COURT OF APPEAL OF VICTORIA

Boroondara City Council v 1045 Burke Road Pty Ltd and Others

[2015] VSCA 27

Warren CJ, Santamaria JA, Garde AJA

9 September 2014, 10 March 2015

Heritage — Development application — Heritage considerations — Demolition of heritage place — Application for permit under multiple permit controls — Whether need to obtain permit under each control — Planning and Environment Act 1987 (Vic), ss 4(1), 4(2), 6(1), 7(1)-(4), 12(1), 12B, 29, 35, 47(1), 55, 60(1), 61(1A), 84B(1), 84B(2) — Boroondara Planning Scheme (Vic), cll 10.02-10.04, 15.03, 20.01, 20.02, 21, 21.07, 22.05, 43.01, 65.

Development Assessment — Integrated development — Heritage considerations — Demolition of heritage place — Application for permit under multiple permit controls — Whether need to obtain permit under each control — Planning and Environment Act 1987 (Vic), ss 4(1), 4(2), 6(1), 7(1)-(4), 12(1), 12B, 29, 35, 47(1), 55, 60(1), 61(1A), 84B(1)-(2) — Boroondara Planning Scheme (Vic), cll 10.02, 10.03, 10.04, 15.03, 20.01, 20.02, 21, 21.07, 22.05, 43.01, 65.

The applicant, Boroondara City Council (Boroondara), was the authority responsible for the administration and enforcement of the *Boroondara Planning Scheme* (Vic) (the Scheme).

The first respondent applied for four permits under the Scheme: for demolition of a heritage building called "Arden"; for construction of a multi-unit building above a basement car park, for alteration of road access and for a reduction in the number of bicycle spaces. The first respondent applied to the Victorian Civil and Administrative Tribunal (the Tribunal) for a review of Boroondara's refusal of the application. The Tribunal granted the permits sought.

The Heritage Overlay contained in the Scheme was the only planning permit trigger for the proposed demolition but there were multiple planning permit triggers for the proposed relevant building works.

The purpose of the Heritage Overlay was set out in cl 43.01 of the Scheme as follows:

> To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
>
> To conserve and enhance heritage places of natural or cultural significance.

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

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

To conserve specifically identified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.

Integrated decision-making having regard to broad societal needs was expressly required by cl 10.04 of the Scheme.

In its reasons, the Tribunal found, inter alia, that in deciding whether the proposed demolition of Arden was acceptable or justified, it was not limited to considering matters pertaining to heritage. The Tribunal also held that Arden had a level of significance such that demolition was not justified in terms of purely heritage considerations, but the "adverse outcome" was outweighed by the first respondent's proposal "having regard to its strategic context, excellent architecture and the site responsiveness of its design".

Held: (1) A single permit for an overall development proposal cannot be granted unless the responsible authority considers each permit requirement that applies to the proposal, and would grant a permit in relation to each such requirement.

(2) If the responsible authority is not satisfied that a demolition permit should be issued in the context of a proposal that would involve relevant demolition work, then it must not grant a global permit for that proposal.

Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal (2001) 18 VAR 411, discussed.

(3) In deciding whether a permit should be granted to demolish or modify a building under a 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, a Heritage Overlay.

(4) In this case, the Tribunal did take into account considerations extending beyond strictly heritage considerations when it granted a demolition permit as well as the other three permits required. 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. None of those considerations were extraneous to what the Tribunal was entitled to take into account.

Cases Cited

1045 Burke Rd Pty Ltd v Boroondara City Council [2013] VCAT 1108.

271 William Street Pty Ltd v City of Melbourne [1975] VR 156; (1974) 31 LGRA 189.

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council (1970) 123 CLR 490; 20 LGRA 208.

Boroondara City Council v 1045 Burke Road Pty Ltd (2014) 202 LGERA 1.

Graeme Gunn Architects Pty Ltd v Melbourne City Council [2006] VCAT 348.

Great Southern Property Managers v Colac Otway Shire Council [2006] VCAT 706.

Harding v Port Phillip City Council [2002] VCAT 416.

Hermann v Port Phillip City Council [2011] VCAT 2353.

Knox City Council v Tulcany Pty Ltd [2004] VSC 375.

Maribyrnong City Council v Malios [2014] VSC 452.

National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd [1976] VR 592; (1976) 37 LGRA 172.

Reis v Port Phillip City Council (unreported, VCAT, Vic, No 23643 of 2000, Bruce DP, 31 March 2001).

Returned & Services League of Australia (Vic Branch) Inc (Glenroy Sub-branch) v Moreland City Council [1998] 2 VR 406.

Rozen v Macedon Ranges Shire Council (2010) 181 LGERA 370.

Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363.

Shalit v Jackson Clement Burrows Architecture Pty Ltd (2002) 19 VAR 236.

Shrimpton v Commonwealth (1945) 69 CLR 613.

Stogdale v Stonnington City Council [2004] VSC 348.

Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal (2003) 126 LGERA 445.

Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal (2001) 18 VAR 411.

University of Melbourne v Minister for Planning [2011] VCAT 469.

Victorian National Parks Association Inc v Iluka Resources Ltd (2004) 16 VPR 98.

Victorian Railways Commissioners v McCartney (1935) 52 CLR 383.

White Ash & GJL Properties v Frankston City Council (2004) 140 LGERA 257.

Whitehorse City Council v Golden Ridge Investments Pty Ltd (2005) 13 VR 275.

Appeal

These proceedings concerned whether a demolition permit was necessary for the demolition of a significant heritage place and the construction of a four-storey building and, if so, whether it was granted without error of law. The facts of the case are set out in the judgment.

J Pizer QC and *E Porter*, for the applicant.

J Gobbo QC and *S Brennan* SC, for the first respondent.

Cur adv vult

10 March 2015

Warren CJ.

1 The applicant, Boroondara City Council (Boroondara) seeks leave to appeal a decision of a judge of the Trial Division.

Summary of facts

2 Boroondara is the authority responsible for the administration and enforcement of the *Boroondara Planning Scheme* (Vic) (the Scheme).

3 The house at 1045 Burke Road, Hawthorn East (the land), is known as "Arden". It is a significant heritage place under the Scheme. The southern part of the land on which it is situated is subject to a site-specific Heritage Overlay, identified as HO20.

4 The first respondent (the permit applicant) wants to demolish Arden and construct a four-storey building in its place that will house 33 dwellings and a basement car park with 59 car parking spaces and 15 bicycle spaces (the development).

5 The Heritage Overlay (cl 43.01) is the only planning permit trigger for the proposed demolition, but there are multiple planning permit triggers for the proposed building works. More specifically, a permit is required to:

(a) construct the new building (cll 32.01-4 and 43.01-1 of the Scheme);

(b) create or alter access to a Road Zone (cl 52.29 of the Scheme); and

(c) reduce the required number of bicycle spaces (cl 52.34 of the Scheme).

6 On 9 November 2012, the permit applicant applied to Boroondara for a planning permit for its proposal (the permit application).

7 On 20 December 2012, Boroondara issued a notice of refusal to grant a planning permit. The permit applicant applied to the Victorian Civil and Administrative Tribunal (the Tribunal) for a review of that decision.

8 Between 20 and 24 May 2013, the Tribunal (constituted by a Senior Member and a Member) conducted that review (the determination). It heard evidence from three expert heritage consultants, among other witnesses.

9 On 28 June 2013, the Tribunal ordered that Boroondara's decision be set aside, and that a permit be directed to be issued. In its reasons, the Tribunal found that:

(d) in deciding whether the proposed demolition of Arden was acceptable or justified, it was not limited to considering matters pertaining to heritage. Rather, the discretion in relation to demolition, to be exercised properly, required reference to all relevant considerations, "including planning policy for urban consolidation, housing diversity, sustainable development and urban design";[1] and

(e) Arden "has a level of significance such that demolition is not justified in terms of purely heritage considerations";[2] but

(f) the "adverse outcome" (being the demolition of Arden resulting in the loss of a heritage building) was outweighed by the permit applicant's proposal "having regard to its strategic context, excellent architecture and the site responsiveness of its design".[3]

10 Boroondara sought leave to appeal against the order of the Tribunal in which the Tribunal granted a permit which allowed for:

(g) the demolition of an existing building ("Arden") on the land despite the heritage overlay;

(h) the construction of a four storey building above a basement car park for 33 dwellings;

(i) the alteration of access to a road in a Road Zone – Category 1 (Rathmines Road);

(j) the construction of a fence, and

(k) a reduction in the number of bicycle spaces required for dwelling visitors.[4]

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1 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [34].

2 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [71].

3 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [137].

4 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [1].

11 The trial judge conveniently summarised the decision of the Tribunal as follows:

> 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.[5]

12 Her Honour articulated the sole question of law sought to be agitated before her as whether Boroondara (or the Tribunal on review), when deciding whether to exercise the discretion to allow the relevant demolition, was entitled only to take into account considerations relating to heritage conservation policy.

13 The schedule to the Heritage Overlay of the Scheme identified the property "Arden" as a Heritage Place. As a consequence a planning permit was required for its demolition by virtue of cl 43.01-1. A permit was also required under the Heritage Overlay to construct a building or construct or carry out works. As her Honour noted, cl 43.01-1 therefore contained a permit trigger for both demolition and new construction.[6]

14 It is convenient to set out the initial parts of the trial judge's reasons in turn setting out the relevant provisions of the Planning Scheme:

> [9] The purpose of the Heritage Overlay is set out in cl 43.01 of the Planning Scheme as follows:
>
> > To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
> >
> > To conserve and enhance heritage places of natural or cultural significance.
> >
> > To conserve and embrace those elements which contribute to the significance of heritage places.
> >
> > To ensure that development does not adversely affect the significance of heritage places.
> >
> > To conserve specifically identified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.
>
> [10] The decision guidelines under the Heritage Overlay are set out in cl 43.01-4. Relevantly, they are as follows:
>
> > Before deciding on an application, in addition to the decision guidelines in clause 65, the responsible authority must consider, as appropriate:
> >
> > - The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
> > - The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.

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5 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [4].

6 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [8].

- Any applicable statement of significance, heritage study and any applicable conservation policies.
- 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.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

…

[11] The decision guidelines in cl 65.01 are also applicable, including the requirement to consider, as appropriate, the State and Local Policy Frameworks and the orderly planning of the area.

[12] The local heritage policy is found in cl 22.05. The objectives of the policy in cl 22.05-2 include the following:

- To encourage the retention and conservation of all "significant" or "contributory" heritage places in the Heritage Overlay.
- To consider the cultural heritage significance described in the statement of significance for any heritage place as part of the design process of any proposal and when making decisions about proposed buildings and works associated with that place.
- To ensure that works, including conservation, alterations, additions and new development, respect the cultural heritage significance of the heritage place.

…

- To ensure that, when determining or when considering issues of bulk, form and appearance of additions or new development, the evaluation is based on the characteristics of the significant or contributory components of the fabric of the heritage place, rather than any non-contributory elements that may exist in the area.

- To promote urban and architectural design which clearly and positively supports the ongoing significance of heritage places.

[13] There is a specific policy in cl 22.05-3 for demolition. That policy, relevantly, is to:

- Retain "significant" or "contributory" heritage places and not normally allow for their total demolition.
- Permit partial demolition of "significant" or "contributory" heritage places for the purpose of additions and alterations if the additions and alterations will not adversely affect the cultural heritage significance of the place and the proposed addition or alteration is in accordance with the provisions of this policy.
- Permit partial demolition to remove non-original and non-contributory additions to heritage places in line with the conservation provisions of this policy.
- Consider the following, as appropriate, before determining an application for demolition of "significant" or "contributory" heritage places or parts of "significant" or "contributory" heritage places:

- The cultural heritage significance of the heritage place, and, when located in a heritage precinct, the contribution of the place to the significance of the precinct;
- Whether the demolition or removal of the entire heritage place or any part of the place will adversely affect cultural heritage significance;
- Whether the demolition or removal contributes to the long-term conservation of the heritage place; and
- Whether the heritage place is structurally unsound. The poor condition of a heritage place should not in itself, be a reason for permitting demolition of "significant" or "contributory" heritage places.

- Require an application for a new building or works to accompany a demolition application. The demolition or removal of any heritage place or part of a heritage place will not normally be approved until a replacement building or development is approved.

[14] Whether a building or place is "significant" or "contributory" depends on its grading in the Hawthorn Heritage Study 1993. Clause 22.05-6 provides that "significant" heritage places include places graded A, B and C by the 1993 Study. Arden was graded B in the 1993 Study and is therefore a significant heritage place under the Planning Scheme.

[15] State policy in relation to heritage protection or conservation is set out in cl 15.03 of the *Boroondara Planning Scheme*, which seeks to ensure the conservation of places of heritage significance. Related strategies are to provide for the conservation and enhancement of those places that are of aesthetic, archaeological, architectural, cultural, scientific, or social significance, and to retain those elements that contribute to the importance of the heritage place.[7]

Sweetvale

15 On this appeal, substantial argument was heard as to whether, before the permit could be granted, the respondent (as the applicant for the permit) needed to satisfy or "tick" every permit requirement that applied to the proposal. In other words, if the application for a permit for the overall proposal did not satisfy all applicable planning controls, was it bound to fail? The Tribunal and subsequently the trial judge effectively answered in the negative.

16 In her reasons, the trial judge considered[8] the propositions underpinning *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (*Sweetvale*).[9] The high point of *Sweetvale* is that a decision to grant a permit represents, as Ashley J stated in that case, "a discrete decision favourable to the applicant in respect of each of those building controls which required [the] grant of a permit".[10]

17 The trial judge gave close consideration to Ashley J's analysis in *Sweetvale* of proposals to which multiple permit triggers apply. Her Honour noted:

> The Council's argument for separation and sequential consideration of matters relevant to individual permit triggers relies heavily on the reasoning in *Sweetvale*. In *Sweetvale*, the proposal was subject to a number of building controls, some of which were exempt from third party review. The appellant sought to advance

7 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [9]-[15].

8 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [23].

9 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411.

10 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411 at [60].

submissions about matters relevant to permit triggers which were exempt from third party review. Justice Ashley rejected the submission that, in determining the operation of the exemptions, the Tribunal was bound to treat the application for the grant of a permit as being for all relevant purposes singular. His Honour said:

> In my opinion, correctly understood, although the application was singular in form, it embodied a series of applications with respect to particular building controls. That this was the fact of the matter could not be doubted. Further, although the decision to grant a permit was singular in form, it represented a discrete decision favourable to the applicant in respect of each of those building controls which required grant of a permit. That this was the fact of the matter again could not be doubted. It is true that in deciding to grant a permit it was necessary for the responsible authority to consider the matter overall, as well as or in the course of considering the individual permissions which the permit applicant had to obtain. But that does not mean that the applications made with respect to each of those controls did not have to be the subject of individual determination. Indeed, the decision guidelines, which varied from one control to the other, dictated that an individual determination did have to be made in the case of each control.

Later in the judgment, his Honour [Ashley J] said:

> There is no reason in logic why a decision to grant a permit should not be understood to be a decision upon applications – that is, in the plural – for grant of a permit in respect of multiple planning controls, reflecting an outcome favourable to the applicant in each instance. There is no reason in logic, to the contrary, to treat the decision to grant a permit as having been made upon a single indivisible application.[11]

(Citations omitted)

18 Her Honour analysed *Sweetvale* in the following way:

> The decision of the Court in *Sweetvale* was, in substance, that third parties were not entitled to be heard on matters relevant to a permit sought under a control where the control itself contained an exemption from third party review. The fact that objectors had rights in relation to one control did not open up rights in respect of controls that expressly excluded third party review. To allow a party to contest decisions made under planning controls that were subject to exemption would negate the exemption provisions and be contrary to both the plain meaning and intent of the relevant provisions in the planning scheme.
>
> Here, the Court is not concerned with rights to participate in the review proceeding, but with the decision to grant or not to grant a permit for the development "overall" and with the decision-making process that leads to that outcome. The relevance of the decision in *Sweetvale* is that the grant of a permit for the development (the demolition of Arden and the construction in its place of a four storey multi-dwelling building) is to be viewed as a series of applications in respect of particular controls as well as an application for permission to carry out the development as a whole. There is, as Ashley J said, a need to consider the matter "overall" as well as the individual permissions which the permit applicant had to obtain.[12]

(Citations omitted)

19 In my view, her Honour's understanding of *Sweetvale* was correct in this respect. Her Honour then proceeded to state:

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11 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [48]-[49].

12 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [50]-[51].

> I do not consider that *Sweetvale* stands for the proposition that each request for permission needs to be decided favourably to the permit applicant for the permit to issue for the development as a whole. The respondent [the permit applicant] submits that the proper approach to what was said in *Sweetvale* is that it is not necessary to have a "tick" in every box, that is, a favourable decision in respect of each control. If there was a "cross" on demolition but a "tick" in the other four boxes, in the overall determination of the application an integrated decision could be arrived at, balancing all relevant considerations, that a permit for the development should issue.
>
> I accept this submission. It reflects the process of integrated decision-making required by the PE Act [the *Planning and Environment Act 1987* (Vic)] and the Planning Scheme [the *Boroondara Planning Scheme*]. Where a permission is required that is integral to the development and where, if permission were denied, the development as a whole could not proceed, to require each application for permission to be decided favourably to the permit applicant in order for a permit to issue for the development would mean that considerations relevant to individual permissions could trump all other planning considerations relevant to the development. This is not the treatment of policies contemplated by either the PE Act or the State and Local Planning Policy Frameworks.[13]

20 Although her Honour was correct to consider that the *Planning and Environment Act 1987* (Vic) (the Act) and the Scheme require a process of integrated decision-making, in my view that does not overcome the need to meet each permit requirement that applies to a proposed use or development of land, for reasons explained further below.

21 First, however, it is important to clarify the nature of the "building controls" to which *Sweetvale* refers. In that case, Ashley J stated:

> In my opinion, correctly understood, although the application was singular in form, it embodied a series of applications with respect to particular building controls … Further, although the decision to grant a permit was singular in form, it represented a discrete decision favourable to the applicant in respect of each of those building controls which required grant of a permit.[14]

22 It follows that, by "building controls", Ashley J was referring to the permit requirements which applied to the building proposal in that case. His Honour's conclusion was reached in that context. His Honour held that, while the responsible authority must also consider the matter overall in deciding whether to grant the single application for the overall proposal:

> … that does not mean that the applications made with respect to each of those controls did not have to be the subject of individual determination. Indeed, the decision guidelines, which varied from one control to the other, dictated that an individual determination did have to be made in the case of each control.[15]

23 Accordingly, in my view *Sweetvale* stands for the proposition that a single permit for an overall development proposal cannot be granted unless the responsible authority considers each permit requirement that applies to the proposal, and would grant a permit in relation to each such requirement. If the responsible authority is not satisfied that a demolition permit should be issued in the context of a proposal that would involve relevant demolition work, then it must not grant a global permit for that proposal.

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13 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [53]-[54].

14 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411 at [60].

15 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411 at [60].

24 The question is whether that proposition is valid, and if so, how it is compatible with the integrated decision-making process required by the Act.

Permit requirements in an integrated decision-making context

25 Section 6(2)(b) of the Act provides that a planning scheme may regulate or prohibit the use or development of any land. In this case, cl 43.01-1 of the Scheme provides that a permit is required to demolish or remove a building on land to which the Heritage Overlay applies.

26 Part 4 of the Act deals with permits. Section 47 provides for the making of permit applications; s 60 sets out the matters a responsible authority must consider before deciding on a permit application; and s 61(1) provides that the responsible authority may decide to grant or to refuse to grant the permit, or to grant it subject to conditions. Of course, a responsible authority must not grant a permit if it is not satisfied that the permit should be granted.

27 The responsible authority is required to make a decision in respect of each valid application for a permit within the prescribed time period. Section 79 provides that if the responsible authority fails to make a decision on a permit application within that time, the applicant may apply to the Tribunal for a review of that failure.

28 Section 126(1) of the Act relevantly provides that it is an offence to use or develop land in contravention of a planning scheme or a permit. Serious penalties are imposed by the Act for that offence, and in appropriate cases criminal liability can also attach to officers of bodies corporate that offend against that provision.[16] It follows that where a planning scheme subjects land to a demolition permit requirement, it is an offence to demolish a building on that land without a permit for the relevant demolition.

29 The difficulty arises in a *Sweetvale* type context where a single permit application is made for an overall development proposal that triggers a number of permit requirements under the applicable planning scheme. Intuitively, an integrated approach to decision-making would suggest that the various permit requirements should be considered together rather than individually, and that one requirement should not be allowed to frustrate the entire proposal.

30 There cannot be any doubt that Victorian planning law requires integrated strategic decision-making. The Act and its history demonstrate that one of the objectives of planning in Victoria is to facilitate development in accordance with the other objectives, including, but not limited to, conservation of buildings which are of aesthetic, historical or cultural interest.[17] Significantly, one of the objectives of planning under the Act is to enable land use and development planning and policy to be "easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels."[18] Further, ss 60 and 84B of the Act require consideration of a wide range of matters in a planning permit application, including the environmental effects and social and economic effects of the proposal, where appropriate.[19]

16 *Planning and Environment Act 1987* (Vic), s 128.

17 *Planning and Environment Act 1987* (Vic), s 4(1); as noted by the trial judge at [34] of *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1.

18 *Planning and Environment Act 1987* (Vic), s 4(2)(c); as the trial judge also noted at [34] of *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1.

19 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [35].

31 In addition, integrated decision-making having regard to broad societal needs is expressly required by cl 10.04 of the Scheme. As noted by the trial judge, cl 65 of the Scheme requires that the responsible authority must decide whether a proposal for a planning permit will produce "acceptable outcomes" in terms of the decision guidelines of that clause.

32 In *Rozen v Macedon Ranges Shire Council* (*Rozen*),[20] Osborn J described the test for "acceptable outcomes" as follows:

> The test of acceptable outcomes stated in the clause is informed by the notions of net community benefit and sustainable development. An outcome may be acceptable despite some negative characteristics. An outcome may be acceptable because on balance it results in net community benefit despite achieving some only of potentially relevant planning objectives and impeding or running contrary to the achievement of others.[21]

33 Earlier in time, in *Knox City Council v Tulcany Pty Ltd* (*Knox City Council*),[22] Osborn J held:

> The concept of net community benefit is not one of ideal outcomes, but of outcomes which result in a net benefit to the community assessed within a policy framework by reference to both their benefits and disbenefits.[23]

34 So much is clear. Nevertheless, it is important to recognise that the "acceptable outcomes" test is a final hurdle for the grant of a permit, not a substitute for satisfaction that the permit should be granted. As the chapeau to cl 65 states:

> Because a permit can be granted does not imply that a permit should or will be granted. The responsible authority must decide whether the proposal will produce acceptable outcomes in terms of the decision guidelines of this clause.

35 In my view, it is not open to read the Act in such a way that individual permit requirements may become optional in the context of an overarching, *Sweetvale*-type permit application. Permit requirements and integrated decision-making are both essential aspects of the legislative scheme envisaged by the Act, and they are compatible with one another. The *Sweetvale* proposition[24] is valid, but it must be understood in the context of the integrated decision-making required by the Act.

36 Whether an overarching permit application is made for an entire proposal or the required permits are applied for separately is a matter of form rather than substance. In either situation, the triggered permit requirements must each be considered by the responsible authority, in the context of the overall proposal. For a cover-all permit to be granted, the responsible authority must be satisfied that, in the context of the overall proposal, a permit should be granted in respect of each permit requirement triggered by the proposal, and also that the cover-all permit which is sought should be granted.

37 Put another way, the overall proposal is taken into account in the consideration of each permit requirement triggered by the proposal, and also as a final check before the project permit is granted. The individual permit

20 *Rozen v Macedon Ranges Shire Council* (2010) 181 LGERA 370.

21 *Rozen v Macedon Ranges Shire Council* (2010) 181 LGERA 370 at [171].

22 *Knox City Council v Tulcany Pty Ltd* [2004] VSC 375.

23 *Knox City Council v Tulcany Pty Ltd* [2004] VSC 375 at [13](e).

24 See above at [23].

requirements that are triggered are not to be considered in isolation or sequentially; instead each must be considered with regard for the other triggered permit requirements and the overall proposal.

38 If the responsible authority would not give every triggered permit requirement a "tick" in that context, then it would be improper for the responsible authority to grant an overall permit for the proposal. To do so would involve either authorising a use or development of land that the responsible authority is not satisfied should be authorised, or a failure to make a decision regarding the triggered permit requirement at all.

39 In this case, such a difficulty did not arise. Although the Tribunal would have refused to grant a demolition permit sought in isolation on the basis of heritage considerations, in the context of the overall development proposal it considered that demolition was justified. It follows that the Tribunal was satisfied that a demolition permit would be granted in that context. Since it was also so satisfied in respect of the other triggered permit requirements, it was possible for the Tribunal also to be satisfied that it should grant the overall permit that the respondent sought. Every permit requirement "box" was "ticked". But had there been a "cross" on demolition, it would not have been open to the Tribunal to grant a permit for the overall development, given that it would entail the demolition of Arden.

40 The sense in which it is not necessary to tick every box is at the level of the particular considerations that are relevant to a decision whether to grant a permit, subject of course to the applicable decision guidelines. It is for this reason that in this case, where there was a "cross" for heritage considerations, but a "tick" on many other considerations, it was possible for the Tribunal to arrive at an integrated decision, balancing all relevant considerations in the context of the global application, that a demolition permit should be granted, even though it was the Heritage Overlay that originally imposed the requirement for a demolition permit.

41 The history of the Act supports the approach I have described in the preceding paragraphs.

42 On the introduction of the legislation in 1986, the Minister said:

> In drafting the Planning and Environment Bill, the government has taken the view that planning involves many judgments of value. Genuine differences of opinion over means and ends are the rule rather than the exception. For these reasons, the Bill establishes a framework within which a continual process of planning for the best use of the land-based resources of Victoria can be successfully carried on …
>
> The Bill establishes a single planning scheme in every municipality and two discretionary planning approval processes – permits and amendments to schemes. All decisions on amendments and permits must take account of significant effects on the environment and may take account of social and economic effects which widen somewhat the range of relevant considerations.[25]

43 In August 1993, the State Government published a policy document, *Planning a Better Future for Victorians, New Directions for Development and Economic Growth*.[26] The Minister for Planning said:

25 Victoria, Parliamentary Debates, Legislative Assembly, 18 September 1986, pp 668-672 (Frank Wilkes, Minister for Housing).

26 Published by the Public Affairs Branch, Department of Planning and Development, Victoria, August 1993.

> Changes are needed to increase certainty, point a clear direction for the future, remove avoidable delays and facilitate rather than obstruct appropriate development.[27]

44 The gist of the policy document was said to be to provide, among other things, "better planning schemes". The express statement was made that "[U]nnecessary controls will be removed and desirable, straight-forward projects will be facilitated".[28] The document referred to "[M]ore efficient, streamlined procedures for approvals".

45 Finally, the planning policy document stated:

> The reforms represent a fundamental re-orientation of this system, from a detailed control emphasis to a more strategic approach …
>
> A reformed planning system with appropriate policies and guidelines, and simpler, more effective processes will be a fundamental part of this new approach.[29]

46 These statements of policy (both with respect to the Bill and the policy document) are manifested or reflected in the relevant cases – *Sweetvale*, *Rozen* and *Knox City Council*. The statements and, in turn, the cases should reflect a comprehension of facilitation and the adoption of a strategic approach to planning permits.

47 It must also be borne in mind that prior to the Act's introduction in 1986, planning controls in Victoria were fragmented. Separate independent approvals were required under the various controls. It was that difficulty which was addressed by the introduction of the Act in 1987 and planning policies subsequently.

48 The integrated decision-making approach contemplated by the Act and the Scheme necessitates that permit requirements triggered by a proposal be considered together rather than in isolation, with regard to the overall proposal and its impacts on all relevant planning considerations; but it does not mean that they cease to be requirements.

49 The point is well demonstrated if the example of a major regional development, such as a shopping centre, is considered. These are examples of major developments that have changed over a period of time from their initial development. Over the decades, expansion, renewal and redevelopment are sought, needed and approved. When applications are submitted for such proposals the responsible authority does not consider each triggered permit requirement in a segregated box. Nor does it insist that all contemplated future development of the site be approved at once. Often, because of the magnitude of the development, permit requirements will be triggered, considered and granted on a staged basis. However, throughout the process the responsible authority will consider the permits needed at each stage in the context of the development proposed at that stage. If an aspect of a stage of development triggers a permit requirement and the responsible authority is not satisfied a permit should be granted for that aspect in the context of the proposed stage of development, then

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27 Published by the Public Affairs Branch, Department of Planning and Development, Victoria, August 1993, p 3.

28 Published by the Public Affairs Branch, Department of Planning and Development, Victoria, August 1993, p 14.

29 Published by the Public Affairs Branch, Department of Planning and Development, Victoria, August 1993, p 27.

the authority must not grant a permit for the stage which authorises that aspect, and that aspect cannot proceed. Again, this is consistent with the philosophy and purpose underpinning the Act.

50 I have had the considerable benefit of reading the draft reasons of Santamaria JA and Garde AJA with which I agree, subject to the emphasis I have placed on integrated decision-making in the above reasons. I ultimately agree with their Honour's conclusions with respect to what Garde AJA describes as the "second question".[30]

51 The matters raised by the application are important to the planning jurisdiction. I would grant leave to appeal and dismiss the appeal.

Santamaria JA.

52 I have had the advantage of reading in draft form the judgments of the Chief Justice and Garde AJA. I agree with them that leave to appeal should be granted, that the appeal should be dismissed and that the decision of the Tribunal published on 28 June 2013 should be upheld.

53 In particular, I agree that, when it decided an application under the Heritage Overlay control, the applicant was not limited to considering only heritage matters. Rather, when exercising its discretion lawfully in relation to demolition, it was required to do so by reference to all relevant considerations, including planning policy for urban consolidation, housing diversity, sustainable development and urban design.

54 In her reasons, the Chief Justice identifies, as the substantial question: "whether, before the permit could be granted, the respondent (as the applicant for the permit) needed to satisfy or 'tick' every permit requirement that applied to the proposal". In his reasons, Garde AJA identifies his "second key question":

> Where there are multiple triggers for a planning permit for a proposal, may a permit be granted for that proposal only if there is a favourable decision or outcome (being the grant of a permit either with or without conditions) in respect of each permit trigger?

55 Part 4 of the *Planning and Environment Act 1987* (Vic) (the Act) is entitled "Permits". Section 47 provides:

> (1) If a planning scheme requires a permit to be obtained for a use or development of land or in any of the circumstances mentioned in section 6A(2) or for any combination of use, development and any of those circumstances, the application for the permit must—
>
> (a) be made to the responsible authority in accordance with the regulations; and
>
> (b) be accompanied by the prescribed fee; and
>
> (c) be accompanied by the information required by the planning scheme; and
>
> (d) if the land is burdened by a registered restrictive covenant, be accompanied by a copy of the covenant; and
>
> (e) if the application is for a permit to allow the removal or variation of a registered restrictive covenant or if anything authorised by the permit would result in a breach of a registered restrictive covenant, be accompanied by—
>
> (i) information clearly identifying each allotment or lot benefited by the registered restrictive covenant; and

30 See below at [146]-[147].

(ii) any other information that is required by the regulations.

(2) Sections 52 and 55 do not apply to an application for a permit to remove a restriction (within the meaning of the *Subdivision Act 1988*) over land if the land has been used or developed for more than 2 years before the date of the application in a manner which would have been lawful under this Act but for the existence of the restriction.

56 "Planning Schemes" are provided for in Pt 2 of the Act. It will be noticed that s 47 uses the expression "use or development of land or in any of the circumstances mentioned in section 6A(2) or for any combination of use, development and any of those circumstances …". Needless to say, developers and practitioners do not need to use the statutory language. What a layperson calls a "proposal" or a "project", the Act will call a proposed "use or development". Secondly, what a developer calls an application for a permit for a proposal may involve applications for several permits. It depends on the planning scheme, upon the permits that it requires and upon what the proposal involves. The relevant planning scheme may identify several aspects of a single proposal or project each of which requires a permit. The present proposal provides an obvious example. In my view, although a developer may, for the sake of administrative convenience, make a single application for a "permit" in respect of a proposed use or development, that application is to be treated, in law, as an application (or several applications) for each of the permits required by the relevant planning scheme.

57 A decision with respect to that application will involve a decision in respect of each of the permits required by the planning scheme. However, the decision-making process in respect of each permit will not be taken in isolation from the decision-making process in respect of each of the other permits. The decision-making process in respect of each such permit will be informed by law and will be integrated with each of the applications for the other permits required by the planning scheme, and the whole process will involve the integrated application of all the considerations and matters made relevant by the Act. Where a planning scheme requires several permits, the Act does not require the consideration of the matters relevant to a particular permit to be separate and segmented from the consideration of the matters relevant to each other permit; it does not require the permits to be considered in any sequential or chronological order such as the sequence in which one or other will be deployed in the use or development. In the present case, the applicant submitted that it could treat the application for the demolition permit separately from and before it considered the application for the permits for construction, alteration of access and reduction of the number of bicycle spaces each of which was also required by the planning scheme. That submission should be rejected. The decision-making process must be integrated because of the "potentially conflicting nature of the objectives stated in s 4 of [the Act] and the need to integrate a range of considerations in arriving at an appropriate planning decision".[31] The responsible authority, in taking into account the matters specified in s 60, and the Tribunal, in taking into account the matters specified in s 84B, will consider the whole of the proposal in respect of which permits are required by the planning scheme.

58 Although the decision-making process in which all applications for multiple permits should be integrated and not segregated, it seems to me that every

31 *Rozen v Macedon Ranges Shire Council* (2010) 181 LGERA 370 at [167] (Osborn J).

permit required by a planning scheme must be granted before the proposed use and development can lawfully proceed.[32] So much, it seems to me, is mandated by s 126 of the Act, which makes it an offence to use or develop land in contravention of or in failing to comply with a planning scheme.

59 In the present case, the Tribunal decided that net community benefit was advanced by permitting the proposal to proceed. The weight that was to be given to heritage considerations was a matter for the Tribunal as was the weight to be given to each of the other relevant considerations. But, in my opinion, the proposed use or development could not proceed lawfully in the absence of a demolition permit.

60 If a planning scheme requires several permits, it is not lawful to proceed with a use or development unless and until each of those permits is granted. In these circumstances, I would answer the "second key question" identified by Garde AJA as "Yes".

Garde AJA.

Introduction

61 On 2 October 2012, the permit applicant[33] made an application for a permit (the permit application) under the *Boroondara Planning Scheme* (Vic) (the Scheme) to construct a four storey building containing 33 dwellings above a basement car park with 59 car parking spaces and 15 bicycle spaces (the development) on land at 1045 Burke Road, Hawthorn East.

62 "Arden", a residence of Federation Queen Anne style, is located on the land. Arden was constructed in 1906, and is in good condition. The building is graded B under the 1993 Hawthorn Heritage Study. It is a significant heritage place under the Scheme. The theme of Arden is identified as "Edwardian Prosperity" with a contributory garden designed in the 1920s. The significance of Arden relates to its architectural and aesthetic values.

63 The land is in the Residential 1 Zone under the Scheme, and in part is subject to a Heritage Overlay. The Heritage Overlay is the only demolition control. The land is adjacent to Burke and Rathmines Roads. Both roads are in a Road Zone, Category 1 under the Scheme.

64 To obtain a permit for the development, the applicant needed to satisfy four separate permit requirements under the Scheme. They were for:

- the demolition of an existing building on land affected by a Heritage Overlay;
- the construction of a 33 dwelling, four storey building above a basement car park;
- the alteration of access to a road in a Road Zone, Category 1 (Rathmines Road); and
- a reduction in the number of bicycle spaces required for dwelling visitors.

65 There was objection to the application principally because the development involved demolition of Arden.

66 On 20 December 2012, Boroondara City Council (Boroondara) refused to grant a permit for the development.

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32 I understand this to have been the conclusion of Ashley J in *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411 at [60], [76].

33 The first respondent in this appeal.

67 On 8 February 2013, the applicant applied to the Tribunal for the review of the refusal by Boroondara to grant a permit.[34] The cost of the development was estimated in the application for review at $13-$15 million.

68 After a five day hearing, the Tribunal ordered that the refusal be set aside and that Boroondara be directed to issue a permit for the development (the determination). The determination included extensive reasons, and was published on 28 June 2013.[35]

69 Boroondara sought leave to appeal to the Supreme Court of Victoria from the determination of the Tribunal on a question of law which may be stated in these terms:[36]

> Where:
>
> (a) a person proposes to demolish the buildings on land covered by a Heritage Overlay in the [Scheme];
>
> (b) the person needs a planning permit to demolish those buildings only by reason of the Heritage Overlay; and
>
> (c) other aspects of the proposal (such as the construction of new buildings) also require planning permission—
>
> is the responsible authority (or the [Tribunal] on review) – when determining whether to exercise its discretion to allow the demolition of the heritage buildings – only entitled to take into account considerations relating to Heritage Conservation Policy?

70 The application for leave to appeal was heard by the trial judge at the same time as the appeal. Her Honour granted leave to appeal, but dismissed the appeal answering the question of law "No".[37]

71 Boroondara now seeks leave to appeal to the Court of Appeal from the decision of the trial judge. The issues considered by her Honour are again raised in the application for leave to appeal. The application for leave to appeal was heard at the same time as the appeal.

The statutory framework

72 The objectives of planning in Victoria are stated in the *Planning and Environment Act 1987* (Vic) (the Act):[38]

> (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
>
> (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
>
> (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;
>
> (d) 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;
>
> (e) to protect public utilities and other assets and enable the orderly provision and co-ordination of public utilities and other facilities for the benefit of the community;

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34 *Planning and Environment Act 1987* (Vic), s 77.

35 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108.

36 *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 148.

37 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1.

38 *Planning and Environment Act 1987* (Vic), s 4(1).

(f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e);

(g) to balance the present and future interests of all Victorians.

73 The objective of planning stated in s 4(1)(d) of the Act includes the conservation and enhancement of buildings which are of architectural or historical interest such as Arden. However, the objectives stated in s 4(1)(a) and (f) refer to the fair, orderly, economic and sustainable use, and development of land, and the facilitation of development. Application of the different objectives to an application for a permit for the use and development of land may lead to divergent or even conflicting considerations. Decision-makers have the difficult task of balancing objectives and considerations in making decisions under the Act.[39]

74 The objectives of the planning framework established by the Act include:[40]

(a) to ensure sound, strategic planning and co-ordinated action at State, regional and municipal levels;

(b) to establish a system of planning schemes based on municipal districts to be the principal way of setting out objectives, policies and controls for the use, development and protection of land;

(c) to enable land use and development planning and policy to be easily integrated with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels;

(d) to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects when decisions are made about the use and development of land;

(e) to facilitate development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes;

(f) to provide for a single authority to issue permits for land use or development and related matters, and to co-ordinate the issue of permits with related approvals;

(g) to encourage the achievement of planning objectives through positive actions by responsible authorities and planning authorities;

…

75 The objective of the planning framework established by the Act and found in s 4(2)(c) speaks of the integration of land use and development planning and policy with environmental, social, economic, conservation and resource management policies at State, regional and municipal levels.

76 The objectives of planning and of the planning framework established by the Act are not qualified or restricted in the Act but are expressed so as to have general operation and application. They apply to planning schemes, planning scheme amendments, and applications for permits.

77 Planning schemes may be made under the Act for areas in Victoria. They:[41]

(a) must seek to further the objectives of planning in Victoria within the area covered by the scheme; and

(aa) must contain a municipal strategic statement, if the scheme applies to the whole or part of a municipal district; and

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39 The expression "decision-maker" is used in these reasons to refer to responsible authorities, and in the event of an application for review, the Tribunal.

40 *Planning and Environment Act 1987* (Vic), s 4(2).

41 *Planning and Environment Act 1987* (Vic), s 6(1).

(b) may make any provision which relates to the use, development, protection or conservation of any land in the area.

78 Planning schemes are required to include and separately specify State standard provisions and local provisions. The local provisions must include the municipal strategic statement. Inconsistency between different provisions of a planning scheme must, so far as practicable, be read to resolve the inconsistency. In the event of inconsistency, State standard provisions prevail over local provisions. A specific control over land prevails over a municipal strategic statement, or any strategic plan, policy statement, code or guideline in a planning scheme.[42]

79 Boroondara is the planning authority and the responsible authority for the Scheme. A planning authority has the responsibility of reviewing regularly the provisions of a scheme for which it is the planning authority, and of preparing amendments.[43] Following adoption by the planning authority, the Minister administering the Act has the responsibility of approving planning scheme amendments.[44]

80 An application for a permit may be made if a planning scheme requires a permit to be obtained for a use or development of land.[45] Applications for permits must be made to the responsible authority in accordance with the regulations.[46] A responsible authority must give a copy of the application to any referral authorities without delay unless the referral authority has stated in writing that it does not object to the grant of a permit for the proposal following consideration of the proposal within the past three months.[47]

81 Before deciding on the application, Boroondara was required to consider:

(a) the relevant planning scheme; and
(b) the objectives of planning in Victoria; and
(c) all objections and other submissions which it has received and which have not been withdrawn; and
(d) any decision and comments of a referral authority which it has received; and
(e) any significant effects which the responsible authority considers the use or development may have on the environment or which the responsible authority considers the environment may have on the use or development.[48]

82 At the time of the Tribunal's determination, s 60(1A) of the Act provided that Boroondara, before deciding on the application, if the circumstances appear to so require, may consider:

(a) any significant social and economic effects of the use or development for which the application is made; and

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42 *Planning and Environment Act 1987* (Vic), s 7(1)-(4).

43 *Planning and Environment Act 1987* (Vic), s 12(1)(c) and (d); s 12B.

44 *Planning and Environment Act 1987* (Vic), ss 29 and 35.

45 *Planning and Environment Act 1987* (Vic), s 47(1).

46 *Planning and Environment Act 1987* (Vic), s 47(1)(a).

47 *Planning and Environment Act 1987* (Vic), s 55.

48 See *Planning and Environment Act 1987* (Vic), s 60(1). Section 60(1) was amended by s 76 of the *Planning and Environment Amendment (General) Act 2013* (Vic) which commenced on 28 October 2013 subsequent to the Tribunal's determination. Section 60(1A)(a) of the *Planning and Environment Act* was repealed and a similar provision inserted as s 60(1)(f).

…

(g) any other strategic plan, policy statement, code or guideline which has been adopted by a Minister, government department, public authority or municipal council; and

…

(j) any other relevant matter.

83 In *Returned & Services League of Australia (Vic Branch) Inc (Glenroy Sub-branch) v Moreland City Council*,[49] Hayne JA held that the use of the word "may" in a previous provision similar to s 60(1A) did not merely confer a discretion, but conferred authority which "must be exercised, if the circumstances are such as to call for its exercise".[50]

84 Section 84B(1) and (2) contain a list of considerations which must be taken into account by the Tribunal in determining an application for review. Section 84B(2)(a) and (b) of the Act require the Tribunal in determining an application for review under the Act to take into account any relevant planning scheme, and have regard to the objectives of planning in Victoria.

85 The objectives of planning (s 4(1)), the objectives of the planning framework (s 4(2)), and the considerations listed in s 60 apply to all applications for permits under planning schemes in Victoria. Likewise, the considerations listed in s 84B also apply to all applications for review to the Tribunal of decisions made by responsible authorities on applications for permits under planning schemes in Victoria.

86 There is nothing in the Act that provides or suggests that the objectives and considerations listed in ss 4, 60 and 84B do not apply to permit applications made under heritage controls contained in planning schemes. As a result, the objectives and considerations listed in ss 4, 60 and 84B do apply to all applications for permits involving heritage controls where those objectives or considerations are relevant to an application. The objectives and considerations listed in ss 4, 60 and 84B must be taken into account by decision-makers if they are relevant to a permit application.

The Scheme

87 The State standard provisions of the Scheme include the State Planning Policy Framework (the SPPF). Clause 10.02 of the Scheme recites the goal of the SPPF:

> The State Planning Policy Framework seeks to ensure that the objectives of planning in Victoria (as set out in Section 4 of the *Planning and Environment Act 1987*) are fostered through appropriate land use and development planning policies and practices which integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development.

88 The goal of the SPPF is of pivotal importance in planning decision-making. It seeks to foster the objectives of planning in Victoria through policies that integrate relevant environmental, social and economic factors in the interests of net community benefit and sustainable development. The net community benefit of a proposal is assessed against the policy framework relating to that proposal.

49 *Returned & Services League of Australia (Vic Branch) Inc (Glenroy Sub-branch) v Moreland City Council* [1998] 2 VR 406 (Brooking, Hayne and Charles JJA).

50 *Returned & Services League of Australia (Vic Branch) Inc (Glenroy Sub-branch) v Moreland City Council* [1998] 2 VR 406 at 413-414.

89 Clause 10.03 is redolent of s 4(2)(c) of the Act, and states:

> …
>
> These policies must be taken into account when preparing amendments to this scheme or making decisions under this scheme.
>
> Planning and responsible authorities must take account of and give effect to the policies applicable to issues before them to ensure integrated decision-making.

90 Clause 10.04 makes it doubly clear that decision-makers are to endeavour to integrate the range of policies relevant to the issues to be determined, and to balance conflicting objectives in favour of net community benefit and sustainable development:

> …
>
> Planning authorities and responsible authorities should endeavour to integrate the range of 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.
>
> …

91 Clause 15.03 is also drawn from the SPPF, and is entitled "Heritage". Clause 15.03-1 has as its objective "To ensure the conservation of places of heritage significance". It lists eight strategies:

> Identify, assess and document places of natural and cultural heritage significance as a basis for their inclusion in the planning scheme.
>
> Provide for the protection of natural heritage sites and man-made resources and the maintenance of ecological processes and biological diversity.
>
> Provide for the conservation and enhancement of those places which are of, aesthetic archaeological, architectural, cultural, scientific, or social significance, or otherwise of special cultural value.
>
> Encourage appropriate development that respects places with identified heritage values and creates a worthy legacy for future generations.
>
> Retain those elements that contribute to the importance of the heritage place.
>
> Encourage the conservation and restoration of contributory elements.
>
> Ensure an appropriate setting and context for heritage places is maintained or enhanced.
>
> Support adaptive reuse of heritage buildings whose use has become redundant.

92 Clause 20.01 is located in the Local Planning Policy Framework (the LPPF). It directs planning authorities and responsible authorities about permit applications when preparing planning schemes and before making decisions to take the municipal strategic statement into account. Likewise, cl 20.02 directs planning and responsible authorities to take local planning policies into account.

93 Clause 21 contains the municipal strategic statement for Boroondara. This addresses with a wide range of subject matter including Residential Land Use. Clause 21.07-3 states the Objectives and Strategies:

> Objectives
>
> - To provide a mix and range of housing types and forms.
> - To maintain and enhance the City's present degree of residential amenity and high standard of residential development.
>
> Strategies
>
> - Maintain and increase housing choice and diversity within existing residential areas.

- Increase residential development opportunities (including higher density development) in and around commercial centres and other strategic locations.
- Protect existing housing stock and residential use.
- Encourage a high standard of residential development.
- Minimise the impact of institutions and other non-residential uses on their surrounding areas.
- Minimise the impact of commercial/industrial uses in areas adjoining residential and other sensitive uses.

94 Clause 22.05 of the LPPF sets out Heritage Policy. The objectives of Heritage Policy under cl 22.05-2 include:

- To encourage the retention and conservation of all "significant" or "contributory" heritage places in the Heritage Overlay.
- To consider the cultural heritage significance described in the statement of significance for any heritage place as part of the design process of any proposal and when making decisions about proposed buildings and works associated with that place.
- To ensure that works, including conservation, alterations, additions and new development, respect the cultural heritage significance of the heritage place.
- To ensure that subdivision respects the cultural heritage significance of the heritage place.
- To ensure that, when determining or when considering issues of bulk, form and appearance of additions or new development, the evaluation is based on the characteristics of the significant or contributory components of the fabric of the heritage place, rather than any non-contributory elements that may exist in the area.
- To promote urban and architectural design which clearly and positively supports the ongoing significance of heritage places.

95 Clause 22.05-3 states the policy in relation to demolition of heritage places. It is policy to:

- Retain "significant" or "contributory" heritage places and not normally allow their total demolition.
- Permit partial demolition of "significant" or "contributory" heritage places for the purpose of additions and alterations if the additions and alterations will not adversely affect the cultural heritage significance of the place and the proposed addition or alteration is in accordance with the provisions of this policy.

…

- Consider the following, as appropriate, before determining an application for demolition of "significant" or "contributory" heritage places or parts of "significant" or "contributory" heritage places:
    - The cultural heritage significance of the heritage place, and, when located in a heritage precinct, the contribution of the place to the significance of the precinct;
    - Whether the demolition or removal of the entire heritage place or any part of the place will adversely affect cultural heritage significance;
    - Whether the demolition or removal contributes to the long-term conservation of the heritage place; and

- Whether the heritage place is structurally unsound. The poor condition of a heritage place should not in itself, be a reason for permitting demolition of "significant" or "contributory" heritage places.

- Require an application for a new building or works to accompany a demolition application. The demolition or removal of any heritage place or part of a heritage place will not normally be approved until a replacement building or development is approved.

…

96 Thus, the policy in relation to demolition applications for heritage places has two significant features. First, an application for a new building or works must accompany a demolition application. Secondly, the demolition or removal of any heritage place or part of a heritage place will not normally be approved until a replacement building or development is approved. This policy requires a substantive proposal to be put to the decision-maker and avoids piecemeal demolition and development proposals. It reduces the likelihood of "bomb sites", where a demolition permit has been granted, and acted on, but no development proposal has been approved.

97 Clause 43.01 is a local provision. It contains the Heritage Overlay controls, and describes its purpose as:

> To implement the State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
>
> 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.
>
> To conserve specifically identified heritage places by allowing a use that would otherwise be prohibited if this will demonstrably assist with the conservation of the significance of the heritage place.

98 For land within the Heritage Overlay, cl 43.01-1 states that a permit is required to demolish or remove a building. The decision guidelines listed in cl 43.01-4 are:

- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The significance of the heritage place and whether the proposal will adversely affect the natural or cultural significance of the place.
- Any applicable statement of significance, heritage study and any applicable conservation policy.
- 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.
- Whether the demolition, removal or external alteration will adversely affect the significance of the heritage place.
- Whether the proposed works will adversely affect the significance, character or appearance of the heritage place.

- Whether the proposed subdivision will adversely affect the significance of the heritage place.
- Whether the proposed subdivision may result in development which will adversely affect the significance, character or appearance of the heritage place.

…

99 Importantly, the decision guidelines for the Heritage Overlay expressly incorporate the decision guidelines found in cl 65 of the Scheme.

100 Clause 65 is a State standard provision. It directs a responsible authority to decide whether a proposal will produce acceptable outcomes in terms of the decision guidelines in that clause. The decision guidelines include general planning considerations such as the purpose of the zone, overlay or other provision, the orderly planning of the area and the effect on the amenity of the area.

101 These considerations are listed in cl 65.01 and include:

- The matters set out in section 60 of the Act.
- The State Planning Policy Framework and the Local Planning Policy Framework, including the Municipal Strategic Statement and local planning policies.
- The purpose of the zone, overlay or other provision.
- Any matter required to be considered in the zone, overlay or other provision.
- The orderly planning of the area.
- The effect on the amenity of the area.
- The proximity of the land to any public land.

…

102 In *Rozen v Macedon Ranges Shire Council* (*Rozen*),[51] Osborn J, as he then was, summarised the manner in which competing considerations are evaluated under cl 65 in making a planning decision:

> The test of acceptable outcomes stated in the clause is informed by the notions of net community benefit and sustainable development. An outcome may be acceptable despite some negative characteristics. An outcome may be acceptable because on balance it results in net community benefit despite achieving some only of potentially relevant planning objectives and impeding or running contrary to the achievement of others.
>
> The weight to be given to the various considerations which may be relevant on the one hand, and to particular facts bearing on those considerations on the other hand, is not fixed by the planning scheme but is essentially a matter for the decision-maker.[52]

(Citation omitted)

103 The test set out in *Rozen* is well established in planning law, and is in general application in Victoria.

The reasoning adopted by the Tribunal

104 The determination is very comprehensive extending over 33 pages and 139 paragraphs. In considering whether a permit should be granted to demolish

51 *Rozen v Macedon Ranges Shire Council* (2010) 181 LGERA 370.

52 *Rozen v Macedon Ranges Shire Council* (2010) 181 LGERA 370 at [171]-[172].

Arden, the Tribunal reviewed previous decisions[53] as to the scope of relevant considerations concerning the grant of a permit under the Heritage Overlay.[54]

105 The Tribunal correctly concluded that the question of what factors a decision-maker is bound to consider is essentially one of statutory construction.[55]

106 It considered that the most definitive statement of the Tribunal's current practice was that stated in *University of Melbourne v Minister for Planning* (the *University of Melbourne Case*):[56]

> We endorse the proposition articulated in *Harding* that even where what is proposed is the demolition of a building which is the sole basis for a site specific Heritage Overlay, the decision must have regard to the full ambit of planning controls and planning policy applying to the site.[57]

107 This led the Tribunal to reject Boroondara's submission that it was limited to considering only heritage matters when deciding an application under the Heritage Overlay control. The Tribunal decided that the discretion in relation to demolition is properly exercised by reference to all relevant considerations, including planning policy for urban consolidation, housing diversity, sustainable development and urban design.[58]

108 Having identified the relevant considerations under the Heritage Overlay, the Tribunal undertook a thorough review of the heritage issues proceeding to consider the nature of the heritage place, discuss heritage considerations, review the relevant heritage study and the heritage significance of Arden having regard to the expert evidence of the heritage witnesses. This review led the Tribunal to conclude:

> Ultimately, we consider that the building has a level of significance such that demolition is not justified in terms of purely heritage considerations. Nevertheless, demolition might be justified when the loss of a representative example of a type of building is balanced against other objectives sought by the planning scheme. The key issue we must determine is how that balance is struck in this instance …[59]

109 The Tribunal stated its concept of balanced or integrated decision-making in these terms:

> We have discussed the balance that we must strike in reaching a decision in this application. In a fundamental way the idea of balanced or integrated decision-making arises because the planning system is concerned to ensure that

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53 *National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd* [1976] VR 592; (1976) 37 LGRA 172; *Reis v Port Phillip City Council* (unreported, VCAT, Vic, No 23643 of 2000, Bruce DP, 31 March 2001); *Graeme Gunn Architects Pty Ltd v Melbourne City Council* [2006] VCAT 348; *Harding v Port Phillip City Council* [2002] VCAT 416; *University of Melbourne v Minister for Planning* [2011] VCAT 469; *Hermann v Port Phillip City Council* [2011] VCAT 2353.

54 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [18].

55 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [25] referring to *Great Southern Property Managers v Colac Otway Shire Council* [2006] VCAT 706; *White Ash & GJL Properties v Frankston City Council* (2004) 140 LGERA 257.

56 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [30].

57 *University of Melbourne v Minister for Planning* [2011] VCAT 469 at [73].

58 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [34].

59 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [71].

> each decision is a preferable decision not only for the present but for the future. Important to this balance is an understanding of the way in which the proposed building responds to its physical and strategic context.[60]

110 The Tribunal then proceeded to evaluate planning considerations including neighbourhood character policy, development on main roads, the physical and strategic context, and the architecture of the building. The Tribunal was well aware that it had to balance competing objectives which were "brought into sharp focus in this case".[61]

111 The need to balance competing considerations was explained by the Tribunal:

> We have stated that planning decision-making has a focus on the longer term future with the aim that decisions taken today result in preferable long-term outcomes. In this case we must balance:
>
> i the significance of the heritage place and the consequences of the decision for that significance;
>
> ii the strategic potential of the site and its capacity to contribute towards the achievement of longer term planning objectives;
>
> iii the present amenity of the site and the question of how that amenity may be managed in the future;
>
> iv the excellence of the architecture and its future potential to positively contribute to the amenity and character of the land and its environs and perhaps even to the broader heritage values of the area; and
>
> v the site responsiveness of the proposed building and the degree to which it successfully manages its interfaces with adjoining and adjacent buildings and public realm.[62]

112 Having weighed up the competing considerations, the Tribunal decided that the development outcome was acceptable:

> We have decided that while a decision to demolish the dwelling and its fence results in the loss of the significance of the place (HO20), it is the loss of a building of modest significance with no wider implications for the preservation of heritage values in the municipality. We are therefore of the opinion that that [sic] this adverse outcome is outweighed by the proposal before us having regard to its strategic context, excellent architecture and the site responsiveness of its design.[63]

113 As a result, the Tribunal decided to set aside Boroondara's decision and to direct the issue of a permit for the development on conditions.[64]

The key questions in the application for leave to appeal

114 In the summary of proceedings and issues prepared for the hearing of the appeal, the parties agreed that the application for leave to appeal raised what they described as two key questions.

115 The first key question is in substance:

> Where:
>
> (a) a person proposes to demolish the buildings on land covered by a Heritage Overlay in the [Scheme];

60 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [73].

61 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [115].

62 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [136].

63 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [137].

64 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [138]-[139].

(b) the person needs a planning permit to demolish those buildings only by reason of the Heritage Overlay; and

(c) other aspects of the proposal (such as the construction of new buildings) also require planning permission—

should the discretion to allow (or refuse) the demolition of the heritage buildings be exercised first and only by reference to considerations beyond those relating to heritage conservation policy?

The second key question is:

> Where there are multiple triggers for a planning permit for a proposal, may a permit be granted for that proposal only if there is a favourable decision or outcome (being the grant of a permit either with or without conditions) in respect of each permit trigger?

116 Boroondara contended that each key question should be answered "yes". The applicant contended that each key question should be answered "no".

The first key question

117 The trial judge held that heritage considerations are to be weighed in the balance and integrated into the decision-making process for the proposal overall. The factors militating against demolition of a heritage building are to be weighed against the benefits (if any) of the proposed replacement building.[65]

118 Senior counsel for Boroondara relied on the principle that a decision-maker may only exercise a discretion for the purpose for which it was conferred. This he described in the planning context as the "*National Trust* principle".[66] He contended that, where there was a requirement for a permit under a planning control imposed for a specific purpose, a decision-maker cannot exercise the discretion to grant or refuse to grant a permit to regulate an aspect of the proposed development that is unrelated to the specific purpose. He contended, that in exercising that discretion, the decision-maker may only consider matters that directly relate to the purpose of the control or that the scheme requires to be taken into account. Other matters constituted irrelevant considerations. He contended that, when considering the isolated question whether to grant a permit to demolish a heritage building, the decision-maker was confined to considering heritage-related matters, and must not have regard to matters such as urban consolidation, housing diversity, sustainable development and urban design. He did not contend that heritage considerations had paramountcy under the Act or the Scheme over other considerations.

119 *National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd* [1976] VR 592; (1976) 37 LGRA 172 (the *National Trust Case*) arose under the planning controls operative in Melbourne in 1975. Clause 24(4) of the *Melbourne Metropolitan Planning Scheme* conferred a discretion for the purpose of controlling the height of buildings. The use of that discretion for the purpose of promoting the conservation of an historic building was outside the purpose for which the power was conferred. The responsible authority could not properly have regard to heritage considerations in the exercise of its discretion concerning building height.

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65 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [41].

66 *National Trust of Australia (Vic) v Australian Temperance & General Mutual Life Assurance Society Ltd* [1976] VR 592; (1976) 37 LGRA 172, relying on *Victorian Railways Commissioners v McCartney and Nicholson* (1935) 52 CLR 383 at 390, 395, 398 and *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 620, 627, 631, 632.

120 The *National Trust Case* did not decide whether non-heritage considerations could be taken into account in making decisions under heritage controls. It considered the reverse question; namely, whether heritage considerations could be taken into account in making decisions under non-heritage controls. It was a decision made in the context of the legislation, planning schemes and controls operative in Melbourne when heritage controls were in their infancy. Since 1987, the conservation and enhancement of buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest has been an objective of planning.[67] The Scheme contains a framework and policies very different from those operative in 1975.

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.[68] 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.

122 The Court of Appeal made the position clear in *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal*:[69]

> The *National Trust Case* was concerned with circumstances where the relevant planning control was silent as to conservation matters hence rendering the objection irrelevant. In the present case the Act and Scheme specify the matters to be taken into account and the exemptions that are to apply with respect to objections. In this matter the scope of relevant considerations to be applied by the responsible authority and, if needs be, the Tribunal on review, is defined by the *Planning and Environment Act* and the Scheme.[70]

(Citations omitted)

123 In *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*,[71] Walsh J observed that the scope of the purpose of "the implementation of planning policy" was to be derived from the Act and from relevant provisions of the ordinance, and not from some preconceived general notion of what constitutes planning. The same principle applies to the scope of considerations to be taken into account under specific planning controls. In determining the scope of considerations that may be taken into account in deciding whether a permit should be granted, the objectives, purposes and decision guidelines found in the Act and in the applicable planning control will ordinarily be decisive. In the present case, the objectives and provisions of the

67 *Planning and Environment Act 1987* (Vic), s 4(1)(d).

68 See *Stogdale v Stonnington City Council* [2004] VSC 348 at [29] (Osborn J); *White Ash & GJL Properties v Frankston City Council* (2004) 140 LGERA 257 at 269 (Justice Morris P); *Shalit v Jackson Clement Burrows Architecture Pty Ltd* (2002) 19 VAR 236 at [29] (Balmford J).

69 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2003) 126 LGERA 445 (Ormiston, Buchanan JJA and Warren AJA), not to be confused with the trial decision before Ashley J.

70 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2003) 126 LGERA 445 at [16]. Footnote 17 expressly refers to ss 60 and 84B of the *Planning and Environment Act 1987* (Vic) and cl 65 of the *Melbourne Planning Scheme*.

71 *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council* (1970) 123 CLR 490 at 499-500; 20 LGRA 208 at 216; see also *271 William Street Pty Ltd v City of Melbourne* [1975] VR 156 at 162; (1974) 31 LGRA 189 at 196 (Harris J).

Act, and the purposes, objectives and decision guidelines applicable to the Heritage Overlay make it plain that considerations wider than strictly heritage considerations are to be taken into consideration by decision-makers.

124 The High Court has held that the factors that a decision-maker is bound to, or may, consider in making a decision are principally determined by the construction of the statute conferring the discretion. Where the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.[72]

125 While these principles were stated by the High Court for the construction of statutes, they are equally applicable to statutory instruments such as planning schemes.

126 In the absence of any statutory indication of the weight to be given to the matters which are required to be taken into account, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are to be taken into account in exercising the statutory power.[73]

127 Mason J said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.[74]

128 It follows that in giving weight to the matters which are required to be, or may be taken into account under planning schemes, it is principally for the decision-maker to determine which matters are of greater significance, and therefore should be given more weight, and which matters are of lesser or no significance, and should be given reduced or no weight in reaching the decision. Some matters listed in a planning control as matters for consideration may not be material in the individual case.[75] In that event, the decision-maker having considered the matter may decide that the matter has no influence one way or the other in deciding whether a permit should be issued or whether conditions should be imposed.

129 Conditions may have a crucial role. A consideration may appear on the face of it to be unfavourable to a proposal, but may be neutral or even favourable to

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72 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 (Mason J).

73 *Whitehorse City Council v Golden Ridge Investments Pty Ltd* (2005) 13 VR 275 at [9] (Warren CJ, Buchanan JA and Osborn AJA); *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375 (Deane J); *Maribyrnong City Council v Malios* [2014] VSC 452 at [34], [52] (Macaulay J).

74 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

75 As Justice Morris P said in *Victorian National Parks Association Inc v Iluka Resources Ltd* (2004) 16 VPR 98 at [40]: "The commandment that certain matters 'must' be considered is, in my opinion, to be qualified by the proviso that the matter bear upon the issue under consideration".

the grant of a permit when assessed with conditions which negate or ameliorate the adverse impacts. Conditions may engender a positive outcome favourable to the grant of a permit.

130 In the case of permit applications for development, it is ultimately for the decision-maker to decide whether there is an acceptable outcome. This will depend on a comprehensive evaluation of the proposal having regard to the purposes and objectives sought to be achieved by the Act and the planning scheme, the applicable decision guidelines, and as to whether or not there is a net community benefit and sustainable development outcome. The decision on a demolition application stands to be made having regard to the considerations made relevant to that application by the Act and planning scheme and whether the net community benefit and sustainable development outcome outweighs negative aspects associated with the demolition.

131 As Osborn J put it in *Knox City Council v Tulcany Pty Ltd*,[76] "the concept of net community benefit is not one of ideal outcomes, but of outcomes which result in a net benefit to the community assessed within a policy framework by reference to both their benefits and disbenefits".[77]

132 In one respect, I disagree with the reasons of the Tribunal where it stated that:

> It is clear that when the Heritage Overlay is the only permit trigger, then the Tribunal's discretion is confined to heritage considerations.[78]

133 The Tribunal understood that if there was a single decision to be made under the Heritage Overlay, the Tribunal was confined to heritage considerations. It believed that it was only when a proposal involved multiple permit applications, that a wider range of planning considerations could be taken into account when deciding whether a permit should issue under the Heritage Overlay.

134 The correct statement of the position is that in deciding whether a permit should be issued under the Heritage Overlay control, the decision-maker is required to take into account all of the considerations directed by the Act and the Scheme to be taken into account for an application under that control. These are not confined to heritage considerations as is apparent from ss 4, 60 and 84B of the Act, and cll 15, 20, 21, 22, 43 and 65 of the Scheme.

135 There is no difference between the relevant considerations which apply under the Act and the Scheme when a decision-maker is considering an application for a permit under the Heritage Overlay alone, or when the application for a permit under the Heritage Overlay is sought as one of a number of permit applications that need to be made in respect of a particular proposal. In the latter situation there may be multiple planning controls contained in the scheme, each of which requires a permit to be obtained. The considerations relevant to each planning control will vary as directed by the Act and the Scheme. However, the considerations relevant to making a decision under the Heritage Overlay control will be the same regardless of whether that control is considered alone, or as one of multiple planning controls.

136 The error made by the Tribunal was not a vitiating error. This is a case where there were multiple permits that had to be obtained before a permit could issue for the proposal. The Tribunal adopted the correct approach to making a decision under the Heritage Overlay first identifying the considerations made

76 *Knox City Council v Tulcany Pty Ltd* [2004] VSC 375.

77 *Knox City Council v Tulcany Pty Ltd* [2004] VSC 375 at [13](e).

78 *1045 Burke Rd Pty Ltd v Boroondara City Council* [2013] VCAT 1108 at [24].

relevant by the Act and the Scheme to such an application and then evaluating and balancing the competing objectives and considerations to determine whether the proposal resulted in an acceptable outcome.

Decision-making 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.

138 Clause 43.01-1 provides that a permit is required within a Heritage Overlay not only for applications to demolish or remove a building. A permit is also required for a very wide range of other developments within the Heritage Overlay including the construction of or performance of works for a solar energy facility, a rainwater tank, road works and street furniture, a domestic swimming pool or spa, a pergola, verandah or deck, a sign, and to remove, destroy or lop a tree. It is self-evident that the relevant purposes and considerations for such applications must be wider than heritage purposes alone.

139 Likewise, the decision guidelines stated in cl 43.01-4 include purposes that require the decision-maker to consider "the proposal", "the proposed building" and "the proposed works", as well as whether the proposed building, alteration or works will affect the significance, character or appearance of the heritage place.

140 The decision guidelines for the Heritage Overlay control found in cl 43.01-4 incorporate the decision guidelines in cl 65 of the Scheme. As I have said, the decision guidelines in cl 65 include considerations such as:

- The matters set out in section 60 of the Act.
- The SPPF and the LPPF, including the Municipal Strategic Statement and local planning policies.
- The purpose of the zone, overlay or other provision.
- Any matter required to be considered in the zone, overlay or other provision.
- The orderly planning of the area.
- The effect of the amenity of the area.
- The proximity of the land to any public land.[79]

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

79 See [101] above.

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.

145 For these reasons, and having regard to the reasons which I will subsequently give in relation to the sequence of decision-making, I answer the first key question "No".

The second key question

146 The second key question raises the issue where a planning scheme requires multiple permits to be obtained for a proposal, a permit may be issued only if there is a favourable decision or outcome in respect of each permit requirement.

147 The issue was considered in *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (*Sweetvale*)[80] where Ashley J, as he then was, said:

> I can and do accept some of the applicants' submissions. But I do not accept their centrepiece, that is, that in determining the operation of exemptions the Tribunal was bound to treat the application for grant of a permit as being for all relevant purposes singular. In my opinion, correctly understood, although the application was singular in form, it embodied a series of applications with respect to particular building controls. That this was the fact of the matter could not be doubted. Further, although the decision to grant a permit was singular in form, it represented a discrete decision favourable to the applicant in respect of each of those building controls which required grant of a permit. That this was the fact of the matter again could not be doubted. It is true that in deciding to grant a permit it was necessary for the responsible authority to consider the matter overall, as well as or in the course of considering the individual permissions which the permit applicant had to obtain. But that does not mean that the applications made with respect to each of those controls did not have to be the subject of individual determination. Indeed, the decision guidelines, which varied from one control to the other, dictated that an individual determination did have to be made in the case of each control.[81]

148 What was said in *Sweetvale* may conveniently be restated in the following terms:

- where for a proposal there is a requirement for the issue of multiple permits, a single application seeking all of the required permits may be made to the responsible authority;
- for a permit to be issued, it is necessary that the decision-maker is satisfied that a permit should issue under each control that relates to the proposal whether with or without conditions;
- where the decision-maker is of the view that no permit should issue under one or more applicable controls, the proposal cannot proceed;
- where the decision-maker is satisfied that all required permits should be granted, the decision-maker will still need to consider the proposal

80 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411.

81 *Sweetvale Pty Ltd v Victorian Civil and Administrative Tribunal* (2001) 18 VAR 411 at [60].

> overall, for the purpose of ensuring that the permit, permit conditions and endorsed plans satisfactorily define and describe the proposal that the decision-maker intends to authorise to proceed.

149 As Senior counsel submitted on behalf of Boroondara, there must be a decision favourable to the applicant in respect of each control for which a permit is required, being a decision to grant a permit in respect of that control either with or without conditions. The proposal cannot proceed if there is not a favourable decision in respect of each permit control. If there is a decision in favour of the grant of a permit under each control, the permit should be considered overall to ensure that the proposed conditions are coherent, consistent and integrated.

150 In principle, it makes no difference whether a single application is made for multiple permits required for a proposal under the controls contained in a planning scheme, or whether multiple applications are made for individual permits under the same controls. No doubt the first approach is administratively more convenient, and cheaper in terms of fees. But the outcome is just the same. In each case, all necessary permits must be obtained with or without conditions, before the proposal can proceed. If one or more permits cannot be obtained, the proposal cannot proceed.

151 Senior counsel for the permit applicant submitted below that it was not necessary to get a "tick" in every box; that is, a favourable decision in respect of every control which required a permit to be obtained. He submitted that if there was a "cross" on demolition but a "tick" in the other three boxes, in the overall determination of the application an integrated decision meant that a permit for the development could issue.[82]

152 The trial judge said as to this submission:

> I accept this submission. It reflects the process of integrated decision-making required by [the Act] and the Planning Scheme. Where a permission is required that is integral to the development and where, if permission were denied, the development as a whole could not proceed, to require each application for permission to be decided favourably to the permit applicant in order for a permit to issue for the development would mean that considerations relevant to individual permissions could trump all other planning considerations relevant to the development. This is not the treatment of policies contemplated by either [the Act] or the State and Local Planning Policy Frameworks.[83]

153 In my respectful view, the submission made on behalf of the applicant that all permits under the planning scheme need not be obtained should not be accepted. In the case of a multiple permit application, it is necessary to satisfy the requirements of each planning control for which a permit is required under the scheme. There must be a "tick" in every box. Three ticks and a cross where there are four boxes is not sufficient. The proposal cannot proceed because a permit required under the Act and scheme has not been obtained. It is unlawful to proceed with a proposal in the absence of a necessary permit. This was the view adopted in the *Sweetvale* decision.[84]

154 If some permits required by the planning scheme are treated as essential while others are not, there would often be doubt as to the relative importance of

82 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [53].

83 *Boroondara City Council v 1045 Burke Road Pty Ltd* (2014) 202 LGERA 1 at [54].

84 See above at [147]-[148].

controls and as to which permission was essential and which was not. There is no paramountcy or precedence of clauses or controls found in the planning scheme. Uncertainty would exist as to which permits were considered essential in a permit application. Objectors concerned about issues which arise under a specific control, for example a Heritage Overlay, might be met with the contention that the control was inessential or unimportant. Authorities may be interested in particular controls that require permits to be obtained, but not in other controls extraneous to their purposes.[85] In my view, the introduction of a regime where some permits need not be obtained, or some controls are paramount over, or have a higher precedence over other controls, would require amendment of planning laws in Victoria, and is not a necessary or implied consequence of integrated decision-making.

155 In the present case, the applicant submitted an application for four permits required under the Scheme for the proposal. The permits required under the Scheme were correctly identified by the Tribunal as requiring the demolition of a heritage building, the construction of a multi-unit building above a basement car park, the alteration of road access, and a reduction in the number of bicycle spaces.

156 Each of these permits is inherently different. One permit is required under a demolition control. Three permits are required under building construction controls. A tick in the box for multi-unit residential development, alteration of road access or a reduction in the number of bicycle spaces does not overcome a cross in the box for demolition of a heritage building. Likewise, if the decision-maker considers that the building does not satisfy the requirements in the planning scheme for a multi-unit residential development, ticks in the other three boxes are not enough. All permits must be obtained. The fact that adherence to some controls may be achieved through the imposition of conditions eg. greater provision of bicycle spaces does not alter the fundamental requirement that all necessary permits must be obtained if a permit is to be issued by the decision-maker for the proposal.

157 Again, this does not mean that the Tribunal fell into error in the present case. The Tribunal considered each of the four planning controls under which a permit had to be granted. It came to the conclusion that the proposal would result in an acceptable outcome having regard to the matters relevant to each permit under the Scheme. The only issue in serious contest before the Tribunal was the grant of a permit under the Heritage Overlay. It is not surprising that most of the Tribunal's decision is directed to this issue. But this does not alter the fact that the Tribunal found that the proposal resulted in an acceptable outcome under each control that it was required to consider. In the Tribunal's view, the proposal received four ticks in the four boxes that stood to be completed.

158 In cases where demolition or modification of a heritage building is considered the order in which permits are considered by the decision-maker is of no consequence. The result is the same. Each individual permit including the heritage permit must be independently considered by the decision-maker having regard to the applicable purposes, objectives, decision guidelines and any other relevant matters. It will be necessary to satisfy each individual control. While it

85 For example, road, environmental protection, and water authorities.

is logical to consider a demolition control before considering new building controls, the sequence or order in which individual controls are considered by the decision-maker makes no difference to the ultimate result.

159 In argument, Senior counsel for Boroondara conceded that this would be the result provided in the multiple permit situation that each permit is dealt with separately, and the ultimate decision rationalised or harmonised to make sure that all decisions work together.

160 As I have said, the Tribunal was well aware of the permits that were needed under the four applicable controls of the Scheme. It was of the view that permits should issue under each applicable control directing Boroondara to issue a permit to this effect subject to conditions. It is not a case where the decision-maker was of the view that the proposal succeeded under three controls but failed under one control. The proposal was given all necessary permits required under the Scheme.

161 For these reasons, the answer to the second key question is "Yes".

Conclusion

162 The conclusions that I have reached may be summarised:

(1) in deciding whether a permit should be granted to demolish or modify a building under the Heritage Overlay in the Scheme, 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;

(2) the Tribunal did take into consideration matters of a non-heritage nature but did not stray beyond the matters that it was permitted to consider under the Act and the Scheme;

(3) a proposal which requires multiple permits under a planning scheme is considered on an integrated basis;

(4) where a proposal requires multiple permits under a planning scheme, a permit may be granted for the whole proposal only if there is a decision to grant a permit with or without conditions under each applicable control;

(5) a proposal which requires multiple permits under a planning scheme cannot proceed in the absence of a necessary permit;

(6) the Tribunal in this case was satisfied that a permit should issue under each applicable planning control on the basis of conditions which it specified; and

(7) there was no vitiating error in the determination.

163 I would grant leave to Boroondara to appeal on the two key questions. For the reasons given, the first key question is answered "No". The second key question is answered "Yes". In the event, the decision of the Tribunal is upheld, and the appeal must be dismissed.

Appeal dismissed

Solicitors for the applicant: *Maddocks*.

Solicitors for the first respondent: *Minter Ellison Lawyers*.

J VENEZIANO