



# Victorian Civil and Administrative Tribunal

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## Holland Road Holdings Pty Ltd v Whitehorse CC [2017] VCAT 314 (7 March 2017)

Last Updated: 7 March 2017

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

#### ADMINISTRATIVE DIVISION

**PLANNING AND ENVIRONMENT LIST**      VCAT REFERENCE NO. P1279/2016  
PERMIT APPLICATION NO.  
WH/2015/1126

#### CATCHWORDS

Whitehorse Planning Scheme; Application pursuant to [Section 77](#) of the [Planning and Environment Act 1987](#); Neighbourhood Residential Zone (NRZ3); Child care centre; 118 children; 24 staff; One and two storey building; Neighbourhood character; Non-residential uses policy; Need; Extent of built form; Basement parking; Traffic; Noise; Loss of vegetation; Landscaping.

#### APPLICANT

Holland Road Holdings Pty Ltd

#### RESPONSIBLE AUTHORITY

Whitehorse City Council

#### RESPONDENTS

Blackburn & District Tree Preservation Society,  
Susan Schreiber, Jia Hong Li, Katie  
Weatherhead, Maryse Hermence, David Berry,  
Karen Croxford, Alan Wong, Eleanor Moist,  
Barbara McMeekin, Christopher G. Benette,  
David Mutimer, Rosemary Wrench, Richie  
Schreiber, Euan Drumm, Stephen Gaunson,  
Terence Peters, Jenny Tingwell, Sue Smith,  
Bradford Baker, Paul John Davies, Peter  
Clenaghan, Geoffrey Thomlinson, Grace  
Thomlinson, Ellen Donoghue, Caroline Williams,  
Andrew Jeffrey, Hilda Vanderzee, Kerri Eade,  
Ken Seng Ung, Therese Glynn, Russel and  
Mary Wade, Claire Miller and Chris Agar, Suzi  
Nottas, Andrew and Alison Cooke, Sarah Lane  
and Wayne Joseph, Susan Dalton, Michael  
William Champness, Don Bowles, David and Jo  
Esh, Jessica Hurle, Jillian Bartlett, Cheryl  
Walker, Bixia Chen, Hui Yu, Brearley Marsorie,  
Shirley Paulse, Bronwyn Soutter, Jan Siwek,  
Bob Mammatt, June De Hoedt, Christine and  
Craig Stephen, Brett Cook, Colin Anthony  
Roberts, Peter and Janet Fraser, John Murray,  
Thomas and Valarie Henderson, Lyn Younger,  
  
John and Virginia Ryan, Coral Miles, Lorraine

<b>SUBJECT LAND</b>	Taylor, Lorraine Bronwin Palmer, Richard & Diane Ridler
<b>WHERE HELD</b>	25 Holland Road, Blackburn South
<b>BEFORE</b>	Melbourne
<b>HEARING TYPE</b>	J A Bennett, Member
<b>DATES OF HEARING</b>	Hearing
<b>DATE OF ORDER</b>	12, 13, 14 and 15 December 2016
<b>CITATION</b>	6 March 2017
	Holland Road Holdings Pty Ltd v Whitehorse CC
	<a href="#">[2017] VCAT 314</a>

## ORDER

1. Pursuant to section 127 and clause 64 of Schedule 1 of the [Victorian Civil and Administrative Tribunal Act 1998](#), the permit application is amended by substituting for the permit application plans, the following plans filed with the Tribunal:

Prepared by:	The Ellis Group Architects
Drawing numbers:	2281-TP-A001 (Issue E), 2281-TP-A002 (Issue E), 2281-TP-A003 (Issue E), 2281-TP-A004 (Issue E), 2281-TP-A101 (Issue G), 2281-TP-A102 (Issue G), 2281-TP-A103 (Issue G), 2281-TP-A104 (Issue G), 2281-TP-A105 (Issue E), 2281-TP-A201 (Issue F), 2281-TP-A202 (Issue D), 2281-TP-A301 (Issue E), 2281-TP-A302 (Issue E), 2281-TP-A303 (Issue G), 2281-TP-A401 (Issue E), 2281-TP-A402 (Issue E), 2281-TP-A403 (Issue E), 2281-TP-A501 (Issue D), 2281-TP-A502 (Issue D), 2281-TP-A503 (Issue D), 2281-TP-A504 (Issue D)
Dated:	21.09.16

2. In application P1279/2016 the decision of the responsible authority is affirmed.
3. In planning permit application WH/2015/1126 no permit is granted.

J A Bennett  
Member

## APPEARANCES

For Holland Road Holdings Pty Ltd

Mr Gary Testro, Solicitor. He called expert evidence from the following witnesses:

- Mr John Glossop, Town Planner of Glossop Town Planning Pty Ltd.
- Mr Tim Marks, Acoustic Consultant of Marshall Day Acoustics Pty Ltd.
- Mr Glenn Waters, Arborist of Glen Waters Arboriculture.
- Ms Charmaine Dunstan, Traffic Engineer of Traffix Group Pty Ltd

- LIU.
- Mr Rob Thomson, Landscape Architect of Habitat Landscape Environmental Design Consultants.

Ms Tonii Tran, Managing Director of Starfish Childcare Centres and a Director of the permit applicant company also prepared a witness statement and attended the hearing to present her material and be asked questions.

For Whitehorse City Council

Ms Maria Marshall, Solicitor of Maddocks Lawyers.

For Respondents as named

Mr Mark Waldon, Town Planning Consultant for all respondents except the Blackburn & District Tree Preservation Society Inc.

Ms Susan Dalton, Mr John Ung, Ms Maryse Hermence, Mr Alan Wong, Mr Brad Baker, Ms Claire Miller, Mr David Berry (Blackburn & District Tree Preservation Society Inc), Ms Susan Schreiber, Ms Lorraine Palmer, Mr Richie Schreiber, Ms Eleanor Moist, Ms Grace Tomlinson, Mr Paul Davies, Ms Coral Miles, Ms Karen Croxford, Mr Geoffrey Tomlinson, Ms Rosemary Wrench

## INFORMATION

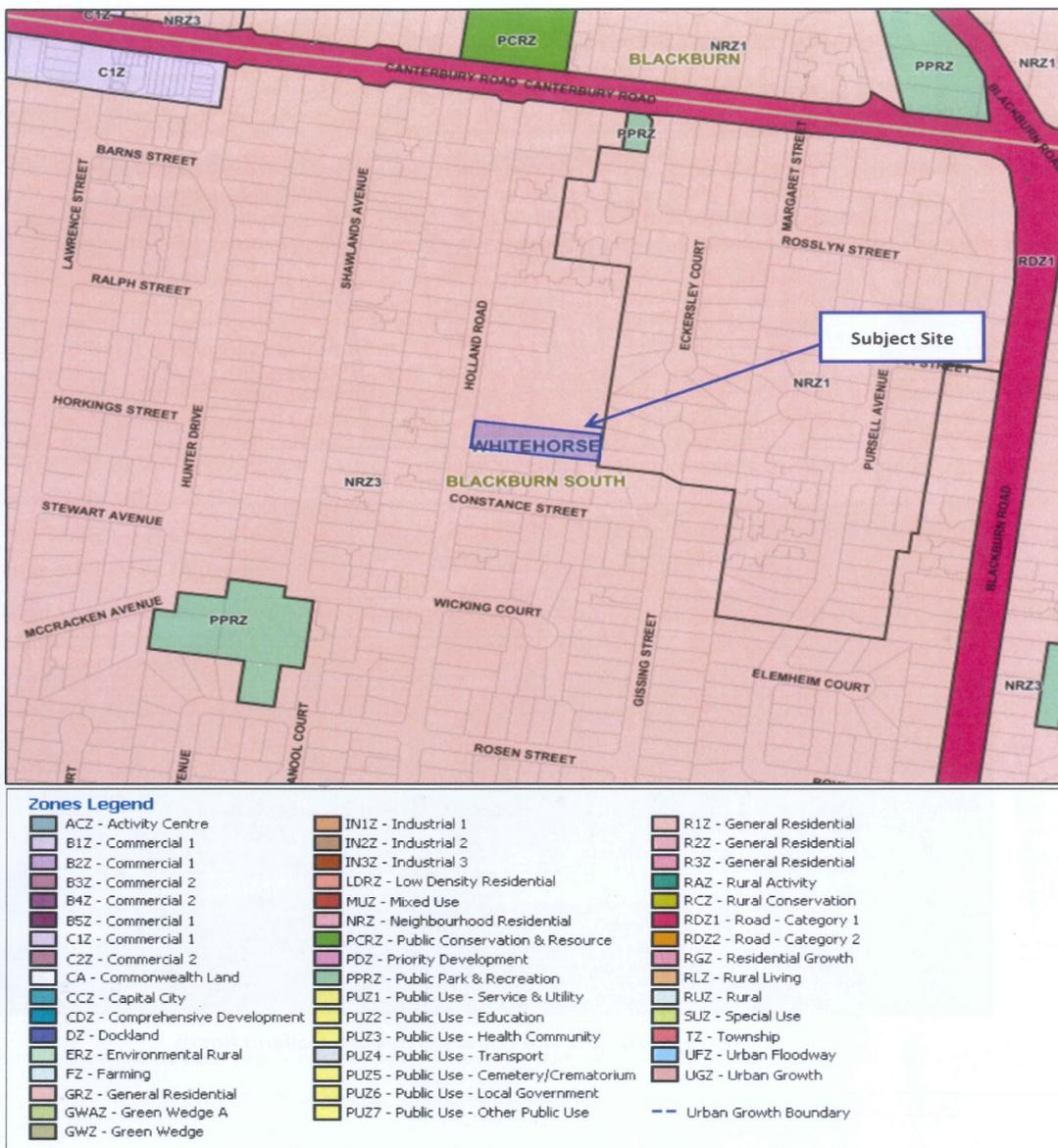
Description of proposal	Use and development of land for a 118 place child care centre.
Nature of proceeding	Application under <a href="#">section 77</a> of the <a href="#">Planning and Environment Act 1987</a> – to review the refusal to grant a permit.
Planning scheme	Whitehorse Planning Scheme.
Zone and overlays	Neighbourhood Residential Zone 3 ( <b>NRZ3</b> ).
Permit requirements	Cl. 32.09-1 (use the land for a childcare centre in NRZ3). Cl. 32.09-7 (construct a building or construct or carry out works for a <a href="#">section 2</a> use in Clause 32.09-1).
Relevant scheme policies and provisions	Clauses 9, 10, 11, 12, 15, 18, 19, 21.05, 21.06, 21.08, 22.02, 22.03, 22.04, 22.05, 32.09, 52.05, 52.06, 52.34 & 65.
Land description	The review site is a large rectangular lot containing a single storey weatherboard dwelling and outbuilding. The site is heavily vegetated comprising garden shrubs and canopy trees. Vehicle access is via a single width crossover located towards the southern end of the site.

The review site is located on the eastern side of the street. It has a frontage of 21.34 metres, a depth of 94.65/94.67 metres and an area of 2,020 square metres.

## REASONS[1]

### WHAT IS THE APPLICATION ABOUT AND WHY IS IT BEING OPPOSED?

1. The permit applicant has appealed Council's decision to refuse a permit for a 118 place childcare centre in Blackburn South.
2. The following extract from Ms Dunstan's evidence statement identifies the review site and land use zoning in the vicinity.



3. The proposal involves the demolition of the existing dwelling, removal of 5 large trees, and construction of a new one and two storey building over basement parking for 20 vehicles. An additional 5 car spaces are provided in the front setback. The ground floor contains 7 child care rooms, kitchen, laundry, reception area and amenities. Pedestrian access is via a lift from the basement car park or via a footpath along the southern boundary. First floor contains a meeting room, staff room, planning room, office, storage and amenities. The outdoor play areas to the north and east of the building have an area of 826 square metres. Proposed operating hours are 7am to 6pm Monday to Friday and 24 staff will be on site, including a cook and a manager. Acoustic fencing, 1.8 metres high along the northern boundary and 2.5 metres high along the rear boundary and southern boundary adjoining the play area, is provided along with landscaping primarily in the front setback and along site boundaries.

4. Despite a favourable recommendation by Council staff, the application was refused by Council on four grounds which can be summarised as:
  - i. Failing to comply with State and Local Planning Policy Frameworks, particularly clauses 21.05 (environment), 22.05 (non-residential uses in residential areas and 22.04 (tree conservation) in terms of maintaining the character of the residential area, providing an appropriate location for a non-residential use and the provision of adequate areas of open space for planting of upper canopy trees and vegetation.
  - ii. Unacceptable off-site amenity impacts and unresolved safety concerns on site that do not meet the requirements of clauses 22.05 (non-residential uses in residential areas) and 52.06-9 (car parking).
  - iii. Being a poor design response and being incompatible with neighbourhood character because of impacts on streetscape, insufficient setbacks, inadequate landscaping opportunities, inappropriate building materials and car parking located in the front setback.
  - iv. Insufficient information provided to support the proposed signage which fails to comply with clauses 22.02 (visual amenity and advertising signs) and 52.05 (advertising signs).
5. The application generated a great deal of opposition within the community. The concerns raised in submissions and statements of grounds were many and varied but in large part mirror Council's grounds of refusal. The most significant additional issue of concern to neighbours is the impact of additional vehicles on local streets and, in particular, the impact of overflow parking and traffic congestion and safety on local streets.
6. The permit applicant rejects these criticisms. In essence the permit applicant submits that the proposal should be supported because:
  - i. It is consistent with relevant State and Local planning policies and the purposes of the Neighbourhood Residential Zone.
  - ii. The proposal, although operating on a commercial basis, is providing a service to the community, is meeting a need and is providing a net community benefit.
  - iii. The built form is an appropriate response to the site context, and landscaping will provide for an increase in the amount and quality of canopy and other vegetation cover compared to existing conditions.
  - iv. There will not be any unreasonable off-site amenity impacts because of noise, overlooking, traffic congestion, reliance on kerb side parking or the visual appearance of signs at the front of the site.

#### **WHAT ARE THE KEY ISSUES IN DISPUTE TO BE DETERMINED?**

7. Based on submissions and evidence, I consider that the key issues to be determined can be dealt with on the basis of the following set of questions:
  - i. Is the proposal consistent with relevant planning scheme provisions?
  - ii. What are the key themes or outcomes arising from a review of relevant Planning Scheme provisions?
  - iii. Is the proposal acceptable when assessed against these key themes or outcomes?
8. What follows is my assessment of each of these issues. However, before doing so I explain why the decision has been delayed beyond 6 weeks from the last day of hearing on 15 December 2016.

#### **WHY HAS THE DECISION BEEN DELAYED BEYOND 6 WEEKS FROM THE LAST HEARING DAY?**

9. It became evident towards the end of the hearing in mid-December 2016 that the draft conditions circulated by Council needed further refinement and that parties needed further time to respond to those refined conditions.
10. By order dated 16 December 2016, I set out a process whereby the Responsible Authority was to prepare revised 'without prejudice' draft conditions by 9 January 2017 and serve copies of them on those persons referred to in the Tribunal's representative order dated 20 September 2016 (being the Permit Applicant, Ms Susan Schreiber and the Blackburn & District Tree Preservation Society Inc).
11. I required the conditions to be based on the previously circulated draft conditions but for them to make reference to and be altered to reflect changes made on the amended plans

them to make reference to and be altered to reflect changes made on the amended plans circulated by the permit applicant under cover of a letter dated 6 October 2016. I suggested that further changes arising from the hearing, including changes suggested by Mr Testro, may be included to allow parties an opportunity to comment on any such changes.

12. My order also requested parties to provide me with a written response to the revised draft conditions by 23 January 2017. The timetable was set to allow extra time due to the Christmas/New Year holiday period.
13. Revised conditions were prepared and circulated as required. Although I have determined to not grant a permit, I record that comments were received from Mr Gary Testro on behalf of the permit applicant, Ms Susan Dalton on behalf of Ms Susan Schreiber and other residents, from Ms Susan Schreiber and from Mr David Berry on behalf of the Blackburn & District Tree Preservation Society Inc.
14. I also note that the time required to circulate revised draft conditions has enabled me to undertake a site inspection after the nearby schools resumed at the beginning of February 2017. Unfortunately I was unable to undertake an inspection in 2016 before schools and other activities wound down for the Christmas/New Year holiday period.

## **IS THE PROPOSAL CONSISTENT WITH RELEVANT PLANNING SCHEME PROVISIONS?**

15. Relevant State and Local planning policies, the Neighbourhood Residential Zone (NRZ) and the particular site context all need to be considered in assessing whether the application warrants support.

### ***The Neighbourhood Residential Zone***

16. The NRZ is the most restrictive residential zone and the NRZ3 in Whitehorse includes a mandatory limit of two dwellings per lot and a maximum height for residential buildings of 8 metres, or 9 metres on a sloping site.
17. Apart from the common purpose in all zones to implement State and Local Planning Policy Frameworks, four of the remaining five purposes specifically seek:

*To recognise areas of predominantly single and double storey residential development.*

*To limit opportunities for increased residential development.*

*To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.*

*To implement neighbourhood character policy and adopted neighbourhood character guidelines.*

18. It also includes a final purpose of particular relevance to this application:

*To allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs in appropriate locations.*

19. The general decision guidelines at Clause 32.09-11 require consideration of the State and Local Planning Policy Frameworks including the MSS and local planning policies, the purpose of the zone and any other decision guidelines specified in a schedule to the zone. These are set out in 6.0 and 7.0 of Schedule 3 and focus on the retention and planting of vegetation.
20. In addition, the NRZ includes the following specific decision guidelines for non-residential use and development:

*In the local neighbourhood context:*

- *Whether the use or development is compatible with residential use.*
- *Whether the use generally serves local community needs.*
- *The scale and intensity of the use and development.*
- *The design, height, setback and appearance of the proposed buildings and works.*
- *The proposed landscaping.*
- *The provision of car and bicycle parking and associated accessways.*
- *Any proposed loading and refuse collection facilities.*
- *The safety, efficiency and amenity effects of traffic to be generated by the proposal*

the safety, emergency and amenity effects of traffic to be generated by the proposal.

21. The NRZ3 applies to traditional bush suburban areas. The zone purposes are clearly aimed at limiting the height and intensity of new residential development. The variations to the Clause 55 standards in Schedule 3 reinforce that intention. Site coverage is reduced from 60% to 40%, permeability is increased from 20% to 40%, side and rear setbacks are increased, no walls are to be constructed on boundaries, private open space for single dwellings is increased from 40 square metres to 80 square metres and the minimum area of secluded private open space in all developments is increased from 25 metres with a minimum width of 3 metres to 35 metres with a minimum width of 5 metres.
22. Whilst I accept that these standards only apply to residential development and not to non-residential uses, they nevertheless give a clue as to the built form outcomes being sought in the NRZ3. The varied standards also help inform an assessment against the specific guidelines for non-residential use and development in Clause 32.09-11.
23. The matters covered by these guidelines are also referenced in local policies. It is convenient to discuss them together later in my reasons when I assess the proposal against local policies. However, it is important to record that the guidelines in Clause 32.09-11 require them to be considered in the local neighbourhood context. It is this local neighbourhood context which is so important in deciding whether this particular proposal is acceptable in Holland Road.

### **State and Local Planning Policies**

24. State policy at Clause 19.02-2 has a single objective for educational facilities which is *to assist the integration of education facilities with local and regional communities*. Of the six related strategies, only one has relevance to a child care application:

*In planning for the location of education facilities, consideration should be given to demographic trends, the existing and future demand requirements and the integration of facilities into communities.*

25. Local policies are more explicit, and relevant provisions for non-residential uses occur in Clauses 21.06-7 and 22.05. More general provisions such as those concerning infrastructure at Clause 21.08-2, visual amenity and advertising signs at Clause 22.02, residential development/neighbourhood character at Clause 22.03 and tree conservation at Clause 22.04 are also of relevance, particularly when considering questions about built form and vegetation in the NRZ3 traditional bush suburban area.
26. The *Housing Strategy 2014*, which is referenced in Clause 21.06, designates different levels of growth within the residential areas of the municipality. The highest levels of growth are expected in Substantial Change Areas, modest growth in Natural Change Areas and the lowest degree of growth in Limited Change Areas. These change areas are aligned with neighbourhood character statements prepared for each area.
27. The review site and the surrounding area is in a Limited Change Area where objectives, at least in relation to housing, seek to:
  - o *Conserve and enhance those elements which contribute to the valued environmental, heritage and neighbourhood character of the place.*
  - o *Ensure new development protects and reinforces the environmental, heritage values and / or preferred future neighbourhood character of the area.*
  - o *Ensure new development mainly takes the form of renovations to existing houses, replacement of single dwellings with new dwellings and some limited medium density development.*
28. More relevantly, Clause 21.06-7 sets out the key issues, objectives and strategies for non-residential uses:

### **Key Issues**

- *Ensuring non-residential uses are designed in a way that integrates these uses and their built form into their residential environments and that there is no detriment to the community or the surrounding residential amenity.*
- *Ensuring that residential activity in non-residential areas is mindful of a lower expectation*

*of amenity protection than in a residential area.*

## **Objectives**

- *To ensure buildings for non-residential uses are designed to integrate with and respect the surrounding neighbourhood character.*
- *To ensure that non-residential uses do not cause detriment to the community or the amenity of the surrounding residential area.*
- *To ensure residential developments in areas where non-residential activity is encouraged are designed to ameliorate the potential impact of non-residential activity in the vicinity.*

## **Strategies**

- *Implement policy to direct non-residential uses to appropriate locations, and provide parameters for their operation.*
- *Apply the Neighbourhood Character Precinct Brochures with Preferred Character Statements and Design Guidelines to provide guidance for future non-residential development in residential areas and assessments.*

29. Neighbourhood character policy is contained in Clause 22.03. The review site is within the Bush Suburban Precinct 3 but the rear boundary abuts the Bush Environment Precinct to the east. Clause 22.03 is a difficult policy to apply to non-residential development despite the specific reference in Clause 21.06-7 to applying the Neighbourhood Character Precinct Brochures with the Preferred Character Statements and Design Guidelines.
30. The difficulty arises because the introductory section to Clause 22.03 says it applies to all applications for development whilst Clause 22.03-3 states that it is policy that Council will assess new applications for dwellings and subdivisions against the relevant objectives and strategies for the three categories of housing change. It also states that Council will ensure that the Preferred Character Statements and relevant precinct guidelines will be applied to applications for dwelling and subdivisions. (My emphasis).
31. There is no reference to applying them to non-residential uses despite the contrary policy direction at Clause 21.06-7.
32. It is not the only inconsistency in the policies. Ultimately it is a question of deciding whether the proposal satisfactorily achieves the NRZ purposes concerning neighbourhood character (i.e. *to manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics and to implement neighbourhood character policy and adopted neighbourhood character guidelines*) and whether it 'fits in'. So what does 'fit in' mean?
33. *Planning Practice Note 43: Understanding Neighbourhood Character* states that:

*In simple terms, respect for the character of a neighbourhood means that the development should try to 'fit in'. Depending on the neighbourhood, there are two broad approaches to respecting character:*

- . respecting the scale and form of surrounding development.*
- . respecting the architectural style of surrounding development.*

34. Practice Note 43 also states that:

*In most cases, a complete pattern of existing lots and development for about five sites or buildings up and down the street, across the street and behind the site in question should be sufficient to identify the features of the neighbourhood that should influence the design. However, sometimes it may be necessary to look further than this, depending upon the individual circumstances of the site and the neighbourhood.*

35. Submissions made on behalf of Council, neighbours and the permit applicant, and the evidence of Mr Glossop, all made reference to the neighbourhood character policy and precinct guidelines.
36. Clause 22.05 applies to non-residential uses within residential areas. Although it is not the policy that must be taken into account, the policy basis at clause 22.05-1 recognises

only policy that must be taken into account, the policy basis at clause 22.05-1 recognises that there is a legitimate need for non-residential uses in residential areas to serve the needs of the local community. However, the policy also recognises that such uses have the potential to adversely impact on the amenity of residential areas if they are poorly designed or located. It is noted that such uses should have a net community benefit and be in highly accessible locations and that the traffic they generate needs to be compatible with the role and function of the street and the surrounding areas

37. Four objectives at clause 22.05-2 are:

- o *To make provision for services and facilities demanded by local communities in a way that does not detract from the amenity of the area.*
- o *To avoid the concentration of non-residential uses where it would:*
  - *Have off-site effects which are detrimental to residential amenity.*
  - *Create a defacto commercial area.*
  - *Isolate residential properties between non-residential uses.*
- o *To ensure that the design, scale and appearance of non-residential premises reflects the residential character and streetscape of the area.*
- o *To ensure that the location of the use is appropriate to the role and function of the road network and that adequate provision is made for on site car parking.*

38. Policies are then listed under topic headings of location; design; landscaping; amenity; car parking and access; and home occupation.

39. Except for the last policy, which is specific to restaurants, hotels, reception rooms and convenience restaurants, the remaining four are that:

- o *Non-residential uses are encouraged to be in convenient walking distance to shopping centres or other non-residential land uses or zones.*
- o *Non-residential uses are discouraged from locating in residential zones if there are suitable sites in nearby commercial centres.*
- o *Non-residential uses are encouraged on a corner site and abutting a Road Zone Category 1 and 2.*
- o *Non-residential uses are encouraged to be in a location where there is a demonstrable need for the proposed facility or service.*

40. The infrastructure policy at Clause 21.08-2 identifies as a key issue the vital need to minimise non-residential traffic travelling on residential streets.

## **WHAT ARE THE KEY THEMES OR OUTCOMES ARISING FROM A REVIEW OF RELEVANT PLANNING SCHEME PROVISIONS?**

41. Although these controls and policies contain many thousands of words, I consider that the key themes or outcomes being sought for non-residential uses in this neighbourhood can be distilled to the following:

- i. In the NRZ, manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.
- ii. In Limited Change Areas, ensure new development protects and reinforces the environmental, heritage values and/or preferred future neighbourhood character of the area.
- iii. Non-residential uses should only be allowed where they do not detract from the amenity of the area or have detrimental off-site amenity impacts caused by noise, traffic, lighting or loss of security.
- iv. Non-residential uses should be located having regard to the role and function of the road network and they are encouraged to be located on corner sites and abutting a Road Zone Category 1 and 2.
- v. It is vital that non-residential traffic travelling on residential streets is minimised.
- vi. Car parking, accessways and bicycle parking should be adequate for the non-residential use and preferably not at the front of the site.
- vii. A demonstrable need for the non-residential use should exist in the area where it is to be located.
- viii. Non-residential use should not result in a concentration of such uses and are encouraged to locate in nearby commercial centres if there are suitable sites available.
- ix. Non-residential uses should be designed to integrate their use and built form into the residential environment and be compatible with residential use.
- x. The built form, scale, height, setbacks and design of the non-residential use and

- x. The built form, scale, height, setbacks and design of the non-residential use and development should reflect the residential character and streetscape of the area.
- xi. The precinct guidelines suggest buildings should not exceed 40% site coverage, provide at least 40% permeable surface, be set back a minimum 7 metres from the front boundary, side setbacks of at least 1 metre from one boundary and 3 metres from the other boundary and have a 5 metre minimum rear setback.
- xii. Non-residential uses should preferably retain large established trees and other vegetation and the development should allow sufficient space for larger canopy trees and other vegetation in the front setback and around buildings.

## **IS THE PROPOSAL ACCEPTABLE WHEN ASSESSED AGAINST THESE KEY THEMES OR OUTCOMES?**

42. For convenience, I have grouped these themes or outcomes as six questions.

### ***Is this a suitable location for a non-residential use?***

43. Local policy for non-residential uses at Clause 22.05-3 has very clear guidance that such uses are encouraged on a corner and abutting a Road Zone category 1 and 2. One of the key issues for infrastructure in 21.08-2 is that:

*In order to preserve residential amenity, it is vital that non-residential traffic travelling on residential streets is minimised. This is an ongoing and significant issue that faces this Council. Council is therefore committed to investigate and implement traffic management measures that will reduce through traffic.*

- 44. I later discuss traffic and Ms Dunstan's evidence in greater detail, but I am not persuaded that locating a childcare centre on the review site has had sufficient regard to the very clear policy statements about the preferred location for non-residential land uses.
- 45. The site is not on a corner, does not abut a Road Zone Category 1 and 2 and has the effect of drawing non-residential traffic to travel on residential streets. The use of the word 'vital' in Clause 21.08-2 emphasises how important it is to minimise non-residential traffic on residential streets.
- 46. Holland Road already has non-residential traffic travelling along it because of vehicles travelling to and from the neighbouring church, two schools and recreation facilities further south. Holland Road is also a bus route and links Burwood Highway with Canterbury Road. I therefore accept that Holland Road is different to smaller, less trafficked local streets. It is nevertheless a residential street and planning policies do not make a distinction between different residential streets except in reference to roads in a Road Zone Category 1 and 2.
- 47. The existing parking restrictions along parts of Holland Road are indicative that congestion does occur at certain times of the day as a result of non-residential traffic accessing those existing facilities. Those facilities have existed for many years, may predate any planning controls and almost certainly predate the current planning policies which guide decision making in 2017.
- 48. Although policy at Clause 22.05-2 states that non-residential uses are discouraged from locating in residential zones if there are suitable sites in nearby commercial centres, I am not sure the policy has much practical purpose since what represents a suitable site is dependent on so many factors including availability at the time required, ownership, price, zoning, size and any legal or other restrictions.
- 49. Policy also seeks to avoid a concentration of non-residential uses where it would have off-site effects detrimental to residential amenity or where it would create a defacto commercial area. Although construction of a child care centre would lead to two non-residential uses being located next to one another, I am not persuaded that results in the creation of a defacto commercial area given the nature of the activities conducted at the church. However, approval of a child care centre on the review site would remove an existing residential property and physically extend the non-residential use further south.
- 50. The necessity to provide business signage further reinforces the impression of a non-residential use extending south into the residential area. According to Mr Glossop the sign is intended to be 1 metre high and 2 metres wide and will be fixed on poles above the front fence. Whilst I accept this does not exceed the maximum area of 2 square metres referred to in Clause 22.02 and that it is not a highly intrusive sign, it nevertheless identifies the site as being used for a non-residential purpose and adds to the overall visual impact of the

proposal within the streetscape.

51. Mr Waldon submits that residents in the area are concerned about the increasing number of non-residential uses in Holland Road and how the neighbourhood character and amenity is being steadily eroded and that it is not just about the physical form but also about the impacts on the ambience of the area and the quiet enjoyment of their homes.
52. Planning policy and the introduction of the NRZ3 are all aimed at respecting the identified neighbourhood character, environmental and landscape characteristics. To the extent that the use of the land for a child care centre contributes to an erosion of that character, I am not persuaded that the application should be supported.

### ***Is there a need for a child care centre in this locality?***

53. Although Council did not refer to need in the four grounds of refusal, parties did raise the question of need, or lack of need, in submissions at the hearing. One of the application requirements in Clause 22.05-4 asks for a written explanation of why there is a demonstrable need for the proposed facility or service in the area where it will be located.
54. Ms Dalton's submission included detailed material about nearby childcare centres, vacancies, waiting periods and demographic data about young children. She submitted that the data did not support the provision of additional childcare centres and that the City Whitehorse is already well serviced with child care centres.
55. Ms Tran, who appeared before the Tribunal, is a director of both the permit applicant company and three Starfish Childcare Centre companies. One of those centres is located nearby to the review site on the corner of Holland and Canterbury Roads, approximately 280 metres north of the review site. In her evidence she explained how the various centres are managed and answered questions about the operation of the proposed centre. She was also questioned about the size and use of the first floor rooms and whether they would be used for meetings and seminars for staff from other centres.
56. I have conducted two childcare centre hearings in the past eight months where the question of need has been raised in submissions. One in Highbury Road, Burwood<sup>[2]</sup>, the other in Dendy Street, Brighton<sup>[3]</sup>.
57. In the most recent case for a 73 place childcare in Highbury Road I quoted from my earlier decision in Brighton. Although quoting from the Highbury Road decision may seem repetitive and unimaginative for those people who regularly read Tribunal decisions, I consider it important for the parties involved in the Holland Road hearing to understand the approach taken to need in other cases heard by the Tribunal.
58. In the Highbury Road decision I made the following comments which I also adopt for the site at Holland Road:

*[16] Last year I conducted a hearing for a site in Dendy Street, Brighton, where I received contrary evidence concerning the need for a childcare centre.<sup>[4]</sup> In my reasons I made the following comments:*

*[37] I accept that the permit applicant is also making assumptions about the matters referred to by Mr Weston, although from the perspective of seeking to operate a viable business. It is inconceivable that an applicant would seek to establish such a facility if there was no demand.*

*[38] Which raises the questions of choice and whether this facility will serve a local community need. Parties made reference to and cited from a great many previous decisions of the Tribunal and its predecessors. All broadly arrive at the same conclusion but it is helpful to recite from one of the most recent cases in Bayside for a site in Bluff Road.<sup>[5]</sup> In discussing local community needs the Tribunal commented that:*

*[23] The next question is whether the proposed use serves local community needs. Respondents said there are already a number of child care centres in Black Rock, that Black Rock does not have a population profile that exhibits a young group using the proposed facility, and that children are likely to be drawn from outside Black Rock.*

*[24] To say that the catchment area for the proposed centre is restricted to the immediate locality or the suburb of Black Rock to fit the meaning of 'local' is rigid. It segregates communities and denies access to services nearby. Further, it can be expected that at least some of children*

attending the centre are from Black Rock.

[39] Although Mr Gillard was critical of the Tribunal's comments cited above, I agree with the Tribunal that limiting the catchment area to an immediate locality, whether Black Rock or Brighton, is unnecessarily rigid. It is also impractical when our society is based on parents having a choice in where children may attend a child care centre. A whole range of factors come into play when parents are selecting a particular child care centre including proximity to work, proximity to home, proximity to other carers such as grandparents, proximity to future schools, cost of care, amount of government fee subsidies, programs offered and whether the centre has been recommended or used by friends and family.

[40] Local can also mean different things to different groups in the community and does not just have a narrow geographic focus or meaning. For example, some religious groups provide facilities serving their local community even though the members can be geographically widespread over many suburbs. Private schools are another example of a facility that can cater for students from widely dispersed geographic areas and yet promote themselves as serving a local community.

[41] It is also the case that Melbourne's population is expected to increase to 8 million and beyond in the next 50 years with the majority of that increase occurring in the established urban areas. Whilst the residential areas of Brighton may only contribute a small fraction of that increase, the overall demand for services and the willingness of people to travel to access services for one or more of the reasons referred to above, will require more not fewer child care places.

[42] As noted by the Tribunal in *Kennedy v Greater Bendigo CC*:<sup>[6]</sup>

[62] The [Planning and Environment Act](#) is not a statute for regulating competition between existing and proposed land users. At Clause 57(2a) a responsible authority may, for example, reject an objection which it considers has been made primarily to secure or maintain a direct or indirect commercial advantage for the objector. In addition the Tribunal has consistently held, for example in *Shell Company of Australia Ltd v City of Frankston* (1983) 8 APA 126, 135, that the lack of need for a facility such as for a further food vendor will rarely if ever be a ground for refusing a permit. The use of the kiosk as an element in the tramway operation and its impact on the cultural significance of the park are the relevant matters for us to consider.

[43] Given all the variables impacting on how parents choose an appropriate child care facility, I do not accept that the proposed child care facility should be refused on the basis of the analysis undertaken by Mr Weston.

[17] I have quoted extensively from the above decision because I consider that the same comments are relevant for this site in Highbury Road. To consider need based on a small geographic area or on vacancy rates takes a too narrow perspective of need and demand when choices about using a childcare centre are based on the whole range of factors referred to in

paragraph 39 quoted above. I therefore do not agree with submissions that the proposal should be rejected because of lack of demand or demonstrable need.

59. As with the earlier cases, I find it inconceivable that a permit applicant experienced in the childcare industry would seek to set up a centre if there was no demand. I also make the point that the childcare centre is providing a service whether it is owned by the community or by a private company. As with so many services previously owned and managed by local government or community groups, these are now conducted by private companies seeking an appropriate financial return. In that sense they are a commercial activity even though they may be serving the local community.

***Is the built form, height, scale, setbacks and design an acceptable response to the residential and neighbourhood setting?***

60. Mr Glossop attended the hearing and gave evidence as to why he considers a childcare centre is an appropriate use and development on the review site. In his planning

contributes to an appropriate use and development on the review site. In the planning assessment, Mr Glossop asked three questions and commented on each:

- o Does the site's context support a child care centre?
- o Is the design an appropriate response to the area's character, the features of the site and surrounding area?
- o Are the off-site amenity impacts appropriate?

61. I have previously discussed the planning provisions and what is being sought for development in this neighbourhood. I do not repeat all the detailed material in Mr Glossop's statement about the design and layout of the building.
62. However, I do note that the proposed building achieves the front, side boundary and rear setbacks contained in the precinct guidelines. Although not a dwelling, it also meets the varied ResCode standards for side and rear setbacks, site coverage, permeability and no walls on boundaries,
63. My main concern is how the building presents to the street, the extent of parking in the front setback and the width of the crossover and driveway. Policy asks that the built form, scale, height, setbacks and design reflect the residential character and streetscape. I am not persuaded that the proposal does reflect the residential character and streetscape because of the way access and parking dominate the front setback.
64. The proposal introduces a 6.4 metre wide crossover and driveway in the centre of the site with 5 car spaces on the southern side of the driveway. The ground floor is setback 2 metres from the southern boundary and 3 metres from the northern boundary but has minimum articulation across the front façade. The driveway leads to a 6.4 metre wide opening into the basement which is positioned beneath the ground floor above. A pedestrian path along the southern boundary rises above the 5 car spaces and at the front of the building the pathway extends across part of the front façade to access the main entry. The entrance pathway is fitted with a metal balustrade to separate pedestrians from vehicles and prevent them falling onto the carspaces below.
65. The first floor has been positioned towards the front of the site which has moved it away from the rear yards of the dwellings to the south in Constance Street. Whilst that has limited the visual bulk of the building when viewed from those dwellings, it has concentrated the built form towards the front of the site where it is most visible from the street. I acknowledge that the first floor is set back from the ground floor below and that it therefore does not present as a building with sheer two storey walls. However, because of the way in which the basement, driveway and 5 car spaces are excavated into the site, the building appears from the street as having three levels. Whilst I accept that landscaping may in time ameliorate oblique views of the three storey form from the street, the extent of hard paving for the 6.4 metre wide driveway and five carspaces in the front setback, will always result in this building being out of context with the lower scale residential character of the precinct.
66. Although some medium density development has occurred in the area, the NRZ specifically discourages intensive development and introduces a mandatory height limit and limit on the number of dwellings on a lot. In that sense, the three dwellings on the lot to the south are anomaly because, in the absence of a change to planning controls, no other three dwelling developments can be built in this neighbourhood. They are different to the mostly more modestly scaled housing stock in the area but I accept that they contribute to the character of the neighbourhood,
67. I also acknowledge that the church complex next door to the north also forms part of the character of the area and that it contributes in a very different way to the dwellings located up and down the street on rectangular lots facing the street. The main church buildings are set back a long way from Holland Road behind at-grade parking. The site contains many large canopy trees and other vegetation, and the buildings appear visually recessive and away from the main views along Holland Road. Although describing the church site as 'bushy' may be something of an exaggeration, the combination of setbacks and vegetation means that the church complex does not visually dominate or seem discordant in the streetscape.
68. On the other hand, I consider that the proposed childcare will be visually prominent and strongly recognised as a non-residential use. I am not persuaded that it integrates with and respects the surrounding neighbourhood as required by relevant policies.
69. In another location, on land zoned differently and with different policy settings, the proposal may well be acceptable. For example, my approval of the 73 place childcare centre in Highbury Road was on land zoned General Residential in a different character precinct

Holland Road was on land zoned General Residential, in a different character precinct, with main road access and with a different site context. It indicates that child care centres can 'fit in' with and be respectful of residential neighbourhoods, but that is not the case for this proposal in Holland Road.

### **Are there any unreasonable off-site amenity impacts caused by noise?**

70. Mr Marks attended the hearing to explain the acoustic assessment that has been undertaken and the measures required to ameliorate noise to an acceptable degree.
71. As part of his assessment, Mr Marks had noise monitoring undertaken between 1 and 9 August 2016 using a continuous noise monitoring device. Weather conditions varied throughout the survey period and noise measurement data was omitted where wind speeds greater than 5m/s and rainfall greater than 0.2mm was recorded at the nearest weather station at Scoresby.
72. The average measured noise levels during the 7am to 6pm period were an ambient level of 57 dB  $L_{Aeq}$  and a background level of 44 dB  $L_{A90}$ .
73. Table 6 in Mr Mark's evidence statement sets out the sound power levels for different age groups based on the Association of Australian Acoustic Consultants *Technical Guideline Childcare Centre Noise Assessment* (AAAC):
  - o 0-2 year olds ---77-80 dB  $L_{Aeq}$
  - o 2-3 year olds ---83-87 dB  $L_{Aeq}$
  - o 3-6 year olds ---84-90 dB  $L_{Aeq}$ .
74. The AAAC also identifies noise targets based on the length of time per day the outdoor play areas are in use. Up to 2 hours it is background plus 10 dB and for more than 2 hours per day it background plus 5 dB. Mr Marks considers that the adoption of background plus 5db is too restrictive and in section 4.13 outlines why he is of that opinion.
75. Mr Marks then identifies noise targets based on the existing noise environment and the AAAC guidelines. For children playing between 7am and 6pm it is 54 dB, for mechanical services between 7am and 6pm it is 50 dB and for car park activity between 10pm and 7am it is 65 dB. Mr Marks notes that initial calculations indicate that these design targets will not be met and that mitigation measures are required.
76. [Section 6.2](#) outlines what these are, including 2.5 metre high acoustic barriers along the rear boundary and about two thirds of the southern boundary and a 1.8 metre high acoustic barrier along about one third of the northern boundary. In answer to a question about the appearance of the acoustic barriers, Mr Marks stated that the choice of materials is less important than the quality of construction in achieving the desired sound attenuation.
77. I accept his evidence that acoustic treatments can be provided to achieve the desired sound amelioration of children playing outdoors. However, I do question whether the construction of 2.5 metre high acoustic barriers along the southern and eastern residential interfaces is a site responsive design in a neighbourhood where there is an expectation in the neighbourhood character guidelines that buildings will be set back from all side boundaries (including carports, garages and outbuildings). This is reinforced in Clauses 54 and 55, applying to dwellings, where standards A11 and B18 have been varied so that no walls are to be constructed on boundaries.
78. Whilst I acknowledge that a 2.5 metre high acoustic fence or barrier does not necessarily have the same visual effect as a single storey wall constructed on the boundary, in this case the proposed barrier extends along the whole width of the rear boundaries of 3 and 5 Constance Street and 46 Gissing Street, for most of the rear boundary of 1 Constance Street and approximately half of the rear boundary of 44 Gissing Street.
79. In other contexts, I have approved acoustic fencing or barriers of this height but I am not persuaded that such a solution to non-compliant noise emission is appropriate in this neighbourhood where boundary built form is discouraged.
80. I agree with Mr Marks that noise from mechanical plant such as air conditioning units and exhaust fans must meet State Environment Protection Policy No. N-1 (SEPP N-1) permissible noise limits at the nearest residential property. [Section 4.2](#) of his statement identifies a daytime noise limit for mechanical plant of 50 dB  $L_{eff}$  and Mr Marks expects that would be achieved.
81. The noise of vehicles is not assessed or controlled by SEPP N-1 and noise from vehicles would not cause me to refuse the application. The inclusion of basement parking is a positive feature of the development as it removes a potential noise source (i.e. doors

opening and closing, people talking near cars) and places it underground and out of earshot of neighbours. I have already commented that I do not support locating car spaces in the front setback for character reasons and it also undermines the amenity benefits of basement parking.

***Is parking adequate and will there be unacceptable impacts on the road network?***

82. I have already made it clear that I do not support a child care centre on the review because of its location away from a Road Zone Category 1 and 2 and because it is contrary to those local policies discouraging such uses in locations where non-residential traffic is required to traverse residential streets.
83. However I also need to more specifically deal with parking and the movement of vehicles on the road network as these were major concerns for neighbours. Traffic and parking were the focus of nearly every submissions made to me by neighbours living near the site.
84. I need to start by making it clear that car parking complies with the rate set out in Clause 52.06 and that a planning permit is not required to reduce the number of on-site car spaces. Clause 52.06 requires that on-site parking be provided at the rate of 0.22 spaces per child which for 118 children equates to 25 spaces. The proposed child care centre includes a total of 25 car spaces and therefore satisfies the planning scheme requirement.
85. I understand residents are concerned that the number of spaces is inadequate and that overflow parking will occur on the street even though there is no statutory reliance on kerb-side parking. It is their experience that staff associated with the childcare centre at the north end of Holland Road do use kerb-side parking rather than the available on-site parking. On my inspections I did observe additional vehicles parked in Holland Road near the childcare centre but do not know for certain why the cars were parked there and whether they were associated with staff parking. I did note that there were vacant spaces in the on-site car park.
86. I accept submissions that some overflow or kerbside parking may occur despite the proposal providing on-site parking in accordance with Clause 52.06. Although parking outside the site is prohibited (no stopping) it is possible to park on the opposite side of the road as it has no limitations during the proposed operating hours of the centre. It is possible that if a child is being dropped off or picked up when kerb-side spaces are available, then parents may choose to use such spaces rather than use the basement or on-site spaces in the front setback. Short of introducing parking restrictions along the west side of Holland Road, or around the corner in Constance Street, there is no impediment to that occurring and no reason why it should not occur given the kerb-side parking is a public resource to be used by anyone.
87. But it is my expectation that the convenience and safety of undercover basement parking or on-site parking, with either lift access or the safety of not having to cross Holland Road, will prove more appealing than kerb-side parking. That would not be an impediment to staff parking kerb-side and this cannot be ruled out even though spaces are provided for them in the basement. Given compliance with Clause 52.06 I would not refuse the application on the basis of inadequate on-site parking.
88. I now want to discuss the road network and the capacity of Holland Road to accommodate the additional traffic. Ms Dunstan attended the hearing to present her evidence and answer questions about traffic issues.
89. She notes that despite Holland Road not being in a Road Zone Category 1 and 2, Council's Road Register categorises it as having a collector road function. She notes that in the vicinity of the review site, it has carriageway width of approximately 7.65 metres and that it carries a 24 hour weekday average of 2,189 vehicles. She also notes Holland Road has a cross-section consistent with an Access Street – Level 2 under Clause 56.06. An Access Street – Level 2 has an environmental capacity of 2,000 to 3,000 vehicles per day per day and on that basis Ms Dunstan states that Holland Road is operating within that capacity.
90. Ms Dunstan has estimated that the childcare centre will generate up to 522 movements per day and in [section 5.5](#) of her evidence statement suggests that 472 of these movements will be for children and 50 for staff. She suggests these projections are conservative because they do not allow for car sharing (more than one child per parent), use of alternative transport modes or linked trips to nearby schools. What I understand that dropping off or picking up a child results in four movements (i.e. a parent there and back)

and that they will be distributed north and south of the site, they nevertheless represent additional vehicle movements in Holland Road.

91. Ms Dunstan suggests that traffic volumes will increase to around 2,460 vehicles but presumably if all vehicles travelled to and from the site to Canterbury Road then the vehicle movements in that section of Holland Road would increase by over 520. I accept her evidence that, in reality, trip movements will be more dispersed and possibly split 40% from the south and 60% from the north as set out in [section 5.5](#) of her evidence statement.
92. The fact remains that the proposed child care centre will result in traffic volumes increasing to about the mid-range of the environmental capacity of the road. It is also evident that the introduction of parking restrictions on Sundays has occurred because of parking congestion associated with the nearby church and the impact that has on traffic flows along Holland Road. The no stopping restriction along the whole eastern side of Holland Road between Canterbury Road and Constance Street also suggests that Council is concerned about the movement of vehicles along the northern section of Holland Road.
93. Whilst traffic volumes may not yet have reached a trigger point for more significant intervention, it does suggest that introducing another significant traffic generator is a poor outcome and contrary, as I have discussed previously, to local policy which states how vital it is to minimise non-residential traffic travelling on residential streets.

***Is the impact on existing vegetation and proposed new planting appropriate for a traditional bush suburban area?***

94. I have left my discussion about vegetation and landscaping to last, but not because it is of least importance given the inclusion of the land in Schedule 3 to the NRZ and the Bush Suburban Precinct 3. Although the site is not affected by any overlays aimed at specifically protecting vegetation, the retention and regeneration of vegetation is a strong theme appearing in the NRZ3 including in the decision guidelines for non-residential use and development in Clause 32.09-11, in the neighbourhood character policy and precinct guidelines, and in the tree conservation policy at Clause 22.04 which applies to all land.
95. Mr Berry, representing the Blackburn and District Tree Preservation Society Inc, attended the hearing and presented a detailed submission about the loss of existing trees and canopy cover. Mr Baker also made a submission about vegetation and the loss of habitat for a number of native species including the Powerful Owl, Tawny frogmouth, possums and other birds.
96. The permit application was supported by an arboricultural report prepared by Treelife. That report assessed 37 trees on the review site or on adjacent land close to the boundary. Mr Waters undertook a separate review of the trees based on the numbering system used by Treelife and attended the hearing to explain his review of the trees referenced in the Treelife report.
97. It is Mr Waters' assessment that 12 trees can be retained without any impact from the development, although I note that 9 of these are on neighbouring properties. The three to be retained are Trees 32 (Red Flowering Gum), 34 (Chokeberry) and Tree 35 (Candlebark). All three are at the eastern end of the site towards the rear boundary. A further 6 trees are to be retained but require protection works during construction. Four have moderate significance and two of low moderate significance. All but one of these trees is native including the 17 metre high Messmate Stringybark located just over the boundary in the north east corner.
98. Fifteen trees are required to be removed to allow the development to proceed. Three have moderate significance and the rest are of low to moderate significance except for two of low significance. He also identified 9 trees that should be removed irrespective of whether the development is approved.
99. The review site currently has a bushy and well vegetated appearance. It is not uncommon that when an arboricultural assessment is undertaken the quality of vegetation or its significance is less than anticipated. A good example around Blackburn is the widespread and bushy cover created by Sweet Pittosporums which is in fact a recognised weed species. Although the review site does not contain any Sweet Pittosporums it is often preferable to replace such weed species with more appropriate vegetation, including species indigenous to the area.
100. Although removal of any vegetation can in the short term be visually confronting or 'shocking' in the medium to longer term the new landscaping can provide a much

shocking, in the medium to longer term the new landscaping can provide a much improved landscape, and environmental, outcome. The question is about balance and how much to remove and how much to retain so that landscape and environmental values are retained. It is for that reason that a staged approach to removal and replacement is often advocated as providing the preferable approach. It also enables habitat to be progressively replaced so that birds and the other species referred to by Mr Baker can still be accommodated. In making these comments, I acknowledge that apart from direct impacts on habitat and fauna, an intensification of human activity of whatever type can also degrade habitat values. Whilst that may be a common impact of urban development it is not something that has caused me to refuse this application.

101. In so far as the review site is concerned, I consider that the principle of removing vegetation of low to moderate significance and replacing it with up to 24 canopy trees and 150 shrubs and other plants will, in the longer term, be an improvement. However, although that may be an improvement, it does not necessarily mean it is an adequate response to the character and vegetation outcomes being sought for the NRZ3 and Bush Suburban Precinct 3. Although the site coverage is below 40%, a large proportion of the 'open' area is required for outdoor play space. As a result, the actual area available to plant canopy trees and other vegetation is more limited than may be initially thought, and the space that is available for planting is largely around the perimeter of the site. Along the north side, a verandah extends to within 2 metres of the boundary and on the south side a pedestrian path limits the width of the planting strip to less than 1 metre.
102. Mr Thomson was asked about the adequacy of space available for canopy trees to grow given that the tree conservation policy at 22.04-4 states that the site available for a new tree should be situated in a minimum area of 35 square metres of open ground with a minimum dimension of 5 metres free of buildings, impervious surfaces and other tree canopies. The landscape plan does not provide space for each canopy tree that meets these minimums.
103. In response, Mr Thomson indicated that he has selected plant species based on his experience of landscaping other childcare centres and is confident that the species selected, along with the three large canopy trees to be retained at the rear of the site, are suitable and safe to use where children are playing. He is also confident that the planting space available is adequate to allow the trees he has chosen to grow to around the mature heights indicated on the landscape plan.
104. From my earlier comments, it will be evident that I do not support the layout and design of the site as it faces Holland Road. Although landscaping is to take place in the front setback, I am not persuaded it will be sufficient to ameliorate the visual dominance of the 6.4 metre wide driveway, car parking in the front setback, the 3 storey scale at the basement entrance and the exposed and elevated pedestrian pathway.

## **CONCLUSION**

105. Whilst I acknowledge that planning policy supports the provision of child care centres in residential areas, I am not persuaded that this particular proposal is an acceptable response to the NRZ3, planning policies and the site context.
106. It is often the case that in refusing an application, I can give pointers as to what refinements, redesign or scaling back would make a development acceptable. However I am not able to do that in this case because I consider a child care centre in this particular location is not an acceptable outcome when assessed against the full suite of relevant provisions of the Whitehorse Planning Scheme. In essence, I have not been persuaded that the proposal represents a net community benefit in the manner required by Clause 10.04 of the Whitehorse Planning Scheme.

## **DECISION**

107. Having regard to all the above reasons, I will therefore affirm Council's decision and direct that no permit is to be issued.

[1] I have considered the submissions of all the parties that appeared, all the written and oral evidence, all the exhibits tendered by the parties, and all the statements of grounds filed. I do not recite or refer to all of the contents of those documents in these reasons.

[2] *Intabuild Pty Ltd v Whitehorse CC* [\[2017\] VCAT 234](#).

[3] *Brighton Early Education Pty Ltd v Bayside CC* [\[2016\] VCAT 1206](#).

[4] *Brighton Early Education Pty Ltd v Bayside CC* [\[2016\] VCAT 1206](#).

[5] *PHHH Investments Pty Ltd v Bayside CC* [\[2015\] VCAT 922](#).

[6] *Kennedy v Greater Bendigo CC* [\[2004\] VCAT 1406](#).

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