

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1466/2014
PERMIT APPLICATION NO.PA2012/3458/1

CATCHWORDS

Section 77 of the Planning & Environment Act 1987; Melton Planning Scheme; Green Wedge A Zone; Environmental Significance Overlay Schedule 1; Permit issued for Place of worship; Application to amend permit; Whether permit has expired; Additional hours; Amenity impact; Biodiversity impact; Traffic

APPLICANT	Melbourne Islamic Centre Ltd
RESPONSIBLE AUTHORITY	Melton Shire Council
RESPONDENTS	Charles & Janice Clayton Graeme & Jane Richards Gregory & Sandra Steers Glenyse Lawson
SUBJECT LAND	171-197 Harkness Road, Melton West
WHERE HELD	Melbourne
BEFORE	Geoffrey Code, Member
HEARING TYPE	Hearing
DATE OF HEARING	20 February 2015
DATE OF ORDER	4 May 2015
CITATION	

ORDER

- 1 The decision of the Responsible Authority is set aside.
- 2 Planning Permit no. PA2012/3458/1 is amended and an amended permit is directed to be issued for the land at 171-197 Harkness Road, Melton West. The permit is amended as follows:

(a) For condition 7, substitute:

7 Worship or prayer sessions must comply with the following provisions:

- (a) Except with the written consent of the Responsible Authority, no worship or prayer session must be conducted outside the following times:

Monday to Friday

Morning: 5 am to 6.30 am

Afternoon: 12.30 pm to 2 pm

Evening: 5 pm to 8 pm

Night: 8.30 pm to 10.30 pm

Saturday and Sunday

Morning: 5 am to 6.30 am

Afternoon: 10.30 am to 3 pm

Evening: 5 pm to 8 pm

Night: 8.30 pm to 10.30 pm

- (b) Except with the written consent of the Responsible Authority, there must be no more than one worship or prayer session in each time period specified in paragraph (a).
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- (c) Except with the written consent of the Responsible Authority, each worship or prayer session must not exceed 45 minutes.
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- (d) Despite, paragraphs (a), (b) and (c), worship or prayer sessions may be conducted at any time between 7 am and 11 pm on the two days in each calendar year when the holidays known as
- Eid Al-Fitr*
- and
- Eid Al-Adha*
- are celebrated.

(b) For condition 14, substitute:

14 The following acoustic conditions apply:

- (a) Noise levels emanating from the premises must not exceed those required to be met under State Environment Protection Policy (Control of Music Noise from Public Premises) No. N-2.
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- (b) Before plans are endorsed under condition 1 or construction of the Place of worship starts, a report must be prepared and submitted to the satisfaction of the Responsible Authority by a suitably qualified acoustic consultant which makes recommendations for detailed design of buildings or works (if required) or for measures relating to the way the use is conducted (if required) to

ensure that compliance with the relevant noise criteria or limits in any relevant Statement of Environment Protection Policy or relevant sleep disturbance guidelines will be achieved.

- (c) Any detailed design of buildings or works or measures relating to the use in the recommendations of the report prepared under paragraph (b) must at all times be complied with to the satisfaction of the Responsible Authority and any works must be carried out and completed before the use starts.

- (c) After condition 5, insert:

- 5A Before the use or occupation of the development starts, the constructed section of Harkness Road from the northern boundary of the Arnolds Creek estate to a point 10 m north of the vehicle entrance to the subject land must be spray sealed in accordance with plans and specifications submitted to and approved by the Responsible Authority. The spray seal must be maintained to the satisfaction of the Responsible Authority.

Geoffrey Code
Member

APPEARANCES

For Melbourne Islamic
Centre Ltd

Ms Teresa Bisucci, Best Hooper Lawyers

She called the following witnesses:

- Mr Peter Wills, traffic engineer, GTA
- Mr John Glossop, town planner, Glossop Town Planning Pty Ltd
- Mr Aaron Organ, ecologist, Ecology & Heritage Partners Pty Ltd

For Melton Shire Council

Mr Joseph Oleyowo, town planner, Melton Shire Council

For Charles & Janice Clayton, Graeme & Jane Richards and Gregory & Sandra Steers	Mr Graeme Richards
For Glenyse Lawson	In person

INFORMATION

Description of Proposal	Place of worship
Nature of Proceeding	Application under section 77 of the <i>Planning and Environment Act</i> 1987 to review the Council's refusal to amend a permit
Permit	Permit no. PA2012/3458/1 issued on 13 July 2012 allows 'use and development ... for a Place of worship with associated car-parking in accordance with the endorsed plans'
Zone and Overlays	Green Wedge A Zone (GWAZ) Environmental Significance Overlay Schedule 1 (Remnant Woodlands, Open Forest and Grasslands) (ESO1)
Permit Requirements	Clause 35.05-1 (use of land in a GWAZ for a Place of worship) Clause 35.05-5 (buildings and works for a Place of worship for land in a GWAZ)
Relevant Scheme, policies and provisions	Melton Planning Scheme Clauses 9, 10, 11, 12, 14, 21.01, 21.03, 22.02, 22.05, 22.08, 57 & 65
Land Description	The land is on the northwest outskirts of Melton, about 5 km from the Melton town centre. It is on the east side of Harkness Road, about 200 m north of Giblin Lane. The land is irregular in shape and has a frontage to Harkness Road of 220 m, a maximum depth of 630m and an area of 10.45 ha. The land is flat. It is occupied by a dwelling and a number of outbuildings. It is used for grazing livestock. There is mature indigenous vegetation at the rear of the land.
Tribunal Inspection	8 March 2015

REASONS¹**WHAT IS THIS PROCEEDING ABOUT?**

- 1 On 13 July 2012, Melton Shire Council issued a permit under the *Melton Planning Scheme* (the **scheme**) to use and develop the subject land for a Place of worship (the **permit**).
- 2 The Applicant has recently contracted to purchase the subject land and now wants to construct a mosque there. A mosque is a Place of worship.² Condition 7 of the permit restricts the use to Wednesday and Friday evenings and Sunday morning, being a total of 9 hours per week. As these times do not correspond with ordinary prayer times for a mosque, the Applicant applied to the Council to amend the condition in the permit to enable the use to operate between 5 am and 11 pm seven days per week.
- 3 Before the Council made its decision, the Applicant attempted to remove some uncertainty and informally amended the application to enable the use up to five times per day between 5 am and 11 pm, seven days per week, for a maximum period of 45 minutes at each time for worship and prayer.
- 4 The Council decided to refuse the application on three grounds.³ The Applicant has applied to the Tribunal to review that decision. The Respondents oppose the application.
- 5 The Tribunal's ambit of discretion is confined to the amendments.⁴ To the extent that the Respondents are opposed to the subject land being used for a mosque, those submissions are not relevant. A mosque is a Place of worship and has been permitted as a lawful use of the subject land. The main issues in this proceeding are whether the amenity, biodiversity and traffic impacts of the amendments are unreasonable.
- 6 After considering the submissions and the evidence and inspecting the land and surrounds, I have decided those impacts are not unreasonable and I will allow the application and amend the permit. My reasons follow.

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

² *Melton Planning Scheme* cl 74.

³ For completeness, at the hearing Mr Oleyowo made and then withdrew an additional ground that the application constituted a change of use to a Restricted place of assembly and a permit was required.

⁴ *Austcom Pty Ltd v Buckerfield* [1999] VSC 23.

HAS THE PERMIT EXPIRED?

- 7 Before addressing the main issues, I will deal with a preliminary matter.
- 8 After the hearing, I considered the permit may have expired. At the hearing, the parties did not address this question. If the permit has expired, it could not be amended and the application must be refused. I directed the Council to make a written submission on this question and gave leave for the parties to make a submission in response. The Council, the Applicant and two of the Respondents made submissions. I have considered those submissions.⁵
- 9 The Council issued the permit on 13 July 2012. The use or development of the subject land for a Place of worship has not started. The permit does not contain an express date by which the use must start or the development must start or be completed. Nonetheless, condition 33 provides:
- This permit expires five (5) years from the date of issue of this permit. At this time the use shall cease, unless a further permit is issued to continue the use.
- 10 The statute provides that a permit for development and use of land expires, relevantly, if:
- [T]he development of any stage of it is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit'.⁶
- 11 Condition 33 is ambiguous. I am aware that responsible authorities have included similar conditions in the past.⁷ Nonetheless, it would be clearer if the condition expressly specified dates by which a use must start and a development must start and be completed, as well as the date by which the use must cease.
- 12 Condition 33 expressly applies to 'this permit' and therefore to both use and development. Properly interpreted, the condition means that the development of the Place of worship must be completed by 13 July 2017 and the use for a Place of worship, if it has started before that date, must cease on that date. Consequently, the default two-year period in the statute does not apply. If the development has not started by 13 July 2017, the permit will also expire. If the development starts but is not completed by 13 July 2017, the use will have commenced by that date.
- 13 I am satisfied these findings are consistent with the Tribunal's authorities on interpreting ambiguous conditions and on when a use starts.⁸ It is also

⁵ One of the Respondents sought to be heard on the submissions but having regard to the nature of all submissions, I found it unnecessary for the parties to be heard on the question.

⁶ *Planning and Environment Act 1987* s 68(3)(b).

⁷ See eg *Ould v Casey CC* [2004] VCAT 9; *Hu v Moreland CC* [2004] VCAT 222.

⁸ See eg *Vestey v Warrnambool CC* [2008] VCAT 963; *Glenelg SC v Printz Pty Ltd* [2009] VCAT 2477.

consistent with what appears to be the Council's intention to grant a temporary permit for a relatively limited period.

- 14 In conclusion, the permit has not expired and may be amended.

AMENITY

- 15 I must consider whether the amendments would result in an unreasonable impact on the amenity of land in the surrounding area.
- 16 The effect of the amendments is to increase the Place of worship use from a maximum of 9 hours to 26 hours per week. That increase is not insignificant. However, the Place of worship will nonetheless be relatively modest in size. Existing permits conditions that would remain, even if the amendments are granted, require:
- The Place of worship to be located at least 80 m from Harkness Road and in a modest building with a length and width not exceeding 24 m and 21m and a wall height not exceeding 4.8 m and a shallow pitched roof.⁹
 - Worshippers to park vehicles on site (and not on the road) in a properly formed car park located behind the Place of worship.
 - A maximum of 60 persons present on the premises at any one time.
 - The use to not cause nuisance and to unreasonably affect amenity. In particular noise must exceed relevant EPA standards and external lights must be baffled.

Mr Richards submitted these conditions will not be complied with and invited me to assess the application as if there would be non-compliance. This is an invitation and proposition that I do not accept.

- 17 The Place of worship is not to be located in a congested residential street. It is on a large lot on the northwestern outskirts of Melton. Consequently, the land uses in the surrounding area are mixed and some of them are or will be changing. The land to the north is the Melton Gilgai Woodland Reserve (the **Woodland**), being public land managed by the Council. Land to the south is vacant land that is a proposed regional cemetery and further to the south is existing and proposed residential areas for Melton. Land to the west is mainly rural living lots with associated equestrian or business use, most with established dwellings, and larger rural lots used for broadscale agriculture to the northwest.
- 18 A Place of worship is not a prohibited use in a green wedge. State policy refers to supporting developments in green wedges that offer social benefits.¹⁰ The mosque offers religious and social benefits for people of

⁹ These details are shown in the permit application drawings. Condition 1 of the permit requires amended plans to be submitted that are 'generally in accordance' with those drawings. The amended plans have not yet been prepared.

¹⁰ *Melton Planning Scheme* cl 11.04-7.

the Islamic faith in and around Melton. Green wedges are now encouraged to contain a broader range of activities than previously. Two other Places of worship are located to the north and northeast of the subject land, about 1 km to 2 km away.

- 19 Mr Richards and Ms Lawson represent occupiers of the rural living lots to the immediate west. They emphasised a loss of amenity from noise including traffic noise, lightspill and dust. I agree with Mr Glossop that there will be a more intensive use of the land for a Place of worship but also agree with him that the amenity impacts are not unreasonable.
- 20 People living in green wedge cannot expect the same level of amenity as a residential area. Nonetheless, the closest dwelling is about 430 m southwest from the Place of worship. Headlight spill from this distance will not be unreasonable. The permit contains a suitable range of amenity protections. Dust and noise from traffic on unsealed Harkness Road will be ameliorated by a further condition requiring an improved standard of construction of the road. The need to comply with EPA acoustic standards can be strengthened by requiring an acoustic report to confirm that the standards can be met.
- 21 There is no unreasonable amenity impact on the proposed cemetery and residential areas further to the south.
- 22 The Respondents did not rely on adverse visual impact. Given the size and location of the Place of worship and the distance to nearest dwellings, there is no unreasonable visual impact.
- 23 It is also relevant to amenity impact that the permit will expire on 13 July 2017 and that an application for a new permit to continue the use would need to be assessed and granted.
- 24 In summary, amenity impacts are not a basis to refuse the application.

BIODIVERSITY

- 25 The subject land is in ESO1 and the GWAZ. The amendments do not trigger ESO1 objectives but one of the purposes of the GWAZ is to protect, conserve and enhance the biodiversity of the area.
- 26 The Council and the Respondents submit the amendments would adversely impact the biodiversity values of the Woodland by additional traffic increasing the risk of roadkill of kangaroos and birds and by additional light impact with evening prayer sessions disturbing fauna.
- 27 In support of these submissions, the Respondents tendered various documents about the Woodland prepared by the Melton Environment Group Inc and others.
- 28 There is no nationally significant flora or fauna or no suitable habitat for protected fauna (such as the Swift parrot) on the subject land. It is heavily

grazed and with a low vegetation cover (except for a patch of mature vegetation at the rear of the subject land).

- 29 I accept Mr Organ's evidence that the impact of the additional hours of use of the subject land on off-site fauna is minimal because most Place of worship noise is contained in a building and external lighting must be baffled. The building and car park are located at least 50 m from the Woodland. Having regard to existing and proposed roads, I accept that most traffic will be from the south to the subject land. Consequently, the increased risk of roadkill is minimal, would not be significant to overall populations and could be minimised, in any event, by warning signs if the Council thought that necessary.

TRAFFIC

- 30 Harkness Road is unsealed adjoining the subject land but is in good condition. It is sealed from High Street to just north of Hardys Road, leaving an unsealed section of about 2 km to the subject land. About 1 km of this 2 km section will be sealed as part of adjoining residential development to the east, leaving about 1 km unsealed to the subject land.
- 31 The Council's traffic engineers did not oppose the application but the Council refused to grant the amendment on the grounds of unreasonable road maintenance requirements. The Respondents also rely on grounds relating to traffic generation and dust.
- 32 Mr Wills' evidence is that the unsealed section of Harkness Road carries a peak daily average of about 90 vehicles per day. He adopted a conservative traffic generation rate of 0.6 vehicle movements per worshipper (or 36 movements) per prayer session. At five sessions per day, his opinion was traffic generation of 180 movements per day.
- 33 Traffic generated the application, compared to that generated by the permit, increases from between 108 and 180 vehicles per day, depending on the day of the week. It also increases from 144 to 1,260 vehicles per week. Peak hour movement remain at 36 vehicles per hour (18 in either direction), because the number of worshippers per prayer session is unchanged.
- 34 Mr Richards relied on higher traffic generation rates based on observations by Mrs Richards on 13 February 2015 at a mosque at Darlingsford Road, Melton. Mrs Richards was not called to give lay evidence. I prefer the traffic generation opinions of Mr Wills.
- 35 According to one traffic manual relied upon by Mr Wills, an unsealed road should be sealed if it carries about 250 vehicles per day. Accordingly Mr Wills does not consider sealing of the unsealed section of Harkness Road south of the subject land is warranted.
- 36 Mr Glossop does not oppose the sealing of Harkness Road between the subject land and just north of Hardys Lane by the Applicant on amenity grounds. I accept his opinion that such work will lower dust levels and may

also reduce road noise. He proposes a spray seal that will have a medium term life span. This is not unreasonable given the imminent further sealing of 1 km of the 2 km length involved.

- 37 It is also not unreasonable because land on the west side of Harkness Road between the freeway and opposite the subject land is currently in the *Development Plan Overlay Schedule 3 (DPO3)*. In DPO3, a development plan must show the orderly extension of the sealed road network. Hence, the scheme currently anticipates sealing of the full length of Harkness upon development of land on the west side of the road. Mr Richards asked me to give little weight to this aspect of DPO3 because the Council is considering changing DPO3. I give more weight in this proceeding to what the scheme currently provides for.
- 38 The Applicant does not oppose the inclusion of the condition in any amendment of the permit. I will include the condition. I will require the Applicant to maintain the new road surface to the Council's satisfaction because the obligation will only apply until 13 July 2017 and a proper assessment of what needs to be done after that date can be made if the Applicant applies for a new permit.

CONDITIONS

- 39 I will allow an amendment to condition 7. I have had some difficulty reconciling the Council's without prejudice amendment to the condition with the amendment to the condition supported by the Applicant before the Council made its decision.
- 40 The Council's condition refers to four prayer periods but the Applicant's condition refers to five periods. I have deduced the Council's condition incorporates a longer early evening prayer period that absorbs the late afternoon period. The Council's condition has periods ranging from 1.5 hours to 4.5 hours. The Applicant's condition refers to prayer periods of no more than 45 minutes. From Mr Glossop's evidence I have deduced that the prayer period is 45 minutes and it can be conducted at any time during the relevant period.
- 41 The Council's condition is included in Mr Glossop's evidence. The Applicant relies on Mr Glossop's evidence. I will therefore amend condition consistent with Mr Glossop's evidence.
- 42 I will also amend condition 7 so that the Council may consent to different arrangements if sought from time to time. As with all conditions, the condition can be reviewed if a fresh permit is sought to continue the use beyond 13 July 2017.
- 43 The Council sought an additional condition relating to native vegetation but I am not persuaded it adds anything significant beyond that already contained in condition 38.

- 44 The Council sought an additional condition requiring an ecological impact assessment on Woodland fauna. I accept the opinion of Mr Organ that the amendments do not warrant the condition. The matter can, of course, be reviewed if a fresh permit is sought to continue the use beyond 13 July 2017.

CONCLUSION

- 45 For the above reasons, I will set aside the Council's decision and amend the permit.

Geoffrey Code
Member