

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## administrative DIVISION

planning and environment LIST	vcat reference No. P939/2006
<b>CATCHWORDS</b>	
Maroondah Planning Scheme; Vegetation Protection Overlay Schedule 1; Removal of tree requiring a permit; Exception for ' <i>an immediate risk of personal injury or damage to property</i> '	

<b>APPLICANT</b>	D and C Mooney
<b>responsible authority</b>	Maroondah City Council
<b>RESPONDENT</b>	M Bieniak
<b>SUBJECT LAND</b>	79 Little John Road, Warranwood
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Richard Horsfall, Senior Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	30 June 2006
<b>DATE OF ORDER</b>	21 July 2006
<b>CITATION</b>	Mooney v Maroondah CC [2006] VCAT (21 July 2006)

### ORDER

- 1 Pursuant to section 149(1) of the *Planning and Environment Act* 1987 the Tribunal declares that the removal of the subject tree does not require a planning permit due to such removal coming within the scope of the exemption under the Vegetation Protection Overlay Schedule 1 ('VPO1') and the Significant Landscape Overlay Schedule 4 ('SLO4') namely, that the subject tree presents '*an immediate risk of personal injury or damage to property*' exemption to the permit requirements of those overlays.

<b>Richard Horsfall, Senior Member</b>		
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<b>APPEARANCES:</b>	
For Applicant	Mr D Scally of Best Hooper, Lawyers.
For Responsible Authority	Mr J Rantino of Maddocks, Lawyers.
For Respondent	Mrs M Bieniak in person.

## Reasons

### Introduction and Background

- 1 Mr and Mrs Mooney have applied for a declaration that the removal of a tree on their property does not require a permit under the Maroondah Planning Scheme
- 2 The permit requirement for the removal of the tree arises under clause 42.02-2 of the Vegetation Protection Overlay where a permit is not required *if the vegetation presents an immediate risk of personal injury or damage to property*. Otherwise in this case a permit would be required under clause 3 of schedule 1.
- 3 Council accepts that no permit is needed to remove the tree under the Significant Landscape Overlay Schedule 4 affecting the land, because it agrees the exemption to the permit requirement in clause 3, Schedule 4, *for a tree which is dead or dying or has become dangerous as declared by a suitably qualified person*, applies as a declaration has been given by a suitably qualified person.
- 4 Rather than apply for a permit, the application sought the declaration A prompt final hearing request came before Members Komesaroff on 20 May 2006 who ordered the matter be listed for hearing on 13 June 2006 before a member who was a legal practitioner and made orders for the exchange of reports and witness statements.
- 5 The applicant filed witness statements by Mr Nicholas Archer, arborist, and Mr David Gunter, arborist, of R & T Tree Services Pty Ltd, who conducted a radar scan of the first 2 metres of the tree's trunk above ground level.
- 6 The responsible authority filed a report by Mr Peter Newbigin, council's senior environmental officer for the planning department, who has qualifications in horticulture and landscape design.
- 7 The parties' representative and Mrs Bieniak tabled and spoke to written submissions which together with the plans, photos and other material tabled at the hearing were attached to the tribunal's file. The applicant called Mr Archer and Mr Gunter to give evidence, and the responsible authority called Mr Newbigin, all of whom gave evidence of whether the tree fell within the exemption to VPO1. The hearing occupied one day. Following the hearing I inspected the land and the neighbourhood.

### the land and the tree

- 8 The land is part of a 2 lot subdivision certified in 2004. The subject tree is on the front lot, 79 Little John Road, and the rear *battleaxe* lot became

81 Little John Road and is occupied by the subdivider Mr Overend. The subject tree is about 30 m from the road frontage and is the closest tree near the boundary of the adjoining property at 77 Little John Road. There are 5 large eucalyptus trees on the lot.

- 9 The applicant proposes to build a single storey weatherboard dwelling on the land. In discussions council's officers have indicated that planning permission will most likely be given under VPO1 for further tree removal within the building envelope, subject to conditions for revegetation and landscaping. No permit application for this has been made and these matters are not before the tribunal in these proceedings.
- 10 There are some continuing disputes between council and Mr Overend, but the applicants are not involved in those matters, have not breached any permit or planning provision and have approached this matter in a proper way.
- 11 The land is zoned Residential 1 and is subject to the VPO1 and SLO4 mentioned above.
- 12 A permit M/2003/885 was issued by council in October 2003 to Mr Overend permitting the pruning of the subject tree and some replacement planting. Having only recently purchased the property, the applicants have only just become aware of that permit and of the disputes. That permit has expired.

### **the evidence**

- 13 Mr Rantino's submission said it was common ground that:
  - the tree is a *Eucalyptus ovata* (Swamp Gum);
  - it is located near the boundary with the neighbouring property at 77 Little John Road;
  - a scaffold limb failure has occurred recently;
  - the tree stem and limbs contain hollows and cavities.
- 14 Mr Archer's report indicated that he is a qualified arborist and has been continually engaged in his arboricultural business since 1969 working both for the private sector and for councils. He had examined the tree in November 2005 and reported, but made a further examination for these proceedings since the tree suffered a failure event with a major scaffold limb falling onto the boundary fence between nos. 77 and 79 causing damage to the fence.
- 15 The investigation of the tree's structural integrity was made using:
  - tree radar scanning; and

- a climbing inspection.

16 His conclusion was that:

The tree structure has been proven to be unsound and therefore the tree is not suitable for retention in this location. Photo 1 shows that the residents at 77 Little John Road is clearly within the fall trajectory of the subject tree. The tree represents an immediate risk of having a partial or total failure event and its immediate removal is seen as a priority.

17 Attached to the report was the radar scan conducted by Mr Gunter. The scan data is analysed in the USA, and he presented that analysis. The attached report described the technology and indicated that the tree was measured at a number of levels up to 2m from the ground. The conclusion from the radar scan was that

- at the elevations for 1.4m, 1.7m and 2m decay was detected across the entire circumference, and the remaining solid wood (RSW) was approximately only 30% of the tree's centre;
- at 1.1m and 0.8m near surface decay was detected in a quarter segment with the RSW equal to 0 to 10cm in that segment. Decay was detected above the remainder of the circumference at this elevation with the RSW approximately 30% of the tree's centre;
- At 0.5m similar near surface decay was detected in 2 quarter segments with the RSW equal to 0 to 10cm in each of those segments. Decay was detected across the remainder of the circumference with the average RSW approximately 30% to 40% of the tree's centre.
- The analysis from the USA consultants concluded:

Based on the external distress signs described above in the overview and these non invasive radar inspection results it is recommended that this tree be examined by a certified arborist to assess its risk potential.

18 Mr Gunter is an arborist of 10 years' standing in the UK and the USA as well as Australia. He attended training courses in the USA in use of the tree radar.

19 He made a climbing inspection of the tree on 23 February 2006 assisted by Mr Archer who took notes and photographs. He agrees with Mr Archer's report. The climbing inspection involved Mr Gunter climbing the whole tree and conducting a mallet tapping inspection of the trunk and the limbs he could reach. Mr Archer and he said this is a well established technique for testing the integrity of the trunk, the sound of the mallet strike indicating the solidity of the timber. Both Mr Archer and Mr Gunter agreed that the strength of a tree which was decaying at its core depended on the integrity of the remaining cylinder. They had detected a large cavity at the base and decay all the way up. Mr Archer

considered that whilst the cylinder is intact the tree could be not a risk but when breached the structural integrity of the cylinder is lost.

- 20 Their reports and photos indicated extensive decay in a lower limb crotch, decay and hollows adjacent to limbs, decay on the underside of a limb in the upper canopy, and Mr Archer's evidence was that this evidence of decay and hollows showed breaches of the structural integrity of the cylinder of the tree trunk and made it a danger. Mr Gunter was not prepared to climb the tree again.
- 21 Mr Archer observed that the tree has a bias to the south so if it fell, it would be likely to fall towards no. 77. His evidence was that they did not rely entirely upon the tree radar scan but also on the physical inspection and the mallet tapping.
- 22 Mr Archer did not think measures to mitigate the limb drop or remedial pruning proposed by Mr Newbegin would help as removing one limb increases the risk of the opposite limb falling, creating further breaches in the structural integrity of the trunk.
- 23 Mr Gunter further explained the tree radar system which he said has been extensively used in the United Kingdom, Europe and USA and found to be a useful additional tool in assessing the integrity and strength of a tree. He was of the view that the level of remaining RSW was below acceptable safety levels in his experience.
- 24 Mr Newbegin's report was given in his capacity as environmental officer of the council. Whilst the reports of Mr Archer and Mr Gunter can be taken to be independent in accordance with VCAT's practice note relating to expert evidence, Mr Newbegin's evidence cannot meet that test as he comes to the tribunal as council's environmental officer and he was plainly an advocate for the retention of the tree and for its extensive pruning so that it remained essentially a tall, probably dead stump with hollows and cavities for birds and animals. He had only examined the tree at ground level, had not made a climbing inspection but had inspected the tree on 3 occasions from 2003 to prior to these proceedings. He agreed the tree contained many cavities and hollows in the stem and scaffold limbs, he thought the tree's stem structure is good, its scaffold canopy structure is fair and its secondary and minor limb branch structures are also fair. He considered the tree was a highly valuable habitat specimen and was of the view that if the pruning under permit M/2003/885 had been carried out the failure would have been avoided. His opinion was that pruning of the tree's canopy to reduce loading stresses and retaining the valuable nesting and perching structures throughout the stem and scaffold limbs provides the most appropriate outcome for the land. He questioned the integrity of the tree

radar technique but was not able to cite any experience or publications to support this opinion. He submitted there was a distinction between low density timber as opposed to RSW, and timber affected by fungus rot and the complete absence of timber, immediate risk being more likely only in the latter cases.

25 On balance and considering the evidence of the experts and their extensive cross-examination by the counsel for the applicant and the responsible authority, I prefer and accept the evidence of Mr Archer and Mr Gunter in preference to that of Mr Newbigin. In this I am influenced by the following:

- Mr Newbigin's inspection of the tree was much less extensive than the others, being only at ground level, whereas Mr Archer and Mr Gunter conducted an extensive climbing inspection supplemented with the radar scan.
- I do not consider that Mr Newbigin has adequately considered the evidence of the mallet tapping and the question of the structural integrity of the trunk *cylinder* being affected by the hollows and decay points at the junctions of limbs and the trunk, and also by the low levels of RSW detected by the radar scan which on Mr Gunter's evidence was well above acceptable risk levels.
- I find Mr Archer's and Mr Gunter's experience to be much more extensive than that of Mr Newbigin, and they are independent experts as opposed to Mr Newbigin who is essentially an advocate and whose opinion is affected by his preference to retain the tree for fauna habitat.
- I do accept that the hollows in the tree would provide nesting for native fauna, as observed by Mrs Bieniak, and that under VPO1 a permit is required to remove a dead tree. However the exception to the permit requirement in the VPO should not be read down by the objectives and purposes of the policies in VPO, SLO and in the local policies, the issue being whether the exemption is met in the ordinary English meaning of the usage of the words.

### **applicable principles**

26 The main question is whether the exemption requirement is satisfied in the light of the expert evidence. There is no dispute between the parties that the question of whether the exemption is satisfied, that is whether there is an immediate risk, is a question of fact to be decided by the tribunal in the circumstances of each case having regard to the common meanings of the words. Neither *immediate* nor *risk* are defined in the

planning scheme

27 The Macquarie Dictionary defines *immediate* as:

... occurring or accomplished without delay; instant: an immediate reply  
2. relating to the present time or moment. 3. having no time intervening;  
present or next adjacent ... 5. without intervening medium or agent.

28 Mr Rantino referred to the definition of *immediate* in Words and Phrases Legally Defined as:

Immediate = relating to the present time or moment.

It is impossible to lay down any hard and fast rule as to what is the meaning of the word “immediately” in all cases. The words forthwith and immediately have the same meaning. They are stronger than the expression “within a reasonable time”, and imply prompt, vigorous action, without any delay.

29 The Macquarie Dictionary defines *risk* in the relevant sense as:

Exposure to the chance of injury or loss; a hazard or dangerous chance; to run risks.

30 The exemption has been referred to in a number of tribunal decisions. In De La Harpe v East Gippsland SC, Deputy President Gibson considered a declaration relating to the interpretation of VPO8 for that shire. Whilst that decision did not depend on the interpretation of the exemption under consideration in this case, the Deputy President commented:

19 The exemption in schedule 8 is not intended to apply in situations of immediate emergency where safety is an issue. Those types of situations are covered in the exemptions set out in clause 42.02-2 of the scheme. Rather, this exemption is intended to apply in situations where the threat to safety is not immediate but can be properly considered.

31 In Defence Housing Authority v Banyule CC, the tribunal considered, inter alia, whether the removal of vegetation presented an immediate risk of personal injury or damage to property under similar exemption provisions in the Banyule Environmental Significance Overlay Schedule 5. There the tribunal accepted evidence there was potential for limbs to fall, without warning, from all sides of the tree. There were instances of tree limbs falling. The tribunal found:

The evidence was not that the entire tree presented the immediate risk of personal injury, rather its limbs or most of its limbs are dangerous. Accordingly the applicant can easily identify dangerous limbs and remove them without requiring any permit. The evidence of the Council’s arborist, Mr Vaughan, was that approximately 80% of the

canopy would need to be removed to make the tree safe.

32 However the tribunal concluded that a permit is required for the removal of the balance of the tree. However the tribunal made no comment in this case on the meaning of the words *immediate risk* but did direct that a permit issue for the removal of the tree.

33 A recent full discussion of the provisions occurred in Australian Retirement Homes Limited v Maroondah CC. In that case Member Martin acknowledged the decision of Senior Member Byard in Boroondara CC v PA and DL Investments which is authority for the proposition that the known fact that eucalyptus trees periodically shed limbs is not a ground for applying the exemption, but in the circumstances of that case Member Martin found the risk of falling limbs was *present and immediate*:

...in the way described by Mr Byard in Boroondara City Council v DL Investments .....in that the risk of injury to person or property could materialise at any moment without the intervention of any additional cause. It is not a latent risk or even a normal risk-it is an identified risk.

34 In a recent decision of Denton v Banyule CC, Member Naylor made an order resulting in overturning the refusal of the council under a section 173 agreement to allow the removal of a tree. She agreed, without reference, to Senior Member Byard's proposition, and said at [25]:

There is a general consensus amongst the parties that the dropping of limbs from this tree is not usual and is not easily explained. However, the facts of this matter are the tree has begun to drop limbs, it does contain decay, its condition requires monitoring, and it is precariously located over part of a house and its private open space. Given these circumstances, I am of the opinion the removal of this tree is warranted.

35 The relevance of this decision is not only the finding of *immediate risk* but that also that Ms Naylor relied on a radar scan of the tree conducted by Recovery Tree Services and accepted their findings, although she acknowledged *the tree radar scan is a relatively new form of assessment system and its accuracy has not yet been fully demonstrated*.

36 Taking these authorities into account I find that this tree presents an immediate risk of personal injury or damage to property. I accept the evidence of Mr Archer and Mr Gunter in preference to that of Mr Newbigin. I find the danger consists not merely of falling limbs but a potential structural failure of the trunk and the whole tree given the extensive loss of solid wood identified by the radar scan and the mallet tapping. The danger to property is accentuated by the bias of the tree

leaning over no. 77 and the fact that damage to property has already occurred. It is not to the point that Mrs Bieniak was present in her garden when the previous branch fell but at present has no concerns about the risk if the tree caused personal injury to herself or a member of her family or damaged their house. What is important in the definition is that the word *immediate* qualifies the word *risk*. I find that at the present time there is an immediate risk of damage or injury without the intervention of any other medium or agent such as a storm in the sense of Member Martin's interpretation of the exemption. The immediate risk in this case goes well beyond the ordinary possibility eucalyptus trees dropping limbs from time to time.

37 Accordingly the declaration is granted as sought.

<b>Richard Horsfall, Senior Member</b>	
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