VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference No. P1102/2019 |
| CATCHWORDS |
| Section 87A of the *Planning and Environment Act 1987*; Monash Planning Scheme; General Residential Zone; Medical centre, Child care centre and dwelling; Whether permit expired; Adjournment refused; Cancellation of permit; Garden area; Maximum building height; Maximum number of storeys; Acoustic impact |

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| APPLICANT | Preveza Enterprises Pty Ltd |
| responsible authority | Monash City Council |
| Referral Authority | Roads Corporation |
| RESPONDENT | Donald Caratti |
| SUBJECT LAND | 170-174 Highbury Road, Mount Waverley |
| WHERE HELD | Melbourne |
| BEFORE | Geoffrey Code, Senior Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 27 November 2019  |
| DATE OF ORDER | 3 December 2019 |
| CITATION | Preveza Enterprises Pty Ltd v Monash CC [2019] VCAT 1094 |

# Order

### Amend name of referral authority

1. Pursuant to section 127 of the *Victorian Civil and Administrative Tribunal Act* *1998*, the statement of grounds filed by “VicRoads – Metropolitan South East Region” is amended by changing the name of the referral authority to:

Roads Corporation

### Application for direction refused

1. The respondent’s application for a direction that the responsible authority produce specified documents is refused.

### Adjournment refused

1. The respondent’s application to adjourn the hearing is refused.

### Application allowed

1. The application is allowed.

### Permit amended

1. The responsible authority is directed to amend planning permit TPA/40955/C. The amendments are set out in Appendix A. The responsible authority must issue an amended permit to the applicant and the owner of the land.

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| Geoffrey Code**Senior Member** |  |  |

# Appearances

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| For Preveza Enterprises Pty Ltd | Mr Andrew Clarke, town planner, Clarke Planning Pty Ltd |
| For Monash City Council | Ms Alexandra Wade, town planner, Monash City Council |
| For Roads Corporation | No appearance |
| For Donald Caratti | In person |

# Information

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| Brief description of proposal | Medical centre, child care centre & dwellings |
| Nature of proceeding | Application under section 87A of the *Planning and Environment Act 1987* to amend permit TPA/40955/C |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone Schedule 3 (**GRZ3**) (*Garden City Suburbs*) |

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

## What is this proceeding about?

1. Preveza Enterprises Pty Ltd (in these reasons, **Preveza**) has applied to the Tribunal to amend permit TPA/40955/C (the **permit**) issued by Monash City Council (the **Council**) under the *Monash Planning Scheme* (the **Scheme**).
2. The permit allows:

The development of a three storey building with basement car parking and use for a medical centre (up to 17 practitioners), child care centre (up to 144 children), café and dwellings and alteration of access to a road zone, category 1.

1. Condition 1 of the permit requires submission of amended plans for endorsement. The Council endorsed plans, comprising sheets 1 to 12, on 20 March 2018 (the **endorsed plans**).
2. The permit was issued on 11 October 2013. The Council is satisfied the development has started because significant earthworks for the development were carried out some years ago. The Council reports it extended the completion dates on 31 October 2017 and 11 December 2018 and, under condition 42 of the permit, the development must now be completed by 11 October 2020.
3. The application seeks to substitute the endorsed plans with plans dated 28 June 2019 (16 sheets) (the **plans**) that the Council submits show the following amendments, in summary:
* The addition of one, one-bedroom dwelling on the second floor (resulting in 11 dwellings overall) with the Highbury Road setback reduced from 14.12 metres to, in part, a minimum of 10.42 metres and the eastern boundary setback reduced from 11 metres to, in part, a minimum of 8 metres.
* The addition of one car space in the basement, to be allocated to the additional dwelling, with an overall increase in car spaces to 109 spaces.
* Addition of a rooftop outdoor play area for the child care centre, including lift and stair access, store room, two metre high fence and shade sails.
* Relocation of the roof top plant area and exhaust flues and screen fencing.
* Adjustment to the location of the main stairs and lift (with consequential minor reconfiguration at each level) and addition of eastern emergency stairs (with consequential changes at basement, ground and level 1).
1. No amendment is sought or required to any other part of the development shown on the endorsed plans.

## ambit of discretion

1. My discretion is confined to the amendments. I have no discretion to reconsider matters which are allowed under the permit. I may amend the permit if I consider it is appropriate to do so,[[2]](#footnote-2) having regard to the matters referred to in section 90A of the *Planning and Environment Act 1987*.

## the parties’ positions

1. The Council supports the application. It seeks six modifications to the plans. Preveza does not oppose those modifications.
2. Mr Caratti opposes the application on various grounds. I will organise my findings under the following headings.

## Expiry of the permit

1. Mr Caratti correctly identifies a principle that a permit may not be amended if it has expired.
2. Mr Caratti submits there are ‘questions’ about the lawfulness of the Council’s previous decisions on two occasions to extend the permit.
3. Mr Caratti has applied to the Council for access to relevant documents under freedom of information laws so that he can consider what action might be available to him if the permit was not lawfully extended. Mr Caratti says the Council has not yet decided that application.
4. Mr Caratti asked me to direct the Council to produce relevant documents before issuing final orders in this application. Alternatively, he asked me to adjourn the hearing to enable him to apply for a summons requiring relevant documents be produced. In either case, he wanted the opportunity to make further submissions on whether the permit has expired.
5. I will not direct the Council as requested. I will not adjourn the hearing.
6. The permit has been extended on two occasions. The extensions only relate to the date for completing the development, not starting the development. The permit records those decisions. A presumption of regularity applies to those decisions, rebuttable by evidence produced by Mr Caratti.
7. Whether those decisions were lawful or not is not a question that is properly before me in this proceeding. I do not get to the point of having to consider any rebuttal of the presumption. Mr Caratti must consider lodging an application to challenge the validity of those decisions. It is not my duty to advise Mr Caratti about what application that might be. All I wish to say is that Mr Caratti should obtain legal advice before deciding his next steps.
8. There is no basis to refuse the application on the grounds the permit may have expired.

### Amendment C125

1. The Scheme has been amended on several occasions since the permit was granted.
2. The most recent amendments are Amendment C125 part 2 (**C125 part 2**) and Amendment C160 (**C160**) that commenced, respectively, on 14 November 2019 and 22 November 2019.
3. C125 part 2 included the subject land in a GRZ3. Schedule 3 introduces various development requirements relevant to a dwelling.
4. Mr Caratti seeks ‘a declaration … on the applicability of [C125 part 2 and 160] on this application …’. This request results from his misunderstanding that C125 part 2 and C160 are merely adopted amendments, not approved amendments.
5. It is unnecessary to make a declaration. It suffices to record the clearly established position that I must have regard to the Scheme in the form that exists at the date of my decision on the application.[[3]](#footnote-3) The Scheme now includes C125 part 2 and C160. I must and do have regard to them.
6. Mr Caratti submits the development fails to meet GRZ3 site coverage, walls on boundaries, garden area and landscaping requirements and the application should be refused for not complying with these requirements.
7. These requirements do not apply because they do not relate to the amendments. They apply to those parts of the development for which a permit has been issued. As I have stated, I am unable to reconsider those parts.

## Cancellation of the permit

1. Mr Caratti applies for an order that the permit is cancelled. He submits there will have been a ‘likely’ material mistake if I allow the application and amend the permit. He claims that the GRZ3 requirements will not have been met and that he (and ‘his family’) will be affected by a material mistake in relation to the granting of an amendment to the permit.
2. Mr Caratti’s application is misconceived. If Mr Caratti seeks cancellation of the permit, he must make a formal request to the Tribunal.[[4]](#footnote-4) Again, I encourage him to obtain legal advice before deciding on whether to make a request.

## Garden area

1. Mr Caratti submits the Scheme’s mandatory requirements for garden area are not met.[[5]](#footnote-5)
2. He submits the application does not benefit from the Scheme’s transitional provisions for garden area requirements.[[6]](#footnote-6)
3. He submits the Tribunal erred in finding in an earlier proceeding relating to this development that the transitional provisions did apply.[[7]](#footnote-7) He submits that finding did not have proper regard to section 84(2)(g) of the *Planning and Environment Act 1987*.
4. The submission is misconceived. Section 84(2)(g) is not relevant because the requirements to which he refers are not part of an adopted amendment but now form part of the Scheme. The Tribunal’s earlier decision contained no error because it was a review relating to a decision on a permit application and not, as in this proceeding, an application in the Tribunal’s original jurisdiction.
5. It suffices to record that it is well established that a permit may be amended under section 87A even if mandatory development requirements are not met.[[8]](#footnote-8)
6. I must have regard to mandatory garden area requirements under section 84B(2)(a), if it is relevant to do so. It is not relevant because there is no change to the garden area in the amendments sought in the application.

## building height

1. Mr Caratti submits the maximum building height is raised in the application to 15.02 metres having regard to the top of the lift overrun. He maintains this exceeds the mandatory maximum building height of 11 metres and the application must therefore be refused.
2. Mr Caratti’s submission is based the on difference between the relative level (**RL**) for the lift overrun and the RL for the lowest point of the land, being near the north-east boundary of the land. This is based on a misreading or misunderstanding of the definition of building height.
3. Building height is defined as:

The vertical distance from natural ground level to the roof or parapet at any point.

1. The critical phrase is ‘at any point’. I must find what is the roof or parapet and then find the maximum vertical distance between any point of the roof or parapet and natural ground level below those points.
2. I prefer the Council’s submission that the maximum building height is 13.7 metres, having regard to the definition.
3. Mr Caratti correctly submits that the GRZ provides that the maximum building height for a dwelling is 11 metres.[[9]](#footnote-9)
4. As I have stated, an application under section 87A may be allowed even if development does not comply with mandatory development requirements.
5. The question for me is therefore one as to the merits of allowing an increase in the maximum building height.
6. The highest point of the roof or parapet is the roof of the staircase that gives access to the roof from the lower levels. The highest point does not include the poles holding the shade sails. The poles are neither a roof nor a parapet.
7. The increase is acceptable for two reasons. First, it is an extremely small area compared to the size of the building envelope and the size of the land. Second, it is well set back from any boundary, particularly the more sensitive eastern boundary. It has no material visual impact.
8. Having regard to existing or preferred character, there is no policy basis to refuse the very small area affected by the increase in overall building height.
9. In conclusion, the increase in maximum building height is no reason to refuse the application.

## number of storeys

1. Mr Caratti submits the application contains four storeys and this exceeds the mandatory maximum three storeys and the application must therefore be refused.
2. Mr Caratti submits whether the application contains an impermissible fourth storey is a question of law for determination by the Tribunal.
3. Mr Caratti correctly submits that three is a mandatory maximum number of storeys for a dwelling in the GRZ.[[10]](#footnote-10)
4. The question of law is, in my opinion, a question of mixed fact and law. It is unnecessary to answer the question because it is not relevant. As I have previously said, an application under section 87A may be allowed even if development does not comply with mandatory development requirements. In consequence, even if the application contains four storeys, it would not result in a necessary refusal of the application.
5. The relevant questions are whether the application does contain four storeys and, if so, whether the fourth storey should be refused having regard to the relevant merits, including the Scheme as a whole.
6. Mr Caratti’s submissions do not persuade me that application contains four storeys. My reasons follow.
7. A storey is defined as follows:

That part of a building between floor levels. If there is no floor above, it is the part between the floor level and ceiling. It may include an attic, basement, built over car parking area, and mezzanine.[[11]](#footnote-11)

1. Mr Caratti submits the roof to the stairwell and lift overrun constitutes a storey.
2. The lift overrun is not a storey. It if was, the part of the building between the floor of the lift shaft and the ceiling of the lift shaft would constitute one storey. In a building of many storeys, this is a nonsense.
3. There are many cases in which the Tribunal has had to determine whether a structure providing access to roof terrace is a storey. The cases show a practical approach is preferred, taking into account the facts and circumstances in a particular case. I adopt that approach.
4. The staircase is not attached to and does not give access to other roof areas such as common living rooms used by residents or additional child care rooms. It merely provides access to an outdoor play area. The staircase giving access to a child care centre outdoor play area is not a storey.
5. The plans show two shade sails each about 30 square metres in area, supported by six poles, centrally located in the roof top child care centre outdoor play area.
6. Mr Caratti also submits these sails constitute a storey. His submission is that:
* The sails transmit (or must have to transmit for health reasons) less than 90 per cent of light.
* The sails cannot be ‘clear to the sky’ because of the nature of the material in the sails.[[12]](#footnote-12)
* If the sails are not clear to the sky they must be roofed and, if they are roofed, the underside of the sails must be a ceiling.
* Therefore, the part of the building between the level of the rooftop outdoor play area beneath and sails and the underside of the sails must be a storey.
1. This submission has no merit. Each proposition has a poor foundation. The ‘clear to the sky’ definition cannot be employed to make a finding that there is a roof.
2. Another difficulty for Mr Caratti is that the four-storey maximum applies to a dwelling. The alleged fourth storey does not contain a dwelling. No dwelling exceeds the third storey of the building.
3. The application does not contain a fourth storey.
4. It is again a merits question as to whether the roof structures should be refused having regard to the nature of the application. The main merits issues are whether those structures cause unreasonable visual bulk or do not respect the existing and preferred neighbourhood character. The minor size of the structures having regard to the size of the building and the site, and their location central to the roof leads me to find they are acceptable.

## Café

1. Mr Caratti submitted the application should be refused because the café has no allocated parking and there are no advertsising sign restrictions in the permit for the café.
2. Mr Caratti effectively withdrew this ground when I told him at the hearing that the ground was not relevant given the application makes no changes relating to the café.

## acoustic impact

1. Condition 11 of the permit provides:

The use of the site approved by this permit shall not cause nuisance or be detrimental to the amenity of the neighbourhood by the emission of noise associated with the use. In this regard the emission of noise shall comply with the provisions of the Environment Protection Act 1970 (as amended) and the policies of the Environment Protection Authority.

1. Mr Caratti submits this condition is ‘limited and vague in nature’ and does not protect the amenity of residents to the east and north from the sound of children’s voices playing in the outdoor play areas, especially the proposed roof top outdoor play area.
2. Mr Caratti submits there is a question of law as to whether a child care centre is subject to the provisions of the *Environment Protection Act 1970* (the **EP Act**). This is unnecessary to answer because it is not relevant. Nonetheless, the answer to the question is straightforward. A child care centre is a ‘commercial’ premises to which *SEPP N-1 (Control of noise from commerce, industry and trade)* applies.
3. The question framed by Mr Caratti does not answer his underlying question which is whether the sound of children’s voices playing in the outdoor play areas is specifically controlled under the EP Act. I do not strictly need to answer that question because Mr Caratti did not raise it. However, I observe that ‘Voices’ are a type of noise emitted from commercial premises that are not assessed under the SEPP.[[13]](#footnote-13)
4. I do not need to consider Mr Caratti’s submission that condition 11 is ineffective. This application provides no basis for me to make such a finding and to amend the condition.
5. It is relevant for me to consider whether, as a matter of town planning rather than environmental protection, the application would result in unreasonable amenity impacts to nearby land.
6. The starting points for this consideration are:
* This is a larger child care centre because it will accommodate a maximum of 144 children under the permit. The potential for unreasonable noise impacts are greater.
* I cannot consider impacts from children’s voices from the ground level and first floor outdoor play areas because the application does not affect those play areas.
1. The new roof top play area is 243 square metres and is bounded by a two metre high non-acoustic fence. The fence is well set in from the floor below and is at least 21 metres from the eastern boundary and at least 18 metres from Highbury Road along the northern boundary.
2. There is no basis to either refuse the application on acoustic grounds or to add a condition requiring an acoustic fence to the roof top play area because:
* Any impacts to the dwellings to the north, on the north side of Highbury Road, will be muted by traffic noise along that road.
* The setback from the more sensitive interface, to the east, is at least 21 metres. The circumstances are very different to those in other child care centre applications on smaller residential lots where an outdoor play area might be about one metre from a habitable room window on neighbouring land and where a requirement for an acoustic fence is not uncommon.
* The immediate interface to the east is not sensitive because it comprises a driveway and garage for a two-dwelling development, and the nearest habitable room windows on that land would therefore be at least about 25 metres distant.
* There is no evidence that the noise emissions will be any greater in aggregate terms given the maximum number of children is not increased in the application.
* There is no evidence that the noise emissions will be greater in aggregate terms given the new noise source is elevated well above the dwellings at the immediate eastern interface.
* Under condition 9 of the permit, the child care centre must stop operating at 7 pm Monday to Friday and cannot operate during the more sensitive evenings and weekends. The condition mitigates any impacts.
1. Condition 11 is framed to prevent nuisance and protect neighbourhood amenity from all noise sources, including the sound of children playing outside. It can be enforced. It will apply to the roof top outdoor play area in the application.
2. In conclusion, acoustic impacts are no reason to refuse the application or to add further conditions.

## Acceptable outcome?

1. I must be satisfied that the application will be an acceptable planning outcome. There are two merits issues regarding the application that Mr Caratti did not press. I will now complete these reasons by addressing those issues.

### Level 1 footprint

1. To accommodate an additional one-bedroom dwelling, the second floor footprint is increased to the north and east.
2. The northern increase varies across a horizontal distance of about 15 metres by between about 0.8 metres and 3.8 metres to accommodate two bedrooms (that project about 3.8 metres) and 3 terraces (that project about 0.8 metres). The result is that the minimum setback from Highbury Road will be about 10.4 metres, corresponding to the two bedrooms each about 3 metres wide.
3. The eastern increase varies across a horizontal distance of about 12 metres by up to 3 metres. The result is that the minimum setback from the eastern boundary is about 8 metres.
4. It suffices to state that I find the increase in the footprint is acceptable having regard to the Council’s character assessment, with which I agree.
5. The Highbury Road interface is not sensitive. There is no change to the ground and first level setbacks. There is compliance with *ResCode* street setbacks standards. The two north-facing dwellings retain their favourable orientation. The setback is well articulated. The addition to the footprint provides a small increase in the overhang to the outdoor play area below and provides additional shade.
6. The eastern interface is acceptable having regard to the non-sensitive nature of the immediate interface and the setback remains well in excess of the applicable *ResCode* standard. There is no unreasonable overlooking.

### Internal amenity

1. The addition to the northern interface does not affect internal amenity. The two dwellings facing north retain that orientation, each with terraces and living areas facing north. The additional one-bedroom dwelling, facing east, has satisfactory access to daylight and sunlight and has a relatively generous floor area of about 80 square metres plus a 11.5 square metre terrace.

## conditions

1. The Council proposes to add paragraphs (d) to (i) to condition 1 of the permit to give effect to its support for the application subject to six modifications to the plans.
2. As I have stated, Preveza does not oppose the modifications. However, it proposes deleting paragraphs (a) to (c) as those modifications have already been incorporated into the endorsed plans. There is merit in that submission.
3. However, the difficulty that I pointed out to the parties at the hearing is that condition 1 requires endorsement of amended plans before the development starts. As I have stated, the development has started. The preparation of modified plans cannot meet that technical requirement. Condition 1 is effectively spent. I will substitute the condition so that amended plans must be endorsed before any further development starts.
4. The six modifications agreed by the Council and Preveza require some further technical modifications that were discussed at the hearing.
5. Condition 20 requires consequential amendment. The heading to condition 38 refers to condition numbers that are now wrong having regard to previous amendments to the permit. It is convenient to simply delete that heading to avoid confusion.

## Conclusion

1. For the above reasons, I will allow the application and amend the permit.

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| Geoffrey Code**Senior Member** |  |  |

# Appendix A

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| Permit No | TPA/40955/C |
| Land | 170-174 Highbury Road, Mount Waverley |

## amendments to the permit

1. For condition 1, substitute:

By no later than 3 February 2020, or by such later date as the Responsible Authority may agree in writing on application made before 3 February 2020, three copies of amended plans drawn to scale and dimensioned, must be submitted to and approved by the Responsible Authority. The submitted plans must clearly delineate and highlight any changes. When approved the plans will be endorsed and will then form part of the permit. The plan must be generally in accordance with the plans prepared by BMG Architects drawing nos. DR01 rev L, SA01 rev G, TP01 rev K, TP01A rev K, TP02 rev L, TP03 rev J, TP03A rev I, TP03B rev J, TP04 rev J, TP05 rev I, TP06 rev H, TP07 rev H, TP08 rev H, TP09 rev H, 3D01 rev G & 3D02 rev G, all dated 28 June 2019, but modified to show:

* 1. The deletion of the following expressions on drawing no. TP02:
* ‘3 PRACT’, being located under the expression ‘SUITE 1’.
* ‘3 PRACTITIONERS’, being located under the expression ‘SUITE 2’.
* ‘4 PRACTITIONERS’, being located under the expression ‘SUITE 3’.
* ‘3 PRACTITIONER’, being located under the expression ‘SUITE 4’.
* ‘3 PRACTITIONER’, being located under the expression ‘SUITE 5’.
* ‘3 PRACTITIONERS’, being located under the expression ‘SUITE 6’.
* ‘3 PRACTITIONERS’, being located under the expression ‘SUITE 7’.
	1. The entry to dwelling 10 from the foyer area and a wall between bedroom 1 and the adjoining dwelling 1.
	2. Further detail (pattern) of the rooftop screens including colour swatches.
	3. Details of the materials in the shade sails.
	4. The reallocation of the two medical visitor spaces (car spaces 47 and 48 within Basement Level 1) with two medical staff spaces. The total number of medical visitor and medical staff spaces must not be altered.
	5. The setback of the plant screen adjacent to the eastern façade of the building to be a minimum of 2 metres form the edge of the roof form.
1. For condition 28, substitute:

By no later than 3 February 2020, or by such later date as the Responsible Authority may agree in writing on application made before 3 February 2020, a revised Parking Management Plan (to replace any Parking Management Plan endorsed before the 2017 amendment to the permit) must be submitted and endorsed as part of this permit clearly designating the allocation of car spaces between uses.

1. Omit the heading to condition 38.

**– End of conditions –**

1. The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. [↑](#footnote-ref-1)
2. *Planning and Environment Act 1987* s 87A(1). [↑](#footnote-ref-2)
3. *Planning and Environment Act 1987* s 90A & s 84B(2)(a). [↑](#footnote-ref-3)
4. *Planning and Environment Act 1987* s 89(2). [↑](#footnote-ref-4)
5. *Monash Planning Scheme* cl 32.08-4. This requirement is not exempt under cl 2.0 of Schedule 3 of the GRZ. [↑](#footnote-ref-5)
6. *Monash Planning Scheme* cl 32.08-15. [↑](#footnote-ref-6)
7. *Preveza Enterprises Pty Ltd v Monash CC* (Corrected) [2017] VCAT 1355 [5]. [↑](#footnote-ref-7)
8. *Fosters Group Ltd v Mornington Peninsula SC* [2010] VCAT 104. [↑](#footnote-ref-8)
9. *Monash Planning Scheme* cl 32.08-10. This requirement is not varied under cl 5.0 of Schedule 3 of the GRZ. [↑](#footnote-ref-9)
10. *Monash Planning Scheme* cl 32.08-10. This requirement is not varied under cl 5.0 of Schedule 3 of the GRZ. [↑](#footnote-ref-10)
11. *Monash Planning Scheme* cl 73.01. [↑](#footnote-ref-11)
12. See definition of ‘clear to the sky in *Monash Planning Scheme* cl 73.01. [↑](#footnote-ref-12)
13. *SEPP N-1 (Control of noise from commerce, industry and trade)* cl 9. [↑](#footnote-ref-13)