

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P964/2018
PERMIT APPLICATION NO. 386/2016/03P

CATCHWORDS

Nillumbik Planning Scheme; high-density mixed-use development in a higher order activity centre; application of SLO in an activity centre; balance between urban consolidation and landscaping outcomes in an activity centre; compliance with discretionary height limits.

APPLICANT	G3 Projects Pty Ltd
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
REFERRAL AUTHORITY	Public Transport Victoria
RESPONDENTS	Friends of Nillumbik Inc, P Bores, C Quinlan, Eltham Community Action Group, S Dyet
SUBJECT LAND	22 Arthur Street & 25 Dudley Street, Eltham
WHERE HELD	Melbourne
BEFORE	Michael Deidun, Presiding Member Lorina Nervegna, Member
HEARING TYPE	Major Case Hearing
DATE OF HEARING	4-8 February 2019
DATE OF ORDER	22 February 2019
CITATION	G3 Projects Pty Ltd v Nillumbik SC [2019] VCAT 263

ORDER

1 Pursuant to section 127 and 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: Fieldwork Architects
- Drawing numbers: Project Area Summary, TP2-098 to TP2-105, TP2-198 to TP2-205, TP2-298 to TP2-305, TP3-100, TP3-101, TP4-100, TP5-100, TP6-100, TP6-200, TP6-201, TP6-300 to TP6-306
- Dated: 14 December 2018



- 2 In application P964/2018 the decision of the responsible authority is affirmed.
- 3 In planning permit application 386/2016/03P no permit is granted.

Michael Deidun
Presiding Member

Lorina Nervegna
Member

APPEARANCES

For applicant

Phil Bisset, Solicitor of Minter Ellison Lawyers. On day 3 Joachim Quino Holland, architect of Fieldwork, also made a submission and answered questions of clarification.

Mr Bisset called the following witnesses:

- Maughan Baston (town planner) of Urbis
- Brodie Blades (urban designer) of SJB Urban
- John Patrick (landscape architect) of John Patrick Landscape Architects
- Charmaine Dunstan (traffic engineer) of Traffix Group
- Michael Rogers (arborist) of John Patrick Landscape Architects
- Jan Talacko (sustainability) of Ark Resources
- Andrew Clarkson (visualisation) of Raw 3D

As none of the parties sought to cross examine Mr Clarkson, he was not called to give oral evidence.

For responsible authority

Jason Kane, Barrister by direct brief

For referral authority

No appearance

For respondents

Lynnsay Prunotto, Sue Dyet, Graham Fildes and Ms Bonja appeared on behalf of the Eltham Community Action Group on the various days of the hearing.

Sue Dyet also appeared in person.

H Haszler and Cindy Allen appeared on behalf of the Friends of Nillumbik Inc.

Pamela Bores and Carlota Quinlan both appeared in person.



INFORMATION

Description of proposal	Construction of two, six storey mixed use buildings, comprising apartments, office, shop, café and restaurant, above basement car parking
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. ¹
Planning scheme	Nillumbik Planning Scheme
Zone and overlays	Activity Centre Zone 1 Parking Overlay 1 Significant Landscape Overlay 1
Permit requirements	Clause 37.08-2 to use land within the Activity Centre Zone for a Section 2 use under the Schedule to the Zone, being a dwelling. Clause 37.08-5 and Clause 37.08-6 to construct a building and construct or carry out works on land within the Activity Centre Zone. Clause 42.03-2 to construct a building and construct or carry out works, and to remove, destroy or lop vegetation, on land to which the Significant Landscape Overlay applies. Clause 52.06-3 to reduce the standard car parking requirement.
Relevant scheme policies and provisions	Clauses 10, 11, 12, 15, 16, 17, 21, 22.07, 37.08, 42.03, 52.06, 52.34, 58, 65 and 71.02.
Land description	The parcel comprises two allotments, divided by a laneway. The lot at 22 Arthur Street has a frontage to Arthur Street of 19.69 metres, a sideage to Circulatory Road of 61.66 metres, a rear abuttal to a laneway and an overall area of around 1207 square metres. The lot at 25 Dudley Street has a frontage to Dudley Street of 19.28 metres, a sideage to Circulatory Road of 60.96 metres, and an overall area of around 1184 square metres. The lots are presently vacant, except for the presence of canopy vegetation.

¹ Section 4(2)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* states a failure to make a decision is deemed to be a decision to refuse to make the decision.



Tribunal inspection

The Tribunal inspected the site and surrounding area on 11 February, 2019.



REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 G3 Projects Pty Ltd (the ‘Applicant’) seeks a review of the failure of the Nillumbik Shire Council to refuse to grant a permit for the use and development of land at 22 Arthur Street & 25 Dudley Street, Eltham (the ‘review site’). Amended plans were circulated prior to the hearing. The application now proposes to use the land for dwellings, and construct two, six storey mixed use buildings, comprising office, café, restaurant and a shop on the ground floors, apartments on the levels above, and two levels of basement car parking in each building.
- 2 After the lodgement of the application for review the Council advised all parties that they oppose the grant of a permit based on 11 grounds. In response to the amended plans the Council modified their grounds in this proceeding. They remain opposed to the grant of a permit. Their grounds now address such matters as the scale, design and layout of the proposed building, its overall height, the lack of landscaping opportunities, and the protrusion of parts of the building onto adjoining Council land.
- 3 A number of nearby residents have lodged statements of grounds. In addition to the Council’s concerns, they raise concerns regarding the traffic and car parking impacts, the use of car stackers, and the potential risk of bushfire.
- 4 The issues or questions for determination are:
 - a. Is the proposal an appropriate built form response to its context?
 - b. Is the proposed vegetation removal acceptable?
 - c. Will there be any unreasonable off-site amenity impacts?
 - d. Is an appropriate level of internal amenity achieved?
 - e. Does the proposal appropriately provide for car parking and traffic movements?
- 5 The Tribunal must decide whether a permit should be granted and, if so, what conditions should be applied. Having considered all submissions and evidence presented with regard to the applicable policies and provisions of the Nillumbik Planning Scheme, we have decided to affirm the Council’s decision, and direct that no planning permit be granted. Our reasons follow.

² 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.



IS THE PROPOSAL AN APPROPRIATE BUILT FORM RESPONSE TO ITS CONTEXT?

- 6 In performing our decision-making task, we must be guided primarily by the content of the Nillumbik Planning Scheme, which in this instance provides a very detailed level of guidance, including through the following:
- a. Various policies at a State level from the Planning Policy Framework;
 - b. The Local Planning Policy Framework, including Clause 21.05-1 Settlement and Housing, and Clause 22.07 Eltham Town Centre Policy;
 - c. Schedule 1 to the Activity Centre Zone (ACZ1);
 - d. Schedule 1 to the Significant Landscape Overlay (SLO1); and,
 - e. Clause 58.
- 7 In the decision of *Eltham Outlook Pty Ltd v Nillumbik SC* [2017] VCAT 675 the Tribunal recently analysed to some depth the planning framework that applied at that time, and which largely continues to apply to this day.³ We will not seek to repeat that analysis here, but rather rely on it and repeat the following learnings from that analysis:

[26] We draw the following from this analysis of the Nillumbik Planning Scheme:

- The review site and surrounding precinct have been identified to play a particular role in providing additional housing;
- The additional housing that is encouraged is to provide a greater level of diversity, which provides support for an apartment style development;
- The level of encouragement for medium density housing, combined with the guidance on heights provided by the Activity Centre Zone, means that the Nillumbik Planning Scheme as a whole is encouraging built form that is taller and bigger than the surrounding housing stock;
- While achieving the encouraged scale, new development is to take on aspects of the surrounding character, particularly in regards to the materials used and the extent of landscaping;
- A high architectural quality and a high standard of urban design outcomes are expected;
- Poor design outcomes, such as where car parking dominates public views, blank facades are presented to the

³ We acknowledge that since that decision the Planning Policy Framework has been implemented through Amendment VC148. This amendment has not altered the policy encouragement for this activity centre location, and while there have also been other amendments to the Nillumbik Planning Scheme, none are of consequence to our decision in this proceeding.

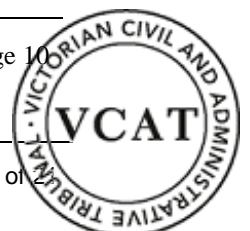


streets, and residential buildings take on a commercial appearance, are discouraged;

- Higher built forms are encouraged at the very periphery of the adjacent commercial land to the west, with buildings to respond to the topography of the land and a desire in reducing scale as one moves east towards the edge of the activity centre.

- 8 Of the planning framework that was analysed in the decision of *Eltham Outlook Pty Ltd v Nillumbik SC* [2017] VCAT 675 there are two facets which we wish to emphasise in terms of the context of the review site. The first is this site's position within the commercial core of the ACZ1 area. While the Eltham Activity Centre covers a broad area, the site that was subject to the decision of *Eltham Outlook Pty Ltd v Nillumbik SC* [2017] VCAT 675 was within a precinct identified for residential development. In contrast, the review site sits within a precinct identified as the commercial core of the activity centre, albeit on the very eastern edge of that core.
- 9 As a result of this designation a wider mix of uses are encouraged on the review site, and residential land uses are discouraged from occupying the ground floor of development. There was no criticism from any party at the hearing that the substituted plans have not resolved to an appropriate degree the provision of a range of commercial uses on the ground floors of both buildings, that will successfully activate the parts of the building that interact with the surrounding public realm. To the extent that Council was critical of the manner in which some elements of the basement level that presented at street level to both Arthur and Dudley Street as non-active frontages, we consider that to be a necessary result of the significant slope on the review site. Overall, we consider that this building has been designed in a manner to reasonably maximise the extent of active frontages presenting to the various public interfaces to the review site.
- 10 Also, the designation of the review site within the commercial core of the activity centre has an influence on the type of built form that can reasonably be expected on the review site. Land within the commercial core is provided with a discretionary height limit of 5 storeys, or 17.5 metres. The way that the height limits vary between the commercial core and the surrounding precincts to the south and east indicates that a future built form on the review site is intended to be a taller built form than that which will occur in the nearby residential precinct, though not considerably taller than that land in Precinct 2C that is provided with a 4 storey or 14.0 metre discretionary height limit. However, in undertaking the discretion to consider a taller building on the review site, it is important to also consider that the ACZ1 does not designate the review site as a key development site,⁴ and that the review site is on the edge of the commercial core, and as

⁴ As occurs on many other sites in the commercial core, as depicted on the Precinct Map on page 10 of ACZ1.



such the following guidance from ACZ1 may act to temper building heights in this location.

To ensure building heights, setbacks and form have regard to and seek to be compatible with the surrounding development and the character of the locality in which the development is situated.

To encourage buildings that present a cohesive appearance which relates to the current modest scale of the precinct, emphasises key entrances to the town centre and reflects the Eltham form and character.

- 11 The second facet which we wish to emphasise is the influence of the SLO1 over the review site, combined with what the ACZ1 says about landscaping outcomes. We agree with the submissions made by Council that it is quite unusual to have a Significant Landscape Overlay over the commercial core of a higher order activity centre. The intent of that overlay is not just to retain existing vegetation, but also to influence the landscape outcomes in new development. This intent is evident through the following objective:

To ensure that new development contributes to the achievement of the preferred character through additional landscaping, particularly canopy trees.

- 12 This intent aligns with the guidance provided by the ACZ1, which seeks:

To ensure that development sites with front, side or rear setbacks are extensively landscaped with indigenous vegetation so as to contribute to the Eltham form and character.

To ensure that any basements do not extend into landscaped areas which would prevent the planting of vegetation.

To recognise, protect, retain and enhance the contribution provided by canopy trees, particularly native trees, to the existing and preferred character of Eltham.

To ensure that the health of existing canopy trees is not unnecessarily jeopardised by buildings and works.

To ensure that new development contributes to the achievement of the preferred character through additional landscaping, particularly canopy trees.

- 13 We consider that these statements have particular relevance here, given the context of the review site abutting the residential component of the activity centre to its south and east, and considering the extent of landscaping achieved and approved in the nearby developments to the east and north-east of the review site.

- 14 These nearby developments provide significant landscaping opportunities, including to the interface to Circulatory Road. An existing townhouse development is found at 31 Dudley Street, on the opposite side of Circulatory Road from the southern half of the review site. This development is setback from Circulatory Road for the entire length of the

development, with some larger setbacks provided for the planting of canopy vegetation. Our inspection reveals a very different picture to that painted by Mr Blades, where in response to questions from the Tribunal he described the development at 31 Dudley Street as built sheer to Circulatory Road.

- 15 Another townhouse development is approved for 28 Arthur Street, which occupies the opposite side of Circulatory Road from the northern half of the review site. We have been provided with the endorsed plans for this development. They depict the provision of ground floor setbacks of between 1.55 and 3.0 metres from Circulatory Road, with a large rear setback provided to retain an existing tree. The endorsed landscape plans, while a little unclear due to the quality of the scanning and printing, appear to depict the planting of seven canopy trees and a range of other vegetation in the setback to Circulatory Road. The largest of these canopy trees is a Red Box gum tree in the north-western corner of that site. It is evident that this extent of landscaping appears on the endorsed plans due to changes required by way of an interim decision issued by the Tribunal in *Flory Pty Ltd v Nillumbik CC No.2* [2017] VCAT 252.
- 16 The final nearby development is the three and four storey apartment building approved at 26, 28 & 30 Pryor Street and 27 & 29 Arthur Street, in the decision of *Eltham Outlook Pty Ltd v Nillumbik SC* [2017] VCAT 675. The endorsed plans for this project, which is under construction at the time of this hearing, depict a range of setbacks to Circulatory Road which are unfortunately not dimensioned. However, it is clear that a range of setbacks are provided, including a very deep recess in each building, which provide setbacks of around 7.5 and 8.5 metres respectively from Circulatory Road, in order to plant canopy trees. In addition, a central break is provided between the two approved buildings which enable further planting of trees, and part of the southern building has been provided with setbacks to enable the protection of a large tree in Circulatory Road. The landscape plans show that this will allow the planting of nine canopy trees along the setbacks to Circulatory Road, in addition to the retention of the existing canopy tree.
- 17 Having now described both the physical and planning context of the review site, we come to assess the proposal that is before us. We need to acknowledge at the outset that the proposed development for the review site achieves many of the outcomes specifically sought by both the policy framework and the ACZ1. These include the activation of the three street frontages to each of the sites, the provision of a good range of commercial floor spaces, including office floor space, at the ground floor of the development, the provision of appropriate setbacks to both Dudley and Arthur Streets, the retention of native trees on the review site, and the achievement of additional housing in a well serviced location in a higher order activity centre.



- 18 The ACZ also contains a specific precinct objective for Precinct 1 as follows:

To ensure that new development does not unreasonably interrupt the canopy ridge line of Eltham and views to the west.

There was some discussion during the hearing about the design response in relation to this specific issue. Residents and ECAG submitted that the development did not achieve this objective and that the development would be highly visible from the Eltham Township and neighbouring residential areas. Mr Blades stated that the views from the west and Main Street would result in a higher degree of visibility from the west and in accordance with the future aspirations of the ACZ and this specific precinct objective. During the hearing we requested Council provide us with a topographical map of the site and surrounds showing the key characteristics of ridges and valleys to better understand the context of the precinct objective. The map provided shows a canopy ridge line westward beyond the Eltham rail reserve, which we find is the canopy ridge line in question. We disagree with all parties that the precinct objective refers to views from the west and find that the objective must be understood to refer to the canopy ridge line of Eltham located over Main Street and past the railway reserve. We find that the proposed built form would not unreasonably interrupt views in this direction due to the topography of the site, environs and the western ridge line.

- 19 Despite these positive attributes to the proposed development, we find there to be three elements of the proposed built form that sit in contrast to the clear guidance provided by the Nillumbik Planning Scheme, and the physical context of the review site. It is our finding that when combined, these three elements will produce a built form that is inappropriate for this location, and not appropriately responsive to the guidance provided by the planning framework. In short, it is our finding that because of these three elements, that a net community benefit will not be achieved by the proposed development of the review site.

Overall height

- 20 The first element is the proposed height of the two buildings. The starting point for a consideration of height is the guidance provided by the ACZ1 that this precinct has a discretionary height limit of 17.5 metres, or five storeys. In comparison, the proposed development of the review site adopts overall heights of between 19.24 and 21.28 metres for the Arthur Street building, and between 20.19 and 20.84 metres for the Dudley Street building. We arrive at these heights by comparing the overall heights of the roof ridges of each building, with the comparative natural ground level below each of those ridge points where they occur along the western elevation of the upper building form, as taken from the site survey plan provided at the hearing. As such, we have adopted the same methodology

as that employed by Ms Prunotto in her questioning of the architect Mr Holland, and by Mr Holland in his answers to Ms Prunotto's questions.

- 21 In addition to these heights, the proposed development will, in part, present as a six-storey built form, mainly due to the significant fall on the land.
- 22 As set out above, the height limits contained in the ACZ1 are discretionary, and therefore can be exceeded on this site and others within this precinct. However, we also consider that we should be cautious about approving a building that sits above the discretionary height limit. On this point we adopt the following remarks in the Tribunal decision of *Athedim (Vic) Pty Ltd v Moonee Valley CC* (No 2) [2010] VCAT 1091:

[11] It is rarely a case that the preferred maximum height of buildings within a particular precinct can be determined solely on the basis of objective considerations. In many cases the planning authority will have to form its own opinion as to the preferred outcome guided by objective considerations. In this case the DDO is an expression of the planning authorities (sic) judgement. However, because the process is not purely objective, it is often possible to form an opinion based on general amenity and urban design considerations that a higher building on a particular site would also be acceptable. Mr Shepherd and Mr Kelderman have formed just such an opinion in this case.

[12] The Tribunal must give effect to the DDO. Notwithstanding the fact that the preferred height within the subject DDO is a discretionary limit, the Tribunal must avoid decisions which in effect render the specification of a preferred height meaningless. I agree with Mr Holdsworth, there needs to be special circumstances which warrant a departure from the preferred maximum specified by the DDO.

- 23 Normally it would be unusual for a proposed development that exceeds a discretionary height limit by one storey, or up to 3.78 metres, to be assessed as having the potential of rendering the preferred height set out in a planning scheme as meaningless. However, we consider that to be a very real potential due to the physical context of the review site and surrounding activity centre. The review site sits at the very edge of the commercial core, adjacent to three storey forms in the residential precinct on the opposite side of Circulatory Road. The review site also sits topographically at the very highest point of land within the commercial core. We are concerned that the establishment of buildings of up to 21.28 metres in height above natural ground level at the highest elevation within this commercial core, may provide an impetus for taller buildings on larger parcels of land that exist on lots with a much lower elevation, away from the periphery of the commercial core precinct. If such an outcome prevailed, then it would potentially render the five storey preferred height limit within the commercial core of this activity centre as meaningless.



- 24 We also observe that the extent to which the proposed building on the review site sits higher than the preferred height limit, is not just a result of the significant fall on the review site. Even along the eastern elevation of the two proposed buildings, which sit along the boundary of the review site with the highest natural ground levels, the proposed buildings have maximum heights above the natural ground level of 18.93 metres for the Dudley Street building, and 19.24 metres for the Arthur Street building. We acknowledge that all of the heights which we have quoted so far in these reasons are measured to the top of the angled roof forms provided above the top floor of the building. We consider this to be an appropriate measuring point, given the frequency that those angled roof forms appear in a gable form as an extension of the wall heights along both the eastern and western elevations of the proposed two buildings, and the clear encouragement within the ACZ1 for pitched roof forms, which we consider must have been anticipated when the discretionary height limits were set for this activity centre.
- 25 Turning away from a purely numerical analysis and to a more qualitative one, we consider that the proposed height of the two buildings proposed for the review site will produce an undesirable built form outcome for this context. It will produce a built form that is overly dominant and tall for this interface location between the commercial core and the residential precinct of this activity centre. We do not regard that the phrases of ‘compatible height and form,’ and a ‘cohesive appearance,’ as found in the ACZ1, could reasonably be applied to the manner in which these two proposed buildings will sit adjacent to the emerging character of three and four storey forms that are found and approved in the residential precinct to the east of the review site. As a comparison, the proposed buildings on the review site will rise some 5.2 and 8.7 metres respectively taller than the approved developments at 28 Arthur Street, and 26, 28 & 30 Pryor Street and 27 & 29 Arthur Street. This is despite the fact that the review site is on significantly lower ground topographically, than those other nearby sites.
- 26 The proposed height of the two buildings proposed for the review site will also produce undesirable built form outcomes on views from the commercial core of the activity centre to the west of the review site. From these vantage points, the topography of this part of the activity centre plays a significant role in emphasising the height that is proposed for the review site, and the manner in which the proposed buildings on the review site will have a ‘towering effect’ over the remainder of the commercial core of the activity centre. While we acknowledge that future development within the commercial core of the activity centre will assist to hinder views to the proposed buildings on the review site, we do not consider that the proposed built form outcome to be achieved on the review site should rely on screening from other buildings in order to achieve an acceptable outcome.
- 27 Overall, we consider that the building height proposed for the review site will result in an unreasonably tall built form for this location, when

compared both to the existing physical context, and the likely future emerging character, for this activity centre.

Articulation of the built form

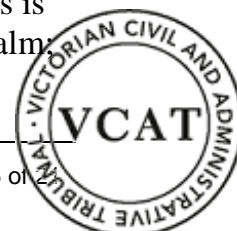
- 28 The second element of the proposed built form which we find unreasonable is the general lack of meaningful articulation within the eastern elevation of the proposed buildings. Much of the eastern elevation of the proposed buildings is proposed to be constructed along the eastern boundary of the review site, with setbacks of around 850 mm provided to the central stairwell, and setbacks of between 1.25 and 2.2 metres provided where each of the four balconies are positioned along the eastern elevation. As the balconies on each of the floors are positioned in an identical location one above the other, these recesses are uniform and repetitive throughout the entire height of the two proposed buildings. What occurs therefore is a very repetitive vertical arrangement of recesses and elements sheer to the eastern boundary of the review site, to the full height of the five storey form that is proposed to this elevation.
- 29 This extent of articulation emphasises the overall height and form of the proposed buildings and compares poorly with the extent of articulation provided in the constructed and approved three and four storey developments to the east and north-east of the review site. In the completed development at 31 Dudley Street we see a very high level of articulation provided both between the three floors of that development, but also within each of the floors. From the respective endorsed plans, we anticipate that a similarly high level of articulation will be achieved on the approved developments at 28 Arthur Street, and 26, 28 & 30 Pryor Street and 27 & 29 Arthur Street. While we accept that a development on a somewhat constrained⁵ site within the commercial core of the activity centre will likely have a reduced level of articulation compared to developments within a residential precinct, we consider that the differences in levels of articulation between these developments are quite stark, and will not assist the buildings proposed for the review site to sit comfortably within their context.
- 30 In this location, where the proposed building will sit quite exposed to the surrounding context, namely due to its sideage to Circulatory Road, we find that a greater degree of articulation in the built form is required in order to achieve an appropriate built form response to the emerging character in this part of the activity centre.

⁵ We acknowledge that the review site is constrained by the overall width of the site, the desire to retain existing canopy vegetation on the review site, and the desire to provide a setback to the western boundary to provide for the future equitable development of adjoining land to the west of the review site.



Landscaping

- 31 The final element of the proposed built form which we find inappropriate for this context is the extent of landscaping that is proposed for the review site, and in particular along the eastern interface, that is to Circulatory Road. We have already described in our reasons above the extent of landscaping that has been achieved in the nearby constructed and approved developments. In comparison, the proposed developments on the review site will provide landscaping along its eastern boundary, that is to the interface to the residential precinct of the activity centre, comprising a single Blackwood Wattle and three planter boxes for the Dudley Street building and a single Blackwood Wattle and six planter boxes for the Arthur Street building.
- 32 The proposed development for the review site anticipates the planting of additional landscaping within the public realm to Circulatory Road as part of the proposed development of the review site. Indeed, the landscape plan prepared by Mr Patrick details the nature of that landscaping that the Applicant proposes to undertake. While we agree that landscaping opportunities exist within the public realm adjacent to the eastern boundary of the review site, we consider that we need to assess this proposed development on the basis of the landscaping opportunities that are to be achieved within the boundaries of the review site itself. That is particularly the case in this dispute, where the Council opposes the proposed landscaping within the public realm that the Applicant wishes to undertake.
- 33 As such, we anticipate that the extent of landscaping proposed within the review site will fail to achieve many of the objectives for land within the ACZ1, including the following.
- To ensure that development sites with front, side or rear setbacks are extensively landscaped with indigenous vegetation so as to contribute to the Eltham form and character.
 - To recognise, protect, retain and enhance the contribution provided by canopy trees, particularly native trees, to the existing and preferred character of Eltham.
 - To ensure that new development contributes to the achievement of the preferred character through additional landscaping, particularly canopy trees.
 - To reinforce the indigenous planting regime within the Eltham.
- 34 It is the submissions of Mr Bissett and the evidence of Mr Blades and Mr Bastone that additional landscaping should not be sought for the review site, having regard to the guidance provided by the ACZ1, for the following reasons:
- a. The front setbacks specified within the ACZ1 are to be measured from the street kerb, which indicates that the setting of buildings is to partially rely on landscaping within the public and private realm.



- b. The objectives and guidelines for Precinct 1, commercial core do not include any statements regarding landscaping, except for in open at grade car parking areas;
- c. The general objective that seeks that landscaping be provided within setbacks is not applicable to the eastern boundary of the review site as there are no setbacks required to this boundary under the provisions for this precinct;
- d. The commercial core of the Eltham Activity Centre is not currently characterised by landscaped setbacks, or canopy trees;
- e. The proposed development should not be required to reflect the landscaping achieved on developments within the residential precinct, where specific objectives and guidelines related to landscaping apply;
- f. The objectives of Clause 22.07 Eltham Town Centre Policy include:

To optimise the development potential of the centre by ensuring that individual sites are developed to their highest and best use in accordance with the Eltham Major Activity Centre Structure Plan (August 2004)

35 We are not persuaded by the submissions and evidence for the following reasons.

- a. We do not accept that the intention for front setbacks to be measured from the kerb is an indication that developments can rely almost solely on planting within the private realm to achieve an appropriate landscape outcome. Such an outcome is inconsistent with the landscaping objectives set out in the ACZ1. In any case, Circulatory Road is a sideage, not a frontage, and so there is no specific guidance provided in ACZ1 on the desired setback from the kerb in Circulatory Road.
- b. Despite the absence of specific statements regarding landscaping in the objectives and guidelines for Precinct 1, we consider that when read as a whole, the ACZ1 still provides clear objectives for the establishment of landscaping throughout the activity centre. We note that while the Eltham Activity Centre covers a wide expanse of land, that the Activity Centre Zone only applies to Precincts 1 to 4 of the activity centre, and as such the objectives, including those promoting the achievement of landscaping, must be read as specifically applying to these precincts. We read the objectives and guidelines found in Precincts 2, 3 and 4 as supplementing the general objectives for the whole of the land with ACZ1, and explaining how landscaping is to contribute to the future character of those precincts. We do not read the presence of those specific guidelines in the other precincts, and the absence of any specific



guideline in Precinct 1, as an indication that no or limited landscaping is sought in the commercial core.

- c. The four precincts that comprise the land within the ACZ1 are each only provided with specified front setbacks. We do not anticipate that this means that landscaping is only sought in the front setback in every precinct. If that were the case, then no landscaping would be required to any of the sideages provided by the constructed and approved developments to Circulatory Road. It is evident that that is not the manner in which the Council, the Tribunal, and a number of expert witnesses have previously interpreted the content of the ACZ1. Also, we do not consider that the absence of a marked 'Landscape Setback' on the precinct map for Precinct 1, as is found on the other precinct maps, is an indication that no landscaping is sought within the commercial core. When read as a whole, we consider it evident that landscaping is sought to be achieved in a much broader manner than simply where the green 'Landscape Setback' lines are found in Precincts 2, 3 and 4.
- d. We accept that the existing pattern of development in the commercial core, does not comprise any meaningful landscaping within the private realm. However, we also observe that the existing development of land within the commercial core has occurred prior to the application of the SLO. As such, this is the first opportunity for the SLO to influence the form of development, and the extent of landscaping to be achieved, within the commercial core. It is important for us to understand that what is sought for this land is a future emerging character shaped by the existing planning controls, rather than a repeat of the existing character of this commercial core. For this reason, we find that a new approach to landscaping within the commercial core should be pioneered by the review site.
- e. We accept the submissions that the landscaping outcomes that is to be achieved on the review site should not necessarily repeat those that have been achieved on land to the east within the residential precinct. However, we do not accept that such a principle should be applied in a manner so as to achieve almost no landscaping within the review site along its eastern interface. We consider that a balance should be struck, where landscaping opportunities are provided within the boundaries of the review site to achieve a landscaped presentation to this interface, but which might be less generous than the landscaping opportunities that have been created and approved on the nearby developments within the residential precinct.
- f. Again, we accept the submissions and evidence that the planning controls clearly intend to optimise development of land within the activity centre. However, we observe that this objective has not



been interpreted as resulting in the absence of landscaping opportunities on the constructed and approved developments in the adjacent residential precinct of the activity centre. Nor do we consider it appropriate for this objective to be applied in a manner which negates the landscaping outcomes that are clearly sought by the planning framework as a whole, in the commercial core.

36 Schedule 1 to the SLO seeks to achieve the following.

Future development should thus seek to strike a balance between the retention and planting of vegetation and the accommodation of higher intensity development.

37 Having regard to the analysis set out above, we do not consider that the future development of the review site has achieved the appropriate balance between the planting of vegetation on the review site and the accommodation of higher intensity development. Indeed, aside from the retention of two existing trees centrally located on the review site, we consider that the outcome sought to be achieved on the review site is too strongly weighted in favour of higher intensity development, and against the planting of new vegetation. A more appropriate balance would see the achievement of more meaningful landscaping opportunities within the boundaries of the review site, and particularly along the eastern boundary where the site interfaces with the residential precinct, and also interfaces with constructed and approved developments that will achieve a very generous landscape setting.

38 It is for these reasons that we find that the proposed development will achieve an unreasonable and an inappropriate built form outcome for the review site, that is not an appropriate response either to the physical context of the review site, or the clear guidance provided by the relevant parts of the Nillumbik Planning Scheme. A more responsive and appropriate development for the review site will be one that complies more closely with the preferred height limit of 17.5 metres, which provides a greater level of articulation and depth to the eastern façade of the proposed buildings, and which provides landscaping opportunities along the eastern boundary. We do not consider that such outcomes can be achieved by way of conditions on a planning permit.

39 While we acknowledge that there are a number of very clear benefits associated with the proposed development of the review site, we do not consider that those benefits could outweigh the disbenefits which we have identified in these reasons, in order to achieve a net community benefit for the proposed development. It therefore follows that we find, having regard to the proposed built form and landscape outcomes on the review site, that we need to affirm the Council's decision, and direct that no planning permit be granted.

Other matters

40 Because of our findings in relation to the matters set out above, we will not proceed to provide full reasons in relation to the other matters in dispute in this proceeding. However, we would like to record the following brief findings, in order to assist the parties in the event that there is a further development proposal for the review site.

- a. With respect to the materials and finishes proposed, although there was much discussion from the residents that the palette proposed did not reflect the earthy muted tones Council policy sought, we find the colour selection appropriate. The proposed light cream brick presented to us in the hearing had sufficient grey, muddy hues to give an earthy appearance and the darker brick would appear in contrast as a complementing element, remembering that greys are also found in earthy tones and in the natural environment. The use of black textured external cladding could be revised for a dark grey finish in context of the ‘Eltham palette,’ thereby presenting as slightly less stark and heavy elements. The mesh screens proposed as a climbing frame for the vertical external stairs would add interest and would become a positive feature of the facades to Circulatory Road by softening the interface with a vegetated vertical element.
- b. While to date we have focused on the extent of new landscaping opportunities created within the review site, the SLO1 also seeks the retention of existing significant trees on the review site, and requires a permit for the removal of significant trees. The application that is before us seeks to retain trees 8 and 12 on the review site, and remove all of the remaining significant trees that currently occur on the review site. While Mr Rogers provided arboricultural evidence in relation to trees 8 and 12, he did not provide any evidence that supports the proposed removal of other trees, and could not answer the Tribunal’s questions in relation to those trees. As such, the only material that we have in relation to the trees that are proposed to be removed, is an earlier arborist report prepared by the Applicant, and referral comments from the Council’s arborist.

In addition to Trees 8 & 12, on site tree 11 appears as a healthy and appropriate tree to consider for retention. While the residents also identified other much younger trees as potential options for retention on the review site, we consider that these younger trees do not currently provide the level of landscape significance, that could outweigh the impact that would be caused to the development potential of the review site.

The arborist report identifies tree 11 as a Yellow Box of good health and structure, of significant tree significance and with a high



retention value, and a useful life expectancy in excess of 20 years. It also notes that the tree protection zone for tree 11, sits largely within the tree protection zone for tree 12.

We note that the Council does not oppose a planning permit being granted for trees that are proposed to be removed from the review site, including tree 11. However, the referral comments from Council's arborist has not assessed the trees that are proposed to be removed, and no reasons were given by the Council as to why a planning permit should be granted.

For these reasons we consider that a future application for the review site should consider the retention of tree 11, in addition to trees 8 and 12.

- c. While the Council is accepting of the proposed rate of provision of car parking on the review site, the residents oppose the proposal that short term car parking associated with the commercial uses on the review site, are provided in the surrounding activity centre. We are persuaded by the evidence of Ms Dunstan that the surrounding activity centre can and should accommodate the short-term car parking associated with these commercial land uses. Car parking surveys provided by Ms Dunstan demonstrate the capacity for this activity centre to provide such short-term car parking. Further, we agree that it is undesirable for casual visitors to the review site to utilise the predominantly stacker car parking provided in the basement, as opposed to the broad extent of car parking that is available at grade in this activity centre.
- d. During the course of the hearing there was some discussion as to whether the extent of car parking provided on site should be reduced to that required by staff to the commercial uses, as demonstrated by empirical evidence. We consider it desirable that a level of car parking be provided on site, to enable the range of commercial uses that are proposed, to be converted to office floor space, without the creation of an offsite demand for long term car parking. As such, we consider that any future proposal for the review site, should provide a level of car parking on site to enable such a transition in land use is to occur without creating a deficit in long term car parking spaces.
- e. Mr Haszler submits that the proposed development will unreasonably increase traffic levels within the Eltham Activity Centre. One of the objectives that sits at the core of the statewide policy to encourage urban consolidation within activity centres, is that these locations are generally the best available to encourage people to not use cars, but rather shift transport modes to public transport. We consider that to be a very real potential for the future development of the review site, given the easy access to a range of



services and facilities within the activity centre, including a number of full range supermarkets, and the easy walking distance to bus services and the Eltham train station. While the proposed development of the review site would also result in a level of increased traffic to the surrounding road network, we consider that must be a reasonable anticipation from the new development that is strongly encouraged at both a State and local level in this activity centre location.

- f. A number of the residents also oppose the provision of car parking via stackers within the proposed buildings. The use of stackers is explicitly an acceptable manner in which to provide car parking, under Clause 52.06-9 of the Nillumbik Planning Scheme. We also are of the view that the car stackers provided for long term car parking on site are likely to be utilised, given the strong demand for long term car parking that already exists in this surrounding context.
- g. The Council is opposed to parts of the balconies to various apartments protruding into the airspace above Circulatory Road, being land owned by Council. The Tribunal is not opposed to such a potential outcome, and considers that ultimately it is a matter subject to the approval of Council. We found the approach taken in the amended plans, to have balconies partly protruding into the road airspace, which would still meet the required minimum size and dimensions if they had to be contained within the boundaries of the review site, to be a reasonable approach.

CONCLUSION

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

Michael Deidun
Presiding Member

Lorina Nervegna
Member

