

3.4 2 and 4 Logan Street and 183 Prospect Hill Road, Canterbury - Removal of a Restrictive Covenant (PP23/0348)

Application no.: PP23/0348

Responsible director: Scott Walker, Director Urban Living

Authorised by: David Cowan, Manager Planning and Placemaking

Report officer: Chiara Lorini, Senior Urban Planner

Executive Summary

Proposal

The proposal seeks to remove restrictive covenant W884794C from the subject sites. The restrictive covenant prohibits the use and development of the land for educational purposes, aged accommodation, religious/medical/surgical purposes, any institutional purpose, or for any sporting or recreational purposes associated with the aforementioned uses.

Issues

The following are key issues in respect of this application:

- Impact of the removal of the covenant on the owners of land benefitted by the restriction and other affected persons;
- Whether the application meets the tests for removal as set out in Section 60(2) of the *Planning and Environment Act 1987* (Act). In particular, whether the removal of the covenant is likely to result in detrimental loss of amenity or loss arising from change to the character of the neighbourhood or the introduction of alternative land uses; and
- Whether the removal of the covenant satisfies the objectives, policies and strategies set out in Clauses 15 and 19 of the Boroondara Planning Scheme.

Thirty-six objections have been received, including 6 received from beneficiaries of the covenant.

Officer's response

The removal of the covenant will likely result in loss of amenity, loss arising from change to the character of the neighbourhood, and material detriment to owners of land benefitting from the restriction due to the introduction of land uses other than a dwelling.

The removal of the restriction will also further affect other persons within the neighbourhood who enjoy the amenity afforded by the existence of the covenant.

The proposal does not satisfy the objectives, policies and strategies set out in the Boroondara Planning Scheme. Further, it is considered likely that one or more of the owners or occupiers of properties benefitting from the covenant would suffer the losses and detriment as set out in Section 60(2). On this basis, Council is obliged to refuse the application.

Officers' recommendation

That the Urban Planning Delegated Committee resolve that a Refusal to Grant a Planning Permit No. PP23/0348 for removal of a restrictive covenant at 2 and 4 Logan Street, Canterbury and 183 Prospect Hill Road, Canterbury be issued under the Boroondara Planning Scheme on the following grounds:

Refusal Grounds

1. The proposed covenant removal will likely result in financial loss, loss of amenity, loss arising from change of character the neighbourhood and other material detriment to owners of land which benefit by the restriction.
2. Pursuant to Section 60(2) of the *Planning and Environment Act 1987* the responsible authority must not grant a permit for the removal of a covenant where the owner of any land benefitted by the restriction will be likely to suffer financial loss, loss of amenity, loss arising from change to the character of the neighbourhood, or any other material detriment as a consequence of the removal.
3. The proposed covenant removal is not in conjunction with an application for the use or development of the site. As a consequence, the myriad of development and use possibilities make it impossible for the threshold tests of Section 60(2) to be satisfied.
4. The proposed covenant removal fails to satisfy the interests of affected people within the surrounding neighbourhood who will likely suffer material detriment.



PLANNING ASSESSMENT

Urban Planning Delegated Committee

| | |
|-----------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Application Number | PP23/0348 |
| Date Application Received | 12/05/2023 |
| Planning Officer | Chiara Lorini |
| Applicant | Strathcona Baptist Girls Grammar School Ltd C/O Urbis |
| Owner | Strathcona Baptist Girls Grammar School Ltd |
| Property Address | 2 and 4 Logan Street, Canterbury and 183 Prospect Hill Road, Canterbury |
| Proposal | Removal of a Restrictive Covenant W884794C on the land associated with Lot 1 TP757840S (Vol 07978, Fol 083), Lots 1 and 2 on Title Plan 673679N (Vol 09313, Fol 998), Lot 1 of TP 673811R, (Vol 02265, Fol 924), Lots 1 and 2 on TP855694E (Vol 09268, Fol 107) and Lot 1 on TP443173H (Vol 03806, Fol 101) |
| Ward | Maling |
| Zoning | Clause 32.09 - Neighbourhood Residential Zone - Schedule 3 |
| Overlays | Clause 43.01 - Heritage Overlay (HO145) |
| Neighbourhood Character Precinct | 45 |
| Particular Provisions | Clause 52.02 - Easements, Restrictions and Reserves |
| Permit Triggers | Clause 52.02 (Easements, Restrictions and Reserves) of the Boroondara Planning Scheme, a permit is required before a person proceeds: <ul style="list-style-type: none"> Under Section 23 of the <i>Subdivision Act</i> 1988 to create, vary or remove an easement or restriction or vary or remove a condition in the nature of an easement in a Crown grant. |
| Section 55 Referrals | None |
| Covenant | The subject sites are affected by Registered Restrictive Covenant as follows: 2 Logan Street - Covenant W884794C 20/11/2001 <ul style="list-style-type: none"> Lot 1 on TP 757840A Volume 07978 Folio 083 Lots 1 and 2 on TP 673679N Volume 09313 folio 998 |

| | |
|--------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| | <p>4 Logan Street - Covenant W884794C 20/11/2001</p> <ul style="list-style-type: none"> Lot 1 on TP 673811R Volume 02265 Folio 924 <p>4 Logan Street - Covenant W884794C 03/07/2000</p> <ul style="list-style-type: none"> Lots 1 and 2 on TP 855694E Volume 09268 Folio 107 <p>183 Prospect Hill Road - Covenant W884794C 20/11/2001</p> <ul style="list-style-type: none"> Lot 1 on TP 443173H on 03803 Folio 101 <div style="border: 1px solid black; padding: 10px; margin-top: 10px;"> <p style="text-align: center;">SCHEDULE 1</p> <p>Each of the Owners and their respective personal legal representatives, successors, transferees and assigns each jointly and severally agree with each other party to this deed not to undertake, suffer or permit the land owned by him, her or them in fee simple as set out in the Recitals to this Deed to be developed or used except wholly or predominantly for residential purposes without the prior consent in writing of all parties.</p> <p>In particular the land shall not be used or developed for:-</p> <ol style="list-style-type: none"> Any school, pre-school kindergarten or any other educational purpose; aged accommodation (other than as permitted by the third paragraph below); any religious, medical or surgical purpose (other than as permitted by the third paragraph below ^{SET OUT BELOW}); any institutional purpose; or any sporting or recreational purpose associated with any of the purposes listed in items 1-4 above. <p>BUT NOTHING HEREIN shall prevent the use of the land for a dwelling and uses ancillary thereto or as a dwelling and for home occupation or home office purposes being more particularly defined as to allow a residential occupier to run a business from their home such as a medical practice, music lessons, language lessons or family day care up to a maximum of 4 children.</p> </div> |
| Advertised? | <p>Public notice of the application was given on 20 July 2023 by Council posting notices to beneficiaries, abutting and nearby property owners and occupiers and by the display of signs on the site for a period of not less than 14 days.</p> <p>Notice of the application was also publicly advertised in the <i>Age</i> newspaper on Wednesday 26 July 2023.</p> |
| Number of Objections Received | 36 (inclusive of 6 objections from beneficiaries) |
| Recommendation | Refuse to Grant a Planning Permit. |

PLANS ASSESSED IN THIS REPORT

Documents advertised July 2023

PROPOSAL

Details of the proposal are summarised as follows:

- The application seeks removal of the restrictive covenant no. W884794C to three properties (2 Logan Street Canterbury, 4 Logan Street Canterbury, and 183 Prospect Hill Road Canterbury).

THE SITE - 2 Logan Street

The site comprises of:

2 Logan Street - Covenant W884794C dated 20 November 2001

- Lot 1 on TP 757840A Volume 07978 Folio 083
- Lots 1 and 2 on TP 673679N Volume 09313 folio 998

| | |
|------------------------------|-----------------------------------------------------------------------------------|
| Width of Frontage | 21.34m |
| Maximum Depth of Site | 47.25m |
| Total Site Area | 919m ² |
| Easements | The subject site is not encumbered by any easements. |
| Fall of the Land | The site has a moderate fall from the east to the west of approximately 3 metres. |



Figure 1a - Subject site - 2 Logan Street

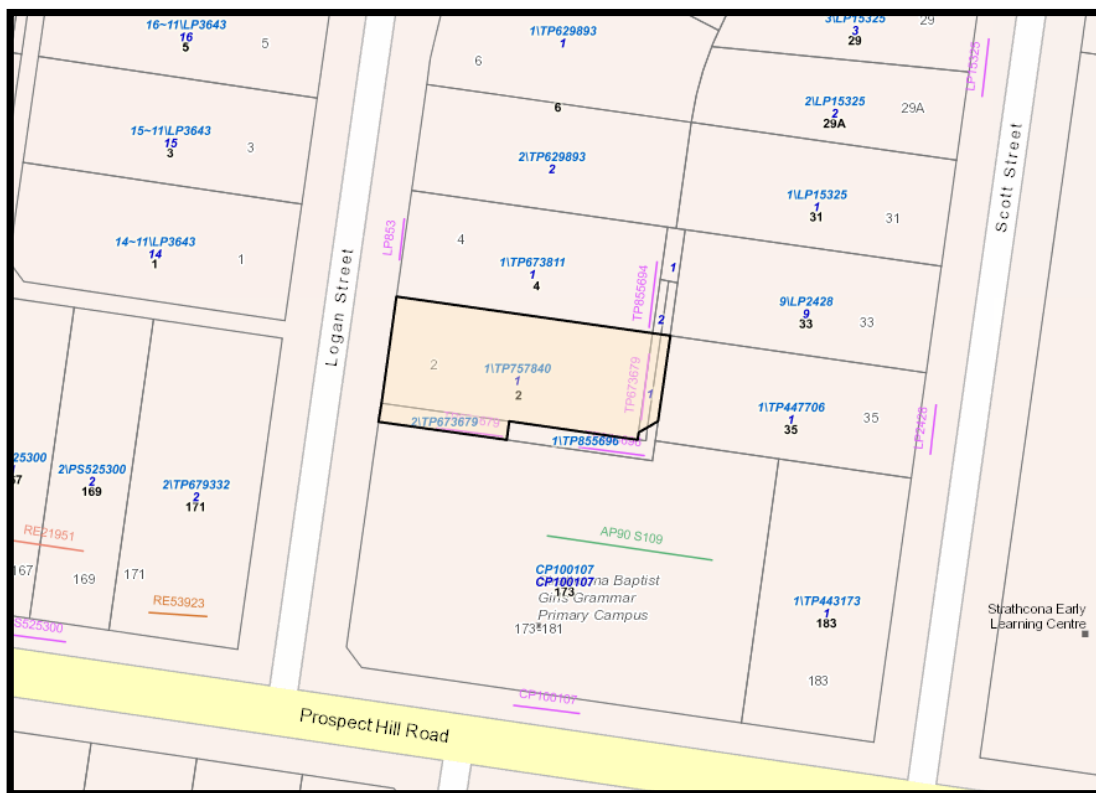


Figure 1a - Lassi (Land and Survey Spatial Information) showing the total parcel of land at 2 Logan Street

THE SITE - 4 Logan Street

The site comprises of:

4 Logan Street - Covenant W884794C dated 03 July 2000

- Lots 1 and 2 on TP 855694E Volume 09268 Folio 107

| | |
|------------------------------|---------------------------------------------------------------------------------------|
| Width of Frontage | 18.29m |
| Maximum Depth of Site | 47.25m |
| Total Site Area | 836m ² |
| Easements | The subject site is not encumbered by any easements. |
| Fall of the Land | The site has a moderate fall from the north to the south of approximately 2.5 metres. |



Figure 1b - Subject site - 4 Logan Street

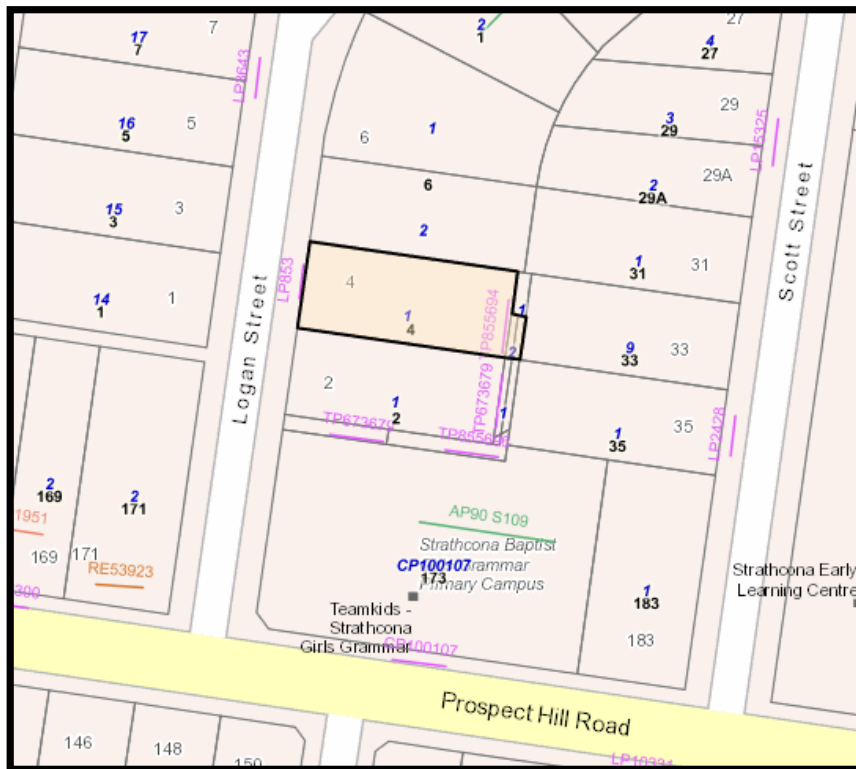


Figure 1b - Lassi (Land and Survey Spatial Information) showing the total parcel of land at 4 Logan Street

THE SITE - 183 Prospect Hill Road

The site comprises of:

183 Prospect Hill Road - Covenant W884794C dated 20 November 2001

- Lot 1 on TP 443173H on 03803 Folio 101

| | |
|------------------------------|-----------------------------------------------------------------------------------------------|
| Width of Frontage | 22.86m |
| Maximum Depth of Site | 45.72m |
| Total Site Area | 1045m ² |
| Easements | The subject site is not encumbered by any easements. |
| Fall of the Land | The site has a moderate fall from the north-east to the south-west of approximately 3 metres. |



Figure 1c - Subject site - 183 Prospect Hill Road

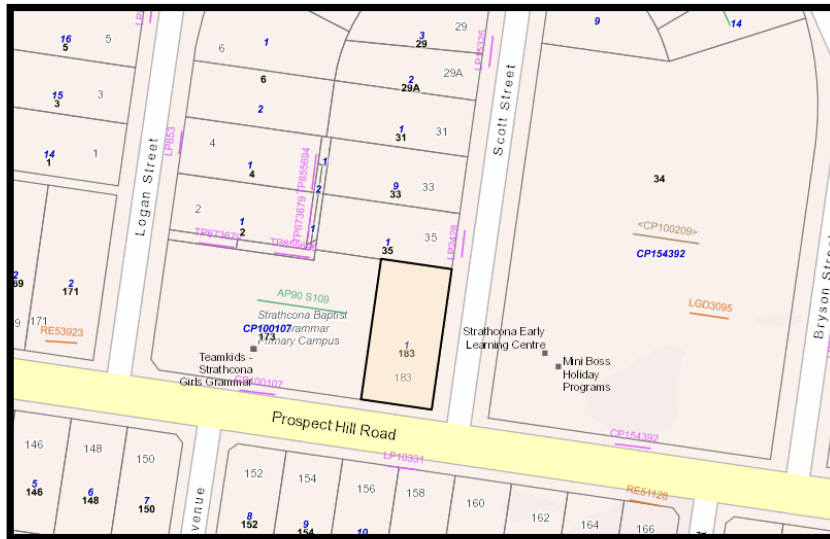


Figure 1c - Lassi (Land and Survey Spatial Information) showing the total parcel of land at 183 Prospect Hill Road

THE SURROUNDING AREA

The subject sites are located to the eastern side of Logan Street and the northern side of Prospect Hill Road (Figure 5). The subject sites were sold as part of the Claremont Park Estate in 1885 and are located to the south-western crescent shaped block of allotments. Advertisements for the Claremont Park Estate notes 'grand villa sites' and a predominantly residential area (Figure 2). Review of Melbourne Metropolitan Board of works plans (1907) and aerial photography from 1945 indicate that the area was established as a residential neighbourhood (Figure 3).

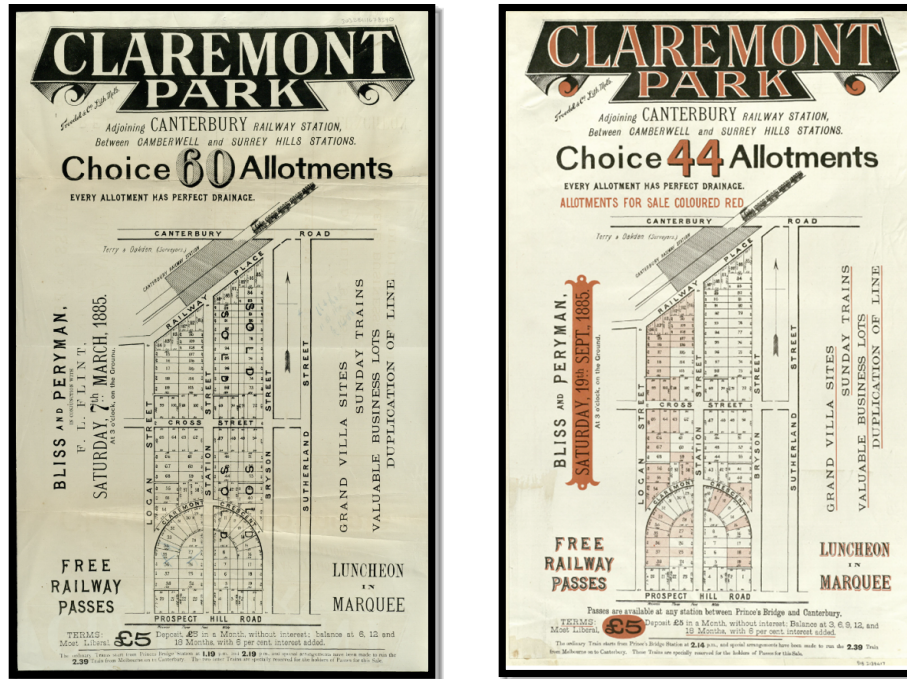


Figure 2 - 'Claremont Park Estate' sale advertisements from March and September 1885 - Source State Library Victoria

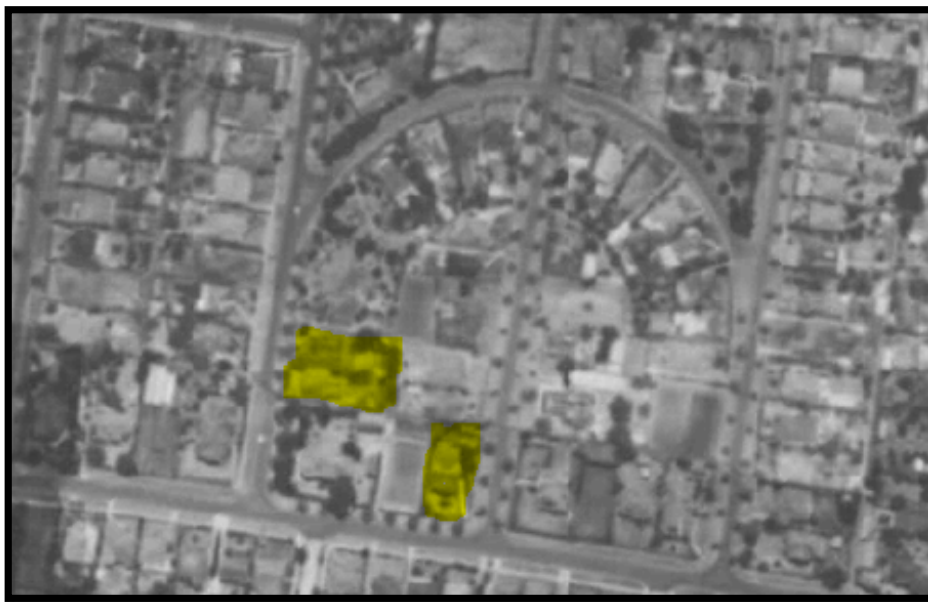


Figure 3a - Aerial image of the subject sites and surrounding area (1945). Source [Melbourne 1945](#)



Figure 3b - 1907 Melbourne Metropolitan Board of Works map of the south-eastern crescent block of the Claremont Park Estate (now Strathcona Girls Grammar School). Source - State Library of Victoria

Strathcona Girls Grammar School ('Strathcona') was established at 34 Scott Street in 1924 at the original namesake dwelling "Strathcona" within the Claremont Park Estate (Figure 3b). Subsequent expansions and developments to the school have occurred over the course of the last century since its founding. The school now encompasses the entire south-eastern crescent block of the Claremont Park Estate (bounded by Scott Street, Bryson Street and Claremont Crescent) in addition to the early learning centre currently under construction to the south-western crescent block (29A-35 Scott Street) and the Junior campus located at 173-181 Prospect Hill Road (Figure 4).

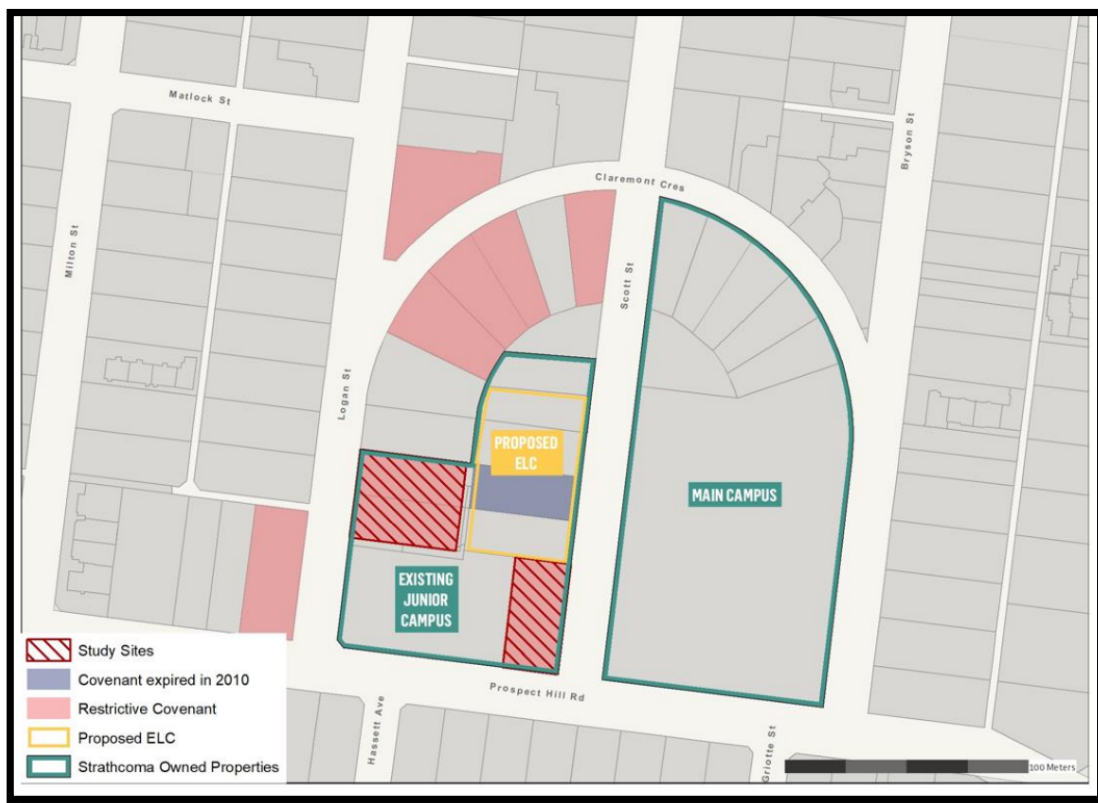


Figure 4 - Current Strathcona owned properties.
Source: Map provided within Urbis Planning Report

*** this plan does not show the former right of ways to the east and south of 2-4 Logan Street which forms part of the application to remove covenants.

No original dwellings remain to the original south-eastern crescent block of the Claremont Park Estate as it is now entirely developed for educational purposes. With the exception of the current Strathcona school sites, the surrounding area to the subject sites remains a relatively intact collection of Victorian and Federation dwellings set within mature landscaped gardens. The surrounding dwellings are generally comprised of brick with roofs of slate or tile which reflects the high quality of the era and predominantly single dwellings to allotments (Figure 5).

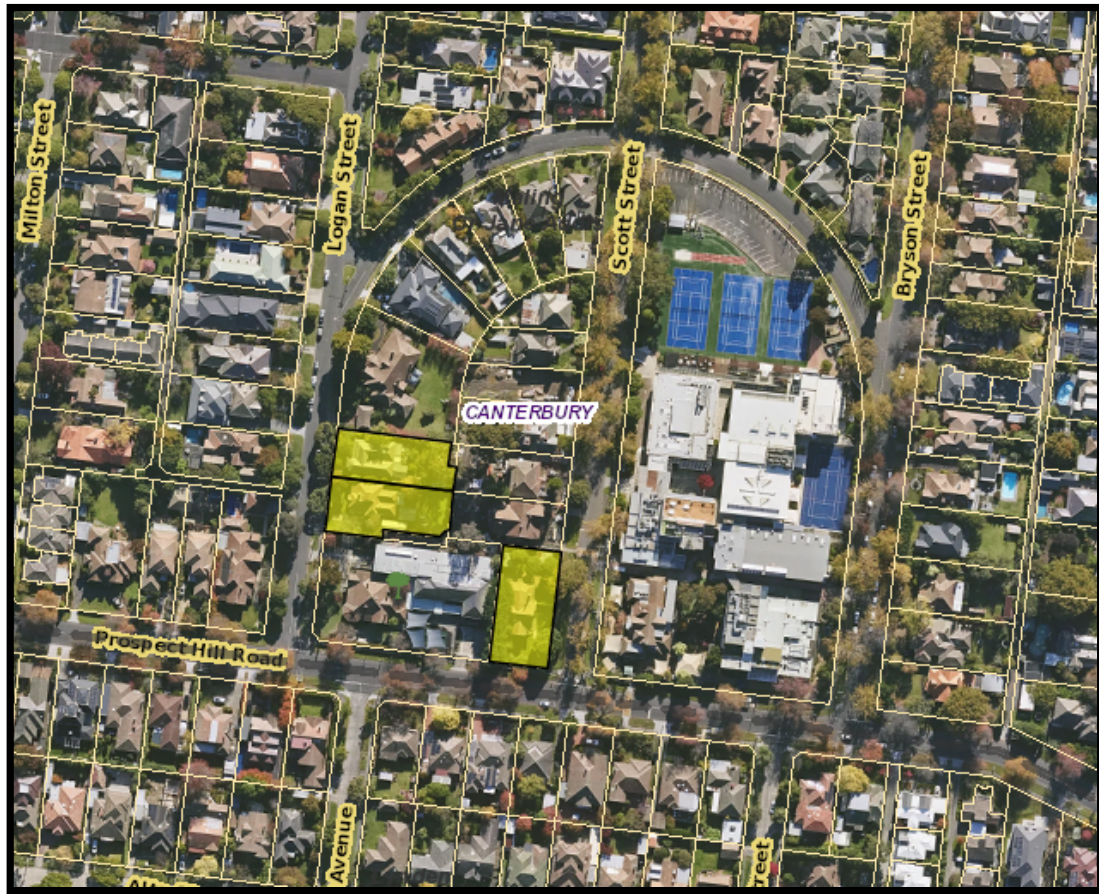


Figure 5 - Aerial image of the subject site and surrounding area

PERMIT HISTORY

A review of Council records indicates that there have been no relevant planning applications at the subject site.

Details of previous applications for the nearby sites are as follows:

| 173-181 Prospect Hill Road | | | |
|----------------------------|------------------|----------|--------------------------------------------------------------------|
| Application No | Date of Decision | Decision | Description of Proposal |
| PP02/00939 | 12/01/2004 | Permit | Construct alterations & additions to an existing education centre. |

| 33 & 35 Scott Street | | | |
|---------------------------------|-------------------------|-------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Application No | Date of Decision | Decision | Description of Proposal |
| PP13/01083 | 17/10/2014 | Permit (at direction of VCAT) | Use of the land as an educational centre (uniform shop and administration areas) and construction of buildings and works to existing buildings in a Heritage Overlay. |
| PP14/00804 | 4/9/2014 | Permit | Part demolition and construct buildings and works to an existing building in a Heritage Overlay. |

| 29A, 31, 33, and 35 Scott Street | | | |
|-----------------------------------------|-------------------------|-------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Application No | Date of Decision | Decision | Description of Proposal |
| PA/2101441 | 15/4/2022 | Permit (Responsible Authority: Minister for Planning) | Use of the land as an education centre, demolition of 29A Scott Street, partial demolition of 31, 33 and 35 Scott Street, construction of a building and carrying out works, waiver of the car parking requirements and display of business identification signage |

OBJECTIONS

Of the thirty-six objections received, six are from beneficiaries of the covenant. Objections primarily relate to:

- Removal of the covenant will allow for expansion of the school into a residential street;
- Increased traffic and congestion (and increase in associated stress for local residents);
- Increased noise associated with an education use;
- Increased pollution;
- Light spill from security lighting associated with an education use;
- Loss of property values due to proximity with an educational use;
- Would allow for future development associated with an educational use that would impact the heritage character of the streetscape;

- Any use or development application is likely to be via State Government approval limiting input for local residents and Boroondara;
- Expansion of the school will degrade the heritage and residential character of the streetscape;
- Liveability of the area will be decreased;
- Proposed indicative uses are already available within current school grounds, so future development may occur;
- Insufficient evidence in application documents to support removal;
- Removal of covenant would allow for subsequent future development applications;
- Heritage Overlay may be insufficient to limit demolition of existing buildings.
- Current development to Scott Street has commercial character, similar development in Logan Street would erode residential character;
- School has not been honest previously with intentions to local residents.

GOVERNANCE ISSUES

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*.

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

The report to Council and any decision arising of Council will be made available on Council's website and by inspection at the Council Offices in accordance with the requirements in the *Local Government Act 2020*, Council's Governance Rules and Public Transparency Policy.

CONSIDERATIONS

In assessing this application, consideration has been given to the following:

- The objectives of planning in Victoria as detailed in Section 4 of the *Planning & Environment Act 1987*;
- Section 60 of the *Planning & Environment Act 1987*; and
- The relevant provisions and decision guidelines of the Boroondara Planning Scheme including the decision guidelines of Clause 65; and
- The objections received.

PLANNER'S ASSESSMENT

PLANNING POLICY FRAMEWORK

The following policies are relevant to the assessment of the current application:

- Clause 15 - Built Environment & Heritage
- Clause 19 – Infrastructure

Of relevance to this application, strategies to achieve the objective to '*recognise, support and protect neighbourhood character, cultural identity and sense of place*' (Clause 15.01-5S - Neighbourhood Character), include to:

- Support development that respects the existing neighbourhood character or contributes to a preferred neighbourhood character.
- Ensure development responds to its context and reinforces a sense of place and the valued features and characteristics of the local environment and place by respecting the:
 - Pattern of local urban structure and subdivision.
 - Underlying natural landscape character and significant vegetation.
 - Neighbourhood character values and built form that reflect community identity.

The proposal is considered to be inconsistent with the strategies and outcomes sought by Clause 15.01-5S, as the removal of the restrictive covenant, will potentially allow for the use and development of the sites for education purposes that will adversely affect the established residential neighbourhood character.

Clause 15.01-5L - Neighbourhood Character

Clause 15.01-5L Neighbourhood Residential Zone Schedule 3

Objectives

- *To provide for development that maintains the spacious character including the consistent spine of backyards and low site coverage.*
- *To ensure development responds to the smaller lot sizes, narrower side setbacks, smaller front and rear gardens and higher site coverage of some inner urban areas.*

Policy

It is policy to:

- *Set development back from the front, side and rear boundaries, consistent with the preferred character of the precinct.*
- *Site development to retain an area of open space to the rear of the dwelling that is capable of accommodating canopy trees.*
- *Avoid attached dwellings set one behind the other that provide no visual separation between built forms.*
- *Design upper storeys of dwellings at the rear of lots to be recessive and have a reduced footprint to the ground floor.*

Clause 15.01-5L Variation or removal of a covenant or restriction on title

Objective

To ensure the variation or removal of a covenant does not adversely impact a precinct's preferred character.

Policy

It is policy to:

- *Discourage the removal of single dwelling covenants.*
- *Ensure the removal or variation of a restriction does not facilitate development that will adversely impact the precinct's preferred character including but not limited to building materials and dwelling setbacks.*

Planner's Comments:

The subject site is located within the Claremont Park Estate. Review of the site and surrounds indicates that the area has a well-established residential neighbourhood character which is broadly typified by detached single dwellings in mature gardens (with rear green garden spine) constructed of brick with slate or tile roofs.

The Claremont Park Estate was subdivided and sold in the late 1800s. Sale advertisements from the period (Figure 2) detail 'grand villa sites' and the subdivision established the estate as residential (with some commercial to Maling Road).

Since the establishment of Strathcona in 1924, a progressive erosion of the residential use and development has occurred to the southern end of the estate in favour of education. The restrictive covenant currently encumbering the subject sites was established in 2001 by local owners/residents expressly to maintain the residential neighbourhood character of the area.

The expansion of Strathcona has, thus far, been limited to the southeastern crescent block, the western side of Scott Street and the interface of the estate to Prospect Hill Road. The removal of the restrictive covenant to 2 and 4 Logan Street in particular would establish a clear avenue for use and development associated with an education centre that is inconsistent with the precincts preferred residential character.

Given the cohesive and intact nature of the Claremont Park Estate to Logan Street, it is considered that the proposal is inconsistent with the objectives of the Planning Scheme, which seek to ensure the variation or removal of a covenant does not adversely impact a precinct's preferred character. This will form a basis for the recommendation to refuse the proposal.

Council's current Single Dwelling Restrictive Covenant Policy was adopted December 2019. The covenant does not include a single dwelling element and this policy is therefore not relevant in the determination of the application.

Clause 19.02-2L - Educational Facilities

Council has established a clear vision to facilitate and encourage education facilities while ensuring the preferred character of established residential areas is achieved and residential amenity is maintained.

Objective

To accommodate the future development needs of education facilities, while limiting detrimental impacts on the neighbourhood character and amenity of surrounding residential areas.

Strategies

Encourage education facilities to locate in activity centres.

Avoid educational institutions establishing in the Commercial 2 Zone.

Provide education facilities where there are minimal adverse amenity impacts on adjoining residential properties particularly in relation to noise, car parking and access and circulation.

Prepare a masterplan for the overall development of education facilities prior to the further development of facilities.

Avoid demolition of existing dwellings for education facilities.

Avoid education facilities opening a new frontage to, or deriving access from, a local road.

Minimise isolating existing residential properties as a result of the expansion of education facilities.

Avoid education facilities encroaching into existing residential areas across a road from the main premises.

Ensure teacher and student numbers of education facilities are only increased if measures to reduce car dependency are implemented in accordance with a Sustainable Transport Plan.

Apply the Development Plan Overlay to land prior to an application being made for the use and development of land as an education facility.

Planner's Comments:

The proposal to remove the covenant from the land is inconsistent with the objectives and strategies set out in Clause 19.02-2L. Removal of the restrictive covenant provides opportunity for expansion of an educational use into Logan Street which is likely to result in material detriment (noise, car parking and access) to local residents.

Furthermore Council's Strategy specifically seeks to (as relevant to this removal of covenant request):

- *Avoid education facilities opening a new frontage to, or deriving access from, a local road.*
- *Minimise isolating existing residential properties as a result of the expansion of education facilities.*
- *Avoid education facilities encroaching into existing residential areas across a road from the main premises.*

The removal of the restrictive covenant would allow for:

- 2 and 4 Logan Street to provide a new frontage for Strathcona into Logan Street (the current corner allotment for the junior school fronts to Prospect Hill Road);
- The partial isolation of dwellings to the southern end of Logan Street within a principally educational area;
- Encroachment of the educational facilities across the road and away from the main premises (the south eastern crescent block of the Claremont Park Estate).

The proposal is inconsistent with the objectives of Clause 19 and will form a basis for the recommendation to refuse the application.

ZONING & OVERLAYS

A planning permit requirement is not triggered under the Neighbourhood Residential Zone.

Heritage Overlay

A planning permit requirement is not triggered under the Heritage Overlay.

PARTICULAR PROVISIONS

Clause 52.02 - Easements Restrictions and Reserves

The purpose of Clause 52.02 is:

To enable the removal and variation of an easement or restriction to enable a use or development that complies with the planning scheme after the interests of affected people are considered.

Clause 52.02 states that *before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider the interests of affected people.*

Planner's Comments:

Hill v Campaspe SC (Red Dot) [2011] established that “affected people” for the purpose of consideration with regard to Clause 52.02 is not limited to only owners of land which are benefitted by the covenant. Deputy President Gibson further notes in *Hill v Campaspe [2011]* that nearby properties may enjoy the amenity afforded from the existence of the covenant:

‘In my view, the existence of the covenant has contributed to the amenity that the Murphy land enjoys, even though it does not have the legal benefit of the covenant. Equally, there are other properties within Lord Court, which do not have the benefit of the covenant but which nevertheless enjoy the amenity that has resulted from the existence of the covenant.’

Further to this, Deputy President Gibson then details that *‘I consider that the interests of affected people encompass the effects or consequences that will flow from the removal or variation of a covenant’* Hill v Campaspe [2011].

Council has received numerous objections from surrounding and nearby residents with regard to the proposed covenant removal. Objections have noted that the covenant has

provided a means of limiting the encroachment of Strathcona within the nearby residential area which has protected their amenity with regard to noise, traffic, and education related use and development.

It is considered that removal of the covenant will allow for uses and development that will adversely impact the amenity of surrounding residents. This will form a basis for the recommendation to refuse the application.

Section 60(2) of the *Planning and Environment Act 1987*

Section 60(2) of the of the Act provides the legislative 'test' for the removal or variation of restrictive covenants created after 25 June 1991, as is the case with this particular covenant.

Section 60(2) states that:

(2) The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefitted by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer-

- (a) financial loss; or*
 - (b) loss of amenity; or*
 - (c) loss arising from change to the character of the neighbourhood; or*
 - (d) any other material detriment -*
- as a consequence of the removal variation of the restriction.*

The tests to be applied to an application to vary or remove a covenant are quite onerous as the very purpose of the application is to remove the rights of the people who benefit from the covenant as a result of ownership of their land.

Several Tribunal cases provide commentary on assessing detriment as set out in Section 60(2) of the Act.

Waterfront Place Pty Ltd v Port Phillip CC (Red Dot) [2014] appropriately details that 'a permit to remove a restrictive covenant constitutes the expropriation of an interest in land without payment of compensation. Section 60(2) Planning and Environment Act 1987, which lays down threshold tests that give some protection to benefitting owners, must be considered as beneficial legislation and given as wide a meaning as the words reasonably allow'.

On this basis, Council must be satisfied that beneficiaries of the covenant will be unlikely to suffer any detriment of any kind as a result of the proposed removal of covenant. In this case, Council must assess whether the application meets the tests set out in Section 60(2) of the Act.

Planner's Comments:

In *Soto v Hobson Bay CC* (June 2023) Member Code highlights that *'it is relevant to construe the purpose of the covenant from its provisions and context in which it was created'*. In the application currently before Council, it is apparent that the purpose of the covenant was to maintain the subject sites for residential purposes and to prevent both the use and development for educational, aged care, religious, institutional or medical/surgical purposes (with the exception of an ancillary home occupation). Indeed, one of the beneficiaries involved in the establishment of the covenant has provided context in their objection to the current application. They have detailed that an integral purpose of the covenant was to limit the expansion of Strathcona further within the surrounding residential area.

With consideration to removal of a covenant, Council must, under section 60(2) turn its mind to the consequences of the removal and potential material detriment to benefitted landowners. Given that the covenant restricts both the use and development of the sites for the purposes of educational, aged care, religious, institutional or medical/surgical purposes Council must therefore consider the consequences with regard to both the potential uses and development for which the covenant currently prohibits.

In *Waterfront Place Pty Ltd v Port Phillip CC (Red Dot)* [2014] Senior Member Wright and Member Benz note *'If there is no specific development proposal before the Tribunal, the wide range of development options for the burdened land if the restriction is removed makes it almost impossible for the Tribunal to conclude that the threshold tests are satisfied'*. The difficulty in satisfying these threshold tests where the application for covenant removal is not in tandem with a development/use proposal is well established at VCAT (e.g. *Giosis v Darebin City Council* [2013]).

The application before Council is not in composite with an application for the use or development of the land. The permit applicant and landowner is Strathcona Girls Grammar School. They note that, in addition to the subject sites, they are the landowner of several contiguous parcels of land. They have provided plans within the advertised documents showing probable 'indicative uses' of the existing buildings to the subject sites. These uses are detailed as an archives storage area, foundation office and an administration/uniform office should the covenant removal be supported.

Any use of the land for educational purposes (or ancillary to an education facility) would ordinarily require a planning permit as 'Education' is a Section 2 (permit required use) within the Neighbourhood Residential Zone. Clause 13.07-1L (Discretionary Uses) is

relevant for any application that seeks the use and development of land in residential areas.

Similarly, any development of the land on these sites would necessitate a planning permit. The planning application before Council however solely seeks removal of the restrictive covenant.

Pursuant to Clause 72.01-1 of the Boroondara Planning Scheme however, the Minister for Planning is the responsible authority for the use and development of land for a:

- Primary school or secondary school, or education centre that is ancillary to, carried out in conjunction with, and on the same land or contiguous land in the same ownership as, a primary school or secondary school, if any of the following apply:
 - There is no existing primary school or secondary school on the land.
 - The estimated cost of development is \$3 million or greater.

The 'indicative' uses of the subject sites noted within the application documentation fails to satisfactorily address the future myriad 'consequences' of the variation of the covenant. As noted in *Soto v Hobson Bay CC* (June 2023) *'the consequence of a variation flows from the meaning and effect of the covenant as proposed to be varied'*.

In this instance, if permission were granted to remove the restrictive covenants from the site, there would be no restriction in seeking an alternative educational use or further development on the site (e.g.) further expansion of the early learning centre or junior school onto the subject sites akin to Planning Permit PA2101441 recently approved by the Minister for Planning.

The permit applicant notes that the subject sites are 'remote' from the remaining parcels of land which in their view ensures that there will not be detriment to the beneficiaries nor material detriment. Review of the burdened sites indicates that the closest benefitting allotment is 19m from 2 Logan Street (across the road). With regard to objections received from beneficiaries, the closest allotment is 10 Logan Street, 78m from 4 Logan Street (or colloquially 'three doors down'). It is considered that the benefitting lots and objections received from benefitting lots are not 'remote' but in sufficient proximity that any use or development of the subject sites may result in loss of amenity, loss of character to the neighbourhood or other material detriment.

Given that the restrictive covenant currently limits the use and development of the land, the potential scope of consequences is too broad for Council to conclude that the threshold tests of Section 60(2) are satisfactorily met. It is therefore considered likely that one or more of the owners/occupiers of benefitting lots would suffer the losses and detriment as set out in Section 60(2). On this basis, Clause 60(2) obliges Council to refuse the application.

OBJECTION RESPONSE

| Summary of Objection | Planner's Comments |
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| Covenant protects built form, heritage, and residential character of precinct providing consistent neighbourhood character. | <p>The Claremont Park Estate has been established with a consistent development pattern and visually cohesive residential neighbourhood character. It is considered that the covenant restrictions continue to operate in maintaining this residential character.</p> <p>This will form part of the recommended grounds for refusal.</p> |
| Removal of the covenant would adversely impact the residential and heritage character of the area | <p>The removal of the covenant, allowing for increased development opportunity on the site, potential introduction of alternative land uses, and deviation from the broadly cohesive residential character of the precinct is a reasonable basis for perceived detriment relating to neighbourhood and heritage character.</p> <p>This will form part of the recommended grounds for refusal.</p> |
| Removal of the covenant would allow for expansion of the school resulting in amenity impacts including security lighting light spill, increased noise, increased pollution, increased traffic and parking issues | <p>Removal of the restrictive covenant will likely result in amenity impact to affected persons, including the owners/occupiers of land benefitted by the restriction.</p> <p>This will form a basis for the recommended grounds for refusal.</p> |
| Removal of the covenant would allow for development applications via state government approval, bypassing local council and residents | <p>Pursuant to Clause 72.01-1 of the Boroondara Planning Scheme the Minister for Planning is the responsible authority for the use and development of land for a:</p> <ul style="list-style-type: none"> • Primary school or secondary school, or education centre that is ancillary to, carried out in conjunction with, and on the same land or contiguous land in the |

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| | <p>same ownership as, a primary school or secondary school, if any of the following apply:</p> <ul style="list-style-type: none"> ○ There is no existing primary school or secondary school on the land. ○ The estimated cost of development is \$3 million or greater. <p>There are insufficient details about future land uses and development on the sites to clarify who will be the responsible authority for any future planning application.</p> |
| Removal of the covenant allows for subsequent applications for use and development - the application only lists indicative uses. | <p>Council is of the position that removal of the restrictive covenant will allow for potential development and uses that may result in detriment to nearby and benefitting owner/occupiers of the restriction.</p> <p>This will form a basis for the recommended grounds for refusal.</p> |
| Heritage Overlay may not prevent demolition of the dwellings | <p>The covenant located on the properties will not prevent demolition. However, any application seeking partial/full demolition of the subject sites would be subject to assessment of merit relevant to the applicable controls.</p> |
| Removal of the covenant will allow for encroachment of Strathcona into residential area. | <p>Council is of the position that removal of the restrictive covenant will result in encroachment of an educational use within a residential area which is inconsistent with the objective and strategies of Clause 19 of the Boroondara Planning Scheme.</p> <p>This will form a basis for the recommended grounds for refusal.</p> |
| Loss of buildings due to Heritage Overlay removal. | <p>The proposal seeks removal of the restrictive covenant, not the heritage overlay controls applicable to the site.</p> |
| Removal of the covenant would | <p>Section 60(2) notes that:</p> |

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| adversely property values in the area | <p>'The responsible authority must not grant a permit which allows the removal or variation of a restriction (within the meaning of the Subdivision Act 1988) unless it is satisfied that the owner of any land benefited by the restriction (other than an owner who, before or after the making of the application for the permit but not more than three months before its making, has consented in writing to the grant of the permit) will be unlikely to suffer-</p> <ul style="list-style-type: none"> a.) financial loss; or b.) loss of amenity; or c.) loss arising from change to the character of the neighbourhood; or d.) and other material detriment. <p>Several objections have noted that the establishment of the school within Logan Street would likely result in a decrease in property value/financial loss. One objection further included supporting documentation from a local real estate agent noting that proximity to the school would likely result in a decreased valuation.</p> <p>The loss of property value will be part of the material detriment that will form a basis for the recommendation to refuse the application.</p> |
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RECOMMENDATION

That Council, resolve to **Refuse to Grant a Planning Permit** on the following grounds:

- The proposed covenant removal will likely result in financial loss, loss of amenity, loss arising from change of character the neighbourhood and other material detriment to owners of land which benefit by the restriction.
- Pursuant to Section 60(2) of the *Planning and Environment Act* 1987 the responsible authority must not grant a permit for the removal of a covenant where the owner of any land benefitted by the restriction will be likely to suffer financial loss, loss of amenity, loss arising from change to the character of the neighbourhood, or any other material detriment as a consequence of the removal.

- The proposed covenant removal is not in conjunction with an application for the use or development of the site. As a consequence, the myriad of development and use possibilities make it impossible for the threshold tests of Section 60(2) to be satisfied.
- The proposed covenant removal fails to satisfy the interests of affected people within the surrounding neighbourhood who will likely suffer material detriment.