

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## ADMINISTRATIVE DIVISION

### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P2428/2017  
PERMIT APPLICATION NO. WH/20161193

#### CATCHWORDS

Application under Section 79 of the *Planning and Environment Act 1987*; Whitehorse Planning Scheme; Neighbourhood Residential Zone; Significant Landscape Overlay; Child Care Centre; Repeat Appeal; Vegetation Protection; Landscape Outcome; Interface with a Reserve; Access; Traffic; Sections 115B and 115CA of the *Victorian Civil and Administrative Tribunal Act 1998*; Application to Reimburse Tribunal Fees; Application Refused.

<b>APPLICANT</b>	Ausco Investment Group Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Whitehorse City Council
<b>REFERRAL AUTHORITY</b>	Vic Roads – Metropolitan South East Region
<b>RESPONDENTS</b>	Anthea Swann & Others
<b>SUBJECT LAND</b>	199 Canterbury Road BLACKBURN VIC 3130
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Margaret Baird, Senior Member Joel Templar, Member
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	9, 10, 11 and 12 April 2018
<b>DATE OF ORDER</b>	11 May 2018
<b>CITATION</b>	Ausco Investment Group Pty Ltd v Whitehorse CC [2018] VCAT 700

#### ORDER

##### Plans substituted

- 1 Pursuant to Section 127 and Clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, the permit application is amended by substituting the following plans for the application plans:
  - Prepared by Point Architects;
  - Drawings CS000, SA01, SA02, TP01, TP02, TP02A, TP03, TP03A, TP04, TP05, TP06 and TP07; all Revision E.

##### No permit granted

- 2 In application P2428/2017 the decision of the Responsible Authority is affirmed.

3 In planning permit application WH/20161193, no permit is granted.

**Application to reimburse fees refused**

4 The application for the reimbursement of fees pursuant to Sections 115B and 115CA of the *Victorian Civil and Administrative Tribunal Act 1998* is refused.

**Margaret Baird**  
**Senior Member**

**Joel Templar**  
**Member**

**APPEARANCES**

For Ausco Investment Group Pty Ltd	Mr P Bisset, solicitor, Minter Ellison. He called the following witnesses: <ul style="list-style-type: none"><li>• Mr M Bastone, town planner.</li><li>• Mr R Fairlie, traffic engineer.</li><li>• Mr R Murray, arboriculturalist.</li><li>• Mr D Atkinson, landscape architect.</li></ul> A letter from Dr Xun Li, Senior Acoustic Engineer, Vipac, was tendered.
For Whitehorse City Council	Ms M Marshall, solicitor, Maddocks.
For Vic Roads - Metropolitan South East Region	No appearance.
For A Swann, D Tribe and others <sup>1</sup>	Ms D Tribe.
For Blackburn Village Residents Group Inc.	Mr D Morrison, Secretary, Blackburn Village Residents Group Inc.
For Blackburn & District Tree Preservation Society Inc.	Mr D Berry. President, Blackburn & District Tree Preservation Society Inc.
For Bert Alesich	Mr B Alesich.
For Jennifer Downes	Ms J Downes.
For Anita & Mark Crawshaw	Ms A Crawshaw.

<sup>1</sup> Written authorities nominating Ms Tribe were tendered at the hearing from 44 parties.

## INFORMATION

Description of proposal	Use and development of the subject land for the purposes of a 122 place child care centre and vegetation removal. A basement car park provides 26 car spaces, with some staff tandem parking. Vehicle access is from Canterbury Road. The building is substantially single storey with a maximum height of 6 metres. No business identification or other signage is proposed.
Nature of application	Application under Section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. <sup>2</sup>
Planning scheme	Whitehorse Planning Scheme [scheme].
Zone and overlays	Neighbourhood Residential Zone – Schedule 1, Bush Environment Areas [NRZ1]. Significant Landscape Overlay – Schedule 2, Blackburn Area 2 [SLO2]. Canterbury Road is a Road Zone Category 1 [RDZ1].
Permit requirements	<p>Clause 32.09-2 (use of land in NRZ1 for a child care centre).</p> <p>Clause 32.09-9 (the construction of a building and the construction and carrying out of works for a Section 2 use on land in NRZ1).</p> <p>Clause 42.03-2 (the construction of a building; the construction and carrying out of works; and the removal of vegetation on land in SLO2).</p> <p>Clause 52.29 (creation or alteration of access to a road in an RDZ1).</p>
Key scheme policies and provisions	Clauses 9, 10, 12, 15, 17, 18, 19, 21, 22.03, 22.04, 22.05, 32.09, 42.03, 52.06, 52.29 and 65.
Land description <sup>3</sup>	The subject land is on the north side of Canterbury Road, between Lagoona Court and Boulton Road, east of Blackburn Road. It has a site area of 2,537m <sup>2</sup> and contains a double storey dwelling and mature trees particularly along the western side of the property. A Melbourne Water retarding basin is to the rear of the land which is used by the community as public open space. Canterbury Road is an arterial road, with a central median.
Tribunal inspection	9 April 2018 and subsequent to the hearing.
Previous case	<i>Simgar Pty Ltd v Whitehorse CC</i> [2016] VCAT 437.

<sup>2</sup> Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.

<sup>3</sup> The subject land is slightly off-set from north. We have simplified directional references for ease.

## REASONS<sup>4</sup>

### INTRODUCTION

- 1 Blackburn has a distinctive character. The nominated “bush environment” area is notable for the height, density, maturity and extent of native canopy trees. New development in this area is to occur in a way that retains native vegetation and the dominance of vegetation cover, as part of a broader tree-dominated landscape. At the heart of the dispute before us in this proceeding is whether a permit application made by Ausco Investment Group Pty Ltd for a child care centre at No. 199 Canterbury Road, Blackburn, appropriately responds to the character and landscape outcomes articulated in the Whitehorse Planning Scheme [scheme].
- 2 This is the second application to come before the Tribunal for a child care centre on this land. An earlier application was refused in 2016.<sup>5</sup> The current application is made against the Council’s failure to grant a permit within the prescribed time. The Council does not support the issue of a permit, although Council officers recommended differently. The Council accepts that the subject land is suitable for a child care centre. However, it submits that the site design and layout are not responsive to policy in the scheme with respect to landscaping and vegetation protection outcomes. The Council challenges the extent of the building footprint and tree removal, the adequacy of space for new landscaping and the amount of hard surfacing in the site’s frontage. The Council’s grounds state that access to the land is not adequately resolved but, with VicRoads withdrawing its objection to the application,<sup>6</sup> this ground has not been pursued.
- 3 Others opposing the permit application submit that the proposal is an inappropriate use of the land, does not respond acceptably to the outcomes sought by SLO2, and will have adverse amenity impacts upon residents. Those amenity impacts include on-street parking in local streets and increased traffic with potential safety issues. They say planting in Canterbury Road’s central median is at risk of removal. Objectors argue that there is not enough space provided for canopy trees and that retained trees will ultimately be removed because of safety concerns for children.
- 4 The applicant challenges all of these and other grounds advanced by parties in the proceeding and the many persons who have lodged statements of grounds opposing the grant of a permit. It relies on expert evidence in submitting the outcome is acceptable and that the permit application responds to the concerns raised in the previous Tribunal decision.
- 5 We must decide whether to grant a permit and, if so, what conditions to apply to the permit. Based on the grounds, submissions and expert evidence presented, and having regard to the matters that we must consider through the scheme, we must determine:

<sup>4</sup> The submissions and evidence of the parties, 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.

<sup>5</sup> *Singar Pty Ltd v Whitehorse CC* [2016] VCAT 437 determined by Member Sibonis.

<sup>6</sup> Letter dated 5 April 2018. The withdrawal is subject to several conditions being included on a permit.

- Whether the use of the land is acceptable having regard to the purpose of the Neighbourhood Residential Zone [NRZ] and local policy at Clauses 21.06-7 and 22.05 of the scheme.
- Whether the built form outcome and vegetation outcomes are acceptable.
- Whether the proposal results in unacceptable traffic congestion and car parking management issues.
- Whether the proposal would cause unacceptable amenity impacts to abutting and neighbouring properties.
- Whether other concerns about the proposal warrant refusal of a permit.

6 We must decide whether the proposal will produce an acceptable outcome having regard to the relevant policies and provisions in the scheme. Clause 10.01 of the 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.

7 Having done so, we are not persuaded to grant a permit. In principle, the proposed use of the subject land for a child care centre is acceptable and the proposal improves upon the design considered by the Tribunal in 2016. Sufficient car parking is provided on site in accordance with the scheme and VicRoads does not oppose access arrangements.

8 However, we find that the landscape outcome of the current proposal is not acceptable and is refused for this reason. The scale of the development, including associated play areas, does not provide for sufficient space for appropriate tree retention and planting of new canopy trees in a manner that respects the area's character and its distinctive landscape attributes. The design response does not satisfactorily achieve the landscape character objectives for the Blackburn Area 2 [SLO2].

## **PHYSICAL AND STRATEGIC CONTEXTS**

### **Physical context**

9 The subject land is larger than others in the immediate vicinity and is located on the north side of Canterbury Road. The land abuts three residential properties to its west. These properties front Lagoona Court. There is one residential lot to the east of the subject land.

10 A retarding basin under Melbourne Water's control is to the rear of the subject land. It presents a park-like quality with a bushland feel notwithstanding its important water management role. It is well-landscaped.

11 The subject land is east of Blackburn Road where there is a dip or low point in the topography. Trees are located within sections of the central median along the arterial road. A bus stop is to the west of Lagoona Court, on the north side of Canterbury Road. There is also a bus stop on the south side of Canterbury Road, east of Deanswood Road.

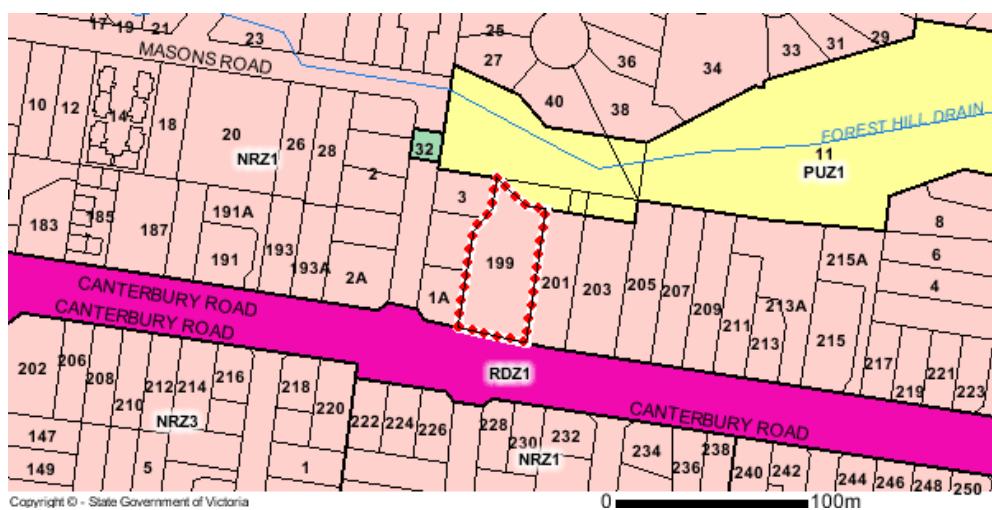
12 Canterbury Road differs in its character compared with the local residential streets, such as Lagoona Court which has no footpaths and where there is a very strong presence of tall native and indigenous canopy trees in the public and private realms, well above powerlines. By contrast, a number of residential properties near to the subject land fronting Canterbury Road have high front fencing. Some lots to the east of the subject land are less well vegetated than the subject land and properties to its west.

13 Permit applications have been made to develop multi-unit dwellings at Nos. 201 and 203 Canterbury Road. These were being advertised at the time of our site inspection on 9 April 2018.

## Planning context

### Zone

14 The subject land is within the NRZ, as shown in the property report extract below. The Melbourne Water retarding basin is in a Public Use Zone. Canterbury Road is a Road Zone Category 1.



15 The purpose of the NRZ includes:

- To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
- To allow educational, recreational, religious, community and a limited range of other nonresidential uses to serve local community needs in appropriate locations.

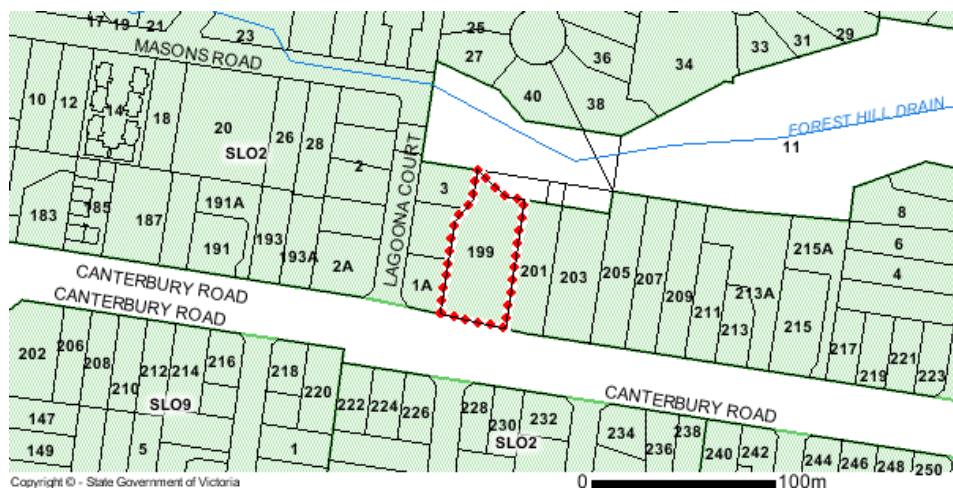
16 Clause 32.09-12 sets out decision guidelines with respect to non-residential use and development which we have considered but do not recite at this stage.

17 Schedule 1 to the NRZ relates to Bush Environment Areas. It applies to land on the north side of Canterbury Road as well as to some land on the south side of Canterbury Road and then extends further to the south.

18 NRZ1 Clause 7.0 contains decision guidelines which we have considered as relevant to the non-residential development before us. Consistent with the overall approach to development in a limited change location, a focus is on the vegetation outcomes with respect to canopy trees.

### Overlay - SLO Blackburn Area 2

19 The subject land is within the Significant Landscape Overlay SLO2 as shown in the property report extract below.



20 A permit is triggered under SLO2 for buildings and works because the site coverage for the building is more than 33% of the site area at ground, excluding hard surfaced and impervious areas. Mr Bisset notes the marginal exceedance of around 2%. A permit is also triggered for the removal of vegetation having regard to the circumference size. As listed in the applicant's submission,<sup>7</sup> these are tree nos. T-1, T-12, T-15, T-19, T-20, T-22 and T-23. Mr Bisset also refers to exemptions for lopping.

21 The landscape character objectives to be achieved are:

- To retain the dominance of vegetation cover in keeping with the bush character environment.
- To encourage the retention and regeneration of native vegetation for the protection of wildlife habitat.
- To ensure that a reasonable proportion of a lot is free of buildings to provide for the planting of tall trees in a natural garden setting.
- To encourage the development of sympathetic buildings within an envelope, which ensures the maintenance of a tree-dominated landscape.
- To ensure that buildings and works retain an inconspicuous profile and do not dominate the landscape.
- To ensure that development is compatible with the character of the area.

<sup>7</sup> Paragraph 36, Exhibit A18.

22 In addition to decision guidelines that apply through Clause 42.03, before deciding on an application, the Responsible Authority (Tribunal on review) must consider, as appropriate:

- Whether the proposed building is set back a reasonable distance from the property boundaries to provide for landscaping.
- Whether the proposed building or works retain an inconspicuous profile and do not dominate the landscape.
- Whether a reasonable proportion of the lot is free of buildings and available for tree planting, landscaping and open space use.
- The impact of the proposed development on the conservation of trees.
- The maintenance of an adequate buffer strip along watercourses, roads, rail lines and other property boundaries.
- The species of vegetation, its age, health and growth characteristics.
- The location of the vegetation on the land and its contribution to the lot garden area, neighbourhood and streetscape character.
- The potential to achieve an average density of one tree reaching a height of over 15 metres to each 150 square metres of site area.
- The availability of sufficient unencumbered land to provide for replacement planting.
- Other options for further planting on the site.
- Whether works within 4 metres of a tree propose to alter the existing ground level or topography of the land.

23 There are some distinctions between the character and landscape environment experienced along the Canterbury Road corridor. As relevant in this case, NRZ1 and SLO2 include land on both the north and south sides of Canterbury Road. NRZ1 and SLO2 work together to give effect to policy directions for land to which the zone and overlay apply.

24 SLO2 has applied since 2006 in its current form. We have been referred to previous planning controls relating to parts of Blackburn dating back to 1988 which recognised the landscape values of a defined area. The controls have managed to ensure that the distinctive and valued character is retained. That is the case even though there may be examples of development that some regard as less than ideal and the fact that new landscaping will take time to make a significant or equivalent contribution to the older canopy.

25 SLO9 was recently applied to other land in Whitehorse, including land along the south side of Canterbury Road within the NRZ3 area.

### Policy

26 The 2016 Tribunal decision explained the relevant planning context. The overall strategic direction has not substantially changed despite scheme amendments including to State policy and Clause 32.09.

27 Current key policies include:<sup>8</sup>

Environment/landscape/vegetation:

- The Strategic Framework Plan at Clause 21.04 which shows the site and its surrounds as being within a ‘significant landscape area’.
- Clauses 21.05 which sets out policy relating to the environment.
- A local policy at Clause 22.04 which applies to all land and addresses tree conservation. Clause 22.04 sets out both policy and performance standards with respect to, amongst other things, tree retention and tree regeneration.

Non-residential uses in residential areas:

- Clause 21.06-7 which sets out policy relating to non-residential uses. The objectives refer to buildings integrating with and respecting the surrounding neighbourhood character.
- The local policy at Clause 22.05 which provides more detailed policy guidance with respect to non-residential uses in residential areas and, based on Clause 21.06-8, is to be complied with for all non-residential use and development applications within a residential zone.

Character:

- Clause 21.06-7 which addresses non-residential uses and calls up the application of the “*Neighbourhood Character Precinct Brochures with Preferred Character Statements and Design Guidelines to provide guidance for future non-residential development in residential areas and assessments*”. The subject land in the Bush Environment Precinct, with the statement of preferred character included in Clause 22.03.
- Clause 21.06-8 which includes a policy to “[E]nsure that all development applications comply with the Residential Development Policy at Clause 22.03”.

28 In the previous decision, the Tribunal summarised policy as:<sup>9</sup>

... the Planning Scheme’s policies and provisions identify the site as being in an area of landscape significance. The Planning Scheme seeks to ensure that development acknowledges and responds to this significance in an appropriate manner. In broad terms, the dominance of vegetation is to be maintained and enhanced, with development having a more subservient role in its appearance. Existing tall trees are to be retained and protected, and further tree planting introduced to contribute to the area’s canopy. A bush-like setting is sought.

29 We agree with this. It remains apt in the current proceeding notwithstanding subsequent scheme amendments.

<sup>8</sup> Additional policies relate to matters such as amenity, traffic, carpark and sustainability which we have considered but do not detail more fully here.

<sup>9</sup> *Singar Pty Ltd v Whitehorse CC [2016] VCAT 437, [20].*

## Issues in application of the scheme

- 30 Several matters about the application of the scheme arising from submissions require comment.
- 31 First, some residents refer to some scheme policies and provisions as “requirements” as if there is not, or should not be, capacity to depart from them. We do not agree. Provisions such as building site coverage that is a permit trigger in SLO2, policies relating to tree protection and tree regeneration in Clause 22.04, and performance standards in Clause 22.04, are not mandatory. Performance standards are one way to achieve the policy objectives and statements and, if achieved, are deemed to achieve compliance with those. There may be other ways to satisfy policy.
- 32 This leads to our second point. In the current case, residents emphasise the desire of the scheme to provide certainty. As Member Sibonis said in 2016, the various provisions and policies can be distilled succinctly and, in this way, are clear in what is being sought. However, decisions about planning permit applications in a performance-based scheme environment require judgements to be made. There can be legitimate differences of professional opinion while opinions by others can be wide-ranging. Ultimately, we have the task of assessing the permit application before us to determine if an acceptable outcome is achieved. It is not the role of the decision-maker in assessing the permit application afresh, to determine if there is a better or ideal solution.<sup>10</sup>
- 33 Third is the application of Clause 22.03 to the proposed non-residential development. This clause is entitled “Residential Development” and, among other things, specifies the preferred built form, landscape and neighbourhood character for each of the identified character precincts. Mr Bisset submits the clause relates to residential development and subdivision and therefore does not apply. Having said that, Mr Bisset accepts that the preferred character statement for the Bush Environment Precinct is expressly relevant through the policy in Clause 21.06-7. Both Clause 21.06-7 and Clause 22.05 have objectives relating to the design, scale and appearance of non-residential premises that are to reflect the residential character and streetscape of a residential area.
- 34 Fourth is the weight to be given to policies in Clause 22.04 having regard to the specific provisions for land within SLO2. Mr Bisset submits greater weight should be given to the specific provisions over the more general municipal-wide provisions. Ms Marshall notes that Clause 22.04 contains specific provisions to land within, for example, the SLO.
- 35 Policy in Clause 21.05-5 is to ensure that “*all tree removal and development complies with the Tree Conservation Policy at Clause 22.04*”. The specific provisions relating to this part of Blackburn are central to our assessment of this application and, in general terms, the more specific provisions carry greater weight over general provisions.

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<sup>10</sup> *Knox City Council v Tulcany Pty Ltd [2004] VSC 37.*

36 But SLO2 and Clause 22.04 work together with other provisions and policies in the scheme. Clause 22.04 assists in assessing the proposal's response to tree conservation and specifically issues relating to tree retention and tree regeneration.

37 Fifth, the applicant's submission references "*guiding principles for considering child care centre proposals*" that the "*Tribunal has developed*". When we asked about this, the applicant agrees that a starting point for an assessment are the provisions and policies contained within the scheme. The various Tribunal decisions to which we have been referred include commentary and findings about child care centre applications. They must be read in the specific planning and physical contexts within which the decisions are made. None of the decisions addresses land in both the NRZ1 and SLO2 in the Whitehorse Planning Scheme, other than the 2016 decision to which we refer next.

## PREVIOUS TRIBUNAL DECISION

### Repeat appeals

38 A permit application for a 120 place child care centre on the subject land was refused by the Tribunal in 2016. All parties addressed the current proposal in the context of the previous application. This is consistent with the concept of a "repeat appeal".

39 The principles relating to "repeat appeals" have been articulated in many Tribunal decisions and re-stated in *Sprut*.<sup>11</sup> Relevant factors to consider when reviewing an application that is similar to a proposal that has been the subject of previous Tribunal findings are:

- Significant changes in the application itself;
- Changes in the circumstances of the land and its surrounds;
- Changes in planning policy; and/or
- Changes in the interpretation of the facts or law relevant to the Tribunal's consideration.

40 The current case is advanced by the permit applicant as one where the Tribunal refused an earlier application and the repeat appeal attempts to address the issues. Adopting the oft-used quotation from *Benc*:<sup>12</sup>

In the case of a different but similar application which has been prepared in accordance with the advice of the Board, equity or fairness demands that considerable weight be given to the fact that the applicant has endeavoured to accommodate suggestions as to what would be appropriate.

### Changes since the previous Tribunal decision

41 It is relevant to the weight given to the 2016 Tribunal decision that:

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<sup>11</sup> *Sprut Pty Ltd v Stonnington CC* [2012] VCAT 1675.

<sup>12</sup> *Benc v City of Doncaster and Templestowe* 1996/38819 unreported. *Sprut* refers to a number of other decisions where this unreported decision has been cited with approval.

- With respect to the site and surrounds:
  - There have been no identifiable material changes with respect to building form and the landscape character other than references to tree removal on adjacent land.<sup>13</sup>
  - As noted earlier, permit applications are being advertised for unit developments at Nos. 201 and 203 Canterbury Road.<sup>14</sup>
- With respect to the scheme:
  - The zoning is unchanged however the purpose and provisions within the NRZ have been amended several times since 2016.
  - SLO2 is unchanged.
  - Local policies such as Clauses 21.05, 21.06, 22.03, 22.04 and 22.05 are unchanged as relevant to the application before us.
  - Changes have been made to State and local planning policies including Clause 9 with respect to *Plan Melbourne* and the structure of other clauses such as Clause 10.01.<sup>15</sup>
- With respect to the proposal:
  - The number of children, staffing levels, hours of operation and the number of car spaces are generally the same.
  - Modifications have been made to the development and landscaping including:
    - Replacing at-grade parking in the site's frontage with a basement for all on-site car parking and on-site waste collections and deliveries.
    - Increasing side and rear setbacks.
    - Reducing site coverage to 35.03%.
    - Reducing impermeable areas to approximately 48.6%.
    - Modifying fencing associated with the front part of the site including that a fence is in line with the front setback of the building rather than along the front title.
    - Modifying building design with a reduced ground floor building area and providing a contemporary roof form.
    - Retaining several additional trees on the land.
    - Providing a fresh landscape concept plan.
    - Removing a proposal for pergolas in the western setback to intercept any falling limbs and protect children and staff.<sup>16</sup>

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<sup>13</sup> Noting allegations that some vegetation removal was undertaken illegally.

<sup>14</sup> A copy of the plans was tendered by Ms Marshall, Exhibits RA3 and RA4.

<sup>15</sup> Formerly Clause 10.04 with respect to integrated decision-making.

42 Ms Marshall summarises changes to the development as follows, consistent with Mr Bastone's evidence:

Site Analysis	Proposal the subject of the Previous VCAT Decision	Current proposal
<b>Ground floor building area</b>	959.5 sqm	888.9 sqm
<b>Site coverage</b>	38%	35.03%
<b>Impervious area</b>	55%	48.57%
<b>Outdoor play area</b>	857 sqm	857 sqm
<b>Minimum setback from Canterbury Road</b>	12.8 metres	13.15 metres
<b>Minimum northern setback</b>	3 metres	9.055 metres
<b>Minimum eastern setback</b>	1.3 metres	4.290 metres
<b>Minimum western setback</b>	4.13 metres	9.287 metres

## Findings

43 We accept the applicant's submission that the proposal is materially different to that refused previously by the Tribunal and improves on that earlier proposal. A number of parties acknowledge improvements in the current application compared with the previous proposal. No party has suggested that changes made to the scheme since the Tribunal's decision affect the outcomes articulated in that decision, as summarised above.

44 It is relevant in considering the arguments advanced in the current case that:

- The Tribunal made no finding that the use of the subject land for a child care centre was unacceptable.
- The Tribunal made a number of favourable findings about the siting of the building, specifically with respect to the front setback and the ability to achieve an acceptable landscape outcome within the western setback to reflect the bush setting.<sup>17</sup>

45 The Tribunal refused the permit application for discrete reasons that focused on the landscape and built form response as evident in these extracts from its decision:<sup>18</sup>

In combination, the building's footprint and the extent of hard pavement associated with the car parking area present as a development outcome which fails to respond acceptably to the area's landscape character. I agree with the submissions that the proposal is too large and too intensive for the site.

<sup>16</sup> The substituted plans refer to a “proposed fence with net to secure outdoor play area from falling limbs” in the western setback but none of the expert witnesses called on behalf of the applicant were aware of, or could describe, what this refers to.

<sup>17</sup> Ibid, [25] and [30]. It refers to the western setback as 7.7 metres with some decking in the setback area.

<sup>18</sup> Ibid, [23] and [29].

Notwithstanding the Applicant’s attempt to incorporate planting around and partly within the car parking area, it presents as a large expanse of hard surface which is inconsistent with the policy direction aimed at achieving garden settings, particularly proximate to the site’s frontages. When viewed holistically, the building’s footprint and the car parking area do not result in a reasonable proportion of the site being available for planting, landscaping and open space. To the contrary, building and paved areas dominate the property.

- 46 The Tribunal stated it would not make findings on a range of other matters argued before it. These included material presented to it with respect to non-compliance with Clause 22.04 and the issue of playground safety having regard to retained trees.<sup>19</sup>
- 47 *Sprut*<sup>20</sup> explains the role of the Tribunal is not to determine whether the proposal before it would have satisfied the earlier (and perhaps differently constituted) Tribunal, nor to summarily determine the matter solely by reference to the above-mentioned principles. Rather, the Tribunal must consider the new application before it on its merits but, in doing so, give great weight to the Tribunal’s decision on the earlier application having regard to the usual principles that have evolved for this purpose.
- 48 Consistent with the findings and approach articulated in *Sprut*, we say that even if the proposal might be better than that refused in 2016 that does not automatically mean it represents an acceptable outcome. We have assessed the proposal against the relevant provisions and policies in the scheme.

## **SUITABILITY OF THE SUBJECT LAND FOR A CHILD CARE CENTRE**

- 49 Arguments presented to us about the suitability of the proposed land use address two questions. One is the suitability of the location for the proposed child care centre and the other is the need for another child care centre.

### **Scheme policy and decision guidelines**

- 50 In assisting to determine whether the location for the proposed land use is appropriate, and in addition to the broad policies contained in the State Planning Policy Framework and *Plan Melbourne*, the decision guidelines in Clause 32.09-12 include:
  - Whether the use or development is compatible with residential use.
  - Whether the use generally serves local community needs.
  - The scale and intensity of the use and development.
- 51 There are additional decision guidelines relating to matters such as amenity, access and design which are relevant to the suitability of the location. We address these matters below.

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<sup>19</sup> *Ibid*, [31] and [36]. We note that the specific policy reference at paragraph 34 of the decision relates to a performance standard regarding space provided for new trees under Clause 22.04-4.

<sup>20</sup> *Sprut Pty Ltd v Stonnington CC* [2012] VCAT 1675, [18].

52 Local policy at Clause 22.05 includes objectives and policy that are relevant to the question of the appropriateness of the location of a non-residential use in a residential area. The objectives include:

- To make provision for services and facilities demanded by local communities in a way that does not detract from the amenity of the area.
- To avoid the concentration of non-residential uses where it would:
  - Have off-site effects which are detrimental to residential amenity.
  - Create a defacto commercial area.
  - Isolate residential properties between non-residential uses.
- To ensure that the location of the use is appropriate to the role and function of the road network and that adequate provision is made for on site car parking.

53 The policy relating to location includes:

- Non-residential uses are encouraged to be in convenient walking distance to shopping centres or other non-residential land uses or zones.
- Non-residential uses are discouraged from locating in residential zones if there are suitable sites in nearby commercial centres.
- Non-residential uses are encouraged on a corner site and abutting a Road Zone Category 1 and 2.
- Non-residential uses are encouraged to be in a location where there is a demonstrable need for the proposed facility or service.

54 The policy refers to locations that either are encouraged or discouraged but these are not mandatory requirements. Locations that do not meet one or all of the policies may still be determined to be acceptable.

55 Local policy raises the topic of “*demonstrable need*” for the proposed facility or service. Although the question of need is frequently raised in disputes about planning permit applications, the usual approach is that need does not have to be demonstrated to find in favour of this permit application.<sup>21</sup> Case law is that a demonstrated need for a facility or use may be a relevant factor in a decision but lack of a need will rarely, if ever, be a ground for refusing to grant a planning permit. In this case, the scheme refers to demonstrable need as a relevant matter. We think this is consistent with case law; a demonstrable need for a facility or service in a specific location is relevant and would be a favourable consideration in assessing a permit application and balancing policy outcomes (per Clause 10.01) but the permit applicant is not required to prove that there is a need for the proposed child care centre in this location.

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<sup>21</sup> *Shell Company of Australia Pty Ltd and Ors v City of Frankston and Anor*, 8 APAD 127, [13].

## Issues

56 The need and demand for a child care centre in this location is questioned in some statements of grounds and submissions. Issues raised include:

- The number of existing and approved child care centres in the immediate area.
- Population projections with growth in this area being high in older age groups and where children are represented at lower than metropolitan averages.
- Research undertaken by the Council indicating an availability of child care places/facilities.<sup>22</sup>
- The scheme's intentions for this quiet limited change location with which a large commercial facility is at odds.

57 The Council does not oppose the permit application based on its location. It does not question need as the officer assessing the application refers to full waiting lists when they made enquiries with four local child care centres. The applicant's evidence refers to this information as well. Ms Tribe challenges waiting lists as a predictor of need given the extent to which parents and carers may include their child or children on multiple waiting lists. She refers to her knowledge of advertised and available vacancies at local child care centres.

## Findings

58 Child care centres are community facilities that provide an important service, whether or not operated on a commercial basis. The commercial nature of the proposal has no bearing on our decision; we do not accept submissions that a commercial child care centre is automatically at odds with the NRZ1 area. Child care centres are typically regarded as an acceptable use in a residential area. They service local needs. Although they may serve a wider catchment, as may be the case for the proposed child care centre, the arterial road location is convenient with respect to drop-off/pick-up forming part of a single journey to and from work (by way of example). Consequently, even though there may be a locational preference expressed in local policy, other locations cannot be excluded if the outcome is consistent with or does not undermine local policy, and is acceptable in other respects.

59 Having regard to the decision guidelines and local policies, we find that:

- The proposal would not concentrate non-residential uses so as to create a de facto commercial area or isolate residential properties between non-residential uses.
- The subject land is proximate and convenient to the Forest Hill Chase shopping centre to its east.

<sup>22</sup>

Cited by Ms Tribe "Whitehorse Municipal Early Years Plan 2014 – 2018".

- The subject land is located on Canterbury Road which is a Road Zone Category 1 and enables access and egress to and from the property to be via the arterial road. This limits travel through residential streets.
- While the use of public transport would be limited to negligible, bus services operate along the main road and such services may be suitable particularly for some staff.
- The subject land is not a corner site but access would be confined to the arterial road network.
- Submissions that there are available and suitable sites in nearby commercial centres have not been substantiated. While that may be the case, there is no material upon which we would conclude that the subject land is not suitable for such a reason.

60 There is no evidence of a demonstrable need for a child care centre in this location, the only favourable material being waiting list enquiries made by the Council. The applicant's witness relies on this material without other enquiries or information being provided. We agree with Ms Tribe that waiting list information alone is not necessarily a reliable predictor of need.

61 We accept the evidence for the applicant that there are a number of non-residential uses along Canterbury Road. However, it is not challenged that all appear to have been approved since 2006 and/or are not located in the SLO2 area.<sup>23</sup> These land uses are part of the existing situation, and we note a number are located close to the intersection of Canterbury Road and Blackburn Road where there is a hospital and an aged care facility. Some are within purpose-built dwellings. We do not think the presence of these non-residential uses has a particular bearing on our decision or set a favourable precedent for the current proposal other than to indicate that this main road may be suitable for non-residential uses.

62 For these reasons, we find that the use of the subject land for a child care centre is acceptable, in principle. Our decision turns on the built form, vegetation and landscape outcomes, as well as the site operation.

## **ACCEPTABILITY OF THE BUILT FORM, LANDSCAPE AND VEGETATION OUTCOMES**

### **Scheme**

63 Our assessment with respect to built form, landscape and vegetation outcomes has considered the purpose and relevant decision guidelines in Clause 32.09-12, decision guidelines in NRZ1, local policy at Clauses 22.04 and 22.05, the decision guidelines and objectives in Clause 43.02 and Schedule 2. This is in addition to State policy.<sup>24</sup>

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<sup>23</sup> This point was made in submissions presented by a number of respondents and was not challenged in Mr Bastone's evidence and cross-examination.

<sup>24</sup> Several other documents have been referred to such as 2012 *Whitehorse Landscape Guidelines* which are not part of or referenced in the scheme.

64 These variously require us to consider the design, height, setback and appearance of the proposed buildings and works, the proposed vegetation removal and landscaping treatment, in terms of the character of the area and specific landscape objectives to be achieved. We have referred to the Tribunal's summary in paragraph 28 including the achievement of a "*bush-like setting*".

65 The Whitehorse Neighbourhood Character Study 2014 includes the site within a Bush Environment Precinct. The preferred character statement for this precinct is:

The streetscapes will be dominated by vegetation with subservient buildings frequently hidden from view behind vegetation and tall trees. The buildings will nestle into the topography of the landscape and be surrounded by bush-like native and indigenous gardens, including large indigenous trees in the private and public domains. Buildings and hard surfaces will occupy a very low proportion of the site. They will be sited to reflect the prevailing front, rear and side setbacks. The larger rear setbacks will accommodate substantial vegetation including large canopy trees. The bushy environs are complemented by a lack of front fencing and street trees. Properties abutting and close to creeks and lake environs will contain more indigenous trees and shrubs that act in part as wildlife corridors. This precinct is identified for the lowest scale of intended residential growth in Whitehorse (Limited Change area) and the preservation of its significant landscape character and environmental integrity is the highest priority.

## Issues

66 Key issues arising in submissions and evidence with respect to built form and vegetation outcomes of the proposal are:

- The intensity of the use and its requirement for certain floor areas and play space areas. These have implications for the design response including the built form impacts on the surrounding landscape character of the area, the extent of impervious surfacing, and the ability to appropriately landscape the site.
- The extent of tree removal, with some parties submitting additional trees could, and should, be retained.
- Conflict between tree retention and the safety of staff and children, with the potential for additional tree removal to reduce risks.
- Implications for the appearance and longevity of trees on neighbouring sites that would be lopped for safety purposes.
- Inadequate space for new canopy trees to reach a height that would respond to the character and landscape outcomes being sought for this location.
- Wider implications on the Melbourne Water reserve including reliance on planting in the reserve.

- Implications on wildlife corridors as a consequence of tree removal including habitat trees, noise and traffic.
- Planting in easements and the use of juvenile versus advanced species for new planting.
- Solid acoustic fencing around boundaries as well as adjacent to the frontage to mask a service yard that would be visible from the street.
- Low-rise planting adjacent to the basement ramp that limits planting along the street and site frontage.

67 The Council and respondents submit the proposal does not comply with local policy nor the landscape objectives in SLO2.

68 The applicant relies on expert evidence in support of its case that the character, landscape and vegetation outcomes sought by the scheme are achieved. The proposal adopts a built form which is predominantly residential in character, including a single storey building envelope, and roof profile. This form fits appropriately with the surrounding neighbourhood context. The building will nestle into a native garden setting inclusive of tall native canopy trees. The front setback has been configured to retain many existing mature trees. This maintains the landscape presentation to Canterbury Road. Additional tree planting will complement and add to this. The applicant submits that the response would perform well if assessed under the varied Clause 55 provisions in NRZ1 including site coverage, permeability and setbacks.

69 The applicant submits that there is a significant net increase in native canopy trees including the eastern section of the site which is largely devoid of canopy trees today. The proposed landscaping will supplement views of distant canopy trees across the main road and the low-profile building will not be conspicuous. Setbacks, the low site coverage and extent of impervious services allow for appropriate landscaping and the proposal achieves the nominated average tree density in the decision guidelines of SLO2.

70 Overall, the applicant submits the proposal performs well against local policy in Clause 22.04 as it minimises the loss of significant trees, and will facilitate the regeneration of tall trees. There is space provided in the design to allow trees to achieve their intended scale and form. There is appropriate separation from existing and proposed trees with respect to the new building and associated works.

## **Findings**

71 The ability to achieve the desired character, landscape and vegetation outcomes is determined by the size and layout of the building and its associated infrastructure, its position on the land, opportunities to retain trees that have landscape value and are sufficiently sound, and opportunities for new landscaping.

## Building form and siting

72 The area has a low-key character assisted by spacing around buildings, often open fencing along boundaries and modestly-sized buildings. High solid fences associated with some properties fronting Canterbury Road present very differently to local streets such as Lagoona Court with its extremely strong landscape setting and sense of enclosure.

73 We refer first to our findings with respect to the streetscape presentation of the proposed development.

74 Car parking is appropriately positioned by the use of a basement. However, the wide opening for the ramp (6.4 metres), basement and extent of hard surfacing associated with the entries, pedestrian ramp and basement ramp expose much of the front of the building, even though the front setback to Canterbury Road is generous.

75 The ‘hard’ form of the streetscape presentation is further evident because tree no. T-32 on the adjacent land is very tall with a clear trunk and the retained tree T-2 is close to the corner. Planting in this south-east part of the site is constrained but the landscape concept includes several trees. Even with this planting growing successfully as the landscaping evidence indicates, the hard elements in the frontage would not present the bush-setting streetscape response sought by the scheme.

76 We reach that conclusion notwithstanding that the south-western corner involves a copse of retained trees. When viewed from further west, this vegetation would provide good screening. However, the outcome for the balance of the frontage is not, in our view, able to achieve a sufficient setting for the development which would, instead, be highly conspicuous by its built elements.

77 Solid fencing is not typical of this location. There are high solid fences serving several properties along Canterbury Road but predominantly there is a strong landscape character. The lack of front fencing is part of the preferred character statement. The proposal has sought to respond to this by not including any front fencing. There is a fence associated with a side service yard that although set back into the site would not necessarily mask service infrastructure. We note the potential to landscape forward of it to improve the outcome.

78 Next we refer to the building and its siting.

79 We do not consider the building design adopts a style and form that responds to the cues evident in the dwelling stock that characterises the area. However, these uses are not expected to adopt a building form that mimics dwellings and, in this case, the building is relatively low-profile.

80 The size of the building footprint is a greater point of distinction. The large building envelope is necessary to accommodate 122 child care centre places in a single storey structure. In addition, open spaces around the building are devoted to play spaces with surfacing and equipment suited to this role.

81 We are not persuaded that there is sufficient unencumbered land to provide for replacement planting of the size sought for this location, particularly in the north-east and along the eastern part of the site. We address this again below.

82 The building is set well back from its western boundary and northern boundary. Spacing around the north-east of the site is much more limited. Although these setbacks are reasonable to provide for some landscaping, the setback areas provide for outdoor play spaces. Tree retention and landscaping must have regard for this function.

83 There is no proposal for shade sails or similar sun-protection structures. Shading is provided by tree canopy, the applicant notes. We note the examples of child care centres shown in photographs tendered at the hearing where most have shade sails over play spaces, including where trees are on the land. We have proceeded on the application as presented without shade sails but observe that our concern about the extent of built form would be exacerbated by the addition of shade structures.

#### Vegetation removal

84 The plans show the removal of ten trees,<sup>25</sup> some of which require a permit for removal. Ten trees are proposed to be retained.<sup>26</sup>

85 The trees nominated for removal are agreed between the permit applicant and the Council's arborist insofar as the arborist does not seek retention of any of these trees. Even so, Ms Marshall submits that the extent of vegetation removal is not acceptable without particularising which additional tree should be retained.

86 Mr Berry explains that the Tree Society contends five of the 10 trees should be retained (T-1, T-15, T-19, T-20 and T-22), three of which are significant indigenous Eucalypts. He submits their removal contravenes Clauses 22.04, 32.09 with respect to the bush environment statement, and 42.03. They are worthy of retention based on several arborist assessments since 2015. The Society also seeks retention of two other trees (T-1 and T-22) and comments on other vegetation to be removed which is not of concern (weedy species).

87 Mr Berry, Ms Tribe and other submitters challenge the extent of vegetation removal that will disrupt the tree canopy, impact on the aesthetic quality, and affect bio-links, wildlife corridors and habitat. Mr Berry further indicates that the Society opposes the retention of an environmental weed (T-18) even though there was some discussion at the hearing about the habitat and other values that could be ascribed to this tree as noted by Mr Atkinson. This highlights the bases for assessments that vary between the arborist and landscape architect. Mr Atkinson refers to landscape and habitat qualities that influence his view that tree 18 (pittosporum) could have some value in being retained.

<sup>25</sup> T-1, T-12, T-15, T-19, T-20, T-22, T-23, T-24, T-31 and T-33 (T-33 is the stump of a small tree, not assessed by the Council's arborist).

<sup>26</sup> T-2, T-4, T-5, T-8, T-9, T-10, T-13, T-18, T-27 and T-28.

88 We do not recite all of the submissions and evidence on the question of tree retention and removal, nor all of the policies in Clause 22.04. We have considered them.

89 The proposal involves significant vegetation removal. This is a function of the size of the proposed child care centre and associated play spaces and infrastructure. It results in a loss of canopy. Most of the retained trees are in the south-west corner.<sup>27</sup> We understand that there are significant issues with the health and diseased Golden Elm (T-22) and some issues with the damaged T-1. Our concerns particularly relate to two swamp gums (T-19 and T-20) even though T-20 leans into the neighbouring property.

90 Even if we accept the arborists' assessments that removal of all of the trees proposed to be removed is appropriate given their condition and health, this extent of tree removal results from the size of the development. Several indigenous trees may be able to be retained in a smaller project as part of a staged replacement of canopy trees rather than the larger scale removal presented in this application.

91 We are also particularly concerned about the ongoing management of neighbouring trees that will clearly affect their aesthetic value. These trees are close to the boundary with canopy overhang. Tree T-17 is to be pruned and cabled for safety while T-14, T-16 and T-21 are neighbouring trees whose canopies will be actively managed. Pruning to T-17 would result in a substantial loss of canopy, based on the evidence. We have had regard to Mr Murray's evidence that this and other trees be pruned at the proponent's cost to avoid dead wood falling into the child care centre. Mr Murray also suggests T-17 could be removed and replaced at the proponent's cost with the agreement of the adjacent land owner.

92 The extent of management is indicative of potential risks associated with the play areas in the child care centre. Pruning of the trees would have an impact that, coupled with the tree removal, would be significant. We appreciate that a new generation of landscaping is proposed, as we discuss next, but the extent of canopy loss for vegetation that contributes to the character of the area is a negative unacceptable outcome in terms of SLO2 and Clause 22.04.

### Proposed landscaping

93 The landscape concept plan has been criticised in many respects. That it is a concept is not a reason to refuse the proposal even though additional information would have been of assistance. We have the necessary information through expert evidence to make findings on the concept and its response to the character and landscape objectives in the scheme.

94 The plan is explained in Mr Atkinson's evidence. It shows new trees and garden beds around the site. Of particular attention at the hearing is a group of five Blackwood trees at the north-eastern part of the site, permeable and hard surfacing, and matters such as play equipment under retained trees.

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<sup>27</sup> There was also discussion at the hearing about the retention or otherwise of T-9. We have assumed it is retained as shown on the plans.

95 There is some disagreement about how many retained trees, and new trees, will achieve a height of 15 metres or more (a decision guideline in SLO2). Mr Berry presents an analysis of the heights projected in evidence for the applicant and compares this with information specific to Whitehorse in literature<sup>28</sup> and based on observations by members of the Tree Society. We have also compared the projected growth height and widths with 2012 *Whitehorse Landscape Guidelines* prepared for the Council as discussed through Mr Atkinson's evidence at the hearing. Mr Berry submits that some trees will not reach the heights anticipated and that the spaces provided, particularly for the Blackwoods on the north-east side of the land, will not have space to reach the height and spread anticipated based on their typical structure. He submits the spaces do not accord with Clause 22.04 and the overall outcome fails SLO2.

96 Regardless of which reference source is used, or when relying on the expert evidence, the five Blackwoods are expected to grow to a substantial height. They are spaced at 4.5 metres. The capacity of these trees to grow in their natural form is limited by the 4.4 metre wide setback area, which is reduced to 3.4 metres by the eave, and the allocation of this setback area as play space. The form of these trees would be managed to fit the space rather than sufficient spacing being provided for the trees to grow. Some of the trees would butt up against an adjacent garage (albeit that could be removed if the abutting property is redeveloped).

97 We also doubt the border planting areas, in part over two metres deep from the boundary fence, because they impinge on the play spaces notwithstanding the potential for these to be used in some way for children's access or activities as alluded to in expert evidence.

98 Other planting spaces are more generous and less restrained by the position of the building with respect to site boundaries.

99 We also record the following findings that are relevant to our conclusion:

- We have assumed that the landscaping concept can be implemented in accordance with the arborist's recommendations. These recommendations include that no soil disturbance occurs in the structure root zones without prior investigation of the location of roots, as well as no cut/fill, trenching or retaining walls within the TPZ of any tree based on Mr Atkinson's evidence.
- We have assumed shrub and low planting can occur within the northern easement, as shown in the landscape concept, although we appreciate that this is not preferred by policy.
- Clause 22.04 prefers juvenile plant stock and we have had regard to Mr Atkinson's evidence with respect to advanced species in the context of this proposal and the landscape concept. If we had been minded to grant a permit, advanced stock would have been acceptable.

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<sup>28</sup> Indigenous Gardening in Whitehorse.

100 In short, we accept that the proposed trees could grow based on the expert evidence of Mr Atkinson and Mr Murray. However, the amount of space provided for them is important to this outcome as is their relationship with play spaces for children. Overall, we do not consider that a reasonable proportion of the lot is free of buildings and available for tree planting and landscaping to contribute to the landscape and vegetation outcomes sought for NRZ1 and SLO2. This is the case whether or not the average density of one tree reaching a height of over 15 metres to each 150 square metres of site area is achieved.

#### Relationship with the Melbourne Water retarding basin

101 Residents emphasise the values of open space created as part of the Melbourne Water retarding basin. They refer to a decision guideline in SLO2 which seeks to maintain an adequate buffer strip along (among others) watercourses and the preferred character statement for the Bush Environment Precinct that includes "*Properties abutting and close to creeks and lake environs will contain more indigenous trees and shrubs that act in part as wildlife corridors*". The residents question the 1.8 metre high timber boundary fence proposed at the interface with the reserve and submit open fencing is required to assist the passage of water and avoid unreasonable impacts on the amenity of the reserve and wildlife movement.

102 The reserve is well-vegetated adjacent to the subject land, even though the arborist's report refers to several trees that are in poor condition (one having fallen). The existing vegetation would assist to limit views to the proposed fence and to the building. We do not consider the proposal 'borrows' excessively from the reserve given its single storey profile although we would have been more concerned if shade sails had been included to provide weather protection to the north-facing play space. Our finding assumes that the landscaping proposed can be achieved along the northern part of the site and would not need to be pared back because of the amount of play space required per child.

103 We note Melbourne Water has not objected to the permit application including with respect to fencing. However, an open-mesh fencing would have benefits in terms of the passage of water and possibly wildlife.

#### Relationship with abutting dwellings

104 The design positions the development toward the eastern boundary with a deeper setback to the west in response to trees to be retained on site and trees on abutting land.

105 The setback of the building from the western boundary is acceptable with respect to the interface of the single storey form to abutting dwellings. Of greater importance in our view is the 2.2 metre high acoustic fencing along part of the boundary, associated with play spaces, that will have a visual impact upon the rear secluded private open spaces of two dwellings in particular. We have also referred to the impact on trees associated with these dwellings which is of concern.

106 The interface to the north is acceptable insofar as the development does not present unreasonable visual bulk to the abutting dwelling and there would be less impact associated with the 2.0 metre high acoustic fence to the side of the existing dwelling. We have not assessed the proposal in terms of the proposed unit development which has only just been advertised. Ultimately, if we had granted a permit in the current case, that would be a relevant matter in assessing that permit application for the adjacent land.

#### Compatibility of retained trees and play spaces in a child care centre

107 We understand the heavy focus on child safety in submissions given the retained trees with play spaces beneath. We have already referred to the applicant's expert evidence that management of the trees is critical including trees on neighbouring land.

108 This was not a matter upon which the Tribunal made findings last time. We accept a management and maintenance regime can be required by a permit condition. However, over time, as the trees age and decline, more intervention will be needed at an earlier stage compared with a situation where the trees remain on land without such intensive use and development.

109 We have been referred to the Tribunal's decision in *SHB Pty Ltd*<sup>29</sup> where the Tribunal comments on limb drop in the context of a gum tree and did not refuse a permit for a child care centre for that reason. We note the decision. The case before us involves multiple large retained trees, including trees on neighbouring land that overhang the subject site, where the expert evidence before us stresses the critical need for tree management. In the overall balance we must undertake, it is also relevant that tree retention is given significant weight through policy and SLO2.

#### **Conclusion**

110 For these reasons, we consider the key failing of this proposal is the extent of built form spread throughout the site and consequential inability to landscape the site to an acceptable level so as to achieve the character and vegetation outcomes sought by the scheme for this location. Put simply, although the building is essentially a single level with concealed car parking, the facility is too large to achieve an acceptable response to the NRZ1 and SLO2, and local policies such as Clause 22.04, because we are not satisfied that the proposed landscaping response will achieve the landscape and vegetated outcome sought for this location.

#### **TRAFFIC AND ACCESS**

111 The safety efficiency and amenity effects of traffic generated by the proposal, as well as the suitability of the access arrangements, are among the relevant considerations through Clause 32.09-12 and Clause 22.05.

112 The Council does not take issue with the proposed access and any associated traffic considerations given VicRoads no longer objects to the permit application (subject to several permit conditions).

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<sup>29</sup> *SHB Pty Ltd v Knox CC* [2006] VCAT 1526.

113 Others opposing the permit application remain concerned about the impacts of increased traffic, the potential for unsafe vehicle movements, and accidents as cars slow to turn into Lagoona Court and/or the child care centre. In addition, they envisage changes to the central median when issues arise, potentially resulting in vegetation removal. They say parents and carers will park along Canterbury Road with implications on the operation of the road as well as the potential for vehicles to queue. Some parties cast doubt about the basis upon which VicRoads' position has changed and the basis for its revised position.

114 Mr Fairlie's evidence in relation to these and related concerns is that the access to the proposed basement is the most appropriate available and can operate safely. The access is positioned further away from a break in the median and there will be good sightlines into and out of the site. Being compliant with the planning scheme parking rate, there will be sufficient parking on-site without queuing into Canterbury Road.

115 We understand why there are concerns about traffic and access but we give weight to the conclusions reached by VicRoads and presented in the expert traffic evidence. There is no independent evidence challenging the findings reached in the expert evidence or to support claims about the extent of analysis undertaken by VicRoads in reaching its revised position. There is, on the material before us, no intent to remove planting in the central median.

116 We find that there is no basis to refuse the application on traffic related issues.

## **CAR PARKING**

### **Quantity of car parking**

117 The proposal provides the number of car parking spaces required by Clause 52.06. Despite recognising that compliance, and no reduction in parking has been applied for, residents question the amount of on-site parking provision. Some submit parking demand is underestimated. They draw attention to examples of overflow parking associated with an aged care facility near Blackburn Lake and a child care centre at No. 213 Canterbury Road. They are most concerned about the potential for overflow parking into Lagoona Court which services three dwellings, has no footpath, and is a short cul-de-sac.

118 Mr Fairlie's evidence is that being compliant with the scheme parking rate, there will be sufficient parking on site without the use of Lagoona Court or Canterbury Road. He refers to both locations as undesirable for parking for essentially for the same reasons as residents. He also notes that the child care centre at No. 213 Canterbury Road did not meet the full parking rate and this may be a factor in any overflow beyond allocated spaces on-site.

119 We cannot say that there will be no parking off-site associated with the proposed use but, being compliant with the scheme rate, there is no basis upon which we refuse to grant a permit because of insufficient on-site parking provision.

120 Mr Morrison made reference to the precautionary principle in the context of traffic and parking demand. As no reduction in parking is being applied for, we do not look behind the parking rates applied in the scheme. If, as suggested, there is a higher parking demand in Whitehorse, it is open to the Council to research this matter and, if justified, seek to introduce a parking overlay setting out specific parking rates to suit local circumstances.

121 We further agree with the applicant that parents, carers and staff can be directed and encouraged to park on site and this can be further detailed through a Car Parking Management Plan.

### **Car park layout**

122 A number of matters with respect to the car parking layout were addressed through submissions and evidence. They include:

- Car park safety;<sup>30</sup>
- Operation of the tandem car spaces allocated to staff;
- Overspill including at staff changeovers;
- Location of the disabled (DDA) car space.

123 Mr Fairlie's evidence is that the car park is relatively standard for a child care centre and operational matters can be addressed through a Car Parking Management Plan. His evidence is that the car park layout is typical of child care centres. The car park has a limited number of tandem spaces and he recommends an additional staff bay be allocated (#1). He is satisfied that no specific pedestrian treatment is required within the car park and, being a low speed environment associated with a child care centre, the design is safe and acceptable. He further says that the design complies with both the planning scheme and relevant Australian Standard.

124 Mr Fairlie recommends modifications to the car park as shown in his statement of evidence with several additional matters addressed at the hearing (such as the addition of a bollard to the DDA space and changes to the basement ramp profile).

125 Had we directed a permit be issued, we would have accepted Mr Fairlie's evidence and required modifications as a permit condition. While the car park layout may be workable and generally acceptable, a DDA space that is more convenient to the lift would be better. The proposed tandem spaces are acceptable as they are for staff use and will not be shared with others in pick-up/drop-off. A Car Parking Management Plan would be important to manage staff changeovers within the site.

126 We note that refuse collection is provided within the car park involving a shared facility for deliveries and loading bay. We find this to be acceptable subject to collection services being managed to avoid busy times at the centre as recommended in Mr Fairlie's oral evidence (9.30am to 3 pm).

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<sup>30</sup> Ms Tribe cites a Parliamentary Enquiry - Victorian Parliament Road Safety Committee "*Walking Safely*".

## OFF-SITE AMENITY IMPACTS

127 This matter was not the subject of extensive submissions at the hearing. It is, however, an issue raised by residents of Lagoona Court with respect to noise, loss of privacy, loss of amenity by the solid acoustic fencing and tree lopping/removal.<sup>31</sup> We have addressed these matters above, except for noise.

128 As already mentioned, acoustic fencing is proposed along parts of the eastern and western site boundaries. A letter tendered on behalf of the applicant from an acoustic engineer refers to the fences shown on the plans and an earlier acoustic report. No expert evidence has been called with respect to noise from children playing. While acoustic fencing may be presumed to mitigate noise, there would be an amenity impact of 2.2 metre high acoustic fencing given the relatively modestly-sized secluded private open spaces currently with open rear boundary fencing.

## OTHER MATTERS

129 A number of other matters were raised at the hearing or are identified in statements of grounds. They are wide ranging. They include grounds or concerns relating to signage, child care centre facility planning, evacuation options and procedures, stormwater management and drainage, the potential for longer operating hours and future amendments to a permit, allegations of unlawful tree removal, potential non-compliances with permit conditions (such as the use of larger delivery trucks) and impacts on property values.

130 Given our conclusion below we do not make specific findings on each of the additional matters. Suffice to say that none provide a reason to refuse a permit. If we had determined to grant a permit, any future applications to amend conditions (such as operating hours) or new applications (such as signage) would need to be assessed on their merits.

## CONCLUSION

131 For the above reasons, we affirm Council's decision and direct that no permit be issued.

132 The subject land is in a suitable location for a child care centre and would serve the community. However, we find that the proposed development, including landscaping, does not represent an acceptable response to the landscape character objectives to be achieved in SLO2 or the purpose of the NRZ to respect the identified character and landscape characteristics. We have accepted there are a number of appropriate or acceptable aspects to the application, but, in considering the question of net community benefit and sustainable development for the benefit of present and future generations,<sup>32</sup> we are not persuaded that these outweigh our findings with respect to character and landscape outcomes.

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<sup>31</sup> We have addressed car parking and traffic earlier.

<sup>32</sup> Clause 10.01.

## APPLICATION TO REIMBURSE FILING AND HEARING FEES

- 133 At the conclusion of the hearing, for the applicant, Mr Bisset made an application pursuant to Sections 115B and 115CA of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act), for the reimbursement of the application filing fee and four days of hearing fees by the Responsible Authority. This is \$3,569.20.
- 134 We provided the Responsible Authority with an opportunity to address the application in writing. This response has been received. At the hearing, Mr Bisset indicated he did not seek any opportunity to reply.

### Section 115 of the VCAT Act

- 135 Pursuant to Section 115CA of the VCAT Act, an applicant to the Tribunal under Section 79 of the *Planning and Environment Act 1987* is entitled to an order under Section 115B that the Responsible Authority reimburse the applicant the whole of any fees paid by the applicant in the proceeding. Pursuant to sub-section (3) the presumption of reimbursement of the fee does not apply if the Responsible Authority satisfies the Tribunal that there was reasonable justification for the Responsible Authority to fail to grant the permit before the application to the Tribunal, having regard to:
  - (a) the nature and complexity of the permit application; and
  - (b) the conduct of the applicant in relation to the permit application; and
  - (c) any other matter beyond the reasonable control of the Responsible Authority.

### Council's position

- 136 The applicant submits that the nature of the permit application was not overly complex and that cannot be used to justify the delay in making a decision. It says that the proposal is of a similar nature to other child care centre applications considered by the Council within the area. The grounds now relied upon by the Council to oppose the permit application are standard and cannot also be said to be matters beyond the reasonable control of the Responsible Authority. While there are a number of objections, the applicant submits the substantive content of the concerns are very similar in nature and would have not warranted a delay in making a decision. Further, the applicant submits it responded promptly to all requests for further information and sought to work co-operatively with the Council in dealing with the application. Therefore, it is not a cause of any delays.
- 137 The Council submits that the Responsible Authority was reasonably justified in failing to grant the permit. While acknowledging that the permit application was not particularly complex, the Council submits ongoing discussions with the permit applicant's representative, and amendments to the permit application, and further notification and consultation as a consequence of amendments, are all part of a consultative process in which the permit applicant's representative was engaged and encouraged.

138 The Council relies on the Tribunal's decision in *Burke Vue Pty Ltd, Aroona Properties Pty Ltd* and *Orme*<sup>33</sup> wherein consultative processes in which the permit applicant was engaged were found to provide reasonable justification for a permit to not be granted within the statutory 60 day time period.

### **Tribunal findings**

139 Having regard to the matters we are required to consider under Section 115CA of the VCAT Act, we find as follows:

- We agree with the Council that the application was not complex, notwithstanding the broad-ranging issues arising, as reflected in these reasons.
- On the information available to us, the permit applicant's representative was actively engaged in consultation with the Council officers, including making formal amendments to the permit application, with the aim of achieving an acceptable outcome with respect to the merits of the permit application. Even though some processing steps could have been undertaken more quickly by the Council, the applicant's conduct contributed to the delay. On this basis, there is reasonable justification for the failure to meet the 60 day timeline. As the Tribunal said in *Orme*,<sup>34</sup> where a permit applicant actively engages in discussions, makes amendments to the application, and takes other steps to seek to facilitate a positive outcome, there may be a *bona fide* basis to justify the delay. Further, as the Tribunal said in *Aroona*:<sup>35</sup>

Although we have not supported the proposal shown on the substituted plans, our refusal does not undermine the benefits arising from ongoing negotiations between Council and the permit applicant in an effort to achieve a more acceptable and positive development than the one first presented to Council.

- The third factor is any other matter beyond the reasonable control of the Council. No grounds have been advanced to suggest such factors exist.

140 We have not been persuaded that the presumption of awarding fees against the Council should apply in this proceeding. The application to reimburse fees pursuant to Sections 115B and 115CA of the VCAT Act is refused.

**Margaret Baird**  
**Senior Member**

**Joel Templar**  
**Member**

<sup>33</sup> *Burke Vue Pty Ltd v Stonnington CC* (Includes Summary) (Red Dot) [2015] VCAT 1723 (30 October 2015); *Aroona Properties Pty Ltd v Port Phillip CC* [2016] VCAT 151; *Orme v Hobsons Bay CC* [2016] VCAT 1418.

<sup>34</sup> *Orme v Hobsons Bay CC* [2016] VCAT 1418, [14].

<sup>35</sup> *Aroona Properties Pty Ltd v Port Phillip CC* [2016] VCAT 151, [76].