VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

administrative DIVISION

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| planning and environment LIST | vcat reference No. P2238/2018  Permit Application no. TPA/49157 |
| CATCHWORDS | |
| Section 77 of the *Planning and Environment Act 1987*, Monash Planning Scheme, Vegetation Protection Overlay, Tree removal, Clause 22.05 Tree Conservation Policy. | |

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| APPLICANT | Chau Le |
| responsible authority | Monash City Council |
| SUBJECT LAND | 1 Hinkler Road, Glen Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Tracey Bilston-McGillen, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 2 May 2019 |
| DATE OF ORDER | 14 May 2019 |
| CITATION | Le v Monash CC [2019] VCAT 686 |

# Order

### No permit granted

1. In application P2238/2018 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/49157 no permit is granted.

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

# Appearances

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| For Chau Le | Mr How S. Ng, town planning consultant. He called the following witness:  Mr Ratana Sar, Civil & Structural Engineer. |
| For Monash City Council | Ms Sally Moser, town planning consultant, Moser Planning Services. |

# Information

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| Description of proposal | Removal of one tree in the Vegetation Protection Overlay. The tree is referred to as tree 18 – a *Liquidambar styraciflua* (Liquidambar)*.* |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.  The ground of refusal reads:  *The tree makes a significant contribution to the landscape character of the area and its removal does not accord with the objectives of Clause 22.05 (Tree Conservation Policy) and Clause 42.02 (Vegetation Protection Overlay) of the Monash Planning Scheme*. |
| Zone and overlays | General Residential Zone Schedule 2 (**GRZ2**).  Vegetation Protection Overlay Schedule 1 (**VPO1**). |
| Permit requirements | Clause 42.02-2. A permit is required remove, destroy or lop tree 18 as it has a trunk circumference greater than 500mm (160mm diameter) at 1200mm above ground level and is higher than 10 metres. |
| Key scheme policies and provisions | Clauses 22.05, 42.02 and 65. |
| Land description | The review site is located on the northern side of Hinkler Road, Mount Waverley. The site has a frontage of 17.48 metres, depth of 41.7 metres and a total site area of 693 square metres.  The site currently accommodates a single dwelling with some canopy vegetation within the front setback. |
| Tribunal inspection | I inspected the site and surrounds. |

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

## What is this proceeding about?

1. This is an application for review against the decision of the Monash City Council (Council) to refuse to grant a permit for the removal of tree 18 – a *Liquidambar styraciflua* (Liquidambar). The permit was refused on the following ground:

The tree makes a significant contribution to the landscape character of the area and its removal does not accord with the objectives of Clause 22.05 (Tree Conservation Policy) and Clause 42.02 (Vegetation Protection Overlay) of the Monash Planning Scheme.

1. Mr Ng acknowledged that the tree is horticulturally sound and pleasant but submitted that the tree is causing damage to the dwelling and endangering the elderly tenants (of the house). Mr Ng put to me that the tenants of the house have requested improvements (to the house) including addressing the issue of damage to the house including cracking and lifted pavers.
2. Having regard to the relevant matters, I have decided that the tree should not be removed. My reasons follow.

### The Tree

1. The tree in question is tree 18 – a *Liquidambar styraciflua* (Liquidambar). The Arboricultural Assessment[[2]](#footnote-2) identifies the tree as mature, exotic origin, 18 metres in height, fair/good health, fair structure, 20+ years useful life expectancy, high amenity value and high retention value. The report further identifies that the tree is considered of high retention value as it is significant to the landscape and surrounding areas. The report recommends that the tree is retained.



Photograph of tree 18 Liquidambar. Source, photograph provided by Mr Ng.

### Clause 22.05 and the Vegetation Protection Overlay

1. Council has a Tree Conservation Policy at clause 22.05. The policy acknowledges the importance of maintaining and enhancing the Garden City Character of Monash. An objective under this clause is:

To promote the retention of mature trees and encourage the planting of new canopy trees with spreading crowns throughout Monash.

1. It is policy under this clause that:

Existing semi-mature and mature canopy trees be retained wherever possible to ensure maintenance of the tree canopy.

1. The site is included in VPO with a general purpose being:

To preserve existing trees and other vegetation.

To recognise vegetation protection areas are locations of special significance, natural beauty, interest and importance.

1. The review site is located in VPO1 Tree Protection Area. This schedule identifies that the significance of vegetation in Monash is in its contribution to the urban character of the municipality, particularly the residential areas. It states that the Municipal Strategic Statement and Tree Conservation Policy further recognises the importance of canopy trees as a significant aspect of urban character stating:

The tree canopy presents a “special” leafy character valued by the community in terms of consistent and visible vegetation and the opportunity for residents to live in a treed, predominantly low density, detached house environment. Retention of existing canopy trees is necessary to complement any new development.

1. In considering an application to remove a tree, VPO1 requires:

An application to remove or destroy vegetation must be accompanied by the following information:

* A plan showing the location of the vegetation to be removed or destroyed.
* The type and quality of the vegetation to be removed or destroyed.
* The justification for the proposed removal or destruction.
* A statement of alternatives examined to removal or destruction.

An application to remove or destroy vegetation in conjunction with development of the land must be accompanied by a site analysis plan and a written statement demonstrating how the removal or destruction of the vegetation is essential for the proposed development to proceed, including an assessment of alternative design solutions retaining the vegetation.

### Evidence

1. Mr Ng called Mr Sar, a Civil and Structural Engineer to provide evidence. Mr Sar acknowledged that he is not an arborist. Mr Sar’s evidence can be summarised as follows.
2. There was evidence of tree roots running along the ground surface, with the concrete between the tree and the house elevated up to 150mm. Mr Sar indicated that the rise and fall of the concrete is a trip hazard to residents. Mr Sar provided photographs of tree roots growing to the underside of the building, damage to tiles on the front porch and roof gutters lifted up in the middle. Internally, Mr Sar provided photographs of cracks in walls at various locations. It was his opinion that the cracks were caused by the lift up of the foundation due to the tree roots.
3. Mr Sar put to me that the presence of the tree is causing abnormal moisture conditions to the soil which causes soil movement and the subsequent movement in the soil pushes up the house footings which results in the cracks etc as described above.
4. Mr Sar submitted that the cracking and structural impact of the tree cannot be fixed if the tree remains on site. It was his view that the tree should be removed to stop the structural damage to the house caused by the roots.

### Should the tree be removed?

1. The matrix of planning policy encourages the retention of canopy trees.
2. Mr Ng put to me that policy seeks to ‘conserve’ treed environments not ‘preserve’, with the latter meaning no change to the environment. He further offered the replacement of three trees that could be planted to replace the removal of the Liquidambar.
3. Policy seeks to conserve treed environments as well as promoting the retention of existing mature canopy trees but the VPO1 allows for the consideration of the removal of trees. The decision guidelines outline matters for consideration including the type and quality of the vegetation to be removed, the justification for the proposed removal and a statement of alternatives examined to removal or destruction.
4. Monash Council highly values and protects the garden character of the municipality. In this case, the tree is one of high amenity and high retention value with a life expectancy beyond 20 years, as determined by the permit applicant’s own Arborist. The Arborist report also noted the high retention value of the tree as it is significant to the landscape and surrounding areas.
5. The tree has a significant canopy contributing to the landscaped character of Hinkler Road, Glen Waverley. I agree with Mr Ng that Hinkler Road is not a pristine landscaped area. However, this in my view, contributes to the importance of retaining what canopy trees exist. My inspection of the area confirmed that the tree is visible from various public vantage points along Hinkler Road and from Springvale Road.
6. I acknowledge the offer from Mr Ng to plant three replacement trees. However, policy gives weight to retaining mature canopy trees and the issue of replacement planting is considered when the removal cannot be avoided. This tree makes a significant contribution to the green landscaped character of Hinkler Road. It would take many years for new planting to replace the impact of this tree makes.
7. I find that planning policy does not support the removal of this tree.

#### Damage

1. It is clear that policy seeks to conserve existing trees and to maintain, enhance and extend the garden city character of Monash. In this case, Mr Ng relied on the tree being unsafe and causing damage to the house that is currently tenanted to justify the removal of the Liquidambar.
2. If I turn to the evidence regarding the damage caused by the tree, from the photographs and from my site inspection of the front yard, there is damage to the house. However, under cross examination, Mr Sar conceded that the house could be repaired, but he could not say how long the repairs would last. He also conceded that from his inspection, it appeared that the house has not had much, if any, maintenance or repair works over the years which also leads to damage.
3. I agree with Ms Moser that the evidence of Mr Sar is not comprehensive. Mr Sar is not an arborist so could not advise me if there are remedial works that could be undertaken to the tree and/or the soil to improve the soil moisture. Mr Sar had not inspected the footings. He had not conducted a soil test and has not inspected the house for any other reason that may be causing damage (Ms Moser suggested termites). Ms Sar acknowledged that the house could be repaired but there are likely to be ongoing issues due to the existence of the tree.
4. I am not convinced that the tree should be removed because of the photographs of damage to the house. Old houses need ongoing maintenance and it appeared that this house has had little maintenance undertaken over the years.
5. The decision guidelines of VPO1 read:

* The reason for removing or destroying the vegetation and the practicality of alternative options which do not require removal or destruction of vegetation.
* The practicality and benefits of relocating significant vegetation.
* The condition and quality of the vegetation.

1. Having regard to the above guidelines, I note that it is not practical to relocate the tree and the quality of the tree is undisputed. I find the evidence of cracking and the lifting of the pavers insufficient grounds to remove the tree. I am not satisfied that all possible alternatives have been investigated to limit any further damage. I was not provided with any arborist evidence investigating the soil moisture and any possible solutions to address this issue.
2. Based on the evidence before me, I am not persuaded by Mr Ng that the tree should be removed.

## Conclusion

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

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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. Taylors Arboricultural Assessment, 14 December 2017. [↑](#footnote-ref-2)