

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P744/2022  
PERMIT APPLICATION NO. WH/2021/915

### CATCHWORDS

Whitehorse Planning Scheme; Neighbourhood Residential Zone, Schedule 1; Significant Landscape Overlay, Schedule 2; Neighbourhood character; Limited change area; Bush Environment character area; Tree retention and landscaping; Visual bulk.

<b>APPLICANT</b>	Nadia Migliardi
<b>RESPONSIBLE AUTHORITY</b>	Whitehorse City Council
<b>RESPONDENT</b>	Blackburn & District Tree Preservation Society Inc.
<b>RESPONDENT</b>	Blackburn Village Residents Group Inc.
<b>JOINT RESPONDENT</b>	Alan Jeffrey Conrad & Robyn Annette Conrad
<b>SUBJECT LAND</b>	225 Canterbury Road BLACKBURN VIC
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	9 December 2022
<b>DATE OF ORDER</b>	10 January 2022
<b>CITATION</b>	Migliardi v Whitehorse CC [2023] VCAT 22

### ORDER

#### Amend permit application

1 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

- Prepared by: Design Equilibrium Pty Ltd
- Drawing numbers: Sheet 3 and 5, Revision C
- Dated: 8 September 2022

- Prepared by: Monarch Garden Design
- Drawing numbers: Landscape Plan
- Dated: 2 September 2022, Issue C



**No permit granted**

- 2 In application P744/2022 the decision of the responsible authority is affirmed.
- 3 In planning permit application WH/2021/915 no permit is granted.

Judith Perlstein

**Member**



## APPEARANCES<sup>1</sup>

For Nadia Migliardi	Chris Mackenzie and Emmanuele Migliardi.
For Whitehorse City Council	Daniel Bowden, planner of Song Bowden Pty Ltd, and Fiona Little, planner of council.
For Blackburn & District Tree Preservation Society Inc.	Dianne Tribe.
For Alan Jeffrey Conrad & Robyn Annette Conrad	In person.
For Blackburn Village Residents Group Inc.	Michael Taafe.

## INFORMATION

Description of proposal	Construction of a second dwelling at the rear of an existing dwelling.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Whitehorse Planning Scheme.
Zone and overlays	Neighbourhood Residential Zone, Schedule 1 ( <b>NRZ1</b> ); Significant Landscape Overlay, Schedule 2 ( <b>SLO2</b> ).
Permit requirements	Clause 32.09-6 - construction of a dwelling if there is at least one dwelling existing on the lot in the NRZ1. Clause 42.03-2 - construction of a building and works and a fence in the SLO2.
Relevant scheme policies and provisions	Clauses 11, 12, 15, 16, 21.05, 21.06, 22.03, 22.04, 32.09, 42.03, 52.06, 55, 65 and 71.

<sup>1</sup> Via online forum.



## Land description

The following is the land description included in the previous Tribunal decision with respect to the land (*Migliardi v Whitehorse CC* [2014] VCAT 1168). The site and its context remain relatively unchanged.

‘The land is on the northeast corner of Canterbury Road and Boulton Road. It has a frontage to Canterbury Road of 13.72 m, a sideage to Boulton Road of 38.49 m and an area of 778 sq m. The land is developed with a single-storey dwelling facing Canterbury Road and several sheds in the rear of the land. There are some small trees in the rear of the land. The land falls about 2 m from the south to the north boundary. Forest Hill Chase activity centre is opposite on the northeast corner of Canterbury Road and Pacific Way. On the corner is a fast food outlet and a petrol filling station and, behind them, the main built form and car park of the Forest Hill Chase complex.’

A street view image of the subject site as it faces Boulton Road is included below.<sup>2</sup>

## Tribunal inspection

Following the hearing, I undertook an unaccompanied inspection of the subject site and surrounding area, including streets and properties referred to by parties during the hearing.



<sup>2</sup> From Google maps, June 2019.

## REASONS<sup>3</sup>

### WHAT IS THIS PROCEEDING ABOUT?

- 1 The applicant proposes to construct a double storey dwelling to the rear of the existing dwelling on the review site. The site is located on the corner of Canterbury and Boulton Roads with the existing dwelling facing Canterbury Road.
- 2 The council refused the proposal on several grounds, primarily based on it not being respectful of the existing or preferred neighbourhood character sought under planning policy within the Whitehorse Planning Scheme (Scheme) as well as the Neighbourhood Residential Zone, Schedule 1 (NRZ1) and Significant Landscape Overlay, Schedule 2 (SLO2) which apply to the site.
- 3 Objectors to the application include residents who live in Boulton Road as well as the Blackburn & District Tree Preservation Society and the Blackburn Village Residents Group. They are concerned about the changes proposed to the streetscape and character of Boulton Road and the effect this has on the Bush Environment character of the area, as well as the adequacy of landscaping and tree planting proposed in the context of this character area and the SLO2.
- 4 The applicant contests the grounds of refusal and considers that the proposal provides an acceptable outcome with respect to the policy objectives and zone and overlay applying to the site, and that it provides a suitable response to the site context in terms of built form, landscaping and neighbouring property interfaces.<sup>4</sup>
- 5 Amended plans were prepared that provided an additional car space in response to the council's concerns about inadequate car parking, and also reduced the first floor element, simplified the architectural expression and provide additional landscaping. The council maintains its objection to the proposal.
- 6 This is not a matter where questions arise with respect to amenity impacts on neighbours or internal amenity concerns for future residents. At its core, it is a question of whether the proposal provides an acceptable response to its site and Scheme context.
- 7 I must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered the submissions and documents filed, the relevant policies and provisions of the Scheme and having undertaken an inspection of the review site and surrounds, I have decided to affirm the decision of the responsible authority and direct that no permit be granted. My reasons follow.

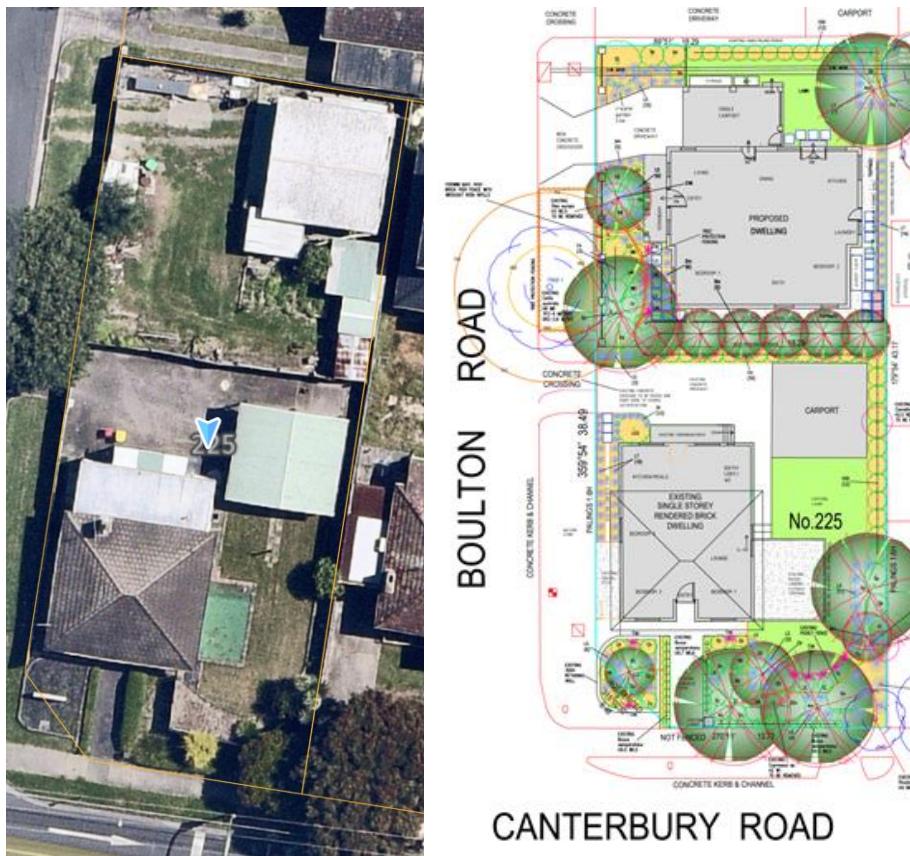
<sup>3</sup> The submissions of the parties, any supporting exhibits given at the hearing, and the statements of grounds filed; have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons.

<sup>4</sup> As generally described in the applicant's written submissions at [1.12].



## THE PROPOSAL AND ITS SITE CONTEXT

8 Below is a nearmap image taken on 3 December 2022 of the review site, and next to it is the landscape plan proposed for the proposal. The existing dwelling and carport can be seen at the bottom of the nearmap image, with the area intended to house the second dwelling already fenced off at the top of the image,<sup>5</sup> and currently housing several sheds/outbuildings.

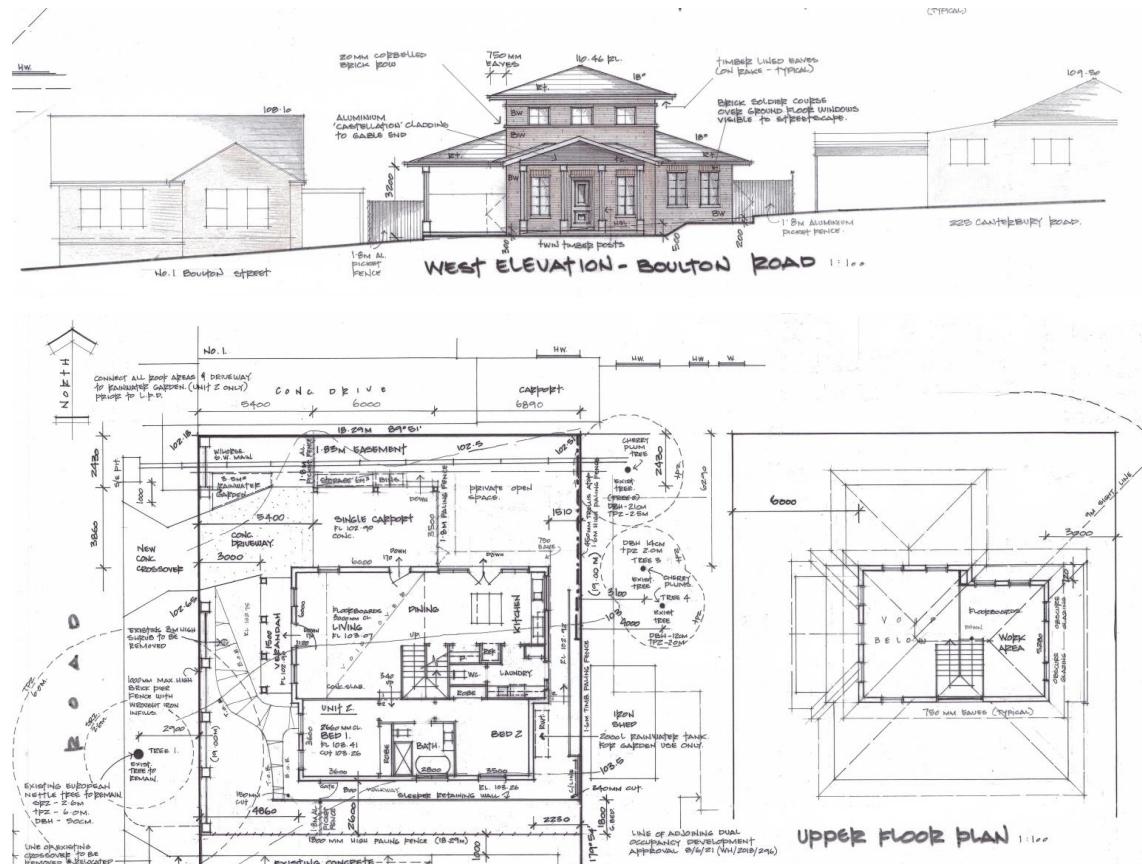


9 The proposal does not include changes to the existing dwelling aside from a slightly widened crossover. It does propose increased landscaping and the planting of five trees within the frontage to Canterbury Road, as can be seen in the landscaping plan above. There are currently no canopy trees planted on the entire review site.

10 The new dwelling is proposed to be double storey in form, with a minimum setback of 4.5 metres to Boulton Road. The porch element is set back 3 metres and has a height of approximately 4.5 metres and a width of 5.5 metres. At first floor it is set back 6 metres from Boulton Road. It includes two bedrooms, living, dining, kitchen and laundry at ground floor and an area described as 'work area' at first floor including a large void. A new crossover is proposed towards the northern boundary to facilitate access to a single carport with space for a second vehicle to park in front. The proposal includes site coverage of 37.3 per cent and garden area of 52.6 per cent.

<sup>5</sup> Noting that in its current iteration, the dividing fence is approximately 2 metres north of the existing carport and in the proposed plans it is 1 metre north of the carport.

11 The dwelling is proposed to be set back 2.6 metres from its southern boundary fence, 1.51 metres from its eastern boundary and the carport is set back approximately 2.4 metres from the northern boundary. The streetscape elevation and floor plans for the new dwelling are included below.



12 On the opposite side of Canterbury Road, to the south east of the review site, is the Forest Hill Chase Shopping Centre. While that land is zoned commercial, the land to the south west of the review site is zoned Neighbourhood Residential, Schedules 3 and 1. The land to the north of Canterbury Road, including the review site, is zoned NRZ1. This can be seen in the zoning map below.<sup>6</sup>

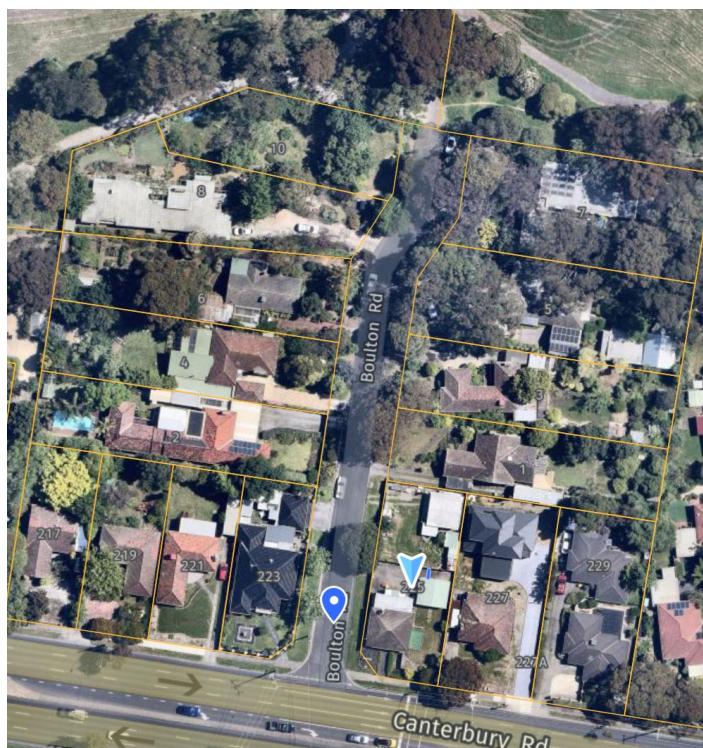


<sup>6</sup> Provided by the council in its practice note 2 material.

13 As described by the council, ‘Boulton Road is a Cul De Sac with parkland at the northern end. ...the nature of Boulton Road is in distinct contrast to the Canterbury Road frontage. It is characterised by mature street trees and no formal footpaths. These features combined with the extensive vegetation of allotments creates a bush environment that is acknowledged by both planning policies and overlay controls’.<sup>7</sup> There are walkways through the parkland at the top of Boulton Road, shown as PUZ1 (public use zoning) in the map above. The Blackburn Lake Sanctuary is located approximately 415 metres directly north of the review site.

14 The land to the north of the review site, at 1 Boulton Road, is improved with a single storey dwelling set back 12.5 metres from Boulton Road. It has a planning permit for a two lot subdivision that includes a building envelope for lot 1 that is set back 9.5 metres from its Boulton Road frontage. To the east are two dwellings constructed at 227 Canterbury Road, one behind the other. The rear dwelling has only recently been constructed and is double storey. Further east are two single storey dwellings at 229 Canterbury Road. Across the road, to the west, is a single dwelling facing Canterbury Road with its entry on the corner. It takes its vehicle access from Boulton Street, opposite the proposed location of the new dwelling.

15 Boulton Street is approximately 120 metres long. The aerial imagery below, spanning the entire street, captures the generous setbacks of the dwellings facing Boulton Road and the dominance of vegetation and tree canopy throughout these dwellings, as well as an increase in tree canopy as the street progresses from Canterbury Road to the open space to the north:<sup>8</sup>



<sup>7</sup> In its written submissions at [3.5].

<sup>8</sup> From [www.nearmap.com.au](http://www.nearmap.com.au), taken on 3 December 2022.

## THE SCHEME CONTEXT

16 The housing policy, at clause 21.06 of the Scheme, explains that areas of substantial, natural and limited growth have been identified through the council's Housing Strategy 2014. The review site is in a limited change area, described as follows:

Limited Change areas enable specific characteristics of the neighbourhood, environment or landscape to be protected through greater control over new housing development. These areas represent the lowest degree of intended residential growth in Whitehorse.

17 Objectives for limited change areas are:

- Conserve and enhance those elements which contribute to the valued environmental, heritage and neighbourhood character of the place.
- Ensure new development protects and reinforces the environmental, heritage values and/or preferred future neighbourhood character of the area.
- Ensure new development mainly takes the form of renovations to existing houses, replacement of single dwellings with new dwellings and some limited medium density development.

18 The residential development policy, at clause 22.03 of the Scheme, includes the following objectives:

- To ensure that residential development within the City of Whitehorse is consistent with the built form envisaged for the three categories of housing change, those being limited, natural and substantial change.
- To ensure development contributes to the preferred neighbourhood character where specified.
- To provide certainty to the community about the areas targeted for and protected from increased development.
- 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 The strategies for limited change areas are:

- Ensure residential development is of a scale, form and character that is consistent with the surrounding area, and will predominantly comprise:
  - Detached dwellings
  - Semi-detached dwellings

- Provide some diversity of dwelling sizes and tenures, including affordable housing, where feasible.
- 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.
- Encourage the retention of older dwellings in areas where these buildings dominate, and limit new development to two dwellings per lot.

20 Clause 22.03-5 then includes preferred character statements for each area, with the review site included in the Bush Environment precinct, as follows:

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.

21 The NRZ1 is specifically applied to bush environment and limited change areas, implementing the strategies of the local policy framework. Clause 55 provisions with respect to site coverage, permeability, landscaping, side and rear setbacks, walls on boundaries, private open space and front fence height are all varied in the NRZ1 to provide consistency with the character sought by policy. For example, site coverage is modified to a maximum of 40 per cent and private open space required is 80 square metres or 20 per cent of the lot, whichever is the lesser.

22 The purpose of the NRZ includes to manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics, and the decision guidelines of the NRZ1 focus on the landscape contribution for this area, as follows:

- Whether the vegetation in the street setback will contribute to the preferred neighbourhood character and the public realm.
- The potential for trees and vegetation to be provided between dwellings on the same site.
- Whether there is sufficient permeable space that is not encumbered by an easement to enable the planting of canopy trees.



- Development should provide for the retention and/or planting of trees, where these are part of the character of the neighbourhood.

23 The SLO2 is applied to 'Blackburn Area 2'. The landscape character to be achieved is described as follows:

- 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.

24 Planning permission is not required under the SLO2 for trees to be removed for this proposal as they are small trees not meeting the dimensions required for a permit trigger.

25 A permit is not required to construct a building or construct or carry out works in the SLO2 if a series of requirements are met. This is not the case with this application as the building does not meet all of the setbacks provided in clause 3 of the SLO2 and comprises more than 33 per cent of the site area at ground level. Therefore, a permit for construction of the second dwelling is required under the SLO2.

26 The decision guidelines which must be considered, as appropriate, for an application under the SLO2 include:

- 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 potential to achieve an average density of one tree reaching a height of over 15 metres to each 150 square metres of site area.

## PREVIOUS PROPOSAL

27 In 2014, a previous application for development on the review site was refused by the Tribunal in *Migliardi v Whitehorse CC* [2014] VCAT 1168. The application was for alterations to the existing dwelling and construction of two double storey dwellings at the rear.



28 Given the passage of time since that decision, the difference in the proposals, and the change in both planning policy and the zoning of the land (the local policies concerning limited change and the bush environment character were introduced in 2014 after the decision was published and the zoning was changed from general residential to NRZ1), this is not a traditional repeat appeal and I do not consider weight ought to be given to that decision in terms of my consideration of the current proposal.

29 However, aside from the development next door on Canterbury Road and the permit issued for subdivision on 1 Boulton Street, the site context has not markedly changed, and the current proposal, although different, also relates to Boulton Street rather than Canterbury Road. The following comments of the Tribunal in that decision, therefore, still resonate:

13 The land and the lot on the opposite corner of Boulton Road and Canterbury Road have little significant vegetation. The bush environment (in the street and of the lots) is more evident in the northern section of Boulton Road. There are no footpaths in the street. It has a peaceful character despite the main road conditions nearby in Canterbury Road.

...

15 The proposal does not respond well to the character of Boulton Road and the SLO2 area. The additional dwellings are located so they relate more to Boulton Road than Canterbury Road. I find the character response problematic mainly because of the attached building format, the minimal upper storey separation, the limited ground and upper floor setbacks to Boulton Road and the limited opportunity for a landscaped setting to the street make. Many lots abutting Canterbury Road in the area make a contribution to the bush environment character and, while the land does not currently make a material contribution, an appropriate design response may make a meaningful contribution. This design response does not do so.

30 I confirm that I have also considered the other Tribunal decisions tendered during the hearing and reviewed the relevant sites during my site inspection. Ultimately each proposal must be determined within its own context. While it is useful to review other decisions made in the same local area, this application must be determined on its own facts and circumstances.

## **DOES THE PROPOSAL PROVIDE AN ACCEPTABLE RESPONSE TO THE SCHEME AND SITE CONTEXT?**

31 The applicant correctly submitted that limited change does not mean no change, and that an additional dwelling on the review site can be accommodated.



32 The applicant also correctly noted that if a proposal does not meet the requirements of the SLO2, that does not mean that the proposal should be refused, it simply means that a permit is required under the SLO2 and the decision maker must have regard to the SLO2 and its decision guidelines in determining whether a permit should be granted.

33 It is also the case that the policies and provisions in the Scheme have been carefully considered and applied to create a framework for the review site, and adjoining areas proximate to Blackburn Lake.

34 As noted in clause 22.03-5, this precinct is identified for the lowest scale of intended residential growth in Whitehorse and the preservation of its significant landscape character and environmental integrity is the highest priority. The NRZ1 and SLO2 requirements and decision guidelines combine to require that any application for development in this area is assessed to ensure it has been designed to achieve the character of streetscapes that are dominated by vegetation with subservient buildings frequently hidden from view behind vegetation and tall trees. It seeks buildings nestled into the topography of the landscape and surrounded by vegetation, with buildings and hard surfaces occupying a very low proportion of the site and sited to reflect prevailing setbacks.

35 It is the case, as noted in the previous decision, that the current dwelling on the site and that on the opposite corner have little vegetation and do not contribute to the bush environment character sought. It is also the case that the bush environment character is more evident further down Boulton Road. However, it is a street with only eight dwellings facing the street, and each of these is generously set back from the street and single storey only. While the dwellings at numbers 1 and 2 Boulton Road are not hidden behind vegetation, they are set back behind a landscaped garden and give the impression of being nestled into the topography, with the street trees and vegetation, and the canopy trees within the remainder of the properties combining to create the bush environment that is automatically evident in the street. As soon as one ventures north from the two properties facing Canterbury Road, one does get the impression of leaving the main road conditions to enter the peaceful character of Boulton Road, as described in the previous Tribunal decision.

36 At present, the new double storey dwelling to the rear of 227 Canterbury Road is prominently in view from Boulton Street due to the lack of built form at the rear of the review site and the lack of trees on either site to filter the view. This dwelling, however, is perceived as incongruous within the Boulton Street environment rather than contributory.

37 The proposal for the rear of the review site will be similarly incongruous. It has not been designed to respond to the character sought or to integrate with the remainder of Boulton Road. It is for a new dwelling facing Boulton Road that is intended to dominate and stand proud in the street, rather than be subservient to vegetation.

38 While a lesser setback to a second dwelling on a corner site is permitted by the Scheme, this does not make it automatically acceptable. The decision guidelines of clause 55.03 (street setback objective) include consideration of any relevant neighbourhood character objective, policy or statement; the design response whether a different setback would be more appropriate taking into account the prevailing setbacks of existing buildings on nearby lots; the visual impact of the building when viewed from the street and from adjoining properties; and the value of retaining vegetation within the front setback.

39 The proposal includes a building setback of 4.5 metres, however the porch element is a prominent feature of the design, and sits 3 metres from the frontage, rising to a height of 4.5 metres. The front wall of the upper storey is set back only 1.5 metres behind the wall of the ground floor level below. As a result, the double storey form will be clearly evident and contribute to the prominence of the built from within the streetscape. The double storey element is excessive given that over half of it is a void space that brings the second storey forward on the site and enhances its dominance in an area where the Scheme is seeking the opposite. The design of the carport attached to the dwelling also serves to promote the dominance of the building form.

40 The visual impact will be starkly different to the remaining dwellings in the street, in terms of setback, design and form. Having regard to the character sought to be achieved within the SLO2, the development is not compatible with the character of the area, does not retain an inconspicuous profile and does not constitute a sympathetic building within an envelope, which ensures the maintenance of a tree-dominated landscape.

41 The dwelling facing Canterbury Road is already existing, and it is the case that canopy tree planting within the front setback will allow this section of the review site to contribute to the character of the area. However, the northern section of the site is arguably the most sensitive, as it is closest to the dwellings fronting Boulton Road and the proposed dwelling facing Boulton Road will form part of the character of this street. It is in this section that it is most important that the preferred character be considered and achieved.

42 However, the carport is proposed to the north, and an easement exists along the northern boundary. There is, therefore, very little planting proposed within the northern aspect that would serve to contribute to the preferred character or serve to screen or reduce the dominance of the proposed building. There is one canopy tree proposed to be planted in the north east corner of the site, within the private open space for that dwelling, which will provide amenity to that dwelling and possibly assist to screen the double storey dwelling at 227 Canterbury Road but will not make a significant contribution to the character of Boulton Street.



43 While two trees are proposed in front of the dwelling, one of which is a large tree of the type sought by the SLO2, the large tree is located in front of the south west corner of the dwelling. The limited setbacks to the rear, eastern boundary, also do not provide space for canopy trees to be planted behind the dwelling, which may have, in time, softened the building form.

44 The decision guidelines of the SLO2 include consideration of whether the setbacks are sufficient to provide for landscaping, whether the 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 and 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.

45 While the numerical requirements for trees can be met (noting that there were many questions during the hearing about whether the trees proposed could practically grow to a height of 15 metres), the majority of large trees are proposed within the front setback of the existing dwelling, facing Canterbury Road. The existing dwelling is, in many ways, neutral within the landscape. It is not particularly large or dominant and does not offend the bush character. It does not particularly contribute to it, either, and any planting in front of or around this dwelling would be a welcome contribution to the preferred character of the area and could be undertaken at any time.

46 The remainder of the site also does not provide a contribution to the bush environment but does not currently detract from it, either. The proposed dwelling, however, will face Boulton Road and would have a significant impact on the character of Boulton Road.

47 While the planting sought by the decision guidelines may be able to be met on the review site, this must be considered in light of the other decision guidelines. Planting is expected to work with the other guidelines in ensuring that buildings and works retain an inconspicuous profile and do not dominate the landscape. This is simply not achieved by this proposal, despite the fact that the site coverage is low and garden area is high, and other numerical requirements of the zone, overlay and clause 55 are met.

48 The proposal currently before the Tribunal does not provide an acceptable response to its Scheme or site context.

49 The design response is also constrained by the decision to retain the existing dwelling on the review site. I note that several applications were made with respect to constructing additional dwellings at 1 Boulton Street and were unsuccessful. It was only when the applicants' proposed removal of the existing dwelling and offered building envelopes that would allow for two new dwellings with space available for landscaping that was consistent with the preferred character, that a permit for subdivision was issued.



50 There are alternative design approaches that could be considered if the existing dwelling were to be removed, which would enable efficient use of the site in a manner that is consistent with the character clearly articulated through the combination of the zone, overlay and planning policies within the Scheme.

## **CONCLUSION**

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

Judith Perlstein

**Member**

