



# Victorian Civil and Administrative Tribunal

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## Derby Street Gospel Trust v Nillumbik SC [2005] VCAT 2292 (26 October 2005)

Last Updated: 8 November 2005

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**ADMINISTRATIVE DIVISION**

**PLANNING AND ENVIRONMENT LIST**

**VCAT REFERENCE NO. P606/2005**  
**PERMIT APPLICATION NO. 426/2004/02P**

### **CATCHWORDS**

Use and development of small Place of Worship, Residential 1 Zone, Future collector road, Early morning service, Limits on hours of use, Section 173 Agreement requiring residential reinstatement if the use ceases, front fence, appearance of hard stand car parking area. Section 77 P & E Act.

<b>APPLICANT</b>	Derby Street Gospel Trust
<b>RESPONSIBLE AUTHORITY</b>	Nillumbik Shire Council
<b>OBJECTORS</b>	N Brown and others
<b>SUBJECT LAND</b>	88 Everleigh Drive, Diamond Creek
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Peter O'Leary, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	5 October 2005
<b>DATE OF ORDER</b>	26 October 2005
<b>CITATION</b>	[2005] VCAT 2292

### **ORDER**

The responsible authority's decision is set aside. The responsible authority must issue a permit for use and development of a Place of Worship in accordance with the endorsed plans and subject to the following conditions:



1 Prior to the commencement of the use and development hereby permitted, three (3) copies of plans drawn to scale and dimensioned shall be submitted to the Responsible Authority. Such plans shall be

generally in accordance with the plans submitted with the application but modified to:

- (a) Redesign the external appearance of the building to match the plans and elevations tabled at VCAT Review Hearing P606/2005, more particularly the revised roof form, facade materials, window and door openings but also to address a revised entrance/ portico feature as recommended by Mr Walsh in his revised car park and access treatment plan.
- (b) A revised car park layout showing;
  - i not less than 36 car parking spaces, of which not less than 18 car spaces shall be properly sealed, drained and constructed, but with the remainder being provided in an over spill area to the north of the sealed car spaces.
  - ii no car parking within 10 metres of the property frontage.
- (c) Deletion of the 1.6 metre high front fence and gates. If fencing is to be shown it must be located at least 10 metres from the property boundary and incorporated into the landscaping and painted in a muted colour which is more sympathetic to the residential character of the area.
- (d) Specify the location and lux level of any outside lighting associated with the development.
- (e) Show all Eucalypts to be planted to be indigenous to the Shire of Nillumbik

Such plans shall be to the satisfaction of the Responsible Authority and when approved shall be endorsed and form part of this permit.

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

3 Prior to commencement of the use, the owner of the subject land shall enter into an agreement pursuant to Section 173 of the *Planning and Environment Act 1987*, to the effect that the land use will revert to residential upon cessation of the use by  **the Brethren**  community to the satisfaction of the Responsible Authority. The cost of the preparation and registration of the agreement shall be borne by the land owner.

4 Landscaping must be undertaken generally in accordance with the landscape plan by Michael Smith & Associates tabled at VCAT Review Hearing on 5/10/05 but modified to show:

- (a) No car parking within the front 10 metres of the site.
- (b) The area previously containing car spaces 30 to 36 landscaped in a manner commensurate with the remainder of the plan including use of native species of local provenance.
- (c) Revised landscaping around the revised car parking area.

All landscaping must be completed prior to the commencement of the use to the satisfaction of the Responsible Authority. The landscaping then shall be maintained to the satisfaction of the Responsible Authority.

5 The use hereby permitted shall not cause injury to or prejudicially affect the amenity of the area by reasons of the transportation of materials to and from the premises or by the emission of noise, smell, fumes, dust, waste water, light, waste products or otherwise, to the satisfaction of the Responsible Authority.

6 No noise shall be audible from congregation services outside the site to the satisfaction of the responsible authority.

7 The times of operation and the maximum number of persons for those times are limited to:

- Sunday 5.45am – 9.00am (50 persons)
- Sunday 12 noon – 7.00pm (120 persons)
- Monday 7.00pm – 9.30pm (50 persons)
- One other weeknight – 7.00pm – 9.30pm (120 persons)
- Saturday Not in use
- Maximum usage – 6 hours per week (all up)

8 The building hereby permitted must not be used or hired for non-religious functions, recreation and or entertainment, without the prior written consent of the Responsible Authority.

9 The following are requirements of SPI Powernet:

- (a) All works are to be carried out in accordance with the submitted plan.
- (b) No part of the building including eaves, awnings canopies, shelters and the like is permitted on the easement.
- (c) Loading, unloading and load adjustment of large commercial vehicles is not permitted on the easement.
- (d) Vehicles and equipment exceeding 3 metres maximum operating height are not normally permitted on the easement. A greater height limit may be permitted subject to available ground clearances at this particular site. The requirements of Electricity Safety (Network Assets) Regulations 1999 may impose additional constraints.
- (e) The storage of flammable materials including waste bins is not permitted on the easement.
- (f) Parking of large trucks and caravans is not permitted on the easement.
- (g) Natural surface levels on the easement must not be altered by the stockpiling of excavated material and/or landscaping without prior written approval from SPI Powernet.

10 The following are requirements of Melbourne Water:

- (a) No polluted and/or sediment laden runoff is to be discharged directly or indirectly into Melbourne Water's drains or waterways.
- (b) A site management plan is to be prepared indicating how Condition 1 above will be complied with.

11 The permit shall expire if:

- (a) The development is not commenced within two years.
- (b) The development is not completed within two years of commencement of development.
- (c) The use is not commenced within two years of commencement of works.

The Responsible Authority may extend the periods referred to if a request is made in writing before the permit expires or within three months afterwards.

Peter O'Leary  
**Member**

## **APPEARANCES:**

For Applicant	Mr M Naughton, Lawyer. Mr Naughton called evidence from: Mr A Rodda, Town Planner Mr J Walsh, Traffic Engineer
For Responsible Authority	Mr D Singleton, Town Planner
Objectors	Ms N Brown, Ms H Redmond and Ms T Wright represented themselves and their families

## **REASONS**

### **Introduction**

1 This is an application for review by the Trustees of the Derby Street Gospel Trust against the decision of Nillumbik Shire Council which refused an application for permit to develop and use the land at 88 Everleigh Drive in Diamond Creek for a Place of Worship.

2 The premises are to be used as a Place of Worship for the growing local congregation of **the Brethren** Christian faith, which has been established in other areas of Melbourne for many years. Congregations of **the Brethren** are predominantly made up of families residing in the immediate surrounding area but may occasionally include visiting members from other congregations who have been extended an invitation to attend.

3 **The Brethren** is sometime referred to as the Exclusive or **Plymouth Brethren**. They are registered under the Religious and Successory Trusts Act 1958, and are practising Christians with teaching based on the Word of God as set out in the Holy Bible. A major difference with other churches and congregations is that **The Brethren** has none of the auxiliary activities that are normally associated with a church. The only activity to be carried out involves 4 to 6 hours of activities including an early morning Lords' supper, gospel preaching, prayer meeting and similar services. The premises are not to be used for any social or entertainment activities and will not be made available for rent as a hall.

4 It is intended to erect a relatively small church building of about 172 square metres in area of which 121 square metres is available for the congregation. Car parking has been shown for 36 vehicles with an overspill parking area on a large grassed area beside it.

5 In this instance the most controversial part of the church's activities is the 6 am Sunday Lords'

supper service because members of the congregation will drive up a quiet residential street early in the morning. The 6am attendance is a strictly requirement of the church and there is no option for an alternative commencement time. A 1.6 metre high fence is proposed along the frontage of the property.



6 The Council opposed the issuance of a permit on the basis:

- That it does not show sufficient regard for the residential amenity of the area
- The manner in which early morning gatherings will occur on a Sunday morning
- Vehicular movements in a minor residential street and the operation outside normal working hours

7 Objectors supported the responsible authority's concerns and argued that:

- The church building and car park will be out of character with the emerging neighbourhood
- They will be woken early on Sunday mornings due to increased traffic movements
- Noise
- Loss of vegetation
- Security and safety
- The front fencing is not in character with the area
- Inappropriate use for a quiet residential area
- Possible off-street parking problems

8 The matters for determination in this matter are:

- Whether the proposed use will have an adverse affect on the amenity of the residential neighbourhood particularly through noise and traffic
- Whether the proposal, including various works is out of character with the neighbourhood
- Whether steps can be taken to ameliorate concerns by the Council and objectors
- Whether there area sufficient extenuating circumstances to grant a permit to  **the Brethren**  and make the permit personal

## Purpose Sought





9 It is proposed to erect a new single storey building with a floor area of 171.5 square metres. It will be set back about 20.5 metres from the street frontage and will comprise foyer, entry, hall, amenities and storage areas. The total height of the building is 6 metres, to the ridge of the roof. For all intents and purposes the building will have domestic proportions and the tribunal was advised the applicants were prepared to make further modifications to ensure the building appeared like a dwelling in the landscape.

10 Car parking has been shown for 36 car spaces with access via a single curved driveway extending under a porte-cochere. An overspill car parking area is also provided.

11 A 1.6 metre high steel metal fence is proposed along the street frontage with lockable gates.

12 Existing native vegetation would be complemented by new plants to disguise some of the car paring and entry details. Some trees will be removed but new planting is proposed to enhance the

existing semi-rural appearance of the site.

13 The church is to be operated by  **the Brethren**  Church and will have limited hours of operation. It has a Sunday morning service commencing at 6.00am for one hour.  **The Brethren**  also have prayer services, often with other congregations by invitation on Sundays between 12 noon and 7.00pm together with other services on Monday evenings or other evenings during the week. The premises do not operate on a Saturday. It is anticipated the maximum usage of the site is 6 hours per week all up.

## Locality

14 The subject site has a frontage of 91 metres to Everleigh Drive and a depth of 40.1 metres. Land area is 3656 square metres. The site is accessed by an existing single crossover to Everleigh Drive. The site has a relatively steep gradient rising from the street. The location of the proposed church building will be the highest part of the site. The site is also affected by easements and High tension electricity powerlines which limit use and development of a large portion of the site and they also have a large impact on the appearance of the site and neighbourhood.

15 The site forms one relatively large lot in a recently subdivided 55 lot subdivision extending northwards along Everleigh Drive in the northern section of Diamond Creek. There are existing dwellings to the east in Harrap Court and there are some recently constructed dwellings in Everleigh Drive and Knightsbridge Place to the south of the subject site.

16 At present Everleigh Drive terminates at the northern extremity of the subject site, so in effect it is operating as a long cul-de-sac. At present it is a relatively quiet underdeveloped but emerging residential neighbourhood. Dwellings that have recently been erected are conventional, single and two storey post 1990 style detached or semi-detached dwellings with garages.

## Planning Controls and Policies

17 The subject site and surrounding properties are zoned Residential 1 under the Nillumbik Planning Scheme. A permit is required for a Place of Worship in this instance because the site exceeds 1200 square metres and it does not adjoin or have access to a road in a Road Zone. A permit is also required for buildings and works under Clause 32.01-6.

18 There are various State and Local planning provisions including Clauses 11, 12, 14.01, 15.5, 18.02 and 19.03, 21 (Municipal Strategic Statement) and Clause 22.12 (Neighbourhood Character). In particular the Neighbourhood Character Policy seeks:

- To ensure that development is responsive to the preferred future character of the area.
- To retain and enhance the identified elements that contribute to the character of the area.

19 The site is affected by Development Contributions Plan Overlay (Schedule 1) and a Development Plan Overlay Area (Schedule 1). A development plan has been approved and incorporated into the Nillumbik Planning Scheme. This development plan shows that Everleigh Drive is to become a "Collector" Road linking between Broad Gully Road and Brownlow Drive.

20 The site is also located within a Wildfire Management Overlay Area.

21 Clause 52.06 (car parking) and Clause 65 (Decision Guidelines) also guide discretion in this matter.

## The Review Hearing

22 At the review hearing Mr Naughton and Mr Singleton tabled detailed written submissions and supplemented these with oral presentations. Objectors made oral submissions and supplemented these with photographs of the locality. I was provided with locality plans, details of the Diamond Creek North Area A Development Plan, a landscape plan, car parking layouts, planning scheme controls and policies and various photographs of the site and neighbourhood. In addition I undertook an inspection of the site and general locality. Both witnesses provided written evidence and were available for cross-examination. As Mr Walsh has provided further documentation during the hearing I gave parties to make further written submissions. None were received.

## Overview

23 I consider there are sufficient reasons to set aside the responsible authority's decision in this case. I acknowledge that under normal circumstances it would be a poor planning outcome to place a Place of Worship at the end of a cul-de-sac which is located in the midst of a quiet residential area. However there are extenuating circumstances in this case including:

- Everleigh Drive is to be upgraded to a Collector Road in the Diamond Creek North Area A plan.
- The restricted nature of the church which effectively limits all activities to 6 hours per week
- The ability of the church to effectively contain its own activities to its small building and the related car parking area
- The willingness of the church to have a Section 173 Agreement which would confine use of the land to the church and reinstate its residential status if the land was vacated
- Opportunities through building design and landscaping to ensure the site blends in with the emerging residential neighbourhood

24 I have some concern about the appearance of the front fence and the car park hard stand, but I consider these matters can be addressed by condition on the permit.

## Basis for Decision

### Appropriateness of the use





25 The council and objectors raised particular concern about the 6.00 am service on Sunday mornings principally on the basis that residents may be woken up by the noise of vehicles travelling up a quiet residential street in a relatively early hour. In this case congregation members attend a Sunday morning supper service at 6.00am until 7.00am. Their Bible readings and these readings may be amplified however there is no music or musical instruments.

26 I am satisfied the proposed use is a reasonable one on the basis of the modest size of the church's operation together with the reference to other tribunal decisions dating back at least 20 years which attest to the relatively passive nature of this type of Place of Worship. I also agree with the evidence of Mr Rodda who stated:

“Whilst the Sunday morning activities occur early, the site is reasonably well separated from most nearby



dwellings and the main source of noise, which is likely to be from the movement of vehicles into the site and within the car park areas, is to occur for relatively short periods either side of the religious service which takes place wholly within the hall.

On balance however, I consider that the proposal is contained in terms of its activity levels and potential affect on local amenity, it would be appropriate for the review site.”

27 Mr Rodda recommended that the approval be specific to  **the Brethren**  Church including a requirement to convert land back to a residential use if and when  **the Brethren**  no longer require the use of the land and to limit amplified audio and music equipment, low level of lighting, no identification of sign, limits of hours and number of persons to 50 and 120 respectively.

28 I consider the use will be relatively benign in the neighbourhood and I am satisfied the congregation will not affect the amenity of a relatively quiet residential street, even on a Sunday morning at 6 am. The proposal involves erecting a relatively modest building for small congregational services. Most of the services will hold no more than 50 persons made up of a group of families. The congregation itself has fairly strict religious obligations to the extent that it does not provide social or festive activities. Whilst there are occasions where up to 120 persons will congregate in the premises, these are on a Sunday afternoon and such times are likely to only occur once every three weeks or during the week between 7.00pm and 9.30pm.

#### Noise and traffic movements



29 There were two real concerns about the proposed use, one relating to the noise from the congregation themselves within the hall and the second from vehicles travelling up Everleigh Drive entering the premises and parking in the car park. This is more evident with concerns about people being woken just prior to 6.00am on Sunday morning when members of  **the Brethren**  attend their 6.00am service. In evidence Mr Walsh estimated the likely car movements to be about 13 just prior to 6.00am and similarly 13 just after. In all he estimated that with the two types of services, that is the early morning and afternoon service, a total of 86 vehicle movements would be recorded from the proposed use.

30 I am satisfied that there is only likely to be 10-15 vehicle movements pre 6.00am and whilst this is relatively high for the end of cul-de-sac Everleigh Drive will become a Collector Road and a higher level of traffic is to be expected. I am satisfied that the relatively small number of vehicles to visit the site on a Sunday morning is reasonable and that the vehicle movements are unlikely to be noticed by the new residents in this subdivision.

#### Noise from the church activities

31 Objectors argued that the type of vehicles to be used are likely to be heavily loaded with family members and when they travel up the Everleigh Drive hill the cars would be noisier due to the need for the cars to accelerate and rev higher. Objectors also expressed concerns about noise such as singing or amplified readings from the church building may disturb nearby residents I am satisfied, given the type of building, its form of construction and the type of activities that will occur within the building that the use will be relatively quiet and unassuming. I have inserted a condition on permit limiting noise emissions from congregation activities so that they cannot be heard outside the site. Having regard to the location of the church building away from property boundaries and the absence



of music or instruments I am confident  **The Brethren**  can meet this condition and it will provide some level of assurance to residents about the level of noise to be expected from this use noise.

### Neighbourhood Character Issues

32 I acknowledge the concerns raised by objectors about the possibility of the proposed use and development being out of character with the emerging residential neighbourhood. However in this instance the applicant indicated a preparedness to modify the building so that it appears as a single storey dwelling. The plans submitted show a building with proportions which roughly resembled a dwelling. At the hearing Mr Naughton tabled further plans and elevations to demonstrate that further changes to roof treatment and window and door openings will assist to ensure the church has residential proportions.

33 By and large I am satisfied with the revised development plans tabled by Mr Naughton including materials, finishes and roof profiles to satisfy me that the building would not unnecessarily stand out in this emerging residential suburb. I have inserted a condition on permit requiring the changes to be incorporated in the endorsed plans together with other changes suggested by Mr Walsh to address the vehicle ramp.

34 My biggest concern relates to the appearance of the front fence and relatively large hard-stand car park. I am concerned that a 1.6 metre high fence, extending for the full 90 metre frontage is at odds with the emerging residential neighbourhood. When I viewed the site and the neighbourhood I noted very an absence of front fences on developed properties. I did not detect any high front fences of the kind proposed for the frontage of the site. I consider the front fence should be removed and if the congregation wish to have a fence it should be placed further in the site close to the sealed car park and the perimeter of the church building. At very least it should be painted in a muted colour to blend in with the primary landscape treatment of the front of the site. Removing the front high fence and replacement with landscaping will assist to better integrate the development in this emerging neighbourhood.

35 I am also concerned about the placement of a relatively stark sealed car park in close proximity to the Everleigh Drive alignment. This is not a common feature in this emerging residential neighbourhood. Whilst landscaping is shown in front of the car park I am not satisfied it will adequately screen the hard stand area.

36 In this regard I have required the front section of the hardstand to be replaced by landscaping so that the front of the site is more consistent in character with this emerging neighbourhood.



### Adequacy of car parking





37 I accept Mr Walsh's evidence that 36 car parking spaces will adequately cater for all the needs of the congregation and its visitors. I have inserted a condition on permit requiring that not less than 18 car parking spaces be properly sealed, drained and line marked because this amount will adequately serve the usual needs of this small congregation. The remaining 18 car spaces can be provided in the "overspill" car park. These spaces could be on the grassed surface as the usage is only likely to be occasional. If at a later time the church finds a need to have a more robust surface this can be explored at a later time with the responsible authority.

### Security



38 I do not consider that the proposed use is likely to cause loss of security or safety to residents in this emerging subdivision and I am satisfied that the proposed use will merge into the emerging neighbourhood and produce a reasonable planning outcome having regard to its modest size.

### Section 173 Agreement

39 The offer by the applicant to place a Section 173 Agreement on the title which would limit the use to  **the Brethren**  Church and if it is subsequently sold off that it would revert to a residential use is an unusual offer. However I consider there is justification in this instance to apply it because:

- There is some uncertainty about the timing of the upgrade of Everleigh Drive to a Collector Road
- The body of evidence about  **The Brethren** 's operations including tribunal decisions dating back to the early 1980s and subsequent correspondence from objectors to at least one of those cases which tended to verify that they have not experienced problems with  **the Brethren** 
- The type of religious order is insular and it has a record of either selling up and moving elsewhere or expanding through the establishment of new cells rather than bolting on additions to existing facilities
- Mr Rodda's evidence and the applicant's own offer to do this which demonstrate an appreciation of the limits of the site to operate as a large scale Place of Worship

### **Conclusion**

40 For the abovementioned reasons the responsible authority's decision is set aside. Whilst I can understand the responsible authority refusing a more conventional Place of Worship on this site, there are extenuating circumstances in terms of the future road access, the very nature of the site itself and  **the Brethren**  congregation which warrant a permit with relatively strict conditions.

Peter O'Leary  
**Member**