



Victorian Civil and Administrative Tribunal

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Pascoevale Gospel Trust v Nillumbik SC [2005] VCAT 2333 (3 November 2005)

Last Updated: 8 November 2005

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST

VCAT REFERENCE NO. P1323/2005
PERMIT APPLICATION NO. 645/2004/OZP

CATCHWORDS

Proposal for place of worship and associated car parking reduction and removal of native vegetation; subject land located in part within a high voltage power easement; proposed site of church building on the crest of a hill, with a proposed sealed driveway for car access to the church building; issues regarding traffic and parking issues and potential noise problems arising from same; discussion of particular characteristics  **of Brethren**  Group that proposes to use the church building, including a non-negotiable requirement for 6am Sunday morning services; permit issued.

APPLICANT	Pascoevale Gospel Trust
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
RESPONDENT/OBJECTORS	Bruce & Christine Tresider and others
SUBJECT LAND	136 Zig Zag Road North, Eltham
WHERE HELD	Melbourne
BEFORE	Philip Martin, Member
HEARING TYPE	Hearing
DATES OF HEARING	23 August and 20 September 2005
DATE OF ORDER	3 November 2005
CITATION	[2005] VCAT 2333

ORDER

In this matter, the Applicant's appeal against the Responsible Authority's failure to grant a permit within the prescribed time is granted.

The Responsible Authority is directed to issue a planning permit for the use and development of the land at 136 Zig Zag Road North, Eltham for the **use and development of the land for a place of worship and associated reduction of car parking and removal of native vegetation**, in accordance with the endorsed plans and subject to the following permit conditions:

1. Prior to the commencement of the use and development hereby permitted three 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. taper the pavement on the east side of the road, to provide a slip lane effect, 40 metres north and 40 metres south to the vehicle entry. The maximum pavement width at the vehicle access should be 2 metres;
 - b. show the vehicle access 6 metres wide with larger than normal splays to encourage easier entry and exit;
 - c. show one additional street light;
 - d. show all external lighting on the place of worship hereby permitted. Such light will be appropriately baffled and will be of an appropriate lux, so that no direct glare or unacceptable off-site effects are caused;
 - e. show all lighting proposed in the carparking area. Such lighting will be appropriately located and baffled and of an appropriate lux, so that no direct glare or unacceptable off-site effects are caused;
 - f. show the location and details (height and design) of acoustic fencing as required by the amended acoustic report submitted on Wednesday 23 March 2005, which must be generally consistent with the location and details of the acoustic fencing shown on the Mont-Eltham Drafting Pty Ltd drawing No. 55304 dated May 2005 ("Drawing 55304"). This fence must be designed by a person suitably qualified and experienced;
 - g. show landscaping around the acoustic fencing required by condition 1(f) in order to soften the visual impact of this fencing;
 - h. show the retention of trees 9 and 14 as identified on the application plans;
 - i. show the relocation of the driveway further to the south and its splitting through use of a landscape island, as generally shown in Drawing No 55304 and the Michael Smith & Associates driveway landscaping plan dated 5 August 2005;

- j. the position of exterior lighting as generally shown in the Arlin "Proposed exterior lighting" plan tabled at the VCAT hearing for appeal P1323/2005;
- k. the amendment of all relevant application plans which show the overflow car parking on the south side of the driveway, so that:
 - any existing notations which refer to the number of available overflow car parking spaces are corrected to show "20" rather than "27" spaces; and
 - the following new notation is inserted – "*All overflow car parking spaces must be excavated as necessary to ensure that the slope of these overflow spaces is no greater than 1:16*".

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. All exterior lighting installed on the land in association with this permit shall only operate during the approved hours of operation of the place of worship listed below (including the 15 minute period before and after an activity for any relevant vehicles to enter and exit the land) or during any other additional hours of operation approved in writing by the Responsible Authority.

4. No more than 200 persons may be present on the site during any approved hours of operation of the place of worship, except between the hours of 6.00am and 7.00 am on Sundays and/or on Monday evenings, when no more than 50 persons may be present on the site at any one time to the satisfaction of the Responsible Authority. In addition, these maximum of 50 persons attending the site between 6.00 and 7.00 am on Sunday mornings and/or on Monday evenings (and on any other additional after hours occasion allowed by the Responsible Authority with its prior written consent where the Responsible Authority requires that no more than 50 people attend):

- (a) can only park up to 12 vehicles on the car park on the site; and
- (b) any such vehicles must only be parked in the 12 sealed car parking spaces in the middle part of the northern end of the car park, closest to the church building.

5. The permitted hours of place of worship activities on the land under this permit (unless modified with the prior written consent of the Responsible Authority) shall be:

Sunday morning – 6.00 – 7.00 am

Sunday afternoon – any one hour time slot starting no earlier than noon and finishing no later than 7 pm

Monday – 7.30pm – 8.30 pm

One other weeknight – 7.30pm – 9.00pm

In relation to all persons who attend at the place of worship by vehicle, all such vehicles must enter

and exit the site as close as practicable to the “start” and “finish” times listed above. No vehicles may enter the driveway/car park on the land any earlier than 15 minutes before a “start” time listed above and no vehicle may exit the car park/driveway any later than 15 minutes after a “finish” time listed above.

6. Subject to any modification through the prior written consent of the Responsible Authority, the place of worship use hereby permitted shall not operate for greater than 4 and a half hours during any one week (plus the permitted additional time for any vehicles to enter and exit the land) to the satisfaction of the Responsible Authority.

7. Notwithstanding permit conditions 5 and 6 above, the Responsible Authority’s discretion to amend the permitted hours of operation of the place of worship shall be limited to any proposed additional place of worship activities on the land between 8 am and 10 pm Mondays to Fridays. Any proposed new place of worship activities on the land earlier than 8 am or later than 10 pm Mondays to Fridays or on weekends shall require the formal amendment of this permit.

8. The use hereby permitted can only be undertaken on the subject site by the Pascoe Vale Gospel Trust (← **the Brethren** →) or any successor body, to the satisfaction of the Responsible Authority.

9. 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, waste products or otherwise, to the satisfaction of the Responsible Authority.

10. The building hereby permitted must not be used or hired for non-religious functions, recreation and/or entertainment, and there shall be no amplification of noise/music associated with the use of the building.

11. Landscaping and planting of the subject land must be carried out prior to the commencement of the use of the new church building permitted under this permit and must thereafter be maintained to the satisfaction of the Responsible Authority. This landscaping must be carried out generally in accordance with the Michael Smith & Associates driveway landscaping plan dated 5 August 2005 and also generally in accordance with the Michael Smith & Associates meeting hall landscaping plan dated 8 November 2004 tabled at the VCAT hearing for appeal P1323/2005 (noting that this meeting hall landscaping plan shows what was previously the parking space in the middle of the southern end of the car park plus the disabled car parking space in the north-east corner of the car park as both instead being utilised for additional landscaping, thereby reducing the number of sealed car parking spaces south of the new church meeting hall to 34 spaces), but subject to both of the aforementioned landscaping plans being modified to show a new landscaping strip to the satisfaction of the Responsible Authority running along the central and top end of the driveway, on the south side of the driveway and of the overflow car parking area.

12. Each tree to be retained within 10 metres of the proposed buildings and works must have a Tree Protection Zone, which must extend to the periphery of the tree’s critical root zone. Each Tree Protection Zone must meet the following requirements:

- a. each Tree Protection Zone must have erected a Tree Protection Fence prior to commencement of any excavation or construction works on the site and shall be maintained in good condition to the satisfaction of the Responsible Authority until the completion of the construction works on the site;
- b. each fence shall be shifted during construction works on the site with the consent of the Responsible Authority;
- c. the Tree Protection Fence shall be constructed of suitably robust construction approved by the Responsible Authority and erected to a height of 1.5 metres around each Tree Protection Zone and the fence clearly signed "Tree Protection Zone" on all sides;
- d. no materials or equipment are to be stored within or should be allowed to enter each Tree Protection Zone. Nothing whatsoever should be attached to any Tree including temporary service wires, nails, screws and any other fixing device;
- e. no open cut trenching or excavation works are permitted within each Tree Protection Zone;
- f. there should be no changes to the soil grade level in each Tree Protection Zone;
- g. temporary access through each Tree Protection Zone can only be done with the consent of the Responsible Authority;
- h. each Tree Protection Zone shall be irrigated during construction using uncontaminated water. Irrigation rates must be 1 litre of water per centimetre of trunk girth measured at the trunk/soil interface. The site should be irrigated once a week during the summer months and once a fortnight during the winter months depending on rainfall;
- i. the entire area within each Tree Protection Zone must be mulched to a depth of 100 mm using well-composted timber based mulch.

13. Prior to the commencement of the use and development hereby permitted, the owner of the land shall enter into and comply with an agreement with Yarra Valley Water for the provision of sewerage.

14. The use hereby permitted shall not cause any nuisance or loss of amenity in any adjacent or nearby land by reason of the discharge of drainage. Storm water is to be absorbed on-site generally in accordance with the Shire of Nillumbik's "Drainage to Unserviced Allotments" document.

Alternatively, storm water from the buildings is to be directed to a holding tank with sufficient storage capacity in relation to the roof area. The overflow from the tank shall be directed to absorption trenches terminating in a one cubic metre (1m³) absorption pit, the length of the absorption trench must be calculated with relation to the volume capacity of the storage tank.

Absorption lines shall be located in the areas 1, 2 and 3 to service the access driveway, carpark and building as shown on drawing number 1343 S1.

A steel heavy duty surface grate shall be provided across the driveway at the entry point serviced with an underground drain connected to the table drain within the roadway.

All works are to be done to the satisfaction of the Responsible Authority.

15. Vehicular access and egress to the subject land from the roadway must be by way of a vehicle crossing constructed to the requirements of the Nillumbik Shire Council to suit the proposed access driveway and the vehicles that will use the crossing. The Responsible Authority must approve the location, design and construction of the crossing. Any existing unused crossing must be removed and replaced with concrete kerb, channel and nature strip to the satisfaction of Council. All vehicle crossing works are to be carried out with Council supervision under a road opening permit.

16. The access driveway and areas set aside for the parking of vehicles together with the aisles must be properly graded and formed to such levels (with a maximum slope of 1:16) that they can be utilised in accordance with the endorsed plans. The 34 car parking spaces located south of the new church meeting hall must be constructed with a sealed surface such as concrete or asphalt. The 20 overflow spaces south of the driveway do not need to be sealed but must be appropriately formed and drained. Both the sealed and the overflow car parking spaces must thereafter be maintained in a continuously useable condition all to the satisfaction of the Responsible Authority.

17. The underground drains to service the carpark and building shall be generally located as shown on the plan. All drainage pits shall be constructed in accordance with Nillumbik Shire Council's drawing number NS106. The grates on the pits servicing the driveway shall be shaped to match the profile of the swale. Outlets from these pits shall be the drains leading to the absorption lines.

18. The following are requirements of SPI Powernet:

- a. no part of the proposed building, including eaves, gutters, awnings, carports and the like is permitted on the easement;
- b. storage and/or stockpiling of materials is not permitted on the easement;
- c. a safety barrier, satisfactory to the SPI Powernet, must be erected to protect the transmission tower from vehicle damage;
- d. prior to the construction of the driveway and earthworks near the transmission line tower, detail plans must be submitted to the SPI Powernet for written approval. All works on the transmission line easement are subject to a permit to work in the vicinity of high voltage electrical apparatus.

19. The permit shall expire if any of the following occurs:

- a. the development is not commenced within two years; or

b. the development is not completed within four years.

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.

Philip Martin
Member

APPEARANCES:

For Applicant

Mr Mark Naughton (solicitor) of The Partners Advisory Pty Ltd.

Mr Naughton called the following witnesses:

- Mr Andrew Rodda of Contour Consultants gave planning evidence; and
- Mr Jason Walsh of Grogan Richards gave traffic evidence.

For Responsible Authority

Mr Jeremy Livingston (Council Planner)

For Respondent/Objectors

Mr Andrew Hooper of Counsel, by direct brief, appeared for the following people:

Bruce and Christine Tresider, Greg James, Dianne and Joe Gjuric, Paul Vinton, Michael and Maree O'Halloran, Michael and Sarah Berryman, Kay and Tom Gould, Mr & Mrs Lehunt, Kathy and Peter Bull.

In addition, the following persons appeared in person and made submissions to me:

Henry Haszler and Mr Kalanj.

REASONS

Summary

1 This matter involves a proposal for the use and development of the subject land of a place of worship and associated car parking dispensation and native vegetation removal. The site is of sloping nature, with the proposed church meeting hall on the crest of the relevant hill. The church building would be accessed by a new sealed driveway running up the hill. On the north side of the subject land there are two dwellings that are located close to the site of the proposed church meeting hall (as well as a third dwelling located further downhill). On the south side of the subject land are a number of residential properties whose backyards face towards the subject land, but with another east-west

vacant lot lying in between.

2 Part of the subject land is subject to a power easement, reflecting the fact that the subject land lies within a cleared area, where high voltage power lines transverse the site. There is in fact a high voltage line tower located on or near the crest of the hill.

3 The most contentious aspect of the proposal is the intention to use the place of worship for Sunday morning 6:00am services, which the Tribunal was told is a worldwide non-negotiable aspect of the worship activities of  **the Brethren**  Group in question here. In addition, several additional hours of worship activities are proposed on other occasions during the week, with some of these other occasions anticipated to involve  **other Brethren**  communities. Where other communities are involved, the overall maximum numbers are likely to be in the order of 100-200 persons.

4 In brief, I am satisfied that in relation to those other proposed worship activities apart from the Sunday morning 6:00am services, there is a strong and straightforward case for a permit being granted. For these less sensitive worship times and activities, I cannot see any material potential for significant amenity impacts on the local residents. With respect to the proposed 6:00am Sunday morning services, I accept there are significant amenity concerns here given the sensitivity of noise at this early hour on a weekend morning. However on balance I am satisfied that the proposal, with some suitable modifications, will be acceptable in terms of the noise created by  **the Brethren**  vehicles and/or persons for Sunday 6.00 am services.

Introduction

5 I was advised early during the first day of hearing by Mr Livingston that Council had resolved that, were it in a position to make a formal decision on the application, it would have otherwise issued a Notice of Decision to Grant a Permit.

6 This matter is an appeal under [s.79](#) of the [Planning and Environment Act 1987](#) against Council's failure to grant a permit within the prescribed time. In relation to the land at 136 Zig Zag North, Eltham ("subject land"), the proposal here is for the use and development of that land for a place of worship and associated car parking dispensation and native vegetation removal.

7 This matter required two hearing dates, being 23 August and 20 September 2005. Over the two hearing days for this matter, I heard submissions from Mr Livingston on behalf of Council, from Mr Naughton on behalf of the Applicant, from Mr Hooper on behalf of a number of local residents and Mr Haszler and Mr Kalanj made direct submissions to me. Mr Naughton also called expert planning evidence from Mr Rodda and expert traffic evidence from Mr Walsh.

8 There were a number of procedural matters which needed to be sorted out at the beginning of the first day hearing, as follows.

9 There was some debate as to exactly which persons Mr Hooper represented, and whether all of those persons were formal parties to the matter in the sense of having put in a Statement of Grounds. As events unfolded, there was a consensus that Mr Hooper only represented a certain number of persons who had duly put in a Statement of Grounds, and to the extent that Mr Hooper originally suggested that he represented any broader group of people, then the Tribunal does not accept that any such broader group of people are parties to this matter.

10 In addition to those local residents represented by Mr Hooper, it was clarified early on the first day's hearing that I would also be hearing direct submissions from Mr Haszler and from Mr Kalanj.

11 There was then discussion of the status of recent plans produced by Mr Naughton, which indicate how potential acoustic fencing might be added to the proposed church building. What emerged here was that although the formal application plans remain the plans dated December 2004, Mr Naughton

wished the more recent plans showing the potential noise walls to be treated as “concept plans”, for the general assistance of the Tribunal, noting that the draft conditions include condition 1(f) requiring such an acoustic fence. I indicated that I saw no problem with this general approach.

12 There was then a procedural challenge made by Mr Hooper whether the Applicant could rely on the two acoustic reports which had been prepared earlier in 2005 (ie the reports dated 24 February and 23 March 2005 by Watson Moss Growcott) for the Applicant. Relying on apparent Supreme Court authority that a party cannot seek to rely on important evidence without actually calling the author of that evidence to be cross-examined, Mr Hooper put to me that in the situation here I should not have any regard at all to these early 2005 noise reports produced for the Applicant, given the Applicant’s failure to call the author of these noise reports as a witness at the hearing (with the associated opportunity for cross-examination).

13 In response, Mr Naughton put to me that the normal approach in this type of situation is that the absence of any noise expert called to give evidence before the hearing should be treated more as a matter of weight, rather than the Tribunal being barred from considering the early 2005 noise reports. Mr Naughton further argued that it would be quite unfair and impractical (both in this case and as a general precedent) for parties before the Tribunal to be unable to rely on any earlier documentation unless the author of that documentation is called to give evidence before the Tribunal.

14 I note here that although Mr Hooper referred in passing to Supreme Court authority which he indicated supported his position, he did not provide me on the first morning of the hearing with a copy of any such case (ie. he did not produce copies of any cases at all supporting his position).

15 Having considered these submissions, I advised the parties that I did not accept Mr Hooper’s objection and that accordingly I would consider the early 2005 noise reports produced for the Applicant, but I would be giving them less weight in light of the failure of the Applicant to call the author of those reports before the hearing. In other words, I considered the issue here to be “a question of weight” rather than Mr Hooper’s position that I should have no regard to the early 2005 noise reports at all.

16 Given issues of my own availability due to a medical appointment during the day and the availability of the planning witness Mr Rodda, Mr Rodda gave his evidence at an early stage during the first day of hearing. I otherwise heard the submissions from Council and from the various objectors. As it became clear by the end of the first day that we would be part-heard, a further hearing was scheduled for 20 September 2005. It was also confirmed at the end of the first day of hearing that the objectors would have the ability to provide to me during the intervening break with any noise report which they wish to procure, but with Mr Naughton still having a right of response to any such resident noise report (reflecting the fact that Mr Naughton’s case was still open, whereas by the end of the first day the objectors’ was otherwise closed).

17 At the beginning of the second’s day hearing, I confirmed that I had received the Arup letter dated 6 September 2005 procured by Mr Hooper, which comments on the early 2005 noise reports produced by the Applicant. As part of opening his case, Mr Naughton circulated a supplementary noise report produced by the Applicant’s noise consultant, Watson Moss Grocott, dated 16 September 2005, which comments on the matters raised in the Arup noise report.

18 Over the rest of the morning, I heard submissions from Mr Naughton and received traffic evidence from Mr Walsh. Near the end of the hearing, there was discussion of the permit conditions in the usual way.

19 Notwithstanding that the half day hearing was scheduled to finish at 1:00pm, at about 1:40pm when we were otherwise close to finishing Mr Hooper and Mr Haszler both raised final legal points. In summary, Mr Hooper essentially tried to bolster his earlier challenge to the validity of the early 2005 noise reports, in terms of making further submissions to me regarding same and providing

copies of relevant cases. Mr Haszler raised with me his concerns that the Applicant had misled the Tribunal in terms of whether or not the Applicant has any beneficial ownership or stake in the vacant east-west lot situated immediately south of the subject land.

20 As a preliminary point, I indicated to Mr Hooper and Mr Haszler that I was unimpressed that these legal points had been raised so late in the hearing (which was already running overtime by that stage), when the relevant Practice Note requires any legal issues to be raised with the Tribunal at the earliest opportunity. I advised Mr Hooper and Mr Haszler that I did not wish in future to see any repeat situation where legal points are raised so late.

21 However in responding to the merits of these points, I advised Mr Hooper that I had already provided the parties with a ruling on his challenge on the first morning to the early 2005 noise reports, and for that reason I indicated to Mr Hooper that I considered myself to have already dealt with this issue (regardless of Mr Hooper supplying me with copies of relevant cases at the end of the hearing, when the time for him to do so was at the beginning of the hearing when he raised his challenge). In any case, Mr Hooper's supplementary submissions added little to his points raised at the beginning of the appeal.

22 In relation to Mr Haszler, I indicated that I saw my role in this appeal as simply reaching a finding on the merits of the proposal as that proposal sits within the boundaries of the subject land, and accordingly I did not see any particular practical significance or relevance to the issue of whether or not the Applicant has any beneficial interest in the adjoining vacant land. Even if any such beneficial interest or link does exist, then any future proposal by the Applicant associated with this other vacant land would need to be assessed on its merits, on another occasion.

23 After the hearing of this matter had been completed, I survived a very windswept view of the subject land. I also closely inspected the section of Zig Zag Road North in front of and lying either side of the subject land. In driving up to the locality from further south, I also inadvertently ended up driving along the whole of Zig Zag Road South as well as then connecting up with Zig Zag Road North. In exiting the locality, I then travelled further north up to the top of Zig Zag Road North.

24 I also record that the Tribunal received a letter dated 31 August 2005 from Mr Henry Haszler, simply advising the Tribunal of the correct spelling of his surname (I note with irony and a smile that in this letter Mr Haszler describes me as "Mr Phillip Martin").

Site and Locality

25 The subject land is located on the east side of Zig Zag Road North, about 100 metres south of its intersection with Wombat Drive. The overall location is about 2.5 kms north-east of the Eltham Town Centre.

26 The subject land is regular in shape with a Zig Zag Road North frontage of about 61 metres and a depth of 205 metres. The total site area is roughly 12,528 square metres. The site already has vehicle access from Zig Zag Road North and rises steeply to the east, before reaching a natural ridge line at the rear part of the subject land. On the crest there is a plateau area of approximately 30 metres before the land slopes back down steeply approximately another 35 metres until reaching the eastern boundary.

27 Much of the site lies underneath high voltage transmission lines which cross this area, with a pylon supporting these lines being located on part of the crest of the site. Most of the site is vacant apart from some scattered existing native trees.

28 Apart from the high voltage line pylon, the only improvements of the site are some internal farm fencing and a dirt driveway that runs east-west along the subject land.

29 In terms of the surrounding area, the land to the north and east of the subject land is characterised

by large residential properties, often being an acre or more in size. However the land to the south is characterised by smaller residential properties with more traditional size suburban lots, with these lots having rear yards facing towards the subject land. However, lying in between (ie. to the immediate south of the subject land) is an additional east-west oriented vacant lot which is also affected by the high voltage power lines.

30 Looking on the other side of Zig Zag Road North, there is other vacant land which allows the high voltage power lines to continue further west.

31 The closest existing buildings to the side of the proposed new church hall are two residential properties located approximately to the north-east and to the north of the site of the proposed church hall. There is also a third dwelling on the north side of the subject land, but this third dwelling is downhill, much closer to Zig Zag Road North.

32 In relation to Zig Zag Road North, this is a two lane undivided road running roughly north-south. The section of Zig Zag Road North in front of the subject land has a pavement width of approximately 6.4 metres, but then becomes somewhat narrow further to the north and south.

Proposal

33 I refer to the following useful paragraphs 3.2 to 3.13 of Council's written submission which provides a good outline of the proposal.

It is proposed to develop the review site for use as a Place of Worship.

The proposed building is to be setback approximately 136 metres from the road frontage, and setback approximately 7 metres from the northern boundary. The building will be located close to the ridgeline, and will have the approximate dimensions of 11.5 by 18.5 metres (totalling 213 square metres).

The building will comprise of a hall, foyer, toilets and two storage rooms. It is to be single storey with a pitched roof (maximum height of 7.47 metres as seen from the western elevation), and orientated so that its entrance faces south-south-west, away from abutting dwellings.

The building materials will comprise of clinker brick walls, rendered gable, and slate coloured roof tiles. The south side of the proposed building will contain a number of windows, similar in size and proportion to a dwelling. Only two other small windows will exist on the building. A separate access point is located in the north-east corner of the building to access the northern storage room.

A bitumen car parking area is to be provided to the south of the proposed building and within the transmission line easement, orientated north-south. This car park will consist of 36 car spaces (including two disabled spaces), and will be accessed via a new two-way bitumen driveway which will extend from Zig Zag Road North to the car park. The driveway will be facilitated by a new 6 metre wide crossover to be located approximately half way along the site's road frontage.

Sixteen (16) trees are nominated for removal either to allow for the proposed development or due to their poor state of health. The arborist report submitted with the application found that many of the trees are in a poor state. The proposed tree removal will leave 7 of 24 trees currently existing within 8 metres of the proposed development.

A landscape plan has been submitted and proposes the planting of a variety of indigenous canopy, middle-storey

and ground-storey vegetation to be planted around the proposed building, particularly between this building and the closest abutting residential properties to the north. A considerable amount of planting will also occur around the proposed car parking area.

The proposed development also requires some earthworks, which will mainly entail the laying of fill to create a more level area for the car park. This fill will reach a maximum depth of 1.0 metre.

The applicant has clarified that some external lighting is proposed as part of the development, this being:

- External lighting on the building which will be appropriately located and of an appropriate lux, so that no direct glare or unacceptable off-site effects are caused;
- Some bollard lighting in the car park and driveway, which will be appropriately located and baffled and of an appropriate lux, so that no direct glare or unacceptable off-site effects are caused. No pole mounted floodlighting is proposed.

The place of worship is to be used by **the 'Brethren'** Christian faith, which has established places of worship in other areas of Melbourne. **The Brethren** has a preference for small-scale community places of worship comprising local residents. It was submitted in the application that congregations on the site will generally comprise a maximum of approximately 60 persons, and will be predominantly made up of families residing in the immediate area. It was also submitted in the application that the regular weekly use of the premises will typically include:

Sunday: 6:00 - 7:00am (Lord's supper);

Sunday: Afternoons for 1 hour (gospel preaching);

Monday: 7:30 — 8:00pm (prayer meeting);

Weeknights (usually Friday): 7:30 — 9:00pm (bible reading);

The applicant has submitted that the congregation at the Sunday morning service will comprise approximately 30 people. It should also be noted that the proposal also alludes to occasional visits from members from **other Brethren** places of worship to specific readings or meetings.

Meetings of the congregation do not include the use of recorded or amplified music or the ringing of bells, and the premises will not be used for ancillary social or entertainment activities, or be made available for rent as a hall.

An acoustic report assessing the potential noise impact associated with the proposed use on neighbouring dwellings was submitted with the application. This report found the potential noise impact on the nearest dwellings, No 16 (incorrectly labelled as No. 18) and No. 20 Wombat Drive, could exceed the accepted standard. However, the report found that by using acoustic fencing, the noise emissions would be brought down to an acceptable standard. As such, the acoustic fencing is 2 metres in height and extends west from the western wall of the proposed building for a distance of approximately 10 metres, and extends east from the eastern wall for a distance of 12 metres.

34 I note that during the hearing it was conceded by Mr Naughton that the parking space in the north-east corner of the car park was too inaccessible to be feasible to use. In addition, Mr Naughton invited me to treat the car park in the middle of the southern end of the car parking area as instead being area available for landscaping. Hence in reality there are 34 sealed spaces proposed on the crest of the hill on the subject land.

Planning Controls and Policies

35 The subject land is zoned Low Density Residential Zone under the Nillumbik Planning Scheme. A planning permit is required to use the site as a place of worship pursuant to cl.32.03-1 under this zoning, together with the usual "buildings and works" permit requirement.

36 The subject land is also affected by a Significant Landscape Overlay Schedule 2, although this overlay played no particular role during the hearing or in my decision, given that the necessary native vegetation removal is fairly uncontentious.

37 Other relevant controls and policies include cl.52.06 (Car Parking), cl.52.17 (Native Vegetation) and the usual cl.65 decision guidelines.

38 The relevant State Planning Policies include cl.14.01 (Planning for Urban Development), cl.14.02 (Metropolitan Development), cl.15.05 (Noise Abatement), cl.15.09 (Conservation of Native Flora and Fauna), cl.18.02 (Carpark and Public Transport Access to Development) and cl.19.03 (Design and Built Form).

39 In terms of Council's Municipal Strategic Statement and Local Policies I was referred to cl.21.05-1 (Settlement of Housing), cl.21.05-3 (Environment Conservation and Landscape), and cl.22.12 (Neighbourhood Character Policy).

BASIS OF DECISION

40 I will not repeat the submissions of the parties, but concentrate on what I see as being the key issues here. I note that copies of those written submissions provided to me are retained on the Tribunal file, along with the relevant plans, photographs etc. that were tendered to me.

41 I consider that a good way of understanding the nature of the proposal and the associated planning issues is to split the proposal into two aspects, being:

- the proposed regular 6:00am service on Sunday mornings; and
- those other more innocuous times (ie. during less sensitive periods) when the Applicant wishes to carry out worship activities on the subject land.

42 I shall now set out my findings on the proposal, tackling the proposal from these two different aspects.

Findings of Tribunal – Aspects of Proposal Excluding 6:00am Sunday Morning Services

43 Excluding the desire of the Applicant to be able to carry out regular 6:00am services on the Sunday, I consider that the Applicant has a strong case that the proposal has planning merit, is reasonable and is deserving of planning approval. Hence I regard this aspect of the proposal as being fairly straightforward. I rely on the following points in making this finding.

Consistency of Proposal With Zoning/Policy Controls

44 I consider it to be important here that the subject land is located within a Low Density Residential Zone. There have been many previous Tribunal cases involving different forms of places of worship where the Tribunal has consistently indicated its view that there is planning merit in place of worship activities being located within residential areas, rather than keeping the two separate. In other words, the Tribunal has consistently endorsed the general approach that there is a net community benefit in allowing places of worship to locate within residential communities, in the interest of these places of worship being easily accessible to those members of the community wishing to be involved in the place of worship.

45 With this general approach in mind, I consider it generally appropriate that a new place of worship of the type proposed here be located within a Low Density Residential zone. In relation to those members of  **the Brethren**  church who live in the broader Eltham area and who wish to have the opportunity to worship together in a new place of worship facility, this seems consistent with the general purposes of the Low Density Residential zone.

46 In making my findings here, I also rely on the planning evidence of Mr Rodda on behalf of the Applicant (I consider Mr Rodda gave credible evidence).

Traffic and Parking Issues

47 In understanding the traffic issues associated with the proposal, one needs to also understand the anticipated pattern of  **the Brethren**  place of worship activity.

48 Excluding the Sunday morning worship which is dealt with further below, on other days during the week it is anticipated that the core group of 30 to 50 people will have worship activities on a Monday evening, and otherwise there may be broader activities where other  **neighbouring Brethren**  communities are invited to participate.

49 Accordingly, whereas the Monday evening activities can be expected to involve no more than 50 people, the other activities on other days may sometimes involve a larger group of between 100 and 200 persons.

50 In terms of the traffic and parking demands that will result from this activity, it is anticipated that the typical car coming to the service will carry five passengers, which will in turn reduce the number of vehicles that are involved. In terms of the number of car parking spaces provided, the proposal involves providing 34 sealed car parking spaces on the crest of the subject land, together with certain “overflow” car parking spaces on the southern side of the driveway. I note here that the evidence of Mr Walsh during the hearing was that his realistic estimate of the number of overflow spaces available in the relevant area marked up on the application plans is about 20 overflow spaces. However, he indicated that the “overflow parking area” could be lengthened so as to provide realistic room for 27 overflow car parking spaces.

51 Taking the proposal “as is”, the total available car parking would be 34 sealed spaces and an additional 20 overflow spaces, being 54 spaces in all.

52 While I note that the usual “car parking spaces per person” figure to be used for this type of proposal under the planning scheme is “0.3 spaces per person”, I am satisfied that in the circumstances here a lower figure is appropriate due to  **the Brethren**  pattern of often having five persons in each vehicle. From the various information available to me, I consider that a reduced figure of “0.25 spaces per person” is a more realistic and appropriate figure.

53 Applying this 0.25 figure to the anticipated situation here, a Monday evening worship activity

involving up to 50 people would only require 12.5 spaces. If a larger group is involved during worship activities on Tuesday, Wednesday, Thursday or Friday or on Sunday afternoons (there being no worship activities for  **the Brethren**  group on a Saturday), then a larger group of say 150 people would require 37.5 spaces. This figure is only marginally greater than the number of sealed car parking spaces being provided on the crest of the hill (ie. 34 sealed spaces).

54 Even if a very large group of 200 people attended over Tuesday to Friday or on Sunday afternoons, this would still only generate a demand for 50 spaces, which could still be accommodated when one incorporates the 20 spaces of “overflow parking”.

55 In all the circumstances then, I consider that the proposed parking arrangements for the proposed Monday to Friday worship activities or on Sunday afternoons (there being no worship activities on a Saturday) to be appropriate and reasonable. To the extent that the proposal requires dispensation from the formal statutory parking requirements under cl.52.06, I consider that dispensation to be minor and in order, given the particular worship characteristics of  **the Brethren**  group in question here.

56 In relation to the overflow car parking, I see no need to expand it to 27 spaces, and I am content with these spaces being non-sealed spaces (in keeping with the semi-rural feel of the area), but subject to these spaces being appropriated graded and to the additional landscaping strip I am requiring along the southern side of the central and upper parts of the driveway (the lower end of the driveway already has landscaping provided for on the south side).

57 With respect to the local road network, I see no problem with Zig Zag Road North and associated local roads dealing with the amount of anticipated traffic movements that will be generated by this use. In particular, I rely here on the fact that the relevant section of Zig Zag Road North in front of the subject land is over 6 metres in width and therefore more capable of accommodating turning movements in and out of the subject land. I note here that Zig Zag Road North in general is significantly wider than Zig Zag Road South. However, as a matter of good traffic engineering, I accept Council’s position via the proposed Condition1(a) that necessary widening to create a slip lane is prudent, particularly given the close proximity/exposed position of the footpath immediately west of the edge of this section of Zig Zag Road North.

58 My findings set out above are consistent with the traffic evidence from Mr Walsh, on which I rely.

Noise Issues

59 On the one hand, I accept that there are real noise concerns associated with the proposed Sunday 6:00am services, which I have dealt with further below in this decision.

60 On the other hand, I consider that none of the proposed Monday to Friday or Sunday afternoon activities and traffic movement associated with the proposed place of worship (there being no Saturday activities) would cause any significant noise impacts on any of the neighbouring residents. In other words, provided that the permit conditions are carefully constructed so as to restrict the Monday to Friday or Sunday afternoon use of the church hall to non-sensitive hours, and bearing in mind that  **the Brethren**  do not have any worship activities on the Saturday, then I consider that any noise impacts on the neighbours Monday to Friday or on Sunday afternoons will be minimal. I also rely here in the fact that:

- the noise concerns raised by the residents during the hearing mainly focused on the 6.00 am Sunday services;

- the proposal as presented to me at the hearing includes the new two metre acoustic walls extending either side of the new church meeting hall, to provide noise protection for the two dwellings which lie close by to the north; and
- the Applicant only proposes to use the church facility for a restricted number of hours per week, with even a larger group not being expected to exceed 150-200 persons.

61 Accordingly, for the purposes of these proposed Monday to Friday and Sunday afternoon place of worship activities, I consider that I do not need to even analyse the opposing noise reports produced on behalf of the Applicant and the objectors, as I do not see that there is any significant noise issue here to be addressed.

Proposed Design of Church Hall, Car Park and Driveway

62 In terms of the proposed design of the church meeting hall, it is a “plus” for the proposal that the hall has been designed to have a residential appearance. In particular, there are no obvious symbols or signs on the outside of the church meeting hall indicating its use as a place of worship, and the church hall will be of a size and design (eg. pitched roof) that is consistent with other residential buildings in the locality.

63 In relation to the proposed carpark and driveway, the driveway and the key car parking spaces on the crest of the hill will be sealed and I am satisfied that the overall design response here is appropriate. In relation to the proposed “overflow car parking”, my main concern here (given the significant slope on this part of the subject land) is that these overflow car spaces be flattened out, so that the slope of the area being used for the overflow parking be reduced to an acceptable level. The significant slope of this area is such that currently I expect most drivers would feel quite nervous about parking sideways on this part of the subject land.

Landscaping Issues

64 I note that the application involves two proposed landscaping plans. Pursuant to these landscaping plans, there would be significant additional landscaping on the sides and the rear of the new church hall, together with new landscaping around the eastern and southern sides of the carpark area. There is also a small area of new landscaping on the western side of the carpark and new landscaping proposed at the bottom of the driveway.

65 I note that the original landscape plan showed the landscaping on the south side of the carpark as actually extending over the boundary of the subject land, into the adjacent vacant block. However during the hearing Mr Naughton in response provided me with an updated landscaping plan which shows:

- none of the proposed landscaping extending over the boundary into the vacant lot to the south; and
- the former car park in the middle of the southern edge of the car parking area instead being used to provide additional landscaping.

66 Basing my decision here on this revised landscaping plan which limits the landscaping to within the boundaries of the subject land, my overall finding here is that I regard the proposed landscaping response (with one proviso) to be acceptable. I consider that the landscaping around the new church

meeting hall and carpark and at the bottom of the driveway seems an appropriate and good outcome in terms of the appearance of the site. Apart from the visual benefits of the landscaping, the landscaping should also provide a minor degree of “noise buffering” as well.

67 The proviso is that I consider that additional landscaping would be beneficial and should be provided along the central and top sections of the driveway, on the southern side of the driveway (there is already landscaping proposed on the south side of the bottom section of the driveway near Zig Zag Road North). This will assist in making the slope of the subject land look less barren and offer visual benefits for the neighbours to the south.

Amenity Impacts on Neighbouring Properties

68 I note that I have already dealt above with the issues of potential noise impacts on the neighbouring properties, and also indicated that I see the design of the proposed church hall, carpark and driveway as being appropriate.

69 The question which then arises is whether there is any other basis on which the proposal might be refused as being unacceptable, in terms of amenity impacts on the neighbouring residential properties.

70 Having considered all the submissions and relevant planning controls and policies and having conducted a view of the site, I see no other basis upon which the proposed Monday to Friday or Sunday afternoon place of worship activities (and associated car parking dispensation and removal of native vegetation) should be refused on “amenity” grounds (there being no Saturday activities).

71 It needs to be borne in mind here that the subject land is not “pristine wilderness” but a largely vacant and windswept piece of land which is dominated by the high voltage power lines and in particular the pylon located on the crest of the subject land. In this regard, the visual amenity associated with the subject land can fairly be said to already be somewhat blighted by the high voltage power lines, and the proposal needs to be considered in this light.

72 A further important factor here is the particular expected pattern of usage of the facility associated with  **the Brethren**  group. That is, Mr Naughton advised that it can be expected that there will be only four and a half hours or so of usage of the church facility during any one week. While the position might be different if the proposed facility was to be heavily utilised by the worshippers and/or potentially hired out to third parties, the position here is that the Applicant is only putting forward the proposed use of the church hall during very limited hours, and with the Applicant content for the permit to be tied to this particular church group.

73 For the reasons set out above, I consider that the overall nature of the proposed Monday to Friday or Sunday afternoon use of the subject land by the Applicant (there being no Saturday activities) will involve only modest hours and should be relatively innocuous in terms of any amenity impacts. Again I also rely here on the planning evidence of Mr Rodda during the hearing.

Relevant Previous Tribunal Decisions

74 While there is no need for me to list them specifically, suffice to say that Mr Naughton provided me with a copy of many previous Tribunal decisions where  **similar Brethren**  place of worship proposals had been approved by the Tribunal. While this case still turns on its own merits, it is another “plus” for the Application that other like Brethen applications with similar features (eg Sunday 6.00 am services) have previously been approved by the Tribunal.

Findings of Tribunal – Noise Issues Arising from Proposed Sunday Morning 6:00am Service

75 As a starting point, I might have otherwise expected some debate at the hearing regarding other potential Sunday morning worship times apart from 6.00 am. However Mr Naughton advised me that having 6.00 am Sunday services is a mandatory aspect  **of Brethren**  worship world-wide. Hence the proposal here rises or falls on whether 6.00 am services are ultimately acceptable.

76 As alluded to, I can see some real amenity issues with 6.00 am Sunday services. I accept that nearby residents have significant concerns about noise issues associated with cars driving up the driveway, then parking, then people getting out of the cars and entering the church meeting hall this early on a Sunday morning.

77 A useful guide here is to seek the best outcome in terms of “net community benefit”, pursuant to Clause 11 of the Planning Scheme. In this regard, on the one hand, I have discussed above the policy support for residentially zoned areas being able to accommodate local places of worship, rather than banishing places of worship to other non-residential locations.

78 On the other hand, Mr Haszler’s submission included raising the question of what benefits there will be for the local community of  **the Brethren**  congregation being established on the subject land. This is a fair question. Mr Naughton put to me that the main benefits here would be to have a good quality development of the site and the fact that the site will only be actively used for a limited number of hours during the week. However I expect many members of the local community would regard Mr Naughton’s “benefit of a good quality development on the site” as more being a basic expectation of the proponent.

79 I note here that it was common ground during the hearing that attendance at the  **proposed Brethren**  place of worship activities is essentially limited to select local community members or visiting members of other like communities. There does not seem to be any scope for offering worship to casual attendees. It follows that unlike many other Christian churches, it would appear that the Applicant here will not:

- offer casual worship opportunities to the local community (eg for those local community members who may wish to worship at easter and christmas time); or
- offer any broader activities open to anyone in the local community such as child play groups, youth group activities, Sunday school activities etc.

80 My comments above are not intended in any way as any criticism of the Applicant (faith takes many forms). However, from a planning perspective, it is appropriate that I consider the implications of the intended method of operation of the  **proposed Brethren**  place of worship in the context of its perspective local community.

81 My finding here is that, when considering “net community benefit”, the “bar is raised” in terms of the Applicant having to convince me of the acceptability of the proposed Sunday 6.00 am services, given that I am struggling to see many other potential benefits for the local community other than the limited hours of operation of the proposed facility and a good quality development.

82 In this context, the critical question is whether the likely noise associated with the proposed Sunday 6.00 am services would create any unacceptable amenity impacts on the occupants of the neighbouring dwellings. I am focusing here in particular on the two dwellings to the north of the location of the proposed new church building, plus the dwellings further to the south that have back yards that face towards the proposed driveway or where the new church building will sit. The submissions from Mr Hooper and from the other two neighbours were that these noise impacts will be major and unacceptable. Mr Naughton and Council put to me that these noise impacts will be

within reasonable parameters.

83 An important issue here is the background noise reports. In summary, the February and March 2005 Watson Moss Growcott noise reports support the proposal on the strength of:

- the proposal being amended to install two 2 metre high acoustic fences either side of the proposed church building, as shown in the plan attached to the March 2005 report; and
- the conclusion in the March 2005 report that the dwellings to the south will be too far away to require any noise attenuation measures, and that the proposed two noise walls will keep noise levels measured at the outside of the two dwellings close by to the north below 60dB(A)max.

84 The Arup report dated 6 September 2005 procured by Mr Hooper criticises various aspects of the early 2005 Growcott reports. Apart from what might be called some “grumblings” about methodology, the Arup report most relevantly criticises:

- the Growcott use of 60dB(A)max as the benchmark for noise impacts, when the Growcott survey work shows the Lmax during 5.30-6.00 am on the relevant Sunday morning to be 54dB(A)max; and
- the failure by Growcotts to use an assessment approach of ensuring that the maximum allowable noise level does not exceed the relevant L90 background noise level by more than 15dB(A) when assessed outside the bedroom window.

85 The key aspects of the Growcott letter of 16 September 2005 for our purposes are that it:

- submits that a noise benchmark below 60dB(A) and/or applying a requirement that the relevant L90 background noise level must not be exceeded by more than 15dB(A) would be overly conservative, when considered in the context of what Growcotts argue to be the relevant standard industry practices; and
- reiterates the view of Growcotts that no dwelling will be close enough to the driveway for there to be any unreasonable noise impacts from cars traversing the driveway, and in relation to car park noise the two dwellings to the north will be adequately protected by the two noise walls ie noise will be kept below 60 dB(A)max.

86 Having considered the submissions during the hearing, these various noise reports and from my view of the site, on balance I am satisfied that there will be no unacceptable noise impacts from the proposed 6.00 am Sunday morning services, for the following reasons:

- I consider the combined Growcott noise evidence to be broadly credible, and I am not satisfied that the Arup letter of 6 September 2005 raises sufficient doubts to justify a refusal of the Application;
- whereas many appeals involving contentious noise issues involve a significant volume of passing traffic, the reality here is that the proposed 6.00 am Sunday service only involves in the order of 30-50 people, driving up to 12 vehicles, that it can be expected will only need to drive once up the driveway to the church building, and then a second time after the service in departing. I am struggling to see that there would be any reason for any of these vehicles to do multiple trips up and down the driveway as part of 6.00 am Sunday worship;

- Mr Naughton’s submission included putting to me that part of the worship experience for **the Brethren** group is that members are expected to not talk when parking and entering or when departing the church building. There was no evidence presented to me during the hearing which might indicate the reality is otherwise;
- Mr Livingston emphasised that Council’s processing of this Application included making enquiries to other relevant Councils where there **are Brethren** communities, and that these enquiries did not reveal any complaints about amenity impacts arising from any **other Brethren** churches. While I take Mr Haszler’s point that some of these **other Brethren** churches might be located in somewhat different physical settings, nevertheless it seems a significant “plus” for the proposal here that **the Brethren** church across broader Melbourne apparently has a commendable track record of being a “good neighbour”;
- I am satisfied that the proposed new two metre noise walls are an appropriate response in terms of protecting the two dwellings to the north from noise. I also note that the dwelling situated more to the north-west is also situated somewhat lower relative to the position of the new church meeting hall, with the result that this difference in height in itself should provide some noise reduction;
- I am also satisfied that the residential properties to the south are far enough away that there are no unacceptable noise impacts on their back yards and/or the rear of their dwellings. While the position may well have been different in the absence of the vacant east-west lot lying in between the subject land and these southern residential properties, the reality is that this vacant lot provides a significant buffer (particularly as this vacant lot contains significant vegetation closer to Zig Zag Road North);
- in terms of assessing “net community benefit” as alluded to above and ultimately approving the proposal, I see a “quid pro quo” here in that it is appropriate that the approval include tight regulation of the new use and development through the permit conditions. In particular, I consider it appropriate that the 6.00 Sunday services be subject to a condition requiring that:

* this service involve no greater than 50 people, who must use no more than 12 vehicles to transport themselves to the 6.00 am service;

* any vehicles used in conjunction with this Sunday 6.00 am service must enter the subject land no earlier than 5.45 am and leave no later than 7.15 am; and

* the 12 car parking spaces which must be used for 6.00 am Sunday services are the 12 spaces at the middle section of the northern end of the car park area, closest to the new church building. This has the benefit of ensuring that cars parked in association with the 6.00 am Sunday service are closer to the two noise walls, further away from the dwellings to the south, and that the walking distance between these cars and the church building is minimised. Concentrating the relevant cars in these 12 particular spaces for 6.00 am services will also assist any policing of this permit condition.

CONCLUSION

87 For the reasons set out above:

- I see there to be a strong and more straightforward case in favour of approving the proposal in relation to the less contentious Monday to Friday and Sunday afternoon proposed operations of the place of worship; and
- while there are more difficult issues associated with the proposed Sunday 6.00 am services, ultimately I consider the proposal to also be deserving of approval in relation to this aspect of the Application, albeit subject to the various permit conditions indicated above.

Philip Martin
Member