VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

|  |  |
| --- | --- |
| planning and environment LIST | vcat reference No. P995/2020  Permit Application no. TPA/51344 |
| CATCHWORDS | |
| Section 82 of the *Planning and Environment Act 1987*; Monash Planning Scheme; Industrial 1 Zone; Proposed Place of Assembly; Reduction in Car Parking; Existing Parking Pressures; Access to Businesses; Safety; Management of Patron Numbers. | |

|  |  |
| --- | --- |
| **Applicants** | Peter Pascuzzi and Others |

|  |  |
| --- | --- |
| **Responsible Authority** | Monash City Council |
| **Respondent** | Sankat Mochan Samiti Incorporated |

|  |  |
| --- | --- |
| SUBJECT LAND | 4 Margaret Street  OAKLEIGH SOUTH VIC 3167 |
| HEARING TYPE | Hearing |
| DATEs OF HEARING | 21 April 2021 |
| DATE OF ORDER | 3 May 2021 |
| CITATION | Pascuzzi v Monash CC [2021] VCAT 398 |

# Order

### Permit application amended

1. Pursuant to clause 64 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* the permit application is amended by changing the name of the permit applicant to:

Sankat Mochan Samiti Incorporated

### Permit granted

1. In application P995/2020, the decision of the responsible authority is affirmed.
2. In planning permit application TPA/51344, a permit is granted and directed to be issued for the land at 4 Margaret Street, Oakleigh South, in accordance with the endorsed plans and the conditions set out in the Notice of Decision to Grant a Permit dated 1 June 2020.
3. The permit allows:

* Buildings and works to the existing building, use of the land as a place of assembly and reduction in the parking requirement pursuant to clause 52.06 of the Monash Planning Scheme.

|  |  |  |
| --- | --- | --- |
| **Margaret Baird**  **Senior Member** |  |  |

# Appearances

|  |  |
| --- | --- |
| For applicants | Mr P Pascuzzi with Mr D Goberman. |
| For responsible authority | Ms J Lui, town planner. |
| For respondent | Mr R Hocking, City Shire Planning Pty Ltd. |

# Information

|  |  |
| --- | --- |
| Description of proposal | Use and development as a place of assembly for the ‘Sankat Mochan Indian Cultural Centre’, a not-for- profit organisation providing spiritual, social welfare and educational facilities to the Hindu community. Some building and works are proposed. Hours of operation and maximum patron numbers in the Notice of Decision are:   * 10.30am-6.30pm – Monday to Friday, 20 patrons. * 10.30am-4.30pm – Saturday and Sunday, 20 patrons. * 6.30pm-8.30pm – Monday to Friday, 50 patrons. * 4.30pm-8pm – Saturday and Sunday, 50 patrons. |
| Nature of proceeding | Application under section 82 of the *Planning and Environment Act 1987* – to review the decision to grant a permit. |
| Planning scheme | Monash Planning Scheme [**scheme**]. |
| Zone and overlays | Industrial 1 Zone [**IN1Z**]. Design and Development Overlay Schedule 1 Industrial and Commercial Design and Development Area [**DDO1**]. |
| Permit requirements | Clause 33.01-1 - a permit is required to use the land as a place of assembly. Clause 33.01-4 - a permit is required for building and works. Clause 43.02 - a permit is required to construct or carry out works. Clause 52.06 - a permit is required to reduce car parking. |
| Relevant scheme policies and provisions | Clauses 11, 13, 19, 21, 22.03, 33.01, 43.02, 52.06, 65 and 71. |
| Subject land description | The subject land fronts Margaret Street and also abuts Carinish Road. It is approximately 1,119m2 and contains a large structure used most recently as a warehouse. The building is within an attached row of buildings. The area is industrial and commercial in nature with a range of existing businesses. |
| Tribunal inspection | 22 April 2021 between 11.45am and 12.15pm. |

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

## Introduction

1. The applicants own and operate businesses in an industrial area where the Monash City Council has determined to grant a permit for a place of assembly at No. 4 Margaret Street, Oakleigh South.
2. The applicants have brought this proceeding to the Tribunal, asking for the Council’s decision to be reviewed. They emphasise existing parking and traffic issues in the industrial area as well as current operational restrictions and considerations (such as for large truck movement). The applicants say the Council and respondent have not understood the existing situation and issues for businesses. They express their significant concerns about how the proposal will adversely affect safety, ongoing access for their vehicles, and the availability of parking for clients and staff.
3. The applicants challenge photographic material as well as traffic counts, surveys and observations relied upon by the Council and permit applicant. They have produced photographic and other material in support of their position about the current situation. They submit that an influx of cars will be problematic for the ongoing operation of existing businesses.
4. The applicants’ submissions are challenged by the Council and respondent who argue the proposal is acceptable, including the permission to reduce car parking on the basis of clause 52.06 of the scheme. The Council’s submission concludes the proposal generally achieves a balance – it provides a place of assembly that can be used for cultural, spiritual and education purposes whilst still maintaining the integrity of the industrial area. The Council’s conditions restrict hours of operation, number of patrons, and noise levels emitted from the site. The conditions also require the preparation of a car parking management plan.
5. The Tribunal must determine whether the application will produce an acceptable outcome having regard to the relevant policies and provisions in the scheme. The key policies and provisions have been listed in the ‘Information’ section of these reasons and have been considered fully by me, as relevant to the facts and the permit application. Clause 71.02-3 requires the decision-maker to integrate the range of policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development.

## Tribunal findings

### Strategic context

1. The subject land is part of an industrial area recognised by its zoning and the application of DDO1. It is towards the eastern edge of the industrial area, with dwellings in a residential area fronting Colin Road.
2. The industrial area contains a mix of building types and uses. It includes warehouses, among them large storage facilities.
3. The area is part of the Huntingdale Neighbourhood Activity Centre[[2]](#footnote-2) where the scheme sets strategic directions including broadening the community activities and ensuring parking is provided to meet the needs of the Centre.
4. Focussing on the key issues in dispute in this proceeding, it is important to refer to clause 21.08-3. It has specific objectives and strategies relating to transport and traffic that are relevant in assessing the applicants’ grounds in this proceeding. These include:

* Improve long term management and development of car park facilities in key activity centres through development of parking precinct plans.
* Ensure access to commercial/industrial areas meets the needs of the enterprises in those areas and assists in maintaining their competitiveness.

1. “*Other actions*” stated in clause 21.08-3 include “*Continuing monitoring of traffic movements and preparation of strategies to ensure that transport systems are meeting community need*”.
2. The subject land is part of an area being assessed by the Victorian Planning Authority in relation to the Monash National Employment and Innovation Cluster. Further work is being undertaken by the Council with respect to the future development and land use within the Huntingdale Precinct, as noted in the applicants’ submission.

### What is not in issue

1. The focus of the dispute is about traffic, parking and safety. The applicants emphasised at the hearing that they are not opposing the use of the premises, *per se*, but that parking and related issues cannot be resolved and have serious adverse impacts.
2. It is relevant to the overall and balanced decision I must make, including permissions under clauses 33.01-1, 33.01-4 and clause 43.02 (and associated policies at clause 21 and 22.03) that:

* The use of the land for a place of assembly, in principle, is not opposed based on the submissions made at the hearing.
* The proposed buildings and works are minor, and no issues have been raised in relation to this part of the permit application.
* Other than issues related to parking, access and safety (as I discuss below) there are no submissions that the proposed use would adversely affect the amenity of the area through noise or other emissions or impacts on businesses or dwellings.
* There are no specific submissions that the purposes of clauses 33.01 and 43.02 will not be met.

### Car parking

#### Proposed parking

1. The car parking requirements in clause 52.06 establish the rate to be applied for a new land use. This is 0.3 spaces per patron for a place of assembly. For a place of assembly with 20 patrons, this is a total of six spaces. For a place of assembly with 50 patrons, this is a total of 15 spaces. This is the rate required to be applied by the scheme, rather than higher rate that the applicants contend should apply based (for example) on the permit applicant’s current place of worship at a site on North Road, Huntingdale.
2. The subject land has six available parking spaces which would be used by the proposed place of assembly. These are in front of the building. This number would satisfy the required rate to a maximum of 20 patrons.
3. A planning permit is required to reduce parking by up to nine spaces. The higher numbers of persons on the subject land would occur from 6.30pm to 8.30pm on Monday to Friday and from 4.30pm to 8pm on Saturday and Sunday when a maximum of 50 patrons at any one time is allowed by the Notice of Decision.
4. Other than the six available on-site car spaces, all other parking associated with the land use would occur off-site and specifically on-street.
5. Clause 52.06 contains a purpose including:

* To ensure that car parking is provided in accordance with the Municipal Planning Strategy and the Planning Policy Framework.
* To ensure the provision of an appropriate number of car parking spaces having regard to the demand likely to be generated, the activities on the land and the nature of the locality.
* To support sustainable transport alternatives to the motor car.
* To ensure that car parking does not adversely affect the amenity of the locality

1. Decision guidelines at clause 52.06-7 provide the basis for the decision I must make as to whether to grant a permit to reduce car parking. Among the matters I must consider, as appropriate, are:

* A Car Parking Demand Assessment (including matters to be included in such an assessment set out in clause 52.06-7).
* Any relevant local planning policy.
* The availability of alternative car parking in the locality of the land.
* Any adverse economic impact a shortfall of parking may have on the economic viability of any nearby activity centre.
* The future growth and development of any nearby activity centre.
* Any car parking deficiency associated with the existing use of the land.
* Local traffic management in the locality of the land.
* The impact of fewer car parking spaces on local amenity, including pedestrian amenity and the amenity of nearby residential areas.
* Access to or provision of alternative transport modes to and from the land.
* The equity of reducing the car parking requirement having regard to any historic contributions by existing businesses.
* The character of the surrounding area and whether reducing the car parking provision would result in a quality/positive urban design outcome.
* Any other relevant consideration.

1. A Car Parking Demand Assessment formed part of the permit application material.[[3]](#footnote-3) It details the nature of the proposed activities. It included parking surveys and empirical data relating to the respondent’s premises at North Road for two weekdays and a special event. It included details from parking surveys of Margaret Street and surrounding streets (250 metre catchment). This data was from February 2020. Updated data with respect to parking utilisation and supply in February 2021 by the same traffic engineer formed part of the respondent’s submission in this proceeding.
2. The respondent tendered a letter from the land owner of No. 6 Margaret Street (who I understand from submissions was the previous owner/occupier of the subject land). The letter indicates an agreement to make four spaces in front of that adjacent premises available for the proposed use after 6pm on Monday to Friday, after noon on Saturdays and between 9am and 10pm on Sundays. While these spaces would plainly be convenient, I cannot give this offer any weight for multiple reasons, including that I have no information as to what (if any) planning permits apply to the adjacent property to consider any implications of the offer, nor to assess it under the relevant criteria in clause 52.06.[[4]](#footnote-4)
3. There is no suggestion by the respondent that public transport use will play a role in patrons’ attendance at the proposed facility.

#### Overview of applicants’ concerns

1. The applicants are concerned that there is not enough parking on-site for the number of persons who will attend the site. They disagree with material and submissions by the Council and respondent, including the following points that are extracted from the applicants’ written material:

* We do not agree with the traffic engineers report stating that there are 80 carparks available as we cannot find parking for our staff and clients.
* There is insufficient on-site parking particularly given the large numbers of patrons attending services (and likely increases in those numbers).
* This area is an industrial zone, the factories and warehouses run round the clock and therefore, the parking is full almost all times of the day. Hence, the assumption of accommodating larger number of patrons outside 9am – 5pm is not valid.
* Having one business take up all available parking is not fair to every other business that has been in the area prior to this change.
* It basically means we have no room to grow; our visitors will be experiencing difficulties when visiting us and daily deliveries / pickups will be affected. Depending on severity of the above effects, we’re likely to see some of our customers leave this site and go elsewhere.
* I have constant complaints from staff and customers that they are unable to find parking. One of my staff has switched to using public transport after getting parking fines and being frustrated with finding parking at 9am in the morning.

1. Photographs were tendered. They were taken in various locations such as Margaret Street, Price Street, Edinburgh Street and near Carinish Road across a range of dates and times including September 2020, March 2021 and April 2021.

#### Conclusions in relation to parking

##### Observations and empirical information about parking supply and demand

1. Multiple surveys, photographs, other information provided by the parties and Nearmap time sequence photography shown at the hearing are relatively consistent in demonstrating:

* Parking around the subject land, in Margaret and Prices Streets, is heavily used during the day.
* Parking demands reduce into the mid to late afternoon.
* There are limited parking demands at weekends.

1. Lower parking demands, with greater vacancies, later into the day, evenings and at weekends are evident. Vacancies at these times are substantial and close to the subject land. The traffic report identifies the location of parking spaces across the surveyed area and the number of occupied spaces at a range of times. For example, on Thursday evenings from 6.30pm -8.45pm there were many more empty than occupied spaces in Margaret and Price Streets.
2. My site visit on a Thursday over the middle of the day aligns with many of the observations made by parties. They include parking spaces mostly occupied, as well as trucks double-parked and loading from the street. A wider area involving residential streets is also heavily parked, where there are some truck bans.
3. I surmise that the amount of unrestricted parking will mean many spaces are occupied by staff; leaving those undertaking short term visits needing to park further away.
4. I appreciate why the applicants’ are concerned. I accept that parking is near or at capacity near to the subject land during the day, it is however evident from multiple sources of tendered information that car spaces are available at a further distance from the subject land for users of the subject land or other businesses. Although further away than car spaces in Margaret and Price Streets, the spaces are within convenient walking distances.
5. The empirical data associated with the North Road site shows a lower parking demand (0.2 spaces per patron) for the surveyed events, being a special event and a regular evening with 50 people. I accept that this material does not relate to the regular daytime activities. Even if there are more than six cars from time to time, there is capacity in the area for parking to be found without using all up all available spaces.
6. I accept information provided by the applicants that some business operations are 24/7 including overnight and on weekends. Conditions on the Notice of Decision have limited patron numbers on Saturday mornings. However, the apparent high weekday daytime parking pressures do not occur at other times based on the multiple parking surveys.

##### Warehouse use of the subject land

1. The Notice of Decision allows daytime use to 20 patrons (Monday to Friday) from 10.30am – 6.30pm because the Council and respondent submit no reduction is needed over this time period due to the credit of 11 spaces associated with warehouse use on the subject land. The former use provided six spaces and had a scheme requirement of 17 car spaces.
2. It is valid to consider this former use, based on the decision guidelines in the scheme to which I have referred earlier. It is generally accepted that a car parking credit for a past use is limited to the actual extent of parking shortfall exercised by the site in the two years prior to the application.[[5]](#footnote-5)
3. Anecdotal information from the applicants is that the warehouse (that I was told has now relocated to the adjacent building) was operated by one person, without staff, with around 11-12 clients per day. This level of activity is unlikely to have generated a demand of 17 spaces. However, it would have had some demands. With six on-site car spaces, its actual demands are likely to have been substantially accommodated on-site.
4. The proposed use would require six car spaces during the day, based on the patron cap in the Notice of Decision (20 persons at any one time). The information in the planning permit application shows that 25 people are currently involved in morning activities that are proposed to now occur on the subject land. It will be incumbent on the permit holder to comply with a permit requirement, which could be achieved in various ways including staggering activities.

##### Impacts on the Activity Centre

1. Clause 52.06-7 distinguishes between the assessment of likely demand for parking spaces, and whether it is appropriate to allow the supply of fewer spaces. The latter is a strategic consideration.
2. Where a change of use is consistent with planning for the activity centre and car parking cannot easily be provided, it is often accepted that a reduction in car parking requirement should be allowed rather than prevent the use or development.[[6]](#footnote-6)
3. In this case, there is no adopted Precinct Plan but the work to date, to which I was referred, shows that parking is a specific issue and concern. This type of issue is usually approached on a centre-wide basis rather than on a site-by-site basis. The Precinct Plan that is in preparation is an avenue to monitor and assess the needs of many users holistically.
4. I am not persuaded that approval of the current permit application would impede or undermine the current use or future use and development of the Huntingdale Neighbourhood Activity Centre. The proposal would not take up all spare capacity because on-site parking would meet the scheme’s required rate during the day and there are extensive vacancies in the evenings and on weekends. For example, the 2021 survey data for a Thursday evening – 4 February 2021 – show between 85 and 94 available car spaces on-street. On a Saturday night – 6 February 2021 – the survey undertaken after 6.00pm shows 94 available car spaces on-street within a walkable range.

### Vehicle access

1. The applicants have explained aspects of their business operations. This includes large trucks, semi-trailers, buses and forklifts. It was explained that, on occasion, motorists parked in the street are asked to move their vehicles to facilitate access for the largest vehicles.
2. This type of activity is evident in the photographs that have been tendered and some was observable on my site visit.
3. This is an existing situation involving very large trucks associated with current business operations. The width of some roads, with on-street parking and vehicles double-parked, appear to be contributing factors. It creates congestion, potential safety and other issues today.
4. It is not, however, a reason to prevent the use of the subject land. The proposed use does not involve more large vehicles and will not exacerbate this type of traffic and access issue.

### Safety

1. The applicants submit the proposal will bring children into the area. They say large number of patrons, including children, will be allowed on-site including weekends and special day events which will spill out onto streets outside.
2. They submit the safety of young children visiting the proposed facility would be compromised due the presence of trucks in the area. They fear potential accidents, as could occur if children enter other properties where there are large trucks and vehicles.
3. Safety issues are an understandable concern. However, there is no indication that children would attend the site unaccompanied or unsupervised. All road users must exercise care, attention and courtesy and are expected to obey road rules. Existing businesses are obliged to as well, including with respect to vehicle access and loading arrangements. No-one can guarantee that accidents can never happen whether today or in the future. The professional assessments do not demonstrate any inherent safety issues, noting there is a network of footpaths around these streets. In addition, the on-site parking layout will enable unimpeded pedestrian entry/exit from/to Margaret Street, avoiding cars parked on-site and not requiring vehicles to park off-site. A car parking management plan is part of the Notice of Decision and that will further refine arrangements. This does not mean users of the centre will never park on-street but the limited number of persons at any one time limits the potential for issues to arise.
4. The Notice of Decision limits the number of person on the site at any one time and time of operation. Smaller numbers are proposed during the day with a maximum of 50 into the evenings and weekends. There is no approval in the Notice for large special events. All of the activities at the North Road temple are not, and would not be allowed, to be relocated to the subject land under this Notice.

### Compliance with patron numbers

1. The applicants contend the number of patrons will far exceed the number granted, saying:

Who will be monitoring these numbers?

As community grows and numbers increase, will patrons be turned away?

What will happen if they are exceeded?

Who will take responsibility?

Will centre be closed?

Who will compensate existing businesses / landlords?

1. The applicants refer to the number of people attending the existing Hindu temple in North Road, Huntingdale, which they say is well above the number of persons for which the permit application is made in relation to No. 4 Margaret Street. They contend more people will attend the subject land and it is not possible for those numbers to be enforced.
2. They are further concerned that the permit application was amended in the Council process to reduce patron numbers so as to fit the parking requirements, leading them to argue that the respondent will allow more people at the premises. This will further add to parking and safety concerns. The applicants also question whether the temple operates beyond its approved patron numbers, so as to understand the likelihood of future compliance at the subject land.
3. The cultural centre is one part of the permit applicant’s operation.
4. Planning permit applications proceed on the presumption of compliance. There are various ways to monitor and record patron numbers (including applications such as QR codes that are now widely in use as a result of the pandemic) and staggering of activities on the land. Any non-compliance is a matter for the Council, or others, to pursue rather than a reason to prevent an acceptable use on the subject land.

### Future intentions

1. The applicants question the permit applicant’s future intentions with respect to ongoing occupation of the North Road premises and potential relocation of the existing integrated facility to the subject land.
2. The respondent submits that there is no intention to do so and, if there was such a proposal, a planning permit would be required. This would give third parties an opportunity to review a permit application and object if they wish.
3. I note the officer’s report referred to the Cultural Centre relocating from No. 1289 North Road but there is no reference to special events and larger functions being accommodated at the subject land, because none is proposed.
4. I must assess this permit application on the basis upon which it has been put, not on the basis of what may or may not happen into the future. There is no application for the subject land to be used as a place of worship with more people than the associated with the proposed Cultural Centre. Any such application would need to be formally made and assessed on its merits. This is not a reason to refuse the current planning permit.

### Other matters

1. Several additional matters have formed part of the applicants’ case. They include alleged favouritism to the permit applicant and the cost of the proposal (purchase) relative to the number of persons proposed.
2. None are relevant considerations to my decision which must be based on relevant, not irrelevant, matters nor unsustained allegations. My assessment is independent and is solely based on the matters I am required to consider under the scheme and *Planning and Environment Act 1987*.

## Conclusion

1. For the above reasons, the Council’s decision is affirmed. The principle of using the land for a place of assembly is not in issue and nor are the proposed buildings and works. The proposed use of the land is a relevant consideration in the overall balance I must undertake under clause 71.02-3. I have considered the applicants’ concerns and existing parking and traffic issues they have described. My understanding of their concerns has been assisted by my site inspection. However, the assessment required under the scheme leads to the conclusion that the proposal is an acceptable outcome, notwithstanding the genuine concerns that have led the applicants to bring this proceeding.
2. A permit is issued in accordance with the Notice of Decision to Grant a Permit dated 1 June 2020.

|  |  |  |
| --- | --- | --- |
| **Margaret Baird**  **Senior Member** |  |  |

1. The submissions and evidence of the parties, 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. [↑](#footnote-ref-1)
2. Clause 21.06. [↑](#footnote-ref-2)
3. ML Traffic Engineers, 3rd March 2020. [↑](#footnote-ref-3)
4. Specifically, 52.06-7 under the heading “For applications to allow some or all of the required car parking spaces to be provided on another site”. [↑](#footnote-ref-4)
5. Planning Practice Note 22, Using the Car Parking Provisions, June 2015. This is a relevant document under the *Planning and Environment Act 1987*. [↑](#footnote-ref-5)
6. *Planning Practice Note 22, Using the Car Parking Provisions*, June 2015. [↑](#footnote-ref-6)