

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P11825/2021  
PERMIT APPLICATION NO. WH/2021/563

### CATCHWORDS

Whitehorse Planning Scheme; Section 77 of the Planning and Environment Act 1987; Neighbourhood Residential Zone - Schedule 1 (NRZ1); Significant Landscape Overlay - Schedule 2 (SLO2); Dwelling, works and vegetation removal; Neighbourhood character; Impact on vegetation; Adequacy and type of landscaping.

<b>APPLICANT</b>	Janita V Goods
<b>RESPONSIBLE AUTHORITY</b>	Whitehorse City Council
<b>RESPONDENTS</b>	Blackburn & District Tree Preservation Society Inc Blackburn Village Residents Group Inc Peter James Dickson & Patrice Mary Quinn
<b>SUBJECT LAND</b>	32 Fuchsia Street BLACKBURN VIC 3130
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	27 June 2022
<b>DATE OF INTERIM ORDER</b>	28 June 2022
<b>DATE OF ORDER</b>	26 October 2022
<b>CITATION</b>	Goods v Whitehorse CC [2022] VCAT 1146

### ORDER

#### No permit granted

- 1 In application P11825/2021 the decision of the responsible authority is affirmed.
- 2 In planning permit application WH/2021/563 no permit is granted.

Mary-Anne Taranto  
**Member**



## APPEARANCES

For applicant

Mr Peter Tesdorpf, town planner of Land use Town Planning Service.

He called the following witnesses:

- Mr Darrell Mcleod in relation to arboricultural matters, of Landscapes by Design
- Mr Michael Rogers, arborist of John Patrick Landscape Architects

For responsible authority

Mr Edward Dumaresq, urban planner

For Blackburn Village Residents Group Inc

Mr David Morrison

For Blackburn & District Tree Preservation Society Inc

Ms Dianne Tribe

For Peter James Dickson & Patrice Mary Quinn

Mr Peter Dickson

## INFORMATION

Description of proposal	<p>Construction of a two storey dwelling and associated works and vegetation removal. Vegetation removal includes three large eucalyptus trees that are 18m in height and a Bower Wattle with a height of 7m.</p> <p>The dwelling would have four bedrooms (one at ground level), a study, double garage, open plan dining/family space with an alfresco dining area and separate living room at ground level. The upper level would also have a rumpus room and a void.</p> <p>Earthworks comprising cut and fill is proposed, including cutting throughout the front half of the dwelling footprint and its surrounds. This includes retaining walls along part of the driveway and garage on their west sides to a depth of up to 0.6m.</p> <p>The dwelling is to be constructed of face brick with render to cladding and a pitched tiled roof.</p>
Nature of proceeding	<p>Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.</p>
Zone and overlays	<p>Neighbourhood Residential Zone - Schedule 1 Bush Environment Areas (<b>NRZ1</b>).</p> <p>Significant Landscape Overlay - Schedule 2 Blackburn Area 2 (<b>SLO2</b>).</p>
Permit requirements	<p>Clause 42.03-2 and clause 3.0 of SLO2 to construct a building and carry out works because not all of the specified requirements are met, namely buildings and works are proposed within 4m of trees protected under the SLO2.</p> <p>Clause 42.03-2 and clause 3.0 of SLO2 to remove, destroy or lop certain protected trees.</p>
Relevant scheme policies and provisions	<p>Clauses 11, 12, 15, 16, 21, 22.03, 22.04, 32.09, 42.03, 65 and 71.</p>

Land description	<p>Located on the south side of Fuchsia Street, this 1011sqm rectangular site has a 20.12m frontage and depth of 50.29m. The site contains a single storey timber dwelling and a garage is sited at the rear in the site's south-west corner. The site has an abuttal to a laneway at the rear but vehicle access is presently taken from a cross-over in Fuchsia Street with an unsealed driveway along the site's west boundary.</p> <p>The land falls from the front to the rear by approximately 1m and between 0.3m and 0.5m towards the east.</p> <p>Numerous trees are located on the site including a number of eucalyptus trees and other native and exotic vegetation.</p>
Tribunal inspection	Unaccompanied after the hearing.

## REASONS<sup>1</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 Janita Goods (the **applicant**) is seeking a review of the Whitehorse Council's decision to refuse a permit for a new dwelling, works and vegetation removal on a treed site in Blackburn.
- 2 The council's reasons for refusal are based on concerns about the removal of three trees. Adopting the tree numbering system in the arborists' reports<sup>2</sup> and submissions referred to by the parties, these are two eucalypts known as Trees 23 and 24 and the Bower Wattle - Tree 11. The council submits that the removal of these trees would be contrary to policy and the SLO2.
- 3 While the respondent objectors support the council's reasons for refusal, they also take issue with other matters. In summary, the respondents variously raise concerns with a number of other trees proposed for removal and the extent of works and vegetation removal more generally. The appearance of the proposed dwelling and the type of landscape response in character terms is also said to be unacceptable. They say the proposal will contribute to the ongoing incremental loss of vegetation throughout the area, undermining the very qualities of the area's treed character that attracts people to this location.
- 4 Through its submissions and the evidence of its two witnesses Mr Mcleod and Mr Rogers in relation to arboricultural matters, the applicant asserts that the proposal would be acceptable. It says that the extent of vegetation removal and retention achieves an acceptable balance between vegetation and landscape related considerations under the SLO2, planning scheme policies and the reasonable development expectations for a dwelling on this residentially zoned site.
- 5 I consider that the determinative issues in this case are whether the:
  - proposal would cause unacceptable impacts on vegetation to be retained;
  - proposed extent of vegetation removal is acceptable;
  - proposal provides for an acceptable landscaping response; and
  - the visual impacts of the dwelling would be acceptable.
- 6 With the benefit of my site inspection and having considered the submissions and evidence at the hearing and submissions made in response to my interim order I have decided that on balance, the proposal is not an

<sup>1</sup> 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.

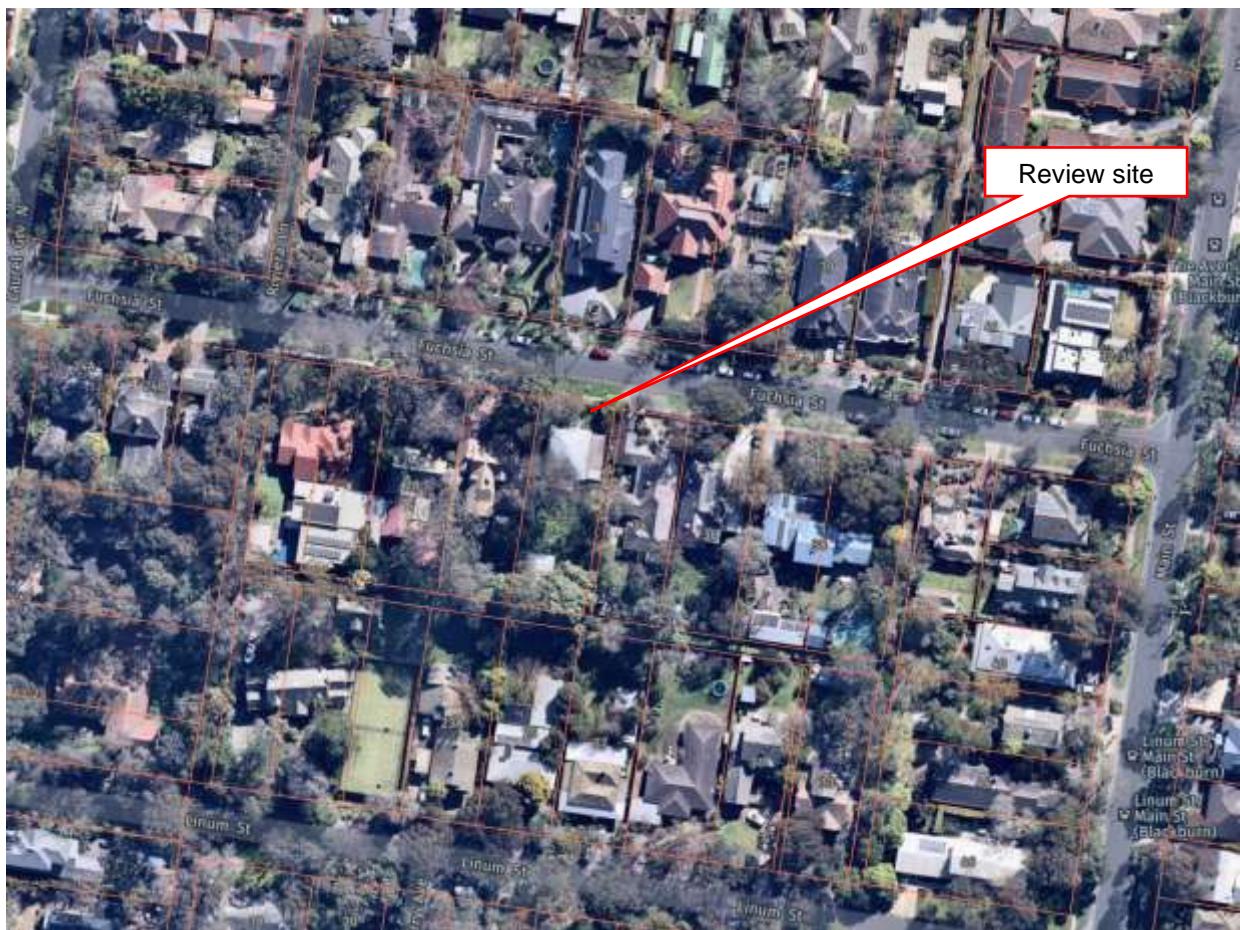
<sup>2</sup> Originating from the 'Preliminary Arboricultural Report' dated 15 June 2021 prepared by Adrian Keene of Landscapes by Design which accompanied the permit application.



acceptable one. Fundamentally, I am not persuaded that the proposal has demonstrated that it is responsive to the presence of existing trees on the site and neighbouring land and the area's landscape character. My reasons follow.

## THE PHYSICAL CONTEXT

7 The review site and its surrounds are shown in the aerial image below.



Source: Nearmap Image captured 14 September 2022

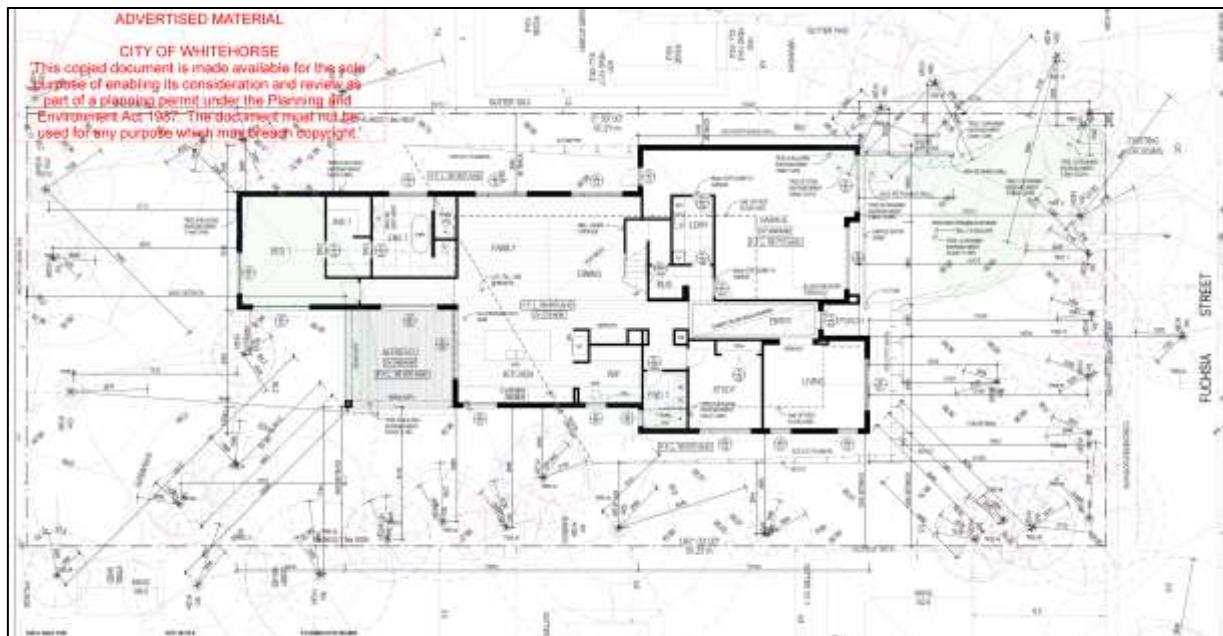
8 As can be seen, the site is an established residential precinct where detached dwellings predominate from various eras that are both single storey and two storeys in scale. Large and often mature canopy trees, comprising native, indigenous and exotic specimens are located within front and backyards as well as in nature strips. They are a particularly influential feature of the area's character in both the private and public realms, particularly on the south side of Fuchsia Street and in surrounding areas to the south and west.

9 The abutting dwelling to the west at 30 Fuchsia Street contains a two-storey brick dwelling with a steeply pitched roof and front setback of about 11.9m. It has a narrow setback of approximately 1.3m along the boundary in common with the review site. Numerous large trees are sited along this common boundary in the front yard to which I will return.

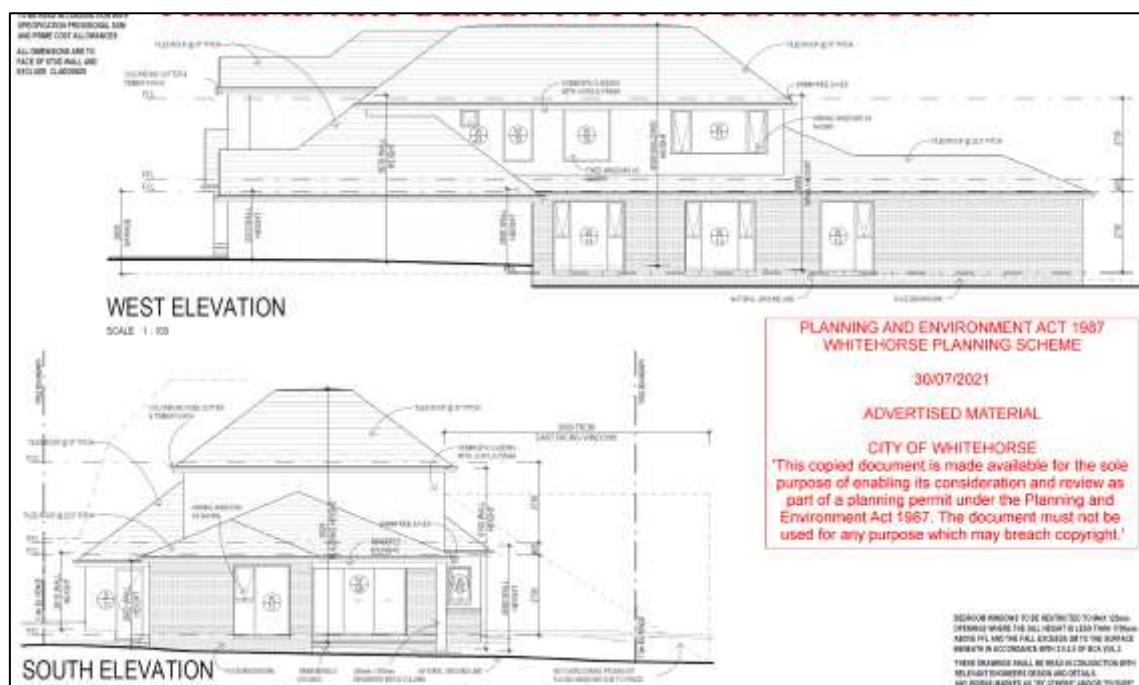
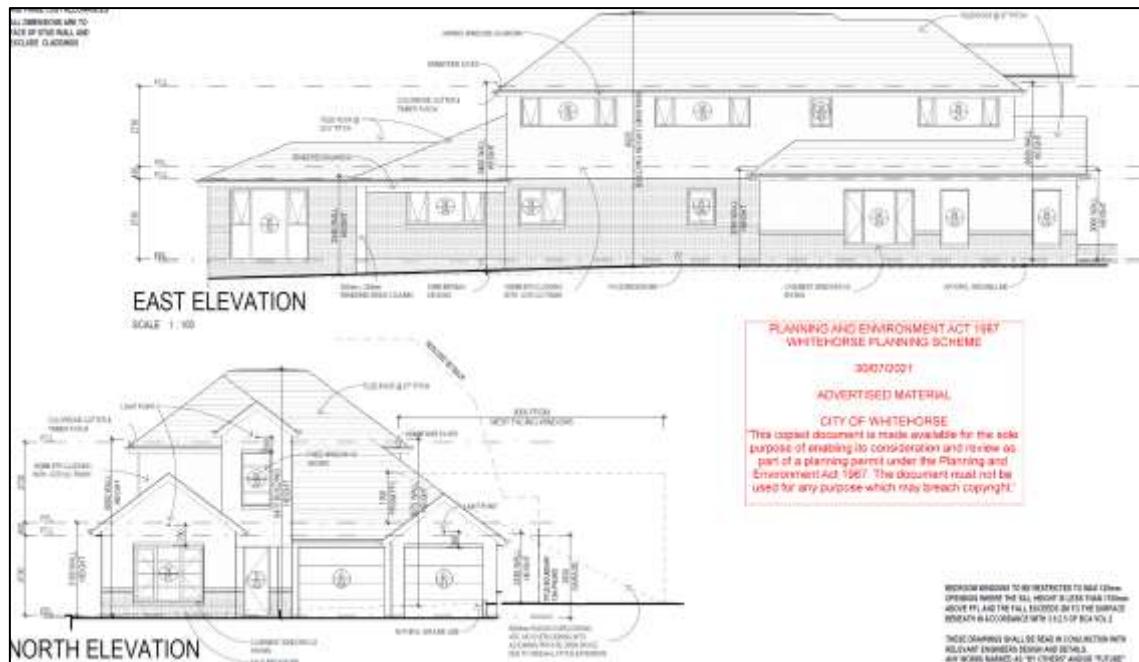
10 The abutting dwelling to the east is a more recent single storey building with a smaller front setback of about 6.2m and garage sited on the common boundary. Side setbacks behind the garage are varied, ranging from 3.6m to a predominant setback of more than 6.3m.

## THE PROPOSAL

11 The layout of the proposed dwelling is depicted in the following images extracted from the plans.



12 Proposed elevations are extracted below.



## THE PLANNING CONTEXT

- 13 The site and surrounding land are within the Neighbourhood Residential Zone and Schedule 1 applies (**NRZ1**). The SLO2 applies to the site and surrounding land to the north, east and west. While the SLO also applies to land to the south, a different schedule applies (Schedule 1).
- 14 This is a long established residential area in Blackburn which planning scheme policies identify as accommodating ‘limited change’ – the lowest

level of housing growth and change in the municipality as distinct from ‘substantial’ and ‘natural’ change areas.

- 15 Neighbourhood character types and preferred character outcomes throughout the municipality are also identified, comprising Garden Suburban, Bush Suburban and Bush Environment areas. The review site and surrounding land are within a Bush Environment area.<sup>3</sup>
- 16 There is a strong emphasis on the role of trees in Whitehorse which are described as integral to the municipality’s neighbourhood character.<sup>4</sup> According to the policy basis for Tree Conservation at clause 22.04-1, ‘The retention of existing trees and the provision of sufficient space for regeneration and replanting are ... key strategies to preserve and enhance the amenity of the City.’
- 17 Council’s residential development policy at clause 22.03 also applies.
- 18 Policy objectives at clause 22.03-2 include, amongst other things that residential development is to be consistent with the built form envisaged for the relevant category of housing change, in addition to the following:
  - To ensure development contributes to the preferred neighbourhood character...
  - To ensure that new development minimises the loss of trees and vegetation.
  - To ensure that new development does not detract from the natural environment and ecological systems.
  - To ensure that new development provides adequate vegetation and gardens consistent with the preferred neighbourhood character.
- 19 Strategies for limited change areas ask for residential development that ‘is of a scale, form and character that is consistent with the surrounding area’ and will predominantly comprise detached or semi-detached dwellings. A further strategy is to:
 

Ensure the scale and appearance of new housing respects the appearance of surrounding development and the environmental, heritage and neighbourhood character values of the area.
- 20 This policy also sets out preferred character statements and refers to precinct guidelines under the Character Study. It is policy to apply these to all applications for dwellings and subdivisions.<sup>5</sup>
- 21 The preferred character statement<sup>6</sup> for Bush Environment areas is:

<sup>3</sup> These descriptions are underpinned by two strategic studies which are reference documents in the planning scheme – the Council’s *Housing Strategy 2014* and *Whitehorse Neighbourhood Character Study 2014*.

<sup>4</sup> Clause 21.05.

<sup>5</sup> Clause 22.03-3.

<sup>6</sup> Clause 22.03-5.



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 street trees and a lack of front fencing. 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. [Tribunal's underlining]

- 22 Under the SLO2, and its parent control at clause 42.03, there are landscape character objectives and decision guidelines that must be considered.
- 23 In Schedule 2 to the SLO ('Blackburn Area 2'), the 'Statement of nature and key elements of landscape' is as follows:

The significance of the area is attributed to the quality of the environment, which includes vegetation notable for its height, density, maturity and high proportion of Australian native trees.

This in turn contributes to the significance of the area as a valuable bird and wildlife habitat.

- 24 The 'Landscape character objective' to be achieved at clause 2.0 is:

- 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. [Tribunal's underlining]

- 25 Decision guidelines include amongst others:

- 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 impact of the proposed development on natural ground levels and drainage patterns which may have a detrimental impact on the health and viability of surrounding trees.
- 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.
- Whether the tree is isolated or part of a grouping.
- 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.
- Whether works within 4 metres of a tree propose to alter the existing ground level or topography of the land. [Tribunal's underlining]

26 Decision guidelines under the parent control at clause 42.03-5 also refer to:

- The conservation and enhancement of the landscape values of the area.
- The impact of the proposed buildings and works on the landscape due to height, bulk, colour, general appearance or the need to remove vegetation.
- The extent to which the buildings and works are designed to enhance or promote the landscape character objectives of the area. [Tribunal's underlining]

### **What planning permissions are required?**

27 No planning permission is triggered for this proposal under the NRZ1. Suffice to say, a maximum building height of 9m and 2 storeys applies under the provisions of clause 32.09-11. The proposal would meet this requirement with its maximum overall height of 8.62m.

28 Planning permissions under the SLO2 are required for:

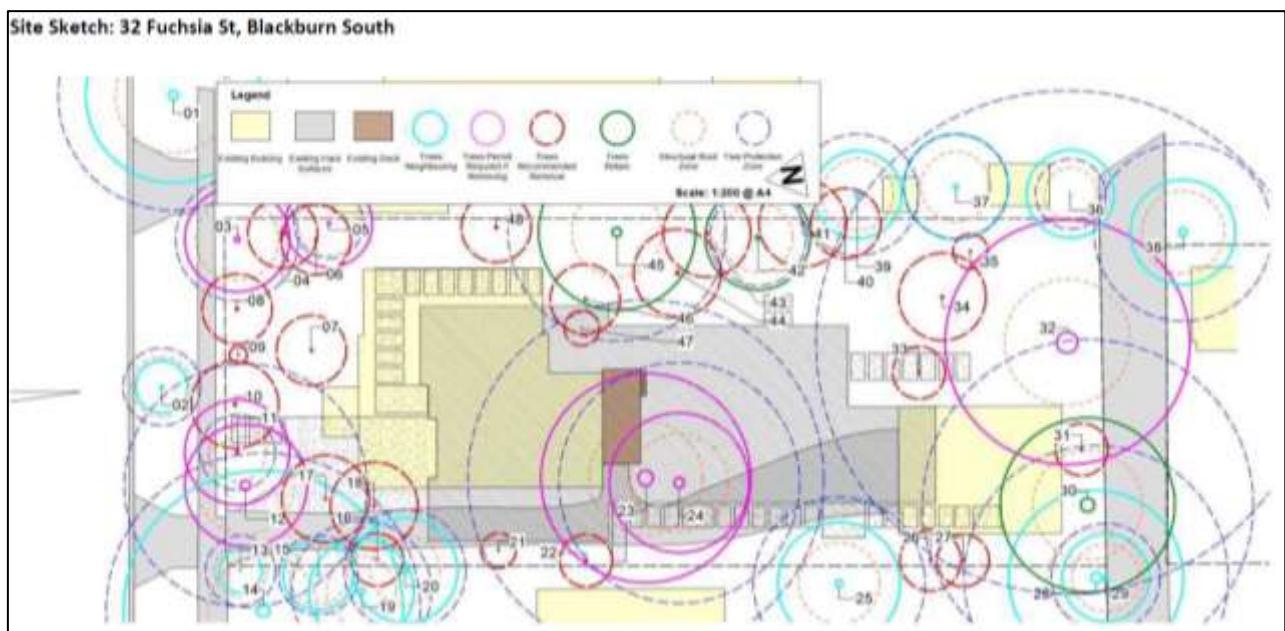
- The dwelling, because it is located within 4m of protected trees under SLO2 being Trees 20, 23 and 24.
- Works, because such works are located within 4m of Trees 11, 12, 14, 19, 20, 23, 24 and 45.



- Removal of Trees 3, 5, 11, 12, 23, 24 and 32.

29 Amongst other vegetation proposed for removal, no planning permission is required for the removal of Tree 4 (Cotoneaster), Tree 9 (Blackwood) and Tree 31 (Silky Oak) given their trunk circumference which is below the threshold that triggers a permit in the SLO2. I acknowledge submissions made about these trees, particularly Tree 9 which is desired to be retained by some of the respondent objectors given its middle storey contribution. As these trees do not invoke a planning permission and would not change my substantive findings in any way, I do not make findings about this vegetation.

30 The location of trees on the site and neighbouring land is shown in the image below, extracted from the arboricultural report accompanying the permit application.<sup>7</sup>



31 In relation to the permission required for the dwelling, I record that this permission was not thought to be required in the council's processing of the permit application and in its written submission at the hearing.<sup>8</sup> I provided the parties with an opportunity to make submissions about the implications of this permission during the hearing, noting that the appearance of the dwelling was a matter raised by a number of respondents in their objections before the determination of the permit application and throughout the hearing. I have considered all submissions made.

<sup>7</sup> Preliminary Arboricultural Report dated 15 June 2021

<sup>8</sup> The officer's report expressed the view that a permit was not triggered for the dwelling itself. Consequently, the report concludes that 'Meeting these exemptions identified within the overlay implies the dwelling and design would generally be appropriate/compatible for the site. Therefore Council is accepting of the building design presented.'

## PROPOSAL'S IMPACTS ON VEGETATION

### Introduction

- 32 The SLO2 together with the planning policy framework are unambiguous in their direction seeking the conservation and enhancement of existing vegetation, given the contribution this vegetation makes to this area's significant and distinctive landscape values and bush environment character.
- 33 The statement of nature and key elements of landscape appearing in Schedule 2 highlights the quality of the environment which includes vegetation notable for its 'height, density, maturity and high proportion of Australian native trees'. This vegetation in turn is said to contribute to the significance of the area as a valuable bird and wildlife habitat.
- 34 Objectives under the SLO2, seek to retain and regenerate native vegetation for the protection of wildlife habitat and retention and to retain the dominance of vegetation cover in keeping with the bush character environment.
- 35 These objectives are consistent with character outcomes sought for Bush Environment Areas where 'the preservation of its significant landscape character and environmental integrity is the highest priority'.
- 36 While a permit is not triggered under the provisions of the NRZ1, the purposes of this zone are relevant to a consideration of this proposal having regard to the provisions of clause 65.01.
- 37 The purposes of the NRZ1 seek to implement planning scheme policies, recognise areas of predominantly single and double storey residential development and 'To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.'
- 38 Together, these planning scheme considerations emphasise the special qualities of the area that are to be protected and reinforced. They are to be given significant weight when balancing conflicting policy objectives.
- 39 Before turning to my assessment I acknowledge submissions made by the council and Mr Dickson about the unlawful removal of five trees from the land in 2018 by a previous owner of the land including two eucalypts (Yellow box).<sup>9</sup> I understand that there was no requirement for any compensatory replacement planting to occur on the site.
- 40 Thus, while I understand submissions put by objectors about the incremental loss of vegetation from this site, as a matter of fairness, I must assess this proposal in the context of the existing site conditions as I find them at the time of my decision.

<sup>9</sup> Following a successful prosecution by the council, the former owner was fined and ordered to pay costs.



41 I should also add that the issues before me for consideration are very much interrelated. This includes the dwelling's siting, design and associated earthworks relative to the location of existing trees on the site and neighbouring land. As will become clearer from my findings that follow, there is a need for a wholistic approach to the planning and development of this site to achieve the planning directions sought by the planning scheme. The starting point should be the retention of vegetation that makes an important contribution to the significance of the area's landscape character and environmental features.

42 I also observe that the requirements in relation to matters such as front setbacks may be varied with a permit in the SLO2.<sup>10</sup> The front setbacks of 9m and 11m for single and two storey developments respectively in clause 3.0 of Schedule 2 to the SLO are references to thresholds, amongst others, which if crossed, trigger a requirement for a planning permit. The operation of these controls is commonly misunderstood.

43 For example, plans of alternative envelopes prepared for and relied upon by the applicant as demonstrative of the site's limited development opportunities adopt front setbacks of 9m and 11m 'as per SLO2'.<sup>11</sup>

44 It needs to be said that these setback thresholds are not set in stone. They may be crossed.

45 Of course if these thresholds are crossed, then discretion needs to be exercised by the council or Tribunal on review when deciding whether the permission invoked should be granted. There will be circumstances when it is appropriate to grant permission and conversely, circumstances when it will not. The exercise of discretion necessitates a consideration of various matters set out in the planning scheme and a weighting accorded to them by the relevant decision maker in deciding whether the proposal as a whole would lead to an acceptable planning outcome. The weighting to be accorded to different considerations will necessarily differ from one case to the next.

46 It is against this backdrop that I have assessed this proposal and whether it would achieve an acceptable outcome.

### **Vegetation on neighbouring land**

47 There are a number of trees on neighbouring land that are proximate to the site's boundaries.<sup>12</sup> While not a ground of refusal the council's arborist expressed concerns about the extent of encroachment into the TPZs of Trees 14 and 20.

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<sup>10</sup> The building height requirements under the NRZ are mandatory requirements that must still be met.

<sup>11</sup> Other alternative envelope setbacks from side boundaries are also described in terms of 'as per SLO2'.

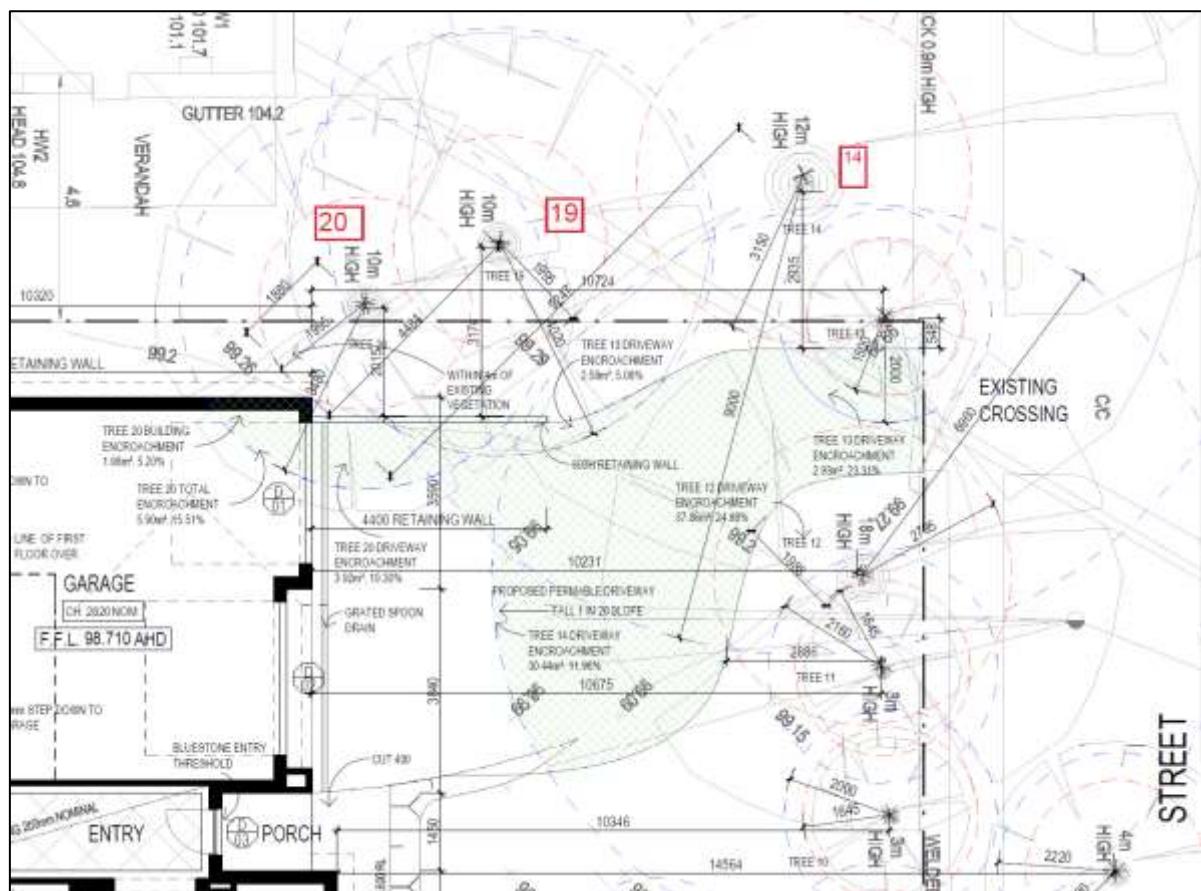
<sup>12</sup> Tree 19 is a Sweet Pittosporum with a height of 10m. This is a hardy species and known environmental weed which I accept would not be adversely affected by this proposal.



48 Tree 14 is a large eucalypt species, a Tallowwood, with a height and canopy spread of 16m, TPZ of 9m and SRZ of 3.15m. This tree is an exceptional specimen that makes a particularly notable contribution to the area's character. It displays excellent vigour with good structure and form.

49 Tree 20 is also a eucalypt, a Yellow Gum with a height of 14m, canopy of 6m, TPZ of 3.48m and SRZ of 1.996m. This tree presents with a tall upright form and contributes to the canopy cover that is a feature of the area's significance and character.

50 These are located on the adjoining property to the west near the proposed driveway, retaining wall and dwelling as shown below.



51 I find that these trees are vulnerable to the effects of this proposal and the proposal is not acceptably responsive to their presence.

52 The proposed dwelling appears to rely on a slab construction involving excavation to a depth of 0.6m within 2m of Tree 20.<sup>13</sup>

53 The plans also show a 4.4m long retaining wall to a height of 0.6m along the west edge of the driveway within 2m of Tree 20. I infer from this retaining wall's location and height that some thought has therefore been

<sup>13</sup> A notation on the plan states 'sill recessed into slab'.

given to driveway grades and finished driveway levels. Despite this, there is no information on any plans depicting proposed finished driveway levels.

54 This is an unfortunate and important omission.

55 Inconsistencies also exist between the proposed landscape plan including the position of the proposed driveway and extent of paving.

56 If the driveway alignment shown in the submitted landscape plan is adopted, the required retaining wall and associated excavation would be located within this tree's SRZ – that is, works would occur within about 1.7m from Tree 20. Encroachment into the SRZ of Tree 14 and to a larger extent than that shown in the design drawings is also indicated on the landscape plans.

57 The council's arborist made the following comments about these two trees:

The areas of encroachment into the TPZs of these trees are above 10% under Australian Standard AS 4970-2009 and considered major encroachments. The encroachments are by way of cut, installation of a retaining wall and new driveway. A cut will permanently remove areas of soil that roots from these trees could be using or may use in the future depending on permeability and water gradients.

The severing of tree roots and removal of the soil profile could have an adverse impact on the health and possibly the stability of the trees. To ensure the trees are not adversely impacted by the proposal it is recommended that plans are amended as specified under recommended Changes to Plans, above.

58 The recommended 'Changes to Plans' refer to a requirement that there be:

- no soil level changes within the TPZ of these trees is to occur;
- the driveway within the TPZ of these trees is to be constructed above the existing soil levels using porous materials.

59 Council's draft permit conditions seek to give effect to these recommended changes.

60 The measures recommended by council's arborist are broadly supported in the evidence of both experts for the applicant with Mr Mcleod agreeing that there can be no cutting within the TPZ of Tree 20. Mr Rogers was unaware that the proposal involved excavation near at least Tree 20 and it was his evidence that root investigation works should be undertaken to determine whether the design as presently proposed is even feasible.

61 Overall, the applicant accepts that these aspects of the proposal require further resolution but submits that they can be dealt with through permit conditions.

62 I am not so inclined to agree.

63 If the finished level of the driveway is raised to avoid any alteration to the existing surface level and thus any excavation, it is unclear what impact this



would have upon the proposed finished floor level of the garage and the dwelling and in turn, their height and design.

64 Moreover, at present, the plans show the use of permeable paving to the driveway with the landscape plan suggesting the use of 'Hydroston permeable paver or similar'.

65 While this type of paving system is intended to allow water infiltration to any tree roots below the driveway which is a desirable outcome, there are no details about the proposed construction requirements associated with the installation of this paving system. This includes the nature of sub-structure features, drainage, any edge restraints and the required depth of these elements beneath or beside the finished surface level of the driveway. The consequential effects of the proposed driveway design in terms of the required extent of works including excavation below the finished level of the driveway surface cannot be properly ascertained under this proposal.

66 Alternatively, if realignment of these features (driveway, garage and dwelling) is found to be necessary to achieve a greater setback from these trees, it is also unclear to what extent this might be required. In turn, what would be the consequences of doing so visually and in terms of other vegetation and landscaping?

67 I find that deferral of these considerations to a secondary consent process is not an appropriate course of action. This approach leaves to much uncertainty about any consequential changes required to be made to the design of the driveway, garage and dwelling, their appearance and in turn the exact nature of permissions required to be granted.

68 I am therefore unable to conclude that this aspect of the proposal will lead to an acceptable outcome in terms of the appearance of the proposed built form, extent of earthworks and their impacts on Trees 14 and 20.

## **Vegetation removal from the site**

### Introduction

69 There are seven trees on the site whose removal requires permission under SLO2. If I had found that this proposal as a whole was acceptable, I would have permitted the removal of four of these trees (Trees 3, 5, 11 and 12) subject to the provision of suitable replacement planting.

70 The council does not take issue with the removal of Tree 12 (Yellow Box) which is leaning to the south and according to council's arborist is likely to be unstable. This position is not opposed by respondent objectors. Both arborists for the applicant concur with the council's assessment.

71 I accept the submissions and evidence in relation to Tree 12.

72 Tree 3 (Sweet Pittosporum) and Tree 5 (Box Elder Maple) are located close to the front boundary. Both are exotic species and are weed species and I would support their removal.



73 The council and respondent objectors are primarily concerned with the proposed removal of the following trees:

- Tree 11 (Bower Wattle) a native tree located close to the front boundary.
- Tree 23 (River Peppermint) a native tree located about 4.5m from the west boundary mid-way into the site and which partially overhangs the existing dwelling to the north-east.
- Tree 24 (Yellow Box) an indigenous tree located about 4.2m from the west boundary close to Tree 23.
- Tree 32 (Norfolk Island Hibiscus) a native tree sited near the rear boundary.

74 It is convenient to begin my assessment with Trees 11 and 32 which are less contentious than Trees 23 and 24.

### Tree 11

75 At the hearing, the council and respondent objectors submitted that Tree 11, a 7m high specimen should be retained as it is said to offer screening of the development in the streetscape, albeit noting that pruning of its canopy which overhangs the footpath would be necessary.

76 The applicant submitted that it would be prepared to retain this tree with both of its arborists agreeing that its retention can be accommodated by the proposal. Mr Mcleod did however express the view that pruning of branches overhanging the footpath would diminish its aesthetic appeal and screening opportunities, reducing its arboricultural value from 'medium' to 'low'.

77 Notations on draft conditions<sup>14</sup> from Mr Dickson received by the Tribunal with its leave after the hearing, describe Tree 11 as having been:

... heavily pruned. It appears that pruning has caused a split in the trunk, which has rendered the tree unsafe. I believe this pruning and damage has occurred approximately 3 months ago during the period of my absence from Melbourne. Presumably the applicant and the expert witnesses have not inspected the property and vegetation since that occurred, notwithstanding the date of their submission and reports respectively. ...

78 During my inspection, I observed the pruning and significant split that is present in the trunk of Tree 11 as described in Mr Dickson's submission. I do not know whether damage to this tree occurred before or during pruning or as a later consequence of that pruning involving some other process such as storm damage. Suffice to say, given its present damaged state, I find that this tree is in poor condition and its retention is no longer justified. I should add that were it not for its now damaged condition, I would not have permitted removal of this tree given photographic images showing the

<sup>14</sup> Email with attachments received by Tribunal on 5 July 2022.



positive contribution it once made to the streetscape and in the context of tree conservation and landscape character outcomes sought by the planning scheme.

### Tree 32

- 79 Tree 32 is a native tree with a height of 17m and canopy spread of 14m. It has a Tree Protection Zone (**TPZ**) of 14.4m and Structural Root Zone of (**SRZ**) 3.61m.
- 80 The plans do not presently show its retention.
- 81 The council accepts that while it has some structural issues, with some maintenance work it submits this tree should be retained given the very high contribution it makes to the landscape character. The retention of this tree is supported by respondent objectors.
- 82 For the applicant's part, Mr Rogers accepts that the tree is not hazardous despite its multiple leaders. He describes it as the largest specimen he has of this species in Melbourne. He did however describe the allergy inducing nature of its seed pods causing irritation for some people and that when shed, seed pods may require regular removal. Alternatively, he opined that this tree's potential irritant qualities may justify the tree's removal and its replacement with another large indigenous tree.
- 83 Ultimately, the applicant confirmed that it would accept a condition requiring retention of this tree.
- 84 While I accept some ongoing management is required in relation to this tree, Tree 32 makes a significant landscape contribution to the surrounding area and is not hazardous. In the context of this proposal, I find that this tree is a suitable candidate for retention.

### Trees 23 and 24

- 85 Tree 23 is a planted native tree with a height of 18m, canopy spread of 12m, TPZ of 10.2m and SRZ of 3.25m.
- 86 Tree 24 is an indigenous tree, likely to be a remnant species with a height of 18m, canopy spread of 8m, TPZ of 6.9m and SRZ of 2.8m.
- 87 The council describes Trees 23 and 24 as significant whose grouping, large canopies and 18m height make an important contribution to the area's landscape character. In the context of the SLO2, planning scheme policies and overall condition of these trees being fair to good, the council submits that the trees are not hazardous, have a high retention value and should be retained. The council's arborist estimates that tree 23 has a Useful Life Expectancy (**ULE**) of between 20 to 40 years.
- 88 The respondent objectors support the retention of these trees.
- 89 The applicant opposes the retention of these trees. Both of its experts concur that the removal of these trees is justified because of their branch

structure, size and location on the site which is said to pose an unreasonable constraint on developing the land with a dwelling. While an old stump union at ground level with signs of borer was said to exist in relation to Tree 24, none was presently observed although this may, in the evidence of Mr Mcleod lead to decay over time.

90 Both Mr Mcleod and Mr Rogers opine that it is the combined shape and size of canopy of both trees and their impacts on the development potential of the site that warrants their removal. As these trees have grown together displaying an interdependence, Mr Rogers' opinion is that the removal of either of these two trees is likely to reduce the long term viability of its remaining companion.

91 In particular, Mr Mcleod and Mr Rogers expressed concerns about Tree 23 which has a large leader branch (50cm in diameter) leaning north-east towards middle of site. Mr Mcleod described the present situation as too hazardous above any dwelling while Mr Rogers expressed the view that although Tree 23 is not currently hazardous, alterations to existing site conditions would make it so. Even if root sensitive footings were adopted, in Mr Rogers' evidence the impact on their TPZs would be substantial, reducing the water catchment area of these trees. In his opinion, this in turn is likely to accelerate the decline of both trees including an increased propensity for limb drop. The likelihood of adverse impacts on tree health is said by Mr Rogers to be exacerbated by the trees' advanced age, expressing the opinion that Tree 23 is 'expected to start senescing within the next 10 years'. Thus, in Mr Rogers' opinion, siting a new dwelling beneath these trees would be 'reckless'. Pruning of the tree's major north-east leaning branch would alternatively in Mr Rogers' evidence result in an unbalanced canopy and poor structural form.

92 I firstly accept the submissions and evidence that Trees 23 and 24 work together as a group to make a very significant contribution to the landscape qualities of this area. I find that they are the kind of trees that the statement of nature and key elements of landscape SLO2 describes as significant.

93 I also prefer Mr Rogers' evidence that the trees in their present state are not hazardous, a view also expressed by the council's arborist having regard to the attributes of these trees including their vigour, structure and form.

94 While I also accept Mr Rogers' opinion these trees may become hazardous if redevelopment of the site with a dwelling occurs in the way which he describes, this opinion:

- assumes major encroachments into the TPZs of these trees which has not been informed by any non-destructive root investigation works;
- assumes siting a dwelling of similar proportions to the current proposal in a location beneath the limbs of concern;



- is not based on a comprehensive hazard assessment that identifies, for example, the fall zone of limbs of concern and management measures to minimise risk;
- is based on assumptions about the spatial needs of a ‘family’ home with features and proportions of the kind presently proposed; and
- has not factored in the contribution these trees make to the landscape significance of the area including the direction sought by planning scheme policies and the SLO2.

95 While the siting of the Trees 23 and 24 and other vegetation proposed for retention do pose some constraints on the development opportunities of this site, conversely there is strong planning scheme support for the conservation of large trees of this kind. In reconciling these competing objectives, I am again reminded of the neighbourhood character statement for this location which concludes that the ‘preservation of its significant landscape character and environmental integrity is the highest priority’. This leads me to attach greater weight to the retention of these trees than the achievement of the proposed dwelling development at their expense.

96 Further, the site is not without its opportunities that otherwise compels the dwelling’s design and siting in the location and manner proposed.

97 Importantly, the proposal before me has development features located in an area where in combination, the most mature and significant trees on the site and neighbouring site are concentrated.

98 This stands in contrast to some other portions of the site that I regard as having a lesser degree of sensitivity where little or no development is presently proposed to the north-east and south-east.

99 I acknowledge that in responding to the opportunities presented by these other locations, it may well be the case that a more modestly proportioned dwelling with a different configuration, scale and setbacks, and which sits more lightly on the site is necessary. A different construction system in preference to a slab on ground design which limits the extent of earthworks and to achieve a site responsive outcome may also be necessary.

100 The provision of vehicle access from the east side rather than the west, the use of an alternative driveway surface such as gravel and the adoption of a smaller front setback necessitating lesser space dedicated to a driveway in terms of its length and breadth are also options worthy of exploration.

101 For now, I find that the applicant’s reasons advanced for the removal of Trees 23 and 24 have not been made out. I am not persuaded that retention of these trees and the construction of any new dwelling are necessarily mutually exclusive outcomes. Rather, it is the particular siting and design features of this dwelling that I find are not site responsive. I am therefore unable to conclude on the basis of the material and evidence before me that the removal of Trees 23 and 24 should be permitted.



## **Vegetation retention and new planting**

102 I find that the retention of three eucalypts, namely Trees 30, 42 and 45<sup>15</sup> is a positive aspect of the proposal. I support their retention noting that at present, Trees 42 and 45 make only a very modest contribution to the landscape character and environmental objectives of the planning scheme given their form and size.

103 The proposed planting of four new eucalypts – Red Box trees which the landscape plan indicates may grow to a mature height of 20m is also a positive aspect of this proposal. Together with trees proposed for retention (Trees 30, 42, 45 and potentially Tree 32), this will result in the provision of seven trees (or eight trees with Tree 32) that either presently or may reach a mature height of 15m. This would meet the decision guideline for tree density in SLO2 of one tree reaching a height of 15m to each 150sqm of site area (seven trees required<sup>16</sup>).

104 In terms of the landscaping scheme more generally, I find that this aspect of the proposal is not acceptable due to the:

- lack of mid-storey planting, particularly in the front garden area;
- mix of planting which includes a large number of exotic species;
- design style of the planting and associated hard landscaping features which are not consistent with a bush environment and informal landscape theme sought by planning scheme policies and the SLO2 for this area; and
- driveway design and amount of hard paving associated with this and other pathways around the dwelling.

105 I accept that a revised landscaping plan could however overcome shortcomings in respect of the type and style of planting.

## **Conclusion on vegetation and landscaping considerations**

106 Overall I concur with submissions put by the respondent objectors that the siting and design of the proposal in its entirety has not been undertaken in a way that is well integrated with and responsive to existing significant vegetation on the site and surrounding land.

107 In particular, I find that the siting and design of the proposed dwelling and its associated features including the driveway is not responsive to the presence of Trees 14, 20, 23 and 24.

108 I find that the proposal has not been conceived in a way that accords the highest priority to the preservation of the area's significant landscape character and environmental integrity. In particular, I find that Trees 23 and

<sup>15</sup> Tree 30 is an 18m high River peppermint, Tree 42 is a 7m high Mealy Stringybark and Tree 45 is a 13m high Yellow Box.

<sup>16</sup> Rounding up from 6.74 trees for a site area of 1011sqm.



24 make a significant contribution to the landscape character and valued environmental features of this location.

109 I am not persuaded on the basis of information before me that the removal of Trees 23 and 24 can be justified.

110 I further find that while space would be available for replacement planting that includes trees able to reach a height of at least 15m, I find that on balance, the particular tree retention and replanting strategy proposed does not appropriately compensate for the removal of the vegetation proposed, particularly Trees 23 and 24.

111 It is primarily for these reasons that I find the proposal is not an acceptable one.

112 In light of these findings, I make only brief findings on other matters raised.

### **VISUAL IMPACTS OF DWELLING**

113 Council submits that the visual impacts of the dwelling's development features and its response to the preferred character and provisions of SLO2 would be acceptable.

114 The applicant submits that the height, appearance, materials, setbacks and overall dwelling design are acceptable and would achieve an acceptable character response.

115 This is refuted by the respondent objectors with Mr Dickson and Mr Morrison expressed the view that the design of the development due to the dwelling's size, form and overall appearance.

116 The built form aspirations of this location and the statement of preferred character ask for buildings that are dominated by vegetation, 'subservient', 'frequently hidden from view behind vegetation and tall trees' and that 'will nestle into the topography of the landscape'.

117 With the front setbacks and floor levels currently proposed, and if the shortcomings that I have identified with landscaping and the amount of paving in the front yard were addressed, I would not refuse the proposal on the basis of the dwelling's visual appearance.

### **CONCLUSION**

118 For the reasons set out above, I conclude that a permit must not be granted.

119 I will affirm the council's decision.

Mary-Anne Taranto  
**Member**

