

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P464/2020
PERMIT APPLICATION NO. 407/2018/03P

CATCHWORDS

Section 77 *Planning and Environment Act 1987*; Nillumbik Planning Scheme; General Residential Zone; Significant Landscape Overlay; Dwelling; Neighbourhood character; Amenity.

APPLICANT	Brendan Hart
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
RESPONDENTS	Bradley and Nicole Lowther, Elizabeth Cox, Andrew Lemon, Melanie and Wayne Barras
SUBJECT LAND	43 Zig Zag Road ELTHAM VIC 3095
HEARING TYPE	Hearing
DATES OF HEARING	11 February 2021
DATE OF ORDER	16 March 2021
CITATION	Hart v Nillumbik SC [2021] VCAT 154

ORDER

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:
 - Prepared by: Airstream Architects
 - Drawing numbers: TP-00, TP-01, TP-01.01, TP-01.02, TP-02, TP-03, TP-04, TP-05, TP-05.01, TP-06, TP-06.01 and TP-06.02
 - Dated: 20.11.2020
- 2 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by deleting reference to subdivision in the description of the proposal.
- 3 Pursuant to section 127 of the *Victorian Civil and Administrative Tribunal Act 1998*, the application is amended by deleting reference to subdivision in the description of the proposal.



- 4 In application no. P464/2020 the decision of the responsible authority is affirmed.
- 5 In planning application 407/2018/03P no permit is granted.

Bill Sibonis
Senior Member

APPEARANCES

For B Hart	Mr S O'Brien, Town Planner of Universal Planning. He called evidence from: <ul style="list-style-type: none"> • Mr J Holdsworth, Architect and Urban Designer of Planning Collaborative (Vic) Pty Ltd
For Nillumbik Shire Council	Mr T McAdie, Town Planner
For E Cox	Ms S Zhang, Town Planner of Planning and Property Partners Pty Ltd
For B & N Lowther, A & A James and R & C Winton	Mr B Lowther
For M and W Barras	Ms M Barras
Mr A Lemon	In person

INFORMATION

Description of proposal	The construction of a dwelling and the removal of vegetation.
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 (Planning Scheme)
Zone and overlays	General Residential Zone – Schedule 1, General Residential Areas (GRZ1) Significant Landscape Overlay – Schedule 3, Bush Garden Character (SLO3)



Permit requirements	<p>Cl. 32.08-6 (to construct a dwelling if there is at least one dwelling existing on the lot in GRZ1)</p> <p>Cl. 42.03-2 (to construct a building or carry out works if the height of any part of the building is more than 7.5 metres above the natural surface of the ground directly below; to remove, destroy or lop any substantial tree; and to construct a building or carry out works within 5.0 metres of the base of any substantial tree on land in SLO3)</p>
Relevant scheme policies and provisions	Cl. 11, 15, 16, 21, 22.01, 22.12, 32.08, 42.03, 52.06, 55 and 65
Land description	<p>The review site is an irregular ('battle-axe') lot on the west side of Zig Zag Road, created as part of a two-lot subdivision arising from the development of two dwellings on the original allotment. It has an area of approximately 1977 square metres and is occupied by a single-storey dwelling. The land has a fall from east to west, resulting in an elevated floor level at the rear of the dwelling. There are mature canopy trees located on the property. To the east is the original single-storey dwelling (which formed part of the two-dwelling development that included the construction of the dwelling on the review site). To the south is a single-storey dwelling, similarly created as part of a two-dwelling development and is located on a 'battle-axe' lot. This is also the case for the land to the north, although the dwelling on that land presents as two-storey to the rear. To the west are residential properties fronting Coolabah Drive, with their secluded private open space areas adjoining the review site.</p>
Tribunal inspection	A site inspection was undertaken after the hearing.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 In February 2020, the Nillumbik Shire Council (**Council**) issued a Notice of Decision to Refuse to Grant a Permit for ‘buildings and works to construct a second dwelling, subdivision of the land into 2 lots and associated vegetation removal’ on the review site. The grounds of refusal refer to matters of policy, neighbourhood character, planting/landscaping and non-compliance with selected provisions of clause 55.
- 2 This is an application to the Tribunal for a review of the Council’s decision.
- 3 At the commencement of the hearing the applicant applied to amend the planning permit application by substituting amended plans for the application plans and deleting reference to subdivision. Notice of the amendments had been given in accordance with the requirements of the Tribunal’s Practice Note PNPE9 *Amendment of plans and applications*. That being the case, and there being no objection from any of the parties, I amended the planning permit application as sought by the applicant. I also amended the application for review by deleting reference to subdivision in the description of the proposal.
- 4 The Council advised that it had considered the amended plans and maintains its opposition to the development. The respondents similarly object to a permit being granted.
- 5 Having regard to the submissions, the key issue in this matter is whether the development will respect the existing neighbourhood character or contribute to the preferred neighbourhood character.
- 6 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered the submissions and evidence, with regard to the relevant policies and provisions of the Planning Scheme, assisted by my inspection, I have determined to affirm the Council’s decision. My reasons follow.

WHAT IS THE RELEVANT PLANNING CONTEXT?

- 7 The land is within the GRZ1. The purpose of the zone includes:
 - To encourage development that respects the neighbourhood character of the area.
 - To encourage a diversity of housing types and growth particularly in locations offering good access to services and transport.
- 8 The land is also in SLO3. The ‘Statement of nature and key elements of landscape’ reads:

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 Shire of Nillumbik Neighbourhood Character Study identifies the importance of vegetation and the relationship between the buildings and the landscape to the character of an area. The areas covered by this overlay have a bush garden character that is dominated by mature native and indigenous trees and planted bush style gardens. Dwellings in these areas are set among the trees and are sited so as to minimise disruption to the landform and vegetation. Buildings maintain the patterns of orientations and setbacks of adjoining properties and the streetscape. There is usually little or no delineation of front property boundaries.

The key elements of this landscape are:

- the visual dominance of vegetation including large native and indigenous trees and bush garden planting.
- the way in which the majority of development sits within the landscape with minimal excavation, and dwellings are partly obscured from view
- the hillsides appear to be covered by trees even when developed with houses.
- dwellings with colours that blend with the landscape.
- a general lack of front fencing.

9 According to clause 2.0 of the schedule to SLO3, the landscape character objectives to be achieved are:

- To retain the dominance of vegetation cover in keeping with the bush garden character.
- To ensure that development is compatible with the scale, setbacks and character of existing development.
- To ensure that development is sensitive to the natural characteristics of the land including slope, terrain, services and any existing vegetation.
- To ensure that development does not penetrate the tree canopy.
- To ensure that the health of existing trees is not jeopardised by new development.

10 At clause 4.0 of the schedule, relevant decision guidelines include:

- Whether the proposed development conforms with the preferred character of the area as stated in the relevant Shire of Nillumbik Neighbourhood Character Study brochure for the area;
- The scale, shape, bulk, design (including height and siting) and external finishes of any buildings and works and the impacts of these on the landscape qualities of the area.
- Whether the proposal retains existing high canopy trees, keeps buildings below the predominant tree canopy height and is sited below the ridge line.



- Whether the topography of the locality and the predominant tree canopy height enables higher buildings to be accommodated within the landscape and that the proposed development does not detrimentally affect long distance vistas and views, including views across river valleys.
- Whether the proposed development minimises excavation.
- The extent to which the proposal maintains the vegetation dominated streetscapes and vistas, including views across river valleys.
- The need to ensure new buildings and works, including driveways fit within the landscape and topography of the land.
- The need for additional landscaping and screen planting to maintain the existing and preferred landscape qualities identified in the Neighbourhood Character Study.

11 Clause 21.05 of the Municipal Strategic Statement provides the objectives and strategies for housing and settlement. Objective 1 is:

To provide for a range of housing types to meet the projected increase in the number and type of households within the municipality, while respecting the neighbourhood character, and protecting the natural and cultural heritage values of the locality.

12 One of the related strategies is to actively encourage residential development within existing urban zones in accordance with the Framework Plan, the Neighbourhood Character Study, the major activity centre structure plans and the township strategy plans. The Framework Plan, found at clause 21.04-4 refers to residential development being focused on existing township areas and medium density housing being focused in close proximity to commercial, community, public open space and public transport facilities. A further related strategy is:

Focus medium density housing in the designated areas in the major activity centre structure plans and in areas with good access to commercial and community services, public transport, open space and where appropriate infrastructure is available. Strongly discourage medium density housing in areas where such services, facilities and infrastructure are inadequate.

13 In respect of built form outcomes, a strategy at clause 21.05-1 is to require all accommodation, including medium density housing, to be site and locally responsive, and to respect local neighbourhood character including the retention of significant vegetation. Objective 4 is to maintain and enhance the character of urban and township areas, with strategies referring to using the Neighbourhood Character Study and Guidelines and encouraging planting of indigenous vegetation.

14 The Planning Scheme's Medium Density Housing Policy (**MDH Policy**) is provided at clause 22.01. Its objectives are:



- To identify appropriate locations for the facilitation of medium density housing development.
 - To ensure that medium density housing development is compatible with the existing character of the area.
- 15 In respect of the location of medium density housing, it is policy that it be located close to, amongst others, the Eltham Town Centre because sites considered suited to medium density development are those with appropriate infrastructure in localities within walking distance (approximately 400 metres) of all of the following:
- a public transport scheduled stop;
 - public open space;
 - community facilities; and
 - commercial centres.
- 16 The MDH Policy states that the Eltham Town Centre provides such facilities. The review site is located approximately 1.6-1.7 kilometres from the Town Centre. The policy also addresses design and siting, which I will consider in the following section of these reasons.
- 17 Clause 22.12 details the Neighbourhood Character Policy (**Character Policy**). The policy basis states:
- The policy responds to the vision contained in the Nillumbik Municipal Strategic Statement and implements the objectives and strategies contained in Clause 21.05 by ensuring that development respects local community and environmental values, and maintains and enhances the character of urban and township areas. The policy implements the findings of the Shire of Nillumbik Neighbourhood Character Study 2000, that identifies the key existing characteristics and preferred future character of the Shire’s residential areas. It provides design guidance to ensure that development and, where relevant, works respond to the preferred neighbourhood character of residential areas.
- 18 It goes on to state that development in residential areas needs to respond to the particular built form and natural elements that make up the neighbourhood character of Nillumbik, with reference made to vegetation cover, topography, vegetation density, building form, scale, siting, materials and fencing.
- 19 The objectives of the policy are:
- To ensure that development is responsive to the preferred future character of the area.
 - To retain and enhance the identified elements that contribute to the character of the area.



- To implement the recommendations of the Shire of Nillumbik Neighbourhood Character Study 2000 and the Nillumbik Residential Design Guidelines 2000.
 - To recognize the potential for change as a result of new social and economic conditions, changing housing preferences and State and local housing policies.
- 20 Pursuant to the Character Policy, the property is situated within the Bush Garden precinct. The Key Characteristics of this precinct include frequently rolling to hilly topography, average-sized dwellings, significant native and indigenous tree canopy occurring at a density of one to every 150 square metres; predominantly low hipped or split gabled roof forms, few front or side fences visible from the street.
- 21 The preferred future character of this precinct is described as follows:
- Development is sited to minimise disruption to landform and vegetation. Buildings maintain the pattern of orientations and setbacks of adjoining properties and the streetscape. Some variation occurs where innovative higher density housing has and will develop in areas close to activity centres and transport routes. Driveways and car storage areas should occupy the minimum functional area.
- Residential development is set among predominantly indigenous trees, although there are some locations where native or exotic trees are present. Hillside residential development viewed from a distance appear to be lushly vegetated. 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 fence. Solid side fences stop level with the front of the building.
- The public domain includes footpaths and verges that are generally informally aligned. Some exceptions occur where formal standard suburban footpath and nature strip layouts are appropriate. Roadways are mostly sealed with roll over kerb and sometimes no kerb. In some areas, roll over kerb and channels have been constructed to prevent erosion and to protect properties from storm water runoff.
- 22 The Character Policy provides design objectives and design responses for all precincts and for individual precincts which I will consider, as relevant, in the following section of these reasons.

WILL THE DEVELOPMENT RESPECT THE EXISTING NEIGHBOURHOOD CHARACTER OR CONTRIBUTE TO THE PREFERRED NEIGHBOURHOOD CHARACTER?

- 23 Pursuant to the MDH Policy, medium density housing that detracts from the character of the area will be strongly discouraged. It is policy that the siting and design of buildings and works should protect and enhance local amenity and areas of environmental significance, and that new development should have regard to the building form and style of surrounding dwellings.

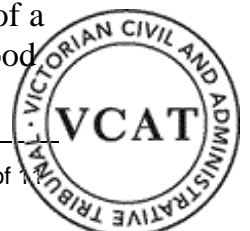


- 24 This neighbourhood has a bush garden character, derived from a prevailing presence of canopy trees in both the public and private realm. The west side of Zig Zag Road is comprised of properties that are noticeably larger than the lots on the opposite side of the street and those to the west, in Coolabah Drive. Mr Lemon advised that these were originally created in the 1950s as ‘one acre lots’. Several of these large lots in the vicinity of the review site have been subdivided into two lots, with the rear being in a ‘battle-axe’ configuration by virtue of the driveway which connects to the street. These more recent lots have been developed with single dwellings.
- 25 The size of the lots has resulted in a pattern of development which includes a notable separation between the original dwelling situated toward the front of the lot and the new dwelling constructed in the ‘battle-axe’ allotment. In the immediate context of the review site, these separation distances are in excess of 20 metres for the property to the north, and approximately 13 metres for the dwellings on the review site and on the property to the south. In combination with the rear setbacks which generally exceed 10 metres, and the side setbacks which contribute a further sense of separation, the siting has resulted in an evident sense of spaciousness which is an element that contributes to the neighbourhood character. This is also the case with the properties to the west, where the dwellings are sited toward the Coolabah Drive frontage of those sites, with the rear being devoted to secluded private open space in the form of a back yard.
- 26 As a consequence, there is a corridor of open space that extends across the rear of properties, which also supports mature canopy vegetation. Any structures within this area are generally modest in size and comprise sheds and the like. There are no examples of dwellings in this setback realm. Although an outbuilding is under construction at the rear of the adjoining property to the south, this is a replacement of an earlier existing structure and, while of more generous proportions than a conventional garden shed, it retains the form and scale of an outbuilding. It does not have the presence or appearance that could reasonably be compared to that of a dwelling.
- 27 The statement of preferred character in the Character Policy and the ‘Statement of nature and key elements of landscape’ detailed in SLO3 note the significance of dwellings being sited in a vegetated context consisting of canopy trees. It is a character which is apparent in the context of the review site.
- 28 Pursuant to the MDH Policy, the siting of buildings and works should respond to existing vegetation and minimise the need for the removal of existing trees. There is a stand of mature trees situated in the southern half of the property. These trees are proposed to be retained, which is an outcome supported by the provisions of the SLO3 and by policy. This, however, has the effect of limiting the available area for the construction of a dwelling to the north-west corner of the land, which is largely devoid of vegetation. The exception is a Pin Oak tree which is intended to be retained, although the Council expressed some doubt regarding the



likelihood of retention given the proposed construction of part of the driveway within the tree protection zone.

- 29 This siting has given rise to criticisms from the Council and the respondents in respect of the proposed dwelling's proximity to the northern and western boundaries, argued as being inconsistent with the neighbourhood character. The northern setback is nominated as 1.0 metre, with the western setback specified as 3.0 metres. I agree that such siting is uncharacteristic of this neighbourhood. The dwelling will stand in marked contrast to the established pattern of development, which has resulted in a spacious, vegetated character at the rear of properties. Insufficient space is provided to achieve a meaningful sense of separation from the boundaries and to incorporate canopy trees to respect the existing character, contribute to the preferred character or to achieve the landscape character objectives of SLO3. It is also inconsistent with policy that sufficient space should be provided for adequate planting of appropriate vegetation.
- 30 Adding to the uncharacteristic outcome is the height of the building, rising to a maximum of 9.17 metres at the rear due to the fall of the land. A design objective of the Character Policy is to minimise site erosion, the detrimental effects of excavation and the landscape impact of development. A related design response is that buildings and other development should minimise the impact on the natural slope of the site by following the topography of the site. In addition, under the MDH Policy siting and design should respond to the slope of the land to minimise the need for cut and fill and split levels in dwelling floors should be used to reduce building bulk and mass. The development does not do this. Rather than responding to the slope of the land, it adopts elevated floor levels at the rear, where the slope is at its greatest. The side elevations do not display any stepping in the building profile.
- 31 A further design objective refers to continuing to enhance the landscape setting with indigenous and Australian natives and understorey. A design response refers to retaining or planting substantial indigenous and native trees as necessary to contribute to the desired future character having regard to solar access, residential amenity and bushfire safety issues.
- 32 The dwelling's proximity to the boundaries and the inability to provide planting of any notable substance to create the vegetated setting referred to in the Planning Scheme accentuates the incongruous nature of the development. The dwelling will not assimilate successfully into its context. It will have a highly visible and dominant presence that cannot be screened, softened or ameliorated by any planting due to its proximity to the boundaries – particularly the northern boundary. The dwelling will present as a large and prominent built form element in a sensitive context defined by open rear yards and tree canopies.
- 33 The objective of clause 55.04-1 is to ensure that the height and setback of a building from a boundary respects the existing or preferred neighbourhood



character and limits the impact on the amenity of dwellings. The related standard B17 specifies a building profile incorporating height-related setbacks.

- 34 As demonstrated on the elevations, the siting and the height of the development relative to the western and northern boundaries is not in accordance with Standard B17. I note the applicant's submission that the encroachment of the dwelling into the Standard B17 profile is confined to the gable of the roof form and could be addressed by modifying the roof to a hipped form. This would not address the concerns arising from the proximity of the building to the boundaries, the overall scale and appearance, or the inability to incorporate canopy planting due to the shallow setbacks.
- 35 The two-storey section of the west elevation presents as a largely blank wall with three highlight windows. This is not consistent with MDH Policy that building lines and walls should be articulated, contain visual features or otherwise be varied. The failure to incorporate such elements compounds the visual impact of the wall on the character of the area and the amenity of the adjoining land to the west. The south elevation of the dwelling, while significantly set back from the southern boundary and has the benefit of screening by the intervening trees, presents as a largely bland and unarticulated built form element, lacking any visual interest.
- 36 The development is not an acceptable neighbourhood character response. It does not respect the existing pattern of development in relation to dwelling siting relative to property boundaries and does not provide sufficient opportunity for the planting of canopy vegetation. In addition, the design does not respond acceptably to the fall of the land and results in the presentation of a dominant built form. It will not respect the existing neighbourhood character or contribute to the preferred neighbourhood character.

CONCLUSION

- 37 For these reasons, the Council's decision is affirmed. No permit is granted.

Bill Sibonis
Senior Member

