Victorian Civil and Administrative Tribunal

The King David School v Stonnington CC & Ors (includes Summary) (Red Dot) [2011] VCAT 520 (29 March 2011)

Last Updated: 21 April 2011

RED DOT DECISION SUMMARY

The practice of VCAT is to designate cases of interest as 'Red Dot Decisions'. A summary is published and the reasons why the decision is of interest or significance are identified. The full text of the decision follows. This Red Dot Summary does not form part of the decision or reasons for decision.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST VCAT REFERENCE NO. P2953/2010

IN THE MATTER OF	The King David School v Stonnington City Council & Ors
BEFORE	Mark Dwyer, Deputy President Rachel Naylor, Member

NATURE OF CASE	Principles applying to use of s 87A process
LOCATION OF PASSAGE OF INTEREST	Paragraphs [9]-[19]
REASONS WHY DECISION IS OF INTEREST OR SIGNIFICANCE	
LEGISLATION – interpretation or application of statutory provision	*Planning and Environment Act* 1987 s 87A; principles applying where process similar to a 'repeat' appeal; whether amendments seek to change key permit conditions upon which original decision predicated
ANALYSIS – exposition of how to asses an issue or matters to consider	Consideration of VCAT approach to s 87A applications to amend substantive conditions on a permit only a short time after permit issued; whether akin to a 'repeat appeal'.

SUMMARY

Following a Ministerial call-in, the Governor-in-Council had directed the issue of a permit for the use of a new school facility. The permit was subject to strict conditions on use of the facility, which had resulted from a panel process conducted by the Minister's delegate. Three weeks after the issue of the permit, the School sought to amend four of the permit conditions under s 87A of the *Planning and Environment Act* 1987.

Both the responsible authority and objectors raised concern at the use of the s 87A process. It was contended that the s 87A process was essentially being used as a re-hearing or repeat appeal in an endeavour to obtain more favourable conditions than those in the permit granted by the Governor-in-Council.

In determining this issue, the Tribunal distinguished between amendments to the permit that clarify its ambit or intent, and more substantive changes.

The Tribunal noted that it will often be appropriate to amend a permit to clarify its ambit or intent, to tidy-up conditions to resolve ambiguity or unintended consequences, or to allow modifications that respond to unforeseen circumstances as a development or use proceeds. The flexibility in the s 87A process clearly contemplates amendments of this type, even within a relatively short timeframe after the permit has been

granted.

The Tribunal did however have some concern with the s 87A process being used to seek more substantive changes to a permit, shortly after it has been granted, where the nature of the proposed changes seems directed to seeking a more favourable outcome than that clearly contemplated in the decision that led to the grant of the permit.

The process under s 87A of the *Planning and Environment Act* 1987 is not, strictly speaking, a ‘repeat appeal’ of the review process through which the permit was granted. The Tribunal is vested with separate original jurisdiction to consider an amendment to a permit issued at its direction, and s 87A provides a wide discretion. In addition to ‘clarifying’ amendments, it will also often be appropriate for the Tribunal to allow more substantive amendments to a permit to facilitate a reasonable change in the development or use. Section 87A was also intended to provide this flexibility.

However, there are some aspects of the principles that apply to ‘repeat appeals’ that are still relevant to the Tribunal’s consideration of a s 87A application to amend a permit, particularly only a very short time after it has issued. Public policy seeks to ensure that there is some finality to litigation. It is to the detriment of the planning system generally, and to the certainty of the permit review process, if permit applicants are able make repeat applications to the Tribunal on similar subject matter, as a basis for simply seeking to change an earlier Tribunal decision with which they do not agree.

The Tribunal indicated that the flexibility afforded by s 87A should not be used to undermine the intent of the original Tribunal decision unless there is some sound justification for doing so. Section 87A should not be used as a *de facto* review of the original Tribunal decision in order to seek a more favourable outcome, or as an attempt to ‘win back’ development aspirations that were not supported in the original Tribunal decision. This would rarely (if ever) be “appropriate” for the purposes of s 87A, as it would undermine the finality and certainty of the review process. Some caution should therefore be exercised by the Tribunal under s 87A in making substantive changes to key permit conditions upon which an original Tribunal decision was predicated - at least in the immediate period

following the original Tribunal decision and in the absence of a change of circumstance or some other good reason that makes it appropriate to do so.

These principles apply not only where the original decision of the Tribunal is set out with detailed reasons. They also apply to a situation where the Tribunal decision comprises a consent order following mediation or a settlement, so as not to undermine the basis of that consent outcome. These principles also apply where the Tribunal decision is a 'deemed' order of the Tribunal following a Ministerial call-in, as in this case.

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

PLANNING AND ENVIRONMENT LIST **VCAT REFERENCE NO. P2953/2010**
PERMIT NO. 0423/09

CATCHWORDS

Planning and Environment Act 1987 s 87A; amendment to permit issued at direction of Governor-in-Council; principles applying to use of s 87A process; whether amendments seek to change key permit conditions upon which original decision predicated.

APPLICANT	The King David School
RESPONSIBLE AUTHORITY	Stonnington City Council
RESPONDENT OBJECTORS	Alastair Hunter & Ors
SUBMITTER	Minister for Planning
SUBJECT LAND	520 Orrong Road, ARMADALE
WHERE HELD	Melbourne
BEFORE	Mark Dwyer, Deputy President Rachel Naylor, Member
HEARING TYPE	Hearing
DATES OF HEARING	4 March 2011
DATE OF ORDER	29 March 2011
CITATION	The King David School v Stonnington CC & Ors (includes Summary) (Red Dot) [2011] VCAT 520

ORDER

1. The application is allowed in part. Pursuant to section 87A of the *Planning and Environment Act* 1987, Planning Permit No.0423/09, issued by the responsible authority at the direction of the Governor-in Council in respect of the subject land, is amended in accordance with this order.
2. Condition 3 of the Planning Permit is amended to read:
   1. Unless with the prior written consent of the responsible authority or otherwise allowed by this permit, the land must only be used during 'ordinary school hours' by enrolled students, teachers and staff of the King David School.
3. Condition 5 of the Planning Permit is amended to read:
   1. A combined total of no more than 350 students (as permitted to use the 'Magid Campus' at 517-519 Orrong Road) and their teachers and 18 administrative staff are permitted on the land and the Magid campus at any one time during 'ordinary school hours'.
4. The application to amend Conditions 13 and 16 of the Planning Permit is refused.
5. The responsible authority is directed to amend the Planning Permit in accordance with this Order and issue an amended permit to the owner of the subject land pursuant to section 91 of the *Planning and Environment Act* 1987.

Mark Dwyer
Deputy President

Rachel Naylor
Member

APPEARANCES:

For Applicant	Mr Ian Pitt SC of Best Hooper.
For Responsible Authority	Mr Matthew Beazley, solicitor, of Norton Rose.
For Respondent Objectors	Mr Anthony Southall QC, instructed by Geoff Dillon & Co, lawyers. He called as a lay witness: • Mr Alastair Hunter, one of the objectors
For Minister for Planning	Ms Tania Heber, solicitor, of DPCD Legal

REASONS

What is the proceeding about?

1. This is an application by The King David School under s 87A of the *Planning and Environment Act* 1987, seeking to amend four conditions on a planning permit relating to the 'use' of its recently developed campus at 520 Orrong Road, Armadale.
2. The new campus contains art and music classrooms, administration offices, and a multi-purpose hall.
3. The school's Magid campus, at 517-519 Orrong Road, is directly opposite the new campus at 520 Orrong Road and caters for Years 3 to 8. The school also runs a senior campus in Dandenong Road that caters for Years 9 to 12, and a junior campus in Kooyong Road that contains an early learning centre and caters for Prep and Years 1 and 2.
4. The dispute about the four permit conditions raises issues as to the extent to which the new campus at 520 Orrong Road can be used by students other than from the Magid campus, and the extent of use outside ordinary school hours.

Background

1. The planning history is complex. In summary:

- Under planning permit 169/84, the student numbers at the Magid campus are restricted to 350 students.
- Under permit 597/06, following the acquisition of the 520 Orrong Road site by the school, the use of that site was limited to 54 students and 6 staff, with no more than 350 students across both campuses. Hours were limited to 8:30am to 4:30pm for students, and 8am to 6pm for staff.
- In 2007, the school sought a major redevelopment of the Magid Campus and the site at 520 Orrong Road, including an increase in student numbers to 634 students and an increase in hours of operation. That application was refused by the responsible authority, and the refusal was upheld by this Tribunal in early 2009[1].
- In 2009, the school received Commonwealth funding under the government's 'Building the Education Revolution' stimulus

program, for the art and music classrooms, administration offices, and a multi-purpose hall now constructed at 520 Orrong Road. That building was exempt from the requirement for a planning permit for buildings and works[2], but a permit for use was still required.

- On 3 March 2010, the responsible authority issued a Notice of Decision to grant a permit for use and a car parking dispensation, subject to conditions. A number of objectors sought to review that decision. Their application to this Tribunal was called-in by the Minister for Planning[3], and referred to a panel hearing conducted by John Phillips[4] as the Minister's delegate to consider submissions. The panel provided advice to the Minister recommending the grant of a permit subject to specified conditions[5].
- On 14 September 2010, the Governor-in-Council (on the recommendation of the Minister) directed the issue of a permit, subject to the specified conditions that had been recommended by the panel. As a consequence, the responsible authority issued Planning Permit 0432/09 on 30 September 2010.
- On 18 October 2010, the school made application under s 87A of the *Planning and Environment Act* 1987 to amend four conditions on the permit.

2. The responsible authority opposes two of the amendments. A group of residential objectors, led by Mr Alastair Hunter, oppose all four amendments. By submission, the Minister for Planning indicated a qualified objection to one of the amendments.
3. At the hearing:

- no party or submitter objected to the Tribunal being constituted with the same two members that had heard the application for review in 2008/09; and
- no party or submitter objected to the Tribunal's jurisdiction to consider an application under s 87A of the *Planning and Environment Act* 1987 to amend a permit issued at the direction of the Governor-in-Council[6].

Conditions sought to be amended

1. The permit conditions sought to be amended by the school are as follows (showing the amendments proposed by the school):

1. Unless with the prior written consent of the responsible authority or otherwise allowed by this permit, the land must only be used by enrolled students ~~of the King David School~~ and ~~the~~ staff of the King David School ~~associated with its operation at either 517-519 Orrong Road or 520 Orrong Road~~.
2. A combined total of no more than 350 students in addition to their teachers (as permitted to use the 'Magid Campus' at 517-519 Orrong Road) and 18 administrative staff are permitted on the land at any one time during 'ordinary school hours'.
3. On 16 occasions per year ~~students~~ the school community and invited guests may attend/use the land between the hours of 9:00am and 5:30pm on Saturday or 10:00am and 6:00pm on Sunday.
4. ~~Sports activities and music rehearsal for students of the King David School may take place~~ Students of the King David School and any students from any other school competing in sports activities with students of the King David School or students partaking in music or drama activities with students of the King David School and staff may use the facility a maximum of three evenings a week between Monday ~~and~~ to Friday, for no more than a combined maximum of 100 ~~students per evening~~ persons. These events must cease by 8:00pm on the same day.

Consideration of issues

Appropriateness of the s 87A process

1. Both the responsible authority and the objectors raised concern at the use by the school here of the amendment process under s 87A of the *Planning and Environment Act 1987*. It was contended that the s 87A process was essentially being used as a re-hearing or repeat appeal or, as the objectors more colloquially put it, an attempt by the school 'to have a second bite of the cherry' in an endeavour to obtain more favourable conditions than those in the permit granted by the Governor-in-Council.
2. In this context, it is important to distinguish between amendments to the permit that clarify its ambit or intent, and more substantive changes.
3. It will often be appropriate to amend a permit to clarify its ambit or

intent, to tidy-up conditions to resolve ambiguity or unintended consequences, or to allow modifications that respond to unforeseen circumstances as a development or use proceeds. The flexibility in the s 87A process clearly contemplates amendments of this type, even within a relatively short timeframe after the permit has been granted. We have no concern with the s87A process being used for this purpose.

4. In this case, we consider that the proposed changes to Conditions 3 and 5 fall broadly within this category.
5. We do however have some concern with the s 87A process being used to seek more substantive changes to a permit, shortly after it has been granted, where the nature of the proposed changes seems directed to seeking a more favourable outcome than that clearly contemplated in the Tribunal decision that led to the grant of the permit.
6. The process under s 87A of the *Planning and Environment Act* 1987 is not, strictly speaking, a 'repeat appeal' of the review process through which the permit was granted. The Tribunal is vested with separate original jurisdiction to consider an amendment to a permit issued at its direction, and s 87A provides a wide discretion[7]. The principles that the Tribunal and its predecessors have previously set down for repeat appeals[8] do not therefore strictly apply.
7. Section 87A allows a permit holder to request the Tribunal to amend a permit issued at its direction, and the Tribunal may amend the permit "if it considers it appropriate to do so". In addition to the 'clarifying' amendments we have referred to earlier, it will also often be appropriate for the Tribunal to allow more substantive amendments to a permit to facilitate a reasonable change in the development or use. This might include, for example, an amendment that responds to different market conditions or opportunities that arise after the permit was issued, or changes arising during the detailed design, construction or financing of a project. Section 87A was also intended to provide this flexibility.
8. That said, there are some aspects of the principles that apply to 'repeat appeals' that are relevant to the Tribunal's consideration of a s 87A application to amend a permit, particularly only a very short time after it has issued. Public policy seeks to ensure that there is some finality to litigation. It is to the detriment of the planning

system generally, and to the certainty of the permit review process, if permit applicants are able make repeated applications to the Tribunal on similar subject matter, as a basis for simply seeking to change an earlier Tribunal decision with which they do not agree. It undermines confidence in the planning system by affected parties (primarily responsible authorities and objectors) and the community at large, as well as imposing an additional cost burden on them[9].

9. We consider that the flexibility afforded by s 87A should not be used to undermine the intent of the original Tribunal decision unless there is some sound justification for doing so. In short, s 87A should not be used as a *de facto* review of the original Tribunal decision in order to seek a more favourable outcome, or as an attempt to 'win back' development aspirations that were not supported in the original Tribunal decision. In our view, this would rarely (if ever) be "appropriate" for the purposes of s 87A, as it would undermine the finality and certainty of the review process. We therefore consider a degree of caution should be exercised by the Tribunal under s 87A in making substantive changes to key permit conditions upon which an original Tribunal decision was predicated - at least in the immediate period following the original Tribunal decision and in the absence of a change of circumstance or some other good reason that makes it "appropriate" to do so.
10. In our opinion, these principles do not only apply where the original decision of the Tribunal is set out with detailed reasons. They apply equally to a situation where the Tribunal decision comprises a consent order following mediation or a settlement, so as not to undermine the basis of that consent outcome. These principles also apply where the Tribunal decision is a 'deemed' order of the Tribunal following a call-in, as in this case.
11. We have some apprehension that the proposed changes to Conditions 13 and 16 in this case fall within this category. Here, the s 87A application was lodged only three weeks after the permit had first issued, and the amendments proposed to Conditions 13 and 16 seek substantive change from what appears contemplated by the Governor-in-Council decision.
12. With these considerations in mind, we have considered the planning merits of the four proposed amendments.

Conditions 3 and 5

1. Conditions 3 and 5 are amongst four conditions in the permit grouped under a sub-heading “Ordinary school hours”. At present, they read as follows:
    1. Unless with the prior written consent of the responsible authority or otherwise allowed by this permit, the land must only be used by enrolled students and staff associated with its operation at either 517-519 Orrong Road or 520 Orrong Road.
    2. A combined total of no more than 350 students (as permitted to use the ‘Magid Campus’ at 517-519 Orrong Road) and 18 administrative staff are permitted on the land at any one time during ‘ordinary school hours’[10].
2. These conditions are not without ambiguity. There is some debate about whether use of the new facility at 520 Orrong Road is limited to students from the Magid campus at 517-519 Orrong Road, or whether the words “associated with its operation” offer greater flexibility and allow use by other King David School students from the school’s other campuses – in particular the senior campus in Dandenong Road. Given we understand that few (if any) students will be separately ‘enrolled’ at 520 Orrong Road, the reference to an association with its operation (separate from the Magid campus) is potentially circular in effect. On one view, mere attendance at the facility creates the association that legitimises the use.
3. For practical purposes, the school seeks to clarify and confirm that students from the school’s campuses, other than the Magid campus, can also access the new facility. This raises some debate about how the ‘combined’ cap in Condition 5 applies, particularly when read in conjunction with the 1984 and 2006 permits we have referred to earlier. Does the 350-student cap mean that there can be no more than 350 students across both the Magid campus and the new facility at any one time, or could some Dandenong Road campus students use the new facility in addition to these numbers?
4. Somewhat curiously, Condition 5 also refers to a cap of 350 students and 18 administrative staff, without reference to teachers. For practical purposes, the school seeks to clarify and confirm that teachers may attend in addition to these student and administrative staff caps.
5. It is acknowledged that some senior students from the Dandenong Road campus already attend the Magid campus at 517-519 Orrong

Road for certain activities, and primarily access that campus on foot during school hours. We understand that this occurs within the overall cap of 350 students for the Magid campus, or is at least intended to be within that cap. This also accords with the 1984 permit, which imposes the cap of 350 students 'attending' the site rather than a cap on those enrolled specifically at the Magid campus.

6. The responsible authority and objectors oppose the proposed changes, on the basis that they believe it would increase overall numbers across the Magid campus and 520 Orrong Road sites beyond the 350 student cap at any point in time and/or that it would increase the intensity of use of the new facility from that constrained by the existing permit conditions. The Minister did not oppose the proposed changes, provided the overall cap on student numbers was not exceeded, and saw some benefit in those senior students occasionally using the Magid campus also having access to the new facility.

7. We agree with the sentiment expressed on behalf of the Minister on this issue. During ordinary school hours, we consider the key to be the overall student numbers attending the site at any point in time, and the consequential impacts on local amenity - particularly at school pick-up and drop off times. For planning purposes, it does not really matter if, during school hours, some of those students attend on foot from the senior campus in Dandenong Road, or cross the road from the Magid campus. The school is entitled to a degree of flexibility in the way it operates the school during school hours, in order to maximise the efficient use of its facilities, provided it operates within the overall student numbers allowed to attend the combined campus sites at 517-519 and 520 Orrong Road, and provided it does not exacerbate existing concerns with traffic and parking. Implicitly, we believe that the local residents accept this, provided the cap is maintained.

8. It follows that we have no particular concern with the clarification the school proposes to Condition 3, provided there is certainty in the way in which the cap on overall student numbers in Condition 5 will operate. As we have indicated, we agree with the school that the 1984 permit for the Magid campus imposes the cap of 350 students 'attending' that site at any point in time, rather than limiting the particular campus they are formally enrolled at or attend from. With

the acquisition of the 520 Orrong Road site, the 2006 permit limited overall numbers across both sites to the 350-student cap, but imposed no additional obligation on which school campus they might attend from.

9. The issue is therefore whether the proposed amendment would change this cap on student numbers, as the residents fear.
10. This issue is not without ambiguity, given the way Condition 5 is worded at present. In the school's written submission at the hearing, Mr Pitt indicated that the school did not seek to alter the cap of 350 students 'on the subject land' (i.e. 520 Orrong Road), but did not clearly link this to the Magid campus cap despite Condition 5 referring to a 'combined total' and despite the intended effect of the 2006 permit. Under questioning, he suggested that the change to Conditions 3 and 5 contemplated that senior students from the Dandenong Road campus could use the new facility *in addition to* the 350 students attending the Magid campus at any particular point in time. We do not agree with this proposition.
11. On 26 June 2009, the school principal had written to nearby residents about its proposals for 520 Orrong Road, and stated:

We have lodged a separate planning application with the City of Stonnington for approval to use 520 Orrong Road in conjunction with the proposal lodged with the Minister for Planning under the BER program. We reiterate that the proposed use of 520 Orrong Road is limited to student numbers already permitted at the Magid campus. (our emphasis)

1. The Council's Notice of Decision had included a proposed Condition 17, allowing students from 'other' King David School campuses (i.e. other than the Magid campus) to use the new facility, with a maximum of 50 students and only during school hours. The panel report, following the call-in, notes a submission by the school that it did not intend to close the Kooyong Road campus and increase student numbers at the Orrong Road campus, and comments that there is no longer a need for other students to use the new facility and that the then proposed Condition 17 could be deleted. The panel report also noted that 'the parties agreed with this'. Condition 17 was not included in the final form of permit granted by the Governor-in-Council.
2. We consider that the panel report is a relevant document to

understanding the Governor-in-Council decision, given that all of its recommendations appear to have been accepted and followed in the permit that was granted. The submission on behalf of the Minister, at the hearing before us, was not suggestive of any contrary view.

3. Equally, the panel report seems to link the deletion of Condition 17 with the decision regarding the Kooyong Road junior campus, and does not refer in this context to senior students occasionally attending the facility from the nearby Dandenong Road campus. The report notes (without apparent opposition) the school's intention to limit the new facility to students already attending the King David School "with the majority of persons being from the Magid campus", and elsewhere that the new facility is intended to be used "primarily" by students and staff from Orrong Road.
4. From an overall reading of the panel report, we find nothing that evinces a clear intention to limit students at 520 Orrong Road only to those enrolled at the Magid campus, rather than from the King David school generally. Equally, we find nothing that evinces an intention to depart from the combined cap on student numbers attending both the Magid campus and the new facility at any one time. The report notes that, for ordinary school hours, there is no change to student and staff limits.
5. From our own consideration of the planning merits, we consider there is no material detriment in clarifying Condition 3 as the school proposes, provided Condition 5 is also clarified to maintain the combined 350-student cap across both the Magid campus and the new facility at any one time during ordinary school hours. We have provided wording to that effect, with the amended wording more clearly noting the cap applies "on the land and the Magid campus at any one time".
6. If the intent of the change to Condition 3 was to allow for the combined cap across both sites to be relaxed, and to allow an unspecified number of senior students from Dandenong Road to attend the new facility in addition to 350 students attending the Magid campus during ordinary school hours, we would not have supported it on the material before us. That would be a substantive change. There was no evidence to indicate the additional numbers that might attend, what the planning implications may be, nor how any additional impacts (if any) may be ameliorated or managed. If

the school seeks such a change in the future, it would need to be supported on a proper planning basis.

7. In clarifying Condition 5, we have agreed with the school that the condition should be amended to confirm that teachers may also attend the new facility in addition to students and administrative staff. The responsible authority and the Minister also supported this amendment. Whilst the change had been opposed by the objectors, they did not pursue their objection strongly on this issue. We consider the attendance of teachers at the new facility to be necessarily implied in the existing wording. In our view, it would be simply absurd to think that teachers could not attend classes with their students within a school facility during school hours, much as the students themselves might relish that thought. However, in the circumstances of this case, we think the matter worthy of clarification.

Conditions 13 and 16

1. The proposed amendments to Conditions 13 and 16 are more problematic. They relate to use of the school facility outside of ordinary school hours, and are grouped with a number of conditions under a sub-heading "Other school purpose events". At present, these two conditions read as follows:
    1. On 16 occasions per year students may attend/use the land between the hours of 9:00am and 5:30pm on Saturday or 10:00am and 6:00pm on Sunday.
    2. Sports activities and music rehearsal for students of the King David School may take place a maximum of three evenings a week between Monday and Friday, for a combined maximum of 100 students per evening. These events must cease by 8:00pm on the same day.
2. The changes proposed are substantive in nature. The amendment to Condition 13 proposes to remove the limitation on use to students, and open up the use of the new facility on the 16 designated occasions to the wider school community (defined to comprise enrolled students, past students, current staff and the families of current students). Similarly, the amendment to Condition 16 proposes to remove the limitation on use to students of the King David School, and open up the potential use on the designated

occasions to students from other schools competing or participating in the activities with King David School students, albeit with the same cap on overall numbers.

3. As we noted in our 2009 decision, there is planning policy support for schools to locate and grow in residential areas, and the local community must expect and accept some augmentation of the school's activities at these sites over time. In this case, however, the nature and pace of that 'augmentation', and its consequences for local residential amenity, has been the subject of vigorous debate over many years, including in particular the proposed use of the new facility at 520 Orrong Road in the evenings and at weekends. This has led to the very strict permit conditions on the existing permit granted by the Governor-in-Council.
4. As previously indicated, the school's application to amend the permit was made less than three weeks after the permit was issued at the direction of the Governor-in-Council. The decision of the Governor-in Council followed a Ministerial call-in, where the then Minister had considered the matter raised a major issue of policy. Moreover, the conditions now sought to be amended had been the subject of extensive submissions and discussion at a panel hearing that had informed the Governor-in-Council decision. The panel was conducted by a senior and experienced Departmental officer, and the conditions recommended by the panel clearly attempted to strike a balance between the school's operational aspirations and local residential amenity.
5. The school had the opportunity to put its case on proposed permit conditions to the panel prior to the Minister's recommendation and Governor-in-Council decision, and did so. The panel report contains a table (Table 3), based on information provided by the school, that indicates a 'schedule of school events proposed at 520 Orrong Road campus'. It indicates events for orientation and parent information, lectures and family events, guest lectures and 'soirees', sports activities, music rehearsals, performance rehearsals, and an art show. For each, there is an indication of numbers expected or allowed (including performance and art show 'without limit'), and for each category the number of weekday evening events per annum, the number of weekend events, and times by which the facility must be vacated. The table is comprehensive, and shows what the school

proposed, and what the permit would allow, and the conditions in the existing permit under the subheading “Other school purpose events” (including Conditions 13 and 16) can each be matched to this Table. In each case, the permit provides the school with at least what it sought, and in some cases is more generous. Some events are limited to students and staff, some involve the wider school community, and some (such as the art show) are unconstrained. Adding all of these matters together, the panel report notes that the permit allows for use of the new facility for up to 208 weekday evenings per year, for 16 occasions on a Saturday or Sunday, and for an entire weekend on 4 occasions per year.

6. Conditions 13 and 16 must be considered in the context of this full suite of conditions that allow for use of the facility outside of ordinary school hours, rather than in isolation.
7. In the ordinary course of events, we consider that the school should accept the umpire’s decision unless there is a very good reason for seeking the changes now proposed. The school called no evidence and provided no indication of a change of circumstances or some other justification that provides us with a sound planning basis for amending the existing permit Conditions 13 and 16. The school called no evidence, nor satisfied us in submissions that there would be no material planning impacts to residents created by the proposed amendments to these two conditions, or that any impacts were reasonable from a planning perspective. We are therefore sympathetic to the contention of the responsible authority and objectors in this case that it is not “appropriate” to amend permit conditions that were clearly and very recently imposed, after careful investigation, as a means of striking a balance between the school’s operations and residential amenity.
8. In relation to Condition 13, the amendment was opposed by both the responsible authority and the objectors, in part for the reasons outlined above, although the Minister offered no objection. Matching this condition to the Table 3 in the panel report, it appears that the 16 occasions where students may attend on a weekend is for the intended purpose of performance rehearsals[11]. Mr Pitt submitted that by limiting attendance only to students in Condition 13, it cannot have been the intention to exclude attendance by dignitaries, guest speakers, parent/teacher interviews or the like. However, Table 3 and

the matching permit conditions clearly provide other arrangements for these types of events – e.g. in Conditions 10, 11, 12 and 14. The school can also seek to extend the number of events by request in writing to the responsible authority.

9. We see no reason why the broader school community or invited guests need to be able to attend performance rehearsals by students, particularly with no proposed constraint on numbers, on these occasions. No reason was advanced by the school. We think it necessarily implied that teachers and those assisting in a performance rehearsal can attend with students. We also consider that the occasional attendance at a rehearsal by a parent would not offend this condition. Attendance beyond these sorts of people, by the school community and invited guests, implies that these 16 occasions would not be used for performance rehearsals as intended, but for a broader range of more formal events. No reason was advanced for this, and we have indicated that the permit already makes other provision for this.
10. Attendance by the broader school community and invited guests on these 16 occasions also carries with it a greater likelihood of impact on residential amenity through parking and traffic in local streets, particularly given that Condition 13 is unconstrained in numbers. It must be noted that the permit contains an exemption from car parking on-site that would ordinarily be associated with a facility of this type, so those attending events will necessarily park in the surrounding residential streets. By limiting attendance to students on these 16 occasions, the numbers are likely to be more self-regulating than for more formal events open to the wider school community that could attract attendance to the full capacity of the facility (which we were told may be up to 400). Again, no evidence was provided as to the sorts of events proposed, the likely attendees, the amenity implications, and how they might be managed or ameliorated.
11. We see no planning justification that makes it "appropriate" in our view for Condition 13 to be amended in such an unconstrained manner.
12. In relation to Condition 16, for evening sports activities and music rehearsals, the objectors opposed the amendment to allow attendees from other schools, although the Minister and responsible authority offered no objection on the basis that the cap on 100 attendees was

maintained.

13. We agree with the objectors that there is a difference between students of the King David School attending these sports and music rehearsal activities, and those from elsewhere. Given the proposed hours (i.e. completion by 8pm), much of the use by King David School students would likely occur in the period immediately after school, where students might stay on from their daily classes before being picked up later. Students attending from other schools would more likely be dropped off and picked up in the evening period, or have parents stay during the activity, and both those students and their parents would be less familiar with the parking restrictions in the local streets and be less beholden to any attempts by the school to regulate this.
14. If 'external' competitions are run from the facility (i.e. involving other school students in competition with King David School students), we agree with the objectors that there is at least the potential for different sessions each night, three nights a week for up to 156 evenings per year, with a variety of people coming and going and creating an extended or intensified impact on local residents from noise, traffic and parking. Again, no evidence was provided as to the sorts of events proposed, the likely attendees, the amenity implications, and how they might be managed or ameliorated. We do not agree with the school's unsupported submission that the change can have no material impact on the objectors.
15. Moreover, neither the principal's June 2009 letter to residents (referred to earlier), nor the panel report, nor any other documents provided to us, make reference to potential use of the facility by students from other schools. Indeed, the contrary is clearly evident. The facility was always stated to be for use by students of the King David School.
16. We see no planning justification that makes it "appropriate" in our view for Condition 16 to be amended in the manner proposed.
17. It follows that the application, insofar as it seeks to amend Conditions 13 and 16, is refused.

Mark Dwyer	Rachel Naylor
Deputy President	**Member**

[1] [2009] VCAT 558[2] clause 52.40 of the Stonnington Planning Scheme [3] under cl 58 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*[4] Assistant Director of Priority Projects at the Department of Planning and Community Development[5] Mr Phillips report and recommendations were obtained by the objectors under the *Freedom of Information Act 1982* and provided to the Tribunal. [6] under cl 61(2) of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998*, an order of the Governor-in Council following a call-in is deemed to be an order of the Tribunal. The relevant planning permit is thus deemed to have been issued at the direction of the Tribunal, for the purposes of s 87A of the *Planning and Environment Act 1987*.[7] see *Popular Pastimes Pty Ltd v Melbourne CC* [2008] VCAT 1184 at [62]-[64] per Dwyer DP.[8] for example *Amoco Australia Ltd v City of Berwick (1983)* 1 PABR 166. Great weight ought to be accorded to the first decision of the Tribunal. In the absence of any material change of circumstances of the land, and its surrounds, changes in planning policy and/or changes in the interpretation of the facts or law relevant to the Tribunal's consideration, or changes in the proposal itself, the first decision of the Tribunal should ordinarily be followed.[9] although not referred to in the hearing before us, a similar sentiment has been expressed by Member Hewet in *Garnaut v Yarra CC* [2010] VCAT 1089.[10] 'Ordinary school hours' are defined in Condition 4 to be between 7:30am and 6:00pm Monday to Friday during term time, with Condition 6 allowing an extra half hour either side of these hours for staff.[11] Provision for the performances themselves, if they occur on-site, appear to be covered under other conditions that allow for attendance by the school community, invited guests or (under Condition 14) on occasions where attendance is unconstrained.

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