 VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P1953/2020  Permit Application no.TPA/40955/D |
| CATCHWORDS | |
| Amendment to planning permit – General Residential Zone (Schedule 3) – internal amenity for dwellings | |

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| **Applicant** | Preveza Enterprises Pty Ltd |

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| **Responsible Authority** | Monash City Council |

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| SUBJECT LAND | 170-174 Highbury Road  MOUNT WAVERLEY VIC 3149 |

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| HEARING TYPE | Hearing |

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| DATE OF HEARING | 29 July 2021 |

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| DATE OF ORDER | 8 August 2021 |

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| CITATION | Preveza Enterprises Pty Ltd v Monash CC [2021] VCAT 887 |

# Order

**Amend permit application**

1. Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by substituting the following plans filed with the Tribunal for the permit application plans:

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| Prepared by: | * Petridis Architects |
| Drawing numbers: | * TPA01, TP02, TP03, TP04, TP05, TP06, TP07, TP08, TP09, TP10, TP11, TP12, TP13, Revision ‘For VCAT’ |
| Dated: | * 6 June 2021 |

### Amended permit granted

1. In application P1953/2020 the decision of the responsible authority is set aside.
2. In planning permit application TPA/40955/D an amended permit is granted and directed to be issued for the land at 170-174 Highbury Road, Mount Waverley in accordance with the endorsed plans and the conditions set out in Appendix A. 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), cafe and dwellings and alteration of access to a Road Zone, Category 1.



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| Dalia Cook  **Member** |  |  |

# Appearances

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| For Monash City Council | Ms Maria Marshall, Solicitor, Maddocks |
| For Preveza Enterprises Pty Ltd | Mr Andrew Clarke, Town Planner, Clarke Planning Pty Ltd |

# Information

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| Description of proposal | Amendment to planning permit to provide 3 additional dwellings and 3 additional basement car parking spaces |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant an amended permit |
| Planning scheme | Monash Planning Scheme |
| Zone and overlays | General Residential Zone (Schedule 3) - GRZ(3)  Vegetation Protection Overlay (Schedule 1) |
| Key scheme policies and provisions | Clauses 11, 15, 16, 21, 22.01 (Residential Development and Character Policy), 55 and 65 of the Monash Planning Scheme |
| Land description | The subject land is a large corner block on the corner of Highbury and Huntingdale Roads, Mount Waverley. It abuts residential properties to the east and a laneway to the south, adjacent to a small neighbourhood strip shopping centre. |

# Reasons[[1]](#footnote-2)

## Introduction

1. The subject land has the benefit of a planning permit allowing its use and development for a café, child care centre, medical centre and apartments. Monash City Council (Council) endorsed plans under the permit.
2. The applicant now seeks to amend the permit by increasing the number of apartments from 11 to 14 on Level 2 and the number of car parking spaces from 109 to 112 within the basement.
3. The approved building footprint and external appearance is not substantially altered.

## Outline of party positions

1. Council refused to grant an amendment to the permit. It was concerned about the reconfigured layout of some apartments and considered they would not provide adequate internal amenity for future residents. On this basis, it regarded the amended proposal as an overdevelopment.
2. It also considered that the decision plans failed to provide efficient vehicle movement within the site and would not meet the design requirements of Clause 52.06 of the Monash Planning Scheme (planning scheme).
3. The applicant engaged in dialogue with Council before the hearing and prepared amended plans seeking to address its concerns.
4. Council subsequently advised it wished to amend its grounds of refusal to delete reference to deficient vehicle movement.
5. While it indicated that the amended plans represented an improvement on the decision plans, Council maintained concerns about the internal amenity of particular apartments as follows:
   * + - 1. inadequate balcony sizes for units 4, 7 and 13 (with residual concern about the functionality of two separate balconies for unit 5);
         2. an unsuitable number of solely south facing units (units 11, 12 and 13);
         3. internal corridors generating safety concerns (to units 6 and 7 in particular); and
         4. ‘snorkel’ windows with partial building overhangs providing limited natural light to individual bedrooms in units 8, 9 and 14.
6. Ms Marshall on behalf of Council explained that, of themselves, these concerns may be considered relatively minor and may be potentially surmountable through design changes. However, in Council’s view, the combination of these deficiencies and the challenges involved with overcoming them indicated an overdevelopment while seeking to maintain the uplifted development yield.
7. Mr Clarke on behalf of the applicant indicated that the Tribunal should consider the changes as a whole, with broad reference to the endorsed plans as an indication of what Council regarded as acceptable.
8. The parties confirmed that transitional provisions applied to this proposal, which meant that the minimum garden area requirement and the provisions of the Better Apartment Design Guidelines in Clause 58 (BADS) of the planning scheme did not apply. However, they agreed that the provisions of Clause 55 of the planning scheme (ResCode) were applicable.
9. Parties referenced various decisions of the Tribunal which provided commentary about acceptable levels of internal amenity. While those decisions largely turn on their particular facts, I have had regard to their underlying reasoning.
10. The hearing considered confined issues. I indicated that I would provide short-form reasons for expediency.

## Key issues – internal amenity

### Balcony sizes

1. Council identified that following planning scheme Amendment C125 Part 2 the land is now included in General Residential Zone (Schedule 3). The ResCode standard for private open space is varied for balconies to:

A balcony or roof-top area of 10 square metres with a minimum width of 2 metres and convenient access from a living room.

1. Council submitted that some of the balconies in question fell short of the overall minimum dimension, such as the balconies for units 4, 7 and 13 which are between 8 and 9.3 square metres.
2. Ms Marshall submitted that the varied standard should be met for all new apartments, absent a good reason. She also explained that this is not a site that is particularly well placed in terms of access to public open space.
3. Mr Clarke advised that the amendment to introduce the GRZ(3) provisions had occurred after the grant of the original permit but that no transitional provisions were provided. He submitted, in summary, that:

* where smaller balconies are proposed they generally face north and serve one bedroom apartments;
* the minimum dimensions of each balcony is generous (and over 2 metres wide per the varied standard) such that they would be useable;
* all balconies would be unscreened and many would have desirable longer range views;
* each balcony would be conveniently accessed from a habitable room through a sliding door; and
* there is potential to achieve a minimum 10 square metres for each with minimal reconfiguration if required (such as by shifting proposed dividing walls).

1. With one exception, I consider that the balconies identified by Council continue to meet the relevant ResCode objective in Clause 55.05-4 namely, “to provide adequate private open space for the reasonable recreation and service needs of residents”. I agree with submissions for the permit applicant that they are conveniently accessed from the units themselves, are favourably orientated and unscreened. They would provide a reasonable level of amenity for passive recreation.
2. I also do not accept that the provision of two separate balconies for unit 5 (totalling over 10 square metres) is problematic or disjointed. Both are north facing and are readily accessible from the rooms they serve. They offer a convenient alternative for outdoor open space for that unit.
3. However, in the context of the varied standard for land in this zone, I have some concern about the combination of an 8 square metre south facing balcony for unit 13, even though this is a one bedroom unit. I note that the orientation of private open space is a relevant decision guideline in Clause 55.05-4.
4. I address the resolution of this concern below.

### South facing units

1. The endorsed plans show one exclusively south facing apartment. By contrast, the amended floorplan provides for three south facing apartments – all one bedroom. The question is whether this is an acceptable outcome.
2. Council considered that these apartments would have reduced internal amenity given their solar orientation.
3. Mr Clarke explained that no windows or balconies to these apartments would be screened and that a wide co-joined balcony space would be provided across the three units in question to provide an open outlook.
4. I accept that there are no particular standards within ResCode that dictate how many south facing apartments are acceptable. However, Mr Clarke conceded that various ResCode standards seek to encourage northern aspects.
5. I appreciate that there are numerous north and east facing apartments, a limited number of west facing apartments and that a proportion of units within this development have been designed as dual aspect to provide improved solar orientation. This is generally favourable.
6. Notwithstanding, in recent years, the planning scheme and community expectations for internal amenity have increased. There is an expectation of a high standard of livability for dwellings within this zone and character area as outlined in Council’s adopted Housing Strategy, which is reinforced in Clauses 21.04 and 22.01 of the planning scheme in particular. This calls for a good standard of design quality for all apartments.
7. On balance, I consider that it is excessive for this development to provide three solely south facing apartments, also noting the under-provision of private open space for one of these.
8. I consider that the internal amenity of these apartments would be made acceptable if the three units were consolidated into two. This would overcome the deficiency in balcony area and would provide more generous floor space for each apartment (especially units 11 and 13) to compensate for their southern orientation.
9. I raised the prospect of this change with Mr Clarke at the hearing and he conceded this was an option available to the Tribunal if it considered it necessary.

### Internal corridors

1. Council submitted there would be a lack of surveillance opportunities given what it regarded as lengthy or cranked internal corridors. It considered this may lead to safety issues.
2. The applicant explained how the floorplan had been rationalized compared with the endorsed plans, to make most corridors shorter and to make more effective use of the space. This would be accompanied by secure entry arrangements for residents and guests and the introduction of skylights to the second floor foyer. Mr Clarke also explained how some corridor corners could be chamfered if required.
3. I consider that the revised corridor arrangement is efficient and acceptable. There is really only one corridor extension that raises concern and it only accesses two units.
4. It could easily be improved to an acceptable level by installing convex mirrors or other devices for increased surveillance, to be secured through a permit condition.

‘Snorkel’ windows

1. Council was concerned that some bedroom windows were set in from the principal exterior building line and would be affected by a partial building overhang. It considered that this would result in an inferior solution to providing natural light.
2. The applicant contested that these should be described as ‘snorkel’ bedrooms as this term is referred to in connection with BADS (with the possible exception of unit 8) since the room does not narrow on both sides beyond the window. Instead, it submitted these rooms have dimensions that would comfortably meet the standards in BADS and would be far in excess of what would justify daylight modelling under Environmentally Sustainable Design provisions.
3. I find that these bedrooms would still provide a reasonable level of internal amenity. I am influenced by considerations including the width and height of the windows in question, their orientation, their limited distance from the building edge and the overall dimensions of the bedrooms. It is also relevant that these windows and any balconies beyond are unscreened.
4. There are some instances of the same window arrangement for bedrooms in the endorsed plans. The proposed plans would not notably increase this.

## Conclusion

1. For the reasons given above, the decision of the responsible authority is set aside. An amended permit is granted subject to conditions.

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| Dalia Cook  **Member** |  |  |

# Appendix A – amended Permit Conditions

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| Permit Application No | TPA/40955/D |
| Land | 170-174 Highbury Road  MOUNT WAVERLEY VIC 3149 |

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| What the permit allowS |
| In accordance with the endorsed plans:   * 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), cafe and dwellings and alteration of access to a road zone, category 1. |

## Conditions

### Amended Plans

1. Within two months of the issue of an amended permit, 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 Petridis Architects drawing nos. TPA01, TP02, TP03, TP04, TP05, TP06, TP07, TP08, TP09, TP10, TP11, TP12, TP13, Revision ‘For VCAT’ dated 6 June 2021 but modified to show:
   1. Consolidation of Units 11, 12 and 13 into two units, each with private open space above 10 square metres in area.
   2. Convex mirrors or other devices to provide visibility to the corridor to Units 6 and 7 from the main eastern corridor.
2. Prior to the commencement of development, you are required to provide to Council either:
   1. A certificate of environmental audit must be issued for the land in accordance with Part IXD of the Environment Protection Act 1970; or
   2. An environmental auditor appointed under the Environment Protection Act 1970 must make a Statement in accordance with Part IXD of that Act that the environmental conditions of the land are suitable for the sensitive use.

Three copies of the Certificate of Environmental Audit or the Statement of Environmental Audit and the audit area plan must be submitted to the Responsible Authority.

The development and use allowed by this permit must strictly comply with the directions and conditions of the Environment Protection Act 1970 and also with the conditions on the Certificate or Statement of Environmental Audit.

A section 173 Agreement under the Planning and Environment Act 1987 may need to be entered into with the Responsible Authority depending on the conditions of the Statement of Environmental Audit issued for the land. Any amendment must be approved by the Responsible Authority prior to the commencement of any works, use and development and may require further assessment of the land.

Should the land be unable to be remediated or the Environmental Audit Certificate or Statement conditions seek change to the form of development approved under this permit or extensive statement conditions for the future management of the site, the Responsible Authority may seek cancellation or amendment to the permit pursuant to Section 87 of the Planning and Environment Act 1987.

Excavation and construction of the basement and other remediation works can be carried out in accordance with the endorsed plans before the requirement in Condition 2 is satisfied.

1. The development and use as shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
2. Once the development has commenced it must be continued and completed to the satisfaction of the Responsible Authority.
3. No more than 17 medical practitioners/technicians are permitted to practice or operate from the premises at any single time.
4. No more than 144 children at any time are permitted to be in care under the control of the childcare centre including the occasional childcare centre unless the Responsible Authority consents in writing.
5. No more than 40 patrons and seats are permitted within the café premises at any single time.
6. The medical centre and café use may operate only between the hours of:

* 8:00am-9:00pm Monday to Friday;
* 9:00am-5:00pm Saturday;

Unless the Responsible Authority gives consent in writing.

1. The childcare centre use may operate only between the hours of:

* 7:00am-7:00pm Monday to Friday;

Unless the Responsible Authority gives consent in writing.

1. The amenity of the area must not be detrimentally affected by the use or development, through the:
   1. transport of materials, goods or commodities to or from the land;
   2. appearance of any building, works or materials;
   3. emission of noise, artificial light, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil;
   4. presence of vermin;
2. 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.
3. The loading and unloading of goods from vehicles must be carried out on the land and be conducted so as not to cause any disturbance to nearby residential properties and must only be carried out between 7:30am and 6:00pm to the satisfaction of the Responsible Authority.
4. No form of public address system may be installed so as to be audible from outside the building.
5. No goods must be stored or left exposed outside the building so as to be visible from any public road or thoroughfare.
6. No bin or receptacle or any form of rubbish or refuse shall be allowed to remain in view of the public and no odour shall be emitted from any receptacle so as to cause offence to persons outside the land.
7. Adequate provision shall be made for the storage and collection of garbage and other solid wastes and these facilities are to be located on the site to the satisfaction of the Responsible Authority.
8. Prior to the commencement of works on the site, the owner shall prepare a revised Waste Management Plan (to replace any previously endorsed Waste Management Plan) for the collection and disposal of garbage and recyclables for all uses on the site by private contractor. The revised Waste Management Plan shall provide for:
   1. The method of collection of garbage and recyclables for uses;
   2. Designation of methods of collection by private contractor;
   3. Appropriate areas of bin storage on site and areas for bin storage on collection days;
   4. Measures to minimise the impact upon local amenity and on the operation, management and maintenance of car parking areas;
   5. Litter management;
   6. Appropriate ventilation;
   7. Bin washing facility;
   8. Suitable capacity to store all the bins;
   9. The maximum height of waste and expected loading vehicles to be accommodated within the Ground Level car park and ensure that these vehicles can exit in a forward direction onto Huntingdale Road;
   10. Waste storage rooms must be constructed so to prevent the entrance of vermin and must be able to be easily cleaned. The floor must be graded to a sewer connection located within the waste storage room.

A copy of this plan must be submitted to Council. When endorsed the plan will form part of this permit.

1. Any infectious or potentially infectious wastes (as defined by the EPA) shall be properly segregated in containers colour coded yellow for infectious wastes and orange for potentially infectious wastes. Any prescribed waste which leaves the premises of generation must be disposed of in accordance with Environmental Protection Authority (EPA) requirements.
2. A grease trap must be provided and be located outside kitchen and server areas.
3. External wet areas or wash areas must be graded and drained to a sewer connection. Waste water from these areas must not be discharged to the stormwater system.
4. Provision is to be made for the protection of food from insects and dust by providing:
   1. self closing doors and fly screens;
   2. air curtains;
   3. positive air pressure ;
   4. plastic strips to open doorways for a reduction in size openings.
5. Before the development starts, a revised construction management plan (to replace any construction management plan endorsed prior to the 2017 amendment of the permit) must be prepared and submitted to the Responsible Authority for approval. The plan must be to the satisfaction of the Responsible Authority. Once approved, the plan must be implemented to the satisfaction of the Responsible Authority. The plan must address the following issues:
   1. measures to control noise, dust and water runoff;
   2. prevention of silt or other pollutants from entering into the Council’s underground drainage system or road network;
   3. the location of where building materials are to be kept during construction;
   4. site security;
   5. maintenance of safe movements of vehicles to and from the site during the construction phase;
   6. on-site parking of vehicles associated with construction of the development;
   7. wash down areas for trucks and vehicles associated with construction activities;
   8. cleaning and maintaining surrounding road surfaces;
   9. a requirement that construction works must only be carried out during the following hours:

* Monday to Friday (inclusive) – 7.00am to 6.00pm;
* Saturday – 9.00am to 1.00pm;
* Saturday – 1.00pm to 5.00pm (Only activities associated with the erection of buildings. This does not include excavation or the use of heavy machinery.)

1. The construction works associated with the use/development and/or subdivision hereby permitted must only be carried out during the following hours:

* Monday to Friday (inclusive) – 7:00am to 6pm;
* Saturday – 9am to 1pm;
* Saturday – 1pm to 5pm (Only activities associated with the erection of buildings. This does not include excavation or the use of heavy machinery);

Unless otherwise approved in writing by the Responsible Authority.

1. No equipment, services, architectural features or structures of any kind, including telecommunication facilities, other than those shown on the endorsed plans shall be permitted above the roof level of the building unless otherwise agreed to in writing by the Responsible Authority.
2. Disabled access to the building must be provided to the satisfaction of the Responsible Authority. All work carried out to provide disabled access must be constructed in accordance with Australian Standards Design for Access and Mobility AS 1428.1.
3. Before the use and development permitted starts, areas set aside for parked vehicles and access lanes as shown on the endorsed plans must be:
   1. constructed to the satisfaction of the Responsible Authority;
   2. properly formed to such levels that they can be used in accordance with the plans;
   3. surfaced with an all-weather sealcoat to the satisfaction of the Responsible Authority;
   4. drained, maintained and not used for any other purpose to the satisfaction of the Responsible Authority;
   5. line-marked to indicate each car space and all access lanes to the satisfaction of the Responsible Authority.

Parking areas and access lanes must be kept available for these purposes at all times.

1. All existing redundant crossings are to be removed and replaced with kerb and channel. The footpath and naturestrip are to be reinstated to the satisfaction of Council.
2. Within two months of the issue of an amended permit, a revised Parking Management Plan (to replace any previously endorsed Parking Management Plan) must be submitted and endorsed as part of this permit clearly designating the allocation of car spaces between uses.
3. No less than 53 car spaces must be provided on the land for the medical centre use. Any future subdivision of the approved development must provide for appropriate allocation of medical centre car parking on Title to the satisfaction of the Responsible Authority
4. No less than 32 car spaces must be provided on the land for the childcare centre use. Any future subdivision of the approved development must provide for appropriate allocation of childcare centre car parking on Title to the satisfaction of the Responsible Authority.
5. No less than 1 car space must be provided on the land for each dwelling. Any future subdivision of the approved development must provide allocation of 1 car space per dwelling on Title to the satisfaction of the Responsible Authority.
6. Before the development starts, a site layout plan drawn to scale and dimensioned must be approved by the Responsible Authority.

The plans must show a drainage scheme providing for the collection of stormwater within the site and for the conveying of the stormwater to the nominated point of discharge.

The nominated point of discharge is the north-west corner of the property where the entire site’s stormwater must be collected and free drained via a pipe to the Council pit in the nature strip to be constructed to Council Standards. A new pit is to be constructed if a pit does not exist or is not a standard Council pit.

If the point of discharge cannot be located then notify Council’s Engineering Division immediately.

1. All on-site stormwater is to be collected from hard surface areas and must not be allowed to flow uncontrolled into adjoining properties. The on-site drainage system must prevent discharge from driveways onto the footpath. Such a system may include either:
   1. trench grates (150mm minimum internal width) located within the property; and/or
   2. shaping the driveway so that water is collected in a grated pit on the property: and/or
   3. another Council approved equivalent
2. Stormwater discharge is to be detained on site to the predevelopment level of peak stormwater discharge. Approval of any detention system is required by the City of Monash, the Responsible Authority, prior to works commencing.
3. Driveways are to be designed and constructed using appropriate engineering standards.
4. A revised landscape plan (to replace any landscape plan endorsed prior to the 2017 amendment of the permit) prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted to and approved by the Responsible Authority within two months of the issue of an amended permit. The plan must show the proposed landscape treatment of the site and must be generally in accordance with the landscape plan prepared by Memla Pty Ltd (project no. 1463, Rev b, dated 12.8.16) but amended to show the removal of the existing crossover to Huntingdale Road and the continuation of the proposed planting within that former crossover area.

When approved the plan will be endorsed and will then form part of the permit.

1. Before the occupation of the buildings allowed by this permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority and then maintained to the satisfaction of the Responsible Authority.
2. Before the development start(s), amended plans, showing the access arrangements to the waste management vehicle to the site, to the satisfaction of VicRoads must be submitted to the responsible authority for endorsement. Once endorsed, the plans will form part of this planning permit. The amended plans shall include (But not limited to):
   1. Define the extent of access crossover required for waste management vehicle using appropriate turn path analysis.
   2. A ‘No Right Turn’ sign at the entrance at the access point on Highbury Road facing eastbound traffic.
3. Prior to the commencement of the use or the occupation of the development, all redundant crossovers must be removed and footpaths, kerbs, channels and nature strips reinstated to the satisfaction of the Responsible Authority.
4. Prior to commencement of the use or the occupation of the buildings, all works required under this permit must be provided and available for use to the satisfaction of the Responsible Authority and at no cost to VicRoads.
5. No work shall be commenced in, on, under or over the road reserve without having first obtained all necessary approvals under the Road Management Act 2004, the *Road Safety Act 1986*, and any other relevant acts or regulations created under those Acts.
6. This permit will expire in accordance with section 68 of the *Planning and Environment Act 1987* if the development is not completed before 11 October 2020.

In accordance with section 69 of the *Planning and Environment Act 1987*, the responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within three months afterwards.

**– End of conditions –**

1. The submissions 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-2)