given to the additional driveway and paving in the front setback area, which compromises the health of the trees near the driveway and the site's ability to contribute to the bush-like gardens expected in the area.
 - The proposal would not achieve an "inconspicuous" streetscape presence required by the SLO, and not meeting the decision guidelines for SLO2 due to the built form's impact on the landscape character of the area.
 - There is no ability to accommodate new canopy planting or trees that can frame the built form.
- 15 In counter-arguing council's submission, Mr. Bellfield pointed out that:
- The 650 square metres minimum subdivision size is not relevant. The proposal is not for subdivision, and this minimum subdivision is arbitrary, a ploy to limit development. The development adjoining the land at 152/152A was approved by council, which is also for a dual occupancies of two storey dwellings for one lot. That site is similar in size and configuration.
 - Lot sizes in Central Road are diverse. To require a minimum lot size of 650 square metres is imposing a single dwelling restriction on land in the area. Council has previously attempted to introduce this minimum lot size by the SLO but was unsuccessful.
 - In order to retain the bush environment character, no tree is removed. Further, dense canopy tree is not a characteristic of Central Road, except for the review site and 148 Central Road.
 - The footprint of the proposal largely follows the footprint of the current house. In fact, the new driveways will see to the removal of much of the asphalt driveway and the carport in the front setback area, replaced by either permeable paving or mulch/landscaping.
 - A landscaping plan has been submitted.

- The buildings will not be dominant, as the front setback is 14.37 metres, which is greater than the 11 metre trigger specified in the SLO. The rear setback is at least 8.2 metres. The garage is constructed to the side boundary, making use of an existing brick wall that is the current garage. The setbacks of the first floors meet the side setback requirements of ResCode but exceed the 'as-of-right' setback of SLO2. The part of the development that does not meet SLO2 side setback is the existing on-the-boundary wall. There is no increase in height or length of this brick wall.
 - As for council's criticism of a lack of separation of between 3 to 4 metres between buildings, development in Central Road does not display such a characteristic.
- 16 My inspection of the site reveals the general development pattern of deep front setback of dwellings on the south side of Central Road in the immediate vicinity of the review site and a bush character, significantly contributed to by road side vegetation. Due to an absence of footpaths and front fencing, there is a merging of landscape and vegetation cover between the public and private realms. Nearby on the south side of Central Road is the Blackburn Lake. The north side of the road is a large complex associated with a church and its care facilities. Building stock of this property is institutional, varying in height of between one to three storeys.
- 17 There are medium density development and two storey dwellings in Central Road. The visibility of built form from the street depends on the setback of the buildings and the presence of vegetation. The development abutting the land to the east is a dual occupancy of two single storey dwellings. Other medium density development and of two storey built form are present at Nos. 180, 186, and 198.
- 18 The existing context of the site is that buildings in the immediate area have deep setbacks but not from side boundaries. The footprint of the existing house on the land is constructed to the western boundary and spans to the eastern boundary with a setback of 2.57 metres from that boundary. The width of this dwelling is nearly 19.9 metres (scaled). The single dwelling to the west also has construction on side boundaries (both), and the dual occupancy development to the east again has on-the-boundary-construction on both sides.
- 19 The front setback of these properties, however, is atypical of suburban development. The front setback of the house on the site is a minimum of 17.159 metres, No. 148 to the west is 22 metres (despite the deeper setback at 22 metres, this house lines up with the house on the review site due to a turn in the road), and the dual occupancy to the east at No. 152 at 14.34 metres. This pattern of deep setbacks is repeated for at least another two lots to the east. Construction to at least one boundary is also prevalent for lots on this side of Central Road towards Springvale Road.

- 20 The proposal is for two substantial dwellings on a substantial lot of 1176.98 square metres. It is to be constructed to the eastern boundary by making use of the wall of the existing garage. It has a setback of 16.245 metres for Unit 1 against the front setback of 14.34 metres at No. 152, and a setback of 16.17 metres against the front setback of 22.052 metres of No. 148. The proposed front setback sits well in its immediate context.
- 21 The first floors of the dwellings are recessed from the front, Unit 1 by between 1.4 and 2.2 metres, and Unit 2 by 3.75 metres. There is a gap of 1.25 metres between the two first floors.
- 22 The width of the combined first floor is just under 13 metres, including the gap between the two dwellings. This represents over 70% of the width of the ground floor. Such a width and breadth of a two storey massing would be difficult to screen or soften when viewed from the street, depending on the effectiveness of vegetation screening. Anyway, a permit condition can be imposed to reduce the width of the building to reduce its streetscape dominance.
- 23 One of Council's concerns is a lack of side setbacks. I am not as critical, as substantial side setback is not a character of the immediate area.
- 24 A case in point is the success of the dual occupancy at No. 152, which is constructed to both side boundaries and almost continuous in the front facade. That development is visible in between the tall trees when viewed from Central Road, aided by the fact that these dwellings are single storeys.
- 25 For the review site, the issue is whether the existing vegetation in the front area can achieve the same effect to maintain the bush setting for the development.
- 26 The proposal does not involve removal of any tree from the land, particularly the front setback area. I note that there is a current a planning permit to remove two trees (a third one is already dead) from this area³.
- 27 There was an arborist report submitted with the application, providing an inventory of trees on the land and in the street⁴. An inspection of the site also shows the presence of dense trees and shrubbery in other parts of the front setback area and in the road reserve. Glimpses of the existing single storey house can be obtained through the existing driveway. The existing carport, which is forward of the house, is highly visible.
- 28 If the existing trees in the front setback area, including the street tree in the road reserve, are retained and able to continue to thrive, the proposal, subject to some modifications to the two storey building massing, can be successful and placed in a bush setting with the bulk of the built form screened and softened by the trees in the front setback area.

³ Permit WH/2016/1069 issued on 8 January 2018, subject to a condition of replacement trees.

⁴ Preliminary Arboricultural Assessment Report by Callan Walker dated 12 November 2016.

29 This takes me to the next issue of the review: the well-being of trees in the front setback area affected by the crossovers and driveways.

THE IMPACT OF THE SECOND CROSSOVER AND DRIVEWAY ON TREES

30 The particular concern is the new second crossover and driveway near the western boundary for Unit 1.

31 From a streetscape point of view, a second crossover is acceptable, given the width of the land at 23.16 metres, and every medium density development in Central Road has more than one crossover and driveway.

32 The concern is the impact of the driveway and paving on Trees 5, 6, 7, and 8 as identified in the arborist report, all of which are Yellow Boxes, indigenous to the area and of substantial height and presence, varying from around 8 metres to 15 metres (Tree 5). Tree 5 is in the centre of the front setback area, Tree 6 is in the nature strip, Tree 7 near the new driveway, and Tree 8 near and along the new driveway. The extent of encroachment by driveway and the permeable paving of the TPZs of these trees are:

- Tree 5: 25% TPZ
- Tree 6: 30% TPZ
- Tree 7: 25% TPZ and SRZ 8%
- Tree 8: 8%

33 The percentage of encroachment on the TPZs is clearly way above the 10% recommended in the Australian Standard for protection of trees of development sites. Under this standard, encroachment of over 10% would be deemed to be substantial. Encroachment on Tree 7 is also severe as its SRZ is also encroached. Given the Significant Landscape Overlay (SLO2) that applies to the site, the bush environment of the area, and the objective for a bush setting, protection of these trees is a critical consideration.

34 One of the arguments by the review applicant is that encroachment on the TPZs of these trees will in fact be less than the existing situation, because these TPZ and SRZ are currently encroached by the bitumen driveway and the carport, and that some of the hard paved area (bitumen surface) are to be removed and replaced by permeable paving.

35 The current bitumen driveway enters the land from the eastern end of the land and curves across the front setback area to the single width garage at the western end of the land. It then has an off-shoot to enter the carport in the front setback area. The alignment of the driveway currently encroaches on the SRZ and TPZ of all these trees.

36 The proposal is to remove the bitumen from the redundant parts of the driveway and footpaths no longer needed. This includes the part of the driveway across the front setback area to the existing garage, the off-shoot to the carport, and the carport itself.

37 New driveway construction includes a new crossover and over gaps in the driveways, all to be constructed of permeable materials, as well as a new paved driveway connecting the existing bitumen driveway to the double garage of Unit 2. There will also be extensive paved area in the front setback area, probably for the purpose of vehicular turning so that vehicles can exit the site in a forward manner.

38 The new permeable paved area is extensive and will increase the encroachment on the SRZ and TPZs of all the trees in question. Council's arborist's review of the submitted arborist report is that there is not enough information in the report and has not demonstrated how the proposal can comply with AS4970-2009 *Protection of Trees on Development Sites Guidelines*.

39 There is a second arboricultural report dated 11 November 2017 which assessed the impact of the driveways on the trees. This report was not prepared on the basis of an expert statement of evidence. The language of the report is such that his views were based on second hand information. The language lacks certainty. For example, the report said:

There appeared no impact associated with the proposed alignment of drive extension as it followed the established alignment from paved carport. Levels appeared supportive of works as they were currently set at near at/above the existing natural ground level.

...

The clear issue was the depth of required excavations. Providing the exposed depth is utilised within works, no impact to tree condition could be expected. The preliminary excavations (compared with non-porous asphalt or like), it would suit. Non-permeable is recommended if it requires less excavation. Water can still permeate soil profile especially if the surface fall is directed off as opposed to down drive.

40 This report is not a formal statement of evidence and the author was not called to give evidence. This report is not enough to convince me that these trees are adequately protected.

41 My concerns regarding the new crossover and driveway regarding their impact on affected trees can be summarised as follows:

The new crossover for Unit 1: This new crossover encroaches on 30% of the TPZ of the street tree (No. 6) and to be constructed over an embankment between the carriageway of Centre Road and the land. The design of the crossover specifies "*proposed 3m wide vehicle crossing to the satisfaction of the relevant authority*". What is council's requirement for a vehicle crossover, which usually requires some excavation and concrete/all weatherseal construction? Can a crossover to Council's satisfaction also means excavation and levelling of the embankment rather than having a permeable paving at or above natural ground level with a total avoidance of excavation? Considering the degree of encroachment of this crossover over the street tree (Tree 6), there is no assurance that this tree is protected.

The permeable paving in the front setback area: There will be a substantial increase in paved surface in the front setback area. There is a technical issue of how the existing driveway constructed in bitumen to be connected to the permeable paved area which is to be above grade (as there is to be no excavation). The second issue is the extent of the paving.

Although the proposed second crossover and driveway would not create additional impervious surface and the amount of bitumen surface reduced, there will be extensive areas of permeable paving in the front setback area, changing the appearance and presentation of the land to the street. It will be a front setback area dominated by paved area, pervious and impervious.

The permeable paving causes extensive additional encroachment on the TPZs of the trees concerned, as well as new encroachments on other trees such as Tree 3. These trees are of significant environmental and landscape values.

- 42 I am not satisfied that the planning objectives of SLO2 and the Bush Environment of the area are achieved.

ANY OTHER ISSUES

- 43 There was a ground of refusal relating to the size of the eventual lot being less than 650 square metres as recommended in clause 21.05-5 for land affected by a SLO.
- 44 I agree with Mr. Bellfield that the application is not one for subdivision of land. Besides, the 650 square metres is meant to be the 'average' lot size. This policy applies to land affected by all SLOs. There are a number of SLOs in Whitehorse, from schedule 1 to schedule 8, covering the length and breadth of Whitehorse, particularly the more environmentally sensitive areas. There is a diversity of lot sizes and lot configurations in these areas. The 650 sq m minimum lot size has to be considered in the context of the site and not as a requirement for development.
- 45 As demonstrated by the proposal and the development adjoining the site at No. 152, a site can easily accommodate two dwellings despite the fact that the eventual lot size of each dwelling is less than 650 square metres.
- 46 Mr. Lee is the respondent in this matter. His concerns relate to amenity impact on his dwelling at the rear of the review site, such as overlooking and the possibility of loss of trees along their common boundary. He asked for the retention of trees along the common boundary.
- 47 I understand that the proposal meets the test of Clause 55.04 with regard to amenity impact. On that basis, there is no reason to refuse the application or require additional permit conditions.
- 48 As for retention of trees along the rear boundary, the proposal does not involve removal of vegetation. At the same time, a removal of a number of these trees does not trigger a permit.

49 In all, I find the development, if reduced in size particularly for the first floor, is acceptable from a built form point of view. However, the impact on the landscape qualities and on the environmentally significant trees in the land has not been ascertained and their contribution assured. This is for a site that has significant environmental and landscape qualities.

CONCLUSION

50 For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Christina Fong
Member