VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment division

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| planning and environment LIST | vcat reference No. P1788/2019  Permit Application no. TPA/49883 |
| CATCHWORDS | |
| Section 82 of the *Planning and Environment Act 1987*, Two dwellings on a lot, Impact on neighbouring trees, Costs application | |

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| APPLICANT | Donald Caratti |
| responsible authority | Monash City Council |
| Respondent | Siew Ling Lee |
| SUBJECT LAND | 5 Charlton Street, Mount Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Tracey Bilston-McGillen, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 16 March 2020 |
| DATE OF ORDER | 24 August 2020 |
| citation | Caratti v Monash CC [2020] VCAT 910 |

# Order

### No permit granted

1. In application P1788/2020 the decision of the responsible authority is set aside.
2. In planning permit application TPA/49883 no permit is granted.

### Costs Refused.

1. No order as to costs.

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| **Tracey Bilston-McGillen**  **Member** |  |  |



# Appearances

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| For applicant | Mr Donald Caratti. |
| For responsible authority | Mr David De Giovanni, town planning consultant, David de Giovanni town planning. |
| For respondent | Mr John Joyner town planning consultant, Melbourne Planning Outcomes. |

# Information

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| Description of proposal | Construction of two double storey dwellings. |
| Nature of proceeding | Application under section 82 of the *Planning and Environment Act 1987* – to review the decision to grant a permit. |
| Planning scheme | Monash Planning Scheme. |
| Zone and overlays | General Residential Zone, Schedule 3 (**GRZ3**). |
| Permit requirements | Clause 32.08-6. A permit is required to construct two or more dwellings. |
| Key scheme policies and provisions | Clauses 11, 15, 16, 18, 21.01, 21.04, 21.08, 22.01, 22.04, 22.05, 22.13, 52.06, 55 and 65. |
| Land description | The review site is located on the northern side of Charlton Street, Mount Waverley. The site has a frontage of 19.81 metres, a length of 38.1 metres and a total site area of 754 square metres.  The site has a slope from RL109.5 Australian Height Datum (**AHD**) in the north-east corner to RL107.81 in the south-west corner.  The site currently accommodates a single dwelling.  To the west is a single storey dwelling. To the east is a dual occupancy with a two storey dwelling fronting Charlton Street and a single storey dwelling located at the rear of the site. A driveway to this property is located on its western boundary (adjoining the review site). |

# Reasons[[1]](#footnote-1)

## background

1. The Tribunal issued a decision on 23 March 2020 making the following findings (in summary):

* In principle, the Tribunal did not have a concern with the site being developed for two dwellings. Monash is a municipality with an ageing population and a need for different forms of housing, which the proposal would fulfill.
* The Tribunal agreed with Council that Charlton Street has an emerging character of medium density housing. This emerging character is the development of two dwellings on a lot, both single and two storey forms.
* There is no longer a defined backyard scape character as new development extends well into the rear yards. The proposed two storey second dwelling in the rear of the review site is a comfortable fit having regard to the emerging character of the neighbourhood.
* The Tribunal was not concerned with the visual impact of the proposed dwelling. The proposal is two storeys with the upper levels sufficiently setback from the boundaries.
* The Tribunal was not concerned with the issue of overlooking.
* During the hearing Council submitted that they had ‘confused’ the proposed condition 1(a) ‘northern most’ and ‘southern most’ and requested the condition be amended.
* Whilst the Tribunal noted that there was compliance with Standard B18 ‘Walls on boundaries’, it was identified that there were trees located on the eastern boundary of the adjoining property (with 7 Charlton Street). It is an issue that, at the hearing of 16 March 2020, the Tribunal considered had not been adequately addressed by the parties. The Tribunal therefore provided a process for the submission of further information and responses. The directions of the Order of 23 March 2020 stated:

i An updated set of plans detailing what the proposed wording change to condition 1(a) intends i.e. the change of word from ‘northern most’ to ‘southern most’ wall. If the responsible authority considers that the condition is to be re-worded, any proposed wording should accompany the plans. The draft condition currently reads:

Dwelling 2 with a minimum setback of 2.4 metres from the eastern most property boundary extending between the laundry for Dwelling 1 and the northern most wall of the garage façade of 2/7 Charlton Street to the satisfaction of the Responsible Authority.

The proposed wording reads:

Dwelling 2 with a minimum setback of 2.4 metres from the eastern most property boundary extending between the laundry for Dwelling 1 and the southern most wall of the garage façade of 2/7 Charlton Street to the satisfaction of the Responsible Authority.

ii An updated Tree Report prepared by a qualified arborist to identify all trees located in the landscape strip of 7 Charlton Street, Mount Waverley (located to the east of the review site). The report must provide an assessment of the impact of the proposed development to these trees (as per order 1(i) above). The assessment must have regard to the amended plans required by this order.

iii As a consequence of the amended arborist report, any draft tree protection conditions to be included on a permit.

* The parties foreshadowed an application for costs. The Order provided a process for this:

i Any party that wishes to make an application for costs must file and serve such application and supporting submissions to all parties to the review by not later than **1 June 2020.** The application must include the following information:

a The amount and details of the costs claimed.

b The reasons why costs should be awarded having regard to the provisions of the *Victorian Civil and Administrative Tribunal Act 1998*.

ii Any response to the application for costs must be filed and served by no later than **15 June 2020.**

iii Upon compliance with the above orders, the Tribunal may decide any application for costs on the papers or list for a hearing if it considers this is appropriate.

1. Following the Tribunal’s Order, a great deal of correspondence was received. Correspondence was received from that applicant for review, Monash City Council and the respondent. The submission of the respondent included an Arborist Report prepared by *Bluegum* Ver05/20.
2. As the Order of 23 March 2020 highlights, the key issue is the impact of the proposed development on the trees located on the boundary of 7 Charlton Street. The Order is clear that a re-design is not permitted. The Order provided:

This process is not an opportunity to redesign the eastern elevation of the proposed development (other than as required by condition 1a). Any other changes would be seeking to redesign the proposal, which would be considered to be a new application.

## Impact on Trees

1. The diagram below is an extract of the *Bluegum* arborist report. It provides the ground floor plan in relation to the trees located on the boundary with 7 Charlton Street. Of particular relevance is tree 16 adjoining the proposed walk-in-robe and ensuite of dwelling 1.

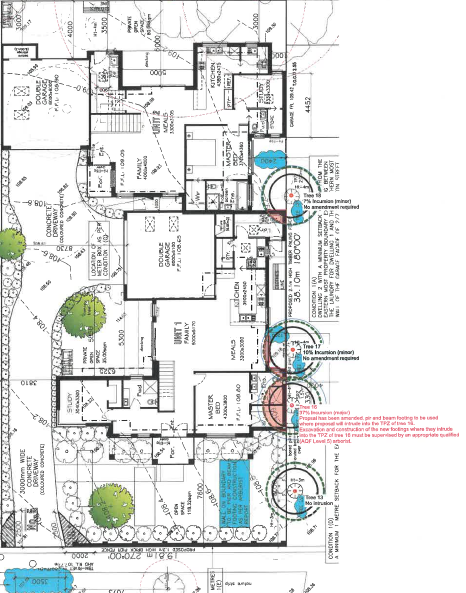


Figure 1: Proposed development detailing trees located on boundary. Source: *Bluegum* arborist report.





Figure 2: Photograph of boundary trees and vegetation at 7 Charlton Street. Source *Bluegum* arborist report.

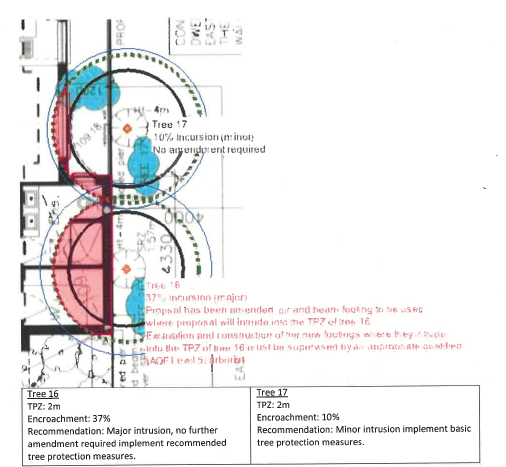


Figure 3: Plan detailing trees 16 and 17 located at 7 Charlton Street. Source *Bluegum* arborist report.

1. The *Bluegum* arborist report makes the following findings.
2. Trees 13 and 16-18 are located in the adjoining property at 7 Charlton Street, Mount Waverley. They are all relatively small sized, early mature *Cupressus sempervirens* (Italian Cypress), in good health and condition. They are planted along the driveway in the adjoining property.
3. Tree 16 will be directly affected by the proposed development as the proposal will intrude into the tree protection zone [**TPZ**] and Structural root zone [**SRZ**]. The incursion at 37% is classified as a major intrusion. The Australian Standard states that ‘*if the proposed encroachment is greater than 10% of the TPZ or inside the SRZ, the project arborist must demonstrate that the tree(s) would remain viable’*. The *Bluegum* report states that the proposal has been amended as it affects the tree recommending the replacement of standard footings to a pier and beam footings system that will bridge over the trees structural root zone.
4. The respondent submitted that in response to the above findings, condition 1(i) should be amended to include the following:

This shall include a specific notation requiring a pier and beam footing for the section of the wall adjoining the eastern boundary that is required for the protection of the Tree shown as Tree 16 on the plans.

1. The respondent noted that the trees in question are not located on Mr Caratti’s property, they are in lot 2/7 Charlton Street being the driveway owned by the property to the rear and not in common property.
2. In response to the submission and the arborist report, the applicant for review contended, in summary, that the following concerns remain and have not been addressed:

* The following standard should be noted - *Australian Standard AS4970 2009 Protection of trees on development sites*: ‘*No change of natural surface/ground levels should occur in a Tree Protection Zone (TPZ)*’. The report has given no consideration to the fact that significant excavation is required up to the common boundary with 7 Charlton Street. The plans fail to indicate the necessary site cut to achieve the nominated floor levels.
* The report fails to identify Tree 1 (as noted in the applicant for review submission) which is located at the proposed south east external wall corner of the walk-in-robe for dwelling 1. Tree 1 is an evergreen flowering tree with the edge of this trunk on or near to the common boundary with a height of 5.1 metres and a canopy width of 3.1 metres.
* The development will also have an impact on trees located at 8 Kemp Street, that have not been addressed.
* The Tribunal made it clear that if it were not satisfied that the changes required by 1(a) and any technical requirements from the arborist to address the adjoining trees, the proposed development would be refused.

1. Having regard to the arborist report and various submissions, the Tribunal is not satisfied that the development has responded appropriately to the proposed trees located on the boundary of 7 Charlton Street and in particular tree 16. The Tribunal makes this finding for the following reasons.
2. In response to the submission that the trees are located in lot 2/7 Charlton Street, the Tribunal makes the observation that regardless of whether they are in lot 1 or lot 2, the impact of the proposed building on the trees is a relevant consideration.
3. The arborist report clearly identifies trees 13 and 16-18 as being located on the boundary of 7 Charlton Street. The arborist report identifies tree 16 as good health, good structure, moderate amenity value and medium life expectancy.
4. The *Bluegum* report refers to *AS4970-2009: Protection of trees on development sites* stating that it is intended to be used as a guideline, generally tree roots do not develop in a uniform manner and vary greatly in their size, spread and depth depending on soil characteristics, available resources and species factors. The report identifies that there is a major incursion to tree 16 but in combination with pier and beam footings to replace standard footings and an updated condition as detailed above, they would adequately protect the tree. However, the Tribunal remains concerned that there will be excavation required to achieve the nominated finished-floor-levels [**FFL**] and this has not been addressed by the arborist report or the respondent. The FFL is nominated on the ground floor plan for the master bedroom as 108.8 with a nominated level on the property at 7 Charlton Street as 109.18. The applicant for review identified that the change in level has not been addressed in the arborist report which places in doubt the impact on the subject trees. The *Bluegum* report states that the following tree protection measures are to be implemented to ensure no adverse impact on the health of the tree:

* Where the proposed development intrudes into the TPZ and SRZ of tree 16 they must utilise a pier and beam footing.
* The piers must be located outside of the tree’s SRZ.
* The beam must be above natural ground level (Tribunal emphasis).
* Where excavation and construction for the new footings intrude into the TPZ of tree 16 they must be supervised by an appropriately qualitied project arborist (minimum AQF Level 5).
* The relevant must be annotated to show the recommended tree protection measures.

1. Whilst it may seem that tree 16 would be adequately protected given the above arborist recommendations, there remains an outstanding matter of the proposed excavation that may be required. It is further noted that the arborist report identifies that ‘the beam must be above natural ground level’. Whilst this may be a matter that, in some cases, may be able to be dealt with by a planning permit conditions, given that a Tribunal Order has already called for further information, the Tribunal is not persuaded that it has been demonstrated how tree 16 will be protected. Perhaps this is a case where some preliminary root investigation work should have been undertaken.
2. The identification of trees both within a site and on adjoining sites is part of a site context assessment. It should not have been a ‘surprise’ at the hearing that the trees were an issue that the Tribunal considered should be addressed.
3. It is not the role of the Tribunal to redesign a proposal, but it is noted that if any future development is proposed, there should be consideration of moving development off the eastern boundary or at least where the development adjoins boundary trees. A 37% incursion into the SRZ of a tree should be a ‘red flag’ to an experienced planner or advocate. In this case, the Tribunal is concerned with the impact of the proposed walk-in-robe and ensuite on the eastern boundary to trees located on the boundary.
4. A 37% incursion is a major incursion and one that could have been avoided. Dwelling 1 could be been located off the eastern boundary to ensure that there was limited or no incursion into at least the SRZ of tree 16 The Order of 23 March 2020 states that if the further information failed to satisfy the Tribunal that the issue of the trees had adequately been addressed, then the proposed development would be refused.
5. Based on the information received, the Tribunal is not satisfied that the information adequately responds to the concerns regarding the boundary trees. Having regard to the Order of 23 March 2020, the Tribunal therefore refuses the proposed development.
6. The applicant for review’s submission raised a number of other matters including the impact of the development on trees located within a property to the north or rear at 8 Kemp street, the accuracy of the survey plan, accuracy of the site description plan and inaccuracies within the development plans that form part of the planning application for redevelopment. As the Tribunal has decided to refuse the proposed development because of the impact on boundary trees, the Tribunal will make no further comment regarding these other matters.

## condition 1(a)

1. The Order of 23 March 2020 seeks clarification to the wording of the proposed condition:

Dwelling 2 with a minimum setback of 2.4 metres from the eastern most property boundary extending between the laundry for Dwelling 1 and the southern most wall of the garage façade of 2/7 Charlton Street to the satisfaction of the Responsible Authority.

1. During the hearing there was an application to amend the ‘northern most to ‘southern most’. Council in its correspondence to the Tribunal stated that the request amending the direction was correct.
2. Whilst the matter is refused for reasons above, the Tribunal makes the observation that condition 1(a) effectively moves the ensuite and walk-in-robe of dwelling 2 off the eastern boundary. Given the sensitivities of the boundary trees on the boundary of the proposed eastern boundary, the Tribunal makes the observation that the same condition could have been applied to the dwelling 1 ensuite and walk-in-robe boundary wall.

## Costs application

1. The Order of 23 March 2020 establishes a process for the lodgement and consideration of costs. The Order states that an application must include the amount and details of the costs claimed and the reasons why costs should be awarded having regard to the provisions of the *Victorian Civil and Administrative Tribunal Act 1998*.
2. Submissions addressing the issue of costs have been received from Council, the applicant for review and respondent.

1. [Section 109](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/s109.html) of the [*Victorian Civil and Administrative Tribunal Act*](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/vcaata1998428/) *1998* [**VCAT Act]** provides the Tribunal with the power to award costs in proceedings. This may be all or a specified part of the costs of another party and such order may be made at any time. This section provides that:

* The starting point is that each party should bear their own costs. However, if, having regard to the matters contained in section 109(3) of the Act the Tribunal is satisfied that it is fair to award costs, then an order may be made.
* Sub-section (3) provides that the Tribunal may make an order “only if satisfied that it is fair to do so” having regard to matters then specified in this sub-section. These include the nature and complexity of the proceeding, the relative strengths of the claims made by the parties and the manner in which the parties have conducted the proceeding.
* For completeness I have provided Section 109 for consideration which reads:

(3) The Tribunal may make an order under subsection (2) only if satisfied that it is fair to do so, having regard to—

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

#### What were the parties’ submissions?

##### Monash Council

1. Monash Council submitted that, as set out in S109 of the VCAT Act 1988, each party should bear their own costs and that should be applied here. Council further submitted that they did not make a material mistake in its decision to Grant a Permit and the matters were ventilated at a merits hearing.

##### Applicant for Review

1. The applicant for review submitted that costs should be awarded against Monash Council and the reason and claim for costs includes:

* Monash Council failed to give proper consideration on the adjoining amenity impacted by the proposed development including failing to include conditions on the Notice of Decision to Grant a Planning Permit to protect the amenity of adjoining properties.
* Monash Council failed to give proper consideration of the proposed impact on the amenity provided by the trees on adjoining properties including failing to note that the proposed ground level finish floor levels are significantly below the natural ground levels within the majority of the area of tree protection zones of adjoining properties.
* Tribunal expenses including application fee, hearing fees;
* Professional services of a contracted licensed land surveyor to provide certified land levels on and near the common boundary;
* Attendance at hearing including costs associated with the preparation of submissions;
* Costs associated with professional building services.

1. A total of $14,880 was submitted.

##### Respondent

1. The respondent submitted that having regard to s109(s)(a)(i to vi) the applicant for review has disadvantaged the parties and process in that:

* Failing to comply with an order of the Tribunal to provide ‘further and better particulars’ without an excuse;
* Causing an adjournment as was subsequently ordered by the Tribunal after the hearing to provide a revised arborist report;
* Seeking further adjournments;
* Vexatiously conducting the proceeding through the deliberate withholding of information from the date of the original objections with Monash Council dated 2 April 2019 to the date of the hearing on 16 March 2020, deliberately prolonging unreasonably the time taken to resolve the matter; and
* Continued attempts to further delay with repeated emails to the Tribunal seeking unwarranted further information from Monash Council.

1. A total of $12,480 in costs is sought including:

* $7480 in direct documented costs incurred thought the retention of a planning consultant and arborist.
* $5,000 in costs associated with the significant delay in resolving the matter.

#### Should the discretion be exercised in favour of awarding costs?

1. As stated above, the general presumption to section 109 of the VCAT Act is that each party will bear their own costs. It is accepted that awarding costs in the Planning and Environment Division is quite rare. This was reinforced in *Rainsbury v Delatite SC*[[2]](#footnote-2) where the Member observed that awarding costs in a planning merits hearing is ‘very rare’. I have also referred to a decision of Deputy President Gibson in *Falconbridge Pty Ltd v Yarra CC[[3]](#footnote-3)* where the principles of awarding costs were discussed and in particular how it should be interpreted when it is put that a party is disadvantaged:

[18] Section 78(1) and section 109(3)(a) both refer to situations where a party has conducted the proceeding in a way that unnecessarily disadvantages another party to the proceeding. Under these provisions the Tribunal must be satisfied that the proceeding has been conducted in a way that *unnecessarily* disadvantages another party. It is not simply sufficient that another party is disadvantaged: they must have been unnecessarily disadvantaged. Any party that is a respondent to an application which is ultimately rejected is likely to have been disadvantaged in some way in terms of time, trouble, expense, delay or lost opportunity. Indeed, any dispute could be considered to disadvantage the parties, but the Victorian Civil and Administrative Tribunal is set up to resolve disputes. Rights are conferred upon people under various pieces of legislation to bring their disputes before the Victorian Civil and Administrative Tribunal for resolution. Thus, the simple fact that someone takes advantage of a right conferred by an Act to make an application to the Tribunal should not justify an award of costs if that application is unsuccessful. If this were the case, it may discourage people from making applications and undermine the objectives of the Victorian Civil and Administrative Tribunal to provide expeditious and cost effective resolution of disputes. This is no doubt the reason for the general rule expressed in section 109(1) of the Act that each party is to bear their own costs in the proceeding, which is an important distinction between the Tribunal and the courts. Rather, there must be some conduct that takes a matter outside the normal bounds of a proceeding to make it fair that an award of costs be made. Thus both section 78(1) and section 109(3) provide that another party must be *unnecessarily* disadvantaged by a party’s conduct of the proceeding to justify an award of costs. The test is therefore whether the disadvantage is unnecessary.

1. The decision further discusses when to award costs:

[31] In light of my findings regarding the earlier hearings, I do not consider any award of costs is appropriate in connection with the costs hearing itself. The issues relating to the application for costs by the respondent/permit applicant were complex and justified a hearing. The applicant/objector’s behaviour throughout this entire saga has not been beyond reproach. There is no doubt that it has caused the respondent/permit applicant expense and delay based on what was, at best, a flimsy objection to the development of the land as a tavern and multi media art gallery. Nevertheless, as I have commented earlier, the Victorian planning system allows extensive rights of third party participation in planning decision making and the general rule is that parties coming before the Tribunal bear their own costs. It is important in administering such a system to determine each proceeding with as much speed as the requirements of the Act and the enabling enactment and a proper consideration of the matters before it permit.[[4]](#footnote-4) I am satisfied that these objectives of the Act were met here. The fact is that the applicant/objector was entitled to make the applications that it did. Although the applications were not successful, that in itself does not justify an award of costs. Nor does the behaviour of the applicant/objector, although annoying, justify an award of costs either.

1. Having regard to the observations in the above decisions, the considerations under section 109 in terms of whether to make an order for costs, noting the overriding consideration that the making of a costs order can only occur if the Tribunal is satisfied that it is fair to do so, the Tribunal is not inclined to grant an order for costs. This conclusion has been reached for the following reasons.

##### Conclusion

1. The respondent submitted that the applicant for review failed to comply with the Tribunal’s order to provide ‘further and better’ particulars. It was further contended that the failure to comply with this direction lead to the delay in having to provide a second arborist report regarding the adjoining trees. It is correct that the applicant for reviewed failed to comply with an order of the Tribunal without providing an excuse. However, the issue of the trees, is one that the Tribunal raised independently identifying that it had not been dealt with to the satisfaction of the Tribunal. As part of a planning application, a site context plan including opportunities and constraints are to be identified. Arguably the level of information located at the town planning application state was inadequate but that is subject to a process outside the Tribunal. It is also noted that the hearing proceeded on the day with the Tribunal offering the respondent extra time if there were any ‘submissions of surprise’. The Tribunal is not persuaded that this course of action results in an order for costs.
2. The respondent submitted that the applicant for review requested unnecessary adjournments causing delay in a decision. The Tribunal makes the observation that a request for an adjournment was also made by the respondent. A tenet of the Tribunal review process is to be ‘fair and efficient’ to all parties.
3. The applicant for review seeks costs against the Monash Council effectively for, what they consider, were flaws in the planning application process. The assessment of a planning application is a process outside the Tribunal Review and it is not considered these complaints warrant costs to be awarded.
4. There have been delays in the Tribunal making a final decision, but the Tribunal notes that some of the delay was a result of inadequate information at the outset and the request for further information to satisfy the Tribunal. The Tribunal finds in this case that the delay is a ‘shared’ outcome by the various parties and therefore refuses to award costs against any party.
5. It is important to acknowledge whilst it is contended that the decision has been unnecessarily delayed, the original Order of the Tribunal provided a timetable 15 June 2020 for a decision on the costs application. Due to requests for adjournments, the final date for any decision (costs application) is 20 August 2020. This decision is made on 24 August 2020. There has been an approximate delay of 9-10 weeks in the finalisation of a decision. Given the intervening COVID-19 Pandemic and the impact on the functions of all parties involved in this matter, the Tribunal does not agree that the delay warrants costs to be awarded to any party.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is set aside. No permit is granted, and the application for costs is refused.

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| **Tracey Bilston-McGillen**  **Member** |  |  |

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. [↑](#footnote-ref-1)
2. [1999] VCAT 176. [↑](#footnote-ref-2)
3. *Falconbridge Pty Ltd v Yarra CC* (costs) (Red Dot) [2005] VCAT 2449 (23 November 2005). [↑](#footnote-ref-3)
4. See section 98(1)(d) of the *Victorian Civil and Administrative Tribunal Act* 1998 [↑](#footnote-ref-4)