Victorian Civil and Administrative Tribunal

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Searl v Nillumbik SC [2005] VCAT 1506 (19 July 2005)

Last Updated: 26 July 2005

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST **VCAT REFERENCE NO. P796/2005**
PERMIT APPLICATION NO. 391/2004/02

APPLICANT	Tanya Searl and others
RESPONSIBLE AUTHORITY	Nillumbik Shire Council
RESPONDENT/PERMIT APPLICANT	Derby Street Gospel Trust
WHERE HELD	Melbourne
BEFORE	Russell Byard, Senior Member
HEARING TYPE	Full Hearing
DATE OF HEARING	28 June 2005
DATE OF ORDER	19 July 2005

SUBJECT LAND	**Address** 2 Henry Arthur Drive, Diamond Creek **Title Particulars** Lot 22 on Plan of Subdivision No. 507010X being the land in Certificate of Title Volume 107744 Folio 020. **Land Area and Dimensions** Irregular but roughly rectangular allotment of land on the south-east corner of the intersection of Henry Arthur Drive with Ryans Road having a frontage of 28.57 metres to the south side of Henry Arthur Drive, a depth along the west side facing Ryans Road of 52.76 metres and an area of 1,265 square metres.
CITATION	[2005] VCAT 1506

ORDERS

A. This application for review is granted to the extent of amending conditions, but otherwise refused. A permit is granted in accordance with the Notice of Decision to Grant a Permit issued by the Responsible Authority on 16 March 2005, and subject to the conditions therein modified as follows:

i. Condition 1, apart from the paragraphs denoted (a) to (j), is to be replaced with the following:

Before the use or development hereby permitted commences, amended plans must be submitted to and approved by the responsible authority. Such plans are to be drawn to scale with dimensions and three copies are to be provided. When approved the plans will be endorsed as evidence of their approval and they will then become the endorsed plans in relation to this permit. The plans are to be generally in accordance with the plans submitted with the application but modified as follows:

ii. Paragraph (b) of Condition 1 is to be deleted and the letters applicable to subsequent paragraphs are to be adjusted accordingly.

iii. Paragraph (e) of Condition 1 is to read:

(e) Front fencing and associated gates are to be designed, located and coloured so as to preserve the visual amenity and vistas of the streetscape, or so as to interfere with them to a minimal extent only.

iv. Paragraph (h) of Condition 1 is to read:

(h) Delete the two car spaces for disabled persons in the front setback and replace them with screen planting and provide two car spaces for disabled persons elsewhere so as to depict a total of 23 car parking spaces, including such two spaces for disabled persons.

v. Condition 5 is to read:

Except with the written consent of the responsible authority, no more than 60 persons are to be on the site at any time.

vi. Condition 9 is to read:

9. Except with the written consent of the responsible authority, the times at which persons may be on the site for communal worship or communal activities are limited to 6am – 7am and one hour in the afternoons on Sundays, 7.30pm – 8pm on Mondays and 7.30pm – 9pm on another week day.

B. The Responsible Authority is directed pursuant to Section 85(1)(b)(ii) of the Planning and Environment Act 1987 to issue a permit in accordance with Order A above.

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RUSSELL BYARD
SENIOR MEMBER

APPEARANCES AND EVIDENCE

Mr. Dwayne Singleton, consultant town planner, appeared for the responsible authority. He presented written and oral submissions.

Mrs. Tanya Searl, objector and applicant for review, appeared in person. She made written and oral submissions.

Mr. Mark Naughton, solicitor, appeared for the respondent/permit applicant Derby Street Gospel Trust. He presented written and oral submissions.

Various plans, photographs and other documents were tendered in evidence. The evidence and submissions in documentary form have been retained on the file of the Tribunal.

NATURE OF PROCEEDING

Application under s.82 of the Planning and Environment Act 1987 (PE Act) for review of a decision of the Responsible Authority to grant a permit.

PROPOSAL

Place of Worship with reduction of car parking requirement.

PLANNING SCHEME AND ZONING

Residential 1 Zone under the Nillumbik Planning Scheme.

GROUNDS OF APPLICATION FOR REVIEW

1. It contravenes the purpose statement (32.01) to serve local community needs.
2. It subsequently will impact on the local community and amenity.
3. It fails to comply with the Local Residency Code as outlined in the selling brochure to all prospective purchasers.

REASONS

1 This case concerns a substantial allotment of land located on the southern side of Henry Arthur Drive and on the south-eastern corner of the intersection of that street with Ryans Road. Ryans Road is a busy main road.
2 Henry Arthur Drive has been subdivided as a residential subdivision in the relatively recent past. The home of Mrs. Searl is located at No. 1 Henry Arthur Drive, opposite the review site, and on the north-eastern corner of the intersection. The land, in this locality, falls from south to north and from west to east. The house of Mrs. Searl, and its crossing to Henry Arthur Drive, is located somewhat to the east and downhill, compared with the review site. Further east, along Henry Arthur Drive, there are a number of substantial allotments. The majority of them support houses, although perhaps ¼ to ⅓ of them remain vacant at this stage.
3 There is a house on the review site. It is older than the new houses that are to be found along Henry Arthur Drive. It predates the subdivision that created the lots fronting that street.
4 This proposal is to demolish that house and to erect a modest and simple place of worship in its place. The building would have a main meeting room, a foyer, and two toilets. No other indoor facilities are intended except, perhaps, a storage cupboard. There is to be no kitchen or other facilities for entertainment and other social activities.
5 The original version of the proposed building was so plain and bland as to look more like a shed than either a house or a place of worship. It was so plain and ugly that it would contribute little to the appearance of the streetscape and neighbourhood character, even if substantially hidden by landscaping.
6 A modified version has now been proposed which is a considerable improvement. It has a much more interesting roof form and other features which make the building look more

like a house, and certainly more interesting and attractive.

7 There is an existing crossing and driveway that serves the existing house. It is proposed to retain and use those facilities for the proposed place of worship. The driveway turns to left and then right before passing under a porte-cochere (a substantial verandah under which car passengers can alight under shelter before moving to the main doorway. The main doorway leading to the foyer is located on the northern side of the building at its rear. From the porte-cochere the driveway leads down the middle of the rear portion of the allotment with car parking spaces on either side facing to the east and west respectively. The original plans provided for 25 car parking spaces, including two spaces for cars of disabled motorists to be located in the front setback beside the northern wall of the building. The other spaces are basically behind the building, although one or two on the western side come far enough north to be adjacent to the rear portion of the building.

8 The responsible authority considers 25 on-site car parking spaces as being more than sufficient, because it has suggested the deletion of three of them, including the two in front of the building, in favour of increased and improved landscaping opportunities. The permit applicant is not keen to lose these spaces, but if the two in front of the building are to go, Mr. Naughton, who appeared for the permit applicant, urges that the northern most one on the western side, also identified for deletion by the responsible authority, should be retained. I consider that to be reasonable.

9 I note that the main windows giving light into the meeting room are on the northern side having northern exposure and on the western side. There is a secondary doorway in the western wall.

10 In the course of the hearing a number of issues raised by Mrs. Searl on behalf of herself and her co-objectors were examined and discussed. At the conclusion of the hearing I gave my decision. I also gave oral reasons for my decision at that time. On some points I referred to and relied upon what I have said on some points in the course of discussion. For example, there was mention of the possibility of reduced land values applicable to nearby properties. That is not regarded as a valid planning consideration. If there is a reduction in land value that can be shown to be attributable to some new use or development nearby, the reduction is regarded as attributable to loss of amenity. It is the question of amenity that is relevant, rather than its reflection in land values, that is relevant.

11 Having given my reasons orally, which reasons were recorded, I will not attempt to recapitulate them in full here. A summary dealing with the main points raised by Mrs. Searl will suffice.

12 The case put by Mrs. Searl is really implacably opposed to the whole idea of a place of worship on this site. She is not really interested in questions of conditions that might improve the proposal, or ameliorate its problems. The thrust of her case is that it should not be there.

13 It is noted that this is a small building and would be a small place of worship. Indeed, Mrs. Searl criticised its very smallness as being out of keeping with the size of substantial houses in the locality. I do not think that is a sufficient reason for refusal.

14 This land is proposed to be used as a place of worship, by the **Plymouth Brethren**

, also known as **Exclusive Brethren**. The evidence indicates that this religious group (not to be confused with the **Open Brethren**, also sometimes known as **Christian Brethren**) do not favour the establishment of large congregations. Groups of 30 to 50 are favoured. Presumably, if a congregation starts to grow too big consideration will be given to establishing a second one.

15 I note that the evidence also indicates certain particular practices of this religious group are more benign in terms of amenity impacts compared with some other Christian denominations. They do not employ church bells, amplified music, amplified voices, or even musical instruments. The singing of hymns is part of their practice, but such singing is unaccompanied.

16 Unlike most Christian congregations, these worshippers do not congregate after worship for fellowship and social chit chat. It is their practice is to leave the place of worship in a quiet reflective manner, and to proceed home without conversation until home is reached.

17 The case presented by Mrs. Searl seemed to assume that, because this is a residential area, nothing but residences could be or should be allowed in it. This understanding has apparently been enhanced by her interpretation of a brochure connected with the promotion and sale of lots within the estate, and by her understanding of the terms of s.173 agreements (agreements made pursuant to s.173 PE Act) applicable to her land and to other purchasers. She indicates that others of her associated applicants have taken similar views. They claim to have had an expectation that nothing but houses would be allowed. Perhaps I should continue this account on the basis of what Mrs. Searl said, understanding that she is not the only one to hold the views she expressed.

18 She is really quite resentful of the Nillumbik council, which was the developer of the estate that created and sold the allotments in Henry Arthur Drive, including the property of Mrs. Searl. The council is also, of course, the responsible authority for the administration and enforcement of the planning scheme.

19 Mrs. Searl claims that the council has misled her and her neighbours as to the possibilities of future development of the review site, and perhaps other land in the subdivision. It is not relevant for me to explore the extent (if any) to which these citizens have been misled, or whether the misleading was deliberate or accidental on behalf of the council, or whether they were really misled by their own enthusiastic interpretations of various documents including the promotion brochure I have referred to (entitled Residency Code) and the s.173 agreements. I am afraid that I do not think these documents in fact bare the interpretations that the objectors have placed upon them.

20 It is true that the Residency Code concerns itself substantially with dwellings and their construction. Neither it nor, as far as I was able to determine, the s.173 agreement applicable to the review site indicates that the use or development of land within the subdivision for non-residential purposes is prohibited. So far as the Residency Code is concerned, some of the propositions included are not relevant in the present case, some are relevant only to dwellings, and others are either met or can be met by the imposition of conditions.

21 It is not my task to resolve the misunderstandings or the mistaken expectations that have apparently arisen, or much less to enforce contracts or representations thought to have been given.
22 The point is, that some of these expectations, though no doubt genuinely held, are mistaken, so far as the planning scheme is concerned. The duty of the council, acting as responsible authority, was to determine this application on its planning merits, and in the light of the relevant provisions of the planning scheme, including the purposes of the relevant zone and the applicable policies. In carrying out that duty properly, there is every possibility that it would conscientiously come to a view that a permit should be granted, notwithstanding the strictures sought to be imposed by objectors.
23 Certainly the Tribunal, in this review, is called upon to consider the proposal on its planning merits, and to determine the case accordingly. In doing so I have been obliged to put aside matters that are not relevant. That has included the misunderstandings of what is relevant to planning and the allegations of misrepresentations attributed to the council.
24 This land is in a Residential 1 zone. The purposes of this zone certainly contemplate the use of land within it for residential purposes, including the development of dwellings at a range of densities, and the encouragement of residential development that respects the neighbourhood character. It also includes this purpose:

In appropriate locations, to allow educational, recreational, religious, community and a limited range of other non-residential uses to serve local community needs.

25 It is clear from this that Residential 1 zoned land is not exclusively for residential purposes, but can include other purposes including religious ones. These non-residential uses need to be on appropriate locations. However, the submissions of Mrs. Searl to the contrary notwithstanding, I consider this to be an appropriate location for a modest place of worship. It is at one end of the estate adjacent to the main road. It is an identifiable location, and one of convenient access from the main road. Not only that, this convenient access does not involve vehicles passing along Henry Arthur Drive between the houses or through the residential streets connecting with it. Only a very small part of Henry Arthur Drive will be traversed. The location of the crossing and driveway is satisfactory. It leads cars to manoeuvre through some turns which require them to move slowly.
26 There was a suggestion made by VicRoads that the crossing and driveway might be relocated further to the east. However, the engineers of the responsible authority have determined that this idea was impractical. A further distance from the intersection would ordinarily be regarded as an advantage, but the distance to the existing crossing is sufficient. There is a wide road reserve, and although some of this might later be taken up with road widening, there is also a vegetation reserve along the road reserve, between it and the review site.
27 The serving of local community needs does not mean that people from beyond the immediate locality cannot also use the educational or recreational religious or community facilities involved. In any event, the evidence produced on behalf of the permit applicant indicates the proximity of a number of families connected with the **Plymouth**

Brethren who intend to utilise this place of worship if it is allowed. I think the purpose, insofar as it refers to the serving of local needs, is sufficiently met.

28 The Table of Uses in cl.32.01-1 of the planning scheme indicates that place of worship is a Section 1 use, for which no planning permission is required, provided that several conditions are met. The conditions are met in this case, except for two. One of those is that the site must not exceed 1200 square metres. This site at 1265 square metres exceeds that limit but only by a minor amount.

29 Another condition is that the site must adjoin, or have access to, a road in a Road Zone. Ryans Road is such a road. The site is in close proximity to Ryans Road, and is separated from it only by the narrow vegetation reserve.

30 I think it is fair to say that this site fails to meet the condition by only a narrow margin in relation to the first condition and by only a technicality in relation to the second.

31 It is a misconception to suggest that there is an obligation to necessarily meet these conditions. Meeting them just means that you can use the relevant land as a place of worship without needing a permit. It does not imply that, where the conditions are not met, such a permit should not be granted. This site very nearly meets the conditions, and to that extent, can be seen as the sort of site that is suitable for this use, even without the need to consider whether a permit should be granted.

32 I do not agree that the impact of this proposal on the local community or its amenity would be substantial or detrimental. It is probably rather similar to the impact of a dwelling on the same land. It is an exaggeration to be referring to this proposal as an intense development or use. It is true that more people, although not a huge number, will be attracted to the land at particular times, but they are quite limited times, and tend to be times that are not greatly likely to inconvenience other traffic or other people. The total number of people, noise, movement, activity and so on, considered over a whole week, is probably less than for an ordinary household.

33 Noise occasioned by vehicles and people is likely to be quite limited. There is a greater threat that neighbours, if they happen to enjoy amplified music, have children who practice on drums, or like having frequent loud parties, would be more of a threat to amenity in terms of noise, movement, traffic and parking.

34 I note that the traffic engineers of VicRoads and of the responsible authority do not suggest that vehicle access will be dangerous or that it will cause congestion. I note that the layout of the carpark means that vehicles will be able to exit whilst travelling forward. As I have already said, I consider the provision of parking to be ample.

35 The standard provision of carparking, for a place of worship of this size, would be 35 spaces. 25, or even 23, is an allowable reduction, quite appropriate in certain circumstances. Mrs. Searl was critical of the survey evidence. In her view it is less than rigorous. Perhaps it is, but it confirmed my judgement, based on knowledge and experience, that the carparking is ample. It is sufficient to enable me to be satisfied in relation to this point.

36 I do not think that the proposal will result in a unacceptable loss of local amenity or have a serious impact, or a detrimental impact on residential lifestyle or neighbourhood character. It is a misconception to think that neighbourhood character means that every

building must be used for a dwelling. This one will fit in quite well.
37 It was said that the proposal will not respect the heritage of the estate. This is not a heritage case, in terms of a Heritage Overlay or heritage legislation.
38 I note that various policy provisions were referred to, such as the appropriateness of contributing positively to the local and urban character, providing attractive streetscapes and the like. Reference to these things seemed to imply that the proposal would be contrary to them, but in my opinion that has not been shown at all.
39 References to street design under cl.56 of the planning scheme were, in my opinion, misguided and irrelevant. Clause 56 relates to subdivision, where no subdivision here is proposed. Mrs. Searl argued that the values sought to be achieved by the cl.56 provisions might be compromised by the proposal. However, it is better to argue the strengths and weaknesses of the proposal directly, and in terms of zone purposes and policy provisions, than to seek to do it indirectly, by reference to provisions that were only ever relevant to a previous subdivision that has already been developed.
40 As I have said, I do not agree with what I have designated as exaggerations such as "high-intensity usage" and "intensive and intrusive use".
41 For the reasons given in the course of the hearing I am of the view that the application for review must, in substance, be refused.
42 However, Mr. Naughton observed that the nature of the review in this case, namely an objector's review of the decision of the responsible authority to grant a permit, opens the whole question of whether a permit should be granted, and if so, on what conditions. This led him to seek to argue for modified conditions. This was in spite of the fact that the permit applicant has not itself applied for a review of any of the conditions pursuant to s.80 PE Act. Not only that, it has not even given notice to the other parties or to the Tribunal, that it was intended to rely on the objectors' review to attack the conditions, or seek their liberalisation. I think that if such a course was intended, then a review under s.80 was appropriate, or at least notice of that sort should have been given. The other parties, and I myself, came to the hearing on the understanding that the conditions proposed by the responsible authority were accepted, and not under challenge.
43 I do note that some of the conditions are quite restrictive. It may well be that, had notice been given, and other parties given an opportunity to deal with the matter, I might have been persuaded to liberalise some of the conditions. Thus, I am not necessarily of the view that all the conditions need be in their present form, or as restrictive as they now are.
44 I am happy to utilise the circumstance where the objectors have sought a review to clarify and improve the wording of conditions or, as I said in the hearing, to "tidy them up".
45 Mr. Naughton, in particular, referred to conditions 5 and 9. These limit the number of persons allowed on the premises to 60 and the times of active use of the premises to 6 – 7 am on Sundays, an hour on Sunday afternoons, 7.30 – 8 pm on Monday and one other weeknight from 7.30 – 9 pm.
46 Both these conditions, on my reading of them, intend that there should be some flexibility in relation to numbers and hours. I think that flexibility is quite appropriate. Mr. Naughton claimed that these restrictions, in these two conditions, were based on

indications of probable use given by his client, rather than intended maximums. Be that as it may, I think the situation can be adequately dealt with, without unfairness, by ensuring that the wording makes it clear that the numbers and times can be exceeded with the consent of the responsible authority. Such consent does not need to be limited to one individual occasions. Hours might be extended by such a secondary consent, for example, on all Mondays, or permanently (subject to the consent not being revoked or varied) in other respects. The same can be true as to numbers.

47 In fact, I make it plain here that I think the indicated hours and numbers are unnecessarily restrictive, and that the discretion reserved to the responsible authority to extend them, should be available and should be utilised appropriately. I note, by the way, that if application for such secondary consent is made and refused, or granted on unsatisfactory terms or to an unsatisfactory extent, the permit applicant can always come back to this Tribunal pursuant to s.149 PE Act to have the Tribunal adjudicate on the matter. Generally speaking, the existence of such a remedy is likely to induce good sense, and obviate the need to resort to the remedy. I note that such procedures can generally be dealt with very promptly by the Tribunal pursuant to its new Friday procedures. I think this means the dealing with the question is superior to the applicant having to seek an amendment of the permit pursuant to s.87 PE Act. After all, it might not be able to find a ground for amendment under that section.

48 One of the oddities of this case is Condition 1(b) as set out in the Notice of Decision to Grant a Permit of the responsible authority. Condition 1 requires modified plans to be submitted to and approved by the responsible authority. The various paragraphs of Condition 1 set out the modifications required. Paragraph (b) does not really read like a modification. It says:

> (b) include a five star energy assessment for the place of worship, as required by the Henry Arthur Estate guidelines;

49 This is a reference to the residency code, previously mentioned. Number 4 of the numbered propositions therein refers to five star energy rating and says:

"All residences are to be a minimum 5 star energy rating. Lots have been oriented to assist solar efficient design.

50 This code document refers to dwellings, not places of worship. There does not appear to be any relevant provision in the guideline. In fact, I am not sure whether there is a basis of assessment for places of worship in terms of five star energy efficiency. The permit applicant's attempt to meet the condition was rejected as being appropriate to residences. The representative of the responsible authority was not even able to assure me that there was such a thing. In any event, even if there is, the matter is adequately covered by the s.173 agreement that applies to the land. I therefore propose to delete paragraph (b).

51 A further issue concerns boundary fences. Numbered paragraph 11 in the code, the

guidelines document reads:

11. **Boundary fences.** No dwelling is to have a fence on or between the title boundary of the lot adjoining a roadway and the front building line of any residents on a lot, with the exception of a side boundary fence. Any side boundary fence or hedges forward of the building line of any residence are not to exceed a height of 1.2 metres. The purpose of this requirement is to preserve the visual amenity of the estate and the vistas of the streetscape.

52 The first thing to be said is that this applies to residences, not places of worship. The needs of a residence are somewhat different to that of a place of worship. Residences are frequented much more than place of worship, especially, it **seems, Brethren** places of worship. It is highly desirable that there should be a fence, or other means of preventing vehicles not connected with worship activities from entering the site at other times, and going to the fairly secluded rear parking area. The same need does not arise in the same way, or with nearly the same urgency, in relation to a house. A fence of sparse metal pickets of an unobtrusive colour might achieve the purpose of paragraph 11 without necessarily adopting the formula contained in it, that is intended for houses. I propose therefore to modify the terms of paragraph (e) of Condition 1 to introduce a little more flexibility in relation to the design of the fence.

53 Condition 1(h) deals with the deletion of the two disabled persons car parking spaces in the front setback and the first car space on the western side of the carpark, all to be replaced with screen planting. I propose to have the two disabled spaces relocated and a reduction of spaces from 25 to 23. This implies retention of the spaces on the western side. There is ample space for landscape planting between the western row of car parking spaces and the frontage to the street, particularly as it is supplemented by the opportunities offered by the vegetation reserve.

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RUSSELL BYARD
SENIOR MEMBER