VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

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| planning and environment LIST | vcat reference No. P2642/2018  Permit Application no. TPA/49346 |

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| APPLICANT | Guy Barel & Rhonda Harbis |
| responsible authority | Monash City Council |
| SUBJECT LAND | 7 Fernbank Crescent, MULGRAVE |
| WHERE HELD | Melbourne |
| BEFORE | Jane Tait, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 26 April 2019 |
| DATE OF ORDER | 3 May 2019 |
| CITATION | Barel v Monash CC [2019] VCAT 620 |

# Order

### Conditions changed

1. The decision of the responsible authority is varied.
2. The Tribunal directs that planning permit TPA/49346 must contain the conditions set out in planning permit TPA/49346 issued by the responsible authority on 29 November 2018 with the following modifications:
   1. Condition 1 (a) is deleted.
   2. Condition 1 (b) is deleted
   3. Condition 1 (d) is amended to read:

Annotations on the plans of the tree protection measures to be implemented that are referred to in the Tree Management Plan required by Condition 2 of this permit. These recommendations are to be implemented to the satisfaction of the Responsible Authority.

1. Conditions in the permit are renumbered accordingly.
2. The responsible authority is directed to issue a modified planning permit in accordance with this order.

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| **Jane Tait**  **Member** |  |  |



# Appearances

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| For Guy Barel and Rhonda Harbis | Mr Sam Palma, town planner, David Lock Associates (Aust) Pty Ltd |
| For Monash City Council | Ms Adrianne Kellock, town planner, Kellock Planning |

# Information

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| Description of proposal | To delete Condition 1 (a), (b), (c) and (d) in Planning Permit TPA/49346. |
| Nature of proceeding | Application under section 80 of the *Planning and Environment Act 1987* – to review the conditions contained in the permit. |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | Neighbourhood Residential Zone Schedule 4 (NRZ4)  Vegetation Protection Overlay Schedule 1 (VPO1) |
| Permit requirements | Clause 32.08-4 – A permit is required to construct two or more dwellings on a lot  Clause 42.02-2 – To remove, destroy or lop vegetation |
| Land description | The site is located on the south-west side of Fernbank Crescent, Mulgrave. It has a frontage of 18.22 metres, depth of 44.32 metres and site area of 734 square metres.  The site is occupied by a single storey brick veneer detached dwelling. |

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

## What is this proceeding about?

1. In November 2018, Monash City Council issued Planning Permit TPA/49346 for construction of two double storey side-by-side dwellings and removal of vegetation at 7 Fernbank Crescent, Mulgrave.
2. Mr Barel and Ms Harbis (the ‘applicants’) have lodged an application to review the following four conditions on the permit including:

Condition 1 (a) The leisure area of Dwelling 2 at the first floor level to be deleted and Bedroom 3 to be relocated approximately 2.9 metres to the north.

Condition 1 (b) The bathroom windows of both dwellings at first floor level to be replaced by a highlight window.

Condition 1 (c) Tree 4, as identified in the Arborist report prepared by Tree-mendous Consulting Pty Ltd dated January 2018, to be retained and clearly marked on all relevant plans.

Condition 1 (d) Annotations on plans that the tree protection measures referred to in the arborist report prepared by Tree-mendous Consulting Pty Ltd dated January 2018 are inclusive to Tree 4 and must be strictly adhered to.

1. The applicants are seeking to delete these conditions on the permit.

## What has council approved?

1. Planning Permit TPA/49346 was issued for construction of two double storey side-by-side dwellings and removal of vegetation. The plans indicate the construction of both dwellings with frontage to Fernbank Crescent with a central party wall. The dwellings are a mirror image and include ground floor family room, dining room, kitchen, study and service areas. The first floor contains four bedrooms, bathroom, en-suite and leisure room.
2. Both dwellings have a single garage and tandem car space in the driveway. The garages are set back a minimum of 1.1 metres from the side (north and south) boundaries. Dwelling 1 is set back a minimum of 7.9 metres from the frontage and Dwelling 2 is set back 7.6 metres.
3. The applicants proposed to remove all vegetation from the site, including Tree 4, a Liquidambar that is 12 metres high. Condition 1 (c.) and (d) on the permit requires the retention of this tree.

## what is the physical context of this neighbourhood?

1. The photographs tendered at the hearing show this neighbourhood contains predominately single storey detached brick veneer houses constructed in the 1970’s and 80’s. Council advised that multi-dwelling development is evident in the wider area, including in Haverbrack Drive. There are also examples of house replacement of single detached dwellings that have greater site coverage and larger first floor areas.
2. The landscape character of the area contains established front gardens with low to medium height canopy trees. The aerial photographs also show canopy tree vegetation is located in both front and rear yards. This section of Fernbank Crescent contains low or no fences that allows views of the dwellings and canopy trees in the frontage.

## Policy Context

1. My decision has considered the purposes of the PPF, NRZ4, Clause 55, Clause 42.02 and local policies including Clause 22.01, 22.04 and 22.05. I am satisfied the development of two double storey dwellings at this location meets urban consolidation policy objectives to contribute to the number and diversity of dwelling types in this area.
2. A development must respond appropriately to the existing and preferred/desired neighbourhood character in accordance with the objectives of Clause 22.01.
3. The site is also located in NRZ4 (Dandenong Valley Escarpment Area). This zone contains neighbourhood character objectives including:

* To ensure new development maintains the important view lines to the Dandenong Ranges, along the streets and between buildings.
* To ensure development is defined by its spacious and generous garden settings, tall canopy trees and consistent built form and setbacks.
* To encourage open gardens to the street, and the planting and retention of significant trees.[[2]](#footnote-2)

1. Council states the subject site is located in Neighbourhood Character Type E in the Monash Residential Character Study. This area notes the desired future character is to evolve in a landscaped setting with mature canopy trees in both the public and private realm. It also recommends that dwellings be designed sympathetically to integrate with any existing native trees and shrubs on or adjacent to the development.

## Condition 1 (a): The leisure area of Dwelling 2 at the first floor level to be deleted and Bedroom 3 to be relocated approximately 2.9 metres to the north.

1. Council acknowledges the heights of the dwellings are in keeping with the single and double storey forms on this neighbourhood. It says the first floor to ground floor ratio is appropriate at 66.01%. This results in the central position of the upper floors that incudes sufficient wall recession.
2. Despite this positive assessment, Council submits the first floor of Dwelling 2 presents unreasonable building bulk and mass facing the secluded private open space of 3 Fernbank Crescent, directly alongside the subject site. It says the interface between the site and this area is very open as the abutting secluded private open space is devoid of vegetation in proximity to the common boundary.
3. Council argues the condition will reduce the length of part of Dwelling 2’s upper floor that is sited opposite the secluded private open space from 8.6 metres to 5.7 metres. This is necessary to reduce the visual bulk of the dwelling.
4. The applicants argue the upper floor of Dwelling 2 is set back a minimum of 3 metres from the north-west boundary, which is in excess of Clause 55.04-1 (Standard B17 – Side and Rear Setbacks). They say the upper floor of Dwelling 2 faces a concrete driveway, brick garage and dwelling at 3 Fernbank Crescent. They argue these setbacks limit the perceived concerns regarding building bulk.
5. The applicants argue the extent of the upper level facing the adjoining secluded private open space is limited. They say it is a well thought out design that balances the amenity of adjoining properties and character of the area. They submit the upper floor is not excessive and aims to minimise bulk and scale impacts on the neighbouring dwelling.
6. I am not persuaded by Council’s arguments and find the location, height and setback of the first floor bedroom 2 of Dwelling 2 acceptable for the following reasons:

* The north-west elevation is set back 3.03 metres to 3.2 metres from the boundary and exceeds the minimum requirement of Standard B17 (i.e. approximately 1.48 metres).
* The first floor is stepped back from the ground floor and adjoining secluded open space. This provides a high level of articulation in the north-west elevation.
* The ground floor is set back 1.3 metres to 1.7 metres from the common boundary and therefore there is no built form directly abutting the neighbouring rear yard.
* The adjoining dwelling does not have any habitable room windows facing the subject site. Photographs indicate this dwelling has an enclosed veranda adjacent to the north-east elevation that is screened facing the subject site. The photographs indicate the outlook from windows of the adjoining dwelling are primarily to the north-east and not towards the subject site. This dwelling has also further enclosed these windows within the veranda that also includes perspex blinds.
* The adjoining secluded open space is already partially enclosed by the adjoining garage of 5 Fernbank Crescent. The addition will not fully enclose this open space.

1. I will therefore direct that the permit be amended to delete Condition 1 (a) on the permit.

## Condition 1 (b): The bathroom windows of both dwellings at first floor level to be replaced by a highlight window.

1. Council argues the bathroom windows should be highlight windows as they currently contain clear glazing with a sill height less than 1.7 metres. It says that as an ‘act of caution’ these windows should be replaced by highlight windows even though they are not habitable room windows.
2. The applicants state that Council has taken liberties in their interpretation and assessment of amenity impacts in Clause 55.04-6 (Standard B22). It says bathrooms are not habitable room windows and are not subject to the requirements of the standard.
3. Standard B22 has an objective to limit views into the secluded private open space and habitable room windows. The standard specifically states that a habitable room should be located and designed to avoid direct views into neighbouring private open space and windows.
4. I find Council’s ‘act of caution’ is misguided as Standard B22 specifically addresses overlooking from habitable room windows only.
5. In any event, the plans indicate the bathroom of Dwelling 2 in the north-west elevation is facing the garage and driveway of 5 Fernbank Crescent and will not cause unreasonable overlooking.
6. I acknowledge the bathroom for Dwelling 1 in the south-east elevation is facing the rear yard of 9 Fernbank Crescent. However the plans show the bath abuts the window and therefore the occupant’s angle of view is setback from the window. I also note that there is a row of canopy trees along the common boundary in the adjoining dwelling that will also filter views from this window.
7. I will therefore direct that the permit be amended to delete Condition 1 (b).

## Condition 1 (c): Tree 4, as identified in the Arborist report prepared by Tree-mendous Consulting Pty Ltd dated January 2018, to be retained and clearly marked on all relevant plans.

## Condition 1 (d): Annotations on plans that the tree protection measures referred to in the arborist report prepared by Tree-mendous Consulting Pty Ltd dated January 2018 are inclusive to Tree 4 and must be strictly adhered to.

1. A planning permit is required to remove Tree 4 – Liquidambar in accordance with the VPO1. The photographs tendered at the hearing show this tree is located in the frontage setback adjacent to the existing driveway. It is clearly visible in the streetscape and contributes to the landscape character of this area.
2. The arborist report submitted with the application notes Tree 4 – Liquidambar that is 12 metres high and has a tree protection zone of 4.7 metres. The report states the tree has moderate retention value, moderate amenity value, fair structure, fair to good health and useful life expectancy of over 20 years.
3. This report states the development will encroach into the Tree Protection Zone by 21.4%, which includes the eastern and western driveway and both dwellings. The arborist considers this is a major encroachment that will comprise the viability of the tree in the long term.
4. Council argues the proposed minimum frontage setback of 7.6 metres is very similar to the 7.5 metre setback of the existing carport. It also says the existing driveway is in proximity to the tree trunk yet the tree has grown to a significant height and is in good health.
5. Council submits that retention of Tree 4 is warranted as it makes a positive contribution to the landscape character of the area and is consistent with the objectives of the NRZ4, VPO1, Clause 22.01 and Clause 22.05.
6. The applicants argue Council’s assessment of the proposal is inaccurate and flawed. They say the existing dwelling is set back 11. 4 metres from the frontage and carport 7.5 metres. They also submit that as the dwellings are proposed to be setback 6.57 metres (porch structures), this is well within the Tree Protection Zone of the tree.
7. The applicants say the existing driveway is to be removed and replaced with new concrete driveway and that requires up to 500mm of fill is within the frontage at the entrance of the dwelling. They also say cut is proposed towards the rear to assist in levelling of the land. This will therefore result in 23% of the Tree Protection Zone encroached by the proposed driveway and porch structure and a total encroachment of 40.9% when taking into account of the fill in the frontage. They did not provide any supplementary arborist report to further justify why the tree cannot be retained as this would require the removal of the existing driveway for the exploratory digging.
8. The applicants also tabled photographs of the driveway that shows it has been uplifted by roots from the tree. They say this provides uncertainty regarding the ability to construct a new driveway at grade without further damaging the root system of the tree.
9. They argue the Liquidambar is an exotic species of fair health/structure and removal will allow for the planting of native/indigenous species in a more appropriate location in the frontage setback. They submit that due to the location of the tree, removal of this tree is required to construct the new dwellings.

### My Findings

1. The objectives of the NRZ4, VPO1 and local policies seek to maintain the Garden City character of the municipality, including the retention of mature trees. The vegetation protection objective to be achieved at clause 2.0 of the VPO1 states:

To conserve significant treed environments and ensure that new development complements the Garden City Character of the neighbourhood.

1. The NRZ4 also contains decision guidelines to minimise the need to remove significant trees and protect significant trees on the site and adjoining properties.
2. The Residential Development and Character Policy at Clause 22.01 identifies the subject site is located in Neighbourhood Character Type E. This area states the desired future character is to evolve in a landscaped setting with mature canopy trees in both the public and private realm.
3. Clause 22.05, Tree Conservation Policy also seeks to promote the retention of mature trees.
4. The submitted photographs by both the applicants and Council indicate the Liquidambar is clearly visible in the streetscape and contributes to the landscape character of this area.
5. I am not persuaded by the applicants’ arguments and agree with Council that every effort should be made to retain this tree as it contributes to the canopy treed character of this area given its location on the frontage and height (12 metres). This is encouraged in the zone, overlay and policy objectives noted above.
6. I also find the retention of the Liquidambar will assist in filtering of views of the two storey dwellings in the streetscape and thus maintain the landscape character of the neighbourhood.
7. I have reviewed the tree protection measures within the arborist report by Tree-mendous Consulting Pty Ltd dated January 2018. I find this report does not include tree protection measures specifically designed to protect Tree 4 as it notes the tree is recommended for removal.
8. I am not persuaded by the applicants’ argument that the tree cannot be retained. The applicant tabled a plan that shows the location of the Tree Protection Zone of the Liquidambar (4.7 metres) is in the frontage setback of Dwelling 2 and adjacent to the driveway and front porch. This plan shows the driveway and part of the porch of Dwelling 2, and frontage setback of Dwellings 1 and 2 within the Tree Protection Zone. This is less than the extent of intrusion identified in the arborist report.
9. Whilst the applicants say the fill in the frontage will increase the level of intrusion, no further arboricultural advice was provided to support this assertion.
10. I agree with Council that a Tree Management Plan, that includes a range of tree protection measures, should be required as a condition on the permit. This plan may require the construction of the new driveway at grade in a permeable material within the tree protection zone. It may also require tree sensitive footings to be used for the construction of the front porch and steps for Dwelling 2. It may require the retention of the natural grade in the frontage setback.
11. Council brought to my attention that Condition 2 of the permit requires the submission of a Tree Protection Management Plan for trees to be retained, including Tree 4. Given that Condition 1 (d) refers to tree protection measures, I will amend the wording to reference those measures recommended in the Tree Protection Management Plan.

## Conclusion

1. For the reasons given above, I will direct that a modified planning permit is issued subject to this order.

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| **Jane Tait**  **Member** |  |  |

1. The submissions and 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. Monash Planning Scheme [cl 32.09, Sch 4, cl 1.0]. [↑](#footnote-ref-2)