

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P38/2020
PERMIT APPLICATION NO. M/2019/171

CATCHWORDS

Maroondah Planning Scheme, Section 77 *Planning and Environment Act 1987*, Neighbourhood Residential Zone – Schedule 3, Significant Landscape Overlay – Schedule 3, Land adjacent to Road Zone Category 1, neighbourhood character, access, traffic, car parking, visual bulk, tree protection, overlooking, light spill.

APPLICANT

Hume Childcare Pty Ltd

RESPONSIBLE AUTHORITY

Maroondah City Council

REFERRAL AUTHORITY

The Head, Transport for Victoria

RESPONDENTS

Adline Tinawy, Mark Warne, Evan & Jane Stuart, Benjamin & Angela Davidson, Steven & Karina Jackson, Jennifer Cimino, Andrea Thomas

SUBJECT LAND

203-205 Canterbury Road
HEATHMONT VIC 3135

WHERE HELD

Melbourne

BEFORE

Alison Glynn, Presiding Member
Peter Gaschk, Member

HEARING TYPE

Hearing

DATE OF HEARING

15, 16 and 17 June 2020

DATE OF ORDER

17 July 2020

CITATION

Hume Childcare Pty Ltd v Maroondah CC
[2020] VCAT 767

ORDER

Amend permit application

- 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: Insite Architects
- Drawing numbers: TP01-TP08 all revision 11
- Dated: 12 May 2020

Permit granted

- 2 In application P38/2020 the decision of the responsible authority is set aside.
- 3 In planning permit application M/2019/171 a permit is granted and directed to be issued for the land at 203-205 Canterbury Road, Heathmont in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:
 - Use and development of a childcare centre,
 - vegetation removal, and
 - alteration of access to a road in Road Zone Category 1.

Alison Glynn
Presiding Member

Peter Gaschk
Member

APPEARANCES

For Hume Childcare Pty Ltd

Mr Paul Connor, Barrister with Mr Sean McArdle, Barrister on brief from Denton Lawyers. They called the following witnesses:

- Mr Glenn Waters, arborist
- Ms Charmaine Dunstan, traffic engineer
- Mr Ross Leo, acoustic engineer
- Mr Sam D'Amico, town planner.

For Maroondah City Council

Ms Irene Plakidis, town planner of Refine Town Planning.

For Department of Transport

Mr Jeremy Beaver, Day 1 and Day 2 only.

For Evan & Jane Stuart, and Benjamin & Angela Davidson

Mr Benjamin Davidson, in person.

For Mr Mark Warne

Mr Mark Warne, in person Day 1 and Day 2 only.

For Ms Jennifer Cimino and Ms Andrea Thomas

Ms Jennifer Cimino and Ms Andrea Thomas in person, Day 1 only.

Adline Tinawy, Steven & Karina Jackson.

No appearance.

INFORMATION

Description of proposal

Use and development of a 139 place childcare centre with associated car parking and access from a Road Zone Category 1. A new access to a rear, local street is also proposed. The proposal also requires removal of vegetation. The centre is proposed to operate between 6.30am and 6.30pm: Monday to Friday.

Nature of proceeding

Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit.

Planning scheme

Maroondah Planning Scheme (the Scheme)

Zone and overlays

Neighbourhood Residential Zone – Schedule 3, Canopy Cover Ridgeline Protection (NRZ3)

Significant Landscape Overlay – Schedule 3 (SLO3)

Adjacent to land in a Road Zone Category 1 (RDZ1)

Permit requirements

Clause 32.09-2 and 9: Use and development of a childcare centre in NRZ3.

Clause 52.29: Alteration of access to a road in RDZ1.

Clause 42.03-2: Removal of trees that require a permit for removal in accordance with SLO3.

Key relevant scheme policies and provisions

Clauses 11, 15.01, 17.02, 18, 19, 21.02, 22.02, 22.13, 32.09, 42.03, 52.06, 52.29, 65 and 71.02.

Land description

The site has a 37.8 metre frontage to the north side of Canterbury Road and extends a depth of 78.64 metres to the south side of Viviani Crescent, where it has a similar width of frontage. The site has an overall area of 2972.6 sqm and is occupied by a former church building with associated car parking, vehicular access (from Canterbury Road) and landscaping (consisting of 31 canopy trees and scattered vegetation). The site includes a crossfall of approximately 2.8 metres from the south-east to the north-west corners of the land. The existing church building is set back approximately 40.0 metres to Canterbury Road and 15.0 metres from Viviani Crescent. A 1.8 metre wide easement runs east-west through the centre of the site.

Tribunal inspection

We inspected the site and surrounds, unaccompanied before the commencement of Day 3 of the hearing.

REASONS¹

WHAT IS THIS PROCEEDING ABOUT?

- 1 Maroondah City Council (the council) has refused to grant a planning permit for a 139 place childcare centre at 203 – 205 Canterbury Road, Heathmont. The proposed permit is to allow redevelopment of a derelict former church and associated buildings that occupy the site, into a two storey childcare centre with vehicle entry-only in from Canterbury Road and exit-only out to Viviani Crescent to the north.
- 2 The decision of the council to refuse the proposal is supported by a number of residents and affected landowners in Viviani Crescent. Both the council and the objectors are concerned that the proposal is too intense for its site resulting in unreasonable built form character impacts, as well as a number of unreasonable amenity impacts. These include:
 - a Unreasonable additional traffic and potential for opportunistic on-street carparking in Viviani Crescent to the north of the site.
 - b Unreasonable noise to adjoining properties from children playing.
 - c Unreasonable noise from cars using the site where it interfaces with Viviani Crescent.
- 3 Some residents in Viviani Crescent are also concerned that the development may lead to unreasonable light spill and overlooking.
- 4 The council accepts that this case is not one where need must be demonstrated. Neighbours, however, question why a child care centre, at the scale and intensity proposed, is sought for this site; particularly when a number of other childcare centres exist nearby.

What are the key issues?

- 5 Based on the grounds of refusal and the issues put to us by the parties, as well as the statements of grounds from non-parties, we find there are several questions we need to determine:
 - a Does the proposal adequately fit the purpose of the zone to provide for education uses that serve a local need in an appropriate location?
 - b Is the proposed use acceptable having regard to any off-site amenity impacts including, unreasonable traffic impacts, car parking impacts, noise, light spill, overlooking and visual bulk?
 - c Is the proposed built form an acceptable response to the site's physical and policy context?

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.

d Does the proposal sufficiently address the landscape needs of the site?

6 We address each of these issues below in context of the Scheme, as well as the submissions and evidence provided. In doing so we firstly set out some details of the proposal and the physical context of the site.

WHAT IS THE PHYSICAL CONTEXT?

7 The site comprises four conventional residential lots, that were previously used for a church with associated car parking. This included access from Canterbury Road with car parking located to the north and south of the church buildings. The car park did not have formal access to Viviani Crescent.

8 As set out in Figure 1 below, the site contains a number of large trees, mostly located around the perimeter of the site. The church is understood to have been constructed in the 1960s, so pre-dated the current planning scheme. We understand from submissions put to us that the buildings have not been used for a church for nearly ten years and have been the subject of some vandalism in recent times. This was evident from our site inspection.

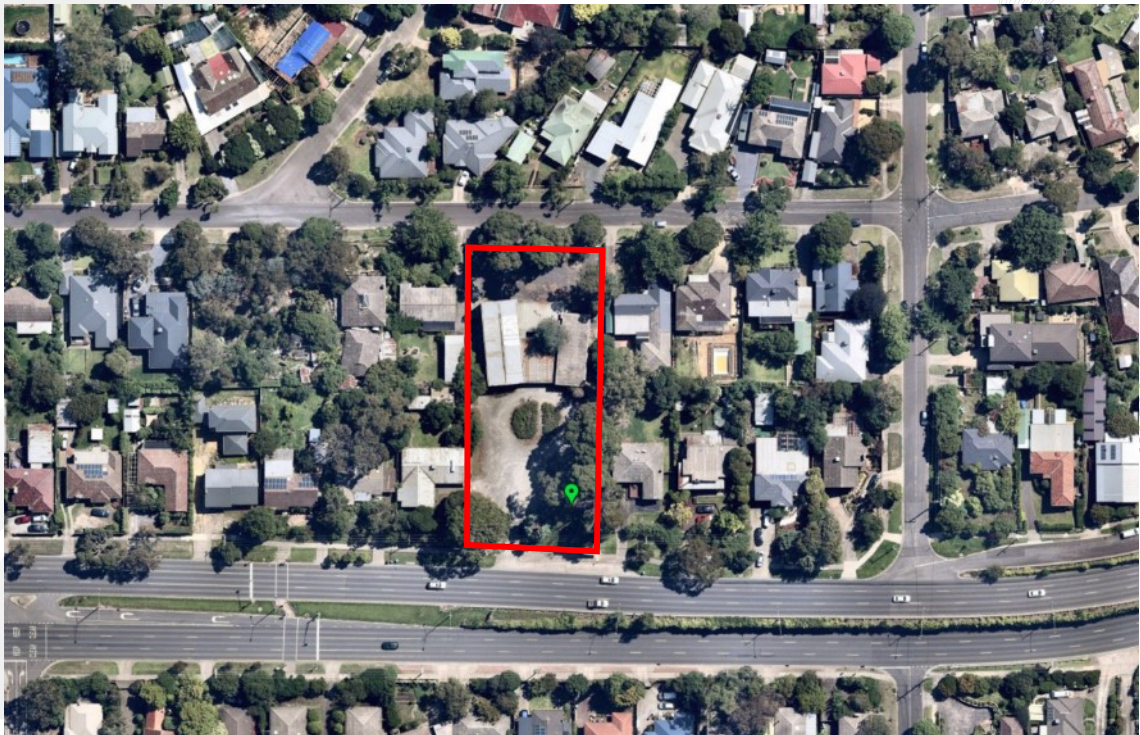


Figure 1 - Aerial image of site from Nearmap image February 2020. Site marked in red.

9 The Heathmont Activity Centre and associated Heathmont Railway Station are located approximately 350 and 500 metres to the east, north-east. Canterbury Road has six lanes of traffic with a grade separation between the north and south carriageways. Provision is also made for a protected U-turn opposite Sunset Drive to the south-west of the site. A signalised pedestrian crossing is located approximately 60 metres (measured from Nearmap) west of the site and a bus stop is located directly in front of the Canterbury Road frontage.

- 10 East and west of the site are single dwellings, with the dwellings to the east both being partly elevated to accommodate a slope down from east to west. The land also slopes slightly down from south to north.
- 11 There is a footpath to Canterbury Road but no footpath in the road reserve of Viviani Crescent. The road reserve in Viviani Crescent includes an approximate 7.2 metres wide road pavement with 4.5 metre wide nature strips on each side. Directly in front of the site are two large paperbark trees. There is currently no formed crossover to the site from Viviani Crescent but there is an informally constructed drive extending along the western side of the review site that extends to the curb edge.

WHAT IS PROPOSED?

- 12 The proposal is to establish a 139 place, childcare centre utilising two buildings linked by a lightweight enclosed corridor space that traverses a drainage and sewerage easement across the centre of the site. Two new built forms are proposed. The northern building is partly two storey and has a rooftop terrace that cantilevers partly over a ground floor rear car park. The northern building, including the first-floor cantilever sits generally in a footprint of the existing church buildings. The southern building is single storey and located in an area of existing carpark and hard stand pavement. Both buildings have adjoining play spaces. These are set to both street frontages and along the eastern side boundary.
- 13 To the west, north and south of the buildings are car park areas. The southern car park accommodates 16 car spaces, principally for use of parents. The rear car park provides for 14 car spaces and is principally for use of staff but may be utilised by parents at peak drop off and pick up times.
- 14 The proposal relies on a one-way driveway system with cars entering from Canterbury Road via a new slip lane and crossover, generally aligning with the existing crossover. The driveway then aligns close to the western side boundary with cars exiting onto a new crossing to Viviani Crescent.
- 15 Correspondence and submission of the Department of Transport² is that previously its preferred position was for no access from Canterbury Road or that traffic enter via Viviani Crescent and exit to Canterbury Road to minimise the number of access points to individual properties from the arterial road network. As a result of discussions with the permit applicant, VicRoads then advised in August 2019 that it accepted the proposal based on amended plans dated May 2019, as it presented 'an outcome that balances the need to protect the safety and efficiency of the arterial network with other factors such as neighbourhood amenity. A one-way entry access

² Formerly VicRoads (see for example correspondence from VicRoads to the Council dated 4 April 2019)

with a deceleration opportunity would provide a safer and more efficient situation than any proposal that included two-way access.³

- 16 The plans were further updated by the permit applicant to modify parking and landscape arrangements in an endeavour to address some of the grounds of refusal issued by the council. These plans were substituted at the commencement of the hearing and are the plans on which we must make our decision. While neighbours argue that alternative access arrangements should be further investigated our role is to determine whether the proposal before us is acceptable. If it is not, then a permit should not be granted.
- 17 The general layout of the proposed buildings and access arrangements as set out in plans substituted by the Tribunal, that are supported by the Department of Transport are depicted in Figure 2 below.

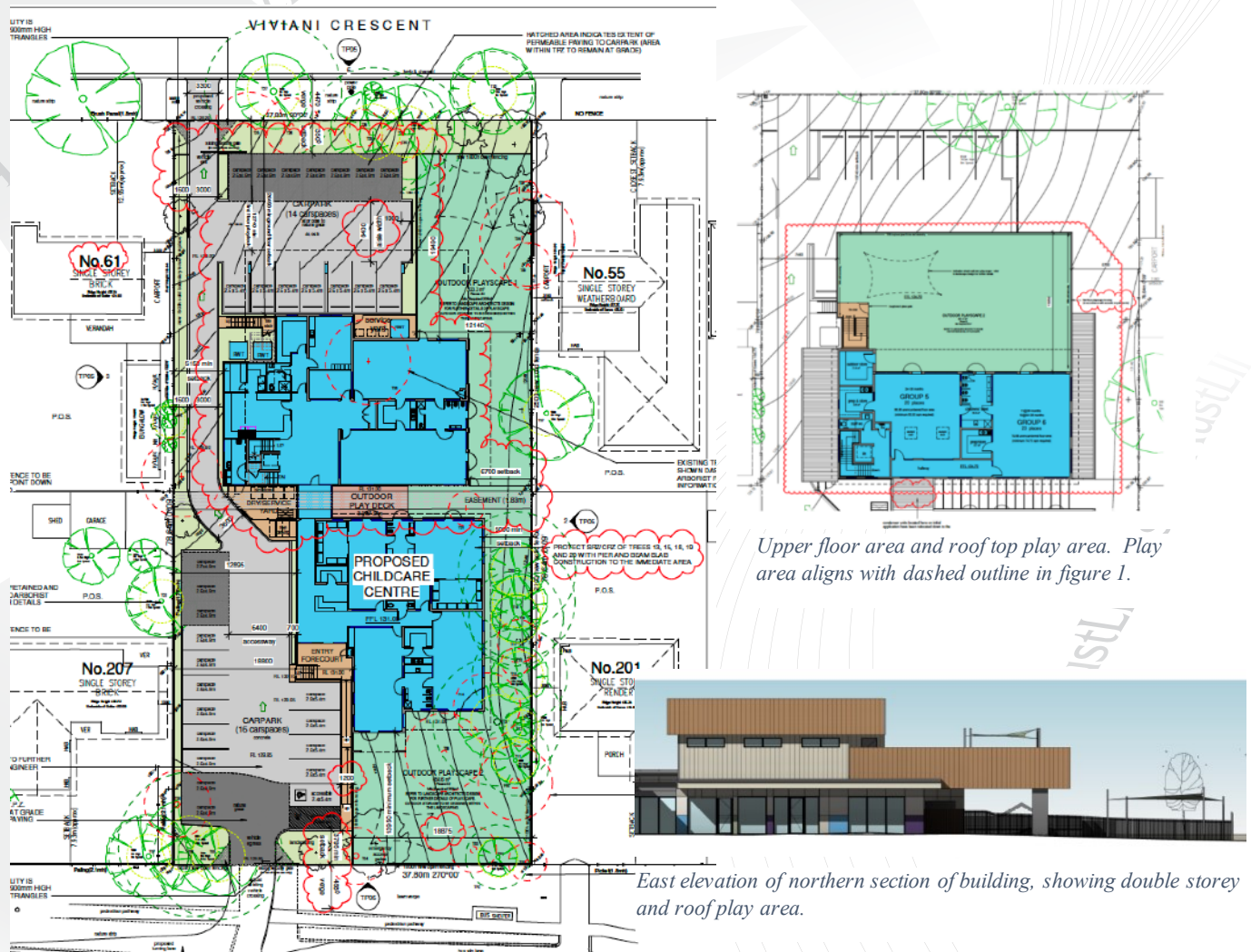


Figure 2 – Ground floor layout of proposal with inserts of showing the upper level and east elevation of the northern building.

³ Letter from VicRoads to the permit applicant representatives 7 August 2019.

IS THE PROPOSED USE ACCEPTABLE?

- 18 The council submits that this case is not about need, acknowledging that childcare centres legitimately serve local community need and frequently these uses can comfortably co-exist in residential areas. Rather, the council submits that the key issue in this case is the intensity of the proposed use. It says the number of children proposed to be accommodated is excessive, leading to building, car parking and play areas that are out of keeping with the residential look and feel of the area; as well as resulting in visual bulk, noise and potentially overflow car parking in Viviani Crescent.
- 19 Neighbours in Viviani Crescent generally agree with the council on these issues, although they question the need for a new childcare centre. They are also particularly concerned that the proposal will lead to an unreasonable increase in traffic in their local street, a feature they say will be out of character with the quiet residential nature of the area. They are also concerned that it will lead to traffic safety issues.
- 20 The site is located in an NRZ3 that has, as one of its purposes, to ‘allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.’ A planning permit is then required for the use and development of a childcare centre in accordance with the provisions of the zone.
- 21 There are two questions we identify from submissions made against this purpose statement:
 - a Firstly, from the submission of neighbours we need to examine if there is a need for the use, given there are other similar facilities nearby.
 - b Secondly, from the submissions of both the council and the neighbours, we need to determine if the site and its location is appropriate for the scale of the use proposed.

How should we assess need?

- 22 In submitting that the capacity of the centre is excessive, Mr Davidson and other neighbours submit that there is not a demonstrated need for the proposed number of places and that there are other existing and planned centres nearby to fulfil any local need for childcare.
- 23 The Tribunal has often commented that in assessing whether a proposal services a local need, a proposal does not need to demonstrate economic viability. Economic viability is a matter that sits outside of planning considerations. The question of need, in a town planning sense, is usually to determine if there is a need for a service that may outweigh amenity impacts that may arise from the proposed use. For a non-residential use in a residential zone, this is in effect a question of whether the use, that may have character and amenity impacts that are different to residential use, can

be justified and is reasonable because of the benefits the use brings to the area by way of fulfilling a local need for that use.

- 24 An often-cited example of balancing need against amenity is that of the establishment of a helipad at the Alfred Hospital⁴. In that case, there were clear demonstrable amenity impacts, but the strong community need to have the helipad, in that specific location, outweighed the amenity concerns.
- 25 In the case before us, we accept that there must be some local need, otherwise the proponent would not be pursuing the application as it would not be economically viable. However, while an additional childcare centre in the general residential area may be viable, nothing was put to us that this is the only site that could accommodate demand for childcare places in the local area, thereby elevating the issue of need in an assessment against other matters.
- 26 The council and some residents highlighted to us that a new childcare facility currently under construction within the Heathmont Neighbourhood Activity Centre. They consider this location offers a more appropriate fit and area for a non-residential use. We do not subscribe to this view. It is not for us to determine if a better site is available, but if the site of our review is appropriate. The review site has a number of existing physical characteristics that lends itself to the proposed non-residential use, consistent with objectives and planning scheme policy at clause 22.13 – Non Residential Uses in Residential Areas. These include that:
- The site is relatively large (comprising four standard sized residential lots) and has a number of existing large trees around its perimeter to provide landscape character commensurate with the NRZ3 and SLO3 objectives applying to the land.
 - The former use of the land as a church has left physical characteristics of a non-residential use on the site. This includes institutional style buildings and large areas of hard stand car parking as elements that formed part of the existing character of the area.
 - As a site containing existing non-residential buildings, the proposal does not remove existing housing stock from the residential area.
 - Land facing Canterbury Road has a somewhat compromised residential amenity due to traffic noise, lending itself to some non-residential uses. Commercial elements of the use, such as signage can also be more easily absorbed into this streetscape.
 - While the site is not directly adjacent or abutting an existing business zone as sought by policy at clause 22.13, it is not an overtly commercial use that would result in ‘ribboning’ of commercial development which is to be avoided under the policy.

⁴ See *Alfred Hospital v City of Malvern* (1986) 4 PABR 334.

- It is within walking distance of the nearby Heathmont Neighbourhood Activity Centre and approximately 500 metres from the Heathmont Railway Station. There is also a bus stop directly in front of the site. The alternative transport options are in our view, important in assessing staff car parking demands and the capacity of the use to serve local needs. This includes that it can serve both residents as well as potentially employees of the activity centre, and is located where staff have a range of transport options to access the centre as a place of employment.

27 We also share the comments put by the applicant, and in evidence of Mr D'Amico that there are many community and education uses that locate in residential areas, including this area. This includes other kindergartens, childcare centres, schools and education centres. We noted these during our inspection of the broader area. A number of these are non-government, private providers of such services. Provided the use can be respectful of the amenity and character expectations of the residential area, then the use can be deemed compatible and acceptable when tested against the purposes of the zone. It is these issues we address below.

IS THE SCALE OF THE USE ACCEPTABLE?

Incoming traffic and parking impacts

- 28 Neighbours to the site are concerned that the exit of all traffic from the site to Viviani Crescent will lead to unreasonable changes in the quiet character and amenity of Viviani Crescent, as well as adding to what they say are existing traffic problems at the intersection of Viviani Crescent and Great Ryrie Street to the west of the site, during peak school drop off time in the mornings. This intersection issue relates to traffic associated with nearby schools to the north along Great Ryrie Street.
- 29 One of the council's grounds of refusal is that the proposal has the potential to result in unreasonable amenity effects by way of increased traffic and car parking to Viviani Crescent and surrounding streets due to the proposed one way traffic flow from Canterbury Road to Viviani Crescent and also fails to incorporate a safe drop-off zone.
- 30 The council delegate report that led to this ground of refusal, included comments from the council traffic engineers that the traffic report prepared on behalf of the permit applicant describes the parking area as operating with one-way traffic flow from Canterbury Road to Viviani Crescent, 'is considered appropriate and will need to be reinforced with appropriate signs and pavement markings.' The comments also considered 'the surrounding street network and intersections can suitably accommodate the proposed increase in traffic generated by the development.'
- 31 The internal referral comments note that the provision and layout of 30 parking spaces on-site meets the requirements of the Maroondah Planning

Scheme, subject to minor layout changes to address disabled access and clearances to walls of the buildings.

- 32 The planning officer assessment in the delegate report, however, concluded that the intensity and operation of the use may adversely affect the amenity of the area by way of traffic and car parking impacts due to the one-way nature of the traffic flow through the site and the lack of a specific drop-off zone for parent parking.
- 33 Subsequent to the council making its decision in November 2019, another internal memorandum of advice was provided by the council's traffic engineers to the council planning officers, dated 29 January 2020. This advice states that the one-way access arrangement is likely to lead to on-site parking being underutilised, creating issues associated with parking amenity on Viviani Crescent. It states that some parents⁵ may prefer to park in Viviani Crescent as there will be delay and inconvenience in accessing the Canterbury Road ingress during peak periods. It makes this conclusion partly based on an assumption that users arriving from the north will prefer to park in Viviani Crescent 'rather than suffer the inconvenience and delay of having to navigate Canterbury Road during the peak periods including the Canterbury Road / Great Ryrie Street (traffic) signals and the pedestrian operated signal outside the property 211' Canterbury Road.
- 34 The internal memorandum also states that the car park is reduced in functionality due to its one way nature, meaning cars entering need to wait while another car may be exiting, that may lead to a bottleneck arrangement, thereby leading to users of the centre using Viviani Crescent rather than the on-site car park.
- 35 We find a key element missing from the new council engineer comments is a balancing of the perceived inconvenience referred to in the memorandum, with the convenience of parking on-site, directly adjacent to the childcare centre pedestrian entry, particularly noting the specific nature of the use.
- 36 We accept the experience and expertise of Ms Dunstan in her analysis of childcare users that correlates with our own understanding of the operation of childcare centres. This is, that for someone dropping off or picking up a child at a childcare centre, having a safe and directly accessible car space to the pedestrian entry is highly valued.
- 37 It is not known exactly how many users may arrive from the north of the site and no party disputed Ms Dunstan's estimate that 20% or 11 - 13 vehicles may enter the site during the AM peak period from the total AM peak into the site, estimated by Ms Dunstan to be between 56 to 66 vehicles. We accept her evidence that this peak is a conservative estimate based on a traffic generation rate of 0.8 to 0.95 vehicles per child using the

⁵ We appreciate that children may be dropped off by someone other than their parent, but for the ease of description we refer to 'parents' dropping off children, as a collective for any person who may be dropping off a child to the centre.

centre. Using a peak estimate of 65 vehicles entering the site within an hour in the AM peak results in each of the 16 car spaces located near the facility entry and dedicated to parent parking to be utilised four times over the hour. This also assumes that all of the vehicle entry movements are parents and not staff. Ms Dunstan confirmed during questions that there is a separate rear car park of 14 spaces directed to be primarily used by staff.

- 38 There no dispute with Ms Dunstan's comments that most drop offs take 5 – 10 minutes. Using this basis we are comfortable that there is more than sufficient parking for convenient drop off available on-site. We are satisfied this arrangement will not lead to a desire to park more than 100 metres away in Viviani Crescent, even if it does require an additional minute or two of car travel from the northern residential area to the front of the site.
- 39 Even if there is an occasion when all sixteen spaces in the front of the site are full, we also accept that in the AM and PM peaks, the staff parking is unlikely to be full as it is during the middle of the day that this parking will be at its peak. Therefore, there is also opportunity for parents to park in the rear car park if needed. We consider parents are more likely to park here than bypass this car park and go further from the facility entry, and park in Viviani Crescent.
- 40 Neighbours also submit that accessing this part of Viviani Crescent from the east is more convenient and likely to occur from vehicles turning right at the signalised intersection of Heathmont Road and then head west along Lisgoold Street and into Viviani Crescent. We would accept this proposition if the primary goal is to access a front entry in Viviani Crescent or further north (such as in Erica Crescent). However, the primary purpose of cars using the centre will be to access the formal front entry of the centre which is close to the Canterbury Road frontage for reasons we have already explained.
- 41 On our inspection, undertaken between 8.30am and 9.30am on a weekday, we took the U turn from the designated bay in Canterbury Road twice. On both occasions we found it to be very convenient and safe, with very little to no wait time. While our site inspection coincided with traffic volumes being potentially below normal traffic volumes,⁶ our experience correlates sufficiently with Ms Dunstan's evidence that this is a manoeuvre patrons and staff are likely to use, rather than traverse around the back of the site and then walk approximately 100 metres back up the internal driveway of

⁶ Due to the COVID-19 pandemic health measures, traffic volumes between March and June 2020 were lower than normal. However, Ms Dunstan's evidence did not rely on traffic data for this period. Our inspection on 17 June 2020 was at a time when traffic data (see <https://chartingtransport.com/2020/05/03/what-impact-has-the-2020-covid-19-pandemic-had-on-road-traffic-volumes-in-victoria/>) indicates that traffic volumes for suburbs away from Melbourne's CBD were potentially only 10% below pre COVID-19 volumes for school drop off and pick up times.

the site. This also takes into consideration that parents are more likely to access the facility from a clear entrance point rather than navigating a rear vehicle accessway from Viviani Crescent. We therefore consider that traffic coming from the east will generally enter the site from its front entrance. The convenience of access from the south and west is also relatively unimpeded and was not disputed by parties as being accessible.

- 42 We cannot substantiate the council comments that the internal parking arrangement will create a bottleneck that may lead to parents not wanting to park on-site given the likely turnover of the drop off spaces and the number of cars entering the site at peak times. The aisle width adjacent to the parking bays is sufficiently wide to make entry and exit into spaces simple to undertake in single manoeuvres. The existing traffic volumes in Viviani Crescent are also very low, making exiting into this street (which will be in a forward motion) quite straight forward and not the subject of any delay that may lead to a bottleneck on-site.
- 43 Overall, we are satisfied that the internal access and on-site car parking arrangements are such that the car parking layout and capacity, can be considered to enable easy and efficient use, as sought by clause 52.06 of the planning scheme.
- 44 The on-site parking also meets the requirements of the Scheme for the number of spaces and relevant dimensions. Our understanding of the provisions also concurs with that of Ms Dunstan that the rate of 0.22 spaces per child is a rate to derive the overall parking requirements of a centre for both staff and parents, not a rate restricted to derive parking needs for parents alone as suggested by Mr Davidson.
- 45 We also see no need for a dedicated drop off bay in the on-site parking, as may occur at a primary school. This is principally because the drop off routine is quite different in a childcare centre to that of a primary school. By its nature, the proposed use requires a parent to get out of a car and escort their child/children into the centre and therefore should rely on conventional parking bays as are provided in this proposal.
- 46 We accept that there may be incidental reasons why a particular parent may park in Viviani Crescent and walk through to the facility entry. However, we are satisfied from our analysis above that it is not likely to be common, or result in any substantive or unreasonable amenity impost to residents in Viviani Crescent.
- 47 This also leads us to a view that there is no need to deter any pedestrian movement onto the site from Viviani Crescent. This was supported by some residents and the council who suggested having the proposed security gate linked to an automatic default closed position, as sought by the council as a permit condition, was preferred if a permit was granted. We see this is counterintuitive to enabling some parents to walk to the centre if they live close by or for staff to walk to the site from the station without going around into Canterbury Road. It also may lead to other noise and amenity

impacts associated with the gate regularly opening and closing. These impacts include the physical sound of the gate moving and also safety measures we anticipate may be needed for the gate given the childcare use. This includes a potential audible and/or visual signal (e.g. beeping and/or light flashing) when the gate is opening and closing when children and parents may be walking in the area. We therefore see no need for a permit condition for the gate to be closed other than when cars are exiting, as proposed by the council in its draft, without prejudice permit conditions.

Exiting traffic impacts

- 48 Residents of Viviani Crescent are particularly concerned that traffic exiting the site will add to intersection congestion at the corner of Great Ryrie Street and unreasonably impact and alter the quiet character of Viviani Crescent.
- 49 The evidence of Ms Dunstan is that the centre should generate an additional 55 – 65 movements out of the site into Viviani Crescent during the AM peak; producing an overall increase in traffic in the street from an existing daily volume of 407 vehicles to somewhere between 535 and 598 vehicles. This is an increase over 100 vehicles across the day, with most of these occurring during AM and PM peaks. Again, we note this is a conservative estimate based on Ms Dunstan's modelling based on a traffic generation of 0.8 to 0.95 car movements per child. Ms Dunstan also explained that her traffic analysis has assumed that each trip to the centre is single purpose and therefore adding to existing volumes, rather than combining with an existing trip already occurring in the area. We envisage that some trips to the centre will be from existing traffic in the area accessing the nearby schools or already commuting to the Heathmont Railway Station or the activity centre.
- 50 Ms Dunstan's evidence is that residents will generally not discern a difference in traffic volumes in the street, as the overall volume is still quite low and well below its maximum design capacity of 3000 vehicles per day. We accept that residents of Viviani Crescent who are at home during these weekday peaks may notice a difference in the number of cars using the street from current patterns. This includes potentially more occasions where a vehicle may need to yield while another passes between two parked cars either side of the street. However, the question we need to determine is not simply if there will be a change, but whether the change is reasonable.
- 51 Ms Dunstan's evidence is that on exiting the site in the AM peak, approximately 70% of the traffic will head west, toward Great Ryrie Street. This will add, and indeed double the likely right-hand turn movements into Great Ryrie Street for the hour. However, this is still only an increase of six to 12 movements based on her conservative modelling. Traffic in Great Ryrie Street means that there may be a need to wait for a gap in traffic. However, we accept Ms Dunstan's evidence that this is not a particularly unsafe intersection, or that the increase in traffic will cause the intersection

to be unmanageable from a traffic flow perspective. On our inspection we undertook this right hand turn movement three times over a half hour period between 8.30 and 9.00am. We did not encounter any significant delay or safety concern. Even if current traffic in the area is slightly lower than pre-pandemic levels, we are satisfied and agree with Ms Dunstan's evidence that this intersection can continue to operate in a safe and reasonable manner.

- 52 It is also worth commenting that while the council's submission is that users of the centre will use on-street parking in Viviani Crescent, it does not take issue with Ms Dunstan's traffic evidence as it relates to general traffic circulation. Nor does it oppose the proposal because of any concern that the impact on the local road network, that it manages, will be unreasonable.
- 53 The site is approximately 360 metres from the edge of a local activity centre and approximately 500 metres from the Heathmont Railway Station. In this context some change in intensification, whether it be by increased housing or uses such as a childcare centre should be expected. As a question of character and general amenity, we are satisfied that the additional traffic likely to exit the site into the local street network and any potential for occasional parking undertaken in Viviani Crescent is reasonable and acceptable.

Noise

- 54 The council submits that the first-floor, outdoor play space and location of play spaces close to side fences may lead to excessive noise. It also questions if the car park area will also lead to excessive noise to neighbours. In making these submissions the council referred to comments in the officer report that formed the basis of the council decision to refuse the permit. The officer commented that the noise assessment prepared as part of the permit application material utilised guidance from the Association of Australasian Acoustical Consultants Guidelines for Child Care Acoustic Assessment October 2013 (the AAAC guidelines), but that these guidelines are not included in the Scheme.
- 55 We acknowledge the AAAC guidelines are not in the Scheme, but in the absence of any other guidelines for assessing noise from childcare centres existing in the Scheme, we are satisfied they provide a useful benchmark for assessment.
- 56 Mr Davidson also submits that noise will emanate from increased early morning traffic and may also increase noise to the north of the site where fencing to the street is an open palisade fence.
- 57 Mr Leo provided acoustic evidence using the upper range of sound power levels referred to in the AAAC guidelines, rather than the middle range used in the original permit application assessment that was undertaken by Cogent Consultants. Mr Leo also based his assessment on 75% of children

playing outside simultaneously during the day and 50% during early morning and late in the day.

- 58 Mr Leo's evidence included modelling that shows noise from children playing is well within the standards set by the AAAC guidelines, noting it is modelling based on conservative parameters as set out in his evidence. While anecdotally the council and Mr Davidson remain concerned about noise, we have no reason to dispute the findings of Mr Leo's modelling that is based on a conservative use of conventional guidelines.
- 59 The council is also critical that if all children were playing in the five metre wide play space along the eastern setback at the one time, close to 207 Canterbury Road, it would increase the sound level beyond that modelled by Mr Leo.
- 60 Between day 2 and day 3 of the hearing, Mr Leo provided an updated model to accommodate such a scenario. This demonstrated that if all the children with access to the eastern part of the side setback were playing in this one space for a period of more than 15 minutes, then some increase in height to the eastern fence to 207 Canterbury Road may be needed to reduce noise levels. We are satisfied that such a scenario is not realistic and no additional fencing is needed. The planning scheme seeks to address general operation of a facility, not a hypothetical scenario as put by the council that we consider is not realistic. To increase the fence height on such a hypothesis would have increased shadow impacts to the play space and to the neighbour, who is not a party to the hearing. We see these shadow impacts are a greater imposition on the neighbour than potential noise from the hypothetical scenario suggested by the council.
- 61 Mr Leo also considered the potential impact of sleep disturbance associated with early morning vehicle movements and staff arriving on site. We note that any impact will only be from approximately 6.15am onward, given the centre does not open until 6.30am. Even this should be limited noise with the centre not being at full operation at 6.30am. Mr Leo's modelling indicates that normally accepted standards for measuring sleep disturbance for this period are comfortably met. We note that with any new noise, it is likely that residents in Viviani Crescent may initially notice some change in noise patterns that may affect sleep when operation of the centre first establishes, however, as a question of whether the proposal maintains reasonable amenity to its neighbours from potential noise impacts, we are satisfied from Mr Leo's evidence that it does.

Light spill

- 62 Residents question if the proposal will lead to light glare from security lighting as well as headlight glare from cars exiting the site and using the rear car park.
- 63 The rear exit to Viviani Crescent is located between 48 and 48A Viviani Crescent where there are no direct habitable windows opposite. Any glare

from cars leaving either early morning or early evening in winter months should not directly impact on any bedroom windows opposite. The rear car park is separated from Viviani Crescent by a 3.5 metre wide landscape space that includes both understorey and overstorey planting. We are comfortable that this landscape space, along with the operating hours that are mostly during daylight hours, for most of the year, should not result in any undue impact from headlight glare to neighbours.

- 64 External lighting will need to be baffled, particularly any security lighting that may stay on after operation, but we are satisfied this can be addressed by a permit condition.

Overlooking and visual bulk

- 65 We cannot identify any unreasonable overlooking to any adjoining secluded private open space. The only outlook from play spaces will be to public areas, such as Viviani Crescent and Canterbury Road⁷. Any view into neighbours' properties north of Viviani Crescent is well outside the conventional overlooking clause 54/55 Rescode tests of nine metres and is to windows already visible to passers by in the public domain of Viviani Crescent.
- 66 Mr Davidson also questioned if security cameras associated with the childcare centre may intrude into the privacy of his home to the north of Viviani Crescent. The primary purpose of any such cameras will be to secure the childcare site, not surrounding sites so we think it is unlikely that any cameras that may be installed on the review site will look directly into adjoining sites. In any event, as discussed at the hearing, we understand that there is separate legislation governing surveillance and filming on private property to address any potential issues.
- 67 As a question of amenity impact we are satisfied the building does not result in any unreasonable visual bulk to adjoining neighbours. The building form is well within the standard⁸ that would be acceptable for a development of two or more dwellings on the land. The building does not result in any significant additional shadow to secluded private open space and is located in a way that it should not appear to dominate or loom over any adjoining secluded private open space. We discuss the broad impacts of neighbourhood character and built form below.

Conclusion

- 68 We are satisfied the proposed use does not result in any unreasonable amenity impacts by way of noise, traffic, on-street car parking overlooking, or visual bulk.

⁷ The upper level play space has solid 1.8 metre high balustrade to its east and west with the upper level building to its south. Some clear Perspex screening is proposed to its northern interface. The site has solid high fences to its east and west neighbours.

⁸ Clause 55.04-1.

IS THE PROPOSED BUILT FORM ACCEPTABLE?

- 69 The council and neighbours are both concerned that the proposal fails to produce an appropriate neighbourhood character and landscape response for the site, having regard to the neighbourhood character policy, NRZ3 and SLO3 provisions of the Scheme affecting the site.
- 70 The council submits that the presentation to both Canterbury Road and Viviani Crescent is dominating both in its building form and in the extensive use of car parking in front of the buildings, rather than landscaping.
- 71 The council also questions if sufficient protection is provided to trees to be retained on site, notably along the eastern property boundary as the proposed building is within tree protection zones of a number of these trees.
- 72 We address each of these issues below through an analysis of the presentation of the building to Canterbury Road, presentation to Viviani Crescent and tree protection. We undertake this analysis in context of the objectives and provisions of NRZ3 and SLO3, along with neighbourhood character policy at clause 22.02 and non- residential uses policy at clause 22.13 that collectively have objectives and policies that we summarise as directing:
- Design to respond to and reflect the existing and preferred neighbourhood character of the area, noting the preferred neighbourhood character, as set out in clause 22.02 is for:
 - Well-articulated building forms that relate to the streetscape.
 - Use of compatible materials.
 - Building setbacks that allow space between dwellings for vegetation.
 - Retaining existing vegetation, particularly canopy trees.
 - Front setbacks not to be dominated by car parking structures or driveways.
 - Low front fence treatments.
 - A need to conserve the existing pattern of vegetation and landscape quality, with re-generation of vegetation encouraged.
 - Maintenance of dense vegetation canopy.
 - Maintenance of the overall scenic beauty of Maroondah.

Presentation to Viviani Crescent

- 73 The council submits the combined development footprint, including the car parking, play areas and building, will not sit as a comfortable companion to residential dwellings adjacent and nearby the site. It also submits the layout fails to provide an appropriate space for new canopy planting and landscape

provision. It is particularly concerned that the streetscape response to the Viviani Crescent frontage is unacceptable because of the expanse of the cantilevered first floor outdoor playscape that gives the design a scale and appearance that does not reflect the residential character and streetscape of the area.

- 74 The proposed buildings, as education spaces are not specifically residential in form, but we are satisfied the overall building presentation to Viviani Crescent is sufficiently respectful of its residential setting, as non-residential form. This is for reasons we examine below.
- 75 Firstly, we think it relevant that while the former church is no longer used, it is an institutional building form that has been part of the Viviani Crescent streetscape for many years and is part of the existing neighbourhood character. The existing building footprint provided by the applicant during the hearing is marked in blue in Figure 3. This existing footprint includes solid wall of the rear of the church building that faces Viviani Crescent that is approximately 6.5 metres high, approximately 3.5 – 4.5 metres from the western side boundary. By contrast, the proposed cantilever play space is set back 7.5 metres from the western boundary. This upper play space has a balustrade sitting six to seven metres above natural ground level, varying due to the slope of the land.
- 76 On the eastern side the ground and upper level is set back 6.7 metres, where the existing building, which is single storey, is four to five metres from this boundary. The proposed side setbacks also well exceed the minimum required for a residential form on the site, utilising the NRZ3 schedule varied setbacks.⁹ As set out in Figure 3 the proposal has a ground level form that is set back at least 5.15 metres from its western boundary and 6.7 metres from the eastern boundary¹⁰. The existing buildings sit approximately 3.6 metres from either side boundary at their closest points. It is our view that the new northern building envelope therefore does not greatly exceed that of the existing buildings on this part of the site.

⁹ For a maximum building height, the side setback is 3.86 metres. For a 7.5 metre high wall (being the maximum height of the play space) a side setback of 2.79 metres.

¹⁰ Noting there is a covered walkway / awning over part of the eastern setback that is shown as part of the first floor dotted footprint in Figure 3. The first floor eastern façade aligns with the ground floor footprint at a 6.7 metre setback to the east boundary.

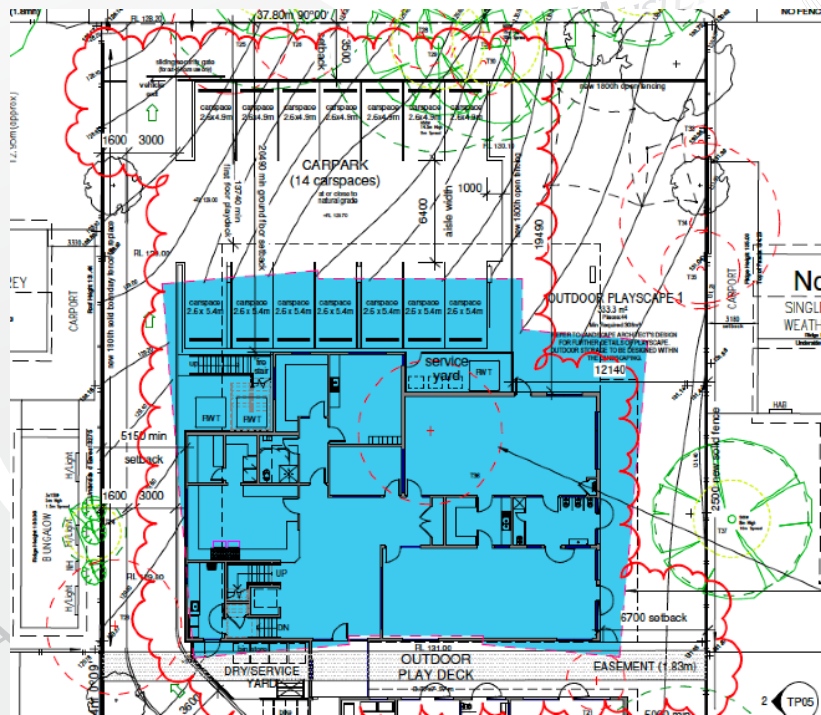


Figure 3 – Proposed ground level layout of northern building, existing building footprint is shaded in blue.

- 77 Secondly, while we acknowledge the building is larger than a single dwelling, it sits centrally to the site in an environ where a more conventional residential development of the land could see as much, if not more, of frontage width to Viviani Crescent dedicated to residential buildings. This is noting the site has a 37.8 metre frontage. At first floor, much of the proposed building footprint is an open play space. This cantilevers over the ground level creating a six to seven metre high building that is set back 13.74 metres from the street edge. This front setback well exceeds the minimum nine metres that would be sought for a residential development and allows the building to sit at a setback that is in line with its east and west neighbours. The proposed building uses a palette of materials and building cues, such as a skillion roof form that are consistent with other buildings in the area. It also generally uses natural tones to blend in with the street.
- 78 Thirdly, the overall building height is 8.57 metres which is well within that permitted by the NRZ3. A permit is triggered for a building over eight metres in SLO3 but we are satisfied the building height meets the relevant decision guideline and objectives of SLO3 because the building profile can sit comfortably into the profile of the skyline in Viviani Crescent. We are satisfied from the streetscape elevation, as we have set out in Figure 4 below, that the building form can sit comfortably in its street context¹¹.

¹¹ Even ignoring the trees illustrated in the diagram.

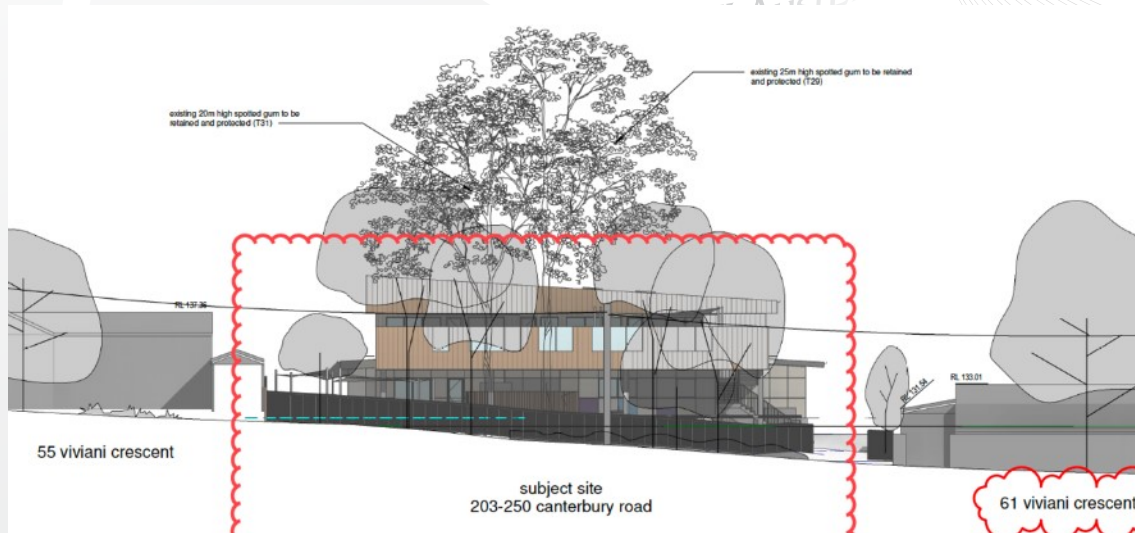


Figure 4 - Viviani Streetscape elevation

- 79 As a proportion of building to landscape space we are satisfied the combination of a 3.5 metre landscape buffer across all but the three metre wide, western driveway entry of the Viviani Crescent frontage, combined with a significant area of the eastern part of the site dedicated to landscape and play space provide a landscape setting as sought by the neighbourhood character policy. We therefore do not share the council's concern that too much of the setback to Viviani Crescent is dedicated to car parking. We note the other cases referred to us by the council where the Tribunal determined that too much of a street setback was dedicated to hard stand in a childcare centre proposal.¹² We have reviewed these cases and are satisfied that there are distinct differences in the settings and, more importantly, the proportion of front setback dedicated to parking between the other cases and that before us is different.
- 80 Fourthly, the building as it faces Viviani Crescent, while having some 'back of house' elements, such as the undercroft parking, enables the commercial elements of the building, such as any signage and more prominent pedestrian entry point, to be positioned away from this lower profile residential streetscape interface and redirected towards the Canterbury Road frontage. This design approach enables the use and development to optimise the commercial intrusion toward Canterbury Road, where the physical setting is more robust and capable of absorbing these elements.
- 81 Fifthly, there are some small additional changes that can assist in ensuring the rear of the building, that faces Viviani Crescent, sits respectfully in its street setting and minimises any amenity impacts from changes in visual form. As we noted at the hearing, and was agreed by the permit applicant:
- a The paving of the parking and driveway area can be treated in a dark tone, similar to the gravel or asphalt car park area of the existing

¹² *Simgar Pty Ltd v Whitehorse CC* [2016] VCAT 437; *Dorset Childcare Pty Ltd v Maroondah CC* [2019] VCAT 834 and *Dymachild Pty Ltd v Maroondah CC* [2020] VCAT 45.

church to blend in with the overall streetscape setting. This can be addressed by permit condition.

- b The setback retains two large trees (Trees 29 and 30) that we consider is a positive attribute. As we questioned at the hearing, we are unclear why Tree 26 cannot also be retained, given it is in a similar alignment to Tree 29, that is retained with permeable paving in the car park. This is a matter that should be further reviewed as part of permit conditions.
- c There is a capacity for the 3.5 metre landscape setback to Viviani Crescent to be planted at the beginning of the project development so that it has time to grow during the construction period. This approach was supported by Mr Davidson and agreed to by the permit applicant. Once the building is completed, more of the new understorey will then have had an opportunity to establish, assisting in screening the car park area. We have also addressed this by permit condition.

82 Finally, the council and residents are critical that the construction of a 1.8 metre high fence within 3.5 metres of the northern boundary (Viviani Crescent street frontage) is problematic. The council submits that while the fencing is intended to be visually transparent, the height and setback of the fence is inappropriate having regard to the prevailing character of low/no front fencing in this residential streetscape.

83 The proposed fence will sit behind the 3.5 metre landscape setback, so much of it will be screened from general view. We further note that the site to the direct west at 61 Viviani Crescent has a high, ti-tree brush fence, as does the side of 31 Erica Crescent, which faces Viviani Crescent, just north-west of the site. We therefore find the use of a permeable fence, 3.5 metres back from the frontage line in this setting is an acceptable design outcome to this street.

Presentation to Canterbury Road

84 The new building as it faces Canterbury Road is in a setting where a more robust form can be expected, given the width of the road reserve and the active nature of this road setting. The proposal in this setting is single storey and sits again with a setback that is further back than the residential facades of its neighbours. More than half of the width of the frontage is dedicated to play space and landscaping, with the car parking and pedestrian path forming 18 metres of the 37.8 metre frontage. Forward of this is 3.79 metres of landscaping, that includes the retention of Trees 5 and 6.¹³ We cannot substantiate the council submission that the proposed extent of car parking in this setback will overly dominate the street setting of Canterbury Road. We are again satisfied that the extent of landscape and

¹³ We discuss the merits of the tree protection further below and note that we have not relied on retaining Tree 5 as critical to the acceptance of the proposal as it faces Canterbury Road.

building form that sits to the side of the car park, rather than only being behind the car park, ensures that the car park will not dominate this street setting.

- 85 There is again a high open palisade fence proposed, but we are satisfied this is acceptable in the setting and note a number of properties have high solid fences as noise barriers to Canterbury Road. We do not endorse a solid fence to this street, as an open garden setting is warranted for the amenity of users of the facility, as well as its visual setting and benefits. We note, however, that there may be a need for the proposal to include clear screening behind the palisade fencing as acoustic attenuation for children from traffic noise associated with Canterbury Road. This was not a matter addressed by Mr Leo's evidence, that solely addressed noise emanating from the site, rather than impacting on the site. We simply note that if any acoustic attenuation is sought to address external traffic noise onto the site, it should retain a transparent view into the garden setting of the site.

Tree protection and landscaping

- 86 The proposal includes removal of 19 trees that require permission to be removed in accordance with SLO3. Of these trees, five are indigenous. The council does not oppose the removal of any of the trees. The proposal retains 12 trees and plants approximately 38 trees.¹⁴
- 87 The former development of the site for a church and associated car parking has meant that existing vegetation is generally around the perimeter of the site. Of these a number are exotic and some according to arborist assessment¹⁵ are in poor condition.
- 88 The council is particularly concerned about play spaces proposed with the protection zones of trees to be retained along east and south of the site. The council is concerned that the landscape plan shows these soft-fall areas as having compacted soil under the soft-fall or synthetic surfaced play space. The permit applicant confirmed that the intent of these spaces is to provide safe play areas, but that the sub-surface would be permeable and could be constructed in a manner that did not require compacted soil that may impact on tree protection.
- 89 We are satisfied this is an issue of design response that can be addressed through the submission of further detail about play areas and soil profiles as part of permit conditions.
- 90 The council maintains that trees along the eastern boundary (Trees 13, 15 and 18-20) may be impacted by construction of the new southern building with foundations that will encroach into the tree protection zones. The

¹⁴ Based on the permit applicant submissions. We note that an updated landscape plan was provided at the hearing and discussion of landscaping through the hearing may lead to these numbers altering slightly.

¹⁵ *Aboricultural Impact Assessment*, prepared by Treetec, dated 24 May 2019.

submission of the council is not necessarily that the trees along the eastern boundary cannot be protected, but the means by which the building is to be constructed may lead to their destruction.

- 91 The council disputes comments of Mr Waters' arboriculture evidence as to whether the description of impacted roots of the eastern boundary trees are 'significant' roots or not, based on their width. The Treetec arborist report submitted with the permit application described a number of these roots as 'significant' due to their width, but Mr Waters considers that their width does not warrant them as being defined as significant. Both the Treetec arborist report and Mr Waters evidence conclude that the eastern trees can be protected, regardless of the definition of the roots as significant or not.
- 92 While there was some debate about the definition of the roots between the council and Mr Waters during the hearing, there does not ultimately appear to be any dispute that the trees can be retained based on an appropriate set of permit conditions to address the protection of the eastern boundary trees. The only dispute is about the description of the southern building needing to be constructed of 'light weight' construction within the proposed landscape plan condition (now condition 27 in Appendix A). Mr Waters' evidence is that if this means only a peer and beam construction is permitted, this is unnecessary as the roots that may need to be cut for an alternative concrete slab construction are not, in his view, significant.
- 93 Whether the words regarding 'light weight' construction are retained or not at condition 27, the permit applicant does not dispute a separate tree protection plan condition (condition 22 in Appendix A). This condition requires any trees to be retained are to be managed in accordance with Australian Standards for the Protection of Trees on Development Sites (AS 4970-2009), and 'any other specific tree protection requirements (e.g. low impact construction measures) or where these cannot be adequately shown reference to more detailed documentation/plans be provided'.
- 94 We are satisfied that this tree protection plan at condition 22 is the relevant place to address the issue of tree protection and any need to amend the construction of the building. We do not see a need to repeat it in the landscape plan condition, or to confuse the interpretation of the tree protection plan condition by having similar, but slightly different words in the landscape plan condition. We therefore have deleted the reference to light weight construction in what is now the landscape condition 27 but have retained the agreed condition 22 which addresses tree protection. This includes a requirement for light weight building construction or reference to 'more detailed documentation / plans'. We agree with the council that the roots and construction methods require more detailed investigation to determine the appropriate means of tree protection. Condition 22 enables this.
- 95 We also note that in making its submission on this issue, the council contends that the applicant should not rely on tree protection zone areas that

extend beyond their boundary, into 207 Canterbury Road as this property may develop in the future. We see no issue with the applicant relying on tree protection zones that lie partly out of their site. This is common practice and the same reason why the application before us must contend with protecting existing trees on adjoining properties that have part of their tree protection zones within the review site. In this area there is added protection to the trees given works that may destroy the trees (including works on adjoining sites) requires a planning permit in accordance with SLO3.

Trees 5 and 6

- 96 Mr Waters' arboriculture evidence is that Tree 5 (Prickly-leaf Paperbark) near the entry to Canterbury Road is in poor condition and should be removed as it currently poses a threat of collapse. The council responded that it was not necessarily opposed to its removal, subject to further review by the council about its condition and suitable replacement planting occurring.
- 97 Our inspection identified that this tree has bifurcation visible from layman inspection and is not a particularly aesthetic tree, relative to other more dominant canopy trees on the site. This includes Tree 6 to the direct west of Tree 5. We are satisfied a better option to retaining Tree 5 may be for it to be removed and replaced with alternative new planting. Given this was a matter that arose through the course of submissions and evidence the council arborist has not had an opportunity to review this issue. The applicant advised it is not opposed to retaining the tree but on the evidence of Mr Waters about its structural failings preferred the tree to be removed.
- 98 We will direct that the structural integrity of Tree 5 be reviewed as a permit condition, as part of preparing and endorsing a landscape plan, with a view to retaining it if warranted, but removed if considered necessary for safety reasons.
- 99 The need to review Tree 5 was agreed between the council and the applicant in discussion of draft conditions at the hearing. We have slightly altered the words for clarity and used the same format of condition to address Tree 26 that we consider requires review, as already explained in our discussion of the Viviani Crescent streetscape presentation.

Other landscape issues

- 100 There are three other criticisms of the council about new landscaping proposed. Firstly, the internal council landscape advice questions if the proposed shade sails may impact on tree protection zones as it cannot identify the location of the shade sails on the site plan (TP02). Our review of TP02 and the draft landscape plan is that the two ground level shade sails sit outside of tree protection zones, other than one pole that sits just within the tree protection zone of Tree 30. There appears to be sufficient room for this pole, and the associated shade sail structure to be moved outside the

tree protection zone if needed as part of detailed design of an endorsed landscape plan and tree protection plan as required by permit conditions. We do not see this is a fatal issue to the proposal.

- 101 Secondly, the council is critical that there is insufficient landscaping along the western side boundary. This is a location where there is currently little to no landscaping. There is one existing tree that sits right on the western boundary, midway between the two street frontages that would need to be removed in any development as it appears to sit on, or possibly straddle, the property boundary to 61 Viviani Crescent. The landscaping along the western boundary is limited, but is at least 1.6 metres wide along the three metre wide drive to Viviani Crescent. Here we are satisfied that shrub planting can soften the view of the car park and drive.
- 102 This western landscape strip widens to a three metre deep triangular planting space midblock. While the council is concerned this space is limited to establish a canopy tree, we are satisfied a small canopy tree could locate in this space, provided the paving of the drive is designed to accommodate for this. The front of the site to Canterbury Road includes a more limited landscape setback to the western side, but this will be effectively hidden by the nearly 3.8 metre deep landscape space to the front of this western setback that contains retained Tree 6 and potentially Tree 5, or an alternative tree. Improved understorey in this front section of landscaping can ensure that overall the landscape setting in the context of SLO3 and the NRZ3 objectives is met.
- 103 Finally, the council is critical of the use of Black Wattles in the proposed landscape plan. Mr Waters' evidence is he agrees with this. The landscape plan can be amended to substitute this species with an appropriate alternative.

CONCLUSION

- 104 We are satisfied that both the built form and any impacts of the scale of use are reasonable for the site location. We find the proposal is not too intense and therefore, for the reasons given above, the decision of the responsible authority is set aside. A permit is granted in accordance with the conditions set out in Appendix A.
- 105 These conditions reflect the conditions discussed at the conclusion of the hearing but with some changes to reflect matters identified in reasons above. Other changes include:
 - a Deleting the need for any building across the central easement to be deleted as proposed by the council in its draft conditions. We agree with the permit applicant that building over the easement is a matter for it to seek approval from with the relevant service agency that is the beneficiary of the easement. If there is any need to amend the design as a result of the separate permission needed this is matter for the

applicant to address in the same way that other separate statutory approvals may affect plans.

- b Deleting some of the elements of conditions that are in effect explanatory notes. This includes some references to Australian Standards, such as was in draft condition 10.
- c Retaining the need for the development to commence within two years and completed within four. The applicant submitted it would prefer these to be amended to three years to commence and five to complete but would accept the condition as drafted if we thought necessary. We accept council's concern that the existing site has been the subject of vandalism and development should be proceeded with as soon as possible. The permit applicant acknowledged similar sentiment. If there is some unforeseen event that does not enable the proposal to commence within two years an extension to time of the permit can be sought in the usual manner, as facilitated by the *Planning and Environment Act 1987*.
- d Deleting draft condition 11 that required a signage and line marking plan of the carpark to be prepared. We consider this now only repeats, in a less detailed form, an agreed permit condition 17 that requires a car parking management plan.

106 Having reviewed the remainder of the draft conditions we are satisfied, with some minor editing and renumbering, these are appropriate to the permit to issue.

Alison Glynn
Presiding Member

Peter Gaschk
Member

APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO:	M/2019/171
LAND:	203-205 Canterbury Road HEATHMONT VIC 3135

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Use and development of a childcare centre,
- vegetation removal, and
- alteration of access to a road in Road Zone Category 1.

CONDITIONS:**Amended Plans**

- 1 Before the use and development starts, amended plans to the satisfaction of the responsible authority must be submitted to and approved by the responsible authority. When approved, the plans will be endorsed and will form part of the permit. The plans must be drawn to scale with dimensions. The plans must be generally in accordance with the VCAT amended plans dated 12 May 2020 by Insite Architects revision 11 (TP01-TP08 inclusive), but modified to show:

Engineering: Traffic / car parking

- (a) Changes required by condition 13 (Construction of vehicle crossing)
- (b) Notation that the sliding gates must be kept closed at all times when the centre is not in use.
- (c) The construction of a pedestrian path into the site located along the site's Canterbury Road frontage connecting to the footpath along Canterbury Road.
- (d) The location of columns must comply with Diagram 1 of Clause 52.06-9 (Design Standard 2) of the Planning Scheme.
- (e) Accessway grades and grades within car parking areas that comply with the design requirement of Clause 52.06-9 (Design Standard 3), AS2890.1-2004 and AS2890.6-2009 (where relevant).

Landscaping

- (f) Changes required by condition 27 (Landscape Plan).

Acoustic conditions

- (g) A 2.0m high acoustic fence must be erected between 207 Canterbury Road and the subject site along the interface to the car spaces as shown in Figure 3 on page 12 of the evidence statement of Mr Ross Leo dated 18 May 2020 filed in VCAT proceeding P38/2020.
- (h) Acoustic absorption must be provided to the building external facade (not windows) and the play area side of the 2.1 m high fence in the section of Outdoor Playscape 2 highlighted in Figure 3 on page 12 of the evidence statement of Mr Ross Leo dated 18 May 2020 filed in VCAT proceeding P38/2020. The absorptive treatment must have a minimum Noise Reduction Coefficient (NRC) of 0.65 and must be applied to the wall/fence from 0.5 m above ground level (AGL) to 2.0 m AGL.
- (i) The side boundary fences within 3.5m of all property frontages tapering down in height to the satisfaction of the Responsible Authority as these sections of fence are not required for acoustic reasons.

Layout not altered

- 2 The layout of the development and use as shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.

Consent to build over easement

- 3 Prior to the endorsement of plans, the permit holder must submit to the Responsible Authority written confirmation that it can lawfully build over the easement traversing the property, including by obtaining any required consents or permits from relevant authorities.

No public address system

- 4 No external sound amplification equipment or loud speakers may be used for the purpose of announcements, broadcasts, playing of music or similar purpose.

No audible security alarm

- 5 All security alarms or similar devices installed on the land must be of a silent type in accordance with any current standard published by the Standards Australia Limited and be connected to a security service.

Maximum noise levels SEPP N-1 (Industry)

- 6 Noise levels emanating from the land must comply with the State Environment Protection Policy (Control of Noise from Commerce, Industry and Trade) No. N-1.

Lighting baffles

- 7 All external lights must be designed, baffled and located so as to prevent nuisance or adverse effect to adjoining land to the satisfaction of the Responsible Authority.

Number of childcare places

- 8 The number of childcare places associated with the permitted use must not exceed 139 places at any one time.

Restriction on operating hours

- 9 Unless with the prior written consent of the Responsible Authority, the use permitted by this permit must operate only between the hours of:
- Monday to Friday 6.30am to 6.30pm

Underground services

- 10 Unless with the prior written consent of the Responsible Authority, before the development is completed, all utility services to the development approved as part of this permit must be provided underground to the satisfaction of the Responsible Authority.

Construction plans for paving required

- 11 Before any building or works start, construction plans for all parking areas and access lanes must be submitted to and approved by the Responsible Authority. The construction plans must be consistent with the endorsed site layout, development plans and landscaping plans.

Car park and access lanes

- 12 Before the use starts or the development is occupied (whichever occur first), the area(s) set aside for the parking of vehicles and access lanes as shown on the approved plan must be:
- (a) Surfaced with a dark coloured, durable all-weather seal except for the areas nominated for permeable pavements;
 - (b) Drained to the nominated legal point of discharge;
 - (c) Line-marked to indicate each car space and all access lanes;
 - (d) Marked to show the direction of traffic along access lanes and driveways; and
- all to the satisfaction of the Responsible Authority.

Construction of vehicle crossing

- 13 Before the development is occupied, the owner must at its cost;
- (a) Fully remove the existing vehicle crossings.

- (b) Construct a new concrete vehicle crossing along Viviani Crescent to Council standard SD-H03 at right angles to the road to suit the proposed driveway to the satisfaction of the Responsible Authority. The vehicle crossing must be a minimum 1.0 m offset from any existing tree or utility service assets (or gain consent from the relevant authority for the construction of the vehicle crossing in closer proximity to their asset) and 2.2m away from the existing adjoining vehicle crossing at the property boundary. The nominated project arborist or a person nominated by the responsible authority, as the Responsible Authority requires, must be on site during excavation of the crossover on Viviani Crescent to oversee the trimming of any roots of any impacted street tree.
- (c) Construct a new concrete vehicle crossing along Canterbury Road to the satisfaction of the Responsible Authority and the Head, Department of Transport.

All to the satisfaction of the Responsible Authority.

Remove any unnecessary external infrastructure

- 14 Before the development is completed, the owner must at its cost remove any unnecessary or redundant crossover or stormwater kerb adaptors and reinstate kerb and channelling and the affected nature strip to the satisfaction of the Responsible Authority.

Car parking to be kept available

- 15 Car spaces, access lanes and driveways shown on the endorsed plans must be kept available for these purposes at all times whilst the centre is operating.

Car parking associated with use

- 16 Before the development is occupied, the car spaces shown on the endorsed plans must be made available at all times for use by customers and staff of the childcare centre. No fees may be imposed for the use of the spaces to the satisfaction of the Responsible Authority.

Car park management plan

- 17 Prior to the commencement of the use, a car park management plan must be submitted to and approved to the satisfaction of the Responsible Authority. The plan must include management measures for the use of the two car parking areas (north and south) on the land to ensure that appropriate signage and line marking is provided and that staff are primarily directed to park in the northern carpark. Once endorsed, the plan will become part of this permit and must be complied with to the satisfaction of the Responsible Authority.

Construction Plans for Drainage Required

- 18 Before any building or works start, drainage plans including calculations prepared by a suitably qualified person to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. The Drainage Plans must:
- (a) Show all drainage works associated with the development including any drainage works required beyond the boundaries of the land;
 - (b) Show the nominated legal point of discharge;
 - (c) Convey stormwater runoff by means of underground drains to the nominated legal point of discharge;
 - (d) Prevent overland flows from having a detrimental effect on the environment or adjoining properties;
 - (e) Provide details of all required water sensitive urban design (WSUD) aspects for the site, including maintenance and reconstruction schedules;
 - (f) Limit the Permissible Site Discharge (PSD) to the equivalent of a 35% impervious site coverage, or the pre-developed discharge rate, if it is less than 35% impervious site coverage, to the satisfaction of the Responsible Authority;
 - (g) Provide appropriate stormwater detention storage to limit the maximum discharge rate to the PSD;
 - (h) Construction of an outfall drain to the nominated Legal Point of Discharge; and
 - (i) Demonstrate that the building foundations adjacent to the easement do not impact on Council's stormwater drainage infrastructure, including:
 - Any footings in or adjacent to the easement must have a minimum 600mm horizontal clearance from the stormwater pipe.
 - The base of any footings are to be are founded 200mm below a line drawn at 45° from the invert of the stormwater pipe.

Any stormwater drains are to be confirmed on site to the requirements and satisfaction of the Responsible Authority.

Drainage works required

- 19 Before the development is occupied, the drainage and associated works shown on the Drainage Plans must be constructed in accordance with those plans to the satisfaction of the Responsible Authority. Within 14 Days of the completion of the works, certification by a suitably qualified engineer must be submitted to the Responsible Authority certifying that works have been completed in accordance with the Drainage Plans.

Control sediment laden run off

- 20 During the works, methods to control sediment laden runoff as described under 'Best Practice Environmental Management Guidelines for Urban Stormwater' or similar must be implemented and used to minimise sediment laden runoff and stormwater pollution from leaving the land to the satisfaction of the Responsible Authority.

Water Sensitive Urban Design (WSUD) – 100% best practice on site

- 21 The stormwater drainage system on the land must be designed such that stormwater runoff exiting the land complies with the current best practice performance objectives for stormwater quality, in the Urban Stormwater Best Practice Environmental Management Guidelines (Victorian Stormwater Committee, 1999).

Tree Protection Plan

- 22 Concurrent with the endorsement of plans or prior to the commencement of any works at the site (including demolition and excavation whether or not a planning permit is required), whichever occurs sooner, a Tree Protection Plan (TPP) to the satisfaction of the Responsible Authority, must be submitted to and approved by the Responsible Authority. The TPP must be prepared by a suitably qualified arborist and clearly show:

- (a) For each tree shown to be retained on the land or on neighbouring land, a Tree Protection Zone (TPZ) and Structural Root Zone (SRZ) calculated in accordance with the Australian Standard for Protection of Trees on Development Sites (AS4970-2009).
- (b) The development layout, all built features, including: pavement, retaining walls; and drainage infrastructure.
- (c) Tree protection requirements for retained trees within and adjoining the subject site (including the road reserve), in accordance with the Australian Standards for the Protection of Trees on Development Sites (AS 4970-2009), including tree protection fence alignments and areas of ground protection, i.e. where fencing cannot adequately afford tree protection or access across the TPZ is required.
- (d) Any other specific tree protection requirements (e.g. low impact construction measures) or where these cannot be adequately shown reference to more detailed documentation/plans be provided.

Tree Protection Plan implemented

- 23 Prior to the commencement of any building and or demolition works on the land, Tree Protection Measures as detailed on the approved Tree Protection Plan, must be established and subsequently maintained until completion of all buildings and works, including landscaping, to the satisfaction of the Responsible Authority.

- (a) The project arborist must advise the Responsible Authority in writing that the Tree Protection measures have been installed to their satisfaction.
- (b) The TPP must be printed on A2 weatherproof paper.
- (c) The TPP must be highly visible on the site and be displayed at the site entry.

Engagement of site project arborist

- 24 Prior to the commencement of any works at the site (including demolition and excavation whether or not a planning permit is required), a letter of engagement must be provided to the Responsible Authority from the project arborist selected to oversee all relevant tree protection works. The project arborist must be an appropriately experienced and qualified professional (minimum Cert IV or equivalent in experience).

Installation of Tree Protection Fences

- 25 Prior to the commencement of any works at the site (including demolition and excavation whether or not a planning permit is required), the project arborist must advise the Responsible Authority in writing that the Tree Protection Fences have been installed to their satisfaction.

Site arborist log books

- 26 The project arborist must maintain a log book detailing all site visits. The log book must be made available to the Responsible Authority within 24 hours of any request.

Amended landscape plan required

- 27 Concurrent with the endorsement of condition 1 plans, an amended landscape plan to the satisfaction of the Responsible Authority must be submitted to and approved by the responsible authority. When approved, the amended landscape plan will be endorsed and will then form part of this permit. The landscape plan must be drawn to scale and its content must reconcile with all other plans which form part of this permit. The plan must be similar to the VCAT amended landscape plan dated 15 May 2020 (tabled at VCAT hearing P38/2020) but modified to show:
- (a) Details of staging of landscape works, consistent with condition (28).
 - (b) The colour and material of pavements in the car park to be of a dark tone.
 - (c) The pedestrian footpath entry to the building entry, extended to the Canterbury Road frontage.
 - (d) Synthetic turf treatments and soft fall areas shown in the front setback (Canterbury Road frontage) and garden bed areas which shows area of sufficient size to support the proposed landscape.

- (e) Amendment to the methodology for granitic sand treatment within the TPZ of trees 13, 15, 18 and 19 and 20, including an amended section detail showing a lightly compacted granitic sand layer and excluding the compacted crushed rock layer.
- (f) Amendment to the methodology with regard to the use of “synthetic turf soft-fall” within the TPZ of tree 20 including an amended section detail showing that the extent of compacted crushed rock subgrade is avoided or minimised.
- (g) Soil amelioration methodology to demonstrate that the proposed landscaping can be supported. This must include an approach which incorporates but is not limited to the following measures:
 - i Removal of compacted layers within all landscapes areas, excluding areas within the tree protection zones of retained trees.
 - ii The installation of suitable soils which satisfies AS4419:2018 – Soils for Landscaping and Garden Use.
 - iii Use of structural soils beneath permeable pavement to support the proposed canopy trees shown along the western boundary.
- (h) Low impact construction measures specified, to the satisfaction of the Responsible Authority, wherever buildings, pavements or services are located within a Tree Protection Zone and which encroaches greater than 10% of the TPZ area. All low impact construction measures must be detailed through cross-section drawings. All pathways and pavements not used for vehicle access and / or car parking be constructed of flexible / porous materials.
- (i) Landscaping treatments within the areas immediately adjacent to the Canterbury Road frontage in a manner which complements the prevailing character of the surrounding area and shows predominance of indigenous and native species.
- (j) Substitution of Black Wattle *Acacia mearnsii* with an alternative species to the satisfaction of the Responsible Authority.
- (k) For the roof garden, an in-set plan which clearly shows:
 - i details for the construction of roof top landscaping which is able to support landscaping, including small trees;
 - ii substrate properties;
 - iii irrigation and drainage specifications;
 - iv section drawings and construction specifications as appropriate; and
 - v maintenance requirements associated with the upkeep of the roof garden (preferably in the form of a maintenance schedule).

- (l) An amended planting schedule of all proposed trees, shrubs and ground covers, including botanical names, common names, pot sizes, sizes at maturity, and quantities of each plant. All species selected must be to the satisfaction of the Responsible Authority
- (m) Tree 5 either:
 - i Nominated as removed and replaced with a new tree to the satisfaction of the Responsible Authority;
 - or
 - ii Identified as requiring remedial pruning, supervised by an arborist, to the satisfaction of the Responsible Authority.
- (n) Tree 26 either:
 - i Nominated as retained and protected in accordance with condition 22;
 - or
 - ii Nominated as removed and replaced with a new tree to the satisfaction of the Responsible Authority.

Staged commencement, completion and maintenance of landscaping works

- 28 Before development starts, (other than demolition) landscaping works (other any reticulated irrigation) as shown on the endorsed plans for landscaping within 3.5 metres of the north site boundary, east of the access drive must be carried out and completed to the satisfaction of the responsible authority. During construction of the remainder of the development this area must be fenced, watered and maintained to the satisfaction of the Responsible Authority.
- 29 Before the use starts, the remaining landscaping works as shown on the endorsed plans, including irrigation to all landscaped areas, must be carried out and completed to the satisfaction of the Responsible Authority. Landscaping must then be maintained and well irrigated to the satisfaction of the Responsible Authority, including that any dead, diseased or damaged plants are to be replaced.

Construction Management Plan

- 30 Before any site works (including demolition and excavation) start, a Construction Management Plan (CMP) to the satisfaction of the Responsible Authority must be submitted to and approved by the responsible authority. When endorsed, the CMP will form part of this permit and must be implemented and complied with to the satisfaction of the Responsible Authority. The CMP must include, be not be limited to, details of the following:
 - (a) Hours of demolition and construction activity (including deliveries).

- (b) The construction program.
- (c) A traffic management plan (including VicRoads Memorandum of Authorisation, if required).
- (d) The movement of construction vehicles to and from the land and measures to minimise any adverse impact.
- (e) A swept path analysis demonstrating the ability for trucks to enter and exit the site in a safe manner for the largest anticipated truck associated with the construction.
- (f) A plan showing:
 - i the location of any site sheds, on-site amenities, building waste storage and the like;
 - ii the location of parking areas for construction and sub-contractors' vehicles on and surrounding the land, to ensure that vehicles associated with construction activity cause minimum disruption to surrounding premises. Any basement car park on the land must be made available for use by sub-constructors/tradespersons upon completion of such areas, without delay; and
 - iii the location and design of construction vehicle washing facilities;
 - iv the location of delivery and unloading points.
- (g) Measures to contain dust, dirt, mud within land, and the method and frequency of clean-up procedures.
- (h) Measures to protect the stormwater drainage system so that no solid waste, sediment, sand, soil, clay or stones from the land enters the stormwater drainage system.
- (i) Measures for prevention of the unintended movement of building waste and hazardous materials and other pollutants on or off the land, whether by air, water or other means.
- (j) An outline of requests to occupy public footpaths or roads, and anticipated disruptions to local services.
- (k) The processes to be adopted for the separation, re-use and recycling of demolition and construction materials.
- (l) Measures to minimise noise and other amenity impacts from mechanical equipment and demolition/construction activities, especially outside of daytime hours.
- (m) Measures to ensure the avoidance of any damage to street trees as a consequence of the movement of large vehicles and machinery (including cranes and excavators) to from the land or as a consequence of the operation of these vehicles and machines in association with the

construction of the proposed building, including excavation of the land.

- (n) Measures to ensure construction staff, including sub-contractors/tradespersons, operating on the site are aware of:
 - i the contents of the CMP;
 - ii the trees to be retained or protected and of the tree protection measures set out in the endorsed Tree Management Plan required by this Permit, where relevant.
- (o) Contact details of a liaison officer for the construction staff.
- (p) Any other relevant matters.

Waste Management Plan

31 Concurrent with the submissions of amended plans required by Condition 1, a Waste Management Plan (WMP) to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved the WMP will form part of the permit and must be implemented and complied with at all times to the satisfaction of the Responsible Authority. The WMP must include, but not be limited to, the following:

- (a) Plans which indicate the on-site waste collection point and a swept path analysis of the proposed truck movements. The plans must show sufficient turning circles for the waste collection vehicles to drive out in a forward direction.
- (b) Calculations showing that all occupiers will be sufficiently catered for with the proposed number of garbage, recycling and where required; food and organics bins.
- (c) Plans which indicate the storage location and the size and type of bins to be used by the site.
- (d) Any screening of the bin area.
- (e) Cleaning, maintenance and ventilation plans for bin storage area(s).
- (f) Details of education plan to ensure ongoing information is provided to new staff on how to use waste system.
- (g) Details of the hours and frequency of collection, with regard to minimising truck movements and potential noise impacts to the surrounding neighbourhood/or specify hours.
- (h) Provision of a risk and hazard analysis to ensure potential risks to both residents and waste collectors are minimised.
- (i) Details of how bins will be transferred to the collection point, including plans which indicate the bin transfer path. The path must

not exceed gradient of 1:14 unless a bin tug is proposed and accounted for and consideration to minimise transfer distance must be made.

- (j) Details of storage location and disposal method for e-waste, medical, chemicals, liquid waste and other bulky or difficult to dispose wastes.

Time for starting and completion

32 This permit will expire if any of the following circumstances applies:

- (a) the development is not started within two years of the date of this permit;
- (b) the development is not completed within four years of the date of this permit;
- (c) the use does not commence within five years of the date of this permit; or
- (d) the use is discontinued for a period of two or more years.

The Responsible Authority may extend the periods referred to above if a request is made in writing:

- i) before the permit expires; or
- ii) within six months afterwards if the development has not yet started; or within 12 months afterwards if the development lawfully started before the permit expired.

Referral Authority Conditions - Department of Transport

33 Before the development starts, amended plans to the satisfaction of the Head, Transport for Victoria must be submitted to and approved by the Head, Transport for Victoria. When approved, the plans will be endorsed and will then form part of the permit. The plans must be generally in accordance with the plans submitted with the application ('203-205 Canterbury Road Heathmont Site Layout and Access' dated 20/01/2019, Drawing Number CS01 prepared by Chris Maragos & Associates) but modified to show:

- (a) Bus stop identification line-marking ("X" marked box) and signage to identify the bus stop and 'bus zone' on Canterbury Road.

34 During demolition and construction of the development, the existing bus stop infrastructure on Canterbury Road must not be damaged or altered. Any damage or alteration to bus infrastructure must be rectified at no cost to and to the satisfaction of the Head, Transport for Victoria.

35 The demolition and construction of the development must not disrupt bus operations on Canterbury Road without the prior written consent of the Head, Transport for Victoria.

36 Any request for written consent to disrupt bus operations on Canterbury Road during the demolition and construction of the development must be

submitted to the Head, Transport for Victoria not later than 8 weeks prior to the planned disruption and must detail measures that will occur to mitigate the impact of the planned disruption.

- 37 Prior to the occupation of the development, all works outlined on the endorsed plans must be completed at no cost to and to the satisfaction of the Head, Transport for Victoria.

- End of conditions -