

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1701/2020  
PERMIT APPLICATION NO. 218/202/14P

### CATCHWORDS

Nillumbik Planning Scheme; two lot subdivision in the Neighbourhood Residential Zone; lot density and pattern of subdivision; assessing a subdivision against the statement of preferred future character; consideration of the likely future development of a two lot subdivision.

<b>APPLICANT</b>	Fotini Georgakopoulos
<b>RESPONSIBLE AUTHORITY</b>	Nillumbik Shire Council
<b>RESPONDENT</b>	Eltham Community Action Group
<b>SUBJECT LAND</b>	8 Bird Street, Eltham
<b>HEARING TYPE</b>	Major Case Hearing
<b>DATE OF HEARING</b>	19 April 2021
<b>DATE OF ORDER</b>	26 April 2021
<b>CITATION</b>	Georgakopoulos v Nillumbik SC [2021] VCAT 381

### ORDER

- 1 In application P1701/2020 the decision of the responsible authority is set aside.
- 2 In planning permit application 218/202/14P a permit is granted and directed to be issued for the land at 8 Bird Street, Eltham in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
  - A two lot subdivision of the land

**Michael Deidun**

**Member**



## APPEARANCES

For applicant	Reto Hofmann, Solicitor of Rigby Cooke Lawyers
For responsible authority	David De Giovanni, Consultant Town Planner
For respondent	Tim Phillips from the Eltham Community Action Group

## INFORMATION

Description of proposal	Subdivision of the land into two lots, one of 332 square metres that contains the existing dwelling, and a vacant battleaxe shaped allotment of 1401 square metres.
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	Nillumbik Planning Scheme
Zone and overlays	Neighbourhood Residential Zone 1 Significant Landscape Overlay 2
Permit requirements	Clause 32.09-3 to subdivide land within the Neighbourhood Residential Zone
Relevant scheme policies and provisions	Clauses 15, 16, 19, 21, 22.12, 32.09, 52.06, 56, 65 and 71.02.
Land description	The land is a rectangular allotment with a frontage to Bird Street of 17.32 metres, a depth of 83.45 metres, and an overall area of 1733 square metres. The land presently supports a single storey detached dwelling.



## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Fotini Georgakopoulos (the ‘Applicant’) seeks to review the decision of the Nillumbik Shire Council (the ‘Council’) to refuse to grant a permit for a two lot subdivision of the land at 8 Bird Street, Eltham (the ‘review site’). The Council refusal was made after the consideration of a report from Council officers recommending the grant of a planning permit.
- 2 Council’s grounds of refusal raise concerns regarding the impact of the subdivision layout and density/size of the lots on the surrounding subdivision pattern and neighbourhood character. At the hearing those grounds were relied upon to raise concerns regarding the likely impact of future development of lot 2, the layout of lot 1 and its existing dwelling, the potential future impacts on trees on adjoining properties, and the proposed replacement planting.
- 3 The only Statement of grounds in this proceeding lodged by another party has come from the Eltham Community Action Group (ECAG). Unfortunately, the ECAG’s submissions focus on some matters not relevant to my decision making task, including:
  - a. Whether the owners’ details are incorrect and declaration invalid on the planning permit application form;
  - b. Whether the application should in preference be for a staged subdivision rather than a two lot subdivision, with further detail provided of the future subdivision of the land, including the proposed configuration of future lots and areas of common property;
  - c. That the cost of the future development of the land has not been declared on the planning permit application form;
  - d. That the application material fails to depict the location of any future proposed buildings and earthworks;
  - e. That the application supporting material contains assertions not consistent with the likely future development of the land; and,
  - f. The proposal fails to address Clause 56.09-3 Fire hydrants objective and Clause 22.01 Medium density housing policy.
- 4 The reasons these matters are not relevant is because it is my role to assess the merits of the application that is before me, that is for a two lot subdivision. A two lot subdivision is a legitimate form of development of the land, and must be assessed on its own merits. While Clause 65.02 of the Nillumbik Planning Scheme requires me to also consider the possible

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<sup>1</sup> 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.



future development of the land, I need to do so in the context of the proposed two lot subdivision, and not some other proposal. Further, when creating a vacant allotment of 1401 square metres, the Applicant is not required by the Nillumbik Planning Scheme to detail the future development of that lot, including the location and number of future buildings and earthworks. Finally, in accordance with Clause 32.09-3 of the Nillumbik Planning Scheme, the provisions of Clause 56.09-3 do not apply to an application to subdivide land into two allotments. The policy at Clause 22.01 also does not apply, as it only applies to applications for the construction and extension of two or more dwellings on a lot, dwellings on common property and residential buildings.

- 5 Similarly to the Council, the ECAG is also concerned regarding the likely form of future development of lot 2, and how this will respond to the surrounding neighbourhood character.
- 6 The issues or questions for determination are:
  - a. Is the proposed subdivision an appropriate response to the surrounding neighbourhood character?
  - b. How should I consider the likely future development of lot 2?
  - c. Are there any matters of detailed design that should result in a refusal to grant a permit?
- 7 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions presented with regard to the applicable policies and provisions of the Nillumbik Planning Scheme, I have decided to set aside the Council's decision, and direct the grant of a planning permit subject to conditions. My reasons follow.

#### **IS THE PROPOSED SUBDIVISION AN APPROPRIATE RESPONSE TO THE SURROUNDING NEIGHBOURHOOD CHARACTER?**

- 8 The Council submits that the immediate area is typically characterised by large allotments, and that the proposed lot 1 is smaller than surrounding lots. They argue that this lot size, and the design elements associated with the existing dwelling on lot 1, will result in a presentation to Bird Street similar to that of a middle suburban dwelling, rather than one typical for a semi-bush area of Eltham. They further submit that lot 1 does not provide for the space required for the level of planting that should be expected for this neighbourhood.
- 9 The ECAG does not oppose the lot sizes and density proposed as part of the two lot subdivision of the land that is before me. Indeed, to the contrary, the following is set out in their written submission.

For the current two lot subdivision sizes there are local examples with the same lot sizes. The further subdivision of Lot 2 however may or



may not reflect lot sizes in/of the overall neighbourhood character of the area.

- 10 The review site falls within the Semi-Bush Precinct 3, with the following statement of desired future character provided at Clause 22.12-6 of the Nillumbik Planning Scheme.

Development is sited so that buildings nestle into the landform and are partly obscured from view by the topography or tree canopy. Development responds to sloping landforms and creates minimal disturbance.

Hillsides of residential development when viewed from a distance appear to be tree covered. In typical streetscapes, substantial indigenous or native trees dominate the skyline and are common in gardens. Garden planting is mostly indigenous or native, and flows uninterrupted to the edge of the roadway. There is little or no physical evidence of the boundary between private and public property at the front of the house, and no solid front fences. The only fencing is around rear gardens, and this is often open (eg. post and wire).

Driveways and car storage areas are confined to a small portion of the land area. Garages and carports are hidden from view.

The public domain includes a dominance of indigenous or native vegetation, although there are some locations where exotics occur. Roadways minimise impacts on the landscape by retaining unsealed surfaces or on sealed roads using roll over kerbs and channels to prevent erosion and protect properties from storm water

- 11 This statement of desired future character is accompanied by a series of design objectives and design responses, that are said to describe how the desired future character is to be achieved.
- 12 In addition to this desired future character, the existing surrounding subdivision pattern is also relevant. This is neatly described in the following extract from the Council's written submission.

[41] Whilst the northern side of Bird Street may be dominated by single dwellings, the NearMap and VicMap extracts below shows the real mix of lot sizes and variety of development along the south side. In short, apart from the subject Land, all lots along the south of Bird Street have been subdivided at some point for multi-dwelling development of 5 to 3 to 2 dwellings of 1 and 2 storeys. Apart from the subject Land there is not a single dwelling on the south side of Bird Street.

[42] To the immediate east of the Land at 10 Bird Street is a row of dwellings running down that site behind the original dwelling at the street front. The lots range from 175 sqm to 600 sqm according to the Officer Report. To the immediate west of the Land is a battle axe 2 lot subdivision with a largely concealed dwelling at 4 Bird Street and are large dwelling in the rear lot (6 Bird Street) with large barn style garage in the south-east corner abutting the Land.



[43] On the corner of Ryans Road to the west at 24 Ryans Road, 2 and 2A Bird Street is a recent development and subdivision of 3 x 2 storey contemporary townhouses on a lot. On the opposite end of Bird Street on the corner of Silver Street are three older style single storey townhouses at 45 Silver Street and 12 and 14 Bird Street.

[44] According to the Officer Report the vacant site at 3 Bird Street diagonally across from the subject site to the north-west has been issued with an approval for the construction of two dwellings.

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[46] Further subdivided lots developed with multiple dwellings in the immediate area can be found at 16 Ryans Road, 43 Silver Street, 35 Silver Street and 33 Silver Street – see the GoogleMap and VicMap extracts above.

[47] The properties to the south of the subject site are in a cul-de-sac known as Cygnet Court. These lots are irregular in shape, and contain single detached dwellings with lots ranging in size from 500 sqm to 1100 sqm according to the Officer Report. Cygnet Court has an unusual subdivision pattern creating irregular lots. There is also at least one lot that has been subjected to development for a second dwelling at 5 Cygnet Drive. Further evidence of multi-dwelling development and subdivision can be found at 15 Swan Street, 25 Silver Street and 33 Silver Street - See Google Maps extract.

- 13 It is evident from this description that the area immediately surrounding the review site has undergone a relatively high degree of medium density development and subdivision of the original lot sizes, that were once common.
- 14 I am not persuaded by the Council's submissions, and instead find that the proposed two lot subdivision is an appropriate response to the existing and desired future neighbourhood character. I make this finding for the following reasons.
- 15 Lot 1 will contain the existing dwelling on a lot of 332 square metres. However, in terms of neighbourhood character impacts, the proposed size of this allotment is of little consequence. That is because the key neighbourhood character impact of lot 1 will be derived from the appearance of this lot from Bird Street, and this appearance is determined by the existing siting and presentation of the existing dwelling, rather than the size of lot 1. That is, the siting and presentation of the existing dwelling is largely not a function of the proposed two lot subdivision for the land, but rather is derived from the existing site conditions. As such, regardless of whether this subdivision is approved, the existing dwelling will still present to Bird Street with a single storey form, car parking arrangements that have



already been approved by Council's Building Surveyor, and existing front setbacks and somewhat limited landscaping opportunities.

- 16 The change brought about by the proposed subdivision to the presentation to Bird Street amounts to a combination of the proposed accessway to lot 2, the additional hard paving area comprising the crossover and driveway to lot 2, and therefore the reduced western side boundary setback to the existing dwelling on lot 1.
- 17 I am not persuaded that these elements of the proposed subdivision are contrary to the character of this neighbourhood. Firstly, the statement of desired future character for this precinct does not refer to side boundary setbacks, and neither does the more detailed design objectives and design responses contained at Clause 22.12-6 of the Nillumbik Planning Scheme. As such, the reduced side boundary setback to the existing dwelling on lot 1 arising from the provision of a driveway to lot 2 does not raise a character issue insofar as the statement of desired future character is concerned. It also does not raise a concern when compared to the existing neighbourhood character, as narrow side boundary setbacks are common in the surrounding neighbourhood, particularly with the dwellings on the southern side of Bird Street.
- 18 Secondly, in relation to the additional driveway and crossover, the following guidance is provided in the statement of desired future character.

Driveways and car storage areas are confined to a small portion of the land area
- 19 In terms of the overall land area of over 1700 square metres, the provision of a very short driveway and open carport to lot 1, and a battle-axe driveway to lot 2 which will result in future car accommodation being hidden from street view, achieves the objective of confining the driveways and car storage area to a small portion of the land area.
- 20 Thirdly, to the extent to which the second driveway and crossover may reduce landscaping opportunities in the front yard, I consider that any impact is relatively minor, considering the extent of landscaping opportunities that are present across the review site as a whole. Further, reasonable opportunities for the planting of new canopy trees and other landscaping will remain in the front setback to the existing dwelling, as well as opportunities for Council to plant new street trees in front of the review site. The opportunities for both planting in the front setback to Bird Street and new street trees for the review site, will be similar to that which exists across the remainder of the southern side of Bird Street, noting the high frequency of crossovers and driveways on this side of Bird Street given the level of urban consolidation that has already occurred.
- 21 For these reasons I find that the proposed physical changes associated with the proposed two lot subdivision that will be visible from Bird Street, will result in an outcome that is consistent with both the statement of desired future character, and the existing neighbourhood character.

- 22 What the proposed size of lot 1 does determine, however is the extent of rear area of secluded private open space provided for the existing dwelling on lot 1, and by extension the extent of landscaping that can occur to the rear of that lot. The proposed lot 1 will be provided with an area that is 4.8 metres wide at the rear of that lot, as measured from the rear elevation of the existing dwelling that is to be retained on that lot. While it is conceivable that the existing dwelling could be demolished and replaced with a dwelling that has a larger footprint, given the extensive renovations that are currently occurring to that existing dwelling, I consider that to be unlikely proposition. An open area at a width of 4.8 metres will be capable of providing both for the reasonable recreation needs of the future residents of the existing dwelling on lot 1, and for the planting of a new landscape. In respect of the later of these outcomes, I note that the existing dwellings on the south side of Bird Street all have very narrow rear yards, that do not provide for the substantial planting of vegetation. As such, the dimensions of the proposed lot 1 will provide for a landscaping outcome that can surpass that achieved on a number of nearby properties. It can also achieve the landscaping outcomes described in the statement of desired future character, and the associated design objectives and design responses.
- 23 Lot 2 is proposed to be a lot of 1401 square metres in size. At this size, lot 2 will remain one of the largest lots in this neighbourhood, easily capable of accommodating both a built form and substantial landscaping in a manner respectful of both the existing and desired future character. On the basis of a neighbourhood character assessment, against either the existing or the preferred future neighbourhood character, there can be no reasonable argument against the size and dimensions of lot 2, nor its contribution to the surrounding pattern of subdivision.
- 24 For these reasons I find that the proposed two lot subdivision is an appropriate response to both the existing neighbourhood character, and the statement of preferred future character.

## **HOW SHOULD I CONSIDER THE LIKELY FUTURE DEVELOPMENT OF LOT 2?**

- 25 The Council submits that in considering the possible future development of the land, there are significant constraints to building on lot 2, namely through the significant slope of the land, the trees on neighbouring properties, and the high neighbourhood character expectations in this locality. They also submit that it is unknown how the proposed tree planting zones will be impacted by the future built form on lot 2, and that the large building envelope proposed for lot 2 does not ensure a built form outcome that will achieve the neighbourhood character and amenity outcomes sought by ResCode.
- 26 The ECAG is concerned that the future development of lot 2 could result in a development of multiple dwellings that would contrast with the existing and preferred neighbourhood character. In particular, the ECAG submits



that the future development of lot 2 could result in a series of cascading buildings up the slope of the land, resulting in an inappropriate extent of building form on medium to longer range views.

- 27 The key to assessing the likely future development of lot 2, is in understanding the extent of development that can occur as of right under the zone and overlay controls. In this case, insofar as the provisions of the Neighbourhood Residential Zone are concerned, that extends to only one dwelling on the lot. Given the proposed lot size of lot 2 at 1401 square metres, there is a broad capacity for a range of design options for a single dwelling to be sited on lot 2. Such a single dwelling and associated landscaping on such a large lot can achieve respect for the existing and preferred neighbourhood character, again through a variety of design options for a single dwelling. Given the breadth of opportunities that exist to very comfortably site a single dwelling on the proposed lot 2 in a manner consistent with the preferred neighbourhood character, there is no need to restrict the manner of that development through additional controls at the subdivision stage. This includes the proposed building envelope, which in my view is completely unnecessary on a lot the size of lot 2. As such, I will adopt the suggested draft permit condition from Council to delete the building envelope from lot 2.
- 28 Further, even the construction of a single dwelling on lot 2 requires a planning permit under the provisions of the Significant Landscape Overlay and Schedule 2 thereof. As such, a proposal to only construct a single dwelling on lot 2, will open an opportunity for public scrutiny of the matters raised under the Significant Landscape Overlay, and for Council to assess and control a number of aspects of a future dwelling, including the planting of a new landscape, and the potential impacts on the neighbour's trees.
- 29 The focus of the Council and ECAG is on the potential for more intense development of lot 2, that comprises more than one dwelling. However, as any such proposal for further subdivision or more than one dwelling will require further planning approval under the provisions of the Neighbourhood Residential Zone, the neighbourhood character and landscaping outcomes of any such proposal can be assessed at the time of any further planning permit application. That is, the approval process associated with any future planning permit applications, can ensure that appropriate neighbourhood character and amenity outcomes are achieved by any future proposal. As such, there is no need to turn our mind now to the potential consequences of such a level of development at this stage. Indeed to do so now will be an inferior process, as it will be conducted in the absence of the type of detail that would need to accompany any future planning permit application.
- 30 Clause 65.02 of the Nillumbik Planning Scheme requires me to consider:



The existing use and possible future development of the land and nearby land.

- 31 This does not require me to be fully informed as to the design of a future development, and determine its suitability against the various provisions of the Nillumbik Planning Scheme. Rather, this decision guideline requires me to turn my mind to the possible form or forms of future development, and whether these are capable of achieving appropriate outcomes on the subdivision layout that is proposed. As noted above, given the size of the proposed lot 2, there is an abundance of opportunities to appropriately site and design a future development on this lot that comprises a single dwelling. Any development that comprises additional dwellings or lots, can be assessed at the time of a future planning permit application. For the reasons which I set out below in relation to my assessment of the draft permit conditions, it is also not necessary at this time for tree planting zones to be created on lot 2.
- 32 For these reasons, I find that the extent to which I can consider the possible future development of lot 2, that the level of development that can occur on this lot can readily and flexibly achieve the desired outcomes for development in this neighbourhood.

**ARE THERE ANY MATTERS OF DETAILED DESIGN THAT SHOULD RESULT IN A REFUSAL TO GRANT A PERMIT?**

- 33 In relation to the layout of the proposed two lot subdivision, the Council submits that the driveway to lot 2 is inappropriately located hard up against the western boundary, potentially impacting neighbouring trees.
- 34 The ECAG is concerned with the management of future development on the review site, and the potential for site erosion and sediment run-off from those works.
- 35 I am not persuaded by these submissions, and instead find that the matters raised by parties should not result in a refusal to grant a permit. I make this finding for the following reasons.
- 36 In terms of the potential impact on the neighbouring trees, I note that any proposal for substantial works or any number of dwellings on lot 2 requires a planning permit under the Significant Landscape Overlay. As such, the impact of these works can be addressed as part of a future planning permit application. In terms of the construction of services associated with this proposed two lot subdivision, the Council has drafted a permit condition that ensures these services are bored under tree roots, where appropriate. I am satisfied that such a permit condition will, if implemented appropriately, adequately protect the neighbour's trees during such activity.
- 37 In response to the submissions of ECAG, while I can turn my mind to the possible future development of the land, I cannot control the potential for site erosion and sediment run-off arising from any future development. That is because the conditions to be applied to any permit must relate to the



permission that is being granted, that is for a two lot subdivision. I anticipate that the works associated with this two lot subdivision are relatively minor, and will be unlikely to result in unreasonable levels of erosion and sediment run-off.

- 38 For these reasons I find that there are no other reasons why a permit should not be granted for the proposed two lot subdivision.

### WHAT CONDITIONS ARE APPROPRIATE?

- 39 The Council via a draft ‘without prejudice’ condition it seeks to be placed on any planning permit issued, seeks a 4% public open space contribution under s18(1) of the Subdivision Act. The relevant legislation for such a contribution is set out below.

- (1) A Council acting as a responsible authority or a referral authority under the **Planning and Environment Act 1987** may require the applicant who proposes to create any additional separately disposable parcel of land by a plan of subdivision to—
  - (a) set aside on the plan, for public open space, in a location satisfactory to the Council, a percentage of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or
  - (b) pay or agree to pay to the Council a percentage of the site value of all of the land in the subdivision intended to be used for residential, industrial or commercial purposes, being a percentage set by the Council not exceeding 5 per cent; or
  - (c) do a combination of (a) and (b) so that the total of the percentages required under (a) and (b) does not exceed 5 per cent of the site value of all the land in the subdivision.
- (1A) The Council may only make a public open space requirement if it considers that, as a result of the subdivision, there will be a need for more open space, having regard to—
  - (a) the existing and proposed use or development of the land;
  - (b) any likelihood that existing open space will be more intensively used after than before the subdivision;
  - (c) any existing or likely population density in the area of the subdivision and the effect of the subdivision on this;
  - (d) whether there are existing places of public resort or recreation in the neighbourhood of the subdivision, and the adequacy of these;
  - (e) how much of the land in the subdivision is likely to be used for places of resort and recreation for lot owners;



- (f) any policies of the Council concerning the provision of places of public resort and recreation.

40 There are two further relevant parts to s18 of the Subdivision Act. Firstly, s18(1AA) sets out that s18 applies if a requirement for public open space is not specified in the planning scheme. I will come to the relevance of that shortly. Secondly, s18(8)(c) sets out the following.

- (8) A public open space requirement is not required if—

...

- (c) the subdivision subdivides land into two lots and the Council considers it unlikely that each lot will be further subdivided.

41 The Applicant submits that such a contribution is not reasonable as:

- a. There is no public open space contribution required under Clause 53.01 of the Nillumbik Planning Scheme for this land, but there are requirements for other land in the municipality; and,
- b. The Council's *Open Space Strategy*, November 2005 does not require a public open space contribution for a two lot subdivision, and the intent of this reference document is to set out when open space contributions should be made under the Subdivision Act.

42 I am not persuaded by these submissions, and instead find that a public open space contribution is applicable to this proposed subdivision. I make this finding for the following reasons. The implication of a public open space contribution not being specified for this site at the Schedule to Clause 53.01, means that the requirements set out at s18 of the Subdivision Act apply. This is confirmed both by s18(1AA) of the Subdivision Act, and by Clause 53.01 of the Nillumbik Planning Scheme, which sets out the following.

A person who proposes to subdivide land must make a contribution to the council for public open space in an amount specified in the schedule to this clause (being a percentage of the land intended to be used for residential, industrial or commercial purposes, or a percentage of the site value of such land, or a combination of both). If no amount is specified, a contribution for public open space may still be required under section 18 of the Subdivision Act 1988.

43 As such, the requirements of s18 of the Subdivision Act apply. The contents of Council's *Open Space Strategy*, November 2005 seek to guide the appropriate rate of contribution, in accordance with the following guidance from Clause 21.05-5:

Seek public open space contributions in accordance with the Open Space Strategy, November 2005.

44 The guidance contained in the *Open Space Strategy*, November 2005 includes the following:



Until such time there has been a review of the Subdivision Act, in relation to medium density housing development, the following open space contributions should be made under the Subdivision Act 1988.

- For the creation of 3 dwellings, a 2 per cent cash contribution should apply.
- For the creation of 4 dwellings, a 3 per cent cash contribution should apply.
- For the creation of 5 dwellings, a 4 per cent cash contribution should apply.
- For the creation of 6 or more dwellings, a 5 per cent cash contribution should apply.<sup>2</sup>

- 45 Of course, the guidance set out above is simply that, it is just guidance. It cannot replace the content of s18 of the Subdivision Act, and in particular cannot supplant the considerations set out at s18(1A) that are used to determine an appropriate contribution on any subdivision permit. Further, this document fails to set out any guidance as to the appropriate contribution to be made by a two lot subdivision, where further subdivision of a lot is not considered unlikely.
- 46 In this case, Mr Hofmann for the Applicant did not dispute that lot 2 is likely to be further subdivided. Indeed, in his oral submissions he conceded that one purpose of the proposed two lot subdivision of the land was to allow his client to dispose of a lot containing the existing dwelling, so as to provide for the further development of lot 2. As such, given s18(8)(c) specifically sets out that an open space requirement is not required for a 2 lot subdivision where each lot is unlikely to be further subdivided, and it is clear and evident that the proposed lot 2 is likely to be further subdivided, the whole of the review site is liable for a public open space contribution at this time.
- 47 Having regard to the matters set out at s18(1A) as set out above, I find that the Council's request for a 4% contribution is reasonable and appropriate. I make this finding for the following reasons:
- a. The significant reduction in the size of the lot that will contain the existing dwelling, as compared to the existing size of the review site, will have the potential to cause nearby public open space to be more intensively used by the future occupiers of that lot;
  - b. The future form of development on lot 2 will likely see the creation of relatively confined allotments, with areas of secluded private open space smaller than those that exist on the originally sized allotments in this neighbourhood. That, combined with the likely increase in the number of lots, will likely result in nearby public open space to be more intensively used by the future occupiers of the review site as a whole; and,

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<sup>2</sup> From page 91 of the *Open Space Strategy*, November 2005



- c. While there is public open space in the surrounding neighbourhood, I have not received any submissions as to the adequacy of these spaces, or whether they are in need of improvements. If I had been persuaded that additional public open space was not required, or that the existing nearby public open space did not need improvements, then that might have weighed in favour of reducing the contribution required.

48 Further, I note that if the proposed lot 2 were to be developed with four dwellings, which is a realistic possibility given that four dwellings exist on a smaller allotment immediately to the east of the review site, then this would result in a development of a total of five dwellings, once one includes the existing dwelling. Under the *Open Space Strategy*, November 2005 a 4% contribution applies to the creation of five dwellings. While the existing dwelling on the review site is not to be ‘created’, the extent to which the lot it is sited on will be reduced in size, creates a likely increase in usage of the nearby public open space from the existing dwelling on the land.

49 For these reasons I support the application of a 4% public open space contribution to the land. In difference to the submissions made on behalf of the Applicant, the amount of this contribution is not to be guessed now and a lump sum applied to the draft permit condition. Rather, there is a process to be followed that is set out in s19 of the Subdivision Act, which involves a valuation of the land being obtained not more than 12 months prior to the payment of the contribution.

50 A number of other matters about permit conditions were raised by the parties. With respect to those matters, other than those already addressed above, I summarise my conclusions as follows:

- a. The Council in their draft permit conditions sought trees and other landscaping to be planted on both lots as part of this proposed subdivision, and then proposed a very complex set of permit conditions, including one requiring a Section 173 Agreement, to ensure the survival of the trees on lot 2 during and after any future development on that lot. In my view, that approach is unnecessarily complex, as any almost development of lot 2 requires a planning permit under the Significant Landscape Overlay, and under the conditions of a future permit authorising such development, the landscaping of lot 2 can be required at that time. As such, I have stripped back the conditions that require the planting of trees, to only require planting on lot 1 as part of the proposed two lot subdivision. In my view, there is no need for a Section 173 Agreement to ensure the continued maintenance of the planting on lot 1.
- b. The Council’s draft permit conditions also contained two permit conditions that each required the provision of an on-site detention



system. I have retained the permit condition that appears to be crafted for this proposal and this site, and deleted the other permit condition.

- c. I have chosen to retain Conditions 1(d) and (e) as set out below, despite the submissions of the Applicant, as I have not been persuaded that there is another way to ensure the protection of the neighbour's trees from the impacts of the works associated with the two lot subdivision. I have also not been persuaded that the future drainage infrastructure should not be vested in Council.

## **CONCLUSION**

- 51 For the reasons given above, the decision of the responsible authority is set aside. A permit is granted subject to conditions.

**Michael Deidun**

**Member**



## APPENDIX A – PERMIT CONDITIONS

<b>PERMIT APPLICATION NO</b>	218/202/14P
<b>LAND</b>	8 Bird Street, Eltham

### WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- A two lot subdivision of the land

### CONDITIONS

- 1 Before the plan of subdivision is certified under the Subdivision Act 1988, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of this permit. The plans must be generally in accordance with the plans prepared by J&M Designs, but modified to show:
  - (a) The building envelope for lot 2 deleted.
  - (b) The trees proposed on lot 2 deleted.
  - (c) The proposed street tree to be deleted.
  - (d) A notation that all services that are to be located in proposed easement E-1 and located within a Tree Protection Zone of any third-party trees, must be installed by directional boring with the top of bore to have a minimum depth of 600mm.
  - (e) Easement E-1 be vested in favour of Nillumbik Shire Council.
- 2 The subdivision as shown on the endorsed plans must not be altered unless with the prior written consent of the Responsible Authority.
- 3 Prior to the issue of a Statement of Compliance, the following trees must be planted and maintained thereafter, to the satisfaction of the Responsible Authority:
  - (a) The planting of two indigenous Eucalypt species canopy trees with a minimum mature growth height of 10 metres within the frontage of proposed lot 1;
  - (b) The planting of one indigenous Eucalypt species canopy tree with a minimum mature growth height of 6 metres within the rear of proposed lot 1.
- 4 Prior to Council issuing a Statement of Compliance for the subdivision, the permit holder must pay to Council a 4% cash-in-lieu open space



contribution in respect to all of the land in the subdivision pursuant to Section 18 of the Subdivision Act.

- 5 Unless with the prior written consent of the Responsible Authority, all services that are to be located in proposed easement E-1 and located within a Tree Protection Zone of any third-party trees, must be installed by directional boring with the top of bore to have a minimum depth of 600mm, to the satisfaction of the Responsible Authority.
- 6 Stormwater drainage works are to be constructed to provide a legal point of stormwater discharge for both lots, at no cost to Council, and must be carried out under Council supervision, in accordance with the approved plans and Council's specifications and must be carried out under Council supervision and an Infrastructure Works permit.
- 7 On site detention must be provided, either below or above ground, to the existing dwelling located on Proposed Lot 1. The on-site detention device shall be designed by a qualified engineer and plans submitted to the Responsible Authority for approval (prior to the commencement of the development unless with the prior written consent of the Responsible Authority).

The engineer that is designing the on-site detention device, which can be located either below or above ground, must obtain tc and tso figures from Council. The permissible site discharge must be restricted to a pre development flow rate for a 1 in 5 year average recurrence interval (ARI) event and detained for a 1 in 10 year ARI event. Please note there will be a fee associated with the Plan Checking and Supervision, of 3.25% of the detention drainage system cost.

- 8 No polluted, effluent and/or sediment laden runoff from the development site is to be discharged directly or indirectly into Council's drains, Melbourne Water's drains or watercourses or adjoining private property during the construction of the development.

In this regard, sediment fencing and/or pollution/litter traps must be installed on site and serviced accordingly, all to the satisfaction of the Responsible Authority.

- 9 Prior to the issue of a Statement of Compliance, vehicular access and egress to the development site from the roadway must be by way of vehicle crossings constructed to the requirements of the Responsible Authority, to suit the proposed driveway and the vehicles that will use the crossing. The Responsible Authority must approve the location, design and construction of the crossing. Any existing unused crossing must be removed and the disturbed area reinstated to the satisfaction of the Responsible Authority. All vehicle crossing works are to be carried out with Council supervision under an Infrastructure Works permit.

The width of the driveway at the property boundary must match the width of the vehicle crossing.



- 10 The owner of the land must enter into an agreement with:
  - (a) a telecommunications network or service provider for the provision of telecommunication services to each lot shown on the endorsed plan in accordance with the provider's requirements and relevant legislation at the time; and
  - (b) a suitably qualified person for the provision of fibre ready telecommunication facilities to each lot shown on the endorsed plan in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.
- 11 Before the issue of a Statement of Compliance for any stage of the subdivision under the Subdivision Act 1988, the owner of the land must provide written confirmation from:
  - (a) a telecommunications network or service provider that all lots are connected to or are ready for connection to telecommunications services in accordance with the provider's requirements and relevant legislation at the time; and
  - (b) a suitably qualified person that fibre ready telecommunication facilities have been provided in accordance with any industry specifications or any standards set by the Australian Communications and Media Authority, unless the applicant can demonstrate that the land is in an area where the National Broadband Network will not be provided by optical fibre.
- 12 The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, drainage, sewerage facilities, electricity and gas services to each lot shown on the endorsed plan in accordance with the authority's requirements and relevant legislation at the time.
- 13 All existing and proposed easements and sites for existing or required utility services and roads on the land must be set aside in the plan of subdivision submitted for certification in favour of the relevant authority for which the easement or site is to be created.
- 14 The plan of subdivision submitted for certification under the Subdivision Act 1988 must be referred to the relevant authority in accordance with Section 8 of that Act.
- 15 This permit as it relates to development (subdivision) will expire if one of the following circumstances applies:
  - (a) The plan of subdivision has not been certified within two (2) years of the issue date of this permit.
  - (b) A statement of compliance is not issued within five (5) years of the date of certification.



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 –**

