

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1797/2019  
PERMIT APPLICATION NO. 41/2019/P

### CATCHWORDS

Child care centre; Location of use in isolated residential street; No main road frontage in DDO1; Neighbourhood Character; Amenity impacts including level of service, noise and traffic.

<b>APPLICANT</b>	Site 33 Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Frankston City Council
<b>REFERRAL AUTHORITIES</b>	Country Fire Authority - Headquarters, Head, Transport for Victoria
<b>RESPONDENTS</b>	Ms M Davis and others
<b>SUBJECT LAND</b>	21 Barmah Court FRANKSTON SOUTH VIC 3199
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Rachel Naylor, Senior Member
<b>HEARING TYPE</b>	Hearing
<b>DATES OF HEARING</b>	7, 8, 9 & 15 October 2020
<b>DATE OF ORDER</b>	10 March 2021
<b>CITATION</b>	Site 33 Pty Ltd v Frankston CC [2021] VCAT 200

### 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 for the permit application plans, the following plans filed with the Tribunal:  

Prepared by:	Raymond Design
Drawing numbers:	Sheets V01 to V13 inclusive, all Issue A1
Dated:	31/01/20
- 2 Pursuant to clause 64 of Schedule 1 of the *Victorian Civil & Administrative Tribunal Act 1998*, the permit application is amended by deleting the planning permission being sought for advertising signage.

### **No permit granted**

- 3 In application P1797/2019 the decision of the responsible authority is affirmed.
- 4 In planning permit application 41/2019/P no permit is granted.

**Rachel Naylor**  
**Senior Member**

### **APPEARANCES**

For applicant

Mr N Crawford, solicitor of TP Legal

He called the following expert witnesses:

- Ms K May, arborist of John Patrick Landscape Architects;
- Mr R Leo, acoustic engineer of Clarity;
- Mr R Fairlie, traffic engineer of Ratio;
- Mr J Patrick, landscape architect of John Patrick Landscape Architects; and
- Mr S D'Amico, town planner of Ratio.

For responsible authority

Ms A Kellock, town planner

For Country Fire Authority

No appearance

For Transport for Victoria

No appearance

For M Davis and others

Mrs M Davis, Mr D Susanj and Mrs R King

## INFORMATION

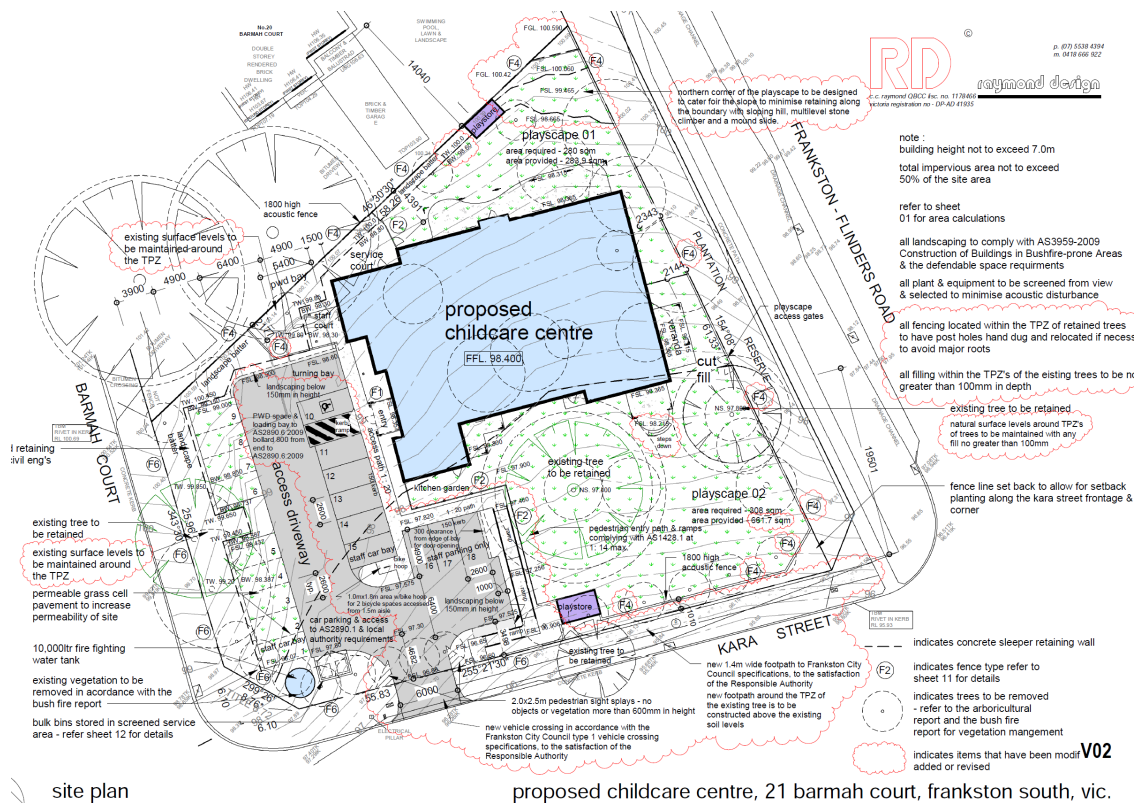
Land description	<p>The site has an irregular shape, including a 25.96m frontage to Barmah Court, a 8.76m corner splay, a 55.83m frontage to Kara Street, a 61.33m abuttal on its eastern boundary to a plantation reserve next to Frankston-Flinders Road and a northern boundary length of 58.26m. The total area is about 2,676sqm. The land falls about 4 metres from north to south and it contains a house and scattered vegetation including some mature trees.</p>
Description of proposal	<p>The development and use of the land for the purpose of a child care centre accommodating 84 children and operating 6.00am to 6.30pm Monday to Friday.</p> <p>The proposal includes the removal of some existing trees, and the carrying out of works in the tree protection zones of other trees located on and off this site.</p> <p>The building has a floor area of 582.9sqm and a total roofed area of 680.1sqm or 25.4% of the site. It is a single storey building with an overall height of less than 7 metres. The car parking area adjacent to the Barmah Court frontage contains 18 car spaces, including a disabled space. The nine spaces closest to Barmah Court are to be constructed of permeable grass cell pavement.</p>
Nature of proceeding	<p>Application under section 77 of the <i>Planning and Environment Act 1987</i> – to review the refusal to grant a permit.</p>
Planning scheme	<p>Frankston Planning Scheme</p>

Zone and overlays	<p>General Residential Zone Schedule 1 – General Residential Areas (GRZ1)</p> <p>Significant Landscape Overlay Schedule 3 – Frankston South (SLO3)</p> <p>Design and Development Overlay Schedule 1 – Frankston South (DDO1)</p> <p>Bushfire Management Overlay Schedule 1 – Carrum Downs, Frankston, Frankston North, Frankston South, Langwarrin, Langwarrin South, Skye BAL-12.5 Areas (BMO1)</p> <p>The nearby Frankston-Flinders Road is in a Road Zone Category 1 (RDZ1)</p>
Permit requirements	<p>Clause 32.08-2 To use the land for the purpose of a child care centre in GRZ1</p> <p>Clause 32.08-9 To construct a building and to construct or carry out works for a permit required use (child care centre) in GRZ1</p> <p>Clause 42.03-2 To construct a building or to construct or carry out works within the tree protection zone of substantial trees (trees 2, 13, 20 and 23) in SLO3</p> <p>Clause 42.03-2 To remove one substantial tree (tree 12a) in SLO3</p> <p>Clause 43.02-2 To construct a building and to construct or carry out works because the amount of the site covered by buildings exceeds 25% in DDO1</p> <p>Clause 44.06-2 To construct a building or construct or carry out works associated with the use of the land for the purpose of an education centre (that includes a child care centre) in BMO1</p>
Tribunal inspection	<p>An inspection of the site and surrounds from the public realm (due to Covid-19 related restrictions) occurred between the third and fourth hearing days.</p>

## REASONS<sup>1</sup>

## Overview

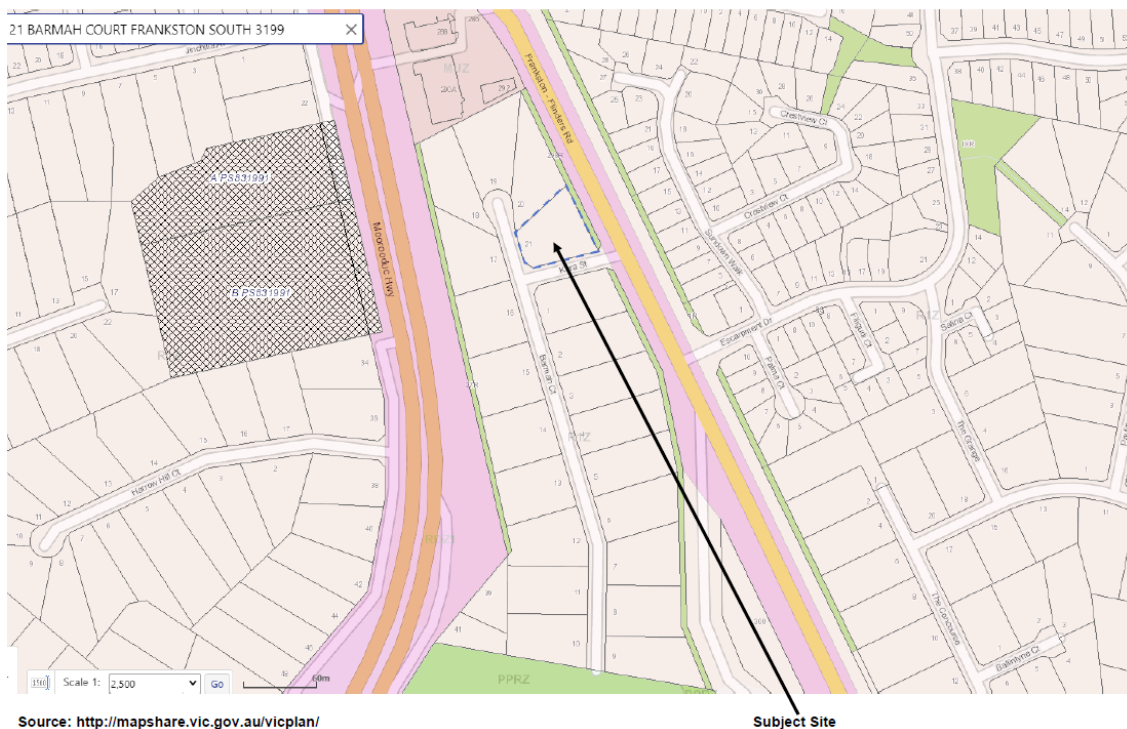
- 1 Site 33 Pty Ltd (the applicant) seeks planning permission to develop and use the site at 21 Barmah Court, Frankston South for the purpose of a child care centre accommodating 84 children and operating 6.00am to 6.30pm Monday to Friday.



Extract of overall layout from proposed plans

- 2 Barmah Court is an isolated residential street with one short road (Kara Street) providing vehicle access to Frankston-Flinders Road. There is parkland at the southern end of Barmah Court. The connection is a walking track and Barmah Court is well removed from the other facilities available further to the south within the parkland. Hence, there is no reason to visit Barmah Court except to visit one of the 21 residential properties in the court.

1 The submissions and evidence of the parties, the 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.



Council attachment showing Barmah Court isolated between Frankston-Flinders Road, Moorooduc Highway and parkland

- 3 Other residential properties in Barmah Court oppose this proposal. They are concerned about a non-residential use that:
  - creates noise from children playing and vehicles,
  - creates parking and traffic issues,
  - introduces a building and a large car parking area that is at odds with the existing neighbourhood character, and
  - is introduced into a location that is contrary to the local planning policies.
- 4 The Council has refused to grant planning permission for this proposal. It shares the residents' concerns and is also concerned the proposal creates an intensity of use and development resulting in a loss of existing vegetation in a location where that vegetation contributes to the existing neighbourhood character and is recognised in the planning scheme through the application of particular overlay controls.
- 5 Whilst a child care centre is a land use that is allowed within a General Residential Zone, it is only allowable subject to obtaining planning permission. Just because a planning permit can issue, does not mean it should or it will issue. It depends upon the merits of the proposal having regard to the physical context of the site and surrounds and the relevant planning controls and policies that apply.



- 6 Having considered all of these matters in detail, there are aspects of this proposal that are both acceptable and unacceptable. Ultimately, I have reached the conclusion that a permit should not be granted. The following reasons explain why I have reached this decision.

### **The physical context of the site and surrounds**

- 7 Mr D'Amico orally described the site and Barmah Court as having the sense of a green leafy area. The Council describes the attributes of the site and surrounds in its submission:

The subject site is located within an area that is considered to provide a high level of amenity to residents due to various factors including the attractive well vegetated character of the neighbourhood, the low density nature of the area, the small number of allotments that front Barmah Court and the 'dead end' nature of Barmah Court, which means there is no through traffic. ...<sup>2</sup>

- 8 The applicant highlights that the properties in Barmah Court are within an existing urban (residential) area, and are a short distance south of a small commercial hub located adjacent to the intersection of Frankston-Flinders Road and Moorooduc Highway. Mr D'Amico acknowledges this hub is not recognised in the planning scheme as a defined neighbourhood activity centre. He points out, though, that it still provides a convenience role in the surrounding area. This makes sense as this hub is located at the intersection of Moorooduc Highway and Frankston-Flinders Road, a main road location surrounded by established residential areas. Whilst this hub is adjacent to the northern properties in Barmah Court, it is also entirely separated from the court. There is no physical connection for vehicles or pedestrians between this hub and Barmah Court.



Nearmap aerial view of the site (green marker) in its broader locality

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<sup>2</sup> Extract from page 29 of Council's submission

- 9 The properties in Barmah Court are all reasonably large allotments. The topography generally falls towards the south so the properties on the west side of Barmah Court are generally elevated above the street whereas a number of properties on the east side and south of Kara Street sit below the street. The frontages are open with typically no front fencing. The vegetation across each of the properties varies in type and density, yet overall creates the impression of a well landscaped character. (Refer to the image below.) Kara Street and Barmah Court have no footpaths, and traffic is limited to that generated by the residential properties themselves. Hence, all of these characteristics contribute to the country lane character described in the planning scheme (which I refer to later in these reasons).

SITE AND WIDER CONTEXT

ATTACHMENT E



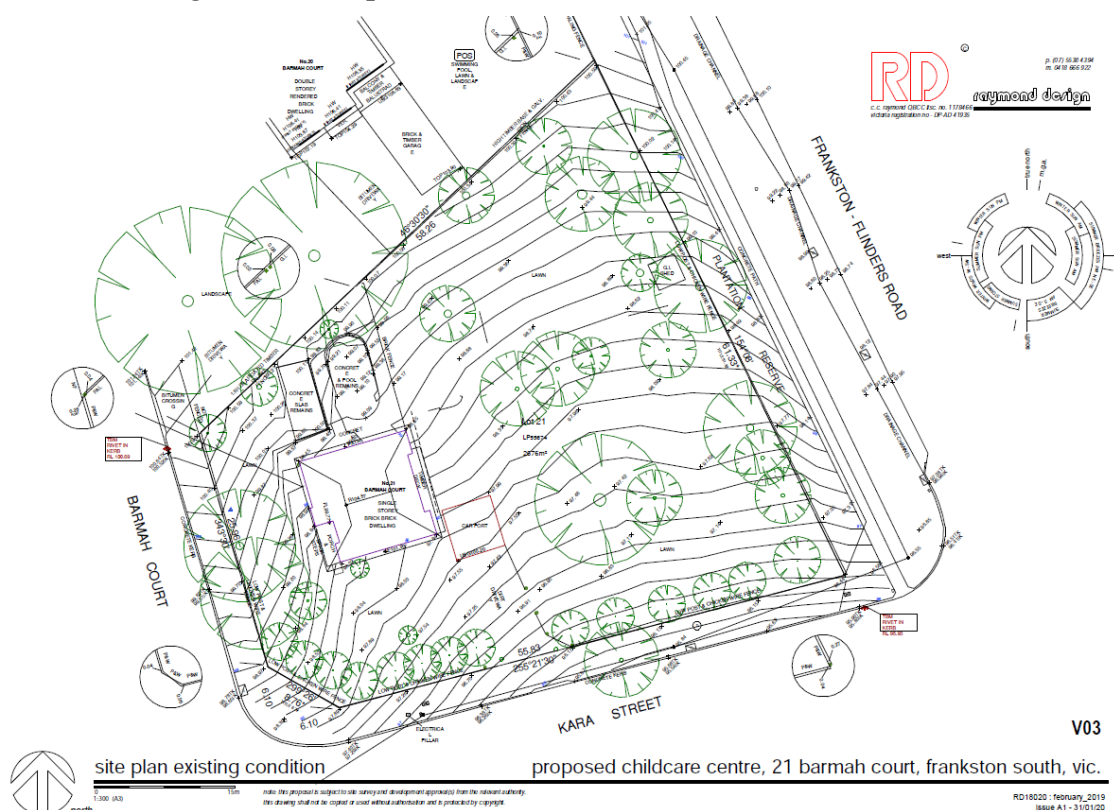
Source: Nearmap (5 May 2020)

Subject Site

Council attachment showing Barmah Court including the large lots and vegetation



- 10 The site has an area of around 2,600 square metres, has a fall generally from north to south/southeast of approximately four metres, and contains a number of trees of varying quality. This is illustrated in the extract of the existing conditions plan below.



### What planning permissions are required?

- 11 The starting point for considering any planning application is to be clear about what planning permissions are required. This is important because these permissions determine the scope of the relevant planning considerations. At the start of this hearing, I explored with the parties the details of the site context and the proposal together with the nuances of the planning controls. This has resulted in a refinement of the relevant planning permissions, which (as I have already said) informs the relevant planning considerations.

### General Residential Zone

- 12 The whole of Barmah Court is zoned General Residential (GRZ1) and the purpose of this zone includes to implement the planning policies in the planning scheme as well as (amongst others):

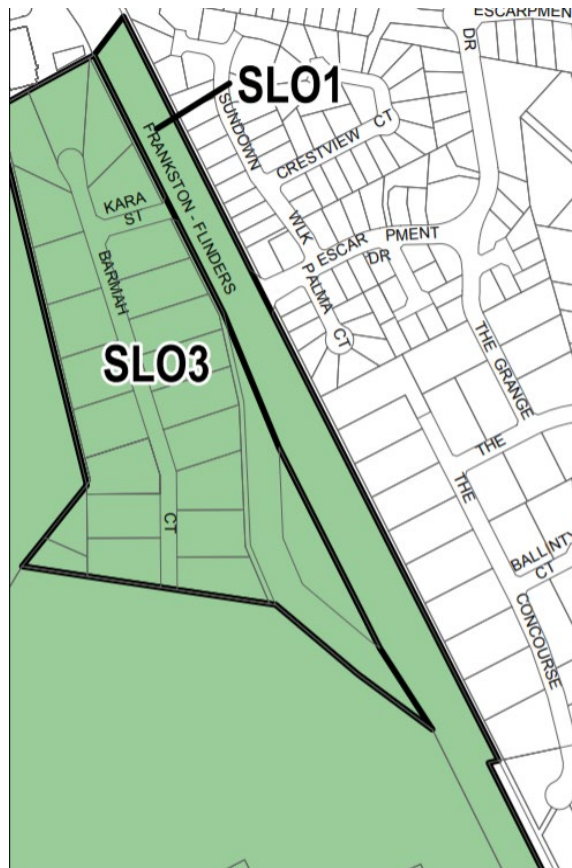
To encourage development that respects the neighbourhood character of the area.

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

- 13 A child care centre land use falls within the range of education centre land uses in the planning scheme. A child care centre land use is not a use that is listed in GRZ1 as being allowed without needing a permit. Similarly, it is not a land use that is listed in GRZ1 as being prohibited. This means it is a land use that is not specified, so it falls into a section 2, permit required, use. This, in turn, means that planning permission is required for the development of this land use as well as to use the land for the purpose of a child care centre.
- 14 The GRZ1 contains general decision guidelines to consider the relevant planning policies. It also contains specific decision guidelines for a non-residential land use to consider (as appropriate):
- 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.
- 15 The consideration of these decision guidelines is also informed by the relevant planning permissions and decision guidelines of the Significant Landscape Overlay and the Design and Development Overlay.

#### Significant Landscape Overlay

- 16 Barmah Court and other residential land on the west side of Moorooduc Highway are affected by the Significant Landscape Overlay Schedule 3 – Frankston South (SLO3). (Refer to map extract on the next page.)
- 17 The statement of nature and key elements of the landscape in SLO3 is:
- At Frankston South there is a mixture of remnant indigenous vegetation and mature native and exotic trees and shrubs which make a significant contribution to the landscape quality and character of this low density residential area. This land is the highest in the municipality and is quite prominent when viewed from the north of Frankston, Port Phillip Bay and the Moorooduc Plain.
- 18 The SLO3 landscape character objective to be achieved is:
- To maintain the well vegetated landscape character of Frankston South.



- 19 SLO3 requires planning permission:
  - To remove, destroy, lop or prune a substantial tree (except in particular circumstances not relevant to this proceeding); and
  - To construct a building or construct or carry out works in the Tree Protection Zone of any substantial tree.<sup>3</sup>
- 20 The proposed building and works are within parts of the tree protection zones of four substantial trees (refer to the extract of Ms May's plan on page 18 for an illustration of this). Two of these trees are on the site and two trees are located on the adjoining property to the north at 20 Barmah Court.
- 21 Ms May's evidence is that possibly up to seven trees on the site meet the SLO3 definition of a substantial tree and would appear to require planning permission to be removed, however in reality only one tree (tree 12a) generally located in the centre of the eastern half of the site requires planning permission to be removed. This is because the other trees all

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<sup>3</sup> The SLO3 definition of a substantial tree includes vegetation that has a trunk circumference greater than 0.5 metres at 1.4 metres above the point where it meets natural ground level. SLO3 also specifies how to calculate the tree protection zone which is generally 12 times the diameter of the trunk but also not less than 2 metres and not greater than 15 metres.

benefit from the bushfire protection exemptions specified in clause 52.12 of the planning scheme.<sup>4</sup>

22 The SLO3 decision guidelines to consider include:

- Whether the removal of substantial trees including for defensible space has been avoided or minimised having regard to the bushfire risk and other available siting options.
- The impact of the proposal on the visual landscape or biological values of the area.

### Design and Development Overlay

23 Design and Development Overlay Schedule 1 (DDO1) affects Barmah Court as well as some of the other residential areas to the southeast and west. Its design objectives include:

To maintain and enhance the low density treed character of Frankston South in recognition of its contribution to the housing diversity and its landscape quality.

To ensure that development densities are consistent with the landscape character of the Frankston South area.

To ensure that new development responds to established and preferred streetscape and neighbourhood character and built form in terms of building height, scale, siting and landscape setting.

To ensure that development is compatible with the environmental and infrastructure capacities of the area, including the capacity of local streets, drainage systems and sewerage systems.

24 Its provisions generally provide for lots of at least 2,500 square metres and buildings that:

- do not exceed 7 metres in height;
- are set back at least 7.5 metres from any road frontage;
- have outbuildings with a total floor area not exceeding 100 square metres; and
- do not cover a site by more than 25%.

25 Its provisions also provide for a total site coverage; including buildings, swimming pools and impervious surfaces, that does not exceed 50%. The total pervious area is stated on the proposed plans to be 57.4%, which includes nine car spaces proposed to be constructed of permeable grass cell pavement.

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<sup>4</sup> These exemptions allow the removal of trees without planning permission if they are within 4 metres of a boundary fence between properties in different ownership or within 10 metres of an existing building used for accommodation.

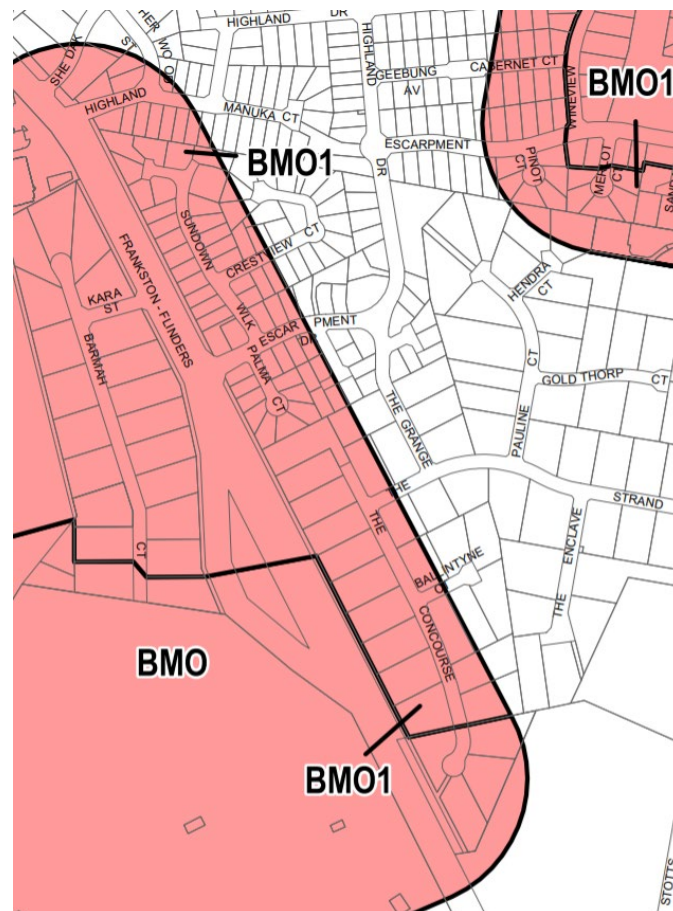


26 The Council and the applicant both presumed planning permission was required at the planning application stage under DDO1 because the 25% building site coverage was exceeded and the 7.5 metre setback from Frankston-Flinders Road was not met. It was confirmed at the start of the hearing that the site does not have a frontage to Frankston-Flinders Road, so the sole reason why permission is required under DDO1 is because the proposed building covers 25.4% of the site. The relevant DDO1 decision guidelines are:

- The appropriateness of any subdivision, building or works having regard to land capability, including land form, slope, drainage, stormwater flows and the presence of vegetation.
- The extent to which the proposed development meets the objectives and design responses contained in the relevant Neighbourhood Character Study Character Statement.

### Bushfire Management Overlay

27 Barmah Court, including this site, is also affected by the Bushfire Management Overlay (BMO1). This requires planning permission to construct a building or construct or carry out works associated with an education centre land use (which includes a child care centre).



28 The planning policy framework makes it clear that, in a BMO area, priority is given to the protection of human life over all other policy

considerations.<sup>5</sup> As such, the extent to which this site can be re-vegetated is limited by the need to create and maintain a defensible space around the child care centre.

### Conclusion

- 29 Whilst the ‘triggers’ for planning permission in both SLO3 and DDO1 may appear limited in extent (i.e. one tree to be removed and 25.4% building site coverage), they nevertheless mean planning permission is required. This in turn means the objectives and decision guidelines of these overlay controls are relevant considerations. Even if these controls had not been formally ‘triggered’ by this proposal, they would still have some relevance to the neighbourhood character considerations. This is because their mere existence and content heightens and strengthens the importance of particular aspects of the considerations of the built form and landscape characteristics of the neighbourhood. For example, Mr D’Amico acknowledges the treed and landscaped character of this area. He explains SLO3 is seeking to protect that landscaped character and DDO1 is seeking to maintain that landscaped character. In contrast, BMO1 does place some limitations on the opportunities to contribute to the landscape character as part of any new building or works. This, in turn, creates a consideration of the acceptability of these limitations in determining the acceptability of this proposal within Barmah Court (the neighbourhood).
- 30 Having regard to all of the relevant planning permissions and the existing context of the site and surrounds, the key issues for this proposal are:
- Whether the development is acceptable having regard to the built form and landscape characteristics of the neighbourhood; and
  - Whether the land use is acceptable having regard to potential amenity impacts arising from the scale and intensity of the use including parking, traffic, and the noise of children and vehicles.

### **The design response to the built form and landscape characteristics of the neighbourhood**

- 31 The Neighbourhood Character policy objectives at clause 22.08 of the planning scheme seek to ensure that development is responsive to the preferred future character of the area. It locates Barmah Court in the Frankston South Precinct 1 with the following character description:

An area of large houses in extensive grounds, in a rural bush setting. There is extensive remnant bush vegetation in public reserves, roadside reserves and private gardens. House and garden designs and front boundary treatments are individualistic, but it is the rural bush landscape that unifies the character of the area. Open or farm fence style front boundary treatments assist in allowing the vegetation to ‘flow’ across individual properties. Some roads have an informal,

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<sup>5</sup> Refer to for example clause 13.02-1S of the planning scheme.

country lane character because they are narrow and either lack kerbs or have asphalt kerbs.

32 The preferred neighbourhood character statement is:

The rural, remnant bush landscape and country lane character will be maintained, and strengthened.

33 The associated objectives and design responses are:

Objectives	Design Responses
To maintain and strengthen the vegetation dominated landscape and the relationship to the vegetation qualities of the Sweetwater Creek environs.	<p>Prepare a landscape plan to accompany all applications for new dwellings that includes substantial native trees and shrubs.</p> <p>Retain large, established native trees and understorey and provide for the planting of new native trees wherever possible.</p> <p>Buildings should be sited and designed to incorporate space for the planting of substantial vegetation. (Locate footings outside root zone).</p>
To reflect the existing rhythm of dwelling spacing.	Buildings should be sited to create the appearance of space by providing setbacks on all boundaries and to reflect the existing spacing of buildings in the street.
To ensure that buildings and extensions do not dominate the streetscape and wider landscape setting.	Only architectural features that contribute to the achievement of other objectives may exceed the relevant building height limit.

34 There are also some other design objectives nominated as relevant to this precinct (as well as some other precinct(s)). They are:

- To minimise site disturbance and impact of the building on the landscape;
- To maintain and enhance the continuous flow of vegetation across the landscape; and
- To ensure that adequate space is available on site for the retention and planting of vegetation.

35 As protecting human life is prioritised above all other considerations, the extent to which this site can be developed will be influenced by these objectives that also seek a landscaped character.

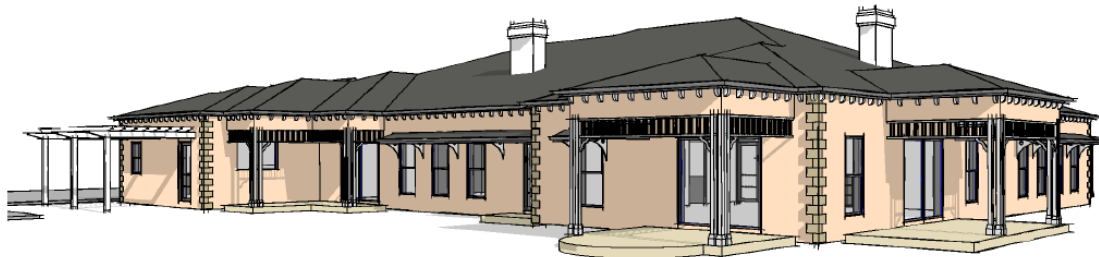
#### Built form character

36 In addition to the Neighbourhood Character policy, the Non Residential Uses in Residential Zones policy at clause 22.04 of the planning scheme seeks built form that is of 'domestic architectural character', 'essentially domestic in scale' and:

Include features to reduce noise and loss of privacy and to enhance the appearance of development, including landscaping, screening,

acoustic fencing and the siting of buildings and works, including car parking, that responds to surrounding housing and the streetscape.

- 37 The perspective of the proposed building contained in the proposed plans from the southeast<sup>6</sup> (an extract of which is below) illustrates a large single storey building with a pitched roof, chimneys and verandahs.



concept perspective

- 38 Large expansive buildings are a characteristic of this neighbourhood, and there is no cohesion of architectural styles. Within this existing neighbourhood, the proposed architectural style and a building of this proposed size/footprint is an acceptable design response. The emphasis for the preferred future neighbourhood character focuses upon maintaining, contributing to and enhancing the existing landscaped character. In summary, the other relevant policy points from the previous page are:

- Setbacks from all boundaries and a sense of space around buildings that can contribute to the planting of significant vegetation;
- Maintaining and strengthening the vegetation dominated landscape character of the area; and
- Including features to reduce noise and loss of privacy and to enhance the appearance of development, including landscaping, screening, acoustic fencing and the siting of buildings, works and car parking to respond to surrounding housing and the streetscape.

#### The landscape character and acoustic fencing

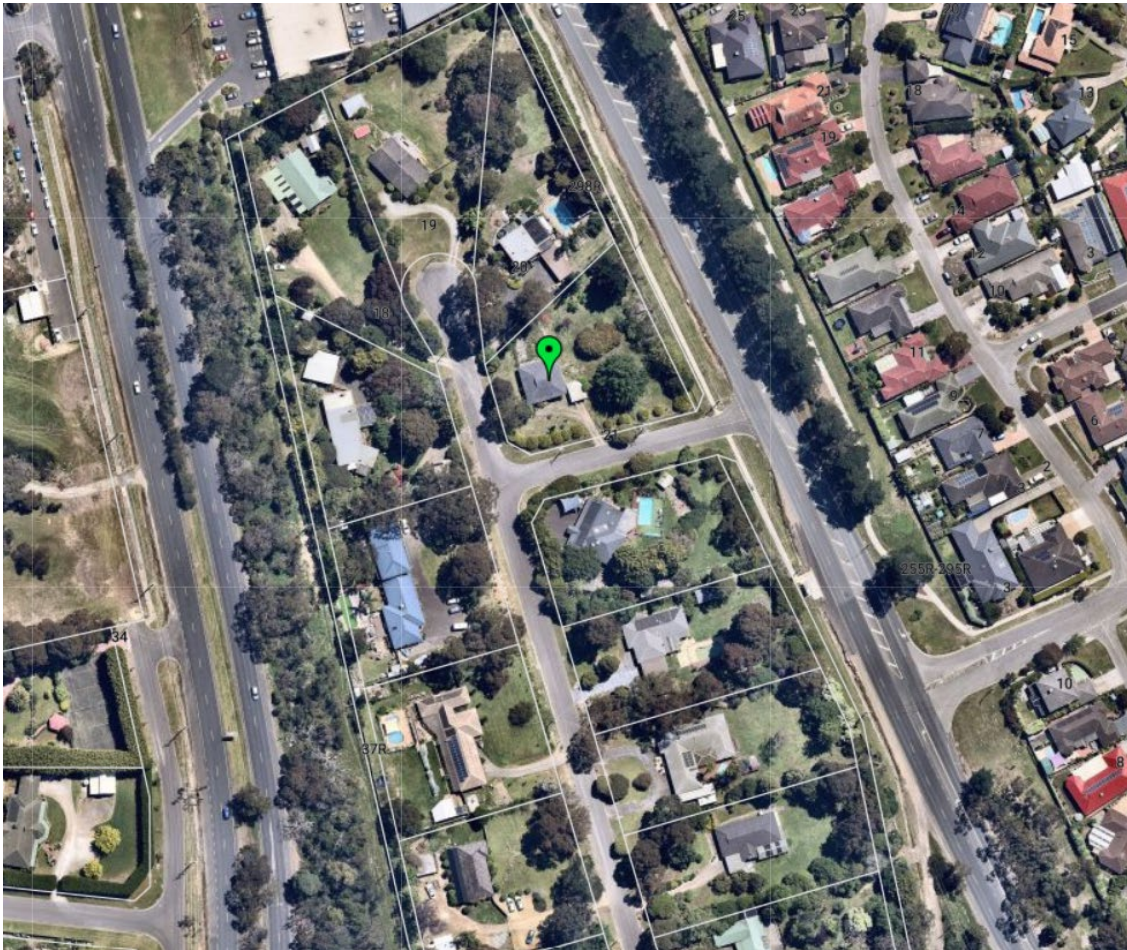
- 39 The large lot sizes, the space around existing dwellings and the existing vegetation on this site and the other properties in Barmah Court is evident in the extract of a Nearmap aerial view from November 2020 on the following page. What is also evident is that these characteristics are different to those found in other nearby neighbourhoods such as on the east side of Frankston-Flinders Road, which contains, for example, small lots and sparse canopy vegetation. The aerial view also illustrates a number of Barmah Court properties that have extensive driveways and on occasion

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<sup>6</sup> This is not a technically correct image in comparison to the elevations. I have used it in these reasons merely to assist the reader with an overall impression of the proposed building.



multiple car parking areas. However, such areas do not appear to be as large as the proposed car parking area on this site and these driveway areas do not appear to interfere with the ability to provide space around the buildings and landscaping opportunities across the properties.



Nearmap extract illustrating the existing space around dwellings and canopy vegetation in the Barmah Court neighbourhood



Nearmap street view extract of the site's two street frontages

- 40 Also, the Nearmap street view extract (on the previous page) of the site's presentation to Barmah Court and Kara Street illustrates the current contribution of shrubs and canopy vegetation to the existing landscaped character of this neighbourhood.
- 41 The proposal involves the removal of 22 trees. The reasons for this include works within their tree protection zones or to satisfy the conditions of the Bushfire Management Plan prepared for this proposal, e.g. spacing of trees and limiting canopies overhanging the proposed building.



Extract from Ms May's evidence statement of trees to be retained/removed and tree protection zone encroachments

- 42 The Council acknowledges much of the vegetation can be removed without planning permission for bushfire protection purposes associated with the existing house and the existing boundary fencing. The Council agrees with the arboriculturalist assessments undertaken for the applicant that some of the vegetation can be removed as it is of low retention value or is considered a weed. The Council supports the retention of three mature canopy trees (trees 2, 13 and 20). However, it considers the proposal does not make a positive contribution to the valued landscape character of the neighbourhood or integrate successfully with its surrounds.
- 43 Mr Patrick's landscape concept plan contained in his evidence statement proposed some new trees, but the extent of vegetation was hindered by the need to achieve the Bushfire Management Plan requirements such as 5 metre spacing between trees. However, it became apparent during the giving of his evidence that the spacing requirement between trees in the



most recently approved Bushfire Management Plan for this proposal is reduced to a distance of 2 metres. This enabled Mr Patrick to prepare a revised landscape concept plan for the last hearing day increasing the trees scattered across the site (refer to the extract below).



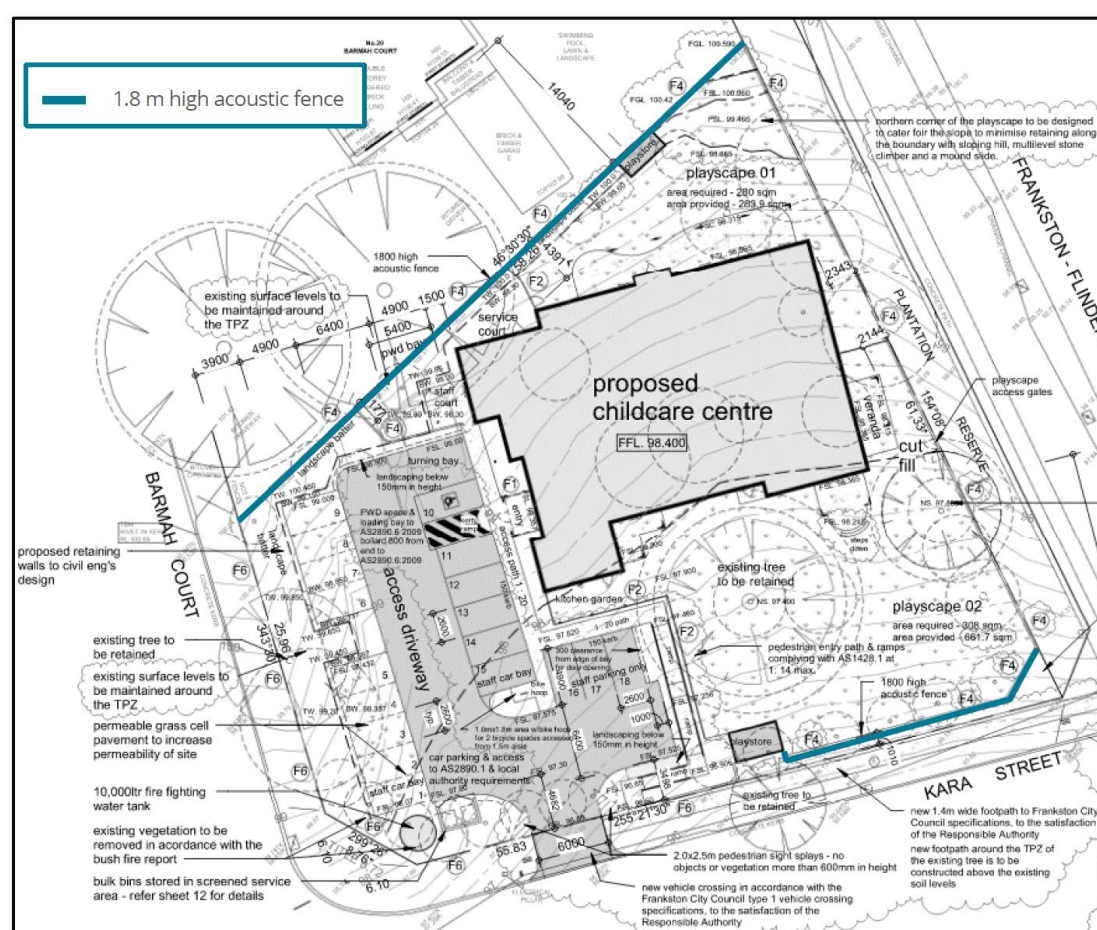
Extract of Mr Patrick's revised landscape concept plan prepared for the final hearing day on 15 October 2020

- 44 This is an improvement upon Mr Patrick's initial plan. The Council acknowledges this too, but submits the fundamental concern about the lack of space across the site that is available for landscaping has not been addressed. I agree that the provision of an 18 space car park, associated driveways and pathways, courtyards, hard surface play areas and the verandah covered areas all limit the available space on this site to enhance the landscaped character of the area. Despite the proposed permeability for car spaces 1 to 9, the fact remains that they are intended to be used for car parking and cannot contribute to the enhancement of the landscaped character fronting Barmah Court and the corner intersection with Kara Street. The Barmah Court frontage is being modified from a reasonably heavily vegetated sideage associated with a single dwelling to a car parking area with scattered trees. During the hearing, the applicant orally suggested an alternative could be to plant more shrubs rather than new trees along this frontage. I am not persuaded this alternative would enhance or improve the situation. This is because the Bushfire Management Plan requires no

shrubs under tree canopies, and individual/clumps of shrubs to not exceed 5 square metres in area and be separated by at least 5 metres.

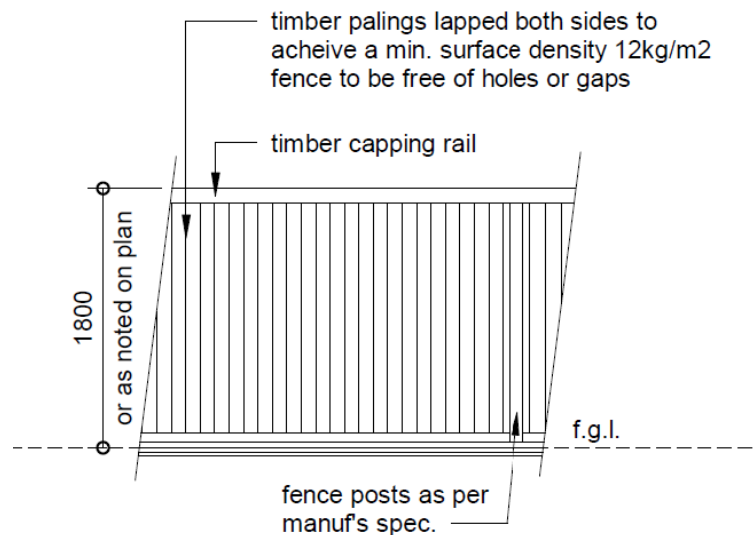
- 45 The existing character and the preferred future neighbourhood character aspirations focus heavily on the landscaped characteristics of this neighbourhood. Whilst Mr Patrick's amended plan is an improvement, the extent of landscaping remains constrained by the various components necessary for a child care centre, e.g. the building, play areas and play equipment, car parking, etc. I agree with the Council that the proposed land use and development combined with the bushfire risk does not enable sufficient landscaping opportunities that can maintain or contribute to the recognised landscape characteristics of the neighbourhood character.
- 46 The Non-Residential Uses local policy seeks 'features to reduce noise and loss of privacy and to enhance the appearance of development, including landscaping, screening, acoustic fencing and the siting of buildings and works, including car parking, that responds to surrounding housing and the streetscape'. In this case, addressing some of the amenity impacts does have an effect on neighbourhood character. I have already made findings about the siting of the car parking, the landscaping/screening around it and the ability to landscape the development overall. Another character consideration is the need for acoustic or screening fencing.

Figure 3 – Acoustic barriers to outdoor play areas





- 47 Mr Leo's evidence is that 1.8 metre high acoustic fencing should be constructed along the northern property boundary with 20 Barmah Court, and near part of the Kara Street frontage in order to minimise the noise of children in the outdoor play areas (extract from Mr Leo's evidence is on the previous page). Mr Leo understands the applicant is proposing to achieve this with timber paling fences that meet the minimum required surface density as per the illustration in the proposed plans (refer to extract below).



### acoustic fence type F4

- 48 A timber paling fence along part of the Kara Street frontage is generally acceptable as this characteristic already exists on the opposite side of Kara Street, providing privacy to the back garden of 1 Barmah Court.
- 49 During the hearing, the existing fencing at the eastern end of the common boundary with 20 Barmah Court was confirmed to be around 2.5 metres in height, whereas at the western end it is lower, partly dilapidated and partly missing (and replaced with trellising on 20's side of the boundary). Paling fences of varying heights and styles are evident around the whole of the court bowl at the northern end of Barmah Court. As such, having a paling acoustic fence along the entirety of the side boundary with 20 Barmah Court is an acceptable outcome that is respectful of the existing neighbourhood character.

### The amenity impacts

- 50 This proposal has unacceptable impacts upon the amenity of Barmah Court. GRZ1 allows for some non-residential land uses in appropriate locations. The Non-Residential Uses local policy objectives seek to ensure non-residential land uses are appropriately located to have 'minimal impact on the amenity of the locality and nearby housing' including in regard to hours of operation beyond standard business hours, traffic and noise. I am not persuaded this site is appropriately located to accommodate this child care

centre land use and development in a manner that acceptably reduces adverse amenity impacts on this particular locality in Barmah Court.

- 51 Amenity is a planning term often used in Victoria's planning schemes as a means of referencing, in particular, the notion or concept of enjoyable residential living. Yet, 'amenity' is also an undefined term in planning in Victoria. It is not a term used at all in the objectives of the *Planning and Environment Act 1987* ('the P&E Act'). Rather, amongst the objectives of planning in Victoria in the P&E Act that are relevant to this proposal are providing for the fair and orderly use and development of land<sup>7</sup>, and securing a pleasant and safe living environment for all Victorians.<sup>8</sup> Similarly, the 'Understanding Neighbourhood Character' planning practice note<sup>9</sup> describes amenity on page 2 as being about 'the pleasantness and good functioning of an area'. 'Pleasant' is defined in the Macquarie Dictionary<sup>10</sup> as 'pleasing, agreeable, or affording enjoyment; pleasurable'.
- 52 Currently, Barmah Court is a pleasant and good functioning residential area. It is an isolated pocket of residential properties that can access to Frankston-Flinders Road via a short road (Kara Street) that connects the court to the main road. Barmah Court contains 21 residential properties that each contain a single house and the neighbourhood characteristics I have already described. Despite the connection of the southern end of the court to the adjacent parkland, this end of the parkland contains vegetation with walking trails, so there is no particular incentive for the broader community to use Barmah Court for car parking to access the parkland. Hence, there are low traffic volumes presently in Barmah Court and Kara Street, generated only by the residential properties. This assists in creating a safe pedestrian walking environment as there are also no footpaths in either Barmah Court or Kara Street at present.

### Local policy

- 53 The Non Residential Uses local policy seeks land uses that provide services outside of standard business hours (with specified examples given of child care centres and medical centres) to be located fronting a primary or secondary road on at least one side. Mr D'Amico's evidence statement reflects a view held by some during the processing of the permit application that this site fronts a primary road, being Frankston-Flinders Road to its east.
- 54 As explained earlier in these reasons, the applicant acknowledges this site does not have what it describes as a 'technical frontage' to Frankston-Flinders Road. However, the applicant submits the reality of the site's context is that it meets the locational attributes of this local policy. I am not persuaded of this. A strip of land along the Frankston-Flinders Road edge

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<sup>7</sup> Part of objective 4(1)(a)

<sup>8</sup> Part of objective 4(1)(c)

<sup>9</sup> Understanding Neighbourhood Character Planning Practice Note 43 dated January 2018

<sup>10</sup> Sixth edition 2013

prevents this site from claiming a frontage to a primary road. The fact that this strip is not physically evident either by landscaping or separate fencing does not persuade me the locational attribute of a primary/secondary road for a non-residential land use in a residential area is achieved.

- 55 The existence of the strip of land along the edge of the Frankston-Flinders Road is not an uncommon situation. Such strips of land are often about a foot wide and are sometimes described as ‘revenge strips’. This is because they are deliberately created at the subdivision stage to prevent road access from the neighbouring lot(s) to the primary/main road. In this case, this revenge strip of land also exists adjacent to the other properties on the east side of Barmah Court as well as for those properties on the west side of Barmah Court (refer to the cadastral plan extract on page 6 of these reasons). This situation means it appears the court has been deliberately designed to have a single point of access to Frankston-Flinders Road via Kara Street.
- 56 Failure to meet or achieve a policy set out in a local or State level planning policy in a planning scheme is not fatal to a proposal. This is because the policies in planning schemes are guidelines. Policies are not mandatory, and they are not prerequisite requirements that must be met. Hence, as a permit could issue for this land use in this zone, the impacts of this land use must be considered on its individual merits regardless of whether a ‘locational’ policy is met or not.
- 57 I agree with Mr D’Amico that there are benefits to the site’s location as it is close to Frankston-Flinders Road, and within walking distance of the nearby activities in the local centre hub to the north as well as surrounding residential areas. However, the locational aspirations in the Non Residential Uses local policy are about reducing adverse amenity impacts. A primary road frontage can mean that a site could utilise it as the primary point of access and thereby limit impacts into the surrounding residential areas. However, this is unlikely to occur for a corner site, which is what this site would have been described as if it had had a frontage to Frankston-Flinders Road. It is always a preference by relevant road authorities for the access to a corner site to be provided via the secondary road frontage, not the primary frontage. Hence, in this case, Kara Street is and would remain (if a corner site) the preferred point of vehicle entry for this site.
- 58 A primary road frontage can also mean that a site and possibly its neighbouring properties may have a lesser level of amenity because of the existing level of activity, including traffic and noise along the primary road. This lesser amenity can have relevance to the acceptability of a proposed non-residential land use when considering potential amenity impacts. However, in this case, the proximity to Frankston-Flinders Road is of minimal relevance as this site and its neighbouring properties all have their primary frontages to Barmah Court. The Barmah Court properties closest to Frankston-Flinders Road have their eastern boundaries (closest to this road) generally fenced and their properties contain significant levels of

vegetation cover. Hence, the acceptability of this proposal is more strongly influenced by its amenity impacts rather than the locational guidelines identified in the local policy.

### **The level of service/intensity of the proposed non-residential land use**

- 59 The proposed child care centre land use is to accommodate 84 children plus staff between the hours of 6.00am and 6.30pm Monday to Friday. These hours are longer than standard business hours (as identified in the local policy). The number of children to be accommodated on the site is reasonably large, but not as large as some of centres that come before the Tribunal that can reach numbers as high as 120 to 150 children. Nevertheless, 84 children will generate the need for staff and will necessitate parents visiting the site twice a day to drop off and then pick up their children. Even though these drop off/pick up occasions are likely to be for a brief period of time, they do involve the parent(s) parking the car, walking with children and associated baggage between the centre and the car, and signing children in or out of the centre. The child care centre car park is located at the Barmah Court end of the site. Whilst some of the car parking is excavated into the slope of the land and some of the car parking will feature permeable construction, the car park remains visible from Barmah Court so these vehicles will be visible to varying degrees from Barmah Court and Kara Street. This, combined with the staff parking and the outdoor play areas, will mean the level of activity/intensity and its services will be discernible to nearby residents.
- 60 For much of the year, the hours at either end of the day (e.g. around 6.00am and around 6.30pm) will also necessitate a level of illumination on the site. For example, internal building lighting, lighting of external areas including the car park and possibly some play areas, and the headlights of cars entering and leaving Kara Court and the site. Individually, these components are understandable and necessary. Cumulatively, their impact will 'cause a disturbance to residential neighbours'<sup>11</sup> because the lighting is generally more extensive than a typical residential property. Furthermore, the driveway entry/exit is generally situated opposite habitable rooms, including bedrooms, in the house at 1 Barmah Court. This house is oriented toward the corner of Kara Street and Barmah Court and has filtering vegetation (not fencing) in proximity to the proposed driveway entry/exit. The extent of illumination will assist in further exposing the intensity of the non-residential use that is occurring on the site. This, in turn, impacts upon the residential pleasantness and amenity of Barmah Court. The cumulative impact of this level of non-residential service, including outside of standard business hours, is an unacceptable amenity impact in this particular context for the residential area of Barmah Court.

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<sup>11</sup> The expression used in the Non Residential Uses in Residential Zones local planning policy when discussing illumination of signs and outdoor security lights.



### Noise generation

- 61 Mr Leo was cross-examined by the Council and the residents about the noise impacts of children playing, elevated children playing and vehicles driving to and from the site.
- 62 In regard to car noise levels, Mr Leo explains the average noise levels of cars is measured on the basis of 50 decibels (dB) at the Leq (the constant noise level being produced over the given period of an hour). For this proposal on this site, it means there would need to be 180 vehicle movements in the one hour period to reach that noise level. Mr Fairlie's traffic engineering evidence is that the maximum number of vehicle movements in the peak hour will be 67, so this is far less than the noise level generated by 180 vehicle movements.
- 63 Mr Leo's analysis of children playing outdoors assumed 50% of the 84 children being outdoors between 6.00am and 7.00am, and 75% of the children being outdoors during the balance of the day. The benefits of exercise, outdoor activity, sunshine and a play based approach to education are at the forefront of the minds of today's educators, including child care centres, hence I find the assessment should consider 100% of the children outdoors during the balance of the day. Mr Leo explained at 100%, the increase in noise level would be one additional decibel. Given the reasonably large size of this proposed child care centre, it is appropriate for this centre to take responsibility for its potential noise impacts and provide acoustic attenuation, where appropriate, to minimise the impact of the noise of children playing upon nearby residential properties to an acceptable level. Acoustic fencing around child care centres in residential areas now commonly forms part of the overall design package in an effort to achieve an appropriate non-residential land use with acceptable impacts in a residential area.
- 64 As previously mentioned, the proposal incorporates acoustic fencing along the northern side boundary with 20 Barmah Court and along part of the southern frontage to Kara Street. Mr Leo's evidence is that the noise impact to the adjoining property at 20 Barmah Court of children playing can be appropriately managed through the excavation and acoustic fencing proposed that will replace the existing boundary fencing, particularly at the northeast end of the common boundary. Mr Leo's evidence notes that the proposed 1.8 metre high acoustic fence at the northwest end of common boundary does 'almost nothing' in terms of acoustic attenuation as it will be adjacent to the excavated section of the car park. Mr Leo considers this fence results in a one decibel reduction so it could be removed from this northwest section as there is an existing 4 dB margin available in terms of existing background noise levels and the required maximum noise levels to be achieved. I am not persuaded removing this section of acoustic fencing is appropriate at this time. This is because Mr Leo also acknowledged, in response to Mrs King's cross-examination, that his acoustic analysis does

not include the deliveries or plant equipment that will also be proximate to this boundary.

- 65 Mr Leo advises he considered 20 Barmah Court's first floor balcony that has an outlook towards this site and its northern outdoor play area. His opinion is acoustic fencing will not be effective given the balcony is raised above the fence. Mrs Davis explained this balcony is connected to a living area and there are two other rooms in this dwelling at first floor level with an outlook to the site as well, being a home office and a bedroom. All of these are habitable rooms (to use the terminology in the planning scheme), so they should be considered in balancing the acceptability of the noise impact.
- 66 The proposed plans of the child care centre show there will be three rooms facing the northern play area catering to 0-2yrs (12 children in one room) and 2-3 years (28 children in two rooms). The 3-5 year olds (44 children) will be in two rooms facing south, toward Kara Street. There are no details of the play equipment to be used in any of the outdoor play spaces in the proposed development plans or elevations. The applicant points out this is a normal approach to the design of child care centres for a planning application, as play equipment can change over time. If play equipment were shown on plans endorsed and forming part of a planning permit, any changes to the play equipment over the years would necessitate further approval under the permit. I accept the layout and type of play equipment in a child care centre is a level of detail that is not commonly required to be 'controlled' through the permit conditions or endorsed plans.
- 67 However, there are circumstances where the layout and type of play equipment can have a direct impact on the noise created and the acceptability of the resultant amenity impact. For example, Mr Patrick's initial landscape concept plan included an illustration for children to climb up the excavated area in the northeast corner immediately next to the boundary with 20 Barmah Court and then come down a slide. That type of activity is therefore encouraging play immediately next to the neighbour's property and as a result generating activity and some noise. Another example that I have had in a Tribunal case and relayed to the parties during this hearing was a cubby house built adjacent to a common boundary fence with a neighbour. This again generated activity and some noise.<sup>12</sup> These examples suggest that some consideration needs to be given at the planning application stage of the design to the layout and type of play envisaged, so that the extent of activity and noise in proximity to neighbouring properties can be minimised.
- 68 However, having made this finding, I am cognisant of the applicant's submission that a child care centre is now nested into the broader land use term of 'education centre' in the planning scheme<sup>13</sup>. An implication of this

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<sup>12</sup> *Petzierides v Hobsons Bay CC* (includes Summary) (Red Dot) [2012] VCAT 686

<sup>13</sup> Child care centre land uses were changed to be nested in the education centre group of land uses on 8 August 2019 as part of Amendment VC159.

is that the following building and works do not require planning permission unless specifically required by the planning scheme:

Furniture and works normally associated with an education centre including, but not limited to, outdoor furniture, playground equipment, art works, drinking fountains, rubbish bins and landscaping.

- 69 There is nothing in the relevant provisions of this planning scheme in this case that specifically require planning permission for playground equipment for an education centre. Hence, it would appear, on the one hand, unreasonable to require the details of the proposed play equipment to be specified. However, it could be said that this quotation above envisages playground equipment for an existing education centre. In the event that this quotation is relevant to a new education centre/child care centre, I have already explained that it is commonplace these days for acoustic considerations to form part of any planning application for child care centres. This means it can be necessary, depending upon the circumstances of a site and its surrounds, to have some understanding of the likely implications of noise from outdoor play areas. Furthermore, acoustic engineers often recommend acoustic fences to limit (but not prevent) the noise of children playing. Unfortunately, in the absence of specific equipment, it is not uncommon for such acoustic fencing to be recommended to heights in excess of two metres in order to deal with any possible eventuality of raised or elevated play equipment.
- 70 Mr Leo's analysis considered only a small number of children playing 'at height' on elevated play equipment, e.g. two children at 2.5 metres. He orally explained if 25% of the children were at 2.5 metres in height, there would be a one decibel increase to surrounding properties and a seven decibel increase to 20 Barmah Court. This will still meet the day and evening noise limits, but it will be four decibels higher for the early morning. I agree with Mr Leo that it is an unlikely scenario that there would be lots of children playing at a height of 2.5 metres. I consider this so because the amount of elevated play equipment is likely to be smaller than the overall play area. Often such elevated features are a highlight of the play equipment rather than forming the entirety or the majority of the play equipment. However, the capacity for noise levels to be exceeded in the early morning needs to be addressed. The applicant suggests the use of the northern play space could be restricted so its usage begins later at 7.00am. This is a possibility but, given my overall concerns, this amenity impact derived from having an outdoor play area alongside the secluded open space and some habitable rooms of 20 Barmah Court is one part of the cumulative amenity impact that has lead me to conclude that this land use is not acceptable in this location.
- 71 Mr Leo also gave oral evidence that the 1.8 metre high acoustic fence along part of the southern boundary near Kara Street 'won't do much for 1 Barmah Court' (located on the opposite side of Kara Street). This residential property has its secluded back garden generally located opposite

the larger southern outdoor play area. I have already made findings about the noise of vehicles in Kara Street. Whilst compliant, it is a noise increase for 1 Barmah Court. The acceptability of noise impacts also needs to be considered with the potential for noise to travel over the southern acoustic fence due to the slope of the land on the site, any elevated play equipment in this southern outdoor play area, and the fact that the 3-5 year old rooms have doors opening out to the south. Again, I find this is another part of the cumulative amenity impact that has lead me to conclude this land use is not acceptable in this location.

#### Traffic generation

- 72 Mr Fairlie's evidence is that a child care centre for 84 children is not a large centre from a traffic engineering perspective. Nevertheless, his evidence reveals this proposal will result in almost a doubling in traffic per day and a four-fold increase in traffic in peak times in Kara Street (excluding food delivery and waste truck movements). This is another part of the cumulative amenity impact that has lead me to conclude this land use is not acceptable in this location.
- 73 Mr Fairlie agrees with the Council that the existing level of traffic in Kara Street and Barmah Court is low at about 168-200 vehicle movements per day.
- 74 This proposed child care centre will generate parent and staff traffic as well as food delivery and waste collection traffic. Mr Fairlie has assumed there will be 16 staff. He estimates the parent and staff traffic will be about 320-330 vehicle movements a day. He also estimates this will result in 500-600 vehicle movements per day in Kara Street including the existing residential traffic. In response to Council's cross-examination, Mr Fairlie agrees the traffic will increase in the AM peak period from 18 to 67 vehicle movements, and in the PM peak from 16 to 67 vehicle movements. Mr Fairlie considers Kara Street will 'still' be a quiet street, although he acknowledges 'it will be different to what people are used to' as the traffic volume increase is coming off a low base level.
- 75 Mrs Davis asked Mr Fairlie if a child equals 4 vehicle movements per day and a staff member equals 2 vehicle movements per day, why the total is not 386 vehicles per day? He explains that it is not expected that there will be 84 children every day as sometimes they will be sick or away. In addition, it is possible for multiple children to be transported in the one vehicle and not all staff will drive. For these reasons, Mr Fairlie estimates there will be 'typically 320 per day'. I note that if there are days that have higher traffic volumes as per Mrs Davis' calculations, the traffic impact already described will be greater.
- 76 Mr Susanj asked Mr Fairlie whether a four-fold traffic increase in the peak hours can be anything other than a negative impact? Mr Fairlie answered that he feels this question is getting outside of his area of expertise.

Nevertheless, he acknowledges the increase in traffic is a negative effect to the residents. This four-fold increase occurs in Kara Street, which Mr Fairlie describes as a 'short local street'. Whilst from a traffic engineering perspective, the street has the 'environmental capacity' to absorb the increase in traffic<sup>14</sup>, it is an increase that Mr Fairlie's evidence acknowledges will be a noticeable difference.

77 The purpose of the Car Parking particular provision at clause 52.06 of the planning scheme includes (amongst others):

- To ensure the provision of an appropriate number of car parking spaces having regard to the demand likely to be generated, the activities on the land and the nature of the locality.
- To ensure that car parking does not adversely affect the amenity of the locality.

78 The decision guidelines in regard to the preparation of a car parking plan prepared under clause 52.06-8 includes consideration, as appropriate, of (amongst others):

- The role and function of nearby roads and the ease and safety with which vehicles gain access to the site.
- The protection and enhancement of the streetscape.
- The amenity of the locality and any increased noise or disturbance to dwellings and the amenity of pedestrians.

79 Also, the general decision guidelines at clause 65 of the planning scheme include consideration, as appropriate, of (amongst others):

- The orderly planning of the area.
- The effect on the amenity of the area.
- The adequacy of loading and unloading facilities and any associated amenity, traffic flow and road safety impacts.

80 Mr Fairlie is a traffic engineer and his evidence demonstrates that the car parking layout on the site is acceptable. He is also supportive of the point of access from Kara Street. It is well removed from the intersection with Frankston-Flinders Road. The residents raise concern about staff and parents parking in Barmah Court from an amenity and safety perspective. I have decided not to make any findings about this, as my primary concern is the unacceptable impact that the traffic increase has on the amenity of Kara Street and Barmah Court.

81 The Non-Residential Uses local policy objectives seek to ensure non-residential land uses are appropriately located to have a 'minimal impact on the amenity of the locality'. This impact includes the intensity of the use including the hours of operation (which I have already made findings about), the noise (which I have already made findings about) and the traffic.

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<sup>14</sup> Mr Fairlie gave evidence Kara Street has the environmental capacity to absorb 1,000 vehicles per day based on its width.



- 82 I reiterate my earlier reasons. Amenity is a planning term often used to reference the notion or concept of enjoyable residential living. The P&E Act has an objective to secure a pleasant and safe living environment for all Victorians. Pleasant can be defined as ‘pleasing, agreeable or affording enjoyment, pleasurable’.
- 83 Whilst Kara Street can technically accommodate the traffic generation from a traffic engineering perspective, the amount of car parking required for this land use generates traffic that significantly increases the existing volumes in a small local connector road. This road (Kara Street) provides the sole means of access to Barmah Court, which is described in the planning scheme as having characteristics akin to a country lane. Kara Street serves a limited function, primarily of funnelling the vehicle and pedestrian traffic from Barmah Court to Frankston-Flinders Road. The length of Kara Street is short, and its integration with the character of Barmah Court is already evident based on my previous findings about the neighbourhood character. Kara Street is part and parcel of the residential amenity currently enjoyed by Barmah Court residents. Kara Street is their sole means of access to their residential street and contributes to the pleasantness (amenity) that they currently enjoy. Traffic increases ranging from a doubling over the course of the day to a four-fold increase in the peak hours is an unacceptable impact upon the pleasantness/amenity of this particular residential area. Again, this is another part of the cumulative amenity impact that has lead me to conclude this land use is not acceptable in this location.

## **Conclusion**

- 84 For these reasons, the decision of the Responsible Authority is affirmed. No permit is granted.

**Rachel Naylor**  
**Senior Member**