



# Victorian Civil and Administrative Tribunal

[\[Index\]](#) [\[Search\]](#) [\[Download\]](#) [\[Context\]](#) [\[No Context\]](#) [\[Help\]](#)

---

## Devcon Group Pty Ltd v Manningham CC [2005] VCAT 2616 (9 December 2005)

Last Updated: 20 December 2005

### VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

#### ADMINISTRATIVE DIVISION

#### PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1508/2005  
PERMIT APPLICATION NO. PL04/016216

#### CATCHWORDS

Manningham Planning Scheme; Application pursuant to Section 77 Planning and Environment Act 1987; Environmental Rural Zone (Schedule 1); Road Zone Category 1; Environmental Significance Overlay (Schedule 1); Significant Landscape Overlay (Schedule 2); Education  centre (**Brethren**  primary and secondary school); Building bulk; Setbacks; Interfaces; Tree removal; Landscaping; Car parking; Access

<b>APPLICANT</b>	Tullamarine Education Trust/Devcon Group Pty Ltd
<b>RESPONSIBLE AUTHORITY</b>	Manningham City Council
<b>RESPONDENTS</b>	Michael Tenace and others
<b>SUBJECT LAND</b>	79-93 Fitzsimons Lane, Templestowe
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	J A Bennett, Presiding Member Christina Fong, Member
<b>HEARING TYPE</b>	Hearing
<b>DATE OF HEARING</b>	19, 20 and 21 October 2005
<b>DATE OF ORDER</b>	9 December 2005
<b>CITATION</b>	[2005] VCAT 2616

#### ORDER

The decision of the Responsible Authority in relation to permit application No PL04/016216 is affirmed. Pursuant

to the provisions of Section 85(1) (a) of the [Planning and Environment Act 1987](#), it is directed that a permit must not be granted.

J A Bennett  
**Presiding Member**

Christina Fong  
**Member**

## **APPEARANCES:**

For Applicant for Review: -

Mr Ian Pitt, SC of Best Hooper Solicitors. He called Mr Marco Negri Town Planner of Contour Consultants Australia; Mr Henry Turnbull, Traffic Engineer of Traffix Group; Mr Robert McGauran, Architect of McGauran Giannini Soon Pty Ltd; Mr Douglas Growcott, Noise and Vibration Consultant of Watson Moss Growcott Australia Pty Ltd; Mr Thomas Greenwood, Arborist of The Tree Works Co Pty Ltd; and Mr John Patrick, Landscape Architect of John Patrick Pty Ltd to give written and oral evidence. Written evidence was also provided by the Rev Charles Sligo, Education Consultant but he was not required to attend the hearing for cross-examination.

For Responsible Authority: -

Mr Terry Montebello, of Maddocks Lawyers

For Respondents: -

Mr Michael Tenace for himself and other objectors

## **REASONS**

### **BACKGROUND**

#### **What are we considering?**

1 Devcon Group Pty Ltd (on behalf of the permit applicant - Tullamarine Education Trust/Glenvale  **School/Brethren**  community) opposes Council's decision to refuse the proposal for a small community school on land at 79-93 Fitzsimons Lane, Templestowe. The site is located on the eastern side of Fitzsimons Lane north of Summerhill Road, has an area of 1.525 ha and contains a vacant single storey, but quite large brick dwelling together with various outbuildings. The main access to the site is via a driveway off Fitzsimons Lane, although a narrow strip of land provides secondary access to Summerhill Road.

2 The proposal involves the complete demolition of the existing dwelling and outbuildings and the construction of an education centre for up to 140 primary and secondary students. Four buildings are to be constructed around a central courtyard in the location occupied by the existing buildings. The western building (Building 1) comprises offices/conference room/library at the lower level and offices/conference and storage and classrooms at the upper, ground level. The southern building (Building 2) comprises a gym at the lower level and a lobby, canteen and female toilets at the upper, ground level. The eastern building (Building 3) comprises classrooms while the northern building

(Building 4) also comprises classrooms with a small, lower section at the western end comprising two classrooms. The lower levels of Buildings 1, 2 and 4 are possible because of the slope of the land to the west and south. The central courtyard between the buildings is available for play and will be used for overflow car parking on special occasions. Vehicles are to traverse the site in a single direction with access from Fitzsimons Lane and egress to Summerhill Road. A bus parking and turning area is provided on the south side of Building 2. Car parking is available near Building 1 and along the driveway leading from Fitzsimons Lane. The proposal also involves the removal of 112 trees.

3 Adjoining lots to the south are being developed for two detached dwellings and an older dwelling to the northwest is subject to acquisition by Parks Victoria for incorporation into the adjoining parkland. Land to the east and north is already parkland. Land on the south side of Summerhill Road is either vacant or developed for single detached dwellings on large lots. Fitzsimons Lane is a major arterial road linking major urban areas on the north and south sides of the Yarra River. Summerhill Road has a country road character, has no kerbs, gravel verges and a seal width of around 4.5 to 5 metres.

### Planning provisions, inspection and documents

4 The site is zoned Environmental Rural (Schedule 1) and is affected by an Environmental Significance Overlay (Schedule 1) and a Significant Landscape Overlay (Schedule 2). A permit is required to use the land for an education centre and place of assembly, for buildings and works, for removal of vegetation and a reduction in required parking. The land abuts a Road Zone Category 1 and a permit is required to create or alter access to the road and VicRoads is a Referral Authority.<sup>[1]</sup>

A number of State and local planning policies were highlighted for our consideration<sup>[2]</sup>.

5 We inspected the site and locality after the hearing. We also viewed (without entering the  sites) **Brethren**  schools at Melton and Lilydale.

6 We agreed to the substitution of circulated amended plans. Documents submitted at the hearing have been retained on Tribunal files.

7 Mr Tenace made a further written submission to the Tribunal which was not in accordance with any leave given by the Tribunal for further submissions. Although the envelope was opened by registry staff we neither read nor considered the material it contained.

### BASIS OF DECISION

8 At the outset we record our dissatisfaction with the way this proposal has continuously evolved since it was first submitted to Council and how the Council, residents and the Tribunal itself have had to try and keep abreast of these changes including some, such as the removal of trees on the eastern boundary, which were not fully revealed and explained until the hearing itself. Indeed Mr Patrick did not take this tree removal into account in his expert evidence. While we accept that it is not uncommon for a proposal to be amended at least once after lodgement with Council, the changes made in this case are quite significant and ongoing. We also consider it unreasonable for Mr Negri to make favourable reference to the support given in the Council's officer's report on the original application, when the proposal we are considering has been substantially changed from the one supported by the Council officer.

9 So what are these substantial changes?

- a The school has changed from being just a secondary school (Yrs 7 to 11) to being both primary and secondary (13 year levels).
- b Actual student numbers have risen from 80 - 100 to 140 (although the maximum potential number has always been 140). We also note that in the Council report on page 6 it was suggested that enrolments would commence at 45 in 2006, increase to 85 students in 2007 and then fall to a likely 54 students in 2012).
- c 9 - 10 teaching staff and 4 - 6 administrative staff (now increased to at least 20 staff in total).
- d 6 special events with numbers in excess of 233 people (Mr Turnbull now says 8 functions with up to 400 people).
- e Previously the main ingress/egress was off Fitzsimons Lane with secondary access to Summerhill Road on special event days (Council officers suggested only emergency access to Summerhill Road). The proposal now is for one-way traffic flow with ingress off Fitzsimons Lane and egress to Summerhill Road.
- f Internal layout of the buildings has been changed to provide more classrooms (previously 6 general purpose classrooms now increased to 9).
- g Previously 25 'good' trees were identified for removal but this has now increased to 57 (written and oral evidence of Mr Tom Greenwood).
- h Instead of retention of many native trees along the eastern boundary, the almost complete removal of such trees (12 in total).

10 In assessing the application we have considered the proposal with these changes and consider that the main issues are:

- i The Environmental Rural Zone, Overlays, planning policy and the suitability of the site for this scale and intensity of development.
- ii Height, setbacks and building bulk - particularly the interfaces with the adjoining parkland and with adjacent and nearby residential properties.
- iii Car parking and traffic.
- iv Landscaping.

We now deal with each of these matters in turn.

### **The Environmental Rural Zone, Overlays, planning policy and the suitability of the site for this scale and intensity of development**

11 The site has an unusual site context that is reflected in the zones applying to the site and nearby land. The review site is an isolated pocket of Environmental Rural Zone (ERZ) bounded by Public Conservation and Resource Zone to the north and east, Low Density Residential Zone to the south and a Road Zone Category 1 to the west (and a Public Park and Recreation Zone to the west of the Road Zone). It is also well within the Urban Growth Boundary which at its closest point in Manningham is well to the east. Only isolated pockets of land within Manningham are included in the ERZ and most are very small in area and located on land close to the Yarra River.

12 The ERZ is primarily designed to allow development and use which is in accordance with sound management and land capability practices, to conserve and permanently maintain environmental

attributes and, in the case of land in Schedule 1, to give effect to specified environmental outcomes. Decision guidelines at Clause 35.02-6 provide guidance on general, rural, environmental and design and siting issues that must be considered. Schedule 1 for the Yarra Valley Environs includes a 40 ha subdivision lot size and includes a list of 9 environmental outcomes sought to be achieved. We will not repeat all of these provisions but were taken to them by each of the parties who, not surprisingly drew different conclusions as to the how the proposal satisfied each of them.

13 The ERZ is supported by two overlays concerning landscape and environment objectives. They seek in broad terms, to protect, conserve and enhance significant landscapes from intrusion by inappropriate development. These overlays are then supported by a suite of State and local policies and we were taken to some of these by Mr Montebello, Mr Tenace, Mr Negri and Mr Pitt. We were also taken to policies relevant to education facilities including broad statements referring to ready access to educational facilities (see Clause 21.17 – Key Issue 3).

14 Clauses 21.08 (Natural Environment) and 21.10 (Non-Urban Areas) recommends applying the ERZ to protect and enhance the existing character, landscape quality, viewlines and other natural landscape characteristics of the area, and applying the Significant Landscape Overlay (SLO) and Environmental Significance Overlay (ESO) to recognise areas of environmental/vegetation significance and provide mechanisms for their protection and enhancement. Policy at Clause 22.01 requires (amongst other matters) *that the form of development and activity levels generated by the proposal be compatible with surrounding land use.*

15 One of the general decision guidelines in the ERZ asks how the use or development relates to natural resource management. While the site provides a very attractive setting for the school, nothing we have heard convinces us that the school has a particular need for this location because of a special program or relationship in terms of resource management or environmental education.

16 We agree with Mr Negri (page 28 of his evidence statement) as to the relevant policy imperatives and the matters to be considered in assessing the proposal. However we draw a different conclusion.

17 Ultimately we remain unconvinced that this site is an appropriate location for a use of the intensity proposed. While we understand that  a Brethren  school operates at a much lower intensity than a general school catering for both primary and secondary levels, we consider that the intensity of use is still far in excess of what could be reasonably expected on a site with the particular characteristics exhibited by the review site. The site is on the very northern edge of the Templestowe/Doncaster urban area and abuts the green belt or Yarra linear corridor separating Templestowe/Doncaster from urban development in the Greensborough /Eltham areas. On the southern side of the Yarra River the zonings reflect a stepping down in intensity from Residential 1, Low Density Residential to ERZ and then to Public Park. While more intensive uses are possible in the two residential zones and the ERZ, proposals need to be considered on their individual merits having regard to the specific site context. In our view the activity levels generated by this education centre, even though operated by  the Brethren  community, is at odds with the surrounding low density residential and parkland land uses and that it is incompatible with such uses in this site context.

### **Height, setbacks and building bulk - particularly the interfaces with the adjoining parkland and with adjacent and nearby residential properties**

18 Residents were clearly concerned about the appearance of the school buildings when viewed from Summerhill Road and from residential properties fronting onto that road. In particular they were concerned about the visual appearance of the two storey gym building located along the southern side of the internal courtyard. We do not share their concerns about the appearance of this building

and consider that the design is such that it will appear to sit within the sloping topography, with the eastern end excavated into the site. There is no requirement in the planning scheme that development must be invisible, rather that it be site responsive and in context with the surrounding neighbourhood character. The issue of visibility has been discussed in a number of VCAT decisions, most notably in recent times in *Rowcliffe Pty Ltd v Stonnington CC*.<sup>[3]</sup> and we agree with such comments.

19 Nevertheless we are concerned about the way the development interfaces with Candlebark Park to the east. Although this is of less direct concern to residents, the removal of 12 large trees and the location of a retaining wall within 2 metres and Building 3 within 5 metres of the side boundary is not a site responsive design. While we accept Building 3 is a single storey structure and that it will be set down within the site as does the existing house, we do not support the further excavation of soil and removal of trees as now proposed. On our inspection we paid particular note of the existing retaining wall and relationship of buildings, trees and the eastern boundary. Any new development should, as a minimum, attempt to locate buildings and other structures west of the existing retaining wall so that there is no need to remove any of the good quality large trees located along the eastern boundary. Retention of the existing retaining wall will also allow sufficient width for considerable supplementary planting along the park interface.

20 In a design sense, we did consider the possibility of relocating the whole building envelope some 3 to 4 metres to the west. However we became concerned about what impact this had on the western edge of the building footprint where the other retaining wall is located adjacent to the car park. In particular we are concerned that the consequential impact on vegetation to the west is likely to be considerable.

21 We are also concerned about the way in which the development interfaces with the nearest neighbouring house under construction on the lot abutting to the south. While we acknowledge that the dwelling has been located, perhaps unnecessarily, very close to the rear corner of its site and that it is orientated so that living areas and view lines do not look directly at buildings on the review site, we are nevertheless concerned at how close the access driveway and bus turning and parking area are to this residence. We have previously discussed the objectives and controls within the ERZ. There is a wide range of consent uses in the ERZ and it is unrealistic for neighbours to assume that a site in the ERZ may not be subject to any number of uses requiring a permit. However any proposal must be assessed having regard to the specific site context and it is obvious many uses could never be sensibly contemplated on the review site. Presumably a new house on the review site would cause least angst to neighbours, although that may depend on the size, footprint and siting of any house and its appurtenances. Other uses with more intensity of activity, more built form and greater adverse on-site and off-site impacts would be, quite reasonably, least expected by neighbours. In relation to the new house to the south, it is the intensity of activity so close to the boundary rather than the built form which causes us most concern. In our view it is quite reasonable to expect the narrow driveway to Summerhill Road to carry some traffic to and from the review site. However the coming and going of buses, many cars, delivery vehicles, refuse vehicles and the like is way beyond the level of activity that we would consider acceptable and far beyond the reasonable expectations of these residents when designing and locating their house so close to the boundary and to the narrow accessway to Summerhill Road.

22 It will be evident by now that we have serious reservations about whether a use of the intensity proposed can exist on this site and of the actual location of the building footprint. However the area which causes us least concern is the actual design of the buildings and we accept Mr McGauran's assessment in relation to the building materials, colours and visual appearance. While the buildings and courtyard as a whole will occupy a relatively large footprint and be highly concentrated at the eastern end of the site, we do not share concerns about visual appearance that were raised by Mr

Tenace. It is a fair assessment that buildings in this part of Templestowe are ‘mansions’, extremely large, occupy big footprints and are for the most part visually imposing within the landscape. That is certainly true of houses in the Low Density Residential Zone to the south and south east which we observed during our site visit. In such a context the buildings proposed on this site are quite acceptable and will not be overly dominating but rather set within the sloping terrain.

## Car parking and traffic

23 Mr Tenace and other residents were particularly concerned about traffic using Summerhill Road to egress the site or by people parking in Summerhill Road and then walking to and from the school property. We share their concerns and consider that the development has the potential to significantly impact on the amenity enjoyed by property owners in this short, quiet and generally low trafficked cul-de-sac.

24 At the Glenroy campus around 33% of students use the bus and at Lilydale around 50%. Mr Turnbull suggests that at the proposed school around 75% of the students would arrive by bus based on the fact that it is a consolidated campus of both schools. We are somewhat sceptical of this assumption and have been given no factual data as to why such a high proportion would travel by bus. While the consolidation of the two campuses may encourage more families to use the bus because the Templestowe site is further removed from students living closer to Glenroy and Lilydale, we consider it equally likely that families living closer to Templestowe may use private vehicles, particularly if parents desire to visit the school for some other purpose than simply dropping off and picking up students. Although  **the Brethren**  community may operate differently than the broader community, the existing bus figures for Glenroy and Lilydale suggests that for whatever reason parents do choose to drive their children – perhaps so they can see teachers, do voluntary work at the school, see other parents or because it is convenient in relation to their other day to day activities.

25 Ultimately, what proportion of children travel by bus or are driven does not hugely change traffic generation rates. Mr Turnbull suggests that if 25% of students arrive by car, then there will be 18 private vehicle movements in the peak hour. Even if we assume 50% of students arrived by car there would be only 36 private vehicles arriving/leaving in the peak hours. In our view is relatively minor and if directed to Fitzsimons Lane would be of much less concern. We accept resident submissions about the congestion along Fitzsimons Lane in peak periods and experienced it first hand during our site inspection. We consider that the traffic engineers have underestimated the inconvenience of entering and exiting the site during peak periods. Suggestions about how buses will access the site by travelling to the large roundabouts to the north and south are speculative, as are the practicalities of turning across traffic through the median breaks.

26 We reject the notion of using Westerfolds Park for overflow parking on special event days. While we recognise these occur relatively infrequently we are not persuaded about the practicality or logistics of having people bussed across the road. A better solution, and one raised by us at the hearing, maybe to allow overflow parking amongst the trees on the front part of the site. We drove our two wheel drive sedan vehicle around this part of the site and found it a quite practical operation, although some minor works would be required to assist vehicles getting on and off the drive.

Whether sufficient vehicles could be accommodated in this way to avoid using Westerfolds Park is another matter. In our view this off-site overflow parking arrangement is yet another instance of why we consider the site is inappropriate for the proposed education centre.

## Landscaping

27 Mr Tom Greenwood gave Arboricultural evidence and Mr Patrick gave landscape evidence. The trees had previously been assessed by Mr Roger Greenwood who assessed 336 trees across the whole site (Mr Tom Greenwood included an additional tree – a Desert Ash which had not been included by Mr Roger Greenwood). Of these trees, 112 are to be removed, including 12 on the eastern side of Building 3 which were not originally designated for removal.

28 While we accept that some tree removal is inevitable and may not even be undesirable in the case of poor quality specimens, we do not support the removal of such a large number of trees. This site is not within a Residential 1 or Low Density Residential Zone but instead is within an Environmental Rural Zone and affected by two overlays dealing with environmental and landscape attributes. We are particularly concerned at the very late inclusion for removal of trees along the eastern boundary at the interface with Candlebark Park. In our view it is yet another example of ad hoc changes to the plan to allow the retaining walls and Building 3 to remain as planned. A more site responsive design would have designed the buildings and retaining walls so as to retain the trees.

29 Proposals for tree replacement and ongoing landscape management require much more than a landscape plan – this is not a medium density development in a residential suburb. The zoning, overlays and the site itself require a more holistic approach. While we do not reject Mr Patrick's plan we consider that the philosophy underpinning revegetation and landscaping should be on the basis of a land management plan for the whole site. During cross examination, Mr Patrick acknowledged the need for some form of ongoing management for trees within the front part of the site. What is required for this site, whether it is used for an education centre or not, is long term management plan for existing and proposed vegetation and of the broader environmental attributes of the site.

## Other

30 Mr Pitt resisted the suggestion that a Section 173 Agreement be put in place specifically limiting the use of the education centre  **for Brethren**  use. In researching the most recent Tribunal cases concerning  **the Brethren**  community, we have found two for churches that specifically tie the use of the land to  **the Brethren**  community. If we had granted a permit we would have adopted a similar approach in this case since so much of the supporting evidence was based on the fact that this was for  **the Brethren**  community rather than a broader based school community.

## CONCLUSION

31 We consider that if this were a proposal for an education centre to be used, for example, as a small public primary school that it may not have even reached the Tribunal or that if it had, we would have quickly refused a permit. It is only because of the particular characteristics of  **a Brethren**  school that we even considered during our deliberations that a permit may be warranted, although subject to many changes to the layout and operation.

32 However we have formed the view that the shortcomings in the application are too great for us to try and redesign it, or condition it, to overcome our concerns. We also have concerns about the use of this land for an activity with the intensity of an education centre, no matter how it operates.

## DECISION

33 Having regard to the above, we will order that no permit issue.

J A Bennett  
**Presiding Member**

Christina Fong  
**Member**

---

[1] Environmental Rural Zone provisions are at Clause 35.02 and Road Zone provisions are at Clauses 43.01 and 52.29 of the Manningham Planning Scheme. Overlay provisions are at 42.01 and 42.03 and permit approvals are also triggered by Clauses 52.07, 52.17 and 52.34.

[2] Relevant provisions include Clauses 11, 12, 14, 15 (various), 18 (various), 19.03, 21.02 (various), 22.01, 22.02, 22.09 and 65.

[3] *Rowcliffe Pty Ltd v Stonnington CC* [2004] VCAT 46 (29 January 2004)