

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P11437/2021
PERMIT APPLICATION NO.104/2021/03P

CATCHWORDS

Application under Section 77 of the *Planning and Environment Act 1987* to review a refusal to grant a permit; Nillumbik Planning Scheme; General Residential Zone; Significant Landscape Overlay; three dwellings; vegetation removal; neighbourhood and landscape character.

APPLICANT	Macauley Environmental Developments Pty Ltd
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
RESPONDENTS	Lynnsay Prunotto Eltham Community Action Group Inc.
SUBJECT LAND	7 Macaulay Court, ELTHAM VIC 3095
HEARING TYPE	Hearing
DATE OF HEARING	17, 18 & 19 May 2022
DATE OF ORDER	7 June 2022
CITATION	Macauley Environmental Developments Pty Ltd v Nillumbik SC [2022] VCAT 624

ORDER

- 1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & 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:	MLD Studio
Drawing numbers:	Cover Page, P1.01, P1.02, P1.03, P1.04, P1.05, P1.06, P1.07, P1.08, P1.09, P1.10, P1.11, P2.01, P2.02, P2.03, P3.01, P3.02, P9.01, P9.02 and P10.01
Revision:	G
Dated:	4/4/22

- 2 In application P11437/2021 the decision of the responsible authority is affirmed.



3 In planning permit application 104/2021/03P no permit is granted.

Christopher Harty
Member

APPEARANCES

For Macauley Environmental Developments Pty Ltd	Mr James Lofting, Solicitor from HWL Ebsworth Lawyers. He called the following witnesses: <ul style="list-style-type: none">• Mr Simon Gilbertson, Town Planner from Contour Consultants Aust. Pty Ltd• Mr Rob Galbraith, Arboriculturist from Galbraith and Associates• Mr John Patrick, Landscape Architect from John Patrick Landscape Architects Pty Ltd
For Nillumbik Shire Council	Mr David De Giovanni, Town Planner from David De Giovanni Town Planning
For Lynnsay Prunotto	No appearance
For Eltham Community Action Group Inc.	Ms Carlota Quinlan



INFORMATION

Description of proposal	Construction of 3 dwellings and removal of vegetation including 2 street trees.
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	General Residential Zone Schedule 1 – <i>General Residential Areas (GRZ1)</i> Significant Landscape Overlay Schedule 5 – <i>Eltham Central Character (SLO5)</i>
Permit requirements	Clause 32.08-6 – to construct two or more dwellings on a lot. Clause 42.03-2 – to remove, destroy or lop any substantial tree. ¹
Relevant scheme policies and provisions	Clauses 11, 15, 16, 18, 32.08, 42.03, 52.06, 55, 65 and 71.02.

¹ A substantial tree is defined in the SLO5 as a tree with a trunk circumference greater than 0.5 metres at one metre above ground level.



Land description

The subject land at 7 Macauley Court, Eltham (**site**) is located at the head of a cul-de-sac that extends north off York Street on the southern edge of the Eltham Major Activity Centre. The site is irregular in shape with a frontage comprising two x 10.5-metre-wide sections, a rear boundary width of 14.20 metres and northern and southern boundary lengths of 45.7 metres and 52.2 metres respectively. The site has an overall area of 1,078 square metres. It has a pronounced slope diagonally of 9.5 metres or 14.6% falling from the north-east to the south-west corners. The cross fall is 2.5 metres or 10%.

The site contains a two-storey brick and weatherboard dwelling and a brick garage located on the northern side of the front boundary. Two sewer and drainage easements run along the northern (1.52 metres in width) and western (3.05 metres in width) boundaries. The site is well vegetated containing 34 trees including two street trees.

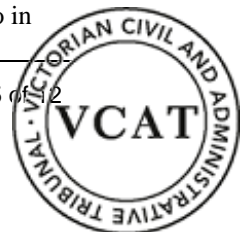
Tribunal inspection

23 May 2022 unaccompanied

REASONS²

- 1 I delivered reasons for my decision orally following the conclusion of the hearing and after I had conducted an inspection of the site. These are the reasons for the decision.
- 2 This is an application by Macauley Environmental Developments Pty Ltd (**applicant**) to review the decision of the Nillumbik Shire Council (**Council**) to refuse permission in relation to permit application 104/2021/03P on 21 July 2021 for the construction of 3 dwellings and the removal of vegetation including 2 street trees at 7 Macauley Court, Eltham (**site**).
- 3 Council's grounds of refusal generally relate to the proposal being inconsistent with the provisions and policy of the Nillumbik Planning Scheme (**planning scheme**) and an overdevelopment of the site and including:
 - A design response that fails to take account of the slope of the site.
 - Adverse impacts on existing vegetation coverage both on the site and on adjoining land to the north and south of the site.
 - Insufficient space for landscaping that includes canopy trees.
 - An over-reliance on the nature strip to provide the appropriate canopy tree setting in the streetscape for the proposal.
- 4 The respondents, Lynnsay Prunotto and Carlota Quinlan from the Eltham Community Action Group, supported Council's concerns. Ms Quinlan adding there is difficulty with the sloping driveway to provide for vehicles accessing the garages for Dwellings 2 and 3 without excessive corrective manoeuvres. She considered this would have the potential for overflow on-street parking and cause congestion in Macauley Court and conflict with other users.
- 5 The applicant's position was that the proposal had been designed to achieve a respectful response and acceptable outcome to the requirements and policy of the planning scheme and the physical context of the site and surrounds. The applicant noting that the site is located at the end of a Court which will limit impact on the area.
- 6 I have been provided with a detailed description of the review site and its environs, the proposal, the planning scheme provisions and applicable policies. I have also inspected the site on 23 May 2022. It is not necessary for me to repeat that material other than to record that:

² 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 site is a large, generally rectangular shaped lot with an overall area of 1,078 square metres. It is located in a residential area at the end of Macauley Court on the southern edge of the area known as the Eltham Major Activity Centre with the gateway to the Eltham town centre itself approximately 600 metres and the Eltham train station 950 metres both to the north.
- The site and area in Macauley Court and further south are all in the General Residential Zone Schedule 1 relating to the *General Residential Areas* in Nillumbik (**GRZ1**). Abutting land to the north is in the Activity Centre Zone while land to the immediate west is in the Mixed Use Zone.
- The site is also affected by the Significant Landscape Overlay Schedule 5 relating to the *Eltham Central Character* (**SLO5**). Land abutting the site to the south and down Macauley Court are also in the SLO5. Adjoining land to the north is affected by the SLO1 which relates to the *Eltham Town Centre* and land to the immediate west is affected by the SLO7 and the Design and Development Overlay Schedule 1 (**DDO1**) which both relate to the *Eltham Gateway*.
- Macauley Court extends in a north-south direction uphill from York Street. The site is located at the end of the Court and runs off the left-hand side of the “Y” head with an east-west orientation downhill towards the adjoining land at 860 Main Road, which is currently vacant.
- The site has a steep slope from the street frontage to the rear of around 9.5 metres or 14.6% as well as a cross slope of around 2.5 metres or 10%.
- The site currently contains a single dwelling which is proposed to be removed and vegetation which is proposed to be removed of which 7 trees require a permit under the SLO5 for removal.
- The site is encumbered by two sewer and drainage easements with run 1.52 metres in width along the northern side boundary and the other 3.05 metres wide along the western or rear boundary.
- The surrounding area is residential in character predominantly comprising single detached dwellings on large lots with spacious gardens including the presence of canopy trees.
- My attention was also drawn to the presence of new redevelopment in the form of single dwellings and medium density residential housing in the area with a new development under construction in York Street.
- The area retains a leafy treed character including large canopy trees.
- The proposal is to construct 3 contemporary flat roofed dwellings in a tandem layout that steps down the slope of the site. The dwellings are



partly two-storey in form and settled into the slope with cut and fill works with the main living areas of all 3 dwellings located at ground level and bedrooms, family rooms and double garages at first floor level.³

- The garage for Dwelling 1 occupies the frontage of the site on the front street boundary, with a setback 5.884 metres from the kerb in Macauley Court associated with the length of existing crossover and 2.475 metres setback from the easternmost side boundary of the site. A new second crossover is proposed with a driveway running down the southern side boundary providing access to the other dwellings.
- Viewed from the street frontage, the development will appear as a single storey form with the garage to Dwelling 1 most prominent and the single storey form of Dwelling 1 behind.
- Viewed from Main Road looking east, the dwellings will be more prominent with a layered double storey built form view and framed by the canopy trees located on adjoining properties either side to the north and south.
- The private open space areas face north for Dwellings 1 and 2 and west for Dwelling 3.
- The dwellings have a maximum height of 6.8 metres and site coverage of 45% below the requirement of 60%, site permeability of 37% above the requirement of 20% and garden area of 38% above the requirement of 35%.

- 7 I acknowledge that there was no disagreement amongst the parties that a large site, such as this, located close to the Eltham Major Activity Centre, has potential for some form of medium density residential development.
- 8 The GRZ1 encourages housing growth and diversity, but the SLO5 tempers such aspirations with a desire to retain and enhance landscape character including canopy trees.
- 9 The planning scheme recognises the challenge, under Clause 02.03-1 in providing a diverse range of dwellings while ensuring it is in keeping with neighbourhood character. One of the locations for residential growth includes the residential zones in the Eltham Major Activity Centre.⁴ The site enjoys support as part of the 20-minute neighbourhood⁵ with convenient access to commercial and community services and public transport options. However, policy⁶ also recognises the value of

³ Noting the garages are positioned upslope in alignment with the upper floor levels of Dwellings 2 and 3 at what is described as first floor.

⁴ Refer to Clause 02.03-6 relating to *Housing* and Clause 16.01-1L relating to *Location of medium density residential development*.

⁵ Refer to Clause 15.01-4R.

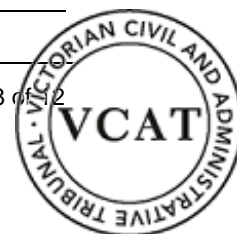
⁶ Refer to Clause 02.03-5 under *Neighbourhood character*.



neighbourhood and landscape character and places like Eltham are characterised by a tree canopy of predominantly indigenous species resulting in vistas that are not dominated by buildings and streetscapes that generally consist of single dwellings with ample opportunities for canopy trees.

- 10 The site is identified under Clause 15.01-5L relating to *Neighbourhood Character - Nillumbik*, within the *Eltham Central* precinct which includes the objective *to maintain a dominance of canopy trees and the existing mix of native and exotic vegetation, including the understorey*. I note the policy includes both general and precinct-based strategies. These generally look for contemporary design that retains or plants substantial trees, with a planting density for substantial trees at 1 per every 200 square metres site area⁷ and allowing sufficient space for planting canopy trees and in the front setback and other strategic locations on the site and to minimise the siting and design of driveways and garages.
- 11 I have had the benefit of evidence on behalf of the applicant from Mr Simon Gilbertson on planning, Mr John Patrick on landscaping and Mr Rob Galbraith on arboriculture and have given consideration to their respective expert evidence.
- 12 The applicant relies on the above evidence to support a position that the proposal is an acceptable response to the policy framework and controls of the planning scheme.
- 13 The applicant and the evidence form the position that the proposal will have minimal impact on the streetscape and neighbourhood character of the area. The existing expression of a front garage in the streetscape will fundamentally be retained through the replacement of the existing garage with a new single storey garage for Dwelling 1 and utilising the existing crossover, albeit slightly reduced in width.
- 14 The loss of the 2 Desert Ash (*Fraxinus angustifolia*) street trees will not be significant as they are considered environmental weeds and are proposed to be replaced by 2 Yellow Box (*Eucalyptus melliodora*) trees that will grow to a height at maturity of 11 metres. This landscaping will contribute to enhancing streetscape character.
- 15 The proposed design features three dwellings in a tandem arrangement stepping down the slope of the site in a contemporary design that will appear as a single dwelling from the street, albeit with the proposed Dwelling 1 garage in the front.
- 16 All existing trees on the site are proposed to be removed with all, except a Claret Ash (*Fraxinus oxycarpa* 'Raywood') identified as having low value for retention. Although the Claret Ash has a moderate retention value, the benefit of doing so is limited due to the tree experiencing the beginnings of

⁷ Equates to at least 5 large canopy trees.



dieback giving it a useful life expectancy of not much more than 10 years according to Mr Galbraith.

17 Large neighbouring canopy trees on either side of the site to the north and south are considered to have levels of encroachment that are minor and not expected to experience irreparable harm from the proposed development. For Tree 10 a Sugar Gum (*Eucalyptus cladocalyx*) located on the adjoining property at 6 Taylor Street to the north, Mr Galbraith undertook a root investigation, finding that the level of impact from encroachment would not be more significant than what presently occurs with the cutting in of the existing dwelling.

18 Council says the proposal fails to strike an appropriate balance including:

The proposal's heavy reliance on the public nature strip to the front of the site to achieve outcomes that should be located within the site boundaries, including:

- The reliance on the nature strip for canopy tree planting that is otherwise lacking in the front setback of the site;
- The reliance on the nature strip to compensate for what is a significant variation to Standard B6 (front setback);
- The positioning of the driveway ramp including the need for 3 gradient changes within the nature strip alone;
- The reliance on the pedestrian path steps in the nature strip; and
- The reliance on blockwork retaining wall(s) in the nature strip.

The lack of a suitable front setback and resulting dominance of built form to Macaulay Court.

The lack of suitable opportunities for canopy tree planting along the driveway, to the front of dwellings 2 and 3, and in-between dwellings.

The highly compromised car parking layout that has an over reliance on correcting movements.

19 With this matter, I must decide whether the proposal will produce an acceptable outcome having regard to the relevant policies and provisions in the planning scheme. Net community benefit is central in reaching a conclusion. Clause 71.02 - *Integrated Decision Making* of the planning scheme requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations.

20 With this proposed development I must decide whether a permit should be granted and, if so, what conditions should be applied.

21 Having considered all submissions and evidence presented with regards to the applicable policies and provisions of the planning scheme and from my

inspection, I find I am generally in agreeance with Council. I find the proposal represents an unacceptable outcome.

- 22 Eltham is a place strongly characterised by two prominent features, sloping topography and canopy trees. Although the site is located in proximity to the Eltham Major Activity Centre, policy relating specifically to the Eltham Central neighbourhood character precinct strives to maintain the dominance of canopy trees and the encouragement of gardens with a mix of native and exotic vegetation and predominantly indigenous or native trees.
- 23 I find the proposal fails to provide for large canopy tree planting to maintain the landscape character on the site at both the front and rear setbacks. The proposal for the garage of Dwelling 1 occupies the front setback creating insufficient space for large canopy tree planting. The presence of the rear easement and the setback of Dwelling 3 also limits the opportunity for planting at least one or two large canopy trees in addition to what is proposed between the rear of Dwelling 3 and the easement and without putting at risk any infrastructure within that easement.
- 24 In this way, the proposal fails to achieve the framing aspect from not only the existing canopy trees to the north and south, but also from what could have been complemented by similar planting to the east and west and achieve what I consider would have been an acceptable outcome. Unfortunately, this is not the case and is not a matter that can be merely conditioned, but rather requires a re-design.
- 25 I accept that Mr Patrick's evidence seeks to provide for canopy tree planting in the front nature strip. As well as other locations on the site such as the Dwarf Scentuous Lemon-scented Gums (*Corymbia citriodora* 'Scentuous') near Dwelling 1 and in the north-west corner of the site, a Coral Bark Maple (*Acer palmatum* 'Senkaki') between Dwellings 1 and 2, Blackwoods (*Acacia melanoxylon*) in the south-west corner of the site and between Dwellings 2 and 3, Black Sheoks (*Allocasuarina littoralis*) between Dwellings 2 and 3 and also beside Dwelling 3 and a Lightwood (*Acacia implexa*) in front of the garage for Dwelling 1.
- 26 I understand these plantings attempt in part to offset the removal of all trees from the site, noting that all had a low level of retention value apart from the Claret Ash which is suffering dieback.
- 27 Although the proposed landscaping has merit, I find that the presence of the garage for Dwelling 1 within the front setback limits the space available to provide for large canopy tree planting without having to rely on such planting solely within the nature strip. This reliance fails the policy under Clause 15.01-2L-02 relating to *Medium density housing design* applicable in the GRZ to discourage medium density housing that relies on the visual amenity provided by road reserves to facilitate development.



- 28 The proposed design to replace the existing garage is what would be a common enticement to maintain the effect of an existing built form presence in the Court. However, what it does is replicate a dominance of built form in the Court rather than an enhancement which could have been achieved through the introduction of large canopy tree planting within the street setback that can better support the policy aspirations of the planning scheme for a canopy tree presence. The proposal does not achieve this and the presence of the garage for Dwelling 1 takes up valuable front setback space that would be better used for planting a couple of large canopy trees.
- 29 The adverse effect on streetscape character from the garage for Dwelling 1 and retention of the existing crossover is compounded by the proposal for a new second crossover located over a steep section of the nature strip. It results in an excessive length of what is a short site frontage to the Court being taken up by crossovers and thus limits space for the nature strip planting. This is a feature that I consider is excessive and not respectful of the streetscape character of Macauley Court.
- 30 The proposal to plant 2 Yellow Box trees in the nature strip area is confronted with space restrictions between crossovers for not only the proposal, but also for a proposed development at 8 Macauley Court on the opposite side of the Court head. In addition, I became aware that one of the Yellow Box trees would be affected by the presence of existing overhead powerlines. Although there was discussion concerning whether those powerlines could be placed underground, it is the reliance on such public spaces to achieve an outcome, that has not been able to be provided on-site that is the issue, and one that draws me to the conclusion that no permit is granted.
- 31 I am comfortable with the building typology and its stepping down the site. I am also comfortable with the extent of encroachment of trees on adjoining properties and accept the evidence of Mr Galbraith in this regard.
- 32 Council was concerned regarding the steep slope of the crossover and potential reliance on retaining walls within the road reserve. Given the location of the site at the end of the Court, I am not convinced its design poses unacceptable risks to pedestrian safety.
- 33 Overall, I find the proposal is not an acceptable outcome sought by the planning scheme. There is too much reliance on borrowed amenity sought from adjoining land and the road reserve for canopy trees and landscape character.

CONCLUSION

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

Christopher Harty
Member

