

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2557/2017
PERMIT APPLICATION NO. WH/2016/1189

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*, Whitehorse Planning Scheme, Significant Landscape Overlay Schedule 2, Proposed garage, Impact on tree, Neighbourhood character.

APPLICANT	Cameron McLellan
RESPONSIBLE AUTHORITY	Whitehorse City Council
RESPONDENTS	Blackburn & District Tree Preservation Society Inc., Blackburn Village Residents Group Inc, Rodney Storey
SUBJECT LAND	20-24 Masons Road Blackburn
WHERE HELD	Melbourne
BEFORE	Tracey Bilston-McGillen, Member
HEARING TYPE	Hearing
DATE OF HEARING	15 May 2018
DATE OF ORDER	5 June 2018
CITATION	McLellan v Whitehorse CC [2018] VCAT 792.

- 1 In application P2557/2017 the decision of the responsible authority is set aside.
- 2 In planning permit application WH/2016/1189 a permit is granted and directed to be issued for the land at 20-24 Masons Road Blackburn in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - The construction of buildings and works (garage on the west boundary).

Tracey Bilston-McGillen
Member

APPEARANCES

For Cameron McLellan as the permit applicant	Mr Dom Scally, solicitor, Best Hooper. He called the following witness: Mr Rob Galbraith, arborist.
For Whitehorse City Council as the Responsible Authority	Mr Gintaras Simkus, town planning consultant, Direct Planning.
For Blackburn & District Tree Preservation Society Inc., Blackburn Village Residents Group Inc, Rodney Storey	Mr David Berry appeared on behalf of Blackburn & District Tree Preservation Society Inc. Mr David Morrison on behalf of Blackburn Village Residents Group In. Mr Rodney Storey appeared in person but did not make a submission.

INFORMATION

Description of proposal	Construct buildings and works (garage on the west boundary).
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	Whitehorse Planning Scheme
Zone and overlays	Neighbourhood Residential Zone - Schedule 1 (NRZ1). Significant Landscape Overlay – Schedule 2 (SLO2).
Permit requirements	Clause 42.03-2 a permit is required to construct a building or construct or carry out works because the following requirement is not met: <ul style="list-style-type: none">• Are set back more than 4 metres from any vegetation that requires a permit to remove, destroy or lop under the provisions of this schedule. Works may be closer than 4 metres provided they do not alter the existing ground level or topography of the land.
Land description	The review site is located on the south side of Masons Road. The site is regular in shape with a frontage of 50.75 metres and a depth of 59.55 metres with an overall site area of 3,022 square metres. The review site accommodates a dwelling extending across the width of the site. The review site has a fall from south (rear) to the north (street) of approximately 4 metres.
Tribunal inspection	I inspected the site and surrounds.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 A planning application was lodged with the Whitehorse City Council (**Council**) because the construction of buildings and works for a garage at 20 – 24 Masons Road Blackburn had commenced without planning approval. Council ordered the works to cease whilst the permit applicant sought approval for the proposed garage. The proposal is for a garage located on the western boundary. The application was refused by Council on the following grounds:
 - 1 The proposed buildings and works (garage) will compromise the structural integrity and overall health of a significant tree with high amenity value (Tree 1 – Eucalyptus Melliodora).
 - 2 The proposed buildings and works is contrary to the decision guidelines of the Significant Landscape Overlay including:
 - The proposed building is not setback a reasonable distance with the west property boundary to provide for landscaping; and
 - The proposed buildings and works do not maintain an inconspicuous profile as a result of being constructed boundary to boundary.
- 2 A number of objectors including the Blackburn Village Residents Group and the Blackburn & District Tree Preservation Society Inc raised concerns that the proposed garage would have an impact on the viability of tree 1, that every effort should be made to ensure retention of tree 1 and that the garage is out of character with the area.
- 3 The applicant for review put to me that the proposed garage is appropriate having regard to the character of the area and that tree 1 remains viable.
- 4 The key issue for determination include:
 - i Does the garage have an impact on the viability of tree 1?
 - ii Does the garage respect the character of the area?
- 5 At the commencement of the Tribunal hearing, I made it clear to all parties that the only matter before me to consider is the proposed garage (albeit it is partially constructed). I do not have an application for the removal of any trees, any planting or any paving. I do not have an application for an enforcement order for works undertaken without planning permission, nor do I have an application for any other works undertaken on the review site. I explained that I am to assess the proposed garage having regard to the permit trigger being the SLO2.

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.

- 6 I have decided to grant a planning permit for the proposed garage. My reasons follow.

IMPACT ON TREE 1 – EUCALYPTUS MELLIODORA

- 7 Under the SLO2, a planning permit is required to construct a building or construct or carry out works within 4 metres from a specified tree. The garage is within 4 metres of a large mature Yellow Box.
- 8 The SLO2 is described as the Blackburn Area 2. 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. The SLO2 establishes a number of landscape character objectives to be achieved including:
- 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.
- 9 The proposed garage has a width of 4.49 metres, a depth of 12.2 metres and an overall area of 55 square metres. It is setback 20 metres from the street frontage and 0.3 metre from the western boundary common with 18 Masons Road. The boundary wall is constructed from face brickwork and has a varied height from 2.4 - 2.8 metres above ground level. The overall height is 4.8 metres.
- 10 A permit is required for the proposed garage because of the SLO2. The proposed garage is located within 4 metres of a tree that requires a permit to remove, destroy or lop under the SLO2.
- 11 There are three trees located within close proximity to the proposed garage. The most notable is tree 1, a Eucalyptus Melliodora or Yellow Box. Trees 2 and 3 are a Eriobotrya japonica and Callistemon salignus.
- 12 Since the proposed development, there have been several arborists reports prepared assessing the impact of the garage on the trees. Tree 1 is the tree that is of most concern to all parties. A summary of the arborists opinions regarding the tree follow.

i Council's Planning Arborist commented that they agreed with the findings of the applicants consulting arborist (the Greenwood Consulting report dated 22 December 2016) and that further investigations are required to determine if structural roots of tree 1 have been damaged. Following the second Greenwood Consulting report and the Galbraith report, there have been no subsequent assessment or comments by Council's Planning Arborist.

ii Arboricultural Construction Impact Assessment prepared by Greenwood Consulting² concluded:

Tree 1 is located on an adjoining property. Prior to the construction of the extension, it is likely that this tree exhibited fair health and good structure with a ULE of 25-50 years. The development on this site intrudes excessively into the TPZ and SRZ of this tree.

a. If this tree has sustained significant damage to its roots for the development then this is likely to impact the stability, health and longevity of this tree.

The report recommended that a root investigation should be undertaken along the edge of the TPZ intrusion nearest the tree to determine the extent of any potential damage to tree roots. The investigation should be conducted using hydro excavation.

iii Following the hydro root investigation, a subsequent report was prepared by Greenwood Consulting³ stating that the new garage intrudes into the structural root zone (SRZ) of tree 1 by 2.0 metres and into the tree protection zone (TPZ) by 30.0%. This report recommends that the "tree be removed based on the extent of root damage observed within the SRZ and its poor structure and unacceptable level of risk of harm resulting from this root damage".

iv The applicant for review called Mr Galbraith, an arborist to give evidence regarding his opinion of tree 1. Mr Galbraith had an opposing view to Greenwood Consulting concluding that:

- The history of the site suggests that beneath the area of the new garage it would not have been a favourable zone for tree roots. It is likely that any roots which were there, were severed when the retaining wall was constructed in 2010.
- From his assessment of tree 1, there is no evidence of any ill health in the tree.
- Tree 1 should be subject to a maintenance regime for the accurate monitoring of the lean of the tree and ways of mitigating any problem in the event the tree does develop a lean.

² Greenwood Consulting, 22 December 2016.

³ Greenwood Consulting 1 June 2017.

- 13 Council refused the proposal because the garage would compromise the structural integrity and overall health of tree 1. There was a consensus from all parties that the tree should be retained and every effort made to ensure its retention.
- 14 Based on the evidence before me, I am persuaded by Mr Galbraith that subject to a tree management plan, tree 1 should be able to be retained and remains viable. I am persuaded by Mr Galbraith that based on his experience the tree remains viable for the following reasons.
- The earlier Greenwood Consulting report did not make it clear as to whether the root damage had occurred during previous development or for the most recent garage construction. This remains unknown.
 - There is no sign of root decay in the exposed roots in the photos.
 - Yellow Box trees are long term survivors of construction abuse. The root loss suffered by the tree is apparent but not what Mr Galbraith considers major.
- 15 SLO2 clearly identifies this area as one that is significant for its vegetation including notable mature Australian native trees. There is a clear intent to retain native vegetation and to continue to enhance the landscape character of the area. I am persuaded by Mr Galbraith that subject to a tree management plan which includes an arboricultural review, tree 1 remains viable and will continue to contribute to the vegetated environment. I will include a condition on the permit to read:

Tree 1: Submission of a Tree Management Plan in accordance with the letter from R Galbraith to C McLelland of 5.2.2018 comprising Appendix 2 of R Galbraith witness statement dated 26.4.2018 in VCAT Ref P2557/2017 to the satisfaction of the Responsible Authority and undertake all actions as follows:

- Arboricultural review every 3 months for the first year and 2 times a year for the following 9 years. After each site inspection and review a report must be submitted to Council by a qualified arborist detailing the findings.
- If within the time period specified in the Tree Management Plan the Council is satisfied that it must be replaced because it has been unstable, a canopy tree on the land subject to this permit capable of reaching a comparable height and spread must be planted on the land within 6 months to the satisfaction of the Responsible Authority.

THE PROPOSED GARAGE

- 16 Council put to me that the proposed garage is inappropriate having regard to the guidelines of the SLO, is not setback a reasonable distance to provide for landscaping and the buildings and works to maintain an inconspicuous profile as result of the overall development of the review site being constructed boundary to boundary.

- 17 Council submitted that prior to the construction of the garage along the common boundary with no 18 Masons Road, the separation of buildings allowed for gardens and clear views to existing vegetation and trees. It was further put that the views reinforce the neighbourhood landscape qualities.
- 18 A landscape character objective of SLO2 seeks “To ensure the development of sympathetic buildings within an envelope, which ensures the maintenance of a tree-dominated landscape” and “To ensure that development is compatible with the character of the area”.
- 19 On my site inspection I made the observation that the surrounding neighbourhood is well vegetated with large canopy trees as well as private garden areas. The level of vegetation within private houses varies and there is some formal exotic planting. It is noticeable that the front setback of the review site is more open than others within the street. It seems from my view however that there has been planting undertaken within the front yard/setback that will grow and fill the space. Overall, the character of the area is reflective of the SLO2, that is an area that is noted for its Australian native trees many that are mature and notable. The other observation however is that there built form is evident. I agree with the submissions that some houses are quite hidden behind well vegetated front yards, but when I walked further down the street within the surrounding area, there is built form evident, it is not completely hidden by vegetation. It is fair to say that some houses are nestled within a vegetated, natural garden setting but other built form is visually evident to the street.
- 20 I am persuaded by the permit applicant that the proposed garage is appropriate on the review site because it is a low-key structure that, combined with recent planting within the front setback of the review site will appear as part of the existing dwelling. The proposed garage does prevent views through the site to vegetation, but views of tall canopy trees in the background remain. It is also likely that over the next few years, due to the growth of the vegetation within the front setback, views into the site and to the garage will be filtered. The views of the garage will be softened by the vegetation planted within the front setback. I find this to be an appropriate outcome and one that is consistent with the outcomes sought in the SLO2.

CONCLUSION

- 21 For the reasons given above, the decision of the Responsible Authority is set aside. A permit is granted subject to conditions.

Tracey Bilston-McGillen
Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	WH/2016/1189
LAND	20-24 Masons Road Blackburne

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- The construction of buildings and works, garage on the west boundary.

CONDITIONS

- 1 Before the use and development starts, or any trees or vegetation removed, amended plans (three copies) shall be submitted to and approved by the Responsible Authority. The plans must be consistent with the plans identified as JCA Land Consultants, Job No 21048 Sheets 1 & 2 dated 22.5.17, drawn to scale, with dimensions, and modified to show:
 - (a) Submission of an amended site plan notating all requirements of the Tree Management Plan in accordance with Condition 4.
 - (b) The plans only detail the works that form part of the permit.All of the above must be to the satisfaction of the Responsible Authority.
Once approved the plans will be endorsed and will form part of the permit.
- 2 The layout of the site and the size, design and location of the buildings and works permitted must always accord with the endorsed plan and must not be altered or modified without the further written consent of the Responsible Authority.
- 3 Submission of a written agreement from the adjoining property owners at 18 Masons Road Blackburn (and their representatives, as appropriate) to allow access to 18 Masons Road and to undertake all maintenance works as listed in Condition 4 to this permit, to the satisfaction of the Responsible Authority.
- 4 Tree 1: Submission of a Tree Management Plan in accordance with the letter from R Galbraith to C McLelland of 5.2.2018 comprising Appendix 2 of R Galbraith witness statement dated 26.4.2018 in VCAT Ref P2557/2017 to the satisfaction of the Responsible Authority and undertake all actions as follows:
 - (a) Arboricultural review every 3 months for the first year and 2 times a year for the following 9 years. After each site inspection and review a report must be submitted to Council by a qualified arborist detailing the findings.

- (b) If within the time period specified in the Tree Management Plan the Council is satisfied that it must be replaced because it has been unstable, a canopy tree on the land subject to this permit capable of reaching a comparable height and spread must be planted on the land within 6 months to the satisfaction of the Responsible Authority.
- 5 All remedial works associated with the monitoring and maintenance of the Eucalyptus melliodora tree located at 18 Masons Road Blackburn shall be organised, commissioned, and paid for by the property owners at 20-24 Masons Road Blackburn over the above nominated 10 year period.
- 6 No service trenching other than already exists or any additional alteration to natural ground levels within the prescribed tree protection zones trees as follows:
 - i Tree 1, Eucalyptus melliodora, TPZ of 13.2 metres
 - ii Tree 2, Eriobotrya, TPZ 2 metres
 - iii Tree 3, Callistemon salignus, TPZ 3 metres
- 7 This permit will expire if one of the following circumstances applies:
 - (a) the development is not commenced within two (2) years from the date of issue of this permit;
 - (b) the development is not completed within four (4) years from the date of issue 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 –