VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P11680/2021Permit Application no. 1007/15-3 |
| **CATCHWORDS** |
| Stonnington Planning Scheme; Amendment to permit pursuant to section 72 *Planning and Environment Act 1987*; Application pursuant to section 77 of the *Planning and Environment Act 1987*; Neighbourhood Residential Zone Schedule 4 (NRZ4); Neighbourhood Character Overlay Schedule 1 Hedgeley Dene Precinct (NCO1); Retrospective approval for landscaping works already undertaken; Approval for new garage; Impacts on neighbourhood character; Acceptability.  |

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| **applicant** | Paul Salter |
| **responsible authority** | Stonnington City Council |

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| **Respondents** | Judith and Geoffrey Hindle |

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| SUBJECT LAND | 13 Glenbrook Avenue MALVERN EAST VIC 3145 |
| HEARING TYPE | Hearing  |
| DATE OF HEARING | 24 May 2022 |
| DATE OF ORDER | 16 June 2022 |
| CITATION | Salter v Stonnington CC [2022] VCAT 670 |

# Order

1. In application P11680/2021 the decision of the Responsible Authority is affirmed.
2. Planning permit No.1007/15-3 must not be amended.

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| J A Bennett**Senior Member** |  |  |

# Appearances

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| For Paul Salter | Ms Annabel Paul, Town Planner of AP Planning.  |
| For Stonnington City Council | Mr Edward Wilkinson, Town Planner. |
| For Judith and Geoffrey Hindle | Ms Judith Hindle.  |

# Information

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| Description of proposal | Amend an existing permit to allow construction of a garage, removal of trees, removal/construction of brick paths and construction of new retaining walls. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the decision to refuse to amend a permit.  |
| Planning scheme | Stonnington Planning Scheme |
| Zone and overlays | Neighbourhood Residential Zone – Schedule 4 (**NRZ4**).Design and Development Overlay – Schedule 4 (**DDO4**).Neighbourhood Character Overlay – Schedule 1 Hedgeley Dene Precinct (**NCO1**). |
| Permit requirements | Clause 43.05-1 (demolish or remove a building, construct a building or construct or carry out works and remove, destroy or lop a tree 5 metres or more in height in NCO1). |
| Relevant scheme policies and provisions | Clauses 21.05, 21.06, 22.23, 43.05, 54, 65, and 71.02. |
| Land description | The dwelling is located on the western side of the street and renovations have been taking place following the issuing of a permit at the direction of the Tribunal in 2017.  |
| Tribunal inspection | An unaccompanied inspection of the site and locality took place on Monday 30 May 2022. |

# Reasons[[1]](#footnote-1)

## Seeking approval for a garage and landscaping

1. The application seeks to amend an existing permit to allow construction of a garage and to give retrospective approval for the removal of trees, and for landscaping works and planting contrary to that shown on previously endorsed plans.
2. The City of Stonnington (**Council**) has refused to support the proposed amendments for reasons that can be summarised as:
* The proposed siting, massing and design of the garage is contrary to the objectives and policies within the NCO1 and contrary to modified Clause 54 standard A11 (walls on boundaries).
* The removal of significant vegetation fails to provide an adequate landscape response and prevents meaningful landscaping contrary to the NCO1.
* The removal of the Queensland Brush Box Tree and Purple Leaved Plum Tree is contrary to modified clause 54 standard A8 (significant trees).
* Insufficient detail has been provided about total site permeability, thereby preventing a proper assessment of modified Clause 54 standard A8 (significant trees).
* The proposed retaining walls fail to encourage landscaping that will maintain and enhance landscaping as required by NCO1.
1. Mr and Mrs Hindle live on the northeast corner of Glenbrook Avenue and Carlyle Way, south of the Hedgeley Dene reserve. They support Council’s grounds of refusal, oppose any amendments to the approved development and are greatly concerned about the removal of trees and landscaping works that have occurred contrary to the approvals previously given.
2. The applicant disagrees. Whilst acknowledging that removal of trees and landscaping works have taken place without the necessary approvals, those matters have been dealt with through enforcement action. Aside from the proposal for a garage, the amendments seek to authorise works and landscaping contrary to what has been previously approved.

## The original approval by the Tribunal

1. In 2017 the Tribunal directed that a permit be granted for an extension to a dwelling on a lot within a neighbourhood character overlay in accordance with the endorsed plans and subject to 12 conditions.[[2]](#footnote-2) I refer to parts of this decision later in my reasons. The plans considered by the Tribunal had been amended and substituted by the Tribunal at the commencement of the hearing. Amongst other changes, the substituted plans deleted a large carport situated forward of the dwelling.
2. Plans responding to the Tribunal’s decision and conditional changes were endorsed by Council on 5 December 2017.
3. Subsequent secondary consent changes approved by Council on 22 May 2018 incorporated changes to the swimming pool and landscaped areas at the rear of the site.
4. The following is a copy of the endorsed landscape concept plan. Relevant to the matters I am considering, is the layout at the front and side of the dwelling. Of note is the extent of landscaping on the southern side of the Pin Oak tree, and the lawn area north of the entrance portico.



1. In November 2019, an application was made under the secondary consent provisions to include a carport north of the dwelling. That application was refused.

## Enforcement action

1. Works that have occurred on site do not accord with the plans endorsed in May 2018. As a result, Council has undertaken enforcement proceedings. Except for the inclusion of the garage, the application I am considering seeks to authorise landscaping and other works which have been undertaken.
2. I agree with the parties that this is not an enforcement proceeding and understand that this application is partly in response to those enforcement actions. Instead, I am considering the proposal on its merits and whether what is proposed is acceptable having regard to the relevant planning provisions and the site context.

## What changes are now being sought?

1. The following landscape concept plan page 1 depicts the changes being sought. Comparing the latest plan with the one on the previous page highlights six things:
* A new garage instead of lawn and trees north of the dwelling.
* Changes to the retaining wall north of the pool in the rear yard.
* Straight edged paths instead of more free-flowing paths from the front fence to the entrance portico and across the front of the dwelling.
* Retention of the original driveway along the southern side of the site and inclusion of a retaining wall along the northern edge of this driveway. I discuss this later in my reasons, but electrically controlled gates have been reinstated for this driveway.
* Proposed landscaping has been removed from where the southern driveway remains.
* The garden bed on the northern side of the new driveway has been reduced in width and trees removed.
1. I note that there are differences between Pages 2 and 3 of the plans stamped as being received by the City of Stonnington on 16/07/2021. The most significant difference is the inclusion of a new retaining wall along the northern side of the original driveway.



## Are the changes now being sought acceptable?

1. The impact of the proposed changes on neighbourhood character is the primary issue in dispute as the only permit requirement arises because of the NCO1. The statement of neighbourhood character emphasises the strong landscape and garden character of the Hedgeley Dene precinct and states that *an abundance of medium and large sized trees throughout the Precinct are critical elements to this landscape and garden character*.
2. The statement then goes on to state that:

The significance of the area is also attributed to a series of urban character elements that combine to produce an expansive and uninterrupted landscape character. Inconspicuous buildings located within a landscape setting define the neighbourhood character. This allows the landscape to remain the key feature of the Precinct.

1. Eleven-character objectives seek:

To preserve and enhance the expansive and uninterrupted landscape character of the Precinct.

To ensure that development presents an inconspicuous profile against the landscape setting, allowing the landscape to remain the key feature of the Precinct.

To encourage landscaping that will ensure that the landscape character of the Precinct is maintained and enhanced.

To maintain the prominence of vegetation in the Precinct by retaining established vegetation, particularly medium to large sized canopy trees.

To retain distant views from Hedgeley Dene Gardens to vegetation canopy in properties within the Precinct.

To maintain and enhance the character of mature trees and landscaping between residential properties and the Hedgeley Dene Gardens.

To ensure that the scale, setback, site coverage, location and overall form of development protects and enhances the expansive and uninterrupted landscape character of the Precinct.

To maintain and enhance the views along the approach routes to the Hedgeley Dene Gardens.

To ensure that sufficient land is set aside free of buildings and hard surfaces in order to sustain landscaping with medium to large trees.

To ensure that the scale, setback, site coverage, location and overall form of development protects and enhances the built character of the Precinct and is complementary to existing buildings.

To encourage the use of colours, materials and finishes in development that reflect the natural elements within the Precinct as well as the rustic character of established buildings in the Precinct.

1. Given the changes I am considering, I have firstly considered the proposed garage against the built form elements and objectives. Secondly, I have considered the works and landscaping against those elements and objectives dealing with landscape character and vegetation, acknowledging there is overlap between them.

### The proposed garage

1. The proposed garage is to be positioned in an area now cleared of vegetation. The endorsed plans depict lawn and the retention of taller vegetation, including a 7 metre high Queensland Box tree west of the proposed garage and a 6+ metre high Purple Leaved Plum tree opposite the entrance portico. Their removal and the ability to provide suitable replacement canopy trees formed one of Council’s grounds of refusal. The potential removal of these trees was of concern to parties at the hearing in 2017 but at that time *the applicant advised that no tree removal is proposed*.[[3]](#footnote-3)
2. As discussed at the hearing, the trees are forever lost, and the real question is whether suitable replacement canopy trees can be provided – either in the same vicinity or elsewhere on the site.
3. I consider that the planting of suitable replacement canopy trees is necessary to achieve the landscape outcomes sought by the NCO1. However, those trees do not need to be planted in the same location. As I later discuss, they can be effective if planted in the area originally set aside for landscaping south of the Pin Oak tree.
4. In principle I support the construction of a new garage on the northern side of the dwelling. However, I do not support it being extended to the northern boundary.
5. As can be seen in the following extract of the proposed ground floor, the garage widens at the front to 5 metres with a narrower 3.5 metre wide western section. It is set back 19.154 metres from the front boundary and 1.37 metres behind the front façade of the dwelling.



1. The east elevation demonstrates how the garage will be integrated into the roof line of the dwelling and by the use of materials and finishes matching the existing.



1. The neighbourhood character statement provides a list of built form elements that generate the neighbourhood character. These include:
* Unobtrusive buildings through design, articulation, scale, setback, site coverage, location and overall form.
* The presence of single and double storey buildings with low horizontal proportions.
* First floor levels designed in an unobtrusive attic form.
* Building mass directed away from the rear of the site and site boundaries.
* Single car access points with limited driveway and parking areas together with small-scale garages and carports.
* Use of colours, materials and finishes which reflect the natural elements within the Precinct.
* Low front and side fences extending to the dwelling facade.
* Pitched roofs with a multi-faceted low slung form that recede from view.
* A distinct pattern of side and rear setbacks.
* Generous amounts of open space set aside for landscaping, allowing medium to large sized trees to flourish.
1. I consider that the proposed garage satisfactorily achieves these elements to a large degree, save for the absence of a setback from the northern boundary and hence inability to provide generous amounts of open space for landscaping between the garage and the northern boundary.
2. The NCIO1 also varies clause 54 standards for street setback (A3), site coverage (A5), significant trees (A8), side and rear setbacks (A10), walls on boundaries (A11), design detail (A19) and front fences (A20).
3. Not all these clause 54 variations are relevant to this application - street setback, side and rear setbacks and front fences. I have already commented how the garage is integrated into the roof line of the dwelling with materials and finishes appropriately matching the existing. Site coverage is 42.65% within the maximum 50% varied standard. The significant tree standard requires at least 35% of the lot not to be covered by buildings or impervious surfaces. I am advised that 40.25% of the site is permeable.
4. I agree with Council that placing the wall of the garage on the northern boundary results in a technical non-compliance with varied standard A11 because there is already a wall on the southern boundary at the rear of the site. However, that wall is effectively invisible from the street and has no visual relationship with the front of the dwelling.
5. Of more importance is how the garage will be viewed from the street given the narrow landscaping strip along the northern boundary. I consider that the northern wall of the garage needs to be set back to create an obvious physical separation to the dwelling on the lot to the north. The existing dwelling on that lot is setback approximately 3 metres from the boundary. The plans of the proposed replacement dwelling, which are yet to be approved, include a lesser setback. From a character perspective, I do not support positioning the new garage on the northern boundary.
6. I consider that a setback of approximately 1.5 metres would create a visually obvious separation between the adjoining dwellings and would provide space for landscaping. I noted on my inspection that the garden bed on the northern side of the driveway only has a width of approximately 300mm in which Lily Pilly trees have been planted. Providing a 1.5 metre setback adjacent to the garage would provide sufficient soil volume for the planting of taller shrubs. Protecting the roots of trees on the lot to the north may well be a consequential benefit, but it is not a key factor in my assessment that that the garage needs to be set back from the northern boundary.
7. I recognise that setting back the garage does not achieve the built form objective to provide generous amounts of open space to allow medium to large trees to flourish. Nevertheless, the ability to plant taller shrubs will assist in retaining the pattern of side setbacks, even though it is much less than what existed before.

### Retaining walls, paving, landscaping, and other works

1. One of the advantages of an application seeking retrospective approval for works already undertaken, is that no imagination or guesswork is required to appreciate what an approval will look like once it is implemented.
2. The pedestrian path between the front gate and portico entrance has been straightened and now aligns with the driveway, although separated from it by a narrow garden bed. To the extent that they differ from the endorsed plans, including a less free-flowing form for the pedestrian paths, I consider they do not materially impact on the health of the retained Pin Oak Tree or the character of the front yard from the street. I find them acceptable.
3. It is my assessment that the straight path across the front of the dwelling provides more unencumbered space for the roots of the Pin Oak Tree than the former driveway which curved closer to the tree. I do note in the Arborist’s report prepared by Mr Bourke in July 2021, that he severed a large 100m root towards the southern end of this new path which was located approximately 7 metres from the trunk of the tree. Although he was not called to give evidence, it was his opinion at that time that:

It is likely that the root damage incurred from the trenching works will have little impact on tree health, structure or longevity. This tree (the Pin Oak) is in overall good condition and there is ample soil volume within the remaining TPZ. It is likely that this tree will tolerate the root disturbance outlined above.

1. My concern with this comment is that Mr Bourke was not called to give evidence and answer questions. Given his report states that the TPZ of the tree is 11.6 metres, I find his estimate of the TPZ difficult to reconcile with his comment about ample soil volume given the extent of disturbance that has incurred well within the TPZ to the north, south and west. The relevant Australian Standard (*AS4970 2009 - Protection of Trees on Development Sites*) states that intrusions of up to 10% may occur without further assessment or analysis. Whilst that assessment has been undertaken, the extent of encroachment including to the north appears to be well beyond 10%.
2. I contrast Mr Bourke’s report with the expert evidence provided to the Tribunal in 2017 by Mr Harris. It was his evidence that the Pin Oak tree had a TPZ of 9.84 metres and that the encroachment of the new northern driveway and pedestrian paths would result in an encroachment of 8.9%. However, it was also his evidence that:

the increased soil volume that will result from removal of the existing driveway on the south side of the tree and replacement with garden will benefit the tree.

1. Whilst the latest landscape concept plan shows different treatments for the original driveway that was to be removed, it is apparent from my site inspection that the new electrically operated gates, new retaining wall and retained driveway, presently with an unsealed surface, indicates that there is an intention that vehicle access will be retained in this location.
2. It is not an outcome I am prepared to support. Construction of the new retaining wall including footings prevent the Pin Oak tree from taking advantage of the increased soil volumes to the south as originally approved in 2017.
3. But even if I accept Mr Bourke’s untested opinion that the tree does not need to rely on that southern area for added soil volume, I consider that the original driveway must be removed, and the area planted out with taller vegetation, to provide a landscaped appearance consistent with the outcomes sought for the Hedgeley Dene precinct. At present the site is visually exposed when approaching from Hedgeley Dene gardens to the south.
4. As can be seen from my comments about the new garage, support for a garage in that location could only be contemplated if there was an ‘offset’ provided of landscaping in the southeast corner.
5. In addition to the works undertaken in the front yard, the retaining wall north of the living/dining room and outdoor terrace has been constructed differently to that shown on the endorsed plans. Originally, the wall was designed to retain soil volume around the Queensland Box tree and provide a wider planting strip along the northern boundary.
6. However, excavation around the Queensland Box tree resulted in irreversible root damage, the tree has been removed and there is less reason to provide the retaining wall as shown on the endorsed plans. I accept the retaining wall is positioned well behind the front façade of the dwelling and would not be visible from Glenbrook Avenue. However, the narrow planting strip limits the opportunity to plant vegetation of sufficient height to contribute to the landscape setting that is stated as defining the neighbourhood character.

## Conclusion and Decision

1. Some of the proposals included in this application are acceptable. Others are not. Whilst in principle I do not oppose construction of a garage, I do not support it abutting the northern boundary as now proposed.
2. For neighbourhood character reasons, I consider that the area proposed to be occupied by any new garage previously approved for lawn and landscaping, must be ‘offset’ by removal of the southern retaining wall, the electrically operated gates, and the original driveway. The area must be planted with canopy trees and other taller shrubs to contribute in a meaningful way to the landscape character of the Hedgeley Dene precinct.
3. Any revised proposal must provide for this area to be raised to form part of the garden area south of the Pin Oak tree. This will increase the soil volume available to the tree and provide an opportunity for roots to spread into this area.
4. The gates and electrical opening devices need to be removed, a fence installed to match the remainder and the crossover removed. One of the built form elements in NCO1 is *‘single car access points with limited driveway and parking areas*. That will not be achieved if the original crossing remains, and gates remain.
5. My task is to decide whether the proposal achieves a net community benefit and an acceptable outcome having regard to all the relevant, and sometimes conflicting, objectives and policies. Whilst I would not reject all aspects of the proposal before me, as presented to me it does not warrant approval.

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| J A Bennett**Senior Member** |  |  |  |

1. 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. [↑](#footnote-ref-1)
2. *Salter v Stonnington CC* [2017] VCAT 1097. [↑](#footnote-ref-2)
3. *Salter v Stonnington CC* [2017] VCAT 1097 9paragraph 46-48 [↑](#footnote-ref-3)