

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P554/2022
PERMIT APPLICATION NO.TPA/53422

CATCHWORDS

Major Activity Centre; four storey childcare centre and townhouses; context; traffic.

APPLICANT	Mike and Shan Pty Ltd
RESPONSIBLE AUTHORITY	Monash City Council
RESPONDENTS	Anthony James Roberts David Allison & Tracy Mu Kitty Li, Simon Li & Others
REFERRAL AUTHORITY	Head, Transport for Victoria
SUBJECT LAND	15-17 Marriott Parade GLEN WAVERLEY VIC 3150
HEARING TYPE	Hearing
DATE OF HEARING	17-20 October 2022
DATE OF ORDER	9 November 2022
CITATION	Mike and Shan Pty Ltd v Monash CC [2022] VCAT 1284

ORDER

- 1 Pursuant to 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: Milton Architects
 - Drawing numbers: A00.00-A00.05, A01.01, A01.03, A02.00-A02.06, A03.01-A03.04, A05.01-A05.03, A12.02, A14.05-A14.06, & A15.01 All Revision G
 - Dated: 28 August 2022
- 2 In application P554/2022 the decision of the responsible authority is set aside.
- 3 In planning permit application TPA/53422 a permit is granted and directed to be issued for the land at 15-17 Marriott Parade GLEN WAVERLEY VIC 3150 in accordance with the endorsed plans and the conditions set out in Appendix A. The permit allows:



- Use and development of the land for a childcare centre;
- Construction of five dwellings; and
- To put up and display of business identification signage.

Michael Nelthorpe
Member

APPEARANCES

For Mike and Shan Pty Ltd	Mr Dominic Scally, lawyer of Best Hooper Lawyers. He called the following witnesses: Mr Ben Watson, visual amenity (photomontages) of Pointilism; Mr James Dodd, architect (3D Imagery) of Zaxis Creative; Mr Damien Iles, town planner of Hansen Partnership; Mr Simon McPherson, urban designer of Global South; Ms Leanne Dowey, landscape architect of Hansen Partnership; Mr Ross Leo, acoustic engineer of Clarity Acoustics; Mr Jan Talacko, environmental scientist (daylight assessment) of Ark Resources; and Ms Charmaine Dunstan, traffic engineer of the Traffic Group.
For Monash City Council	Mr David Vorchheimer, lawyer of HWL Ebsworth Lawyers. He called the following witness: Ms Alison Milner, town planner of Milner Planning Advisory.
For Anthony Roberts	Mr Roberts
For David Allison & Tracey Mu	Mr Allison



INFORMATION

Description of proposal	An integrated development of a four-storey childcare centre for 172 children and five townhouses over a two-level basement.
Nature of proceeding	Application under section 79 of the <i>Planning and Environment Act 1987</i> – to review the failure to grant a permit within the prescribed time. ¹
Planning scheme	Monash Planning Scheme
Zone and overlays	Residential Growth Zone Schedule 4 (17 Marriott Parade) General Residential Zone Schedule 7 (15 Marriott Parade).
Permit requirements	Clause 32.07-2: to use land for a childcare centre; Clause 32.07-8: to construct a building or construct or carry out works for a childcare centre; Clause 32.08-2: to use land for a child care centre; Clause 32.08-6: to construct two or more dwellings on a lot; Clause 32.08-9: to construct a building or construct or carry out works for a childcare centre; Clause 52.05-2: to put up and display business identification signage.
Relevant scheme policies and provisions	Clauses 11, 13, 15, 16, 17, 18, 19, 21.04, 21.08, 21.13, 22.01, 22.04, 22.09, 22.13, 22.14, 32.07, 32.08, 52.06, 52.34, 53.18, 55, 65 & 71.02.

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



Land description

This 2,186m² site consists of two titles on the south-west corner of Kingsway and Marriott Parade, Glen Waverley. It is in the southern section of the Glen Waverley Major Activity Centre. It is irregular in shape with most of its frontage to Marriott Parade. The site falls by approximately 2.5m from the north-west to the south-east. It is vacant.

Tribunal inspection

15 October 2022



REASONS²

WHAT IS THIS PROCEEDING ABOUT?

- 1 Mike and Shan Pty Ltd ('the Applicant') seek a permit for an integrated childcare centre and townhouse development at 15-17 Marriott Parade, Glen Waverley. The site has a permit for an integrated development of a four-storey apartment building and five two-storey townhouses.³
- 2 Monash City Council ('the Council') failed to decide on the permit application in the prescribed time, and the Applicant initiated this proceeding at the Tribunal.
- 3 Mr Roberts and Mr Allison ('the Respondents') have joined this proceeding.
- 4 The Applicant relies on amended plans, as shown in the image below:



Figure 1: the amended proposal.

- 5 Amongst other things, these plans:
 - a Remove a level from the childcare centre (reducing its height from five storeys to four storeys);
 - b Reduce the number of children from 204 to 172;
 - c Change the materials of the ground level facades from stacked stone to cream brick and render;
 - d Replace the stacked stone and horizontal batten front fences with more permeable fencing;
 - e Diversify the screens enclosing the upper-level outdoor play areas;
 - f Reduce the height of the external staircase and further articulate the façade; and

² The submissions and evidence of the parties, any supporting exhibits 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.

³ Planning Permit TPA-51317 – Endorsed plans dated 25/2/2021.

- g Soften the appearance of the childcare centre and townhouses in views from the residential area.
- 6 The Applicant relies on expert opinion in the fields of town planning, urban design, landscape architecture, traffic engineering, daylight assessment and acoustics. These experts contributed to the amended plans, which they say is an acceptable planning outcome.
 - 7 The Council formed an opinion on a previous iteration of the proposal, being a five-storey childcare centre with 204 children, and townhouses with subterranean courtyards/lightwells.



Figure 2: the iteration of the plans before the Council.

- 8 Amongst other things, it said that this iteration:
 - a Failed to have appropriate regard to the character and amenity of the adjacent residential area;⁴
 - b Was inconsistent with neighbourhood character objectives on building height and scale, landscaping, private open space, front fencing and design detail;⁵
 - c Failed to meet the design and built form policies of the Glen Waverley Major Activity Structure Plan due to the childcare centre's scale (height, mass and setbacks), the townhouse's continuous built form, the excessive front fences and insufficient landscaping;⁶ and
 - d Would have a detrimental impact on the safety, amenity and performance of the surrounding streets and street network.
- 9 The Council concluded that this iteration was an overdevelopment and a poor design response. It said that the proposal did not respect the site's context or achieve a good quality architectural outcome.

⁴ As sought by Planning Scheme at Clause 22.09: Non-residential Use and Development in Residential Areas.

⁵ As sought by Planning Scheme at Clauses 21.04: Residential Development; 22.01: Residential Development and Character; and 55: Two or more Dwellings on a Lot and Residential Buildings.

⁶ As sought by Planning Scheme at Clause 22.14: Glen Waverley Major Activity Structure Plan.

- 10 In submissions to the Tribunal, the Council advised that its position and grounds of refusal remain unchanged despite the amended plans. However, its criticism of the childcare centre's height, mass and setbacks is muted as it accepts that these aspects of the proposal are similar to the approved development. It now says that the built form is unacceptable because it:
- a Does not address the main road;
 - b Does not reference the residential area's style or character; and
 - c Cannot be well landscaped because of the play areas in the front setbacks.
- 11 The Council relies on expert town planning opinion on the amended proposal. This expert concludes that the proposal is unacceptable because it:
- a Does not accord with local policy discouraging non-residential uses in cul-de-sacs due to its intensity;
 - b Poorly integrates its childcare and townhouse components;
 - c Adversely affects the neighbourhood's character due to the site layout and presentation of the childcare centre;
 - d Adversely affects the neighbourhood's amenity due to increased traffic in Marriott Parade and the likelihood that some parents and carers will park on the street; and
 - e Has poor internal amenity for the childcare and townhouse components.
- 12 The Respondents say that the size of the childcare centre is excessive. They agree with the Council and its expert that the proposal is contrary to local policy discouraging non-residential uses in cul-de-sacs.
- 13 They say that Marriott Parade and the adjoining street network will be made unsafe and inconvenient by the 798 daily traffic movements that the proposal generates. They also expect that some parents and carers will park on the street rather than in the basement.

WHAT ARE THE KEY ISSUES?

- 14 The key issues are:
- Is the proposal an acceptable response to planning policy and the site's physical context?
 - Does the proposal provide acceptable traffic, parking and safety outcomes?
 - Is the proposal an overdevelopment and a poor architectural outcome?

SUMMARY OF FINDINGS

- 15 I find that the proposal is an acceptable response to planning policy and the site's physical context. In policy terms, this is one of the most appropriate locations in the municipality for a large childcare centre.
- 16 In terms of the site's physical context, the proposal is a more than acceptable response. It delivers the scale of development sought by the Planning Scheme and provides a sleeve of townhouses to protect the amenity of the adjoining dwellings.
- 17 I find that the traffic generated by the proposal is acceptable because it impacts on that part of Marriott Parade that is identified for more intensive development. Some parents or carers may park on the street, but this is a matter for the Council rather than the Applicant.
- 18 I find that the proposal is not an overdevelopment as the building envelope meets all relevant requirements of the two Zones and generally meets the objectives and standards of clause 55 of the Planning Scheme.
- 19 I find that the proposal is a very good architectural outcome. The childcare centre is visually interesting and attractive, and the sleeve of townhouses respects its residential neighbours.
- 20 I elaborate on these findings below.

IS THE PROPOSAL AN ACCEPTABLE RESPONSE TO PLANNING POLICY AND THE SITE'S PHYSICAL CONTEXT?

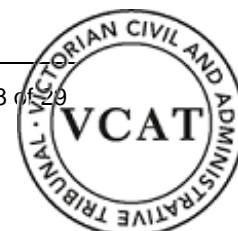
- 21 The Council, Ms Milner and the Respondents all say that the proposal fails to achieve the outcomes sought by local policy for non-residential uses in residential areas.⁷
- 22 They also say that the proposal fails to achieve the outcomes sought by local policy for residential development and character, primarily due to its appearance and landscaping.
- 23 Finally, they all say that a large childcare centre is not the intended land use according to the Glen Waverley Major Activity Centre Structure Plan ('the Structure Plan'). They say that it anticipates intensive housing, not intensive childcare. They say that the approved development is exactly what the Plan wants.

My findings

- 24 These submissions fail for several reasons.
- 25 At the highest level, the statutory assessment task requires integration of all relevant policies and a balancing of any conflicting policy objectives in favour of an overall community benefit.⁸

⁷ At clause 22.09: Non-residential Use and Development in Residential Areas.

⁸ At clause 71.02 – Integrated decision making.



- 26 State and local planning policies for the Glen Waverley Major Activity Centre identify it as a place for intensive growth and activity.⁹ In effect, it is to have the characteristics of a city centre – being a place to work, live, shop, recreate and access a wide range of services. It is intended to be a diverse, busy place that contrasts with the uniformity and quiet of the residential areas that it serves.
- 27 As such, a Major Activity Centre is one of the most appropriate locations in the municipality for a large childcare centre. It will provide a service for parents who work in the area, or who commute from the nearby railway station, or who use Springvale Road as part of their commute. It will contribute to the sense of activity that the Planning Scheme anticipates for a Major Activity Centre. Its height and scale will be absorbed amongst other buildings of a similar scale that will emerge over time.
- 28 The local policies that the Council, Ms Milner, and the Respondents rely on must be read in this context.

Regarding the local policy on non-residential uses

- 29 This is a municipality-wide policy that applies in all circumstances – from a site in a local street in Monash’s residential areas, to a site on a main road, or a site in a large or small activity centre. The policy’s objectives and performance criteria must be read in this context.
- 30 The Council, Ms Milner and the Respondents say that the proposal fails because a locational criterion of this policy seeks to:
- Avoid locating in heritage precincts and in lower order residential streets and cul-de-sacs.
- 31 I disagree with these submissions. I find that this criterion of policy is outweighed by the strong policy support for intense and diverse land uses in a Major Activity Centre. A large childcare centre may be an inappropriate land use in a residential area far from an activity centre or a main road, but this site is not in such a location. It is in the activity centre and in a sleeve earmarked for taller buildings and more intense activity.
- 32 Separately, I agree that a large childcare centre in a typical cul-de-sac may be inappropriate due to its traffic impacts. However, Marriott Parade is not a typical cul-de-sac. It is a local street that is closed at the western end.
- 33 I need to consider the intention of this criterion rather than apply it literally. I regard it intends to avoid adverse traffic impacts rather than prohibit childcare centres in cul-de-sacs. Only a Zone’s provisions can prohibit a particular land use. Policy, on the other hand, is used to guide a decision-maker’s discretion as to what is appropriate.
- 34 I find that the traffic impacts of this proposal are acceptable. For reasons that I provide later, I am satisfied that the impact of the childcare centre will

⁹ At clauses 11, 16, 21.04, 21.06 and 22.14.



primarily affect the first 30m of Marriott Parade. All parents and carers (except those who live in Marriot Parade or Berkeley Court) will enter Marriott Parade from Kingsway and leave in the same direction. There is no reason why they would drive down Marriott Parade to its dead end.

- 35 On a separate matter, the Council and Ms Milner say that the proposal fails this policy because it does not reference the residential area's style or character. The Council highlights the lack of transparency of the childcare centre's screened play areas and Ms Milner highlights the lack of interaction with the street.
- 36 I am not persuaded by these submissions and evidence for several reasons.
- 37 Firstly, the residential style that the childcare centre must respond to is the style of four-storey development that is to be guided by the Structure Plan and the Zone – not the low-rise dwellings that currently occupy these sites. To this end, the childcare centre's height and setbacks are comparable to the desired future height the Structure Plan and the Zone. Its height will become less obvious as other four storey buildings are constructed, and its setbacks allow the landscaping envisaged for this area.
- 38 The townhouses (and the component of the childcare centre that sits above Townhouse 1) are different. They are in a different Zone and are subject to the local neighbourhood character policy as well as the Structure Plan's aspiration for more diverse and intense housing types.



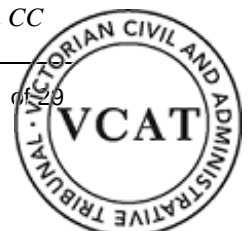
Figure 3: The townhouses and childcare centre in the plans before the Council viewed from the residential area.



Figure 4: The townhouses and childcare centre in the plans before the Tribunal viewed from the residential area.

- 39 In terms of the residential style and character that these aspects of the proposal must respond to, I agree with Mr Isles that have a similar scale to the approved apartment and townhouse development. Consequently, I regard the scale as acceptable. In terms of character, I agree with Mr Isles that the relevant front setbacks and landscaping meet the ‘Garden City’ requirements, and I agree with Mr McPherson that the built form character of this area is not uniform. Original dwellings from the 1970s and 1980s predominate and these have different expressions. In addition, there is a degree of contemporary infill development that appears quite different from its older neighbours.
- 40 Apart from this, the amended plans tone down the appearance of the southern end of the childcare centre and the entrance to the townhouses. Mr McPherson proposes additional minor changes that make the appearance more subdued.
- 41 The Council takes issue with Townhouse 1 because it does not face the street however, I find that this is appropriate given that primacy should be given to the shared entrance to the townhouses. This shared entrance is part of the well-integrated design of the entire building.
- 42 The Council also takes issue with the use of a mansard roof at the third level. I find that it is acceptable given the diversity of roof forms nearby. Further to this, it is set back some distance from the levels below and is part of a well-balanced façade.
- 43 Regarding the area’s landscape character, Ms Dowey’s evidence persuades me that the front setback of the townhouse component provides sufficient space for landscaping that contributes to the Garden City character.
- 44 Secondly, non-residential uses do not have to look like their residential neighbours.¹⁰ In other words, the childcare component of this proposal does not need to adopt a residential appearance. It is acceptable for the form of such uses to reflect their function rather than to adopt a domestic appearance.
- 45 Thirdly, I do not accept the Council’s submissions regarding the transparency of the childcare centre. I find that it is not a critical issue. The building is an attractive and interesting piece of architecture that will add positively to the emerging character of this Major Activity Centre.
- 46 The transparency of the childcare centre’s upper floor play areas is a function of the use. By design, the battens on the upper-level play areas are widely spaced to provide light and outward views from these spaces. A side benefit is that vehicle occupants and pedestrians will gain views though to the built form behind the play areas.

¹⁰ See the Applicant’s submissions at paragraphs 27 to 35 that reference *Calhand v Moreland CC* [2011] VCAT 1009, *Doranit Pty Ltd v Glen Eira CC* [2015] VCAT 201 and *Zheng v Monash CC* [2018] VCAT 45.



- 47 On a separate issue, the amended plans improve the interaction with the street. The high, solid fences of the previous iteration have been replaced with a low plinth with well-spaced vertical battens. Pedestrians on Marriott Parade will easily be able to see into the play areas and indoor spaces facing this street. The scalloped shape of the building also assists as it provides depth, interest, and variety to the façade.
- 48 The Council’s focus on the transparency of the fences and screens led to an offer by the Applicant to achieve 80% transparency on the vertical batten features of the upper floor balustrades. This is excessive and is likely to detract from the architectural purpose of these screens. I will not impose this by condition on the permit.

Regarding the Glen Waverley Major Activity Structure Plan

- 49 The Council, Ms Milner and the Respondents suggest that the proposal is contrary to the Structure Plan.
- 50 In its written submissions, the Council says that a childcare centre is not the intended land use, and that the intensification envisaged by the Structure Plan relates to housing only.¹¹ I find these submissions are inappropriate given that the Council officer’s report says:

The subject site benefits from its location within the Glen Waverley Major Activity Centre (GWMAC), and its interface with the commercial precinct. It is considered suitable for the proposed uses of ‘dwelling’ and childcare centre’ as supported by relevant strategic policies. Whether the proposed development should be supported depends on the design detail, its response to the site context and the potential external amenity impacts to the surrounding residential properties.¹² (My emphasis)

- 51 This extract from the Council officer’s report clearly and properly separates the use of the land (childcare and housing) from the development of the land (the building). And it says that the use is supported by the Structure Plan and relevant policies. Based on this extract, to defies the Council’s credibility to now say that the childcare use is inappropriate.
- 52 Ms Milner says that the childcare centre is somewhat questionable because housing is the primary use for the site and other land in the Residential Growth Zone. This evidence did not withstand cross-examination. Ultimately, her opinion was confined to being that the site was an inappropriate location for a childcare centre of this intensity. This is a different proposition.
- 53 In response to her original evidence, I find that the only distinction in the Residential Growth Zone is that a childcare centre must be in ‘an

¹¹ At paragraphs 7.2 and 7.7 of its written submissions.

¹² At Section 1.3 – Page 14 of the record of Council meeting 31 May, 2022.



appropriate location’ whereas residential use can occur anywhere in Zone.¹³ This does not make a childcare centre a questionable use.

- 54 Separately, it is not contrary to the Structure Plan to propose a childcare centre on this site. A proper reading of the Planning Scheme suggests that nominating an area for ‘residential intensification’ then placing it in the Residential Growth Zone means that any residential or non-residential developments that are permissible under the Zone can be contemplated. The land use is not limited solely to housing.
- 55 I am also satisfied that the intensity of this childcare centre is acceptable. The Planning Scheme is silent on the size of childcare centres, and it is beyond the scope of a statutory planning assessment to judge a childcare centre due to its size. The statutory assessment is limited to its external impacts.
- 56 Ms Milner could only rely on the external impact of traffic movements associated with the intensity of this childcare centre. As I said earlier, I find these traffic movements are acceptable.
- 57 In part, the Respondents take a different approach. Mr Allison objects to the Applicant fitting a childcare centre into the space approved for an apartment building in a ‘post-hoc’ manner. Mr Roberts suggests that the Applicant’s approach could be used to allow a nuclear reaction if the built form remained the same. While hypothetical, it is a memorable image.
- 58 However, I find that these are not valid criticisms. There is nothing underhand, or inappropriate in re-purposing the approved built form. I accept the Applicant’s submission that they would have proposed a large childcare centre in this format without the previous approval. It is their approach.
- 59 Mr Roberts’ example is helpful in that it clearly separates the use (nuclear reactor) from the development (apartment building). Both must be acceptable in the statutory planning assessment, and an acceptable building cannot justify an unacceptable use.

Regarding the landscape response and the Garden City character

- 60 The Council says that the proposal provides insufficient landscaping to achieve the Planning Scheme’s Garden City objectives. This concern is limited to the use of the childcare centre’s front setbacks for play areas in addition to providing landscaping to soften the building’s appearance.
- 61 Ms Dowey’s evidence persuades me that the proposed landscaping can coexist with the use of the front setbacks as play areas. Her landscape plan suggests that adequate planting can occur in these areas.

¹³ According to the purposes of the Zone.



62 Apart from this, landscaping to achieve the Garden City character is limited in the Residential Growth Zone. The relevant Schedule requires only three canopy trees per site, with two located in the frontage. Ms Dowey's landscape plan shows far more than this limited number.

DOES THE PROPOSAL PROVIDE ACCEPTABLE TRAFFIC, PARKING AND SAFETY OUTCOMES?

63 The Council says that the traffic generated by the childcare centre will adversely affect the safety and performance of the surrounding street network. It criticises the design choice of providing all vehicle access from Marriott Parade. In terms of detailed design, it says that the crossover should be perpendicular to the street to improve pedestrian safety.

64 The Respondents also object to the traffic generated by the childcare centre. This is their main objection to the proposal. They say that it is inappropriate to introduce an additional 798 daily traffic movements to this cul-de-sac. They expect that there will be bunching (queuing) of vehicles at the entrance to the childcare centre and that this could affect traffic movements on Kingsway as well.

65 They also say that Marriott Parade usually has parked cars on both sides of the street, meaning that there is only one trafficable lane for most of the day. They raise issues with the safety of vehicles travelling around the bend in Marriott Parade and expect that introducing new drivers into this situation will make it less safe.

66 They expect that some parents or carers will choose to park on-street rather than in the basement, and that this will be to the detriment of the existing residents of Marriott Parade.

67 They also question the safety of introducing a new stream of traffic turning right from Kingsway into Marriott Parade. They say that this is a dangerous manoeuvre given that drivers on Kingway expect all traffic to continue through to Springvale Road.

My findings

68 Ms Dunstan's evidence persuades me that the traffic and safety impacts of the childcare centre are acceptable.

69 I agree with her observations that traffic from childcare centres is spread out during the morning and evening peaks, given that these centres do not have fixed start or finish times. As such, they do not generate the short-term peak traffic movements that schools do.

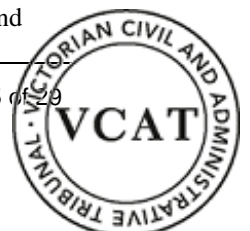
70 I accept her opinion that this centre is likely to generate 138 traffic movements during the peak hours, meaning a vehicle entering or exiting the site every 50 seconds. This differs from the Respondents' emphasis on 978 daily traffic movements. This daily figure includes most staff movements



(which are spread out during the day) and the off-peak drop off and pickup trips.

- 71 Ms Dunstan does not expect that queuing on Marriott Parade will occur during the peak hours. She says that Marriott Parade's low traffic volumes will allow parents or carers to turn immediately into the basement, and that the basement's access aisles can accommodate any queuing or congestion.
- 72 Based on my review of the plans, I accept this evidence. As Ms Dunstan described, this is comparable to what occurs with shopping centre and multi-deck car parks. Consequently, I do not accept Mr Allison's concern that the proposal will cause unreasonable congestion at the entrance to Marriott Parade. I accept his point that queuing occurs outside the Glen at Christmas but find the supermarket peak at Christmas does not apply to this childcare centre. The basement is designed to accommodate its peak traffic volumes.
- 73 Ms Dunstan believes that all parents and carers will park in the basement. She considers that it is the safest, most comfortable, and most convenient location. She notes that it is protected from the weather and that it provides direct access to the lobby via a lift. I accept this evidence, and do not expect parents and carers to travel further along Marriott Parade. This appears to be a key concern, but there is no reason why a parent or carer would do this given that Marriott Parade is a dead-end street.
- 74 Despite Mr Robert's submission to the contrary, I expect that almost all parents and carers will use the basement. - particularly given the level of all-day parking on Marriott Parade. I agree with Mr Roberts that some people prefer not to park in basements however, this is more easily done when alternatives are available.
- 75 Some parents or carers who arrive before 8am may park on Marriott Parade if spaces are available within a short distance of the childcare centre. They may use Berkeley Court to turn around for parking. Yet, the basement will be used once these streets are parked out.
- 76 It is also the case that parents and carers become familiar with the basement and its characteristics. This familiarity generally overcomes the apprehension that Mr Roberts refers to.
- 77 Aside from the above, I cannot consider the impact of on-street parking. The decision in *Brunswick Investment* makes it clear that parking impacts on local streets cannot be considered when a proposal provides the required number of car parking spaces.¹⁴ Consequently, the management of on-street parking on Marriott Parade is a matter for the Council rather than this Applicant.

¹⁴ *Brunswick Investment Project Pty Ltd v Moreland CC* [2021] VCAT 1191 at paragraphs 24 and 68-9 for example.



- 78 Ms Dunstan's comprehensive assessment of the nearby street network persuades me that the congestion anticipated by Mr Allison will not occur. Her firm has assessed the impact on the Springvale Road/Kingsway intersection, the Kingsway/Marriott Parade intersection, and the roundabout at Kingsway/Southdown Avenue.¹⁵
- 79 This analysis shows a change from excellent service to very good service in the right-hand turn from Springvale Road and suggests that any additional queueing in the right-hand turn lane can be accommodated in the storage capacity in this lane.
- 80 It indicates that there will be minor increases in delays and queues along Kingsway however these will not extend over the Kingsway/Marriott Parade intersection. Thus, vehicles turning right from Kingsway into Marriott Parade will not be unduly impeded.¹⁶ Mr Allison takes issue with Ms Dunstan's estimate that 20% of the childcare centre's vehicles will come from this direction however, I am satisfied with Ms Dunstan's opinion that this intersection would continue working well with a higher number of vehicle trips from this direction.
- 81 Regarding the design question raised by the Council, I consider that an angled crossover is appropriate in this proposal. I am satisfied that pedestrian safety is properly accommodated in the proposal. Adequate sight lines are provided, and the driveway is almost flat for the first 8m into the sight. As such, drivers leaving the centre and pedestrians on Marriott Parade will have clear views of each other and will have adequate time to avoid any conflict.
- 82 In summary, I find that the traffic generated by the proposal is managed satisfactorily and will not adversely affect the safety or amenity of the area to an unreasonable extent.

IS THE PROPOSAL AN OVERDEVELOPMENT AND A POOR ARCHITECTURAL OUTCOME?

An overdevelopment

- 83 In their report to Council, the Council's officers said that the previous iteration of the childcare centre was an overdevelopment because:
- a several outdoor play areas are on the building's upper levels;
 - b the townhouses have a continuous built form;
 - c the front setbacks are dominated by hard paving;
 - d the extension of the childcare centre over Townhouse 1 accentuates the mass of the dwellings;

¹⁵ At page 61 of her Statement of Evidence.

¹⁶ At page 62 of her Statement of Evidence.



- e the screened townhouse windows create a ‘very busy and heavy façade’;and
 - f the townhouses do not have 60m² of private open space.
- 84 Ms Milner shares many of these views and is concerned by the internal amenity of the childcare centre.
- 85 I am not persuaded by these submissions. The play areas on the upper floors of the childcare centre are well integrated with the associated indoor areas and are indicative of the four-storey development sought for this area. As identified by the Applicant, the ‘internal amenity’ of the childcare centre is a matter for the National Standards for this use rather than for the Planning Scheme.
- 86 I do not agree that the front setbacks are dominated by hard paving. There are only two areas of hard paving on this very long frontage. The first is for the driveway and the second is for the pedestrian entry. Otherwise, the frontage is dedicated to landscaping and play areas.
- 87 I do not agree that the continuous built form or screened windows of the townhouses are symptoms of overdevelopment. The proposal provides a transition between the more intensive form proposed near Kingsway and the adjoining residential area. The low-scale townhouses provide a step between the adjoining dwellings and the childcare centre and largely screen the childcare centre from view. This ‘buffering’ of the existing residential properties is a good design outcome.
- 88 I do not agree that the extension of the childcare centre over Townhouse 1 is problematic in the amended plans. The entire southern façade is very subdued and well-designed. The extension of the childcare centre is within the anticipated height, is clad in a mansard roof and integrates with the third level of the childcare centre. The cohesiveness of the design minimises any sense that this specific element of the proposal is inappropriate.

A poor architectural outcome

- 89 In submissions to the Tribunal, through Ms Milner’s evidence and through the cross-examination of witnesses, the Council identified concerns about the internal walkway to the dwellings, with a focus on the width of this walkway, the extent of daylight to these dwellings, the privacy of these dwellings, and the enclosure of the courtyard of Townhouse 5. They say these concerns indicate that the proposal is a poor design response.
- 90 I disagree with the Council and Ms Milner. I consider that the proposal is a good design outcome, particularly by creating a buffer of townhouses between the childcare centre and existing dwellings.
- 91 Other good design outcomes are the design technique of locating the childcare centre’s main play areas towards Marriot Parade. This separates the noise and activity of children playing from a future four-storey building



on the abutting site to the north at 125 Kingsway and uses the street's width to provide separation from future four-storey buildings at 32, 34 and 36 Marriott Parade.

- 92 It is also a good design outcome for the childcare centre to turn its back on the townhouse component of the proposal. This minimises the impact of the noise of children playing and manages the change in scale from a four-level childcare centre to the existing residential area.
- 93 These 'bigger picture' design responses outweigh the concerns raised by the Council and Ms Milner.
- 94 The internal walkway is an outcome of these 'bigger picture' design responses. The consequence is that the townhouses have a sense of a 'mews development', i.e., being accessed off an intimate laneway. At its highest, policy supports such diversification of dwelling stock. In terms of the detail raised by the Council, I take no issue with the width of the walkway. It is proportional to its intimate scale. I am satisfied by Mr Talacko's evidence that daylight to the townhouses' living areas is acceptable.
- 95 I accept Mr McPherson's evidence that future residents can manage their privacy by using internal blinds. This arrangement may not appeal to all members of the community however, I am satisfied that the overall amenity of these townhouses, their unique ambience relative to most housing in Glen Waverley, and their excellent location relative to shops, services and public transport leads to an acceptable outcome.
- 96 At the hearing, I asked the Applicant what could be done about the enclosure of the courtyard of Townhouse 5. Due to the site being cut to accommodate the proposal, its courtyard is a maximum of 1.4m below natural ground level. The Applicant offered to increase the ground floor and courtyard heights of Townhouses 2 to 5 by 100mm each. They say that it would raise the level of the courtyard of Townhouse 5 to approximately 1m below natural ground level while ensuring an almost flat grade to the internal walkway. They and the Council note that this change raises the question of notifying the adjoining property owners and occupiers at 1/125 Kingsway.
- 97 After review and further consideration, I find that this change is not necessary. I am persuaded that the landscape treatment proposed by Ms Dowey, where the courtyard consists of a flat area and a raised garden bed counteracts the sense of enclosure to a sufficient degree. This is a minor matter in the context of the proposal, and the design merit of the whole proposal influences my decision.

WHAT CONDITIONS ARE APPROPRIATE?

- 98 At the end of the hearing, we discussed the draft conditions circulated by the Council and marked up by the Applicant. After the hearing, the



Applicant and the Council circulated a further version of the conditions with all their changes marked up. I have revised these conditions to reflect my reasons and have made the following changes to the combined marked up version.

- 99 I have made the following substantive changes to draft Condition 1 on amendments to the plans:
 - a Deleted the requirement to set the crossover a minimum of 3m from the street tree as I am satisfied that the proposed distance is adequate;
 - b Deleted the requirement for bicycle spaces to be shown on the plans, as the plans show 8 bicycle spaces;
 - c Deleted the requirement to show corner splays for sight lines as these are shown on the plans; and
 - d Defined the acoustic treatments required by Mr Leo and the transparency and durability of the screens.
- 100 I have revised draft Condition 31 to limit its content to the mechanical plant, as this is the element of the proposal that requires further acoustic assessment.
- 101 I have removed the reference to 'line marking within the carpark' from draft Condition 33 (Car Parking Management Plan) as all line-marking is shown on the plans. I have also revised the 'standard condition' on 'Car Parking and Accessways' (draft Condition 16) to remove all information that is shown on the plans.
- 102 Regarding the use of the land being restricted to 172 children (at draft Condition 9), I have included the phrase 'Except with the written consent of the Responsible Authority' to allow any short or long-term increase in these numbers to occur with the Council's consent if it considers it appropriate.
- 103 Regarding the standard condition on structures above the building's roof level (at draft Condition 21), I have included the Applicant's request to allow works recommended in the amended Sustainability Management Plan. I understand that it is likely that rooftop solar panels will be proposed in this amendment, and I expect that the amended condition will allow this to occur.
- 104 I have also reordered the draft conditions in a more logical arrangement.

CONCLUSION

105 For the reasons given above, the decision of the responsible authority is set aside. A permit is granted subject to conditions.

Michael Nelthorpe
Member



APPENDIX A – PERMIT CONDITIONS

PERMIT APPLICATION NO	TPA/53422
LAND	15-17 Marriott Parade GLEN WAVERLEY VIC 3150

WHAT THE PERMIT ALLOWS

In accordance with the endorsed plans:

- Use and development of the land for a childcare centre;
- Construction of five dwellings;
- To put up and display of business identification signage.

CONDITIONS

Amended plans

- 1 Before the development and use starts, one copy of amended plans drawn to scale and correctly dimensioned, must be submitted to and approved by the Responsible Authority. 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 prepared by Milton Architects (Revision G) dated 28 August 2022, but modified to show the following all to the satisfaction of the Responsible Authority:

- a On-site parking spaces clearly marked;
- b Any changes required to accord with the Landscape Plan required by Condition 3;
- c Any changes required to accord with Condition 6 – Acoustic management of Plant and Equipment;
- d Any changes required to accord with the Car Parking Management Plan required by Condition 7;
- e Any changes required to accord with the Waste Management Plan required by Condition 8;
- f Any changes required to accord with the Sustainable Management Plan required by Condition 10;
- g Acoustic screening in accordance with Section 6 of the Statement of Evidence of Ross Leo dated 30 September 2022 except revised to show the acoustic fencing wrapping around the north-western corner of the childcare centre's ground floor;



- h The 'light' tone FB1 (face brickwork) applied to the residential frontages/building, and the 'medium-light' tone to the Early Learning Centre component in accordance with Drawings A00.005 Rev. I and A02.00 Rev. I;
- i The notations regarding the 'Acoustic Report' on A02.00 revised to state:
 - i "All Acoustic Screens associated with the childcare centre must have a minimum surface density of 12kg/m² and be free from holes and gaps and must be visually transparent;
 - ii the glazing of all Townhouse bedroom windows must achieve a minimum sound insulation requirement of R_w35;
 - iii the glazing of all Townhouse living room windows must achieve a minimum sound insulation requirement of R_w31;
 - iv all Townhouse facades facing the childcare centre must achieve a minimum sound insulation requirement of R_w 45 for bedrooms and R_w41 for living areas; and
 - v all Townhouses must be provided with 40mm thick solid core entrance doors (or the acoustic equivalent) with full acoustic seals."
- j The Materials Legend on A02.00 revised as follows:
 - i "All screens constructed of powder-coated aluminium or similar low maintenance materials";
 - ii 'PRF – Perforated Panels White' to include the phrase 'at a minimum 20% transparency';
 - iii Deletion of the word 'Frosted' from the 'BAL-F – Semi-Frameless Frosted Fixed Glass Balustrade';
 - iv 'BS – Batten Screens/Louvres – Timber Look' to include the phrase 'at a minimum 50% transparency';
 - v 'BS2 – Batten Screens/Louvres – White Colour' to include the phrase 'at a minimum 50% transparency';
 - vi 'BS4 – Batten Screens/Louvres – Light Colour Type 1', 'BS5 – Batten Screens/Louvres – Light Colour Type 2', and 'BS6 – Batten Screens/Louvres – Timber Look' to include the phrase 'to be no more than 25% transparent.'
- k The southern façade of Townhouse 1 amended in accordance with Drawing A04.02 Rev. I (South Elevation); and
- l The design detail of the Level 2 'mansard roof' component amended in accordance with Drawings A03.02 Rev. I (South Elevation), A05.02 Rev. I and A05.05 Rev. I.



Layout not to be Altered

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

Landscaping Plan

- 3 Concurrent with the endorsement of any plans requested pursuant to Condition 1, a landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority. The Landscape Plan must be generally in accordance with the Landscape Plans prepared by Hansen Partnership dated 30 September 2022 (LCD-001 – LCD-008 all revision A) except that the plans must show:
 - a Changes to the amended development plan required under Condition 1;
 - b The hydrant booster enclosure, electricity supply, gas and water meter boxes designed to be incorporated into the landscape setting;
 - c The detail of all proposed paving;
 - d The location of external lighting (if any); and
 - e The provision of an in-ground, automatic watering system linked to rainwater tanks on the land servicing the main garden areas.all to the satisfaction of the Responsible Authority. When approved, the plans will be endorsed and then form part of the Permit.
- 4 Before the use starts and before the dwellings are occupied, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and then maintained to the satisfaction of the Responsible Authority thereafter.
- 5 All landscaping works shown on the endorsed landscape plan(s) must be maintained and any dead, diseased or damaged plants replaced, all to the satisfaction of the Responsible Authority.

Acoustic Management of plant and equipment

- 6 Prior to the commencement of the use of the childcare centre, a written assessment of noise levels generated by mechanical plant and equipment and noise mitigation measures must be prepared by a suitably qualified person and approved to the satisfaction of the Responsible Authority.
The permitted use must operate in accordance with the requirements of this assessment to the satisfaction of the Responsible Authority.

Car Parking Management Plan

- 7 Prior to the commencement of the use of the childcare centre, a Car Parking Management Plan, must be prepared by a suitably qualified person and approved to the satisfaction of the responsible authority. It must address:
- a Way finding and car park allocation signage;
 - b Management of tandem spaces; and
 - c Any changes to the plans to be endorsed under this permit

The permitted use must operate in accordance with this CMP to the satisfaction of the Responsible Authority.

Waste Management Plan

- 8 Concurrent with the endorsement of plans required pursuant to Condition 1, a Waste Management Plan must be approved by the Responsible Authority. The plan must be generally in accordance with the Waste Management Plan prepared by Milton Architects dated 24 December 2021 but revised to show the:
- a Inclusion of the TPA number and purpose of the WMP to the introductory section;
 - b Correct waste volume calculation to include private collection to the dwellings;
 - c Inclusion of glass recycling service;
 - d Demonstration of details of compliance with permitted collection times;
 - e Details of in-dwelling waste and recycling receptacles and provision of food waste kitchen caddy to the dwellings;
 - f Scaled plans detailing bin washing facilities and drainage to sewer, ventilation and all waste streams to the child care centre and dwellings;
 - g Scaled plans detailing the proposed waste collection process including; bin collection areas, the strategy for bin transfer from storage area to collection point & transfer routes and gradients; and plans for hard waste and e-waste collection and disposal;
 - h Details of the provision of hard waste and e-waste management;
 - i Details of responsibility for the operation of the waste management system; and
 - j A Waste Communication Strategy for occupiers.
- to the satisfaction of the Responsible Authority



When approved, the plans will be endorsed and then form part of the Permit. The provisions, recommendations and requirements of the endorsed Waste Management Plan must be implemented and complied with to the satisfaction of the Responsible Authority.

Construction Management Plan

- 9 Prior to the commencement of any site works (including any demolition, vegetation removal and excavation), a Construction Management Plan (CMP) must be submitted to and approved by the Responsible Authority. Once approved, the CMP will form part of the permit and must be implemented to the satisfaction of the Responsible Authority. The CMP must address the following issues:
- a Appropriate measures to control noise, dust and water and sediment laden runoff;
 - b Appropriate measures to prevent silt or other pollutants from entering into the Council's drainage system or onto the road network;
 - c Appropriate measures relating to removal of any hazardous or dangerous material from the site, where applicable;
 - d A plan showing the location and design of a vehicle wash-down bay for construction vehicles on the site so as to prevent material leaving the site and being deposited on Council's road network or drainage system;
 - e A program for the regular cleaning and maintenance of the surrounding road surfaces;
 - f A site plan showing the location of any site sheds, on-site amenities, building waste storage and the like, noting that Council does not support the siting of site sheds within Council road reserves;
 - g Measures to provide for public safety and 24-hour site security;
 - h A plan showing the location of parking areas for all construction and sub-contractors' vehicles on and surrounding the site, to ensure that vehicles associated with construction activity cause minimum disruption to the surrounding location. Any basement car park on the land must be made available for use by sub-constructors/tradespersons upon completion of such areas, without delay;
 - i A Traffic Management Plan showing truck routes to and from the site;
 - j A swept path analysis, using the largest truck anticipated on site, demonstrating the ability of trucks to enter and exit the site in a safe and timely manner.
 - k Appropriate measures to ensure that sub-contractors/tradespersons operating on the site are aware of and adhere to the requirements of the CMP;



- l The provision of 24-hour contact details of key construction site staff; and
- m Restriction on hours of work on site, including demolition, excavation or general construction works, to the following hours:
 - Monday to Friday (inclusive) – 7.00am to 6.00pm;
 - Saturday – 9.00am to 1.00pm;
 - Saturday – 1.00pm to 5.00pm (Only activities associated with the erection of buildings that does not exceed the EPA guidelines); and
 - No works are permitted on Sundays or Public Holidays.

Unless prior written consent is provided by the Responsible Authority these hours cannot be varied.

The provisions, recommendations and requirements of the endorsed Construction Management Plan must be implemented and complied with by all contractors to the satisfaction of the Responsible Authority.

Sustainable Management Plan (SMP)

- 10 Concurrent with the endorsement of plans requested pursuant to Condition 1, a Sustainable Management Plan must be submitted to and approved by the Responsible Authority. The plan must be generally in accordance with the Sustainability Management Plan prepared by Milton Architects dated 25 February 2022 but amended to reflect the amended development plan required under Condition 1.

Green Travel Plan

- 11 Before the childcare centre use commences, an amended Green Travel Plan to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the amended Green Travel Plan will be endorsed and will form part of this permit. The amended Green Travel Plan must be generally in accordance with the Green Travel Plan prepared by Milton Architects, but modified to include the following:
 - a The person who is responsible for implementation and the proposed timeframe for implementation; and
 - b Details of reporting to Council on the Green Travel Plan monitoring/ review.

Ongoing Green Travel Plan Requirement

- 12 The provisions, recommendations and requirements of the endorsed Green Travel Plan must be implemented and complied with to the satisfaction of the Responsible Authority.



Use of Land

- 13 Unless with the written consent of the Responsible Authority, there must be no more than 172 children in the Child Care Centre premises at any one time.
- 14 The Childcare Centre use may operate only between the hours of 6:30am to 7pm Monday to Friday.

Tree Protection

- 15 All existing vegetation (including trees on adjoining properties and nature strip) shown on the endorsed plans marked to be retained, must not be removed, destroyed or lopped without the further written consent of the Responsible Authority.
- 16 Prior to the commencement of any works permitted by this permit, all trees (including trees on adjoining properties and nature strip) that are to be retained, or are located within or adjacent to any works area, must be marked and provided with a protective barricade to ensure the retention. The installation and maintenance of these barriers must be verified by a qualified landscape architect or horticulturist.
- 17 All work within the dripline of any tree to be retained (including trees on site and adjoining properties) shall be supervised by a qualified arborist or horticulturist who shall ensure that the works are done in a manner which protects and minimises any damage to those trees.
- 18 No building material, demolition material earthworks, machinery or vehicles shall be parked, stored or stockpiled under the canopy line of any tree identified as “to be retained” during the construction period of the development hereby permitted.

Car Parking and Accessways

- 19 A minimum of 37 parking spaces are to be provided for the childcare centre use at all times and suitably labelled/signed as such to the satisfaction of the Responsible Authority.
- 20 All parking areas and access lanes must be kept available for these purposes at all times to the satisfaction of the Responsible Authority.

Privacy screens

- 21 Prior to the use starts or occupation of the dwellings, all screening and other measures to prevent overlooking as shown on the endorsed plans must be installed to the satisfaction of the Responsible Authority. Once installed the screening and other measures must be maintained to the satisfaction of the Responsible Authority. Note: The application and use of obscure film fixed to transparent windows is not considered to be 'obscure glazing' or an appropriate response to screen overlooking.



Services and Plant Equipment

- 22 All pipes (except down-pipes), fixtures, fittings and vents servicing any building on the site must be concealed in service ducts or otherwise hidden from external view, to the satisfaction of the Responsible Authority.
- 23 No equipment, services, architectural features or structures of any kind, including telecommunication facilities, other than those shown on the endorsed plans shall be permitted above the roof level of the building unless recommended in the SMP to be approved under condition 10 of this permit.
- 24 No bin or receptacle or any form of rubbish or refuse shall be allowed to remain in view of the public and no odour shall be emitted from any receptacle so as to cause offence to persons outside the land.
- 25 Air-conditioning and other plant and equipment installed on or within the buildings must be so positioned and baffled that any noise emitted complies with the appropriate Australian Standards and EPA requirements.

Drainage & Stormwater

- 26 The site must be drained to the satisfaction of the Responsible Authority.
- 27 All stormwater collected on the site from all hard surface areas must not be allowed to flow uncontrolled into adjoining properties or the road reserve.

Satisfactory Continuation

- 28 Once the development has started it must be continued and completed to the satisfaction of the Responsible Authority.

Signage

- 29 The location, layout, dimensions, structures and features of the approved sign shown on the endorsed plans must not be altered without the prior written consent of the Responsible Authority.
- 30 The sign must be constructed and maintained to the satisfaction of the Responsible Authority.
- 31 No flashing, intermittent or changing colour light is permitted to be displayed, except with the prior written consent of the Responsible Authority.
- 32 The sign must only be illuminated between the hours of 6:30am to 7pm, except with the prior written consent of the Responsible Authority.
- 33 In accordance with section 68 of the Planning and Environment Act 1987, this permit will expire if one of the following circumstances applies:
 - a The development is not started before three (3) years from the date of issue.
 - b The development is not completed before five (5) years from the date of issue.



In accordance with Section 69 of the *Planning and Environment Act 1987*, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or:

- vii within six (6) months afterwards if the development has not commenced; or
- viii within twelve (12) months afterwards if the development has not been completed.

Council and the Victorian Civil and Administrative Tribunal are unable to approve requests outside of the relevant time frame.

– End of conditions –

