

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1312/2023
PERMIT APPLICATION NO.TPA/55240

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987* (Vic.) - Monash Planning Scheme - Neighbourhood Residential Zone 4 - Vegetation Protection Overlay 1 - Narrow-leaved black peppermint tree – Obligations of owners to maintain trees

APPLICANT	Deepak Kumar
RESPONSIBLE AUTHORITY	Monash City Council
SUBJECT LAND	51A Petronella Avenue WHEELERS HILL VIC 3150
HEARING TYPE	Hearing
DATE OF HEARING	15 February 2024
DATE OF ORDER	15 February 2024
CITATION	Kumar v Monash CC [2024] VCAT 131

ORDER

No permit granted

- 1 In application P1312/2023 the decision of the responsible authority is affirmed.
- 2 In planning permit application TPA/55240 no permit is granted.

Cassandra Rea
Member

APPEARANCES

For applicant	Deveet Kumar
For responsible authority (Monash City Council)	Roseanna Oppedisano, Statutory Planner



INFORMATION

Description of proposal	Removal of a tree - 14-metre-high <i>Eucalyptus nicholii</i> (Narrow-leaved black peppermint tree) ('the Tree')
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Monash Planning Scheme ('the Scheme')
Zone and overlays	Neighbourhood Residential Zone – Schedule 4 ('NRZ4') Vegetation Protection Overlay – Schedule 1 ('VPO1') Special Building Overlay ('SBO')
Permit requirements	Remove or destroy any vegetation that has a trunk circumference greater than 500 millimetres (160 millimetres diameter) at 1200 millimetres above ground level and is higher than 10 metres.
Key scheme policies and provisions	Clauses 21.01, 21.04, 22.01, 22.05, 42.02, 59.06, 65
Land description	The site is rectangular in shape with a frontage of 8.6 metres, an average depth of 37 metres and an area of approximately 317 square metres. The site comprises one of a pair of side-by-side dwellings that has been recently constructed. Located adjacent to the western boundary and within the front setback is a mature narrow-leaved black peppermint tree

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 This proceeding relates to the removal of a narrow leaved black peppermint tree ('the Tree') located on the above property. The tree is estimated to be approximately 14 metres high.



Figure 1: Photo of large tree to be removed. Source: Council's Submission.

- 2 The Monash City Council ('the Council') refused a planning permit on the following grounds:

Removal of the tree would be inconsistent with the objectives of Clause 22.05 (Tree Conservation Policy) and Clause 42.02 (Vegetation Protection Overlay) and would have a detrimental impact on the landscape character of the area.

There is insufficient evidence to support removal of the subject tree, as removal has been arboriculturally assessed as 'premature because mitigation options are worth implementing.'

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.

The tree makes a significant contribution to the landscape character of the area. The removal would fail to maintain the Garden City Character of the area.

- 3 The applicant has applied to the Tribunal for a review of the Council's decision relating to the following matters:
- The Council did not properly consider the arborist letter that accompanied the application.
 - The necessary mitigation options are costly and he is not in a financial position to bear these costs. Council ought to pay for these options.
 - There are two new street trees less than 10 metres from this tree which will maintain the Garden City Character of the area.
 - There is an electricity pit beneath the tree and a group electricity box within the structural root zone.
- 4 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered the submissions, with regard to the relevant policies and provisions of the Planning Scheme, I have determined to affirm the Council's decision. My reasons follow.

PLANNING CONTEXT

- 5 The subject site is located within the NRZ4. Schedule 4 relates to the Dandenong Valley Escarpment Area. The objectives of Schedule 4 are:
- To ensure new development maintains the important view lines to the Dandenong Ranges, along the streets and between buildings.
 - To ensure development is defined by its spacious and generous garden settings, tall canopy trees and consistent built form and setbacks.
 - To encourage open gardens to the street, and the planting and retention of significant trees.
- 6 Whilst there are decision guidelines relating to retention of trees and designing a development having regard to the landscape setting, there are no permit triggers for the removal of vegetation under the NRZ4.
- 7 More relevant, the land is also located within the VPO1. The purpose of the VPO1 is:
- To conserve significant treed environments and ensure that new development complements the Garden City Character of the neighbourhood.
- 8 The following statement applies:
- The significance of vegetation in Monash is in its contribution to the urban character of the municipality, particularly in residential areas. The Municipal Planning Strategy and tree conservation policy recognise the importance of canopy trees as a significant aspect of urban character. Canopy trees unify the streetscape in residential



areas, avoid the impression of visual clutter, and provide a strong naturalistic image and a sense of enclosure within a street.

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.

The western slopes of the Dandenong valley are known for having a dense canopy of native trees. While most of these are due to planting that has occurred since development, there are some large remnant trees throughout the area.

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.

(Council’s emphasis added)

- 9 A planning permit is required to remove or destroy any vegetation that has a trunk circumference greater than 500 millimetres (160 millimetres diameter) at 1200 millimetres above ground level and is higher than 10 metres.
- 10 There were no submissions tendered that this tree did not meet the above threshold or the tree was dead or a species where the permit trigger didn’t apply.
- 11 Clause 42.02-2 establishes the application is a VicSmart application and information requirements and decision guidelines are outlined at Clause 59.06. The objectives of the VPO1 enables consideration of the broader Planning Policy Framework.
- 12 The importance of retaining trees is also recognised in the following policies:
 - Clause 21.01 Introduction, Municipal Strategic Statement.
 - Clause 21.04 Residential Development
 - Clause 22.01 Residential Development

- Clause 22.05 Tree Conservation Policy

PLANNING HISTORY

- 13 The Council outlined that the site does have relevant planning history. As mentioned above, currently located on the subject site is a recently constructed dwelling that was approved and constructed as a part of a side by side development.
- 14 The Council provided a copy of planning permit TPA/49888 that was issued on 11 September 2019 and notes that there are a collection of specific tree protection measures outlined at Conditions 1a, 1b, 1c, 5, 6, 7 and 8.
- 15 The Council says the tree was documented as being in good health at the time of processing the dual occupancy application, and visually appeared to be in good health at the time of landscape inspection in October 2021.
- 16 Council also notes a number of variations to the previously endorsed plans around the tree. Specifically, the location of an electrical meter box and the alignment of the front fence that impinges within the structural root zone of the tree.

TREE CONDITION

- 17 It is clear from photos provided within the submission and the arboricultural letter dated 11 August 2023 prepared by Tree Response ('arborist letter') that the tree's condition has declined.
- 18 No arborists have provided any expert evidence to assist the Tribunal about how this particular tree contributes now, and will into the future, to the landscape environments.
- 19 The applicant says he values the tree and has attended to the tree to ensure it's survival. He says the tree has been in good condition for five years but on three separate occasions recently he has had to engage arborists to remove branches. The applicant says that this has been done in accordance with the Australian Standard.
- 20 During the hearing the applicant established that he asked the builder to comply with the conditions of planning permit TPA/49888. He alleges that the electrical company undertook works to uplift a pit near the tree without notice. This is regrettable.

HOW DOES THE TREE REMOVAL RESPOND TO THE RELEVANT DECISION GUIDELINES UNDER CLAUSE 59.06?

- 21 Council's submission tenders photos of the site and area showing the 14 metre high tree is clearly visible from the streetscape and makes a contribution to this suburban environment.

- 22 The Council also says that the tree *‘along with other trees in the immediate locality, form an important naturalistic element that makes a significant contribution to the character of the area’*.
- 23 In relation to relevant decision guidelines under Clause 59.06 and VPO1, Council makes the following submissions which were not contested by the applicant:
- The nature of the tree being a native supports birdlife throughout the area and provides part of a canopy “corridor” on private and public land along Petronella Avenue and the multiple reserves/parkland surrounding the site.
 - While the tree is not identified as a rare species it does form part of a broader upper level canopy and it makes an important contribution to the canopy and birdlife habitat in the area.
 - The tree’s loss would be a significant one for the area and the landscape. It would remove upper level canopy on this site that has existed for a long time.
 - Any replacement planting would take a long time to grow and make a comparable contribution.
 - There are no other trees on the land.
 - The tree can not be relocated.
 - No issues arise from bushfire, soil erosion, slippage or salinisation.
- 24 The reasons for removal will be discussed in greater detail below, however the Council dismisses the need for the removal of the tree on the basis that the arborist letter says the decay is minor only, the tree is showing some vitality and there are some mitigation recommendations that ought to be explored. The arborist letter concludes that *‘Tree removal is now premature because mitigation options are worth implementing’*.
- 25 Overall, the Council has completed a comprehensive assessment of the relevant decision guidelines under Clause 59.06 and the VPO1. I must now determine whether the reasons for the removal submitted by the applicant justify the removal of the tree.

MATTERS RAISED BY THE PERMIT APPLICANT

- 26 The applicant has raised that the Council did not properly consider the arborist letter that accompanied the application. As specified above, no arborist has provided any assistance to the Tribunal with respect to the condition of the tree. Moreover, there have been no arboricultural reasons why the mitigation options cannot be pursued. The applicant interprets the arborist letter as the tree will still need to be removed in five years but in the meantime he has incurred costs for maintenance.

- 27 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. Whilst I asked the applicant what is the cost of the mitigation measures, this has not been substantiated or verified. In fact, no quotes had been obtained by the applicant.
- 28 The Council says ‘*Maintenance costs versus the cost of removal and replanting are not matters for consideration*’. I cannot be persuaded that the alleged excessive cost of the mitigation measures outweighs the net community gain of the tree retention that contributes to the treed environment sought by planning policy.
- 29 As the tree is a private asset, I do not agree that Council ought to pay for these options. The alleged damage sustained to the tree and the approval of the meter box within the Structural Root Zone was not done by Council.
- 30 Council’s planning policy is clear with respect to the objective to retain trees on private land. They have implemented a VPO1 that provides extra protection to keep trees that contribute to the treed environment urban character. It is not unencumbered on Council alone to plant and retain trees. If anything, the two new street trees less than 10 metres from this tree further contributes to the Garden City Character of the area that is sought by policy. I also agree with Council’s statement *It will take an extensive period of time for any replacement planting to replace the amenity lost if the subject tree is removed.*
- 31 The matter of insurance coverage is not a matter that I can have regard to.
- 32 Notably, the applicant did not take the Tribunal to any relevant matters within the Scheme, but did make mention of the Garden City Character.

CONCLUSION

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

Cassandra Rea
Member