

# VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

## PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P65/2025  
PERMIT APPLICATION NO. GE/DP-36420/2023

### CATCHWORDS

Glen Eira Planning Scheme; Section 80 of the *Planning and Environment Act 1987* (Vic); Inconsistency between the conditions of the permit, what the permit allows and the permissions sought at first instance; Inclusion of condition tantamount to refusal; Power to amend what the permit allows in an application for the review of conditions; Section 127 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic); Application for review amended.

#### APPLICANT

Axolotl Pty Ltd

#### RESPONSIBLE AUTHORITY

Glen Eira City Council

#### RESPONDENTS

Fiona Solomons

Rudolf William Joosten

#### SUBJECT LAND

139-141 Hawthorn Road  
CAULFIELD NORTH VIC 3161

#### HEARING TYPE

On the Papers

#### DATE OF ORDER

28 May 2025

#### CITATION

Axolotl Pty Ltd v glen Eira CC [2025]  
VCAT 471

### ORDER

#### Amendment of application for review

- 1 The application for review is amended under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) to include the review of what Permit GE/DP-36420/2023 allows including the matters for which a permit has been granted.

#### What the responsible authority must do

- 2 By **4:00pm on 3 June 2025**, the responsible authority must give the following documents to any referral authority and every person who lodged a written objection to the grant of the permit i.e. objectors, except for those objectors who are respondents in this proceeding:
  - a. the application for review, including the applicant's statement of grounds;
  - b. a copy of **this order** and the Tribunal's order dated **1 May 2025**;
  - c. a letter which must:
    - i. explain that application for review has been amended and the Tribunal requires the documents to be given to any objectors and any referral authorities;
    - ii. explain that a statement of grounds may be lodged with the Tribunal and specify **4:00pm on 20 June 2025** as the closing date by which a statement grounds must be given to the Tribunal, the responsible authority and the applicant;



- iii. including the link to the online Statement of Grounds form on the Tribunal's website ([www.vcat.vic.gov.au/respondplanning](http://www.vcat.vic.gov.au/respondplanning))
  - iv. specify the date/s and time/s of the hearing as confirmed by this order.
- 3 By **4:00pm on 13 June 2025**, the responsible authority must give to the Tribunal:
  - a. a completed statement of service;
  - b. a list of names and addresses of all persons and authorities to whom the documents were given; and
  - c. a sample letter sent with the documents.
- 4 Any referral authority or person who lodged a written objection to the grant of the permit that wants to take part in this proceeding, must complete a Statement of Grounds online at [www.vcat.vic.gov.au/respondplanning](http://www.vcat.vic.gov.au/respondplanning) and give a copy to the responsible authority and the applicant by **4:00pm on 20 June 2025**.

## Hearing

- 5 The hearing details set out in the Tribunal's order dated 14 May 2025 are **confirmed**.

The proceeding is listed for hearing on the date and for the time as detailed below.

If there is any change to these details, the Tribunal will notify you.

<b>Standard Cases Hearing:</b>	
Date and time	28 & 29 July 2025 10:00am – 4:30pm
Conduct	In Person
Place	VCAT Melbourne, 55 King Street, MELBOURNE VIC 3000

Details of the location of the hearing will be published on the Tribunal's website, under 'Upcoming Hearings' on the afternoon of the day prior to the hearing – [www.vcat.vic.gov.au/upcoming-hearings](http://www.vcat.vic.gov.au/upcoming-hearings)

## Providing submissions and associated material before the hearing

- 6 No later than **5 business days** before the hearing, the parties must provide an electronic copy of their submissions and associated material (such as supporting documents, case law and photographs) to the Tribunal and all parties. The copy for the Tribunal must be sent to [admin@courts.vic.gov.au](mailto:admin@courts.vic.gov.au)
- 7 All expert evidence must be filed and served in accordance with the Tribunal's Practice Note PNVCAT2 Expert Evidence.

## Hearing fees

- 8 If you are the applicant in this proceeding, you may be required to pay a daily hearing fee before the hearing commences. For more information, see the VCAT website [www.vcat.vic.gov.au/fees](http://www.vcat.vic.gov.au/fees)

## Costs

- 9 No order as to costs.

Teresa Bisucci  
**Deputy President**



## REASONS

### WHAT IS THIS PROCEEDING ABOUT?

15 This proceeding is commenced by Axolotl Pty Ltd ('applicant') under s 80 of the *Planning and Environment Act 1987* (Vic) ('PE Act') and seeks review of condition 1(p) ('application for review') contained in planning permit No. GE/DP-36420/2023 ('permit').

16 Condition 1 (p) provides:

The following conditions apply to this permit:

#### Amended plans

- l. Before the development starts, amended plans and documents to the satisfaction of the Responsible Authority must be submitted to and approved by the Responsible Authority. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and must be generally in accordance with the plans identified as Drawing Numbers T0-04 to T0-15 (all Rev. A), prepared by DO Architects, dated October 2023, but further modified to show:
- p. Consolidation of the internal floor plan layout to result in no more than 22 apartments in total. Each apartment must have no more two bedrooms to the satisfaction of the Responsible Authority. No external walls are to be altered to accommodate the internal consolidation.

17 The background to this proceeding is central to my consideration of the application to amend the application for review.

18 The land at 139-141 Hawthorn Road, Caulfield North ('land') is within the General Residential Zone – Schedule 2 ('GRZ2') and subject to a Parking Overlay, Schedule 2 (Precinct 2) ('PO2-2') of the Glen Eira Planning Scheme ('scheme').

19 The application for planning permit sought permission for an apartment building comprising 26 apartments, a front fence exceeding 1.5 metres in height and a reduction of the statutory parking rate by four spaces.

20 The Glen Eira City Council ('council') issued a Notice of Decision to Grant a Planning Permit ('NOD') on 10 December 2024 with condition 1(p) as set out above. The permit issued on 9 January 2025 as there were no applications for review filed under s 82 of the PE Act.

21 In essence, condition 1(p) of the permit requires the consolidation of apartments so that the maximum number is 22 and no reduction in the statutory car parking rate is required. Accordingly, the NOD did not refer to cl 52.06 of the scheme in the list of permissions that were granted. Below is an extract of that part of the permit:

Planning scheme clause	Matter for which the permit has been granted
Clause 32.08-7	Construct two or more dwellings on a lot
Clause 32.08-7	Construct a front fence that exceeds the maximum height specified in Clause 55.06-2 (to Halstead Street)
Clause 52.29-2	Create or alter access to a road in a Transport 2 Zone (Hawthorn Road)

22 Thus, the application for review by the applicant, which seeks deletion of condition 1(p) of the permit to allow the construction of 26 apartments and a consequent reduction in four car spaces.



- 23 The process followed by council creates a conundrum for the parties and VCAT in this proceeding. Frankly, a fair process would have involved a refusal of the application for permit based on insufficient car parking, being the real issue in dispute in this proceeding.
- 24 At the practice day hearing on 13 May 2025, I was to consider the future conduct of the proceeding. However, at that practice day hearing, I considered the joinder of Fiona Solomons who had not been provided submissions and proposed consent orders setting the position of the applicant and the council regarding the future conduct of the proceeding. I joined Fiona Solomons and provided an opportunity for submissions from the respondents on the future conduct of the proceeding thus, reserving my decision on the following two matters:
- Can the application for review be amended under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act')? and
  - If the application for review is amended, should the application for review be the subject of further service?
- 25 I now consider these two matters.

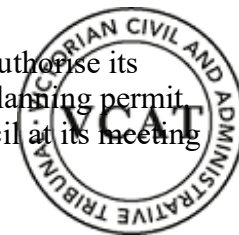
**Can the application for review be amended under s 127 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act')?**

- 26 To ensure that VCAT can determine the real issue in dispute in this proceeding that is, the reduction in car parking, *if* the applicant is successful in this application for review, the parties have agreed that I should follow the course in *Townsing v Stonnington CC (No 2)*<sup>1</sup> (***Townsing***). This case involved similar facts as those relevant in this proceeding. At paragraph 17 and onwards, VCAT stated:

17 The applicant submits the following:

- the application for planning permit embodied a series of applications, notwithstanding that one application was made to council;
- the series of applications were:
  - buildings and works to the existing dwelling under Heritage Overlay, Schedule 155 (**HO155**) of the Stonnington Planning Scheme (**scheme**);
  - buildings and works for the second dwelling on the lot under HO155 and the General Residential Zone, Schedule 12 (**GRZ12**) of the scheme; and
  - reduction in the number of car spaces required for the second dwelling under clause 52.06 of the scheme.

- 18 The council officer recommended that council authorise its officers to issue a notice of decision to grant a planning permit. This recommendation was not adopted by council at its meeting on 15 November 2021.



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<sup>1</sup> [2022] VCAT 1252.

- 19 Instead, it appears that council resolved to authorise its officers to issue a notice of decision to grant a planning permit for the additions and alterations to the existing dwelling only. A copy of the minutes of council's meeting was not provided however, the minutes are available on council's website.<sup>2</sup>
- 20 The recording of the council meeting makes it clear that the second dwelling was refused because council believed that the proposal contained two separate elements. Council supported the additions and alterations to the existing dwelling. However, council assessed the second dwelling, and refused it due to its dominance, the lack of car parking and impacts on amenity.
- 21 On 30 November 2021, council's delegate issued a notice of decision to grant a planning permit for the 'partial demolition, buildings and works to an existing dwelling on a lot in a heritage overlay'. It included condition 1f) that required the deletion of the second dwelling.
- 27 In *Townsing* the applicant sought review of condition 1 f) of the relevant permit at paragraph 34 onwards, VCAT held:

**Can section 127 of the VCAT Act be used to amend the application for review to include what the permit allows? If so, in what circumstances?**

- 32 To consider whether section 127 of the VCAT Act can be used to amend the application for review to include what the permit allows requires an understanding of the permit itself.
- 33 I start by setting out the regulatory regime with respect to permits.

What do the PE Regulations require to be included in a permit?

- 34 Regulation 22 of the *Planning and Environment Regulations 2015 (PE Regulations)* provides:

**22. Form of permits other than permits granted under Division 5 or 6 of Part 4 of the Act**

- (1) The form of a permit, other than a permit granted under Division 5 or 6 of Part 4 of the Act, is Form 4 in Schedule 1.
- (2) The information to be included in a permit, other than a permit granted under Division 5 or 6 of Part 4 of the Act, is the information set out in Form 4 in Schedule 1.
- 35 Form 4 of Schedule 1 of the PE Regulations sets out the form of planning permits as follows:

**FORM 4**

Sections 63, 64, 64A and 86

**PLANNING PERMIT**

Permit No.:

Planning scheme:



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<sup>2</sup> I note that a recording of the meeting on 15 November 2022 is available on council's website.

Responsible authority:

ADDRESS OF THE LAND:

**THE PERMIT ALLOWS: [All matters that the responsible authority has decided to grant the permit for must be included in the description of what the permit allows.]\***

THE FOLLOWING CONDITIONS APPLY TO THIS  
PERMIT:

Date issued:

Signature for the responsible authority:

**(\*Tribunal emphasis)**

- 36 Form 4 of Schedule 1 of the PE Regulations requires a responsible authority to articulate what permissions have been granted by it in the section ‘the permit allows’. In my view, the importance of the description of what the permit allows cannot be underestimated. The description must provide an understanding of the extent and nature of all the permissions considered and granted by the responsible authority. Further, an accurate description of what a permit allows assists with the inclusion of valid and lawful conditions. I note that an accurate description of what the permit allows also assists with enforcement of a planning permit.
- 37 Whilst a permit is a public document that should speak for itself and be able to be understood by an ordinary person,<sup>3</sup> that does not mean that an accurate description of what the permit allows with respect to the permit triggers is somehow not necessary. In other words, Form 4 of Schedule 1 of the PE Regulations does not mean that conditions of a permit can only be included in the section ‘the following conditions apply to this permit’. This may be the conventional location for conditions, but it is imperative to examine the permit in its entirety to understand what conditions and limitations have been placed on the approval and where they are located in the permit.
- 38 In addition, it is now common practice for responsible authorities and the Tribunal on review to include some or part of the following phrase in what the permit allows:
- ...in accordance with endorsed plans and subject to the following conditions...
- 39 Section 61 of the PE Act states:
- 61 Decision on application**
- (1) The responsible authority may decide—
- (a) to grant a permit; or
- (b) to grant a permit subject to conditions; or
- (c) to refuse to grant a permit on any ground it thinks fit.
- 40 Having regard to section 61 of the PE Act, it is clear that a permission that is granted may be limited in extent by a

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<sup>3</sup> *Vestey and Ors v Warrnambool CC* [2008] VCAT 963 at [31] citing *Gant v Greater Geelong City Council* (2003) 15 VPR 230 at page 232.

condition. This may occur regardless of whether the condition is specified in what the permit allows, is by reference to ‘subject to conditions’ or is listed as a condition in the permit itself.

- 41 In the first two examples above that is, when a condition is specified in what the permit allows, or by reference to ‘subject to conditions’, the permission is explicitly limited by or through the condition or conditions. In those two examples, what the permit allows is explicitly linked to the condition or conditions, such that the permission or permissions are part of the condition or conditions.
- 42 In those circumstances, an application under section 80 of the PE Act of any condition in a permit could include a review of what the permit allows. This view is consistent with the decision in *Pierrepoint*. Further, I add that the decision under review in such circumstances, includes the decision to explicitly refer to a condition or conditions in what the permit allows.
- 43 Therefore, section 51(2)(a) and (b) of the VCAT Act allows the Tribunal to affirm or vary the decision under review, respectively including to what the permit allows.
- 44 Whilst I have arrived at the same outcome as the Tribunal decisions cited earlier, I have done so for different reasons. To be clear, I have found that ‘what the permit allows’ can be a condition of the permit in certain circumstances. Further, I agree with the reasons in *Gallco Pty Ltd v Moonee Valley CC*<sup>4</sup>, that if there is no connection between what the permit allows and the condition under review, then what the permit allows cannot be amended using section 80 of the PE Act. In this proceeding, this situation may have arisen if what the permit allows did not expressly refer to the permission being subject to conditions.
- 45 What follows is whether the application for review in this proceeding should be amended under section 127 of the VCAT Act. I deal with this later in this opinion.
- 46 I also note that in many cases under section 80 of the PE Act, the need to examine what the permit allows would not arise if, only the permissions were set out in this section rather than a limitation for example, the number of dwellings. It is this practice that leads to further complications before the Tribunal in applications under section 80 of the PE Act.

- 14 For completeness, I note that VCAT’s jurisdiction in an application for review under s 80 of the PE Act was also considered in *Tsourounakis v Cardinia SC*<sup>5</sup> (*Tsourounakis*) and the following sets out the relevant factual scenario relevant in that case:

#### **WHAT IS THIS PROCEEDING ABOUT?**

- 1 This proceeding concerns the review by the applicant of one condition included on a permit. Permit T220194PA was issued for:

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<sup>4</sup> [2011] VCAT 2320.

<sup>5</sup> (Red Dot) [2024] VCAT 1104.



- Use of the land for an education centre (adult employment training) generally in accordance with the approved plans.
- 2 Various conditions were included on the permit. Condition 3 is the condition sought to be reviewed by the applicant. It states:  
Student numbers
  3. The use must only have a maximum of sixteen (16) students on site at any one-time, unless with the further written consent of the Responsible Authority.
  - 3 The maximum number of students allowed under this condition is the number the applicant ultimately sought as part an amended permit application processed by the Cardinia Shire Council ('council'). It is also the maximum number of students allowed on the premises before a permit would be triggered under clause 52.06 to reduce the number of car parking spaces required to be provided on the land.
  - 4 The applicant has sought the review of condition 3 to allow an increase in this number to a maximum of 60 students.
  - 5 The hearing for this proceeding was originally listed on 14 June 2024. At the hearing, as part of preliminary matters, the council raised concerns with the nature of the proceeding in that it said the Tribunal did not have jurisdiction to consider the application for review. This was because it said the result of the appeal being upheld would introduce a new permit trigger (pursuant to clause 52.06) which was not originally considered as part of the permit application, and is not something the permit granted by the council has included permission for.

#### **WHAT IS THE EFFECT OF WHAT THE APPLICANT IS NOW SEEKING?**

- 18 The application for review seeks to vary condition 3, in order to increase the maximum number of students on the site at any one time from 16 to 60. There is provision of four car parking spaces on the land for the use.
- 19 Parking Overlay Schedule 1 (PO1) applies to the land. At clause 3.0, this overlay sets out that:  
For all non-residential uses listed in Table 1 of Clause 52.06-5, the *Rate* in Column B of Table 1 in Clause 52.06-5 applies.
- 20 In Column B of Table 1 of Clause 52.06-5, the car parking rate to be provided for an Education Centre is 0.3 spaces per student.

Table 1: Car parking requirement			
Use	Rate	Rate	Car Parking Measure
	Column A	Column B	Column C
Education centre other than listed in this table	0.4	0.3	To each student that is part of the maximum number of students on the site at any time

- 21 Consistent with what the applicant sought, and was granted permission for, a maximum of 16 students would equate to 4.8 spaces, or, rounded down to 4 spaces. Therefore, under the original number of 16 students, no reduction is necessary.

- 22 A maximum of 60 students would equate to a requirement of 18 spaces to be provided. For this number, a reduction of 14 spaces is required (when subtracting the 4 spaces provided on site) pursuant to clause 52.06-3. Any more than the 16 students the permit restricts the use to, would trigger the need for a permit pursuant to clause 52.06 and the considerations under the PO1. The permit granted does not include the reduction of car parking.
- 23 This is the issue that the council raised as a matter of jurisdiction. It said that the effect of the applicant now seeking to amend the maximum number of students to 60 goes beyond what the permit allows, and that the Tribunal is therefore unable to consider as part of this section 80 application for review of conditions.

(footnotes omitted)

28 In *Tsourounakis* VCAT distinguished *Townsing* as follows:

- 45 In this case, the nature of what the applicant seeks is not related to the permissions sought nor granted. Form 4 of the *Planning and Environment Regulations 2015* (Vic) requires all permissions granted to be included on the permit. The permissions granted are also clearly discussed in the officer's report and clause 52.06 is not a matter addressed. This is logical, because the permit application did not seek nor require a permit under this clause. There is no dispute that what the permit allows is wholly consistent with what was applied for.
- 16 The facts in this proceeding are more akin to the facts in *Townsing* than those in *Tsourounakis*. As set out earlier, in this proceeding the applicant sought the permission for the reduction in the statutory car parking rate, but council issued the permit with a condition requiring the consolidation of apartments to ensure that no permit was necessary under cl 52.06 of the scheme. In essence, council's actions are tantamount to a refusal of that part of the application for permit. In *Tsourounakis*, the applicant did not ultimately seek any reduction in the statutory car parking rate and thus, that reduction was not considered by the relevant council at first instance. In *Tsourounakis* VCAT stated:
- 56 It is evident from the material presented that the applicant made a conscious decision to avoid the need for a permit under clause 52.06 because it could not provide the car parking spaces that were required for a greater number of students, and it did not wish to pay the cost of the financial contribution requirement at clause 5.0 of the PO1.
- 57 This conscious decision led to the issue of the permit, including condition 3. The applicant now seeks to review a condition which is entirely consistent with the applicant's amended permit application, and which would consequently result in something that is inconsistent with what was applied for. It seeks to subvert the proper process of seeking a reduction of car parking requirements under clause 52.06 and the PO1.
- 58 The actions of the applicant in seeking to review a condition that is consistent with what it applied for, also disregards procedural fairness to the original decision maker, where that decision

maker has not had the opportunity to properly consider all relevant factors. Clause 52.06, whilst not a new planning scheme provision, has a lengthy list of matters that must be considered for an application to reduce the car parking requirements. It is evident from the officer's report that none of these has been considered by the original decision maker in its final assessment because it was not required to, as there was no trigger for consideration of these matters in the first place.

- 59 For these reasons, I find that it is not open to me to consider the variation of condition 3 as sought by the applicant in this proceeding because of the limited nature of the Tribunal's jurisdiction in an application for review under section 80 of the PE Act.

- 17 On that basis, *Tsourounakis* is readily distinguishable on its facts.
- 18 In this proceeding there is a connection or nexus between what the permit allows and the endorsed plans. The permit allows:

The permit allows:	Construction of a three storey residential apartment building, a front fence exceeding 1.5m in height (to Halstead St), alter access in a Transport Zone 2 (Hawthorn Rd) in accordance with the endorsed plans
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- 19 Condition 1 of the permit requires amended plans and documents to be submitted to council for its endorsement that depict the consolidation of the apartments. Thus, in this proceeding the endorsed plans form part of what the permit allows and could form the basis of an application under s 80 of the PE Act. At this point, I add that it is fortunate the permit has described what the permit allows by reference to the development in addition to the matters under the scheme for which the permit has been granted.
- 20 Having regard to the above, and the position of the parties in this proceeding, I consider it appropriate to amend the application for review under s 127 of the VCAT Act to allow consideration of what the permit allows including the matters for which a permit has been granted. This process allows the real issue in dispute to be considered by the parties and VCAT. It also provides a mechanism for any amendment to what the permit allows including the matters for which a permit is required if condition 1(p) is deleted or amended by VCAT.

**If the application for review is amended, should the application for review be the subject of further service?**

- 21 Given the process that led to the issue of the permit and the application for review before VCAT, I agree with the parties that the application for review should be the subject of further service, and that council should be responsible for that process.
- 22 I have made the orders agreed between the applicant and council with respect to the further service of the application for review with amendments to the relevant dates.

Teresa Bisucci  
**Deputy President**

## HELP AND SUPPORT

Information for all parties is available at the Tribunal's website  
[www.vcat.vic.gov.au](http://www.vcat.vic.gov.au)

For information about what happens after you make your application, visit  
[www.vcat.vic.gov.au/afterapplyplanning](http://www.vcat.vic.gov.au/afterapplyplanning)

For information about responding to an application visit  
[www.vcat.vic.gov.au/respondplanning](http://www.vcat.vic.gov.au/respondplanning)

If you are not able to access the website, contact the Tribunal on 1300 01 8228  
Monday to Friday 9.00am to 4.30pm to request a paper copy.

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