VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

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| planning and environment LIST | vcat reference No. P152/2021  Permit Application no. TPA/38319/B |
| CATCHWORDS | |
| Sections 77 of the *Planning and Environment Act* 1987; Monash Planning Scheme; General Residential Zone; Application of clause 52.06 – Car parking; Whether amendment of planning permit required. | |

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| APPLICANts | Athanasious Flores and Zena Flores |
| responsible authority | Monash City Council |
| SUBJECT LAND | 30 Franklyn Street  OAKLEIGH EAST, VIC , 3166 |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 25 February 2021 |
| DATE OF ORDER | 3 May 2021 |
| CITATION | Flores v Monash CC [2021] VCAT 420 |

# Order

1. In application P152/2021 the decision of the responsible authority is set aside.
2. In planning permit application TPA/38319/B, an amended permit is directed to be issued in accordance with the endorsed plans and the conditions set out in Appendix B.

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| **Picha Djohan**  **Member** |  |  |

# Appearances

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| For applicants | Michael Sanger of counsel instructed by Luna and Xia Lawyers |
| For responsible authority | Peter English, town planner, Peter English & Associates |

# Information

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| Description of proposal | Amendment of endorsed plans to accommodate home based business in existing garage attached to dwelling. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant an amendment to a permit. |
| Planning scheme | Monash Planning Scheme |
| Zone | General Residential Zone – Schedule 3 |
| Relevant scheme policies and provisions | Clause 52.06-9 Car Parking |
| Tribunal inspection | 1 March 2021 |

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

## What is this proceeding about?

1. The applicants seek a review of the decision of Monash City Council (the **Council)** to refuse to amend planning permit TPA/38319/A to remove a car parking space within the garage of the dwelling at the subject land brought about by the applicants use of the garage for a home occupation.
2. The application to amend planning permit TPA/38319/A was precipitated by the commencement of an enforcement proceeding (P2430/2019 – referred to in these reasons as **the enforcement proceeding**)[[2]](#footnote-2) under s.114 of the *Planning and Environment Act* 1987 (the **Act**) by Council against the applicants.
3. The enforcement proceeding was brought by Council for the alleged contravention of–
   1. Clause 52.06-5 of the Monash Planning Scheme (**the planning scheme**); and
   2. condition 2 of planning permit TPA/38319/A (the **planning permit**) that required the development shown on the endorsed plans not to be altered without the written consent of Council. Council alleged that the endorsed plans, to the extent relevant to the enforcement proceeding, required two car parking spaces on the land to be provided in connection with the dwelling on the land.
4. Sometime prior to February 2019, the applicants converted the garage into chiropractic visiting and treatment rooms from which Mrs Flores conducts her chiropractic practice (**the home based business**). As a result, the garage is not now available for use as a car parking space.
5. There is agreement between the parties, with which I concur, that-
   1. the use of the garage for the home based business does not trigger the requirement for a permit under clause 32.08-2 of the planning scheme; and
   2. the building works involved in the conversion of the garage into chiropractic visiting and treatment rooms do not trigger a requirement for a permit under the planning scheme.
6. On 29 July 2020, and following the conduct of a compulsory conference conducted in the enforcement proceeding on 24 July 2020, the Tribunal ordered that on or before 21 August 2020, the applicants *“must apply to amend Planning Permit TPA/38319/A to allow a reduction in the required number of carparking spaces for the dwelling at 30 Franklyn Street, Oakleigh. The application must include plans showing the current use of the garage of that dwelling as a chirpractor’s rooms and showing the accomplanying works.*”[[3]](#footnote-3)
7. In August 2020, in response to the Tribunal’s order of 29 July 2020, the applicants applied to Council to amend TPA/38319/A to remove the car parking space in the garage on the land (**the amendment application**).
8. On 26 October 2020, Council refused the amendment application because the proposal–
   1. does not satisfy the requirements of clause 52.06 – Car parking of the planning scheme; and
   2. would set an undesirable precedent.
9. On 15 February 2021, the Tribunal ordered that the enforcement proceeding and the review application be heard together on 25 February 2021. A practice day hearing was held before me on 18 February 2021 at which neither party raised opposition to the combined hearing proceeding on 25 February 2021. At the commencement of the hearing on 25 February 2021, after hearing further from the parties, I ordered that the enforcement proceeding be adjourned to a date to be fixed.
10. By interim order made on 25 March 2021, I required that Council provide copies of relevant permits that had previously issued for the land[[4]](#footnote-4) as full copies of those permits, complete with good quality plans, had not been provided to the Tribunal prior to, or during, the hearing. I also provided the parties with the opportunity to make further written submissions on four issues that I had formed a preliminary view may be relevant to the determination of this review application (but had not been directly addressed by the parties during the hearing or in the written submissions relied upon at the hearing).
11. Both parties availed themselves of the opportunity to make further written submissions[[5]](#footnote-5) and in making my final determination in this proceeding, I have considered all the material that has been submitted by both parties, including their respective responses to the interim order of 25 March 2021.
12. For the reasons that follow, I have determined that the amendment application should be approved and an amended planning permit should issue on the conditions set out in Annexure B to these reasons.

## The amendment application

1. This section of the reasons contains uncontentious facts relevant to the amendment application.
2. The land is included in the General Residential Zone – Schedule 3 and the Principal Public Transport Network Area as shown on the *Principal Public Transport Network Area Maps* (State Government of Victoria, August 2018).
3. The applicants became the registered proprietors of the land on 28 February 2018, having occupied the dwelling on that land since its construction some 9 years ago.
4. The applicants have made the amendment application to “*allow for the reduction in on-premise parking and to formalise the use of the garage for the home based business.”*[[6]](#footnote-6)
5. The amendment application was accompanied by a car parking assessment demand, dated 31 August 2020, by O’Brien Traffic (Ms Donald).
6. Further, the amendment application was publicly notified between 1 October 2020 to 19 October 2020. No objections were received by Council against the amendment application.
7. Mrs Flores is a chiropractor and the home based business will be solely operated by her. She will attend to only one patient at a time. Patients will attend by appointment only. There will be no additional on site staff. The home based business will operate on the following days and times–
   1. Monday – 12 noon to 4pm;
   2. Tuesday, Wednesday and Thursday – 9.30am to 4pm.
8. No vehicle is intended to be used or parked on the land in conjunction with the home based business.
9. The applicants have two pre-school age children. They currently own one vehicle which is parked on the land.
10. Sometime after November 2018, the applicants caused to be erected a non-structural dividing wall in the garage creating a treatment room at the rear of the garage and a waiting area at the front. An aluminium and glass framed door was installed at the garage entrance behind the existing roller door. No changes have been made to the external appearance of the garage and when the roller door is closed there is no visible sign that the home based business is conducted from the land.

## What are the key issues?

1. On behalf of Council, it was submitted that the single issue in the review application was in relation to “*an amendment to the existing permit which effectively results in a reduction in the clause 52.06 carparking requirement from two spaces to one*.”[[7]](#footnote-7)
2. The written submissions on behalf of the applicants do not challenge that a permit to reduce the car parking associated with the existing use is required.[[8]](#footnote-8)
3. After the hearing on 25 February 2021, and upon further consideration of the material and submissions provided to me at that hearing, I provided the parties with an opportunity to make further written submissions on a number of identified issues. I did this because the legal basis for requiring an amendment application to be made, on the facts before me, had not been identified with sufficient particularity by either party (in either their oral submissions at the hearing or in the final written submissions received prior to the hearing) for me to identify the basis on which an amendment application was said to have been required.
4. From review of the remarks made by the Tribunal in support of its order of 29 July 2020, it appears that the parties had reached an agreement that an amendment application to reduce the number of car parking spaces on the land, could and should be made, however no ruling was made regarding the legal basis on which an amendment application was required to be made.
5. The remarks of the Tribunal accompanying the order of 29 July 2020, do no more than record the background to the making of the order by consent. Those remarks do not contain a detailed examination of the interpretation or application of clause 52.06, any other part of the planning scheme or the planning permit. I am not bound by what the parties may have agreed on questions of interpretation or application of the planning scheme or the planning permit. If, as in this case, a proceeding is to be finally diposed by a a determination after a hearing, then parties should be prepared at the hearing to identify the legal and factual basis on which their respective positions in a proceeding are based.
6. After detailed consideration of all the submissions and material before me, the key issues in this proceeding are –
   1. whether, as a result of the conduct of the home based business from the garage on the land, there is a requirement under clause 52.06 – *Carparking,* for a permit for the reduction of car parking; and
   2. whether, as a result of the use of the garage by the applicants for a home based business, the planning permit *TPA/38319/A* must be amended, and if so whether the amendment application should be granted?

## Application of Clause 52.06 – Car parking

1. The purposes of clause 52.06 are set out in the opening paragraphs of that clause. These purposes do not amount to triggers requiring applications for permits to be made, but rather express the overall desired outcomes of the clause.
2. Clause 52.06-1 and 52.06 -2 read together identify–
   1. the circumstances under which the requirements of clause 52.06 will apply, that is, the ‘triggers’ for applying the car parking requirements set out in clause 52.06 ; and
   2. in the circumstances where clause 52.06 does apply, the required car parking spaces to be provided.
3. The scope of clause 52.06 is set out in clause 52.06-1 which provides–

Clause 52.06 applies to:

* a new use; or
* an increase in the floor area or site area of an existing use; or
* an increase to an existing use by the measure specified in Column C of Table 1 in Clause 52.06-5 for that use.

Clause 52.06 does not apply to:

* the extension of one dwelling on a lot in the Neighbourhood Residential Zone, General Residential Zone, Residential Growth Zone, Mixed Use Zone or Township Zone; or
* the construction and use of one dwelling on a lot in the Neighbourhood Residential Zone, General Residential Zone, Residential Growth Zone, Mixed Use Zone or Township Zone unless the zone or a schedule to the zone specifies that a permit is required to construct or extend one dwelling on a lot.

1. On the facts of this matter, there is no proposal to extend the existing dwelling or to construct a dwelling on the land. The exceptions to the application of clause 52.06 set out in the extract above therefore do not apply.
2. Considering each one of the circumstances for which clause 52.06-1 makes clause 52.06 applicable, the following conclusions can be drawn from the facts–
   1. there is a new use proposed – that of ‘Home Based Business’;
   2. there is no increase in the existing floor area or site area of the existing dwelling use;
   3. there is no increase in the existing use of the land as a dwelling as set out in Column C of Table 1 along side the item for “Dwelling”.[[9]](#footnote-9)
3. I reject Council’s submission that the use of the garage for a home based business has effectively increased the floor area of the existing use of the land as a dwelling. Any use of the garage for the purpose of parking a vehicle is not a primary use of the land. It is part of the of the existing dwelling use.
4. The application of clause 52.06 is triggered, on the facts as I have found them, because the applicants’ conduct of the home based business on the land amounts to the start of a new use on the land.
5. Clause 52.06-2 sets out the car parking requirements where clause 52.06-1 directs that clause 52.06 applies. On the facts of this matter, because a new use of ‘Home Based Business’ is proposed, car parking spaces in accordance with the requirements of Table 1 in clause 52.06-5 (**Table 1**) are required to be provided.
6. Table 1[[10]](#footnote-10) sets out two rates for the provision of car parking. One rate is identified in Column A and the other is identified in Column B. Column A applies unless Column B applies.[[11]](#footnote-11) Column B applies here because the land is identified as being within the Principal Public Transport Network Area. As a result, no car spaces are required to be provided under Table 1 for the use of the land for the purposes of a home based business.
7. Clause 52.06-3 sets out the circumstances under which a permit application is required to be made under clause 52.06. Where it is proposed to reduce (including reduce to zero) the number of car parking spaces required under clause 52.06-5 (or in a schedule to the Parking Overlay[[12]](#footnote-12)) a permit is required to be obtained. Keeping in mind that Table 1 does not require the provision of any car parking spaces for the use of the land for a home based business, there is no sensible basis for any application for a permit to reduce a ‘zero’ requirement for car parking associated with that new use.
8. Council’s submission that the single issue to be decided in the review was in relation to “*an amendment to the existing permit which effectively results in a reduction in the clause 52.06 carparking requirement from two spaces to one*”[[13]](#footnote-13) is predicated on the basis that two car parking spaces are required to be provided on the land as a result of a requirement in clause 52.06. As, the facts of this matter do not establish that there will be an increase in either–
   1. the existing floor area or site area of the existing dwelling use; or
   2. an increase in the existing use of the land as a dwelling as set out in Column C of Table 1 along side the item for “Dwelling”.

Accordingly, Council’s submission in this regard is rejected.

1. I find on the facts of this matter that–
   1. a permit is not required under clause 52.06-3 as it is not proposed to reduce the amount of car parking required for the new home based business under clause 52.06-5; and
   2. the requirements of clause 52.06 do not apply to the existing use of the dwelling on the land as a result of the commencement of the home based business from the land.

## Does the permit require amendment?

1. In order to properly consider this key issue, it is necessary to examine in detail the contents of relevant planning permits.

### Relevant Permit History

1. On 16 August 2010 in respect to land situated at 2 Claudel Street, planning permit TPA/38319 **(TPA/38319)** approved *“development of a double storey dwelling at the rear of the existing dwelling”*.[[14]](#footnote-14)
2. Condition 1 of TPA/38319 required that, before the development starts, amended plans, were required to be submitted to, and approved by, Council showing–
   1. the deletion of the balcony of bedroom 1 of dwelling 2. (The reference to ‘dwelling 2’ in TPA/38319 is a reference to the existing dwelling on the 30 Franklyn Street);
   2. provision of a 900mmm wide with standard height window to the north wall of bedroom 3 of dwelling 2 (approximately 600mm east of the staircase window);
   3. boundary fences amended to accord with condition 4 of this planning permit.
3. Condition 2 of TPA/38319 provided–

The development shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.

1. A landscape plan was required to be prepared and submitted to Council for approval under condition 3 of TPA/38319. The landscaping plan was required to show the proposed landscape treatment of the site by reference to seven identified matters required to be incorporated into the plan. Condition 3 expressly provided that on approval by Council, the approved landscaping plan would form part of the permit.
2. Prior to the start of the development, a site layout plan (showing a drainage scheme and other drainage related matters) drawn to scale and dimensioned was required to be approved by Council under condition 5 of TPA/38319. Condition 5 did not make the site layout plan part of the permit upon approval by Council.
3. Prior to the occupation of dwelling 2, all buildings and works (including landscaping works and removal of redundant vehicle crossings) specified in TPA/38319 were required to be completed to the satisfaction of Council (see conditions 8, 9 and 10 of TPA/38319).
4. TPA/38319 was amended on 10 November 2010 resulting in permit TPA/38319/A, which is the version of the permit the subject of the amendment application.[[15]](#footnote-15) Permit TPA/38319/A will hereinafter be referred to as the ‘planning permit’ in these reasons.
5. The conditions of the planning permit are identical to those of TPA/38319 save that condition 1 required, prior to the start of the development, amended plans modified to show the boundary fences amended to accord with condition 4 be approved by Council.
6. The plans endorsed by Council under the planning permit included[[16]](#footnote-16)–
   1. proposed site/ground floor plan – Drg. No 40/10 Sheet 1/3;
   2. proposed first floor plan/overview – Drg. No 40/10 Sheet 2/3;
   3. proposed elevations – Drg no. 40/10 Sheet 3/3.
7. The approved site/ground floor plan under the planning permit shows the ground floor configuration of dwelling 2 in relation to the existing dwelling on 2 Claudel Street. A copy of the site/ground floor plan appears as **Appendix A** to these reasons.
8. On 15 November 2011, planning permit TPA/39838 (the **subdivision permit**) was granted authorising the subdivision of 2 Claudel Street into two lots.[[17]](#footnote-17) Thus the land, situated at 30 Franklyn Street, more particularly known as Lot 2 on PS 703566D, was formally created on 19 May 2014.[[18]](#footnote-18)
9. The subdivision permit was subject to six conditions. Condition 3 relevantly provides–

3. Prior to the issue of a Statement of Compliance for this subdivision:

* the development, including landscaping and storm water drainage works, must be completed in accordance with Planning Permit No. 38319A to the satisfaction of the Responsible Authority.

..OR..

* the owner of the land to which this permit relates must enter into an agreement with the Responsible Authority under Section 173 of the Planning and Environment Act 1987. In addition to the usual provisions, the agreement must provide for the following matters:

a) Except with the consent of the Responsible Authority, the land and any lot created by the subdivision of the land may only be developed in accordance with the development authorised in Planning Permit No.38319A and depicted in the plans endorsed under that permit;

b) Each dwelling shall not be occupied or used until all works, including landscaping and drainage for the respective dwelling has been completed;

c) Lodge with the Responsible Authority, a bond, bank guarantee or similar security equivalent to either:

* 150% of the cost of landscaping each unfinished lot and/or the common property of the proposed development or
* $5,000.00 per unfinished dwelling

whichever is the greater, for the satisfactory completion of the development of the land and the landscaping works.

d) In the event that the landscaping works are not provided to the satisfaction of the Responsible Authority, the Responsible Authority may provide the landscaping works and deduct the cost thereof (including supervision) from any bond, bank Guarantee or similar security lodged pursuant to agreement;

e) The costs of the Responsible Authority in relation to the agreement including an administrative fee of $707.00, are to be borne by the owner.

The Agreement must be entered into, and registered on title, prior to the certification of the Plan of Subdivision.

1. The current title search for 30 Franklyn Street shows that title for that land is not encumbered by a s.173 agreement and no agreement of the kind described in condition 3 of the subdivision permit is contained in the material before me.
2. The delegate report for the amendment application notes on page 2 that “*The development was completed and the property was subsequently subdivided under Planning Permit TPA/39838 issued on 15 November 2011 with the new dwelling now known as 30 Franklyn Street.”[[19]](#footnote-19)*

### Condition 2 of the planning permit

1. Central to Council’s submission that the planning permit is required to be amended to reduce the number of car spaces provided at the land is the existence of condition 2 of the planning permit.
2. Condition 2 of the planning permit requires that the*“The development shown on the endorsed plans must not be altered without the written consent of the Responsible Authority”*.
3. A necessary first step in in the interpretation of condition 2 is to identify ‘the development shown on the endorsed plans’.
4. A planning permit is a creature statute and is a public document. A planning permit should be interpreted as it stands by reference to its text and that of documents that either expressly (by way of conditions) or impliedly, form part of the permit. Extraneous documents, such application documents may be consulted (particularly if referred to in the permit), if the the permit is otherwise ambiguous or unclear but only if the extraneous document is of a form to provide logical assistance to the construction of the permit.[[20]](#footnote-20)
5. In this matter, the planning application that preceded the planning permit (and TPA/38319) was not in evidence before me, but in any case, recourse to the application materials is not necessary because neither condition 2, nor the planning permit, is otherwise ambiguous or unclear.
6. The preamble of the planning permit describes the matter approved under it as “*the development of a double storey dwelling at the rear of the existing dwelling”*. [[21]](#footnote-21)
7. The terms ‘use’ and ‘development’ have distinct and separate meanings under s. 3 of the *Planning and Environment Act* 1987 (the **Act)**.
8. The term ‘development’ is defined in s. 3 of the Act to include–
   1. the construction or exterior alteration or exterior decoration of a building; and
   2. the demolition or removal of a building or works;
   3. the construction and carrying out of works; and
   4. the subdivision or consolidation of land, including buildings or airspace; and
   5. the placing or relocation of a building or works on land; and
   6. the construction or putting up for display of signs or hoardings;
9. The term ‘use’ is defined in s. 3 of the Act to mean–

…in relation to land includes use or proposed use for the purpose for which the land has been or is being or may be developed..

1. Section 3 of the Act defines the terms–
   1. ‘construct’ to include *“reconstruct or make structural changes’*;
   2. ‘building’ to include–
      1. a structure and part of a building or a structure; and
      2. fences, walls, out-buildings, service installations and other appurtenances of a building; and
      3. a boat or a pontoon which is permanently moored or fixed to land;
   3. ‘works’ includes any change to the natural or existing condition or topography of land include the removal, destruction or lopping of trees and the removal of vegetation or topsoil.
2. Interpreting condition 2, by reference to the definitions in s.3 of the Act, I find the reference to ‘development’ in condition 2 can only mean–
   1. the construction of the building shown on the endorsed plans (that is, Drg No 40/10 Sheets 1, 2 and 3); and
   2. the landscaping works shown on the plan approved and endorsed by Council under condition 3 of the permit.
3. What is then left to consider is whether condition 2 has ongoing operation after the completion of the construction of dwelling 2.
4. That issue was the subject of the decision by Obsorn J in *Benedetti v Moonee Valley City Council[[22]](#footnote-22)*. In that case, a permit was granted in 1994, for the construction fo a residential dwelling that would exceed 6 metres in a ‘Skyline Area’ designated under the relevant planning scheme, in accordance with the endorsed plans and subject to conditions including:

The layout of the site and the size of the proposed building and works as shown on the endorsed plan, shall not be altered or modified (whether or not in order to comply with any Statute, Statutory Rule or By-Law or for any other reason) without the consent of the Responsible Authority.

No new buildings or works shall be erected or constructed and no existing buildings shall be enlarged, rebuilt or extended (whether ot not to comply with any Statute, Statutory Rule or By-Law or for any other reason) without the consent of the Responsible Authority.

1. In *Benedetti,* Obsorn J opined as to the purpose of condition 1 (of the *Benedetti*) permit stating–

A condition in the form of Condition 1 in the present case may be regarded as having two purposes. First, the condition has a restrictive function. It ties the proposed development to a permitted relationship between size and context. Secondly, it has a facilitative function enabling by way of proviso minor modifications of endorsed plans and consequently to the permitted development. The condition does not, however, merely provide for modification to the plans, it provides that the layout of the site and the size of the proposed buildings and works shown on the plans shall not be altered or modified without the consent of the responsible authority.

(footnote omitted)

1. In *Cope v Hobsons Bay City Council[[23]](#footnote-23),* Justice Morris (as he was then) considering a condition in identical terms to condition 2, stated–[[24]](#footnote-24)

[43] A planning permit which authorises the development of land may or may not have continuing relevance after the development has been carried out. The answer depends on both the nature of the development and the form of the permit (including the conditions in the permit).

1. After considering the impact of conditions on permits for subdivision, Justice Morris further states–

[48] But when it comes to a permit authorising the construction of a building, considerations based upon the principle of indefeasibility of title are not relevant. Hence it is necessary, in such a case, to consider the nature of the permission and the form in which it is granted.

[49] In the present case, the permit allowed the development of land with a building and provided that the development, as shown on the endorsed plans, must not be altered without the written consent of the responsible authority. This form of permission contemplates the possibility that the development will be altered from that shown on the endorsed plans. It is arguable that the permit might be regarded as only contemplating the possibility of written consent being given if this occurred before the development commenced or, at least before the development was completed. But, common experience tells us that development is sometimes carried out in a manner different than that permitted, yet the differences are such that it is reasonable to consent to them after the event. Why should the permit expressly allowing the possibility of consent being given for the alteration of the development be interpreted so as to exclude this reasonable possibility? Further, it is also commonplace that once development is carried out the owner may wish to effect minor changes to the development. Why should a permit expressly allowing the possibility of consent being given for the alteration of the development be interpreted so as to deny this possibility in every circumstance?

1. In *Box v Moreland CC, [[25]](#footnote-25)* the Tribunal, citing the decision in *Benedetti,* held in respect to the application of a condition identical to condition 2 on a permit authorising the construction of two dwellings on a lot, that–

[26] We are not persuaded that condition 2 of the subject permit ceases to have effect simply because the land has been subdivided….The permit contained condition 2, which provides that the development as shown on the endorsed plans must not be altered without the consent of the responsible authority, The applicant has taken the benefit of this permit. Having done so, condition 2 will continue to have effect while the development allowed by the permit is maintained. This means that matters such as fences, landscaping and other elements of the development shown on the endorsed plans may not be changed with the consent of the responsible authority even though they may not otherwise require a permit under the planning scheme.

1. In *Box,* the Tribunal held that it was not persuaded that the condition ceased to have effect as a result of the subsequent subdivision of the relevant land. That decision did not contain an analysis of the legal bases on which a development condition of a planning permit, granted in respect of a development that had been completed, continued to have effect after the subdivision of the parent parcel. Both Obsorn J in *Benedetti* and the Tribunal in *Box,* placed considerable weight on the fact that the applicant in their respective proceedings took the benefit of the permit under consideration. Although the facts of this matter do not establish the identity of the applicant for the planning applications leading to the grant of TPA/38319, the planning permit or the subdivision permit, it is uncontentious that the applicants in this proceeding occupied the dwelling on the land since its construction prior to the subdivision of 2 Claudel Street. On this basis, I am prepared to accept for the purposes of this proceeding[[26]](#footnote-26) that the applicants in this proceeding have ‘taken the benefit’ of the planning permit. Following the Tribunal’s decision in *Box,* I am not persuaded on the material before me that condition 2 of the planning permit ceased to have operation after the subdivision of 2 Claudel Street. Indeed, neither party gave any consideration to the effect of the subdivision permt on the continuing effect of condition 2 of the planning permit.
2. It is clear from the above extract of the decision in *Benedetti,* that a condition such as condition 2 has both a restrictive and facilitative function. The nature of those functions was comprehensively considered by the Tribunal in *Cook v Mornington Peninsula SC (Red Dot)[[27]](#footnote-27)*. On the restrictive function of a condition in identical terms as condition 2, the Tribunal stated-

[53] I will return later to the concept of the ‘restrictive function’ tying a proposed development to a permitted relationship with its size and context, and the ‘facilitative function’ being a proviso to enable minor modifications. I think some important assistance can be derived from Justice Osborn’s observations in this regard. Too often a Condition 2 type condition is construed in practice as being just a general secondary consent condition, whereas it is actually worded as a restrictive condition with a limited facilitative proviso.

….

[75] In this regard, I return to the comments in *Benedetti*[[35]](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/1129.html?context=1;query=Cook;mask_path=au/cases/vic/VCAT" \l "fn35). A Condition 2 type condition has a ‘restrictive function’ tying a proposed development to a permitted relationship with its size and context. The ‘facilitative function’ that allows for a secondary consent process is a limited proviso to this ‘restrictive function’ to enable minor modifications. Having regard to the decision in *Benedetti*, the reference to a secondary consent being a ‘proviso’ allowing for ‘minor modifications’ is important. Condition 2 type conditions could otherwise theoretically allow for anything to be dealt with under secondary consent. Having said that, I am confident that the reference in *Benedetti* to ‘minor modifications’ was intended as a reference to changes being ‘minor’ in the sense of their materiality or consequence from a planning perspective. This can be gleaned from the facilitative function of secondary consent being a proviso to a restrictive function contained in the same Condition 2 that ties a proposed development to a permitted relationship with its size and context.

[35] [2005] VSC 434, at [27]-[28].

1. In this proceeding, detailed consideration of the extent and application of the facilitative function of condition 2 (the ‘secondary consent’ function) is ultimately moot because the applicants here have made an amendment application. Both the applicant and Council have misguidely relied on previous decisions of the Tribunal[[28]](#footnote-28) that examined the scope and extent of the secondary consent function of conditions like condition 2 to underpin their respective submissions regarding the extent of the restrictive function of condition 2.
2. For the purpose of determining the extent of the restrictive function of condition 2, the parties were afforded the opportunity to provide futher submissions on the following issues[[29]](#footnote-29)–
   1. whether, by reference either to the endorsed plans or any conditions, Planning Permit TPA/38319A required the provision of 2 car parking spaces on the area of land now known as 30 Franklyn Street, Oakleigh East;
   2. whether, the use of the existing garage on 30 Franklyn Street, Oakleigh East for a home occupation as conducted by Mrs Flores constitutes an alteration to “ the development” shown on the endorsed plans under Planning Permit TPA/38319A;
   3. whether, the internal alteration to the existing garage undertaken by the respondents (described at paragraph 3 of the applicants’ “Reasons for Applying’ annexed to the application for review in P152/20210) constitutes an alteration to “the development” approved under Planning Permit TPA/38319A; and
   4. whether, in light of any further written submissions on the issues identified in paragraphs 3(a), (b) or (c), an application for amendment of Planning Permit TPA/38319A is required to be made on the facts of proceeding P152/2021.

#### Does the planning permit require the provision of two car parking spaces for dwelling 2?

1. None of the conditions of the planning permit expressly require the provision of two car parking spaces on the land. This is clear from a plain reading of the permit conditions imposed on the planning permit.
2. The applicants submitted that there is no reference to two ‘car parking spaces’ on the endorsed plans or on any of the conditions of the planning permit while acknowledging that an assumption as to car parking spaces is inferred by the ‘garage’ designation on Attachment A. [[30]](#footnote-30)
3. Council’s further submissions also drew attention to the contents of Attachment A and submitted that the plans endorsed as part of the planning permit ‘required’ the provision of two car parking spaces at 30 Franklyn Street. In support of this submission Council relied on the following extract of Attachment A –

![A picture containing graphical user interface

Description automatically generated]()

Source: Council’s further written submissions received 8 April 2021- paragraph 1.3 page 2.

1. Consideration of the whole of Attachment A shows that the extract above does not provide an accurate representation of what is shown on the site/ground floor plan.
2. Attachment A forms part of the plans endorsed by Council and as a result forms part of the planning permit. Attachment A is heavily notated; showing amongst other things the layout of the existing dwelling at 2 Claudel Street and its position relative to the proposed dwelling 2; the existing setbacks of the existing dwelling and the proposed setbacks of the proposed dwelling 2.
3. There are also notations on Attachment A that identifies the garage for the second dwelling as “*Garage 2*” and a carspace in front of that garage as “*Carspace 2*”. The endorsed plan also includes a notation for the existing carport at 2 Claudel Street as “*Carport 1*” and a car space tandem to that carport as “*Carspace 1*”. Below the notations for ‘Carspace 1’ and ‘*Carspace 2*’ is the following notation “*New 6500 w crossing to the satisfaction of Council”*.
4. There is a difference between a requirement under a permit condition or endorsed plan and a notation. In *City of Brighton v Eura Nominees Pty Ltd[[31]](#footnote-31),* Justice Gobbo, in considering a condition that did not allow the alteration or modification of the layout of a site and the size of proposed buildings and works without the consent of the responsible authority, stated–

In my view condition 1, which is apparently a common condition in permits, did not effectively embrace every detail noted on the endorsed plan. It was confined to precluding alteration, without consent, of the size of the buildings and works. A notation as to use for parking was not, in my opinion, one relating to buildings and works in the present situation. As to modifications in lay-out, I am not satisfied that in the present case of an earlier notation, there is a change in lay-out where that area has a notation as to works in the latest permit that does not repeat an earlier notation. No doubt there may be some situations where the description of car parking areas in a plan may represent the lay-out of a site. It will be a question of construction in every case…

1. Noting that condition 2 of the planning permit restricts the alteration of the development shown on the endorsed plans, and that the land the subject of the planning permit is the whole of 2 Claudel Street, it is not appropriate to construe the planning permit as applying to only a select part of 2 Claudel Street. The notations on Attachment A should be construed in the context of the whole of the planning permit and the whole of the land the subject of that permit.
2. In that context, Council did not establish whether any provision of the planning scheme at the time of the issue of planning permits TPA/38319 orTPA/38319/A, required the provision of a minimum mandatory number of car spaces to be provided for the construction of a second dwelling on a lot in the relevant zone. I am therefore not assisted by Council and cannot draw the conclusion that the notations on Attachment A represent a relevant requirement under the planning scheme applicable on the grant of the planning permit.
3. Further–
   1. the development approved under the planning permit is central to whether the notations of “*Garage 2*” and “*Carspace 2”* require the provision of two car parking spaces on that part of the land now known as 30 Franklyn Street. The development shown on the endorsed plans is the construction of the second dwelling and the permit does not authorise the use (primary or ancillary) of 2 Claudel Street or any part thereof;
   2. the grant of the planning permit is not conditional on the provision of any of the car parking spaces at 2 Claudel Street. If the provision and maintenance of 4 car spaces on 2 Claudel Street, or two car spaces for use in association of the second dwelling approved under the planning permit, was a necessary condition precedent to the grant of the planning permit, then that requirement could have easily been imposed by an express condition so requiring; and
   3. condition 10 of the planning permit requires the reinstatement of any redundant vehicles crossings as a result of the approved development.
4. I am not satisfied that the notations of “*Garage 2’* and “*Carspace 2*” of themselves, or together with the notations of “*Carport 1*” and “*Carspace 1*, do anything other than indicate–
   1. the likely need for a proposed new vehicle crossing to provide access to the existing dwelling and proposed dwelling 2; and
   2. that 2 Claudel Street could provide on-site car parking for four vehicles and that the layout of the dwelling shows that one of those car spaces would be provided in the garage of proposed dwelling 2.
5. As I must interpret the planning permit as I find it, and given that there are no permit conditions on the planning permit making the grant of approval for the development of the construction of a second dwelling at 2 Claudel Street conditional on the ongoing provision of any car spaces, I find that the planning permit does not require two car spaces to be provided on the land now known as 30 Franklyn Street.

#### Does the use of the garage for the purposes of a home based business constitute an alteration to the development shown on the endorsed plans?

1. Council’s further submissions on this issue relied upon a partial extract of a passage of the decision of Chief Justice Burt in *University of Western Australia v City of Subiaco[[32]](#footnote-32)* and in particular to his observations[[33]](#footnote-33) that the meaning of ‘development’ under the *Town Planning and Development Act* 1928 (WA) encompassed both the use of land and the activities which result in some physical alteration to the land. The submission further asserts that the use of the garage as a home based business satisfies the ‘use’ element of the definition of ‘development’ referred to in *Subiaco* and thus the use of the garage for a home based business constitutes an alteration of the development depicted in the endorsed plans under the planning permit.
2. I reject that submission for the following reasons.
3. The decision in *Subiaco* interpreted the statutory definition of ‘development’ found in s. 2 of the *Town Planning and Development Act* that “*unless the context otherwise requires”* development isdefined to mean “*the use or development of any land and includes the erection, construction, alteration or carrying out, as the case may be, of any building, excavation or other works on any land”.[[34]](#footnote-34)* It is not suprising therefore that the decision in *Subiaco* involved discussion of the two ‘elements’ that were relevant to that statutory definition. The statutory definition for ‘development’ in s.3 of the Act is different as it does not encompass the ‘use’ of land and therefore observations in *Subiaco* relied upon by Council are irrelevant to the issue.
4. Although the use of the garage for a home based business of itself, does not amount to a change in the development shown on the endorsed plans, it will lead to a change in the approved layout of the dwelling shown on the endorsed plans in order to accommodate that use. Where there was once shown a ‘garage’ there will now be chiropractor consulting and treatment rooms.
5. The internal layout of the dwelling as shown on the endorsed plans is in my view, a requirement of the development (being the construction of the second dwelling) approved under the planning permit. now be ‘chiropractor consulting and treatment rooms’. The internal layout of the dwelling on the endorsed plans indicate the location, purpose and inter-relationship of various parts of the dwelling that are of central importance in the context of the planning permission obtained. It is on the basis of such a layout that assessment of the dwelling can be made against the planning controls applicable at the time.

#### Does the internal alteration to the existing garage constitute an alteration of the development shown in the endorsed plans?

1. The applicants’ submissions on this issue focuses on the consequences and scale of the works involved in the internal alterations to the garage to support its position that the works do not result in a consequential change. In my view, these submissions do not focus on the question of whether there is in fact a change proposed to the development shown on the endorsed plans.
2. On behalf of Council it was submitted that, relying on the decision in *Subiaco*, the internal alterations are development in their own right and are alterations to the development depicted in the endorsed plans. I reject that submission to the extent relies on the decision in *Subiaco* for the reasons previously provided.
3. The definition of development in s.3 of the Act includes the exterior alteration of a building or exterior decoration of a building. Although the building works to the garage undertaken by the applicants is not structural, some of those works are designed to impact on the external appearance of the building when the roller door is in the open position. The purpose of the aluminium framed window and door erected across the entry of the garage is for the purpose of altering the appearance exterior of the dwelling but does not amount to an alteration to the exterior of the dwelling as shown on the endorsed plans.

#### Is an amendment application required?

1. In my view, the nature of the changes involved to the development shown on the endorsed plans upon the permit are such that an amendment application is required. Although the physical changes involved in the conversion of the garage into chiropratic consulting and treatment rooms do not involve any structural change to the dwelling and the use of the dwelling as a home based business does not require a planning permit to be conducted, the conversion of the part of the dwelling, from garage to chiropractor consulting and treatment rooms amounts to change of the layout and context of the development shown on the endorsed plans which was not a matter considered when the planning permit was granted.

## will grant of the amendment application result in an acceptable outcome?

1. Although I have found that the requirements of clause 52.06 do not apply to the amendment application, I have considered the detailed submissions made by Council regarding the adequacy of car parking to be provided in my assessment of the merits of the application.
2. The conversion of the garage by the applicants leaves a single car parking space available in the driveway. The ultimate question to be determined on the merits is whether provision of a single car space on the land results in an acceptable planning outcome having regard to the activity on the land and the nature of the location.
3. The conduct of the home occupation by Mrs Flores does not involve the use of a vehicle. Only one client at a time will be seen by appointment by Mrs Flores during limited hours on three business days (totally 16 hours per week). The applicants have one vehicle which is parked in the driveway of the dwelling.
4. Under the current planning scheme, and because the land is identified as being within the Principal Public Transport Network Area, no car spaces are required to be provided as a result of the conduct of the home based business.
5. A car parking demand assessment, undertaken by a qualified traffic engineer, accompanied the amendment application and formed part of the material before me. That assessment which considered the impact of the reduction of one car space for the dwelling use, concluded that there is “*clearly sufficient on-street* *availability in close proximity to the subject site (including along the site frontage outside the restriction times, which are 8am-4pm Monday to Friday) to allow the reduction of one on-site parking space.”[[35]](#footnote-35)*
6. Council was critical of the car parking demand assessment in support of the amendment application on a number of grounds but in its written submissions stated–

This is not a case where the Council is arguing that additional parking generated by the proposal cannot be accommodated on the street, as it clearly can. The issue is whether or not it is appropriate to permit a reduction in parking, where that reduction would result in the development not being self-sufficient in parking and having to rely on kerbside parking elsewhere in the surrounding road network for the resident and home occupation usage.

1. Despite acknowledging that the home based business does not require the provision of any additional car spaces under the planning scheme, Council points to the requirement under Table 1 in clause 52.06-5, for the provision of two car spaces for dwellings with three bedrooms or more, as a reasonable indicator of the parking demand likely to be generated by the use of the land as a dwelling.
2. Other factors relied upon by Council to support refusal of the amendment application include–
   1. the location of the land on the edge of an industrial precinct where there is ‘clearly some overspill parking into the adjoining residential area’;
   2. the reduction in car parking would result in the development not being self sufficient and would rely on kerbside parking elsewhere in the surrounding area;
   3. the ‘no-standing’ area between Cordell Street and Lanham Street adjacent to the land;
   4. the likely generation for the need for parking by the home based business;
   5. the lack of unique circumstances of the area in relation to its proximity to services and facilities to justify a reduction in car parking;
   6. the limitations of the car parking demand assessment submitted with the amendment application including the fact that it was a desk top assessment not informed by a site inspection (because of Covid-19 restrictions); lack of car parking survey or other empirical evidence;
   7. the possibility that the present circustances of the owners regarding single car ownership may change in the future.
3. In support of the allegation that there exists overspill parking from the industrial estate across the road from the land, Council relied on photographs taken of cars parked in Claudel and Lanham Streets.[[36]](#footnote-36) Those photographs were brought to my attention during the hearing and I have reviewed them closely for the purposes of these reasons. I do not accept that the photographs demonstrate that there is overspill parking from the industrial estate in surrounding residential streets. In fact, the photographs relied upon by Council show under utilisation of the onsite carparking provided along the Franklyn Street frontage of the industrial estate and readily available parking within the surrounding residential streets, including proximate to the land (allowing for existing parking restrictions).
4. I also do not accept that in order for the amendment application to be approved, the owners must demonstrate ‘unique circumstances’ in respect to the location of the land proximate to services and facilities. The facts of this matter are that the land is located within a PPTNA and that inclusion is a factor that tends to support a reduced reliance on transportation by private vehicle to premises so included.
5. The car parking demand assessment supporting the amendment application is a document provided in support of the application prepared by a suitably qualified person and I am entitled to have regard to its contents. The weight I provide to its contents and the opinons expressed within are a matter for my discretion. Even though the assessment was compiled without the benefit of a site inspection, I nevertheless found its contents of assistance in considering the following matters and the reduction of one car space from the land -
   1. Degree of car parking saturation in the surrounding area in pre- Covid 19 times and during Covid-19 restrictions from the 9 Nearmaps from the period April 2019 to April 2020. Those maps demonstrate that the under utilisation of onsite car parking at the industrial estate is characteristic of the area and that generally on street parking in the surrounding residential streets is also characteristic during pre-Covid-19 times.
   2. The availability of alternative car parking in the locality of the land, including consideration of the existence and location of parking restrictions surrounding streets and the availability of on street parking in the locality of the land that is intended to be for residential use.
   3. The likelihood of multi-purpose trips within the locality which are likely to be combined with a trip to the land.
   4. The variation of car parking demand likely to be generated over time.
   5. The short-stay and long stay car parking demand likely to be generated.
   6. The availability of public transport in the locality of the land.
   7. The convenience of pedestrian and cyclist access to the land.
6. Not coincidentally the matters considered in the assessment are matters required to be addressed under clause 52.06-3 for a car parking demand assessment in support of an application for a permit for car parking reduction. As can be seen, a car parking assessment demand under clause 52.06-3 considers matters beyond whether or not a development is self sufficient in terms of parking generated by the development.
7. The car parking demand assessment concluded that there is sufficient on-street parking availability in close proximity to the land to support the reduction of one on-site car space. On my consideration of the facts of this matter, I agree with that conclusion.
8. I accept that nothing in a planning permit could restrict the applicants from acquiring another vehicle. The sufficiency of availability of parking in the surrounding area is a factor that diminishes this consideration as a sufficient ground to refuse the amendment application.
9. It is also very relevant that the use of the garage as a home based business will not structurally alter the garage or its future availability for car parking. The ability to ensure that the reduction of car parking is temporary and tied to the applicants’ use of the land is also a relevant matter that tends in favour of approval. The use of s.173 agreement to this end also ensures that any prospective purchaser of the land will not labour under the assumption that the garage can continue to be alienated from use as a car space without further approval from Council.

## Conclusion

1. For the reasons given above, the decision of Council is set aside. A permit is granted subject to conditions contained in Appendix B to these reasons.

|  |  |  |
| --- | --- | --- |
| **Picha Djohan**  **Member** |  |  |

# Appendix A– DRG No 40/10 Sheet 1 of 3



# Appendix B– Permit Conditions

|  |  |
| --- | --- |
| Permit Application No | TP/38319/A |
| Land | 2 Claudel Street, Oakleigh East. |

|  |
| --- |
| What the permit allowS |
| In accordance with the endorsed plans:   * Development of a double story dwelling at the rear of the existing dwelling |

## Conditions

1. Before the development starts, three copies of amended plans drawn to scale and dimensioned, must be submitted to and approved by the Responsible Authority. When approved the plans will be endorsed and will form part of the permit.

The plans must be generally in accordance with the plans submitted with the application, but modified to show:

1. Boundary fences amended to accord with condition 4 of this planning permit.
2. The development shown on the endorsed plans must not be altered without the written consent of the Responsible Authority.
3. A landscape plan prepared by a Landscape Architect or a suitably qualified or experienced landscape designer, drawn to scale and dimensioned must be submitted and approved by the Responsible Authority prior to the commencement of any works. The plan must show the proposed landscape treatment of the site including:-
   * the location of all existing trees and other vegetation to be retained on site;
   * provision of canopy trees with spreading crowns located throughout the site including the major open space areas of the development;
   * planting to soften the appearance of hard surface areas such as driveways and other paved areas;
   * a schedule of all proposed trees, shrubs amd ground cover, which will include the size of all plants (at planting and at maturity), their location, botantical names and the location of all areas to be covered by grass, lawn, mulch or other surface material;
   * the locaton and details of all fencing;
   * the extent of any cut, fill, embankments or retaining walls associated with the landscape treatment of the site;
   * details of all proposed hard surface materials including pathways, patio or decked areas.

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

1. All common boundary fences are to be a minimum of 1.8 metres above the finished ground level to the satisfaction of the Responsible Authority. The fence heights must be measured above the highest point on the subject or adjoining site, within 3 metres of the fence line.
2. 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 Council Standards.

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:
   * Trench grates (150mm minimum width) located within the property; and/or
   * Shaping the driveway so that water is collected in a grated pit on the property; and/or
   * 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.

Note: A drainage contribution may be accepted in lieu of the installation of the detention system.

1. Before occupation all buildings and works specified in this permit must be completed to the satisfaction of the Responsible Authority. The Responsible Authority must be advised in writing when all construction and works are completed to enable the site to be inspected.
2. Before the occupation of all building allowed by the permit, landscaping works as shown on the endorsed plans must be completed to the satisfaction of the Responsible Authority.
3. The redundant vehicle crossings must be removed and the area reinstated with appropriate kerbign and channelling and then sown with grass to the satisfaction of the Responsible Authority.
4. **Section 173 Agreement**

Prior to the endorsement of plans associated with the reduction in the car parking spaces at the land by reason of the conversion of the garage for a home based business, the owners of the land now known as 30 Franklyn Street, Oakleigh East at the time of the amendment of the permit (the **owners**), must enter into an agreement with the Responsible Authority under section 173 of the *Planning and Environment Act* 1987 (Vic) and register the agreement on title. In addition to the usual provisions, the agreement must provide for the following matters:

1. prior to any settlement of the sale of 30 Franklyn Street, the owners must provide plans to the Responsible Authority showing the previously existing garage to be reverted to the use of a garage, providing for two car spaces with one being under cover;
2. should the owners fail to provide plans in accordance with paragraph a) above, any subsequent registered proprietor of the land must, within three months of becoming registered on title, provide the plans required under paragraph a) above to the Responsible Authority; and
3. within three months of the garage being ceased to be used for a home based business, the owners must provide plans required under paragraph a) above to the Responsible Authority.

All costs of preparation, execution and registration of the agreement (including those costs reasonably incurred by the Responsible Authority) must be borne by the owner or any subsequent registered proprietor.

In accordance with section 69 of the *Planning and Environment Act 1987*, an application may be submitted to the responsible authority for an extension of the period referred to in this condition.

**– End of conditions –**

1. The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. [↑](#footnote-ref-1)
2. Proceeding P2430/2019 was commenced on 20 December 2019. [↑](#footnote-ref-2)
3. Interim order made by Member Nelthorpe in P2430/2019 on 29 July 2019. [↑](#footnote-ref-3)
4. Copies of which were received by the Tribunal on 1 April 2021 in accordance with the interim order. [↑](#footnote-ref-4)
5. Although Mr English appeared for Council in P152/2021, further written submissions dated 8 April 2021 on behalf of Council were received from Russell Kennedy Lawyers in response to the Tribunal’s order of 25 March 2021. Further written submissions on behalf of the applicants were received by the Tribunal on 8 April 2021. [↑](#footnote-ref-5)
6. See page 1 of the document entitled “Reasons for Applying” accompanying the review application. [↑](#footnote-ref-6)
7. See Section 11, page 13, of the written submission on behalf of Council by Peter English dated 22 February 2021. [↑](#footnote-ref-7)
8. See [9], [14] and [15] of the document entitled “Reasons for Applying” accompanying the review application. [↑](#footnote-ref-8)
9. See page 4 of 13 of clause 52.06 for the relevant part of Table 1. [↑](#footnote-ref-9)
10. See pages 3-6 of clause 52.06. [↑](#footnote-ref-10)
11. See clause 52.06-5 at page 3 of 13. [↑](#footnote-ref-11)
12. There is no Parking Overlay in the planning scheme – Amendment C137 in operation from 24 May 2018 deleted the Parking Overlay (Clause 45.00) including schedules 1 and 2 to that overlay. [↑](#footnote-ref-12)
13. See Section 11, page 13, of the written submission on behalf of the responsible authority by Peter English dated 22 February 2021. [↑](#footnote-ref-13)
14. The facts do not establish the identity of the applicant of the planning application leading to the grant of TPA/38319. [↑](#footnote-ref-14)
15. The facts do not establish the identity of the applicant of the planning application leading to the grant of TPA/38319. [↑](#footnote-ref-15)
16. Under condition 3, the landscaping plan approved by Council was to be endorsed and form part of the permit. [↑](#footnote-ref-16)
17. Taken from Council officer’s report part of the PNPE – 2 material provided on behalf of Council. The facts do not establish the identity of the applicant of the planning application leading to the grant of TPA/39838. [↑](#footnote-ref-17)
18. Title search of the land provided by the applicationas an attachment to the application for review. [↑](#footnote-ref-18)
19. This delegate report forms part of the Council’s PNPE-2 material as attachment 1.20. [↑](#footnote-ref-19)
20. *BDL Cable & Electrical Co Pty Ltd v Brighton CC* (1990) 72 LGRA 227 at p. 230. [↑](#footnote-ref-20)
21. See the preamble to the planning permit under the heading “THE PERMIT ALLOWS’. [↑](#footnote-ref-21)
22. *Benedetti v Moonee Valley City Council* [2005] VSC 434 [↑](#footnote-ref-22)
23. [2004] VCAT 2487. [↑](#footnote-ref-23)
24. Ibid at [43] and at [48] and [49]. [↑](#footnote-ref-24)
25. (Including Summary) (Red Dot) [2014] VCAT 246. [↑](#footnote-ref-25)
26. Noting that this is a review application and not an enforcement proceeding in which a different level of satisfaction may be needed to establish material facts. [↑](#footnote-ref-26)
27. [2017] VCAT 1129. [↑](#footnote-ref-27)
28. # *Westpoint Corporation PL v Moreland CC (Red Dot)* [2005] VCAT 1049; Detour Investments PTY Ltd v Boroondara CC [2007] VCAT 2254.

    [↑](#footnote-ref-28)
29. See Tribunal’s order of 25 March 2021. [↑](#footnote-ref-29)
30. See paragraphs 2, 3 and 13(a) of the applicant’s further written submissions received on 8 April 2021. To the extent that it is submitted in paragraph 13(a) that an inference may be drawn from clause 52.05-5, my findings as to the application of clause 52.06 apply. [↑](#footnote-ref-30)
31. (1983) 56 LGRA 263 [↑](#footnote-ref-31)
32. (1980) 52 LGRA 360 [↑](#footnote-ref-32)
33. Ibid, at 363. [↑](#footnote-ref-33)
34. Ibid, at 363. [↑](#footnote-ref-34)
35. Car parking demand assessment, 31 August 2020, O’Brien Traffic, D. Donald. [↑](#footnote-ref-35)
36. See photographs 14 -17 Council’s written submissions in P152/2021. [↑](#footnote-ref-36)