VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P381/2020  Permit Application no. P818/2019 |

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| APPLICANT | Mr Martin Skeinke |
| responsible authority | Banyule City Council |
| SUBJECT LAND | 44 Wahroonga Crescent, Greensborough |
| WHERE HELD | Melbourne |
| BEFORE | Michael Nelthorpe, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 18 August 2020 |
| DATE OF ORDER | 19 August 2020 |

# Order

1. In application P381/2020 the decision of the responsible authority is set aside.
2. In planning permit application P818/2019 a permit is granted and directed to be issued for the land at 44 Wahroonga Crescent, Greensborough in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:

* Development of two (2) dwellings on a lot; and
* Associated buildings and works within the canopy dripline of trees protected under the Design and Development Overlay – Schedule 8

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| Michael Nelthorpe |  |  |
| **Member** |  |  |

# Appearances

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| For applicant | Mr Mark Waldon, town planner of St-wise Pty Ltd. He called the following witness:  Mr Robert Thomson, landscape architect of habitat – landscape and environmental design consultants. |
| For responsible authority | Mr Richie Dean, development planner. |

# Information

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| Description of proposal | Two dwellings |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit. |
| Planning scheme | Banyule Planning Scheme |
| Zone and overlays | Neighbourhood Residential Zone Schedule 3  Design and Development Overlay Schedule 8  Vegetation Protection Overlay Schedule 1  Development Contributions Overlay Schedule 1 |
| Permit requirements | Clause 32.09-6: to construct two or more dwellings on a lot; and  Clause 43.02-2: to construct a building or construct or carry out works within the dripline of existing trees. |
| Relevant scheme policies and provisions | Clauses 11, 12, 15, 16, 21.04, 21.06, 22.02, 22.05, 32.09, 42.02, 43.02, 45.06, 52.06, 55, 65 & 71.02. |
| Land description | This rectangular site is located mid-block on the east side of the street. It has a 16.76 metre frontage, a 38.96 metre depth and an area of 650 square metres. A two-storey dwelling is sited at the rear with an inground swimming pool in front. |

# Remarks

1. The applicant seeks a review of the council’s decision to refuse to grant a permit for two dwellings at 44 Wahroonga Crescent, Greensborough.
2. The council’s primary grounds are that there is inadequate space for large and medium canopy trees in the proposal, and that excavation associated with Dwelling 2 is likely to affect the health of a mature Sydney Blue Gum on the neighbouring property to the north.
3. It says that local housing policy for Incremental change areas and local neighbourhood character policy for Semi-Bush areas justify its decision. It accepts that the dwellings will sit below the neighbourhood’s tree canopy but says the lack of space for new planting means that this canopy will not be enhanced. As such, the proposal will not contribute positively to the neighbourhood’s preferred character. A second consequence is that views of the new dwellings from the street and neighbouring properties will not be softened.
4. After reviewing the plans and hearing submissions and evidence, I found that the council’s grounds were not made out. I gave my reasons at the time. A summary of these reasons follows:
5. Mr Thomson persuades me that the two large canopy trees he has selected for the frontage have adequate space to grow. He cites numerous situations where large canopy trees grow to maturity in far less space than the 90 square metres sought by local neighbourhood character policy. These include street trees throughout metropolitan Melbourne.
6. He acknowledges that the northernmost of these trees will grow more slowly than its companion as it will compete for moisture and nutrients with the existing eucalypt on the property next door. However, he expects it will reach its mature height in time. I accept this evidence.
7. He also persuades me that the five medium canopy trees he has selected will grow satisfactorily in the space that is available. Once more, he cited numerous situations where he had used the selected species in similar spaces.
8. His evidence combined with my observations of the siting of canopy trees in Melbourne’s middle ring suburbs satisfies me that the proposed landscaping will contribute to the neighbourhood’s preferred character if it is reasonably maintained.
9. Mr Waldon’s submissions and photographs satisfactorily address the council’s concerns about the health of a mature Sydney Blue Gum on the neighbouring property to the north. It transpires that no additional excavation in the Tree Protection Zone of this tree is required because the site was cut when the existing house was constructed.
10. I accept that some pruning of this tree’s canopy will occur due to the siting of Dwelling 2. I am satisfied that the amenity value of this tree will be retained despite this pruning.
11. Otherwise, the proposal’s design respects the neighbourhood’s character because its architecture and materials are conventional.
12. For these reasons, I find that the grant of a permit is warranted.

## What conditions are appropriate?

1. The applicant accepts the draft conditions circulated by the council with one addition, being that the design of the footings of Dwelling 2 is overseen by the consulting arborist. This can only occur once the driveway and associated paving is removed. This requirement is made in Condition 9(c).
2. I have replaced draft condition 1(c) with a condition requiring a reduction in the height of the southern boundary fence at the frontage to 900mm to provide adequate sight lines for vehicles exiting the property.
3. I have added the phrase ‘to the satisfaction of the responsible authority to the conditions on Tree Protection where appropriate.
4. I have replaced the permit expiry condition with the condition preferred by the Tribunal.

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| **Michael Nelthorpe** |  |  |
| **Member** |  |  |

# Appendix A – Permit Conditions

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| Permit Application No | P818/2019 |
| Land | 44 Wahroonga Crescent, Greensborough |

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| What the permit allowS |
| In accordance with the endorsed plans:   * Development of two (2) dwellings on a lot; * and associated buildings and works within the canopy dripline of trees protected under the Design and Development Overlay – Schedule 8 |

## Conditions

1. Before the development permitted by this permit starts, amended plans to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions. The plans must be generally in accordance with the advertised plans submitted with the application but modified to show:
   1. Dwelling 1 and 2 storage sheds relocated outside of the TPZ area of tree #5;
   2. All existing and/or proposed retaining walls shown on site plans;
   3. a reduction in the height of the southern boundary fence at the frontage to 900mm to provide adequate sight lines for vehicles exiting the property;
   4. Gas and water meters to be sited or screened to minimise visibility from the public realm and neighbouring properties;
   5. The mail boxes located in accordance with Australia Post guidelines;
   6. A schedule of external building materials and colours, including details of cladding, roofing and driveway materials. Driveways must be finished in muted tones;
   7. All sustainable design features indicated in the submitted Sustainable Design Assessment (SDA). Where sustainable design features outlined in the SDA cannot be visually shown, include a notes table providing details of the requirements (i.e. energy and water efficiency ratings for heating/cooling systems and plumbing fittings and fixtures, etc.);
   8. The Tree Preservation Fencing in accordance with Condition 9 of this permit;
   9. Engineering plans showing a properly prepared design with computations for the internal drainage and method for of disposal of stormwater from all roofed areas and sealed areas including:
      1. The use of an On-site Stormwater Detention (OSD) system;
      2. The connection to the Council nominated legal point of discharge;
      3. The outfall drainage works necessary to connect the subject site to the Council nominated Legal Point of Discharge;
      4. All drainage plans must show for Trees #1, #2, #4 & #5: The Tree Number; Structural Root Zone (SRZ) radius; and the Tree Protection Zone (TPZ) radius, each as detailed and calculated in the Arboricultural Report (authored by All Tree Consulting Services – dated 5/9/2019).

### General

1. The development as shown on the endorsed plans or described in the endorsed documents must not be altered or modified except with the written consent of the Responsible Authority.
   1. Unless otherwise agreed in writing by the Responsible Authority the development permitted by this permit must not be commenced until:
   2. The tree protection measures required by Condition are installed to the satisfaction of the Responsible Authority.
2. The necessary approvals and associated fee for the removal and replacement of any existing street trees if applicable, must be obtained and paid to the Responsible Authority (Banyule Tree Care Department).
3. Unless otherwise agreed in writing by the Responsible Authority the development permitted by this permit must not be occupied until the development has been completed to the satisfaction of the Responsible Authority in accordance with the permit and endorsed plans (including, but not limited to built form and layout, parking, landscaping, drainage, street numbering, replacement of street trees).

### Car Parking / Access

1. Areas set aside for the parking of vehicles together with the aisles and access lanes must be properly formed to such levels that they can be utilised in accordance with the endorsed plans and must be drained and provided with an all-weather seal coat. The areas must be constructed, drained and maintained in a continuously useable condition to the satisfaction of the Responsible Authority.
2. Areas set aside for the parking and movement of vehicles as shown on the endorsed plans must be made available for such use and must not be used for any other purpose.
3. Vehicular access or egress to the subject land from any roadway or service lane must be by way of a vehicle crossing constructed in accordance with Council’s Vehicle Crossing Specifications to suit the proposed driveway and the vehicles that will use the crossing. The location, design and construction of the vehicle crossing must be approved by the Responsible Authority. Any existing unused crossin must be removed and replaced with concrete kerb, channel and nature strip to the satisfaction of the Council prior to occupation of the building. All vehicle crossing works are to be carried out with Council Supervision under a Memorandum of Consent for Works which must be obtained prior to commencement of works.

### Tree Protection / Landscaping

#### No additional tree removal

1. Except with the further written consent of the Responsible Authority, no vegetation (other than that indicated on the endorsed plan or exempt from planning permission under the provisions of the Banyule Planning Scheme) shall be damaged, removed, destroyed or lopped.

#### Tree Preservation Zones

1. Unless otherwise agreed in writing by the Responsible Authority, prior to the commencement of works on the site Tree Preservation Zones and associated fencing must be established around Trees #1. #2, #4 and #5. *At least 14 days prior to the commencement of works you must provide a ‘Statement of Compliance’ which must include photographic evidence of the below requirements. This correspondence must be sent to enquiries@banyule.vic.gov.au*. Once installed to the satisfaction below the Tree Preservation Zones must be maintained until the conclusion of works to the satisfaction of the Responsible Authority, and must meet the following requirements:
   1. Tree Preservation Zones must be provided in the following trees to the satisfaction of the Responsible Authority:
   * Tree #4 to the extent of the calculated Tree Protection Zone (TPZ);
   * Neighbouring Trees #1, #2 4, & #5 to the extent of the calculated Tree Protection Zone (TPZ) where it occurs within the subject Land (not obstructing a footpath or cross-over).
   1. Where there are approved works within a TPZ, it may only be reduced to the required amount by an authorised person, only during approved construction within the TPZ and must be restored in accordance with the above requirements at all other times.

#### Driveway Removal

* 1. The removal of any section/s of the existing driveway and associated paved areas must be undertaken under the supervision and direction of the project arborist where those sections occur within the TPZ of Trees #1 and #5 to the satisfaction of the responsible authority.
  2. The exposed areas must be mulched with a 75mm layer of coarse grade composted woodchips with rumble strip boards placed on top, all to the satisfaction of the responsible authority . These works must be maintained until such time as the treatment approved for that section is installed.

#### Design of footings for Dwelling 2

* 1. The design of footings for Dwelling 2 must be approved by the consulting arborist to the satisfaction of the responsible authority. This process must occur after the existing driveway and associated paved areas are removed in accordance with Condition 11 of this permit.

#### Weed control

* 1. Any weeds located within the Tree Preservation Zone are to be removed and the area mulched with 100mm of composted coarse grade woodchips to the satisfaction of the Responsible Authority.

#### Protective fencing

* 1. Protective fencing must consist of chain wire mesh panels held in place with concrete feet. Fencing must comply with Australian *Standard AS 4687-2007 Temporary fencing and hoardings* to the satisfaction of the Responsible Authority.

#### Signage

* 1. Fixed signs are to be provided on all visible sides of the Tree Preservation Fencing, stating “Tree Preservation Zone – No entry without permission from the City of Banyule” to the satisfaction of the Responsible Authority.

#### Irrigation

* 1. The area must be irrigated during the summer months with 10 litres of clean water for every 1 cm of trunk girth measured at the soil / trunk interface on a monthly basis during summer (or a percentage thereof equivalent to the percentage of TPZ area occurring within the subject site) to the satisfaction of the Responsible Authority.

#### Access to Tree Preservation Zone

* 1. No persons, vehicles or machinery are to enter the Tree Protection Zone except with the consent of the Responsible Authority;
  2. No fuel, oil dumps or chemicals are allowed to be used or stored within the Tree Preservation Zone and the servicing and re-fuelling of equipment and vehicles must be carried out away from the root zones to the satisfaction of the Responsible Authority;
  3. No storage of material, equipment or temporary building is to take place within the Tree Preservation Zone to the satisfaction of the Responsible Authority;
  4. Nothing whatsoever, including temporary services wires, nails, screws or any other fixing device, is to be attached to any tree to the satisfaction of the Responsible Authority.

#### Ground Protection

* 1. A permeable membrane beneath a layer of mulch or crushed rock below rumble boards must be laid down where the tree protection zone occurs outside the fenced area detailed in Condition 9 (a) to the satisfaction of the Responsible Authority. Rumble boards should be of a suitable thickness to prevent soil compaction and root damage. Ground protection must only be removed once all buildings and works have been completed.

Requests for consent of the Responsible Authority (City of Banyule) pursuant to this Condition should be directed to Council’s Arborist – Development Planning on 9457 9808. Consent for the conduct of further works within a Tree Protection Zone, where granted, may be subject to conditions. Such conditions may include a requirement that:

* + Any further works that are approved are to be supervised by the project arborist, and a written component may be required also;
  + All root excavation be carried out by hand digging or with the use of ‘Air-Excavation’ techniques;
  + Canopy and Limb protection is provided in accordance with the guidelines detailed in AS4970-2009 *Protection of Trees on Development Sites* or other conditions, as relevant, to ensure the ongoing health and stability of the subject trees.
  + Any excessive impacts on the canopies and/or roots of trees located on or adjoining property may trigger the need for a Section 72 Amendment application in regard to the design of built-form and/or landscaping.

#### Tree Pruning

1. Prior to the commencement of works, the project arborist must determine the canopy impact to trees on or adjoining the subject site that are shown to be retained on the endorsed plans in regards to any pruning required to enable clearance from the proposed Buildings and Works (including any temporary scaffolding requirements), and advise council’s Development Planning Arborists via email to enquiries@banyule.vic.gov.au marked “Attention - Development Planner” and including the planning application number. Following written approval from the Responsible Authority, all tree pruning must then be carried out by the suitably qualified project arborist (AQF Level 3) in accordance with Australian Standard *AS4373-2007 Pruning of Amenity Trees*, and must be restricted to the removal of no greater than 15% of the total live canopy of individual trees unless otherwise agreed in writing by the Responsible Authority.

#### Underground Services

1. Any underground services installations within the calculated Tree Protection Zone of any retained tree must be bored to a depth of at least 600mm. Any excavation within the calculated TPZ of a retained tree required for the connection of services must be:
   1. Undertaken after written approval is received from the Responsible Authority; and,
   2. Undertaken by hand or by approved non-destructive techniques suitable in the vicinity of trees under the supervision of the project arborist.

#### Fencing

1. Where fencing is proposed within the TPZ of any neighbouring/retained tree, any excavations for posts must be undertaken by hand under the supervision of the suitably qualified project arborist (AQF Level 5). Final post locations must be flexible so they can be set away from any roots greater than 25mm in diameter. No roots greater than 25cm in diameter can be severed as part of the fence construction unless with the written consent of the Responsible Authority.

### Arborist supervision

1. Any root severance within the TPZ must be undertaken by a project arborist to their satisfaction using a clean sharp and sterilised tree root pruning equipment in accordance with Australian Standard AS4373-2007 *Pruning of Amenity Trees.* There must be no root pruning within the Structural Root Zone. The project Arborist must ensure that any impact resulting from endorsed buildings and works does not adversely impact the health and or stability of any retained tree now or into the future. The project arborist and builder must ensure that TPZ Fencing Conditions are being adhered to throughout the entire building process, including site demolition, levelling and landscape works to the satisfaction of the Responsible Authority.

### Maintenance of landscaping

1. Unless otherwise agreed in writing by the Responsible Authority, the landscaping areas shown on the endorsed plans must be used for landscaping and no other purpose and any landscaping must be maintained to the satisfaction of the Responsible Authority, including that any dead, diseased or damaged plants are to be replaced.

### Development Infrastructure Levy

1. Prior to the issue of a building permit for any building or any works approved by this permit, a Development Infrastructure Levy and a Community Infrastructure Levy must be paid to Banyule City Council. The amount of the levy for each charge unit must be calculated in accordance with Schedule 1 to the Development Contribution Plan Overlay.

### Time Limits

1. This permit as it relates to development (buildings and works) will expire if one of the following circumstances applies:
   1. The development is not started within two (2) years of the issue date of this permit.
   2. The development is not completed within four (4) years of the issue date of this permit.

In accordance with section 69 of the *Planning and Environment Act 1987,* an application may be submitted to the responsible authority for an extension of the periods referred to in this condition.

**End of conditions –**