

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P79/2021
PERMIT APPLICATION NO. WH/2020/229

CATCHWORDS

Whitehorse Planning Scheme; Application pursuant to Section 80 of the *Planning and Environment Act 1987*; Significant Landscape Overlay (SLO6); Clause 22.04; Conditions review; Retention/removal of Tree 7 most contentious issue; Tree Protection Zones (TPZs); Decision Guidelines.

APPLICANT	GMP Land Nominees Pty Ltd
RESPONSIBLE AUTHORITY	Whitehorse City Council
RESPONDENTS	Blackburn & District Tree Preservation Society Inc, Blackburn Village Residents Group Inc, David Gannon, Geoffrey & Julienne Cope, Graham Bell, Helen Selleck, John Hazlett, John McLean, Michael Collie, Robyn Timmins, Robyn Weir, Steven Plumridge, Bertam Alesich
SUBJECT LAND	1 Andrew Street FOREST HILL VIC 3131
HEARING TYPE	Hearing
DATES OF HEARING	28 and 29 June 2021
DATE OF ORIGINAL ORDER	19 July 2021
DATE OF CORRECTION ORDER	16 August 2021
CITATION	GMP Land Nominees Pty Ltd v Whitehorse CC (Corrected) [2021] VCAT 781

ORDER

- 1 Pursuant to section 60 of the *Victorian Civil and Administrative Tribunal Act 1998*, the following person is joined as a party to the proceeding:
Bertram Alesich.
- 2 In application P79/2021 the decision of the Responsible Authority is varied.
- 3 The Tribunal directs that Permit No. WH/2020/229 must contain the conditions set out in the Permit WH/2020/229 issued by the Responsible Authority on 28 September 2020 with the following modifications:
 - (a) Conditions 1a), 1g) and 6b) are deleted.
 - (b) Condition 1c) reworded to read:
 - 1c) The location of all service trenches to serve the dwellings (for example: gas, water, electricity, stormwater, sewerage, telecommunications), including the extent of trenching required



in easements over adjoining lots (if any) and the location of protected trees within 4 metres of these trenches (if any). If the service trenches are within 4 metres of the trunk of the protected trees or within the TPZ of such trees (whichever is the lesser distance) such trenches must be located, hand dug or bored to ensure that protected trees are not damaged, to the satisfaction of the Responsible Authority.

(c) Condition 1h) reworded to read:

1h) Front fencing in accordance with concept fence elevation prepared by Axiomplus Architects Rev A dated 15 October 2020. The area between the fence and footpath to be provided with landscaping, including climbing plants trained onto the fence.

(d) Condition 5a) reworded to read:

5 Prior to commencement of any building or demolition works on the land, the Tree Protection Zones (TPZs) must be established on the subject site and nature strip and maintained during, and until completion of, all buildings and works including landscaping, around the following trees in accordance with the distances and measures specified below, to the satisfaction of the Responsible Authority:

a) Tree Protection Zone distances:

- i Tree 3 - 2.5 metre radius from the centre of the tree base.
- iii Tree 4 - 2.4 metre radius from the centre of the tree base.
- iv vi Tree 8 - 5.8 metre radius from the centre of the tree base.
- vii Tree 9 - 2.3 metre radius from the centre of the tree base.
- viii Tree 10 - 2.3 metre radius from the centre of the tree base.
- ix Tree 13 - 2.0 metre radius from the centre of the tree base.
- x Tree 16 - 2.5 metre radius from the centre of the tree base.

(e) Condition 6a) reworded to read:

6a) Unless Tree 16 is removed before any development starts in accordance with this Permit, the paved area where within the TPZ of Tree 16, must be constructed above the existing soil grade using porous materials that allows water to penetrate through the surface and into the soil profile. There must be no grade change within the TPZ, and no roots are to be cut or damaged during any part of the construction process.

- (f) Condition 6c) reworded to read:
 - 6c) All buildings and works for the demolition of the site and construction of the development (as shown on the endorsed plans) must not alter the existing ground level or topography of the land (which includes trenching and site scrapes) within greater than 10% of the TPZs of Trees 3, 4, 8, 9, 10 and 13.
 - (g) Condition 6d) reworded to read:
 - 6d) The builder / site manager must ensure the TPZ Fencing Conditions and the Tree Protection Conditions for Trees 3, 4, 8, 9, 10, 13 and 16 are being adhered to throughout the entire building process, including site demolition, levelling, and landscape works.
 - (h) Condition 8 reworded to read:
 - 8. All stormwater drainage systems are to be connected to the legal point of discharge to the satisfaction of the Responsible Authority prior to the occupation of the building/s.
 - (i) Condition 13 reworded to read:
 - 13. The qualified civil engineer when undertaking civil design must ensure that the landscape plan/s and drainage plan/s are compatible. The stormwater drainage system must be located outside the tree protection zone (TPZ) of any trees to be retained.
- 4 Conditions 5b)(iv), 5b)(vi) and 11 to remain unaltered.
 - 5 Remaining conditions are renumbered accordingly.
 - 6 The Responsible Authority is directed to issue a modified permit in accordance with this order.

J A Bennett
Senior Member

APPEARANCES

For GMP Land Nominees Pty Ltd	Mr Robert Forrester, Barrister instructed by Best Hooper Lawyers. He called expert evidence from the following witness: <ul style="list-style-type: none">• Mr Dean Simonsen, Arborist of Treemap Arboriculture.
For Whitehorse City Council	Mr David Song, Town Planner of Song Bowden Planning Pty Ltd,
For Blackburn & District Tree Preservation Society Inc, Blackburn Village Residents Group Inc, David Gannon, Geoffrey & Julienne Cope, Graham Bell, Helen Selleck, John Hazlett, John McLean, Michael Collie, Robyn Timmins, Robyn Weir, Steven Plumridge, Bertam Alesich	Ms Dianne Tribe for Blackburn & District Tree Preservation Society Inc (BDTPS). Mr Michael Taafe for Blackburn Village Residents Group Inc (BVRG). He called expert evidence from the following witness: <ul style="list-style-type: none">• Mr Mark Reynolds, Arborist of Arbor Survey Pty Ltd. Mr David Gannon. Mr Geoffrey and Ms Julienne Cope. M John Hazlett. Mr Michael Collie Ms Robyn Weir for herself and Ms Robyn Timmins and Mr Steven Plumridge.

INFORMATION

Description of proposal	Construction of one dwelling and removal of vegetation. Request to delete or amend conditions 1a), 1c), 1g), 1h), 5a), 5b)(iv), 5b)(vi), 6a), 6b), 6c), 6d), 8 and 11.
Nature of proceeding	Application under section 80 of the <i>Planning and Environment Act 1987</i> – to review the conditions contained in the permit.
Planning scheme	Whitehorse Planning Scheme
Zone and overlays	Neighbourhood Residential Zone – Schedule 1 Bush Environment (NRZ1). Significant Landscape Overlay – Schedule 6 Yarran Dheran, Somers Trail, Collina Dell and Menin Road (SLO6).

Permit requirements	Clause 42.03 (construct a building or construct or carry out works within 4 metres of a tree that would require a permit to remove, where the total building coverage exceeds 35% of site area, construction of a front fence within 4 metres of Trees 8, 9, 10 and 13 which are protected under SLO6, remove destroy or lop trees except those exempted in SLO6).
Relevant scheme policies and provisions	Clauses 11, 15, 16, 21.04, 21.05, 21.06, 22.03, 22.04, 42.03, 65 and 71.02.
Land description	The site is triangular in shape, has a frontage of 42.67 metres, a depth of 34.64 metres and an area of 739 square metres. The site is now vacant following demolition of a single storey dwelling following a house fire in 2019.
Tribunal inspection	An unaccompanied inspection was undertaken on Thursday 8 July 2021.

REASONS¹

- 1 The Responsible Authority has granted a permit for a new dwelling on a vacant lot, previously occupied by a dwelling destroyed by fire some 2 years ago. The site is now cleared save for taller vegetation which survived the fire or has not been removed.
- 2 The new dwelling is single storey, and contains open plan living areas, four bedrooms and double car garage accessed via the existing crossover towards the western end of the site. A 1.8 metre high fence is proposed along the street frontage. Site coverage is 38.5% and hard paved surfacing is 44%. Four trees protected under the SLO6 are proposed for removal (Trees 1, 6, 7 and 12) and four trees protected under the SLO6 are proposed to be retained (Trees 8, 9, 10 and 13).
- 3 The Applicant has sought to delete or amend conditions 1a), 1c), 1g), 1h), 5a), 5b)iv, 5(b)vi, 6(a), 6(b), 6(c), 6 (d), 8 and 11. At the hearing I also included condition 13 to ensure consistency with agreed changes to condition 8. These are the only conditions subject to review and require:
 - 1a) Alterations to the plans to allow for the retention of Tree 7 (with no reduction to street front setback and a maximum 10% encroachment into the TPZ and no encroachment into the SRZ).
 - 1c) The location of all service trenches to serve the dwellings (for example: gas, water, electricity, stormwater, sewerage, telecommunications), including the extent of trenching required in easements over adjoining lots (if any) and the location of protected trees within 4 metres of these trenches (if any). The service trenches must be located, hand dug or bored to ensure that protected trees are not damaged, to the satisfaction of the Responsible Authority.
 - 1g) Provision of increased landscaping and groundcovers alongside rear boundaries with a fast-growing native/indigenous species selection.
 - 1h) Front fencing in accordance with concept fence elevation prepared by Axiomplus Architects Rev A dated 15 October 2020 – however be amended to be setback 0.5 metres from street frontage with landscaping in front and to show wrought iron infill in front of proposed dwellings entire frontage .
5. Prior to commencement of any building or demolition works on the land, the Tree Protection Zones (TPZs) must be established on the subject site and nature strip and maintained during, and until completion of, all buildings and works including landscaping, around the following trees in accordance with the

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.

distances and measures specified below, to the satisfaction of the Responsible Authority:

- a) Tree Protection Zone distances:
 - i. Tree 2 – 5.2 metre radius from the centre of the tree base.
 - ii. Tree 3 – 2.5 metre radius from the centre of the tree base.
 - iii. Tree 4 – 2.4 metre radius from the centre of the tree base.
 - iv. Tree 5 – 2.0 metre radius from the centre of the tree base.
 - v. Tree 7 – 6.8 metre radius from the centre of the tree base.
 - vi. Tree 8 – 5.8 metre radius from the centre of the tree base.
 - vii. Tree 9 – 2.3 metre radius from the centre of the tree base.
 - viii. Tree 10 – 2.3 metre radius from the centre of the tree base.
 - ix. Tree 11 – 2.0 metre radius from the centre of the tree base.
 - x. Tree 13 – 2.0 metre radius from the centre of the tree base.
 - xi. Tree 14 – 2.0 metre radius from the centre of the tree base.
 - xii. Tree 16 – 2.5 metre radius from the centre of the tree base.

- b) Tree Protection Zone measures are to be established in accordance with Australian Standard 4970-2009 and are to include the following:
 - i. (not being reviewed).
 - ii. (not being reviewed).
 - iii. (not being reviewed).
 - iv. No excavation, constructions works or activities, grade changes, surface treatments or storage of materials of any kind are permitted within the TPZ unless otherwise approved within this permit or further approved in writing by the Responsible Authority.
 - v. (not being reviewed).
 - vi. No trenching is allowed within the TPZ for the installation of utility services unless tree sensitive installation methods

such as boring have been approved by the Responsible Authority.

- vii. (not being reviewed).
 - viii. (not being reviewed).
 - 6. During construction of any buildings, or during other works, the following tree protection requirements are to be adhered to, to the satisfaction of the Responsible Authority:
 - a) The paved area where within the TPZ of Tree 16, must be constructed above the existing soil grade using porous materials that allows water to penetrate through the surface and into the soil profile. There must be no grade change within the TPZ, and no roots are to be cut or damaged during any part of the construction process.
 - b) For Trees 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14 and 15 no roots greater than 40mm in diameter are to be cut or damaged during any part of the construction process.
 - c) All buildings and works for the demolition of the site and construction of the development (as shown on the endorsed plans) must not alter the existing ground level or topography of the land (which includes trenching and site scrapes) within greater than 10% of the TPZs of Trees 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14 and 15.
 - d) The builder / site manager must ensure the TPZ Fencing Conditions and the Tree Protection Conditions for Trees 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15 and 16 are being adhered to throughout the entire building process, including site demolition, levelling, and landscape works.
 - 8. All stormwater drains and on-site detention systems are to be connected to the legal point of discharge to the satisfaction of the Responsible Authority prior to the occupation of the building/s. The requirement for on-site detention will be noted on the stormwater point of discharge report, or it might be required as part of the civil plans approval.
 - 11. Prior to works commencing the Applicant/ Owner is to submit design plans for all proposed engineering works external to the site. The plans are to be submitted as separate engineering drawings for assessment by the Responsible Authority.
- 4 At my suggestion, and with the agreement of parties at the hearing, the application has been amended to include condition 13 as a subsequent change is required to that condition to delete reference to an on-site detention system.
- 13. The qualified civil engineer when undertaking civil design must ensure that the landscape plan/s and drainage plan/s are compatible. The stormwater drainage and on site detention

system must be located outside the tree protection zone (TPZ) of any trees to be retained.

- 5 Of these, it is the request to delete condition 1a) and allow the removal of Tree 7 which has generated the greatest opposition from Council and the respondent parties. Whilst respondents are also concerned about requested changes to other conditions, those other conditions were not the primary focus of written and oral submissions.
- 6 Proposed changes to conditions 8, 11 and 13 relating to on-site detention systems and engineering design were only in dispute between Council and the Applicant.
- 7 Before discussing each of the conditions, I start by providing an overview of the planning provisions relevant to my assessment.

MY ASSESSMENT OF THE CONDITIONS IN DISPUTE

Relevant planning provisions guiding my assessment

- 8 Whilst the site is within a NRZ1 (Bush Environment Areas), the only permit requirements arise because the land is within the SLO6.
- 9 Whilst Significant Landscape Overlays apply across the municipality, only a few geographically confined areas are included in the SLO6, including a small area around Menin Road. The statement of nature and key elements of landscape for the SLO6 are:

The topography and vegetation of the Yarran Dheran and Collina Dell area, sloping down to the Mullum Mullum Creek and Somers Trail and associated parklands, make these areas distinctive and have influenced the building styles and forms. The Menin Road area is distinctive for the presence and frequency of remnant indigenous stringybark eucalypts and its overall tree density among surrounding areas of lesser vegetation dominance. The dwellings are often nestled into the bushy gardens comprising both exotic and native species, and the canopy trees on lots and within reserves also contribute to the vegetation dominated streetscapes. Consistent front and side setbacks, the use of natural building materials in retaining walls and the lack of front fencing contribute to the bushy setting of the area.

- 10 The landscape character objective to be achieved:
 - To retain and enhance the bush vegetation dominated vistas and streetscapes, through ensuring the dominance of native and exotic vegetation cover.
 - To ensure that a reasonable proportion of a lot is free of buildings to provide for the retention and planting of tall trees in a natural bush setting.
 - To ensure that the development of buildings follows the contours of the land, and sited below the predominant tree canopy height.

- To ensure front setbacks are consistent with others in the street, and are well vegetated.
- To ensure that buildings and works retain an inconspicuous profile and do not dominate the landscape.
- To encourage the use of vegetation as an alternative to front fencing, and low to average height open style front fences.
- To ensure that development is compatible with the character of the area.

- 11 Underpinning the SLO6 is local policy at Clause 22.03 which identifies the area as being within a Bush Environment Precinct. The preferred character statement for these precincts is that:

The streetscapes 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. Properties abutting and close to creeks and lake environs will contain more indigenous trees and shrubs that act in part as wildlife corridors.

This precinct is identified for the lowest scale of intended residential growth in Whitehorse (Limited Change area) and the preservation of its significant landscape character and environmental integrity is the highest priority.

- 12 In addition, local policy at Clause 21.06 recognises that trees and vegetation are one of the most significant determinants of neighbourhood character, and tree preservation and regeneration are of vital importance if the character is to be maintained and enhanced. Within limited change areas there is a desire to conserve and enhance those elements that contribute to the valued environmental, heritage and neighbourhood character and that adequate space should be provided for substantial vegetation.
- 13 When taken together, it is clear that the local policies expressed in Clauses 21.06 and 22.03, and the SLO6, are seeking to preserve the significant landscape character, and that environmental integrity is to be given the highest priority. It is also significant that the presence and frequency of remnant indigenous stringybarks in the Menin Road area is specifically referred to in the statement of nature and key features for SLO6.
- 14 However, it is not the case that vegetation, even remnant indigenous stringybarks, must be retained to the complete exclusion of other policy or site context influences. The Tree Conservation policy at Clause 22.04 acknowledges that all trees that are sound in health, reasonable in structure



of an appropriate species, and are in a location that can be reasonably designed around should be retained. Performance standards in Clause 22.04-4 state that trees be retained except if they are in a location which in the opinion of the responsible authority makes it impractical to be retained. Other performance criteria are also given as to why trees may be suitable for removal.

- 15 The performance standards also deal with buildings and works near existing trees, techniques for successful tree retention and tree replanting. I note that the decision guidelines in SLO6 also include requirements/things to consider, including total building site coverage and a planting density of one 15 metre high tree per 150 square metres of site area.
- 16 These matters to consider also concern built form such as buildings designed to retain an inconspicuous profile and not dominating the landscape, providing boundary setbacks to accommodate substantial canopy trees, vehicle access arrangements, and materials and finishes to harmonise with the landscape setting. Although these all in one way or another have a focus on landscape and vegetation, they cannot be ignored in any discussion about alternatives to removing/retaining individual trees such as Tree 7.
- 17 As I later discuss, suggestions that construction of a double storey dwelling would enable retention of Tree 7 needs to also have regard to matters such as the building achieving an inconspicuous profile and provision of boundary setbacks able to accommodate substantial canopy trees.
- 18 Policy recognises that there will be instances where it is not reasonable to design around trees or where it is impractical to do so.
- 19 That reasonableness or practicality is the fundamental issue in dispute around the removal/retention of Tree 7. Council and respondents submit that a single dwelling can be constructed on the site without the need to remove Tree 7. It is submitted that Tree 7 was able to be retained when the previous dwelling occupied the site and that a differently designed dwelling, perhaps of two storeys, could be constructed which enables both retention of Tree 7 and construction of a new dwelling.
- 20 The Applicant disagrees and submits that the position of Tree 7 on the site and its canopy structure is such that it is impractical and unreasonable to retain it, whilst also allowing construction of a single storey dwelling on the site.
- 21 As always, any assessment needs to balance often competing outcomes to arrive at an acceptable outcome as required by Clause 65. As affirmed by the Supreme Court of Victoria², acceptable does not mean ideal outcomes.
- 22 I now discuss each of the conditions in dispute.

² *Rozen & Anor v Macedon Ranges Shire Council & Anor* [2010] VSC 583 (paragraph 175).



Condition 1a) – retention of Tree 7 (mealy stringybark)

- 23 I start by observing that the condition requiring retention of Tree 7 was not recommended by Council officers but was included by Councillors. Whilst some late changes to recommended permit conditions do not fundamentally change a development proposal, that is not the case here. Retention of Tree 7 will require a fundamental redesign of the proposal.
- 24 The following photograph of Tree 7 is from Mr Collie’s submission.



- 25 Four Arborists have investigated this tree and two appeared and gave evidence at the hearing.
- 26 The first assessment was undertaken in November 2019 by Evergreen Tree Consulting. It identified the tree as a Mealy Stringybark (*eucalyptus cephalocarpa*), diameter at breast height (**DBH**) of 57cms, height 13 metres, canopy spread 10 metres, poor health, fair form, fair structure, medium retention value, 5-10 year useful life expectancy (ULE), low hazard and with canopy dieback.
- 27 The second was undertaken by Council's Arborist in July 2020 based on reviewing the earlier work, and supported removal of trees plus provided recommendations for permit conditions.
- 28 The third assessment was undertaken by Treemap Arboriculture following an inspection on 8 April 2021. It also identified the tree as a Mealy Stringybark (*eucalyptus cephalocarpa*), DBH of 56cms, height 14 metres, canopy spread 15 metres, fair to poor health, asymmetric form, fair to poor structure, low retention value, semi-mature, canopy dieback but could be retained.
- 29 The fourth and final assessment was undertaken by Arbor Survey on 14 April 2021. It also identified the tree as a Mealy Stringybark (*eucalyptus cephalocarpa*), DBH of 56cms, height 13 metres, canopy spread 13 metres, fair to good health, fair to good structure, high landscape and arbor value, mature, no evidence of impact from past fire, minor deadwood and epicormic growth.
- 30 Based on these assessments, there is broad agreement about the height and width of the tree, and that the health ranges from fair to poor to good and structure ranges from fair to poor to good.
- 31 The main difference in opinion is the overall value of the tree. Given the Arbor Survey assessed the health as fair to good and structure as fair to good, it is difficult to reconcile those ratings with the subsequent high Arbor value. However, I do accept that Tree 7 may have a high landscape value despite the lower health and structure ratings. Even Mr Simonsen who found the tree had a low retention value acknowledged that the tree could be retained.
- 32 Based on the Arboricultural evidence, I consider that there can be no doubt that Tree 7 is both important in the landscape and that it can be retained.
- 33 Although it has some dead word and dieback, it does not suffer any of the major structural or other shortcomings listed in the performance standards in Clause 22.04-4. Although I have not been told it is significant because of specific cultural or historic links, it does contribute to the aesthetic, neighbourhood character and ecological values of the precinct.
- 34 It survives now and I agree with submissions that the canopy health appears to have improved since the fire and first Arboricultural assessment in 2019.

- 35 However, it is not so much a question as to whether the tree can be retained. Rather it is a question of whether it is reasonable and practical to do so even though the preservation of significant landscape character and environmental integrity is the highest priority within Bush Environment Precincts.
- 36 Whilst Mr Simonsen in his assessment took into account the position of the tree on the site and formed the view *that Tree 7 is in a location which makes it impractical to be retained*, that seems to me to go beyond an expert arboricultural assessment of the physical condition of the tree (i.e. health, structure, useful life expectancy, canopy condition including possible lopping or trimming) and TPZ and SRZ calculations.
- 37 Deciding whether the location of the tree on the site makes development impractical or unreasonable brings into play other factors which I need to consider including relevant sections of the municipal planning strategy and broader planning policy framework.
- 38 The BVRG' submission made favourable reference to the Tribunal's comment in *Doruwalla v Whitehorse CC* [2004] VCAT 1057 that:
- [16] The existence of overlays raises the bar compared to policies and controls applying to land that is simply Residential 1 Zone without overlays. Matters such as neighbourhood character..... are relevant in both instances but on sites with overlays such as SLOs any proposal will need to be designed having regard to the specific objectives, policies and decision guidelines contained in the relevant overlay.
- 39 I agree that the existence of overlays introduces a layer of control which would not otherwise exist. Overlays require a more detailed examination of matters which would otherwise be of lesser importance, or as in this case where no permit is required under the NRZ1, is the only reason for a permit and assessment against the SLO6 provisions.
- 40 The permit requirement to retain Tree 7 but with no reduction in the front setback, but allowing a maximum 10% encroachment into the Tree Protection Zone (TPZ) but no encroachment into the Structural Root Zone (SRZ), will require a complete redesign of the approved dwelling.
- 41 To provide the same floorspace will almost certainly require a dwelling of two storeys with consequential impacts around built form, upper level setbacks and off-site amenity impacts. The single storey dwelling now approved achieves many of the SLO6 objectives and decision guidelines including retaining an inconspicuous profile, not exceeding the predominant tree canopy height, and providing sufficient unencumbered land in the pointy end of the site to provide for replacement planting. Building coverage marginally exceeds the 35% 'trigger' for planning permission but is less than the 40% referred to in the decision guidelines.
- 42 Whilst submissions questioned whether existing and new planting would achieve the average density of 1 tree reaching a height of over 15 metres to



each 150 square metres of site area (6 trees in total), the landscape plan and permit conditions indicate that 5 trees reaching these heights will be planted or exist (two *eucalyptus cephalocarpa*, two *acacia melanoxylon*, one *eucalyptus goniocalyx*). Whilst one shy of the six needed to satisfy the decision guideline it still represents a substantial increase in the number of canopy trees on this site. Unlike some other sites in the SLO6, the area to be utilised for planting is to the side (rather than backyard) of the dwelling and visible from the street. As the new vegetation grows it will make a visible contribution within the streetscape and to the environmental and neighbourhood character of the SLO6 precinct.

- 43 As I observed earlier in my reasons, these are all matters that would need to be considered if buildings and works approval is required pursuant to part 3 of the SLO6.
- 44 The physical relationship between Tree 7 and the dwelling can be seen on the site plan appended to Mr Simonsen’s evidence statement.



- 45 Whilst the TPZ is 6.72 metres and the SRZ just 2.7 metres, the canopy of the tree is asymmetrical with major southern and northern leader branches. The southern leader branch extends well beyond 2.7 metres from the trunk and would overhang any dwelling setback outside the SRZ. It would also extend beyond the TPZ. Positioning the dwelling outside the SRZ would require deletion of Bedroom 3. Beyond the 10% encroachment of the TPZ would realistically require deletion of Bedrooms 2 and 3, the en-suite and part of the bathroom.
- 46 An examination of the plan on the previous page suggests that the developable area of the lot would be significantly reduced based on the limitations imposed by condition 1a), together with setbacks from the side boundary to protect Tree 16 and the 1.83 metre wide easement along the rear boundary.
- 47 Whilst there was some dispute about whether Tree 7 can be described as being positioned close to the centre of the site or instead off-centre towards the narrower, pointy end of the site, the width of the TPZ and its extension towards the widest section of the site results in the central part of the site being excluded from development. The width and spread of the canopy also impact on the area of the site that can be developed.
- 48 I agree with Mr Simonsen that the southern leader branch would require removal or significant lopping even if the tree were retained to allow construction of a dwelling with a smaller footprint. The remaining tree canopy comprising the northern leader branch would be lopsided and potentially require removal in the future for arboricultural or safety reasons. I do not support such a poor long-term environmental outcome.
- 49 I accept there will be a loss of habitat for birds and other creatures and that the landscape amenity as experienced from nearby residents will be affected by removal of the Tree 7. Whilst removal of any large indigenous canopy tree is not a decision to be taken lightly, I consider that removal of Tree 7 and its replacement with trees of a similar species will, in the longer term, help maintain the bushy vegetated character of the precinct..
- 50 It is a long-term view. The people involved in this hearing may not live to see replacement planting reach maturity, but without the gradual replacement of the older canopy trees, the valued character of SLO6 will be lost. Mature trees will die or be damaged over time but without the benefit of planned replacement such as required by the conditions on this permit.
- 51 Conditions which are not being appealed require new trees and other vegetation in accordance with the landscape plan and for it to be to the satisfaction of the Responsible Authority. I observe that two Mealy Stringybarks are required to be planted.
- 52 In making these comments I acknowledge that there are many instances within the immediate area where trunks and branches are close to or overhang dwellings. For example, the dwelling at No 12 Andrew Street



opposite the review site, has a very large tree with its trunk abutting the eaves of the dwelling. Tree canopies also overhang many dwellings.

- 53 Those are existing circumstances and highly valued by residents who reside in this locality. But for the most part those dwellings were constructed with different controls in place, or perhaps no controls in place concerning tree retention, tree planting, construction techniques and knowledge and standards about the impact of trees close to buildings and buildings close to trees. Given the current controls and regulations it would not be possible, or extremely difficult, to replicate those existing conditions. The new dwelling at No 57 Shady Grove is indicative of the impact of a new dwelling and the separation distance being provided to the canopy tree remaining on the site.
- 54 In balancing the relevant policies and controls applying to this application, I consider that retention of Tree 7 will significantly impact on the ability of this site to be developed for a dwelling which, as I have described above, achieves many of the built form outcomes sought by SLO6.
- 55 I recognise that every tree that is allowed to be removed represents a cumulative loss, which is something that SLO6 and Clause 22.04 aim to prevent as much as possible. That loss is something which residents and groups such as the BVRG and BDTPS have fought long and hard to stop. The current controls exist because of that advocacy.
- 56 But the controls are not prohibitive, and it is necessary to consider every proposal on their individual circumstances. The unusual triangular shape of the review site, lack of a backyard and instead a side yard exposed to the street, occupation by a relatively modestly sized dwelling burnt down 2 years ago, and the position of the largest tree approximately 2/3rds of the way along the site, all influence whether approval should be given to remove Tree 7.
- 57 Whilst the environmental and character impacts in allowing removal of even just one canopy tree cannot be downplayed, I consider it is impractical and unreasonable to retain Tree 7 and allow construction of a new dwelling that achieves many of the built form outcomes sought by SLO6.
- 58 I will direct that condition 1a) be deleted.

Conditions 1c), 5b)(iv) and 5b)(vi) – trenching within TPZs

- 59 The Applicant seeks to amend these conditions so that service trenches must only be located, hand dug or bored when within more than 10% of the TPZs of protected trees.
- 60 The reference to 4 metres in condition 1c) is in response to the performance standard in Clause 22.04-4 for buildings and works near existing trees. It also responds to the permit requirement for buildings and works within 4 metres of vegetation requiring a permit to remove, destroy or lop. I emphasise that the provisions refer not just to buildings but also works.



- 61 I therefore do not agree with the amendment proposed by the Applicant to allow excavation, storage of materials, trenching and the like within the 10% encroachment of the TPZ of retained trees.
- 62 I do not agree with Mr Simonsen's criticism of the 4 metre separation distance. Whether it is different to the more recent provisions for SLO9 is beside the point since the provision specifically applies to SLO1-8 or a Vegetation Protection Overlay.
- 63 However, I note that the TPZ of Trees 3, 4, 9, 10 13 are all less than 4 metres and I consider the condition should be amended to allow trenching outside the TPZ if it is less than 4 metres from the trunk of the protected tree.
- 64 Condition 1c) is to be amended, whilst conditions 5b)(iv) and 5b)(vi) are to remain unaltered.

Condition 1g) – increased landscaping along the rear boundary

- 65 A 1.83 metre wide easement runs along the whole rear boundary. The new planting of larger trees and shrubs is often problematic and opposed by servicing authorities. That is the case even though many easements do contain more substantial vegetation, including within the easement on the review site. I also record that policy at Clause 22.04-4 specifically states that new trees should not be planted within land encumbered by an easement.
- 66 The landscape plan has proposed three large canopy trees outside the easement together with lower growing shrubs within the easement. The unusual triangular shape of the land, the absence of a more traditional 'backyard', the existence of the easement and the proximity of the dwelling to the back fence, do not provide practical scope for more extensive areas of landscaping along the rear boundary.
- 67 Whilst some nearby sites do have larger trees and vegetation in rear yards, those sites are mostly rectangular in shape and for the most part do not have the same layout constraints as the review site. Because of its triangular shape, the 'backyard' on the review site is effectively a side yard at the pointy end of the triangle.
- 68 I consider it more important from a landscape character perspective that additional landscaping take place in this pointy end of the site, where it can make a more meaningful visual and character contribution to the streetscape and where planting is not constrained by the easement.
- 69 I will delete this condition.

Condition 1h) – setback of front fence, changed design structure and landscaping

- 70 As observed in the previous section, because of the triangular shape, the backyard on the review site is effectively a side yard. It is reasonable in a

residential setting to expect this yard to have a level of privacy which would normally be afforded in the backyard of a rectangular shaped lot.

- 71 I acknowledge that one of the landscape character objectives in SLO6 is to encourage the use of vegetation as an alternative to front fencing, and low to average height open style front fences. Whilst low of no fencing is relatively common in the SLO6 area, higher fencing exists along Andrews Street, including on the two adjoining sites. Remnant taller fencing also remains along part of the frontage of the review site. I consider that a taller fence is justified as it will provide privacy to the private open space of the dwelling. I also find the fence materials and colours as shown on the fence detail diagram acceptable. My support is also predicated on the landscaping being provided in front of and on the fence.
- 72 As discussed at the hearing, somewhat unusually the footpath does not abut the title boundary and instead is located approximately 500mm away from that boundary. This setback can be clearly seen on the photographs tendered by Council at the hearing. As confirmed on my site inspection, the remnants of the original fence shown on the site plan as being positioned on the title boundary means that there is an area between the footpath and the title boundary/front fence available for planting. That footpath setback condition appears to exist along the frontages of the adjoining properties.
- 73 Whilst I understand the character benefit of providing space for landscaping including the planting of fence climbers, I am not persuaded that there is reasonable justification for requiring the new fence to be setback 500mm from the title boundary. It would have the effect of creating a 1 metre planting strip between the footpath and the new fence and is not necessary to allow plants to grow.
- 74 I will amend this condition.

Condition 5a) -TPZ's from specified trees

- 75 Whilst the Applicant submits this condition is unnecessary because the TPZs are contained in the Arborist report, it does not oppose its retention subject to the reference to removed tree being corrected.
- 76 I support its retention subject to corrections being made to remove trees no longer on the site or being retained. It is far preferable in the implementation of the permit conditions for the TPZs being specified in the permit rather than referring to a separate Arborist report.

Conditions 6a) to 6d) – Construction within TPZ of Tree 16

- 77 I do not support the deletion of condition 6a) or other parts of conditions referencing Tree 16 on the neighbouring property. Mr Simonsen states that *Tree 16 is allegedly being removed by the adjoining property owner*. I am advised that is factually incorrect and I note that at the time of the hearing the tree remains.

- 78 Tree 16 is a *Pittosporum eugenioides* and is not a weed species. The tree has a SRZ of 1.8 metres and a TPZ of 2.5 metres. I acknowledge that the TPZ of the tree was most likely significantly impacted by a previous building on the review site. Aerial photos tabled at the hearing show a structure built very close to the side boundary adjacent to Tree 16.
- 79 However, no root investigation has been undertaken of Tree 16 and I consider it is speculative to assume that no roots extend onto the site. In those circumstances the tree roots should be protected so long as the tree remains.
- 80 I support retention of condition 6a) subject to additional wording recognising that if Tree 16 is removed before development starts on the review site, then there is no need for paving to be constructed above existing soil grade.
- 81 Condition 6b) can be deleted as condition 6c) deals with root protection in a more general way. Conditions 6c) and 6d) to be amended to include varied Tree numbers.

Conditions 8, 11 and 13 – onsite detention systems and off- site engineering works

- 82 These three conditions concern reference to an onsite detention system and external engineering works. These conditions were not at issue or commented upon by respondent parties. Council agreed that the reference to an on-site detention system should be deleted as there is no necessity to provide such a facility since all drainage is required to go to a legal point of discharge.
- 83 Whilst the Applicant does not strongly oppose the condition concerning external engineering works, I consider it should be retained and do not support its deletion. Whilst separate approvals maybe required for such external works, where they relate to works being undertaken on the site it makes sense that Council can review designs to ensure they integrate with off-site services and infrastructure.
- 84 I will amend conditions 8 and 13 but retain condition 11.

CONCLUSION AND DECISION

- 85 Retention or removal of Tree 7 is the key issue in dispute. Whilst removal of any large indigenous tree is not a decision to be taken lightly, I consider that retention of the tree is both impractical and unreasonable given the significant constraints caused by its location on the site.
- 86 I recognise that the preservation of the significant landscape character and environmental integrity is the highest priority within Bush Environment Precincts. However, Clause 72.02-3 of the Planning Scheme requires me to balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.



- 87 In balancing those objectives, I have considered both the environmental and landscape impacts of removing Tree 7 but also, as required by SLO6, considered the built form impacts of the new dwelling and whether it achieves the outcomes sought, including it having an inconspicuous profile, being sited below the predominant tree canopy and not dominating the landscape.
- 88 Importantly, the net community 'test' is not only about present generations but also about the future. Without the gradual and regulated replacement of older canopy trees, I consider that the valued environmental and landscape character of the SLO6 will be progressively lost for those who come after us. Replacement planting of indigenous species required by permit conditions will in time enhance the contribution this site makes to the environmental and landscape character of SLO6.
- 89 For all the reasons given, I will amend the permit by deleting conditions 1a), 1g) and 6b) and vary or retain other conditions as set out in my order.

J A Bennett
Senior Member