

3 Presentation of officer reports

3.2 Kew Hebrew Congregation - referral by Minister for Planning to Standing Advisory Committee

Abstract

The purpose of this report is to inform the Urban Planning Delegated Committee (UPDC) of the Minister for Planning's decision to call in the VCAT proceedings associated with the planning permit application for the Giant Steps School for autistic children located at 11 Malmsbury Street, Kew.

On 22 September 2020, under delegation from Council, a Notice of Decision to Refuse to Grant a planning permit was issued for a planning permit application for the Giant Steps School at 11 Malmsbury Street, Kew. The planning application proposes to expand an existing education centre and includes the demolition of some of the existing buildings and construction of new buildings. The new development seeks to facilitate an increase in the number of staff and students on site.

On 7 September 2020 the Urban Planning Delegated Committee (UPDC) resolved to adopt a heritage citation for the Kew Hebrew Congregation site at 11 Malmsbury Street/53 Walpole Street Kew and to write to the Minister for Planning seeking authorisation to prepare and exhibit a planning scheme amendment to introduce a Heritage Overlay (HO) across the entire site on a permanent basis. An existing HO covers the part of the site occupied by a synagogue.

Authorisation for Amendment C342boro was granted by the Minister for Planning on 13 November 2020.

The buildings under threat of demolition by the planning permit application are proposed for heritage protection by Amendment C342boro.

The planning permit application was refused on the grounds the proposed demolition would have a detrimental impact on the social and cultural heritage significance of the place. The applicant subsequently appealed Council's decision to VCAT.

On 9 April 2021, Council received notification from VCAT the Minister for Planning has called in the planning permit application for development of the site. The Minister's decision was prompted by his consideration the VCAT proceeding raises a major issue of policy and the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives.

Section 151(1) of the *Planning and Environment Act 1987* gives the Minister for Planning the power to appoint an advisory committee to "advise on any matters which the Minister refers to them".

Clause 58(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* gives the Minister for Planning the power to call in a proceeding for review of a decision under the *Planning and Environment Act 1987* if the Minister considers that:

- a) the proceeding raises a major issue of policy; and
- b) the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives.

The Minister has referred the matter to the Priority Projects Standing Advisory Committee (SAC) for advice. The purpose of the SAC is to provide advice to the Minister for Planning on projects referred by the Building Victoria's Recovery Taskforce (BVRT), projects affected by Covid-19 and or where the Minister has agreed to, or is considering, intervention to determine if these projects will deliver acceptable planning outcomes. The SAC is expected to hold a hearing on the 11 May 2021. All parties have been invited to make submissions, including Council.

It should be noted the Minister's powers under Section 151(1) are broad and discretionary, and calling in the VCAT proceedings are consistent with this power. However, the information provided by the Minister to date is unclear in demonstrating why the referral of the planning application to the SAC is warranted. Projects eligible to be considered by the Priority Projects SAC includes those that are of regional or state significance, projects that are 'shovel ready' and have investment certainty, the project is dependent on a decision timeframe and the project aligns with government policy and priorities.

On 14 April 2021, the Minister also informed Council he was deferring making a decision on Council's application for an interim Heritage Overlay for the site until after he had completed consideration of the development application. The Minister has not provided any guidance on how consideration of the development permit might impact on his consideration of the permanent Heritage Overlay and has not provided any advice to Council regarding how to progress the planning scheme amendment.

This decision raises serious concerns with respect to the prioritisation of the development proposal over heritage protection.

The introduction of interim heritage controls would afford the site heritage protection whilst Council continues to progress Amendment C342boro and appropriately requires any development to have regard to the heritage values of the subject site. The decision not to introduce interim heritage controls also disregards the prospect the heritage buildings can be re-purposed to meet the ongoing needs of the Giant Steps School.

The decision not to introduce interim heritage controls is also inconsistent with previous advice provided by the Minister and his delegates. Previously, the Minister and officers at the Department of Environment, Land, Water and Planning (DELWP) have indicated that interim heritage controls will be supported where Council is able to demonstrate a place is under threat of demolition. An active planning application where demolition of identified heritage places is proposed is considered to meet the test of 'under threat'.

In summary, Officers have a number of concerns with the Minister's Call-In of the VCAT proceedings in relation to the Giant Steps Planning Application as discussed in the officers' report.

Officers recommend the UPDC write to the Minister for Planning prior to the commencement of the SAC hearing to highlight the following:

- Council's concerns with the Ministerial Call-In process and referral to the Priority SAC as the project is not of state or regional significance and request the Minister reconsider his Call-In.
- Council's concerns the SAC will not adequately consider the heritage merits of the site as part of their deliberations, considering the SAC hearing process will not test the merits and provide recommendations on the heritage significance of the site in the way an independent Planning Panel hearing process would with respect to Amendment C342boro.
- Council's objection to the prioritisation of the development proposal over the heritage value of the site, particularly as heritage protection is a 'seriously entertained' proposal under Amendment C342boro.
- Council's objection to the Minister's decision not to introduce interim heritage controls to the site and request the Minister to expedite the introduction of interim heritage controls.

Officers' recommendation

That the Urban Planning Delegated Committee resolve to:

1. Receive and note the Priority Projects Standing Advisory Committee hearing process as outlined in **Attachment 1**.
2. Write to the Minister for Planning to express:
 - Council's concerns with the Ministerial Call-In process and referral to the Priority SAC as the project is not of state or regional significance and request the Minister reconsider his Call-In.
 - Council's concerns the SAC will not adequately consider the heritage merits of the site as part of their deliberations, considering the SAC hearing process will not test the merits and provide recommendations on the heritage significance of the site in the same way an independent Planning Panel process would with respect to Amendment C342boro.
 - Council's objection to the prioritisation of the development proposal over the heritage value of the site, particularly as heritage protection is a 'seriously entertained' proposal under Amendment C342boro.
 - Council's objection to the Minister's decision not to introduce interim heritage controls to the site and request the Minister to expedite the introduction of interim heritage controls.

Responsible director: **Shiran Wickramasinghe, Director Urban Living**

1. Purpose

The purpose of this report is to:

1. Inform the Committee of the referral of the planning permit application by the Minister for Planning to the Priority Projects Standing Advisory Committee.
2. Seek a resolution from the Urban Planning Delegated Committee (UPDC) to write to the Minister for Planning to communicate Council's concern regarding the call-in of the application and to urge a reconsideration of this action.

2. Policy implications and relevance to community plan and council plan

Council Plan 2017-2021

The identification and protection of identified heritage places through the Study and amendment is consistent with the strategic objective to 'Protect the heritage and respect the character of the City to maintain amenity and liveability whilst recognising the need for appropriate, well-designed development for future generations' under Theme 4 - Neighbourhood Character and Heritage.

Specifically, it assists in implementing Council's commitment to '*Preserve the City's history and protect heritage properties and precincts by undertaking a municipal wide heritage review and introduce heritage overlays in the Boroondara Planning Scheme*' (Strategy 4.3).

The amendment will further assist Council in fulfilling its major initiative commitment to 'protect the City's heritage by continuing a municipal wide heritage assessment of all areas not currently subject to a heritage overlay in the Boroondara Planning Scheme'.

Boroondara Community Plan 2017-27

The Boroondara Community Plan 2017-27 sets out the 10 year vision for Boroondara's future based on values, aspirations and priorities important to the community.

The amendment implements Strategic Objective 4 of the Plan: *Protect the heritage and respect the character of the City to maintain amenity and liveability while recognising the need for appropriate, well-designed development for future generations.*

Specifically, the amendment implements the following strategies:

- **Strategy 4.3** - Preserve the City's history and protect heritage properties and precincts by undertaking a municipal-wide heritage review and introduce heritage overlays in the Boroondara Planning Scheme.
- **Strategy 4.6** - Engage with owners and developers to achieve a balance between development and protection of neighbourhood character, heritage and amenity.

Heritage Action Plan 2016

The Heritage Action Plan was adopted by Council on 2 May 2016 and establishes the framework to guide Council's heritage work program as it relates to the identification, protection, management and promotion of Boroondara's heritage assets.

The amendment is consistent with the following themes of the Heritage Action Plan 2016:

- Knowing - which seeks to identify, assess and document heritage places.
- Protecting - which seeks to provide statutory protection for identified heritage places.

Boroondara Planning Scheme

The amendment is consistent with the objectives of the Planning Policy Framework (PPF) and Local Planning Policy Framework (LPPF). In particular it addresses the following Clauses:

- Clause 15.03-1S *Heritage Conservation* which seeks to '*ensure the conservation of places of heritage significance*' by identifying, retaining and protecting places with identified heritage significance.
- Clause 21.04-5 - *Built Environment and Heritage* of the Municipal Strategic Statement which includes the objective '*to identify and protect all individual places, objects and precincts of cultural, aboriginal, urban and landscape significance*'.
- Clause 22.03-2 Heritage Policy which seeks to '*preserve 'significant' heritage places, protecting all significant heritage fabric including elements that cannot be seen from the public realm*'.

Both the PPF and LPPF seek to ensure the Heritage Overlay is applied to protect places of heritage significance in the City of Boroondara.

Plan Melbourne 2017-2050

The identification, assessment and protection of places of local heritage significance are supported by Outcome 4 of *Plan Melbourne* which seeks to ensure '*Melbourne is a distinctive and liveable city with quality design and amenity*'. Direction 4.4 recognises the contribution heritage makes to Melbourne's distinctiveness and liveability and advocates for the protection of Melbourne's heritage places.

In particular, Policy 4.4.1 recognises the need for '*continuous identification and review of currently unprotected heritage sites and targeted assessments of heritage sites in areas identified as likely to be subject to substantial change*'.

The amendment is consistent with these *Plan Melbourne* directions and initiatives.

Planning and Environment Act 1987

The amendment is consistent with the objectives of planning in Victoria, in particular the objective detailed in Section 4(1)(d) of the *Planning and Environment Act 1987* (the Act), being:

To conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value.

This means Council has a statutory obligation to continuously identify and protect places of heritage significance through the Heritage Overlay.

3. Background

Request for heritage investigation

On 24 May 2020, Council received a request from a community member to investigate the heritage significance of the buildings located at 53 Walpole Street, Kew currently not protected by the Heritage Overlay. This request was made in response to a planning permit application that requires the complete demolition of many of the buildings on the site.

The request sets out the buildings are of heritage significance to the Jewish community's cultural and religious commitment and way of life. These buildings include a 1880s dwelling used as the original synagogue from 1949-63, as well as classrooms built in 1959, a school building built in 1966 and a former caretaker's cottage built in 1970.

Council officers engaged heritage consultants Context to undertake the investigation.

Heritage Assessment

As part of their detailed assessment, Council's heritage consultants carried out internal and external inspections of the subject property and researched the history and development of the site. Following this investigation, they concluded the remaining buildings on the site were of local historical, architectural (representative), rarity, social and associative heritage significance and warrant inclusion in the Heritage Overlay.

Council's heritage consultant recommends extending the existing HO559 to cover the entire site to the title boundaries.

Context has prepared a revised heritage citation that is proposed to replace the existing heritage citation for HO559. This revised citation supports the Heritage Overlay that currently applies to the synagogue building, while also providing justification for the protection of the remaining buildings on the site.

Preliminary consultation

Council's Strategic and Statutory Planning Department undertook preliminary consultation from 27 July 2020 to 10 August 2020. This consultation process involved:

- Sending letters to all owners and occupiers of the site and adjoining properties.
- Publishing relevant information on a dedicated webpage on Council's website.

Adoption of Study

On 7 September 2020, the UPDC considered a report on the outcomes of the preliminary consultation process including the officers' response to the issues raised in the feedback.

The UPDC resolved to adopt the heritage citation subject to some changes to address feedback received during the preliminary consultation, and to write to the Minister for Planning to seek authorisation to prepare and exhibit a planning scheme amendment.

Authorisation

Following the resolution of the UPDC, officers sought authorisation from the Minister for Planning to prepare and exhibit Amendment C342boro. The Minister authorised the amendment on 13 November 2020.

Strategic Planning Officers have carried out exhibition of the amendment and have prepared a report to be presented at the UPDC on the 17 May 2021 to consider the next steps with the amendment.

Planning permit application

There is an active planning permit application for the site which proposes to demolish some of the buildings on site and carry out new construction, to expand an existing education centre that currently operates and support an increase in the number of staff and students.

On 22 September 2020, under delegation from Council, a Notice of Decision to Refuse to Grant a planning permit was issued for the application. The application was refused on the grounds that demolition of Norman Smorgon House would have a detrimental impact on the social and cultural heritage significance of the place.

The applicant has appealed Council's decision to VCAT.

4. Outline of key issues/options

Call in of planning permit application

On 9 April 2021, Council received notification from VCAT that the Minister for Planning has called in the planning permit application for development of the site, on the basis the proceeding raises a major issue of policy and the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives. The Minister has referred the matter to the Priority Projects Standing Advisory Committee (SAC) for advice.

The purpose of the SAC is to provide advice to the Minister for Planning on projects referred by the Building Victoria's Recovery Taskforce (BVRT), projects affected by Covid-19 and or where the Minister has agreed to, or is considering, intervention to determine if these projects will deliver acceptable planning outcomes.

Section 151(1) of the *Planning and Environment Act 1987* gives the Minister for Planning the power to appoint an advisory committee to "advise on any matters which the Minister refers to them".

Clause 58(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* gives the Minister for Planning the power to call in a proceeding for review of a decision under the *Planning and Environment Act 1987* if the Minister considers that:

- a) the proceeding raises a major issue of policy; and
- b) the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives.

The letter received from the Priority Projects SAC can be viewed in **Attachment 1**.

The Priority Projects SAC will provide advice and recommendations on whether a planning permit should be issued and, if so, the appropriate permit conditions that should be imposed. Specific advice and recommendations will be sought on:

- Whether the proposed development appropriately responds to the heritage significance of the site and surrounding heritage/neighbourhood character of the area.
- Whether the proposal would result in unacceptable impacts on safety, amenity and noise within the surrounding area.

The Priority Projects SAC hearing to consider the planning permit application is scheduled to be held on Tuesday 11 May 2021. Council has been invited to make a submission.

It should be noted the Minister's powers under Section 151(1) are broad and discretionary, and calling in the VCAT proceedings are consistent with this power. However, the information provided by the Minister to date does not clearly demonstrate why the referral of the planning application to the SAC is warranted. Projects eligible to be considered by the Priority Projects SAC includes those that are of regional or state significance, projects that are 'shovel ready' and have investment certainty, the project is dependent on a decision timeframe and the project aligns with government policy and priorities.

It is unclear whether the SAC will adequately consider the merits of the heritage values of the site in the way an independent Planning Panel would with respect to a planning scheme amendment. It is likely Amendment C342boro will be progressed for consideration by an independent Planning Panel in the next few months. The process would allow community members who have either supported or objected to heritage protection of the site to make further submissions through the Panel hearing process. It would be prudent for the Minister to allow the amendment process to be completed before any decision is made in regards to development to ensure any heritage value is taken into the SAC's consideration.

Application for Interim Heritage Overlay

On 14 April, the Minister informed Council he was also deferring making a decision on Council's application for an interim Heritage Overlay until after he had completed consideration of the development permit.

The decision not to introduce interim heritage controls is inconsistent with previous advice provided by the Minister and his delegates. Previously, the Minister and officers at the Department of Environment, Land, Water and Planning (DELWP) have indicated interim heritage controls will be supported where Council is able to demonstrate a place is under threat of demolition. An active planning application where demolition of identified heritage places is proposed is considered to meet the test of 'under threat'.

The introduction of interim heritage controls would afford the site heritage protection whilst Council continues to progress Amendment C342boro and appropriately requires any development to have regard to the heritage values of the subject site. The decision not to introduce interim heritage controls also disregards the prospect heritage buildings can be re-purposed to meet the ongoing needs of Giant Steps School.

Impact on Amendment C342boro

The Minister has not provided any guidance on how consideration of the development permit might impact on his consideration of the permanent Heritage Overlay, nor given any direction to Council on how it should proceed with the planning scheme amendment.

As there is no indication from the Minister as to how the SAC process will impact on the introduction of heritage controls to the site, officers are recommending Council continue to progress Amendment C342boro. A report is expected to be tabled at the UPDC meeting on 17 May 2021 regarding the outcomes of the exhibition of Amendment C342boro. All submitters to the amendment and the property owner will be invited to the meeting. It is also expected the amendment will be referred to an independent Planning Panel to consider the submissions received.

Notwithstanding the SAC hearing process, the Minister must appoint a Planning Panel to consider any submissions to Amendment C342boro should Council request the Minister appoint one.

Should the development application be approved without changes, it will result in the demolition of buildings that have been identified as having heritage significance. Should these buildings be demolished, it will have a detrimental impact on the heritage of the site.

As noted above, it is unclear whether the SAC will adequately consider the merits of the heritage values of the site in the way an independent Planning Panel would with respect to a planning scheme amendment, which raises concerns for officers. It would be prudent for the Minister to allow the amendment process to be completed before any decision is made in regards to development to ensure any heritage value must be taken into the SAC's consideration.

Ultimately, the Minister has the final decision-making power regarding the application of the permanent Heritage Overlay. Should Council proceed with adopting Amendment C342boro following the panel process, the Minister may still decide not to approve the Heritage Overlay.

In the event Council resolves to adopt the amendment to introduce a Heritage Overlay, and the Minister approves the amendment, a planning permit would be required for the proposed demolition if it has not already taken place.

Conclusion

In summary, Officers have a number of concerns with the Minister's call in of the VCAT proceedings in relation to the Giant Steps Planning Application as discussed in the officers' report.

Officers recommend the UPDC write to the Minister for Planning prior to the commencement of the SAC hearing to highlight the following:

- Council's concerns with the Ministerial Call-In process and referral to the Priority SAC as the project is not of state or regional significance, requesting the Minister reconsider his Call-In.
- Council's concern the SAC will not adequately consider the heritage merits of the site as part of their deliberations, considering the SAC hearing process will not test the merits and provide recommendations on the heritage significance of the site in the way an independent Planning Panel hearing process would with respect to Amendment C342boro.
- Council's objection to the prioritisation of the development proposal over the heritage value of the site, particularly as heritage protection is a 'seriously entertained' proposal under Amendment C342boro.
- Council's objection to the Minister's decision not to introduce interim heritage controls to the site, and request the Minister to expedite the introduction of interim heritage controls.

5. Consultation/communication

All parties to the VCAT hearing have been invited to take part in the Priority Projects SAC process.

Council will continue to keep interested parties up to date on the outcomes of the process.

6. Financial and resource implications

Costs associated with the Priority Projects SAC process will be met by the Strategic and Statutory Planning Department budget for 2020/2021.

7. Governance issues

The officers responsible for this report have no direct or indirect interests requiring disclosure.

The implications of this report have been assessed and are not considered likely to breach or infringe upon, the human rights contained in the *Victorian Charter of Human Rights and Responsibilities Act 2006*.

8. Social and environmental issues

The inclusion of the property in the Heritage Overlay will have positive social and environmental effects by contributing to the continual protection and management of the City's heritage.

Manager: Simon Mitchell, Manager Strategic and Statutory Planning

Report officer: Nick Brennan, Senior Strategic Planner

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Hon Richard Wynne MP

Minister for Planning
Minister for Housing8 Nicholson Street
East Melbourne, Victoria 3002

Cr Gary Thompson
Mayor
City of Boroondara
Private Bag 1
CAMBERWELL VIC 3124
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Ref: MBR044239



Dear Mayor

BOROONDARA PLANNING SCHEME AMENDMENT C336

I refer to your council's request for me to prepare, adopt and approve Amendment C336 to the Boroondara Planning Scheme. The amendment proposes to apply the Heritage Overlay on an interim basis to that part of 11 Malmsbury Street, Kew, not already included in HO559.

A request was also received by the Development Facilitation Program seeking my consideration of an accelerated assessment and determination of the proposed development at this site, as proposed by planning permit application P19/1085, which was refused by your council on 22 September 2020 and was appealed by the applicant to VCAT under section 77 of the *Planning and Environment Act 1987* on 1 October 2020.

I have decided to call in the Victorian Civil and Administrative Tribunal (VCAT) proceeding for planning application P19/1085 under Clause 58(2)(a) of the *Victorian Civil and Administrative Tribunal Act 1998* as I consider the proceeding raises a major issue of policy and the determination of the proceeding may have a substantial effect on the achievement or development of planning objectives. I have also decided to refer the matter to the Priority Projects Standing Advisory Committee (SAC) for advice.

The proposed Heritage Overlay on the land will have a significant effect on this application, which has been substantially progressed. After careful consideration, I have decided to sequence my consideration of these requests and will not make a decision on your council's request to prepare Amendment C336 until after I have received advice from the Priority Projects SAC about the planning permit application.

The Priority Projects SAC will provide advice and recommendations on whether a planning permit should be issued and, if so, the appropriate permit conditions that should be imposed. Specific advice and recommendations will be sought on:

- whether the proposed development appropriately responds to the heritage significance of the site and surrounding heritage/neighbourhood character of the area
- whether the proposal would result in unacceptable impacts on safety, amenity, noise and traffic within the surrounding area.

All parties to the proceeding will be notified by VCAT of my decision to call this matter in, and Planning Panels Victoria will also shortly contact all parties about the Priority Projects SAC process.

A decision on your council's request will be made as soon as possible following the completion of the SAC.



OFFICIAL-Sensitive

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If you would like further information about this matter, please email Dr Jane Homewood, Executive Director, Statutory Planning Services, Department of Environment, Land, Water and Planning, at jane.homewood@delwp.vic.gov.au.

Yours sincerely



HON RICHARD WYNNE MP
Minister for Planning

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