VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

planning and environment DIVISION

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| planning and environment LIST | vcat reference Nos. P2131/2018  Permit Application no. TPA/48214 |
| CATCHWORDS | |
| *Section 77 Planning and Environment Act 1987*; Monash Planning Scheme; Neighbourhood Residential Zone; Heritage Overlay; Design and Development Overlay; Activity Centre; Demolition; Place of Assembly; Net Community Benefit. | |

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| APPLICANT | The Coptic Orthodox Church (Victoria) Property Trust |
| responsible authority | Monash City Council |
| RESPONDENTs | Scott Brydon, Trevor Winston Young & Beverly May Young. |
| SUBJECT LAND | 2 & 4 Palmer Street, Oakleigh |
| WHERE HELD | Melbourne |
| BEFORE | Joel Templar, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 16 and 17 May and 31 October 2019 |
| date of interim order | 18 November 2019 |
| DATE OF ORDER | 18 December 2019 |
| CITATION | The Coptic Orthodox Church (Victoria) Property Trust v Monash CC [2019] VCAT 1994 |

# Order

### No permit granted

1. In application P2131/2018 the decision of the responsible authority is affirmed.
2. In planning permit application TPA/48214 no permit is granted.

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| **Joel Templar**  **Member** |  |  |



# Appearances

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| For The Coptic Orthodox Church (Victoria) Property Trust | Ms Jane Sharp of counsel by direct access.  She called evidence from the following witnesses:   * Father Daniel Ghabrial, Senior Priest, Archangel Michael and Saint Anthony’s Church. * Mr Bryce Raworth, heritage architect of Bryce Raworth and Associates. * Mr Terry Hardingham, traffic engineer of O’Brien Traffic. * Mr Thomas Evans, acoustic engineer of Resonate. * Mr Will Bromhead, town planner of Ratio Consultants. |
| For Monash City Council | Ms Maria Marshall, lawyer of Maddocks Lawyers. She called evidence from the following witness:   * Ms Anita Brady, heritage consultant of Lovell Chen. |
| For Scott Brydon | Mr John Ward, in person (on days 1 and 2 only). |
| For Trevor Winston Young and Beverly May Young | Mr Trevor Young, in person. |

# Information

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| Description of proposal | Demolition of the existing buildings and use & development of the land for the purposes of a place of assembly, ancillary facilities associated with the adjacent Place of Worship (Coptic Orthodox Church) and reduction of the car parking requirements under clause 52.06 of the Monash Planning Scheme. |
| Nature of proceeding | Application under section 77 of the *Planning and Environment Act 1987* – to review the refusal to grant a permit. |
| Planning scheme | Monash Planning Scheme (the scheme). |
| Zone and overlays | Neighbourhood Residential Zone Schedule 1.  Design and Development Overlay Schedule 11.  Heritage Overlay Schedule 92. |
| Permit requirements | Clause 32.09-2 – to use the land for a place of assembly.  Clause 32.09-9 – to construct a building or construct or carry out works for a use in section 2 of clause 32.09-2.  Clause 43.01-1 – to demolish a building and to construct a building or construct or carry out works.  Clause 43.02-2 – to construct a building or construct or carry out works.  Clause 52.06-3 – to reduce (including reduce to zero) the number of car parking spaces required under Clause 52.06-5. |
| Land description | The review site is the composition of two separate lots known as 2 and 4 Palmer Street. It is regular in shape with a combined frontage width of 30.48 metres, length of 39.62 metres with an overall site area of 1205 square metres. The topography falls from east to west with a maximum of 0.62 metres fall. Each lot currently contains two single storey buildings. |
| Tribunal inspection | 17 May 2019, 28 October 2019 and 14 November 2019. |

# Reasons[[1]](#footnote-1)

## What is this proceeding about?

1. This proceeding concerns the council’s refusal to grant a planning permit for demolition, use and development of the land as a place of assembly, ancillary facilities associated with the adjacent Place of Worship (Coptic Orthodox Church) and reduction of car parking requirements.
2. Initially, the application for planning permit now before the tribunal comprised two separate permit applications (TPA/48059 and TPA/48214) and two separate tribunal proceedings (P2121/2019 and P2131/2019 respectively).
3. The first was for:

Demolition of both dwellings in a heritage overlay and to construct and use the land for an at grade temporary car park associated with the adjacent place of worship.

1. The second was for:

Development and use of the land for a place of assembly, ancillary facilities associated with the adjacent place of worship and reduction of the car parking requirements.

1. At the request of the applicant and with no objection by any party and by Order of the tribunal dated 20 May 2019, both permit applications and applications for review were effectively combined into one and proceeding P2121/2019 was withdrawn.
2. The proposal now before the tribunal is:

Demolition of the existing buildings and use and development of the land for the purposes of a place of assembly, ancillary facilities associated with the adjacent Place of Worship (Coptic Orthodox Church) and reduction of the car parking requirements under clause 52.06 of the Monash Planning Scheme.

1. The proposed use and development has an intrinsic connection to the adjoining land to the west which currently occupies the Archangel Michael and St Anthony Church. The proposed use and development would be used in direct connection with the adjoining church use. The review site is currently used by the church although in a less intense manner than what is now proposed given the existing layout and condition of the buildings on the review site.
2. A key issue in this proceeding is whether a permit should be granted for demolition of the two buildings on the review site. If demolition is not acceptable, the permit application will fail. If demolition is acceptable, the other issues for consideration are:

* Is the proposed building an acceptable built form response?
* Will there be any unacceptable off-site amenity impacts?
* Is the proposed car parking acceptable?

1. This is a case where there are competing policies and aspirations in the planning scheme. On one hand, the review site sits within the Oakleigh Activity Centre, where community and cultural facilities are encouraged by the scheme. On the other, the review site is affected by a heritage overlay with two buildings that are listed as contributory and where heritage policy seeks to conserve buildings of heritage significance and that new development be sympathetic to its heritage context.
2. In such cases, the scheme requires that decision makers integrate the range of policy considerations in order to arrive at the decision which favours net community benefit for present and future generations.
3. In order to arrive at a decision about this, the various merits of the proposal must be considered and I do so below.
4. In summary, when balancing all considerations, I find that net community benefit favours retention of the two existing buildings, even when taking into account the benefits that would be derived from the proposal and which would flow to the church and its congregation, if the application were approved.

## strategic context

1. The review site is in the Neighbourhood Residential Zone (NRZ) and is affected by a Heritage Overlay (HO92). It is also affected by Design and Development Overlay Schedule 11 (DDO11) which pertains to the Oakleigh Major Activity Centre.
2. A permit is required under the NRZ for the use and development of the land for a place of assembly.
3. A permit is also required under the HO for demolition and buildings and works.
4. Both of these controls have the following purpose, amongst others:

To implement the Municipal Planning Strategy and the Planning Policy Framework.

1. The NRZ also includes the following in its purpose:

To recognise areas of predominantly single and double storey residential development.

To manage and ensure that development respects the identified neighbourhood character, heritage, environmental or landscape characteristics.

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

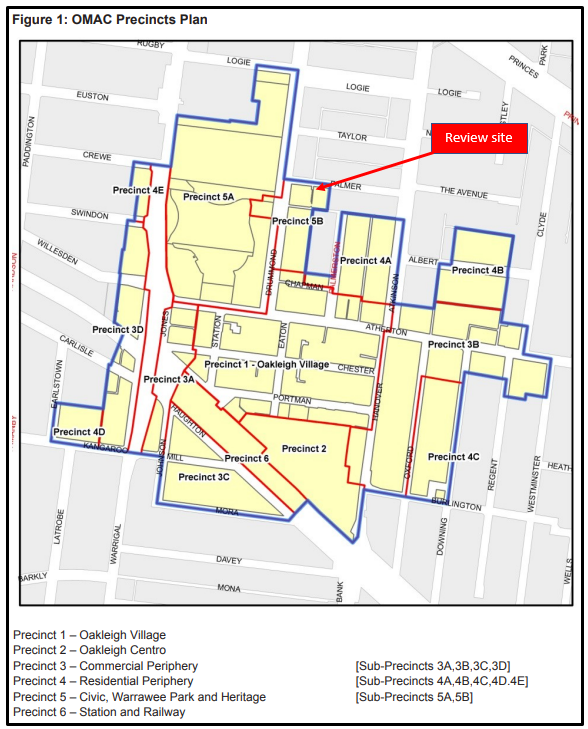
1. The HO also includes the following in its purpose:

To conserve and enhance heritage places of natural or cultural significance.

To conserve and enhance those elements which contribute to the significance of heritage places.

To ensure that development does not adversely affect the significance of heritage places.

1. Somewhat unusually, in addition to the NRZ zoning, the review site is also located within the boundaries of the Oakleigh Activity Centre. It is consequently affected by DDO11 where a permit is also required for buildings and works.



1. The design objectives of the DDO11 include:

* To ensure that the Oakleigh Major Activity Centre is developed in accordance with preferred built form outcomes.
* To avoid underdevelopment of sites.
* To maintain the prevailing streetscape rhythm and building scale of the Oakleigh Village.
* To develop the centre in a way that conserves and enhances its valued urban character and heritage places.
* To encourage a range of housing types and forms.
* To encourage environmentally sustainable design in the Oakleigh Major Activity Centre.
* To protect the economic viability of businesses by designing and constructing commercial premises to prevent unreasonable off-site amenity impacts on adjoining and nearby residential uses.
* To ensure new housing provides a high level of on-site amenity for residents.
* To improve pedestrian and access between key destination points.
* To ensure public spaces including key pedestrian streets have good solar access and weather protection.
* To ensure that new development contributes to safe and active streets.

1. The HO also includes the following relevant decision guidelines:

* Whether the location, bulk, form or appearance of the proposed building will adversely affect the significance of the heritage place.
* Whether the location, bulk, form and appearance of the proposed building is in keeping with the character and appearance of adjacent buildings and the heritage place.
* The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
* Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.

1. The DDO11 has its origins in the *Oakleigh Major Activity Centre Structure Plan, 28 August 2012* which is a reference document to that DDO schedule. The DDO11 area is separated into different precincts and sub-precincts. The review site sits within precinct 5 and sub-precinct 5B. Precinct 5 describes the existing land uses and built form respectively:

Place of Worship and facilities, Public Library and community facilities, Oakleigh Hall and commercial offices located on the east side of Drummond Street. A Heritage Overlay covers the majority of buildings located on the east side of Drummond Street.

Generally, two storey buildings on east side of Drummond Street, single storey buildings within Warrawee Park and surrounds, with the exception of the 3 storey football clubrooms pavilion.

1. The above description is generally reflective of my observations on site.
2. The different sub-precincts set out various preferred outcomes for building heights and land use throughout the overlay area. The review site is located in precinct 5B, entitled “Civic, Warrawee Park and Heritage”.
3. Specifically, precinct 5B is earmarked for continuation of existing land uses and for minimal change in scale and built form to respect the heritage character of the area. This is at the lower end of the spectrum of what the DDO11 envisages for change, whereas some sites and precincts are slated for 8 storey scale development.
4. The DDO11 and OMAC Structure Plan are largely silent on the inclusion of the review site within sub-precinct 5B other than illustrative inclusion within the boundaries of the activity centre as per the relevant maps in each. Existing built form commentary is limited to that on the east side of Drummond Street and buildings within Warrawee Park, to the west.
5. Although the review site forms part of precinct 5B in the DDO11, it comprises two lots that, upon inspection, look like part of the residential nature of Palmer Street with buildings that take on appearance of original, Interwar period dwellings.
6. The Precinct 5B objectives in DDO11 are:

* To maintain the Precinct as a consolidated focus for civic, community and recreation facilities and associated activities.
* To retain and enhance the heritage places within the Precinct. Encourage an enhanced pedestrian environment within the Precinct.
* Support the continued improvement of the public realm.

1. The DDO11 also sets out that street setbacks should respect existing and the preferred building height change is to be minimal to respect the historical character of the DDO11 precinct.
2. In terms of built form, DDO11 seeks development to be sympathetic to the heritage character and building facades of buildings within the DDO11 precinct within which the review site sits and to reflect the functions of the precinct. What is sought by the DDO11 is that the sympathetic design must be to that of buildings within this precinct, rather than those within the HO92 within which the site also sits. This is an important distinction.
3. The existence of the review site in HO92, which does not generally affect the activity centre (other than the review site), also requires balancing the competing aspirations of each overlay control, as the DDO11 includes areas of heritage significance which are recognised as being different from the residential heritage precincts. Separate heritage overlay schedules affect parts of precinct 5B within the DDO11 area.

### Amendment C125 part 2

1. Following the conclusion of the hearing, planning scheme amendment C125 part 2 (C125) was gazetted. By order dated 18 November 2019, I required the Council to provide me with written submissions about the changes implemented by that amendment and any implications for this permit application. I also provided the other parties an opportunity to respond.
2. The council and the applicant both made further submissions.
3. The council submitted that changes in policy as a result of C125 introduced new applicable policy at clause 22.01 (Residential Development and Character Policy) which did not previously apply to this proposal. It also said that additional policy considerations at clause 21.04 were introduced. The council submitted that C125 re-enforces the need for the proposed demolition to have regard to the building’s value and contribution to the heritage overlay and strengthened the proposition that the replacement building must have regard to its context.
4. The applicant said the council’s submission does nothing more to support those than what the council submissions were at the hearing. The applicant agreed that clause 22.01 is a relevant policy, albeit the applicant submitted that the substance of this clause went to the form of residential development, not non-residential development as is proposed here. It submitted that in relation to the designation of the review site on map 1 of clause 22.01, it was unclear whether the review site fell within the heritage or OMAC precinct. It said that in the event of any doubt, the purposive approach is to interpret the map as including the review site within the OMAC area, consistent with the application of the DDO11, clause 21.15 and the Oakleigh Structure Plan.
5. The applicant also submitted that the tribunal need not form a view as to whether it lied in one or the other as the applicant’s submissions consistently recognised the range of controls and policies applicable.
6. I agree with the applicant that C125 has, perhaps, confused matters with respect to the designation of the review site being in either a residential heritage precinct or in the OMAC. I find it is subject to consideration of both, given its NRZ zoning, the application of HO92 and the application of DDO11 and its inclusion within
7. Ultimately, the applicant said[[2]](#footnote-2) that C125 neither strengthened nor weakened the Council’s case.
8. C125 did not change the zoning of the review site or remove the DDO11 from it, nor were either of these provisions altered in their content.
9. Clause 21.04, ‘Residential development’, has been introduced by C125 and is relevant to this proposal. It has its origins in the *Monash Housing Strategy 2014* which sets out a housing framework for future development. This framework has eight categories of areas classified according to development potential and groups them into three broader areas within the municipality:

* Areas with future development potential;
* Areas suitable for incremental change; and
* Areas with limited development potential.

1. Neighbourhood character has also been grouped into nine key character types, of which ‘Heritage Precincts’ is one and within which the review site is situated. Policy also seeks that all new development (not just residential development) should be designed to satisfy the intent of the preferred character for each character type area and refers to clause 22.01 as containing the future preferred character statements.
2. Clause 21.04 also reinforces heritage policy elsewhere in the scheme in that it seeks to protect identified heritage precincts, buildings and places.
3. Clause 22.01-4 states the following for Heritage Precincts:

Any future development within the five Oakleigh / Hughesdale Heritage Precincts will be designed to respect the heritage values of the precinct of which it forms a part.

The scale of new buildings or extensions to dwellings will continue to reflect the prevailing building scale, where dwellings present as single storey to the street, with any double storey elements constructed to the rear, behind the line of the hipped or gable roof line. The mixture of building styles will be retained, and appropriate features and materials will be guided through the directions provided within the Heritage Overlay (and citations).

1. Local policy at clause 22.07 (Heritage Policy) seeks replacement buildings to be sympathetic to the heritage place and surrounds. In this case, the heritage place is HO92, which is an extensive precinct-based overlay that principally covers residential properties outside the activity centre.
2. Clause 22.09 (Non-Residential Use and Development in Residential Areas) also includes built form policy that seeks to ensure new development responds to the residential environment and amenity of the neighbourhood. It also seeks to discourage non-residential uses from establishing in heritage precincts.
3. Clause 22.09 also seeks that discretionary non-residential uses be located in residential areas where they are adjacent to existing activity centres but are to be avoided in heritage precincts.
4. Clause 22.09 also seeks setbacks and building height to be consistent with existing neighbourhood and residential scale.
5. The Scheme also requires decision makes to decide whether a proposal will produce acceptable outcomes[[3]](#footnote-3). An acceptable outcome may be one which, despite having some positive or negative benefits, may still be refused or approved, respectively. The Scheme then sets out that integration of policies and balancing of conflicting objectives in favour of net community benefit is to be undertaken when determining a proposal[[4]](#footnote-4).

## Demolition

1. It was the evidence of Mr Raworth that the demolition of the two buildings will result in a loss of significance in the precinct but that this may be reasonably supported. He described the loss as a modest one, even though it is of some level of significance, and his reasons for supporting their demolition included:
   1. Their poor condition, in part based on an engineering report.
   2. Their degree of visibility in the streetscape which is obstructed due to the high front fences.
   3. The mixed character of the streetscape at this end of Palmer Street.
   4. The net community benefit to be gained from the new building.
2. Mr Raworth also said that in terms of the condition of the buildings, both buildings were in poor condition but it was 4 Palmer Street that was in particularly poor condition. This was also evident from my site inspections and the evidence of Father Ghabrial that 2 Palmer Street is still habitable and used from time to time to house people.
3. As a result, Mr Raworth said that the loss of the building at 4 Palmer Street would mean that 2 Palmer Street would become isolated as the only contributory building between the church and other contributory buildings further east along Palmer Street, as 6 Palmer Street is also non-contributory.
4. I deal with each of these other issues in turn except the last matter outlined above; it is difficult to reconcile Mr Raworth’s evidence regarding net community benefit, as this requires balancing of considerations outside the area of Mr Raworth’s expertise.

### Condition of the two buildings

1. The applicant tendered reports that assessed the condition of the buildings as well as pest inspection reports. None of the authors of these reports were called to give evidence. Hence, the substance of these reports has not been able to be tested through cross examination. Accordingly, I give these reports weight accordingly.
2. In between the May and October hearing days, the applicant contacted the Council’s building department and requested that it inspect the building at 4 Palmer Street.
3. The Council inspected the building and issued a Building Notice[[5]](#footnote-5) pursuant to section 106, Division 2 of Part 8 of the *Building Act 1993 (Vic).*
4. This notice identified the following issues:

* The floor covering has been removed throughout the dwelling due to extensive moisture damage; and
* Portions of plaster lining has been detached from the ceiling due to water leak in the roof tiles; and
* There is extensive mould infestation in the bathroom; and
* The building has not been provided adequate stormwater to collect and dispose in a controlled manner.

1. The notice then set out that the owner needs to demonstrate why it should not carry out the following building work:

* Provide an inspection report on the current condition of the dwelling and required rectification work
* Cease use and occupation of the dwelling as a habitable building.

1. A building report was commissioned after the first hearing days in May and is dated 30 May 2019. This report sets out issues with the existing building and states:

* The works needed to be undertaken to re instate the structural integrity to this building is (sic) not achievable.

1. Examples of the works required include that the internal plaster, vinyl floor coverings and tiles were not salvageable.
2. I accept that the items set out in the 30 May 2019 report might not be salvageable of themselves but these items, to me, would appear to be parts of a building that would be quite readily removed and replaced. It is unclear why that could not be undertaken.
3. Other examples of issues with the building include:

* Vegetation having grown into the roof space;
* Roof rafters and battens having been cut.
* Evidence of pest damage.
* Joist and bearer framework damaged.
* A mixture of concrete and timber stumps resulting in poor foundations and pest pathways to access framework.
* Movement of front porch footings.
* Decay in beams.
* Roof tiles cracked and displaced.
* Gutters and downpipes not intact.
* Decay of weatherboard cladding.
* Floor boards severely decayed and missing in some rooms.
* Glazing broken and timber frames decayed.
* No sub-floor ventilation.

1. I accept that a degree of rectification works would be required in order to address the various issues with this building. However, I am not persuaded that the extent is unachievable. The report sets out the rectification works that are required but I agree with Ms Brady’s oral evidence that it does not state why or how they cannot be undertaken.
2. I find it difficult to place any great level of weight on this report, partly because its author was not called to give evidence and be subject to cross examination but also because it is not clear how and why these items cannot be readily addressed.
3. Mr Raworth’s evidence also quoted an engineering report assessing the condition of the buildings. However, the author of this engineering report was not called to give evidence.
4. Mr Raworth quoted the following from that report:

The structural condition of the building is very poor and in my opinion beyond repairing. It will need to be substantially rebuilt to bring it to a safe and compliant structural state.

…

Rectification works would include replacement of footings, timber bearers and joists, wall bottom plates and weatherboard cladding.

Further replacement of wall framing will be required when extent of termite damage is determined – upon removal of weatherboard cladding.

These works are not practical without demolishing the building.[[6]](#footnote-6)

1. Mr Raworth’s evidence also set out the following in response to that quotation:

This indicates that if the buildings were to have a long-term future they would essentially need to be rebuilt in terms of both structure and external cladding, becoming a facsimile of the original.[[7]](#footnote-7)

1. The fact that this engineering report is quoted in Mr Raworth’s evidence does not elevate its standing to a level commensurate with evidence of a witness who is called. It can only be treated, at best, at the same level as any other material submitted to the tribunal. Mr Raworth was not called to give structural engineering evidence and he did not do so during his evidence at the hearing. He merely relies upon this report in order to draw some of his own conclusions.
2. There are however, questions that remain with the issues raised in the engineering report:

* Why is the structural condition beyond repair?
* What extent of those items needs to be rectified?
* What extent of weatherboard cladding needs to be removed and replaced?
* Why does weatherboard cladding need to be removed to inspect the frame – why could internal plaster/cladding not be removed for that purpose?

1. The answers to these matters remain uncertain and I am not satisfied that there is adequate material before me to conclude that the buildings are in such a state of disrepair that they would need to be so substantially rebuilt so as to become a facsimile of the original, as Mr Raworth suggests.
2. It is also not clear to me that the extent of works required is so substantial as to result in the dwellings being a replica such that they would lose their heritage significance.
3. The planning scheme also does not cite the condition of a building as justification for demolition.
4. For these reasons, I am unable to conclude that the demolition of the dwellings, either together or individually, is an acceptable outcome based on their current condition.

### Contribution of the dwellings to the heritage place

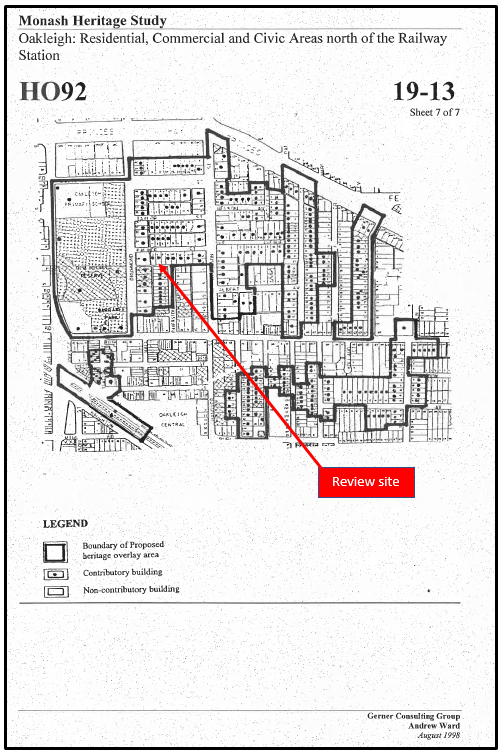
1. It was the applicant’s case that the existing buildings on the review site do not make a significant contribution to the heritage place for a number of reasons. These were set out in Mr Raworth’s evidence.
2. In his evidence, Mr Raworth stated that the heritage precinct is the sum of its parts.
3. He stated that this end of Palmer Street had a mixed heritage character owing to the church building with a modern extension on one side of the review site and a non-contributory building on the other.
4. Mr Raworth said that the dwellings on the review site:

are at the end of the residential portion of the streetscape within the heritage precinct, rather than within the heart of this portion of the streets.[[8]](#footnote-8)

1. The buildings at 2 and 4 Palmer Street are both identified as contributory buildings[[9]](#footnote-9) on a scale where buildings of significance are only identified as either non-contributory or contributory.
2. Contributory buildings are defined[[10]](#footnote-10) as:

…contributory when applied to a building or natural feature means that it adds to the cultural heritage of an identified area and/or the municipality as a whole.

1. I am not persuaded by Mr Raworth’s evidence on a number of accounts.
2. There is nothing in the scheme that I was taken to that distinguishes parts of a heritage precinct and assigns differing levels of importance to them based on whether they are in the ‘heart’ or at the edge. I find that this lack of distinction is pertinent and that the edge of a heritage precinct may be just as important as the heart. Depending on the context, the edge of a precinct could be even more important from a comprehension point of view, as it is the introductory part of a heritage precinct.
3. The western end of Palmer Street contains a large number of contributory sites as identified in the heritage study (see extract below). Further, the entire southern side of Palmer Street contains contributory buildings on all but one site.



1. Mr Raworth describes Palmer Street architecture as being of Victorian, Edwardian and Interwar styles with some later infill. I agree that Palmer Street has a mixture of dwellings from different architectural eras. The Statement of Significance for the precinct also acknowledges the range of eras and architectural styles in this precinct.
2. Palmer Street could be described as an amalgam of the eras that the precinct is identified as being significant for all in one street. It also includes an individually significant place at 13 Palmer Street (HO60).
3. I find that although Palmer Street might have a mix of dwellings styles and eras, this is consistent with the statement of significance and not a reason that I find justifies, even in part, the demolition of the buildings. In fact, it is exactly the reason why the heritage overlay has been implemented when taking the statement of significance into account.
4. I find the fact that the review site sits between a church building with a modern extension and a non-contributory site does not diminish the heritage significance of the place, this end of Palmer Street or the buildings on the review site to the point where this justifies the demolition of the existing buildings.
5. I find that the buildings on the review site contribute to the significance of the precinct and their demolition would adversely affect the significance of the heritage place. This is because they are identified as contributory dwellings, retain identifiable and visible features of the period of architecture within which they were constructed, and provide an identifiable and visible entrance to this heritage precinct when entering Palmer Street from the west.
6. I am not persuaded by the evidence that the loss of the building at 4 Palmer Street would then diminish the contribution and therefore the loss of the building at 2 Palmer Street. Although I have found that the demolition of 4 Palmer Street is not justified, even if it were, I am not persuaded that its loss would provide an acceptable basis for demolition of 2 Palmer Street, which is still a contributory building within the heritage place and precinct. It is also the edge of the precinct which provides the introduction to the precinct, which I have already made findings about.
7. In terms of the visibility of the dwellings, whilst the front fences are high and, to a degree, mask the lower parts of the front facades, the buildings are still legible as interwar dwellings above the fences.
8. The roof profiles, including the gable ends and protruding verandah gable at the front of 2 Palmer Street, windows and detailing are all elements of Californian bungalows that are recognisable and evident in the streetscape above the front fences. I am therefore not persuaded that the existing high front fences significantly diminish the significance of the buildings.

### Unintentional demolition

1. The council raised the issue of whether the lack of action taken to maintain the buildings on the review site and to let them deteriorate to their current state essentially amounts to unintentional demolition which is contrary to clause 15.03-1S which, in part, states:

* Consider whether it is appropriate to require the restoration or reconstruction of a heritage building in a Heritage Overlay that has been unlawfully or unintentionally demolished in order to retain or interpret the cultural heritage significance of the building, streetscape or area.

1. I am not persuaded that any lack of action amounts to unintentional demolition. I find that the term ‘unintentional demolition’ is different to allowing a building to deteriorate to a state of dilapidation or deterioration, as suggested by the council.
2. The policy above refers to a building that has been demolished. In this proceeding. I was not taken to any enforcement action, order or other legal proceeding or finding that sets out that there has been any demolition on the review site, whether unlawful, unintentional or otherwise.
3. I therefore find that this policy is not able to be applied in this instance where no demolition has occurred.

## Is the proposed building an acceptable built form response?

1. The council submitted that the proposal does not positively respond to the relevant built form scheme provisions and that the proposed form, height and footprint of the proposed building would be an inappropriate insertion into the heritage streetscape. It also submitted that the proposed building would not be sympathetic to and compatible with the heritage precinct and adjacent church.
2. It was the evidence of Ms Brady that a proposed non-residential building should have detail that distinguishes the proposed use from residential uses. It was also her evidence that the proposed building would not detract from the adjacent church building. Ms Brady’s evidence was that the upper floor of the proposal should be further setback from the ground floor façade. She did not have any concerns with the side setbacks.
3. Ms Brady recognised that the proposed building was not dissimilar in scale and size to other larger buildings in the general area, but she distinguished the review site from others where those buildings are located, as the review site is within the residential area and HO92 whereas the other larger buildings she referred to are not. She said that the proposed building is not sympathetic to and compatible with other buildings within Palmer Street as it is two storeys in scale and the breadth of the proposal is significantly greater than contributory buildings found in the surrounding area, particularly HO92.
4. It was also Ms Brady’s evidence that the proposed double width crossover was contrary to the intent of clause 22.07 which seeks to minimise the impact of car parking structures.
5. Mr Raworth’s evidence was that the proposed new building would sit comfortably within a streetscape where existing built form varies in height. He said that the proposed building would be similar in height to the existing church to the west. He also stated that it would be compatible with the characteristics of the heritage place, with the bulk and setbacks responsive to the adjoining church to the west and the form stepping down towards the residential streetscape to the east.
6. The respondents also raised issues with respect to the proposed built form and that it was not in keeping with the existing character of Palmer Street.
7. The Council submitted that one of the key purposes (neighbourhood character objectives) set out in the NRZ1 is:

To ensure that scale of new buildings and extensions will continue to reflect the prevailing building scale.

1. The NRZ1 includes neighbourhood character objectives, including:

To conserve and enhance the heritage significance of the precinct of which it forms part.

To retain modest building footprints, generous open space provision and front and side boundaries reflecting the prevailing development pattern.

1. The NRZ1 also includes numerous decision guidelines[[11]](#footnote-11) which I do not recite. These largely focus on ensuring development is responsive to the existing character including siting, setbacks, scale and massing, including provision for landscaping.
2. The existing character of Palmer Street is generally single storey, detached dwellings in a garden setting. Although most dwellings are fully detached, side setbacks between dwellings on respective lots are not significant, except where side driveways have been incorporated but these are limited.
3. Some lots have crossovers and some do not. Where they do exist, they are generally along one side boundary leading either to an open car space or well-hidden vehicle accommodation structures. Garages and carports are not dominant features within the streetscape.
4. Frontage setbacks are relatively consistent yet modest.
5. The proposed building is to be two storeys in scale. A third level comprises an open rooftop garden area mostly contained within the roof space of the first floor and therefore largely indistinguishable from street level, except for a balustrade/parapet.
6. The objectives of clause 22.07 seek new buildings to be sympathetic to the heritage place. The purpose of the heritage overlay includes ensuring that development does not adversely affect the significance of the heritage place.
7. I find that the built form is an acceptable response to the DDO11 aspirations and other buildings outside HO92 but not to the heritage context and existing character of Palmer Street. The surrounding residential area derives much of its character from its heritage significance and so these considerations are somewhat intertwined.
8. Although the proposed design has responded to the higher built form of the adjacent church to the west and steps down somewhat to the lower scale character of development in the residential area to the east, Palmer Street has a strong character and heritage character of single storey buildings which are generally modest in size and scale. There is a distinct absence of double storey development and the statement of significance does not identify double storey development as being characteristic. I find the proposal is not an acceptable response to this character despite the design response at the eastern interface.
9. Whilst I agree with Mr Raworth that the proposed new building might sit well when compared with buildings in Drummond Street, I find it is too disparate with buildings in Palmer Street and not sympathetic with heritage aspirations for the HO92 precinct or the character of Palmer Street in a more general sense.
10. The upper floor has a staggered setback from the ground floor façade, but is generally flush with it on the western end. On the eastern side, the upper floor façade is recessed from the ground floor façade by approximately 2.4 metres. It also includes a sloped eastern wall and a 4.120 metre setback from the eastern boundary.
11. I am not persuaded that even with these somewhat recessive elements, the double storey form is an acceptable response to the Palmer Street streetscape. Greater setbacks of the upper floor from the front of the site are required to make it more recessive in what is a predominantly single storey heritage streetscape.
12. I am not concerned with the detail and styling of the building, which clearly distinguishes it as a non-residential building consistent with Ms Brady’s evidence. Equally, I am not concerned with the front setback but I am not persuaded that the double storey form is not an acceptable insertion into the Palmer Street streetscape or that it is sympathetic to the heritage character of Palmer Street.

## Are there any other issues?

1. A number of other matters were raised during the course of the hearing. In particular, objectors raised concerns about noise impacts, particularly from the upper level roof deck, as well as traffic generation and car parking.
2. With respect to these matters I record my findings as follows:

* The review site is located within a residential area but also within a designated major activity centre. Given this and the significant increase in floor area on the review site, it can be expected that there would be an increase in activity on the review site but this is not something that I find could not be managed by appropriate conditions limiting the number of people on the roof deck, operation hours and the total number of people able to be present, consistent with the acoustic evidence.
* The proposed reduction of car parking spaces is acceptable for a site that is within an activity centre location and which enjoys good access to public transport. There are also synergies with the existing church where multi-purpose trips would be generated meaning church attendees would then move to the proposed new building, rather than additional people being accommodated. The proposal would also increase the availability of off-street parking for use by both the occupants of the review site and adjoining church, in comparison to what is currently available. Public, on-street parking is also available along Drummond Street, which is adjacent to non-residential uses.
* Increased traffic volumes are capable of being accommodated within the street network.

## Net community benefit

### What is it in planning terms?

1. The applicant submitted that a key aspect of the decision-making role in this proceeding is to balance competing scheme objectives in order to arrive at an outcome that achieves net community benefit. The applicant conceded that the proposal before me is not of the same level of net community benefit as that in *The University of Melbourne[[12]](#footnote-12)* case but said that the proposal will still have important benefits to the church community and wider community given the functions the church serves with the homeless, refugees and new arrivals to Australia.
2. Clause 65 requires decision makers to decide whether a proposal will produce acceptable outcomes having regard to the decision guidelines within that clause. The concept of acceptable outcomes contemplates that there may be positives and negatives of a proposal but that an acceptable outcome might still be one that has some negative aspects. Conversely, a proposal that has some positive attributes might still be one which does not warrant approval.
3. Net community benefit in planning is explicitly set out at clause 71.02-3, ‘Integrated decision making’. It states:

Society has various needs and expectations such as land for settlement, protection of the environment, economic wellbeing, various social needs, proper management of resources and infrastructure. Planning aims to meet these needs and expectations by addressing aspects of economic, environmental and social wellbeing affected by land use and development.

Planning and responsible authorities should endeavour to integrate the range of planning policies relevant to the issues to be determined and balance conflicting objectives in favour of net community benefit and sustainable development for the benefit of present and future generations. However, in bushfire affected areas, planning and responsible authorities must prioritise the protection of human life over all other policy considerations.

…

1. Section 60(1)(f) of the *Planning and Environment Act 1987* also requires the following to be considered:

any significant social effects and economic effects which the responsible authority considers the use or development may have.

1. In *Icon Co[[13]](#footnote-13)* the Tribunal set out the following:

41 The Court of Appeal in *Boroondara City Council v 1045 Burke Road Pty Ltd[[14]](#footnote-14)* held that in deciding whether a permit should be granted to demolish or modify a building under the Heritage Overlay, considerations of a non-heritage nature can be taken into account provided that they are relevant matters under the provisions of the Act or the purposes, objectives or decision guidelines relating to, or incorporated into, the Heritage Overlay.[[15]](#footnote-15)

42 In fact, the same proposition applies to each decision under each applicable control, which requires a permit, and then in the overall context of the permit as a whole, having regard to the well-established principle of planning decision-making articulated in *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal[[16]](#footnote-16)*, that if a planning proposal requires multiple permissions under different provisions of the planning scheme, permission must be granted under each provision.

43 The facts in the *1045 Burke Road* case related to an application for demolition of a building (‘Arden’) in a Heritage Overlay and the construction of a multi-unit residential development. The Tribunal determined to grant a permit for demolition of the existing building under the Heritage Overlay; construction of a four storey building above a basement car park for 33 dwellings; alteration of access to a Road in a Road Zone Category 1; and construction of a fence.

44 The Tribunal held that, in deciding whether the proposed demolition of Arden was acceptable or justified, it was not limited to considering matters pertaining to heritage conservation policy. It held that the exercise of its discretion in relation to demolition required reference to be made to all relevant considerations, including planning policy for urban consolidation, housing diversity, sustainable development and urban design, which were relevant to assessing the replacement building.

45 The responsible authority, Boroondara City Council, appealed against the decision. Essentially, it invoked the *National Trust* principle and claimed the Tribunal had taken into consideration irrelevant considerations when determining to grant a permit for demolition under the Heritage Overlay.

46 The Court of Appeal had this to say about the *National Trust* principle:

[121] *The National Trust Case* stands for the principle that a discretion cannot be exercised for a purpose other than that for which it is granted. This principle continues to have underlying validity. However, identification of the purposes for which the discretion is granted is undertaken by reference to the Act and the Scheme and not by reference to preconception or speculation as to what those purposes must be.

47 The Court of Appeal then went on to say with respect to the Tribunal’s decision to grant a permit for demolition under the Heritage Overlay:

[137] The purposes of the Heritage Overlay contained in cl 43.01 of the Scheme are mainly heritage purposes. But they also include the implementation of the SPPF and the LPPF including the Municipal Strategic Statement and local planning policies. The SPPF, the LPPF including the Municipal Strategic Statement and local planning policies contain non-heritage as well as heritage purposes. There is nothing in cl 43.01 that says that only heritage purposes may be considered when an application for a permit is received under the Heritage Overlay.

…

[141] In addition to considerations relevant under the Heritage Overlay control and under cl 65, there are also the considerations made relevant by the Act, including the objectives of planning, and of the planning framework under s 4(1) and (2) and the considerations listed in ss 60 and 84B.

[142] In reaching its decision, the Tribunal did take into account considerations extending beyond strictly heritage considerations. Those considerations included the architecture of the proposed building, neighbourhood character policy, development on main roads, the physical and strategic context, and the interfaces of the site.

[143] All of these considerations were relevant considerations in an application under the Heritage Overlay having regard to the provisions of the Act and the Scheme. So too are considerations such as urban consolidation, housing diversity, sustainable development and urban design. The weight to be given to these considerations is fundamentally for the decision-maker and not for the Court to determine.

[144] The Tribunal was entitled to have regard to considerations other than heritage considerations provided that the considerations it took into account did not stray beyond those authorised by the Act and the Scheme. Boroondara has not shown that any consideration taken into account by the Tribunal was extraneous to those that the Tribunal was entitled to take into account.

48 On the basis of the principle set out in the *1045 Burke Road* case, the applicant in this case submitted that the Tribunal should, when balancing competing objectives, have regard to State Planning Policy relating to urban consolidation and the imperative to accommodate massive expected population growth. This is one of the key driving imperatives at the centre of *Plan Melbourne* and a core element of the overarching strategic policy to which detailed local policies and planning controls are intended to give practical expression. In a case such as this, it is especially important to proceed upon an understanding of how the achievement of urban consolidation depends upon the sum of many individual planning decisions, and the extent to which that imperative must remain at the forefront of individual decisions if the overarching objective is to have any chance of realisation.

1. The above extract as it applies in the proceeding before me, sets out that in deciding whether to grant a permit for demolition, I must also consider other parts of the scheme that are not necessarily heritage related.
2. In *Icon Co*, the application included the demolition of two listed dwellings and the construction of 12 dwellings in their place.
3. The permit application before me is common in one respect, being the demolition of dwellings but also differs in that the replacement is not for dwellings, rather, for a place of assembly associated with an adjoining use. This requires a different approach and one which is perhaps less quantifiable than that in *Icon Co*.
4. I now turn to these matters.

### What will the benefit be?

1. Based on the above, it is necessary to set out what the benefit of the proposal will be. This is primarily obtained from the submissions and evidence of the applicant.
2. Father Ghabrial’s evidence was that the general trend of the church’s existence in Melbourne over the past 50 years has typically been to grow the number within a congregation and when that congregation outgrows its premises, a new congregation would then be formed in a location generally proximate to where the majority of the congregation live.
3. However, he said that this proposal was not to serve that general trend, as the church has practiced from the review site since about 1980 and a number of new congregations had formed and relocated elsewhere since then. It was his evidence that the purpose of this application was to address changing demographics of the existing congregation.
4. Father Ghabrial’s evidence stated:

The current proposal to build a Community Activity Centre is to address the change in the demographics of the congregation. There are more younger people needing facilities, an increasing elderly and frail persons population and newly arrived migrants need assistance with settlement. Efficiency of building use and facilitating the movement of people in a safe and comfortable manner is an urgent need and a major impetus for this project.[[17]](#footnote-17)

1. And:

The current proposal is due to the change of demographics of the congregation with more younger people needing facilities.[[18]](#footnote-18)

1. He also stated that the existing layout results in ‘poor traffic flow and inefficiency of building use’ and that varying floor levels, minimal space and lack of car parking are all demonstrative of the current facilities being inadequate, unsafe and inconvenient.
2. This proposal is not premised on providing for an increase in the number of people within the congregation or for the number of people able to be present on the wider church premises[[19]](#footnote-19) at any one time to be substantially increased. The applicant submitted that it was satisfied to accept a limitation on the number of people within the new building at any one time.
3. There is no doubt that there will be a benefit derived from the proposed new building to the existing congregation. It will provide improved facilities for the changing demographic of the church and provide more functional space.

### What will be the disbenefits?

1. One of the matters to be determined in this case is whether that benefit outweighs the loss of heritage fabric in order to accommodate the new building.
2. The disbenefits of the proposal primarily relate to the loss of the contributory heritage fabric being the existing buildings on the review site, and the insertion of an unsympathetic replacement building for which I have already made findings on.
3. Other issues such as car parking reduction or amenity impacts resulting from the proposal have the potential to result in unacceptable impacts, but I have found that the proposal will not result in unacceptable outcomes with respect to these aspects of the proposal.

### Will the proposal result in net community benefit?

1. Based on the submissions, evidence and material presented, I am not persuaded that the benefits derived from the proposal will outweigh the loss of heritage fabric.
2. I am not persuaded that the proposal results in an acceptable outcome and one which results in net community benefit when balancing competing scheme policy. I find the net community benefit is in the retention of the existing buildings on the review site and a sympathetic replacement building that responds to the heritage character of HO92 and Palmer Street.
3. The gradual erosion or ‘chipping away’ at contributory elements of a precinct-based heritage overlay has the potential to eventually erode all contributory fabric, even if this were to occur in an incremental manner. Such an approach is contrary to what the scheme seeks. Once heritage fabric is lost, it is lost forever, and unsympathetic replacement buildings are likely to remain for a significant period of time.

## Other matters

1. Ms Brady’s evidence included her opinion that the expansion of church facilities could be accommodated on the review site without requiring total demolition of the contributory buildings. Her evidence statement sets out the following:

A scheme which incorporates the heritage buildings into the new building/development may have less of a heritage impact. This could involve partial retention of the former dwellings, maintaining their principal form and presentation to Palmer Street, and a sensitive treatment to the rear of the retained buildings in terms of partial demolition, and the scale and setback to new works. The local heritage policy provides a framework in which this can occur, subject to the design approach.

1. Whilst Ms Brady was cross examined on the above passage of her evidence statement and conceded that she had not undertaken a design exercise of any other possible outcomes, she is not required to do so and neither is the tribunal. I have found that the proposal before me is unacceptable for reasons I have already set out but I note there may be other options to provide improved facilities for the church on the review site.

## Conclusion

1. Having considered all aspects of this proposal under the various scheme provisions for which a permit is required, as well as relevant policy, I find that a permit should not be granted for demolition and the replacement building for the reasons I have set out above. I have, however, considered the other aspects of the proposal notwithstanding my decision on the other matters.
2. I find that the review site is one which is generally capable of supporting a two-storey development associated with the non-residential use proposed and that the reduction of car parking for this proposal is an acceptable outcome. If the retention of the contributory heritage fabric could be achieved along with an appropriate development outcome, then one could conceivably comprehend that a permit could be issued.
3. This is a case where I find the net community benefit lies in the retention of two existing buildings of contributory heritage significance, where the planning controls and policy seek to conserve heritage places and to avoid demolition and development that will adversely affect and not be sympathetic to the heritage place.
4. The unacceptable permanent loss of heritage buildings and unsympathetic replacement building within the Palmer Street heritage streetscape and the HO92, outweigh the provision of better facilities associated with an existing use on the adjoining land in the manner proposed.
5. For the reasons given above, the decision of the responsible authority is affirmed. No permit is granted.

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| **Joel Templar**  **Member** |  |  |

1. The submissions and evidence of the parties, any supporting exhibits given at the hearing and the statements of grounds filed have all been considered in the determination of the proceeding. In accordance with the practice of the Tribunal, not all of this material will be cited or referred to in these reasons. [↑](#footnote-ref-1)
2. At paragraph 27 of its subsequent submission dated 9 December 2019. [↑](#footnote-ref-2)
3. Clause 65. [↑](#footnote-ref-3)
4. Clause 71.02-3. [↑](#footnote-ref-4)
5. Dated 5 July 2019. [↑](#footnote-ref-5)
6. Paragraph 37 of Mr Raworth’s evidence statement. [↑](#footnote-ref-6)
7. Paragraph 38 of Mr Raworth’s evidence statement. [↑](#footnote-ref-7)
8. Paragraph 39 of Mr Raworth’s evidence statement. [↑](#footnote-ref-8)
9. *Monash Heritage Study, 1999*, which is a reference document at clause 22.07. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. At clause 7.0 of the NRZ1. [↑](#footnote-ref-11)
12. *The University of Melbourne v Minister for Planning* [2011] VCAT 469 [↑](#footnote-ref-12)
13. *Icon Co (Jessamine Avenue) Land Pty Ltd v Stonnington City Council* (Red Dot) [2018] VCAT 1134 [↑](#footnote-ref-13)
14. [2015] VSCA 27. [↑](#footnote-ref-14)
15. [2015] VSCA 27 at [162]. [↑](#footnote-ref-15)
16. [2011] VSC 426. [↑](#footnote-ref-16)
17. Paragraph 21, Father Daniel Ghabrial’s evidence statement. [↑](#footnote-ref-17)
18. Page 12, Attachment B, Father Daniel Ghabrial’s evidence statement. [↑](#footnote-ref-18)
19. Including the existing church and the proposal. [↑](#footnote-ref-19)