

# **HERITAGE INFORMATION SERIES**

## **HERITAGE AND DEVELOPMENT: A LAWYER'S PERSPECTIVE**



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## **INTRODUCTION**

This publication is based on a paper presented at the 1999 Royal Australian Planning Institute (NSW) conference by Helen Macfarlane. In her position as Senior Associate with Deacons Graham & James, Ms Macfarlane has had much experience with cases heard in the Land & Environment Court involving heritage issues. In this paper she discusses some of the recent cases in which she has been involved and provides practical advice for heritage professionals in relation to development involving heritage.

Helen Macfarlane is an alternate member of the Heritage Council of NSW. This paper has been published with the consent of the author and the Royal Australian Planning Institute (NSW).

## **1. HERITAGE ITEMS AND DEVELOPMENT**

A heritage consultant may be employed by a developer to provide advice on the heritage issues relating to the development of a site. This chapter looks at some of the issues which should be considered when giving advice on a proposed development that may impact on a heritage place.

### **1.1 WHERE THE SITE IS A HERITAGE ITEM**

A heritage consultant may be asked to advise on a site that includes a building that is listed on the State Heritage Register or is listed as a heritage item in a local environmental plan. In this case it will be clear that heritage is going to be a significant issue. The consultant and the developer should be aware that demolition of a building listed on the State Heritage Register is prohibited (sections 63(2) and 70 of the *Heritage Act 1977*) and that it is extremely unlikely that the council or the Court would grant development consent for the demolition of a building listed as a heritage item in a local environmental plan.

Listing as a heritage item in a local environmental plan *per se* does not prevent a council or the Court from approving a building's demolition: see *Villa Floridiana v Hunters Hill Council* (unreported, Assessor Nott, 6.6.89). However, most local environmental plans provide that the council must notify the Heritage Council of its intention to approve the demolition of a heritage item and must take into account any objection made by the Heritage Council. Note that the council is not prevented from granting consent even if the Heritage Council objects to the demolition, although the Minister may decide to intervene and issue an interim heritage order or a section 136 order over the property. In many cases concerning a local heritage item, the Heritage Council will delegate the decision back to the local council.

The first thing a heritage consultant should do is obtain a heritage impact statement from an experienced and reputable heritage expert and make inquiries as to whether a heritage report had been undertaken by or for the council in relation to the site. The consultant should be aware that the major issues the developer will have to consider in developing such a site will be curtilage and adaptive re-use. These issues are discussed in greater depth in Sections 3 and 4.

### **1.2 WHERE THE SITE IS LISTED ON THE STATE HERITAGE REGISTER**

If the site proposed for redevelopment is listed on the State Heritage Register the heritage consultant should also ascertain whether there is a heritage agreement registered on the title. These are agreements entered into by the Minister with the owner of the item: section 39 of the *Heritage Act*. (A heritage agreement cannot be entered into in relation to an item only listed as a heritage item in a local environmental plan). If a heritage agreement is registered to run with the land it is enforceable against any subsequent owners: section 43 of the *Heritage Act*.

A heritage agreement can affect the way a site is redeveloped. It can include provisions:

- restricting the use of the item;
- requiring the carrying out of specified works;
- restricting the kind of works that may be carried out; and
- exempting specified activities from the need to obtain approval under Part 4 of the *Heritage Act*: section 40 of the *Heritage Act*.

The Minister may apply to the Land and Environment Court for an injunction restraining a breach or threatened breach of a heritage agreement (section 44(1) of the *Heritage Act*). The Minister is not required to show a likelihood of damage or give an undertaking as to damages: section 44(2) and (4) of the *Heritage Act*. As such, the consequences of a failure to investigate whether there is a heritage agreement attached to an item listed on the State Heritage Register can be serious.

The heritage consultant should also investigate whether the building has been identified as a potential heritage item. It is not uncommon for Councils to prepare a preliminary “drive by” heritage inventory from time to time. Although the identification of a property as a potential heritage item is certainly not conclusive, it indicates that heritage will probably be a relevant issue.

### **1.3 WHERE THE SITE IS LOCATED WITHIN A HERITAGE CONSERVATION AREA**

When a site is not listed as a heritage item but is located within a heritage conservation area the issue of development may not be clear-cut. This is particularly so if the building on the site exhibits, at least to the non-heritage expert, little heritage significance. However, even in that case, it is prudent (and often a requirement of Council) to obtain a heritage assessment report.

### **1.4 WHERE THE SITE IS NEITHER A HERITAGE ITEM NOR LOCATED WITHIN A HERITAGE CONSERVATION AREA**

The real challenge for the heritage consultant is the property that is not listed as a heritage item in a local environmental plan, nor located within a heritage conservation area. How do you advise a client in such a case?

### **1.5 CASE STUDY**

**Picture this scenario:**

Developers purchase a site for redevelopment as a residential flat building. They intend to live in the new development themselves. On the site is a two-storey dwelling house. The site is zoned 2(b). The proposed development is permissible with development consent. Before they purchase the site, the developers check the section 149 certificate – neither the site nor the building is listed as a heritage item, nor is the site located within a heritage conservation area.

Because it is proposed to demolish the existing dwelling house on the site, to be even more cautious, the developers discuss the issue of heritage with one of the council's counter staff. She reassures them that heritage will not be an issue. They do not discuss the site with the council's heritage officer.

The developers purchase the property. They lodge with the council a section 68 application to demolish the existing dwelling house (it is before 1 July 1998) and a development application for the erection of a residential flat building (development consent is not required for demolition).

As is the council's policy where demolition is proposed, the applications are referred to the council's heritage officer who duly investigates the property. She finds to her horror that the significant two-storey, mainly intact Arts and Crafts style Federation dwelling house on the site is not listed as a heritage item nor is the site located within a heritage conservation area. As such, development consent is not required for its demolition!

### **What does the council do?**

It advises the developers that a heritage assessment report is required because demolition of the dwelling house is proposed. (One is subsequently provided to the council by the developers. It concludes that the dwelling house has little heritage significance to warrant its retention). The council also commissions a heritage assessment report from an independent heritage consultant. He concludes that the dwelling house is rare and of high significance and should not be demolished. Consequently, the council refuses both applications on heritage grounds and resolves to prepare a draft local environmental plan to list the dwelling house as a heritage item in the council's local environmental plan.

### **How do the developers react?**

They lodge separate appeals in the Land and Environment Court against the council's refusal of each of the demolition and development applications. They also commence proceedings in the Land and Environment Court challenging the validity of the draft local environmental plan on the grounds that it is a sham and an abuse of the council's plan-making powers.

### **Leamington, Darling Point**

As you can probably tell, this is a true story. I acted for the council in the following proceedings:

- Demolition application appeal (*Andriotakis & Ors v Woollahra Municipal Council* (unreported, Assessors Nott and Murrell, 11.3.98) and a section 56A appeal by Woollahra Municipal Council which was subsequently discontinued.
- These proceedings involved a number of questions of law including whether heritage is a relevant issue for the Court to take into account in considering a section 68 demolition appeal: *Andriotakis v Woollahra Municipal Council* (1998)

97 LGERA 310. Justice Sheahan followed Justice Talbot's decision in *Murrell v Mosman Council* (unreported, Talbot J, 28.8.96) and held that heritage was not a relevant issue and as such, could not be taken into account in considering the demolition application. Assessors Nott and Murrell subsequently granted demolition approval. When Council sought a stay of the demolition approval, the developers gave an undertaking to the Court not to demolish the dwelling house until Council's appeal to the Court of Appeal against Justice Sheahan's determinations was resolved.

- Development application appeal. These proceedings were adjourned twice and ultimately discontinued by the developers.
- Proceedings by the developers challenging the validity of the draft local environmental plan to list the dwelling house as a heritage item: *Andriotakis & Ors v Woollahra Municipal Council* (unreported, Talbot J, 30.6.98).
- These proceedings were unsuccessful and ultimately the Minister made the local environmental plan. (The developers had initially sought an urgent interlocutory injunction to restrain Council from even considering preparing a draft local environmental plan. They were unsuccessful).
- Proceedings by Council for a declaration that as a result of the listing of the dwelling house as a heritage item, development consent was now required for its demolition, pursuant to a clause in Council's local environmental plan dealing with demolition of heritage items: *Woollahra Municipal Council v Andriotakis & Ors* (unreported, Talbot J, 11.8.98).
- Council was successful in obtaining such a declaration. Council also obtained an injunction against the developers restraining them from demolishing the dwelling house without first obtaining development consent to do so, notwithstanding that they had obtained a section 68 demolition approval from the Court.
- An appeal to the Court of Appeal by Council against Justice Sheahan's determinations on the questions of law in the demolition application appeal: *Woollahra Municipal Council v Andriotakis & Ors* (1998) 101 LGERA 194. Council's appeal was unsuccessful. However, by the time judgment was delivered (five months after the hearing) the developers had sold the dwelling house.
- An appeal to the Court of Appeal by the developers against the Land and Environment Court's declaration that development consent was required as a result of the dwelling house's listing as a heritage item. These proceedings were discontinued by the developers.
- After twelve months of stress and costly litigation for both parties (and their solicitors!), the developers surrendered and sold the property. Thankfully the purchasers wanted to live in the house and had no intentions of redeveloping the site.

- The dwelling house the subject of so much litigation, *Leamington* in Darling Point, recently featured in the Historic Houses Trust's exhibition *Demolished Houses of Sydney* as a dwelling house earmarked for, but saved from demolition.

## Recommendations

So how could this costly litigation have been avoided? What more should the developers have done *before* purchasing the property, when everything they did appeared to be right. ? As I see it:

- The developers should have listened to advice that was allegedly given to them (before and after they purchased the property) by a number of consultant planners and heritage experts to the effect that they did not think that Council would consent to the demolition of the dwelling house.
- The developers should have ascertained whether Council had a policy of requiring a heritage assessment report because demolition was proposed.
- (Many councils require a heritage assessment report for any development application involving the entire demolition of a building. If the council has such a requirement and you fail to provide one, the council may advise you that it seeks such an assessment, which it is legitimately entitled to do within 21 days after the lodgment of the application, pursuant to clause 48(1) of the *Environmental Planning and Assessment Regulation 1994*.)
- It must be remembered that the period of time from the date of the council's request, to the date the heritage assessment report is provided to the council or the council is advised that the report will not be provided, is not taken into account in calculating the deemed refusal period. Accordingly, there is a real benefit in ascertaining whether the council requires such a report before lodgment of a development application for demolition).
- The developers should have discussed heritage with Council's heritage officer, not just Council's counter staff. Some developers would be reluctant to raise this issue with a council fearing it would put the issue in the council's mind. However, in my view, it is better to know in advance whether heritage is going to be an important issue
- The developers should have been honest about the building's heritage significance rather than stubbornly asserting that the 2(b) zoning gave them a right to redevelop the site.
- *Leamington's* significance is unquestioned. The Heritage Office and the National Trust strongly opposed its demolition. Three eminent heritage experts and Council's heritage officer opposed its demolition. Indeed, the developers and their solicitors knew the building's significance because in conducting the various proceedings, they used numerous tactics to try to exclude the issue of heritage from the Court's consideration.

## **1.6 INTERIM HERITAGE ORDERS**

In light of the amendments to the *Heritage Act*, I would also recommend heritage consultants investigate whether the council has the power to make interim heritage orders. If it does, it may make an interim heritage order over the property. This is discussed further below in paragraphs 3.4-3.14.

## **1.7 APPLICATION FOR DEMOLITION ONLY**

A developer concerned to eliminate costs incurred in retaining an architect to prepare architectural drawings for a development proposal, where there is a concern that the council may not consent to the demolition of the existing building on the site, should consider lodging a development application for demolition only. Such an application should be accompanied by a heritage assessment report if the council requires one.

However, this can be a double edged sword. Councils and residents are generally more concerned about what is proposed to be erected on a site than what it is replacing. They are also concerned about the effect of a vacant site on the streetscape.

Some Commissioners have refused such applications on the basis that demolition would leave a “hole” in the streetscape until the site was redeveloped: see *Paynter Dixon Constructions (Australia) Pty Limited v Randwick City Council* (unreported, Assessor Watts, 19.6.97).

However, I recently acted for a council in such a situation in the Land and Environment Court. I sought to have the Court impose a condition that demolition is not to be carried out until a development consent has been granted by either council or the Court for the redevelopment of the site. The developer strongly opposed such a condition, being concerned that this will give the council the ability to reconsider the demolition issue and thwart redevelopment of the site on the basis that what is existing is better than what is proposed. The Commissioner declined to impose the condition.

## 1.8 WHEN TO SEEK LEGAL HELP

Even a heritage assessment report that does not recommend retention of an item is no guarantee that a development application for demolition will be approved. If the council's heritage officer comes to a contrary view to the heritage assessment report, then in my experience, it is highly unlikely that the councillors will go against the council's heritage officer's view. (I have been involved in matters, however, where the council's heritage officer has been of the view that a building has little heritage significance to justify its retention, but the councillors have come to a different view and refused a development application for demolition!)

In such circumstances, if the developer is prepared to fight the council, that is the time to see a lawyer. The lawyer will explain the risks to the developer and advise them of their options should the best and worst case scenarios ensue. If the developer decides to appeal, the appeal should be lodged on the 41<sup>st</sup> day provided the proposed development is not integrated development and the "stop the clock" provisions in clause 48 of the *Environmental Planning and Assessment Regulation 1994* do not apply.

## LOCAL COUNCILS AND DEVELOPMENT

### 2.1 CASE STUDY: LEAMINGTON

Could Council have avoided the costly litigation involving *Leamington*?

The developers argued that if the dwelling house had heritage significance it would have been listed as a heritage item in Council's local environmental plan. They pointed to the fact that the local environmental plan was only made in 1995 and the dwelling house could have been listed then if Council genuinely thought it to be of heritage significance. They also pointed to subsequent amendments to the local environmental plan which included new heritage listings but not *Leamington*.

In the challenge to the validity of the draft local environmental plan seeking to list the building as heritage item, Justice Talbot held that:

- the draft local environmental plan was a legitimate use of Council's plan making powers, given the evidence before the Court that Council genuinely believed the building was of heritage significance justifying its listing and its retention; and
- it is unrealistic to expect councils to have the resources to undertake heritage studies regularly.

His Honour said (at p7):

*The identification and listing of heritage items is an ongoing process which evolves over time as relevant information is gathered. The fact that earlier studies had paid no regard to the subject building, that it was not included in the original schedule of the LEP or recognised by later amendments to the LEP may be indicative only of a lack of awareness. No matter how laudable the project might be, a council cannot be expected to have adequate resources that would enable it to investigate every building in its area at the one time.*

The inability to eliminate buildings of heritage significance "falling through the cracks" has been recognised by the amendments to the *Heritage Act* which commenced on 2 April 1999.

### 2.2 INTERIM HERITAGE ORDERS

The Minister may delegate to councils the power to make interim heritage orders: section 25(1) of the *Heritage Act*. (At the time of writing this paper the Minister had not delegated this power to any council in New South Wales).

A council delegated such power may make an interim heritage order where an item (which includes a building) is in the council's area and the council considers that the item may *on further enquiry or investigation*, be found to be of heritage significance and is being and is likely to be harmed. Note that a council need not be satisfied that the item *is* of heritage significance.

*Local heritage significance* means the building's significance to an area in terms to its historical, scientific, cultural, social, archaeological, architectural or aesthetic value: section 4A(1) of the *Heritage Act*. *Harm* includes demolition of a building: section 4(1) of the *Heritage Act*.

A council is not required to notify any person who will be affected by the interim heritage order of its intention to make the order (section 26 of the *Heritage Act*) although it is required to notify an affected person once the interim heritage order has been gazetted: section 28 of the *Heritage Act*.

An interim heritage order is effective for a maximum period of 12 months unless it is revoked sooner: section 29(2) of the *Heritage Act*. There is no restriction on the making of another interim heritage order when the twelve month period expires.

There is a right of appeal to the Land and Environment Court within 28 days after the interim heritage order is gazetted: section 30(1) and (2) of the *Heritage Act*. Note however that failure to notify an affected person of the order does not affect its validity: section 28(3)(a) of the *Heritage Act*.

It is unclear at this stage as to what the basis of such proceedings would be, given that the council may make an interim heritage order where it considers that the item may on *further enquiry or investigation* be found to be of heritage significance. It would be extremely difficult, if not impossible, for an applicant to satisfy the Court that the building may not, *on further enquiry or investigation*, be found to be of local heritage significance. However, I suspect that the Court will consider the issue of the heritage significance of the building in any such appeal. We will have to await resolution of this issue once councils have been delegated the power and appeals have been lodged.

The effect of an interim heritage order is a complete prohibition on the demolition of the building: sections 63(2) and 70A of the *Heritage Act*. Accordingly, in advising a developer, heritage consultant will need to be confident that the council will not place an interim heritage order on the site.

The power to make interim heritage orders is meant to be used as interim protection measure only. The reasons for giving councils the power include the delay in amending local environmental plans to list buildings as heritage items and to reduce the need for the Minister to make emergency orders to protect such sites. In his Second Reading speech on the amending legislation, the previous Minister made it clear that the power is not meant to be a substitute for councils actually listing buildings as heritage items in their local environmental plans.

Developers have expressed concern that this power may be used (or more correctly abused) as a form of *de facto* development control. Councils should be aware that the Minister has the power to revoke an interim heritage order made by a council (section 29(3) of the *Heritage Act*) and may withdraw a council's power to make interim heritage orders: section 25(5) of the *Heritage Act*. (The withdrawal of a council's power does not affect an interim heritage order made before the power is withdrawn: section 25(5) of the *Heritage Act*).

## **CURTILAGE – HOW MUCH IS ENOUGH?**

### **3.1 DEFINITION**

The High Court of Australia defined curtilage as:

*Any building, whether it is a habitation or has some other use, may stand within a larger area of land which subserves the purposes of the building. The land surrounds the building because it actually or supposedly contributes to the enjoyment of the building or the fulfilment of its purposes.*

Royal Sydney Golf Club v Federal Commissioner of Taxation (Cth) (1955) 91 CLR 610 at 626.

In *Grasso & Anor v Stanthorpe Shire Council* (1996) 91 LGERA the Queensland Court of Appeal held (at p.434) that in defining the curtilage of a building the question is:

*. . . what land actually or supposedly contributes to the enjoyment of the building for the fulfilment of its purposes? The answer to that question would always be dependent upon the particular facts of the case; what constitutes the curtilage of a building would normally be a question of fact to be determined upon the evidence in the particular case. The relevant evidence may well include the nature of the use of the building, and any visual or physical separation of the building and the land immediately and otherwise surrounding it.*

*Heritage curtilage* is defined in the Heritage Office's *Heritage Curtilages* as "the area of land (including land covered by water) surrounding an item or area of heritage significance which is essential for retaining and interpreting its heritage significance".

### **3.2 TYPES OF HERITAGE CURTILAGES**

The Heritage Office identifies four types of heritage curtilages. Reduced heritage curtilage and expanded heritage curtilage are, in my experience, the most contentious.

*Reduced heritage curtilage* is where the heritage curtilage is less than the property boundary. The challenge is to identify the heritage curtilage which is sufficient to maintain the property's heritage significance.

*Expanded heritage curtilage* is where the heritage curtilage required is greater than the property boundary. In defining an expanded heritage curtilage the prominent observation points from which the item can be viewed, interpreted and appreciated must be identified.

Although the definition of curtilage is settled and the principles for establishing heritage curtilages are generally agreed upon, heritage experts can disagree strongly on how much is enough.

## CASE STUDIES

It is useful to discuss a number of matters in which I have been involved where curtilage has been a contentious issue to illustrate the difficulties. The following cases are examples of reduced heritage curtilage or at least attempts of reduced heritage curtilage.

### 3.3 HAWTHORNDEN

In 1995 Woollahra Municipal Council rejected a development application to erect a residential flat building with basement car parking on part of the site of *Hawthornden*. *Hawthornden* was built in about 1859-60 and was extensively altered and extended in 1927 by the architects Wilson Neave & Berry. It is a two-storey stone and rendered brickwork dwelling house with a two-storey verandah enclosing the northern corner of the main section of the dwelling house on two sides. There are views of Sydney Harbour from the dwelling house to the north and the north east. Sydney Harbour is also visible from the gates and driveway, looking towards the north. The view has changed little since the building was erected although wisteria growing in a tennis court fence has eliminated part of the view. Abutting *Hawthornden* are townhouses that were developed in the 1970s on land excised from the *Hawthornden* property.

The dwelling house, gardens, gate posts, gates and a Bunya pine on the site are listed as heritage items in Woollahra Local Environmental Plan 1995 and the dwelling house is listed as an historic building on the National Trust's register.

The residential flat building was to be erected on the northern section of the site where there are open lawns, an inground swimming pool and a lawn tennis court. It was to be located within 7.5 metres of *Hawthornden*.

The grounds of refusal included that the proposed development would have a detrimental impact on the heritage significance of *Hawthornden* and the site as a whole, and that by virtue of its location the proposed development would result in a *de facto* subdivision of the land between the proposed development and *Hawthornden*.

The heritage experts for Council testified that the proposed development would destroy the expansive historic spatial relationship to the garden north of the house, would drastically alter the historic forecourt character of the house and the garden, and would block off traditional views of Sydney Harbour seen from the entrance drive.

In contrast, the developer's heritage experts concluded that the location of the proposed new residential flat building in the area of the existing tennis court respected the curtilage of *Hawthornden*. Although one of the developer's experts agreed with the National Trust's argument that ideally, in heritage terms, no further development should take place on the site, he noted the land was zoned for residential development and that subdivision was permissible under the relevant controls.

Commissioner Watts agreed with the Council's heritage experts:

*It is imperative in the Court's opinion that the spaciousness of the grounds and the vistas which contribute to the feeling of perched openness of the grounds must be retained. Over the years the site has been reduced in size by subdivision, and the grounds which presently surround the house are well proportioned to the house. To reduce them further in size as proposed cannot be permitted.*

He held however that some development in the grounds may be considered, although "any development must be subservient to the importance of the heritage item".

### **3.4 SWIFTS**

In 1996 a development application was lodged with Woollahra Municipal Council to erect a 25-storey building within part of the grounds of *Swifts*, at Darling Point. *Swifts* was then subject to a permanent conservation order. (It is now listed on the State Heritage Register). The zoning did not permit the erection of a residential flat building on the site but the applicant sought to rely on the incentive provisions in Woollahra Local Environmental Plan 1995 which would permit Council to grant development consent to the proposed development provided Council was satisfied that the proposed use would have little or no adverse effect on the heritage significance of *Swifts*, and the conservation of *Swifts* would be achieved by Council granting consent.

The applicant argued that the continued conservation of *Swifts* necessitated funds which would be generated by the sale of the units in the proposed residential flat building.

Council refused the development application on the ground that the proposed development did not satisfy the incentive provisions because it would adversely affect the significance of the curtilage of *Swifts*. The applicant did not lodge an appeal against the refusal.

### **3.5 ST RONAN'S**

Curtilage was a contentious issue in *Sagdan Developments Pty Limited v North Sydney Council* (unreported, Proceedings No 10477 of 1998, 15.1.99). Senior Commissioner Jensen had to consider a proposal for the adaptive re-use of *St Ronan's*, a two-storey Victorian Italianate style dwelling house built in the latter part of the 19<sup>th</sup> century, into two apartments, the subdivision of the site into two lots (the upper lot being approximately 1,200m<sup>2</sup> which was to comprise *St Ronan's* and the lower lot being area of approximately 840m<sup>2</sup>) and the erection of a residential flat building with four townhouse type units on the lower lot.

*St Ronan's* was listed as a heritage item in North Sydney's Local Environmental Plan. The site was not located within a heritage conservation area. The Council was

also in the process of producing a new environmental plan under which *St Ronan's* was described as “*of local significance*”. Council and its heritage experts argued that the proposed subdivision boundary and the erection of a residential flat building on the lower lot would adversely affect *St Ronan's* heritage significance.

An examination of Council's heritage and conservation map revealed that only about half of the site was coloured as a heritage item. Council and its experts argued that this was immaterial in terms of establishing a curtilage for *St Ronan's*. The applicant's experts argued otherwise. The Court upheld the applicant's argument.

The lesson learnt from that matter is that councils must consider the issue of curtilage thoroughly when listing heritage items and particularly when preparing their heritage maps. The same can be said in relation to the making of interim heritage orders which can also be expressed to apply to the curtilage of a building.

### **3.6 MORAN HOUSE**

Another matter in which our firm was involved was the redevelopment of the St Patrick's estate at Manly: see *Lend Lease v Manly Council* (1997) 92 LGERA 420. Lisa McCusker of our firm acted for Manly Council.

The parties did not disagree as to the heritage significance of Moran House, the most significant building on the St Patrick's Estate. The argument, however, was whether the proposed subdivision and residential development in the various precincts of the site would adversely and unacceptably affect the visual prominence of Moran House and its curtilage. Howard Tanner gave evidence in support of the applicant's proposal. Clive Lucas and Michael Lehaney gave evidence in support of Council's refusal.

Justice Pearlman held that the subdivision of two of the precincts would maintain the visual integrity of the curtilage of Moran House and its associated group of buildings but that the proposed residential development of another precinct would be incompatible with the direct and expansive views of Moran House from another vantage point. In effect, her Honour was accepting the applicant's heritage expert's evidence in some respects and disagreeing with it in others.

### 3.7 STABLES

I was recently involved in a matter for a developer which involved an expanded heritage curtilage. My client bought two lots resulting from a five lot subdivision. It proposed to further subdivide the two lots into approximately 85 rural – residential lots. The five-lot subdivision had been approved by Council not long before my client bought the two lots.

Located on one of the remaining three lots are the oldest stables still in existence in Australia. One of the lots purchased by my client was adjacent to this lot. In its assessment of the proposed five-lot subdivision, Council did not turn its mind to the issue of the requisite curtilage of the stables. It did when my client lodged his development application. One of the grounds of refusal of my client's development application was that the proposed subdivision layout near the stables would have an adverse effect on the stables' curtilage. The Heritage Office was also opposed to the subdivision layout.

Two heritage experts were retained by my client. As a result of their advice, my client amended the subdivision layout and included building envelope restrictions on the proposed lots adjacent to the stables. The amended proposal was considered satisfactory by Council and consent orders were entered into by the parties.

This is a good example of a developer listening to its experts, which contrasts to the attitude of the developers in the *Leamington* matters. However, it was unfortunate that my client had to bear the brunt of the curtilage issue. Council should have turned its mind to the issue before granting consent to the five-lot subdivision.

## **ADAPTIVE RE-USE**

### **4.1 Swifts**

In the development application relating to *Swifts*, consent was also sought for the conversion of *Swifts* into four units. Interestingly, Council did not have any real objection to the adaptive re-use proposal. It may well be that had the development application sought approval only for the adaptive re-use of *Swifts*, Council may have been satisfied that the applicant could rely on the incentive provisions and it may have approved the application.

It is important for councils not to take a “no change at all” stance in relation to its heritage items. Such an attitude is unreasonable and is viewed unfavourably by the Court.

### **4.2 ST RONAN’S**

In the *St Ronan’s* matter, Senior Commissioner Jensen was highly critical of the council’s opposition to the adaptive re-use of the dwelling house into two apartments. He said (at pp 29-30):

*Given the extent to which historical development can be seen as replete with examples of adaptive re-use, intransigent professional opposition to such change seems to the Court to be something of an aberration. Evidently, all the cities of Europe and now many in the new world, have embraced change through processes including adaptive re-use of old buildings and spaces. Certainly, it must be conceded that some of these changes have been more sympathetic and appealing than others. However, in most instances, without such an approach available, much city development would effectively be stifled.*

*That a professional involved in heritage and conservation matters should as a point of departure appear to oppose change at all costs, seems to the Court to be quite excessive. On the contrary, where development is proposed that could be seen as sympathetic to an existing item in both heritage and planning or architectural terms, the matter appears to the Court to be something that should be supported.*

## ZONING AND HERITAGE

A question often arises as to whether zoning and heritage are mutually exclusive issues or must be considered together.

In the *St Ronan's* matter, the site was zoned Residential 2(c) under North Sydney Local Environmental Plan 1989. The proposed development was permissible with consent.

On the issues of zoning and heritage, the Senior Commissioner said (at p 29):

*. . . under the current controls relating to heritage and conservation, when read together with the zoning and associated control, what is proposed is a permissible development. In noting this, there is to be seen another important principle. This is that issues of heritage and conservation have been embedded in the matrix of planning controls and are not to be considered in isolation. Quite the contrary, as compared with earlier heritage legislation in this State, which was designed to protect exceptional items of State and Regional significance, in this instance issues involving heritage and conservation have been subsumed into the general planning controls. For that reason, consideration of heritage and conservation issues is not seen as appropriately carried out in isolation but to be undertaken in conjunction with an analysis of all other matters associated with the relevant planning controls.*

*In this regard it appears to the Court that in the ultimate a balancing exercise will be required. In this, the merits of conservation of particular items will have to be judged against other ambitions of the plan as they impact upon proposed development.*

So the zoning of a site cannot be given little weight, or ignored, even where the site is listed as a heritage item or located within a heritage conservation area. However, having said that, the zoning does not give the developer the right to develop where heritage is an issue.

## CONCLUSION

Hopefully this paper has provided some guidance to both heritage consultants and heritage advisors. For heritage consultants, knowing what is required by council when heritage may be an issue is essential. It is also essential that council's heritage advisors know what council can do when protection of a significant heritage item is required.

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