

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1542/2018
PERMIT APPLICATION NO. YR-2017/1144

CATCHWORDS

Section 77 of the *Planning and Environment Act 1987*; Yarra Ranges Planning Scheme; Neighbourhood Residential Zone; Child care centre; Policy, Neighbourhood character; Amenity; Car parking.

APPLICANT	ET Ceres Pty Ltd
RESPONSIBLE AUTHORITY	Yarra Ranges Shire Council
RESPONDENTS	M Cant and others
SUBJECT LAND	4 Eothen Lane, Kilsyth
WHERE HELD	Melbourne
BEFORE	Bill Sibonis, Member
HEARING TYPE	Hearing
DATES OF HEARING	10, 11 and 17 December, 2018
DATE OF ORDER	29 January, 2019
CITATION	ET Ceres Pty Ltd v Yarra Ranges SC [2019] VCAT 94

ORDER

- 1 Pursuant to section 127 and clause 64 of Schedule 1 of the *Victorian Civil and 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: T3 Architecture Pty Ltd
 - Drawing numbers: TP01, TP02, TP03, TP04, TP05, TP06, TP07, TP08, TP09, TP10,
 - Dated: 17th Oct 2018
- 2 In application P1542/2018 the decision of the responsible authority is affirmed.
- 3 In planning permit application YR-2017/1144 no permit is granted.

Bill Sibonis
Member

APPEARANCES

For ET Ceres Pty Ltd

Ms L Eastoe, Solicitor of Best Hooper Lawyers. Evidence was called from:

- Mr C Abery, Property Economist of Deep End Services Pty Ltd
- Mr N Peters, Acoustic Engineer of Renzo Tonin & Associates (VIC) Pty Ltd
- Mr N Woolcock, Traffic Engineer of Traffix Group Pty Ltd
- Mr J Patrick, Landscape Architect of John Patrick Landscape Architects Pty Ltd
- Mr D Crowder, Town Planner of ratio:consultants pty ltd

For Yarra Ranges Shire Council

Mr G Tokun, Town Planner of Diamatrix Planning Consultants

For M Cant and others

Mr S O'Brien, Town Planner of Universal Planning. Evidence was called from:

- Mr A McGuckian, Town Planner of Journeyman Planning

INFORMATION

Description of proposal	The development and use of a child care centre. The centre is proposed to operate between 7.00am and 6.00pm, Monday to Friday and accommodate a maximum of 59 children. A maximum of 18 staff is proposed. The centre is to take the form of a two-storey building, with ground level play areas. Twelve on-site car spaces are proposed within part of the front setback area. A 1.5 metre high fence is proposed on the frontage. The rear and side boundaries are to be defined by 2.2 metre high acoustic fences.
Nature of proceeding	Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.
Planning scheme	Yarra Ranges Planning Scheme
Zone and overlays	Neighbourhood Residential Zone – Schedule 1, Incremental Residential Areas: Mooroolbark, Chirnside Park, Kilsyth and Lilydale (NRZ1) Significant Landscape Overlay – Schedule 23 (SLO23)
Permit requirements	Cl. 71.03 and Cl. 32.09-2 (use of land in NRZ1 for child care centre) Cl. 32.09-9 (the construction of a building and the construction or carrying out of works for a use in Section 2 of clause 32.09-2)
Key scheme policies and provisions	Cl. 11, 15, 17, 18, 19, 21, 22.01, 32.09, 52.06 and 65
Land description	The review site is located on the east side of Eothen Lane in Kilsyth. The land has a frontage of 29.27 metres, a depth of 36.58 metres and an overall site area of approximately 1070 square metres. A single-storey detached house and outbuildings occupy the property. To the north is a single-storey dwelling facing Eothen Lane and a single-storey dwelling under construction at the rear, on a separate allotment. The remainder of the adjoining sites are similarly developed in the form of single-storey dwellings.
Tribunal inspection	An inspection was undertaken after the hearing.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 The Yarra Ranges Shire Council ('the Council') has refused to grant a planning permit for the development and use of the review site for a child care centre. The grounds of refusal refer to matters of policy, scale and amenity.
- 2 This is an application for a review of the Council's decision.
- 3 Residents who objected to the planning application and oppose the grant of a permit raise similar concerns with the proposal.
- 4 The Tribunal must decide whether a planning permit should be issued and, if so, what conditions should be applied. Having considered the submissions and the evidence, with regard to the relevant policies and provisions of the Yarra Ranges Planning Scheme ('the Planning Scheme'), assisted by my inspection, I have determined to affirm the Council's decision. My reasons follow.

IS THE PROPOSAL CONSISTENT WITH THE PLANNING POLICY FRAMEWORK?

- 5 The purpose of the Neighbourhood Residential Zone is:
 - To implement the Municipal Planning Strategy and the Planning Policy Framework.
 - To recognise areas of predominantly single and double storey residential development.
 - To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
 - To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.
- 6 Decision guidelines are provided at clause 32.09-13. In respect of non-residential uses, these are:
 - In the local neighbourhood context:
 - Whether the use or development is compatible with residential use.
 - Whether the use generally serves local community needs.
 - The scale and intensity of the use and development.

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.

- The design, height, setback and appearance of the proposed buildings and works.
 - The proposed landscaping.
 - The provision of car and bicycle parking and associated accessways.
 - Any proposed loading and refuse collection facilities.
 - The safety, efficiency and amenity effects of traffic to be generated by the proposal.
- 7 The schedule to the NRZ1 includes the following additional decision guidelines:
- Development respects existing residential character and responds to the attributes of the established neighbourhood. Development within the metropolitan incremental change areas should cover no more than 40% of the site in keeping with the established character of the area.
 - Development adds to the diversity of the existing housing stock.
 - Consideration of the geographic constraints of a location with preference to infill development where people can easily access community services and transportation facilities.
- 8 Clause 15 of the Planning Policy Framework addresses the built environment and heritage. It states that, amongst others, planning should ensure all land use and development appropriately responds to its surrounding landscape and character, valued built form and cultural context. It also states that planning should promote development that minimises detrimental impacts on the built and natural environment.
- 9 Policy for building design is at clause 15.01-2S, with the objective being to achieve building design outcomes that contribute positively to the local context and enhance the public realm. Related strategies include minimising the detrimental impact of development on neighbouring properties, the public realm and the natural environment; ensuring the form, scale and appearance of development enhances the function and amenity of the public realm; and ensuring development provides landscaping that responds to its site context, enhances the built form and creates safe and attractive spaces. The objective of clause 15.01-5S is to recognise, support and protect neighbourhood character, cultural identity and sense of place.
- 10 Policy for educational facilities is detailed at clause 19.02-2S. Its objective is to assist the integration of education and early childhood facilities with local and regional communities. Relevant strategies include:
- Consider demographic trends, existing and future demand requirements and the integration of facilities into communities in planning for the location of education and early childhood facilities.

Locate childcare, kindergarten and primary school facilities to maximise access by public transport and safe walking and cycling routes.

Ensure childcare, kindergarten and primary school facilities provide safe vehicular drop-off zones.

11 Objectives and strategies for commercial land use are set out at clause 21.04-2 of the Municipal Strategic Statement. According to this clause it is policy, amongst others, that:

- Commercial centres are the preferred location for retail, business and community services and encroachment of these uses into other areas be discouraged.
- Any proposed land use reinforces and enhances the established role of the centre.
- The proposed use be located on a site that can provide adequate car parking without compromising the character and appearance of the built and natural environments.
- Traffic generated by a proposed use be able to be accommodated without compromising the functioning of the centre or detracting from the residential amenity of the surrounding area.

12 Clause 21.06 details the objectives and strategies for built form. The objective for buildings in residential, rural living and rural areas is to ensure that any development reflects the environmental and physical form of the surrounding neighbourhood. Related strategies refer to protecting and enhancing the residential character and neighbourhood amenity of residential, rural living and rural residential areas to ensure that new development is compatible with the scale and bulk of nearby buildings; and to building setbacks, height, site coverage and design enabling the efficient use of the site while also recognising the amenity of the surrounding residents, and the residential and environmental character of the area.

13 The clause sets out specific policy for development in the Neighbourhood Residential Zone which addresses matters of siting, height, design, character, and amenity. In broad terms, it is policy that development recognises and is generally consistent with the character of the area and that it protects residential amenity.

14 At clause 22.01 is a local policy which addresses discretionary uses in residential and industrial zones. The objectives for residential zones are:

- Provide limited and controlled opportunities for non-residential uses that meet the needs of the local residential community, protect the residential amenity of the area and are compatible with the visual, environmental and landscape qualities of the neighbourhood.
- Ensure that non residential uses are of a scale and intensity that will not detract from the environmental features and amenity of the residential neighbourhood.

- Prevent the establishment of commercial uses which would be more suitably located in a commercial centre or industrial area.

15 Relevantly, it is policy that:

- there be a demonstrated need for any proposed non-residential use which seeks to locate in a residential area, rather than within a commercial centre
- any proposed non-residential use:
 - be clustered in or adjoining a commercial centre, close to public transport or situated on a main road and not contribute to ribbon commercial development along main or tourist roads
 - be compatible with the surrounding neighbourhood, not lead to a transformation of a residential area into a quasi commercial area and be of a scale and design that respects the environmental and built elements of the area
 - be provided with setbacks from common boundaries with adjoining residential uses that ensure the protection of residential amenity and, where appropriate, provide for the establishment of effective landscaping and screening buffers
 - provide sufficient off-street car parking, with traffic access being located on or near a main road so as to minimise the need for cars to travel through local residential streets.

16 From a land use perspective, there is planning policy support for the establishment of child care centres in residential areas (in appropriate locations), where they will be accessible to residents and meet a community need.

17 The Council's grounds do not raise need as a matter which justifies the refusal of a permit. Nor is it a matter raised in the residents' grounds or submissions. Notwithstanding, in order to address this issue, as it arises in policy, the applicant called evidence from Mr Abery. The evidence was detailed and comprehensive. It demonstrated that there is a demand for child care places within the catchment of the proposed centre, and that the proposal would address some, but not all, of the demand.

18 Policy states that non-residential uses should be clustered in or adjoining a commercial centre, close to public transport or on a main road. The review site is some distance from Collins Place, and Eothen Lane is not a main road. Although there is a bus route along Mt Dandenong Road, the nearest bus stop is in excess of 400 metres from Eothen Lane. I am not persuaded that the proposal meets the locational criteria of policy.

19 It is policy that sufficient off-street car parking is provided with access being located on or near a main road to minimise the need for cars to travel through local residential streets. Although the Council questioned the workability of one car space (car space 7), the evidence demonstrated that a

vehicle can enter and exit the space satisfactorily. This may involve one correcting manoeuvre on exiting and, for this reason, it was submitted that the car space be allocated for staff use only. This is acceptable.

- 20 With a maximum capacity of 59 children, the proposed child care centre attracts a car parking requirement of 12 car spaces.² This requirement is met and there is no basis to require the provision of additional car spaces on the land, or to conclude that the proposal provides insufficient car parking.
- 21 The evidence is that the traffic generated by the proposal can be accommodated by the surrounding street network, and that the majority would enter and exit Eothen Lane from Mt Dandenong Road. Further, according to the evidence, Eothen Lane presently carries in the order of 1000 vehicles per day and has an environmental capacity of 2000-3000 vehicles per day. The proposal will add a further 500 vehicles to the existing volume, which will result in the road carrying approximately half its capacity. The proposal will not result in any unacceptable traffic impacts.
- 22 The policies and decision guidelines require consideration of the proposal's response to neighbourhood character and any impacts on residential amenity. I address these matters in the following sections of these reasons.

WILL THE DEVELOPMENT RESPECT THE NEIGHBOURHOOD CHARACTER?

- 23 The review site is within an established residential area characterised by single-storey detached dwellings in a garden setting. There are some examples of medium density housing and selected two-storey dwellings also evident in the neighbourhood. Front fences are typically low, allowing views of vegetated front setback areas. There are no non-residential uses in proximity to the review site, with the closest being the various commercial activities in Collins Place, located some 200 metres from Eothen Lane.
- 24 One of the decision guidelines of the NRZ1 is that development respects existing residential character and responds to the attributes of the established neighbourhood.
- 25 The design and overall appearance of the proposed building reflects the residential architecture which characterises the neighbourhood. The regular proportions and fenestration, pitched roof forms and materials selection are all reflective of existing dwellings both within Eothen Lane and the wider residential area. The Council is not critical of the design. Rather, it submitted that the setbacks from the side and rear boundaries are insufficient to establish an acceptable landscape buffer, the deep front

² Clause 52.06-5 specifies a rate of 0.22 space per child for a child care centre use. This calculates to 12.98 spaces. Pursuant to clause 52.06-5, if in calculating the number of car parking spaces the result is not whole number, the required number of car parking spaces is to be rounded down to the nearest whole number.

setback is out of keeping with the pattern of development in the street and that the car parking area will impact detrimentally on the streetscape.

- 26 The Council's concerns regarding the impact of the car parking area are shared by Mr McGuckian. His evidence notes that the proposal is within an established residential area with generally consistent front setbacks, well-established and maintained front gardens with an absence of extensive hard paving and parking facilities within frontages. He considers the provision of a deep setback to the bulk of the building, the extended crossovers the absence of landscape buffering and the visual presence of car parking in the streetscape to be at odds with the character. Mr McGuckian does not consider the landscaping provided to the frontage of the site adjoining the car park to be sufficient to mitigate its impact, and further considers that there is minimal overall landscaping to the frontage of the car park and around its fringes to integrate it into the residential area.
- 27 Mr Crowder's evidence is that Eothen Lane is a 'disrupted' streetscape, referring principally to the proximity to Mt Dandenong Road, the front setbacks of No. 2, the diversity in building stock and the variation in dwelling siting along the street. He stated that the review site is not part of an intact continuum of dwellings. Mr Crowder noted that there is a need to have the car park in the front setback and that it will be visible and different to what is there. Nonetheless, his view is that the outcome is acceptable due to the provision of landscaping and the site's location in a 'transient environment' where it will be observed by passing traffic rather than being opposite a park or similar where people will dwell for extended periods of time. He also noted the effect of the curve of Eothen Lane on limiting views of the car park in the broader streetscape.
- 28 The site forms part of a 'residential hinterland'. Despite its proximity to Mt Dandenong Road, it is sufficiently removed from this thoroughfare due to the width of the road verge and the intervening presence of No.2 to clearly read as part of a local residential neighbourhood. Mt Dandenong Road has limited influence on the site's context. The property fronts a local street and is a component of a streetscape and neighbourhood which is characterised by modest detached houses set behind low front fences and established gardens. Car accommodation is typically located to the side or rear of dwellings, with the existing garage on the review site being an obvious exception. The only other development in proximity to the site which has paved parking adjacent to the frontage is the aged care accommodation further to the north. That development is anomalous in the neighbourhood and does not act to define the area's character.
- 29 In comparison to what presently exists, the development will present as a discordant element which will not assimilate successfully into its context. The expansive car park extending to within 3.3 metres of the frontage and occupying more than half of the site's frontage will be noticeably out of keeping with the form and pattern of development in the street. Adding to this is the deep front setback to the greater part of the building (between

18.6 metres and 21.5 metres) which is uncharacteristic of the siting displayed by the existing dwelling stock. While the 9.7 metre front setback of the southern portion of the building may reflect that evident in the street, it is to a small part (6.2 metres wide) and has restricted presence in the streetscape when viewed in the context of the site as a whole. The development's appearance and presentation in the streetscape is dominated by the car park.

- 30 The landscape plan proposes the planting of trees throughout the site to contribute to the area's landscape character. The extent of planting able to be achieved within and adjacent to the car parking area is constrained by the requirement to accommodate the cars on the land and by the width of the access aisle. It is a space dominated by hard paving. While the northern edge is to be defined by a row of 3.0 metre high callistemon plants, the eastern and southern edges display minimal planting, in the form of groundcovers and climbers. The two trees which flank the entry to the car park, while contributing to the locality's canopy will not screen the car park, and the requirement for sightlines further limits planting along the frontage. The double-width crossover, necessary for two-way traffic flow, results in a high level of exposure of the car park in the streetscape. This exposure and consequent visibility highlights the absence of meaningful planting throughout the space.
- 31 The development will represent a marked departure from both the streetscape and the neighbourhood character and is not an acceptable insertion into this residential context. It will present as a discordant and intrusive element. When considered and assessed against the relevant policies and against the decision guidelines of the NRZ1, the proposal will not represent an acceptable planning outcome. In a more robust environment, there may be some justification for this (or other similar) design response, but the review site and its surrounds do not represent such a context.

CONCLUSION

- 32 I have not made any findings in relation to the impacts on residential amenity addressed in both the submissions and the evidence. There is no utility in doing so. My findings with respect to neighbourhood character are sufficient basis to refuse a permit and I will do so. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

Bill Sibonis
Member