

Permit Appeal Number P23980

**Fashoda Homestead, (H2312) Permit Application P22414**

**330 Bridge Inn Road, Mernda**

**Hearing – 24 February 2014**

**Decision of the Heritage Council**

After considering the appeal and conducting a hearing, pursuant to Section 76(4)(a) of the *Heritage Act* 1995 the Heritage Council has determined to grant the permit with conditions.

**Heritage Council Permits Committee**

**Lucinda Peterson (Chair)**

**Juliette Halliday**

**Ursula de Jong**

**Decision Date – 26 April 2016**

**Appearances**

**Executive Director, Heritage Victoria**

Martin Zweep, Heritage Officer at Heritage Victoria, appeared on behalf of the Executive Director. Janet Sullivan, Manager Permits at Heritage Victoria was also available to take questions from the Committee.

**Appellant**

Mr Nicholas Porritt, Resimax Group lodged an appeal against the Executive Director’s decision to refuse to issue a permit for a proposed subdivision. Mr Porritt made written and oral submissions. Mr Ofev Fridberg from Planning Horizon also presented at the hearing on behalf of the Appellant.

**Written submissions**

Written submissions were received from Mr Porritt, Mr Fridberg, Whittlesea City Council and the Executive Director, Heritage Victoria.

**Introduction/BACKGROUND**

**The Place**

1. The Fashoda Homestead (‘the Place’) is located at 330 Bridge Inn Road, Mernda. It was once a complex of timber farm buildings on a 640 acre lot but now consists of a smaller holding including the original vernacular timber farmhouse with detached kitchen, small dairy building, remains of a cow shed and several mature exotic trees. The Place is architecturally, historically and archaeologically significant to the State of Victoria and is included in the Victorian Heritage Register (H2312). The extent of registration includes a 6,767 sq m lot on which the buildings and remnant landscaping remain, as well as the incursion of a batter on the northern boundary and four recently subdivided lots with paling fences on the western boundary. Recent works to the Place include restoration and modernisation of the house and detached kitchen, and the demolition and reconstruction of a garage.

**The Proposal**

1. The original permit application lodged with Heritage Victoria proposed to subdivide the existing 6,767 square metre lot into two separate lots comprising Lot A – 4,277 square metres (containing a building envelope and proposed access easement) and Lot B – 2,490 square metres (containing the Fashoda Homestead complex including the farmhouse and associated outbuildings).

**Permit Appeal**

1. This appeal deals with a proposal to subdivide the existing 6,767 square metre lot (‘the Site’) into two lots. A request for a permit for the proposal was lodged with the Executive Director on 7 April 2015.

**Determination of the Executive Director**

1. A notice of refusal to grant a permit was issued by the Executive Director on 6 November 2015.

The Executive Director refused to issue the permit because:

1. The place has previously been granted a permit for subdivision (ref:P19363) to excise a 5 lot residential subdivision from the place. This permit was enacted and the applicant has undertaken conservation works to the building as a condition of the permit. This subdivision will have a substantial impact on the place and will diminish all views to the place from the west, once these lots are developed. Further subdivision will irrevocably remove any remaining sense of the place’s original context by relegating the homestead and its associated buildings to a suburban block;
2. Subdivision will place the registered land under two separate management regimes. This is likely to result in divergent aesthetic and physical outcomes for both lots, potentially compromising the context and understanding of the heritage significance of the place;
3. Subdivision of the place is likely to result in requests for additional features and structures to be added to the place, particularly with regard to the Proposed Lot A. These structures many include such things as dwellings, fences, garages, garden bed, driveways and outbuildings, which have the potential to further erode any remaining sense of context and understanding of the site and homestead buildings;
4. The area adjoining the homestead to the west has the potential to contain historical archaeological elements (features, deposits and/or objects) associated with the development and use of the place. Any subdivision of the site may disassociate the homestead from these other associated elements; and
5. Reducing the amount of land with the homestead may compromise its ability to continue to be used as a residence or repurposed for another use. (Permit Refusal P 22414, 6 November 2015).
6. An appeal against the Executive Director’s decision was lodged by the Applicant on 13 November 2015.

**Site Inspection**

1. The Committee conducted a site inspection of the Place on 16 February 2016. The Committee was accompanied by Rhonda McLaren, Manager – Heritage Council Secretariat. Mr Porritt provided access to the Committee, but no submissions were received.

**Preliminary Matters**

1. There is some ambiguity as to whether the application under consideration is for subdivision only, or for the subdivision and the construction of a farm style fence, a carriageway and rotation of the (previously permitted) building envelope as shown in the amended plans. The original permit application form refers only to a proposal to ‘subdivide the land parcel into 2 lots’. On this basis the Committee has concluded that the application relates purely to the subdivision of the Site into two lots, which includes the proposed realigned building envelope on Lot A, and access easement E-1. The decision of this Committee will relate only to the refusal of the permit for the proposed subdivision. The Committee notes that the construction of a fence and other matters should be the subject of a future permit or permit exemption application.
2. On 10 December 2015 the Appellant applied to lodge amended plans. This application was approved by the Committee on 6 January 2016 and the amended plans supersede those provided with the original permit application only in so far as they relate to the proposed subdivision.
3. The amended plans propose the subdivision of the existing 6,767 square metre lot into two separate lots, comprising Lot A - 3,035 square metres (containing a building envelope and proposed access easement) and Lot B - 3,732 square metres. It is proposed that Lot B would contain the Fashoda Homestead complex including the farmhouse ( ‘the Homestead’) and associated outbuildings.
4. The Committee has considered all mandatory considerations under s73 of the Heritage Act 1995 (Attachment 1). Only those that are relevant have been addressed in this decision.

**ISSUES**

**Summary of issues**

1. At issue is the impact of the proposed subdivision upon the cultural heritage significance of the Place. The Executive Director has argued that the subdivision will result in a loss of views and context for the Place, may lead to further works, and will result in management of the Place being fragmented.
2. The Appellant’s argument can been summarised as follows:
3. The subdivision will have a minor impact on the curtilage of the Homestead and subdivision itself will not impact on the cultural heritage significance of the Place. The Executive Director should not refuse to grant a permit on the basis that there may be some works in the future, this should be dealt with through the permit approval process at Heritage Victoria.
4. The current size of the Site will result in a high cost of property ownership and limit the ability of owners to undertake ongoing building maintenance.
5. The heritage structures are located close together on the eastern edge of the Site, in an ‘introspective’ and ‘intimate’ setting and the views to this will not be impacted on by the subdivision. Further, the remains on the western side of the Site were not residential and are unlikely to reveal any significant archaeological remains.

Mandatory Considerations

**s.73(1)(a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object**

1. The Appellant submitted that subdivision itself will have no impact on the cultural heritage significance of the Place.
2. The Executive Director argued that ‘the Fashoda homestead was once part of [a] small farm in a landscape of small holdings and the maintenance of a land holding around the homestead is intrinsic to its understanding as a collection of farm buildings’.

*Submissions and evidence*

1. The Appellant submitted that there have been major changes to the context of the Fashoda Homestead complex as a result of the subdivision of the surrounding land, construction of housing and installation of services and roads. It was his view that the historic relationship of the surrounding area with the Place is not to the west, and that subdivision of this area will not impact on the cultural heritage significance of the Place.
2. In response to the Appellant’s argument that the context has already been significantly impacted, the Executive Director submitted that the Place in its current setting, still maintains a sense of the original agricultural context. The Executive Director stated that the previously approved 5 lot subdivision was seen to be an acceptable encroachment (given the circumstances) but that a second subdivision would impact on the ability to understand the Place. He is of the view that, given some fragmentation of the land has already taken place, it is even more important that the remaining context of the Place is conserved.
3. It was the Appellant’s submission that, as the proposed Lot A would have no heritage buildings, it would be a more simple arrangement to have a management regime solely for Lot B where the heritage fabric is located. Further, any new development on Lot A would still require approval from Heritage Victoria. The Executive Director would need to consider the impact of any future works, before a permit is granted. The Appellant stated that ‘it is not appropriate for the Executive Director to refuse to grant a permit for subdivision on the basis that the Appellant (or any future owner of the Place) may at some future date seek approval for as yet unspecified works’. However, the Appellant also submitted that if subdivision were to go ahead, it is likely that the new purchaser would be applying for approval to construct a dwelling on the newly created lot (on proposed Lot A).
4. The Executive Director submitted that approval of the subdivision will likely result in two different management regimes on each of proposed Lots A and B, and increase the isolation of the Homestead from the remainder of the Place. It is his view that this would be compounded by the likely construction of a new residence, differing landscaping, and the proposed creation of a fence between the two lots.
5. It is the Executive Director’s view that the current extent of registration protects the Place, and that any reduction of land will negatively impact on the sense of context. The Executive Director acknowledged that subdivision itself does not have a physical impact and that any future works would still require approval from Heritage Victoria. However, he argued that subdivision creates ‘an expectation that some sort of development will be proposed’. It is his view that when considering if a place may be subdivided, he must look at whether or not the place can sustain any further development. The Executive Director stated that any development should be kept to a minimum, and that approval of the subdivision would give an unreasonable expectation of potential use of the Place and result in further encroachment on the Site due to the likely construction of a dwelling.
6. The Appellant agreed that the Site is significant, and that the ‘setting’ is important. However, he submitted that a building envelope has already been approved by Heritage Victoria, and therefore further development has already been considered. The current application is not seeking any further buildings, rather just subdivision of the parcel.
7. The Appellant argued that the required ‘heritage curtilage’ is that which is needed for the use and function of the building and land. The Appellant submitted ‘that the western portion of the heritage site has no direct nexus to the functional requirements of the principal structure’.
8. Mr Fridberg (on behalf of the Appellant) submitted that the subdivision will have close to zero impact on the cultural heritage significance and this is consistent with previous Heritage Council Permits Committee decisions such as that for the Willis Flour Mill (Decision of the Heritage Council, Willis Flour Mill P20647, 19 February 2014).
9. The Executive Director argued that ‘it is not appropriate to approve a subdivision ... where any further changes required as a result of the subdivision may not receive approval due to their impact on cultural heritage significance’.
10. The City of Whittlesea (‘Council’) did not appear at the hearing (although they made a written submission as part of the permit process to the Heritage Council). The Council outlined the history behind previous approvals for subdivision on the (larger) original property comprising 68 lots, and then a further 5 lots following inclusion of the Place within the Victorian Heritage Register. Council considered the proposed subdivision contradicts the original Conservation Management Plan that was prepared when the Place was included on the VHR. Council said that works associated with the further subdivision of the Site will result in greater impact on the heritage values of the Site (including further landscaping and fencing between the two proposed lots) thus interrupting the existing vista from Fashoda Drive and the overall setting of the Place.
11. The Council commended the restoration works undertaken to the building but believes the current application ‘is premature and has potential to adversely affect the heritage significance of the place and its setting’.

*Discussion and conclusion*

1. The Committee has considered all of the submissions, as well as the Statement of Significance for the Place and the 2012 Conservation Management Plan prepared by Context.
2. The Committee notes the Statement of Significance refers to the garden setting of the Homestead and outbuildings. Having considered the setting of the Place, the Committee has determined that the sense of the original agricultural context of the Homestead has already been significantly diminished by the surrounding subdivisions, and by the recent mounding and roadworks associated with works to Bridge Inn Road. The proposed subdivision of the Site would still allow the majority of the Homestead and surrounding trees to be managed within one large lot. The Committee notes that the size of lots in proximity of the Site (particularly to the south and west) are generally in the range of 300 to 600 square metres. In light of these matters, it is the Committee’s view that the proposed Lot B (at 3,732 square metres) will be considerably larger than most residential lots in proximity to it. Lot B will be able to continue to demonstrate the historical context of the Site, and will be able to provide a garden setting for the buildings. Furthermore, the significant fabric, and the majority of mature trees will continue to be located on Lot B, and within single ownership, ensuring consistent management of the Homestead and associated structures and garden.
3. That said, the Committee considers in order to retain a sense of the spaciousness of the historical and landscape context of the Homestead complex, Lots A and Lot B should not be further subdivided. A covenant under s 85 of the Act will be required to give effect to this outcome.
4. The Committee acknowledges that if the permit for subdivision is granted, the Appellant may seek to undertake additional works, including the construction of fences and buildings. However, as was conceded by the Executive Director during the hearing, most works would still require approval from Heritage Victoria. The Committee expects that any proposal for these works will consider the context of, and relationship to, Lot B (containing the significant buildings and setting) and should be designed to ensure a sense of spaciousness is retained.

**s.73(1)(b) the extent to which the application, if refused, would affect the reasonable or economic use of the registered Place, or cause undue financial hardship to the owner in relation to that Place**

1. The Appellant submitted that it would be difficult to attract a buyer for the Site given its current size, and with the recent works to bring the Homestead up to a habitable level, the construction of a building on the approved building envelope would ‘overcapitalise’ the Place. It is his view that ‘reasonable use’ of the Site would be better facilitated by subdividing the Site into two smaller lots.
2. In response to the Appellant’s argument, Mr Zweep submitted that it would be difficult to determine the saleability of the Place until it had been tested in the marketplace. Mr Zweep submitted that any change on the Site should be managed under one ownership and management regime.
3. The Appellant provided a number of financial scenarios as evidence that, due to the extensive cost of repair works to the building (as well as the costs of land management, sale costs, and landscaping works), the Appellant will incur significant losses if the subdivision is not approved.
4. In response to the financial hardship argument presented by the Appellant, the Executive Director noted that the previous permit (P19363 approving conservation works) set down a required conservation outcome (and did not specify the cost of these works). The Executive Director noted that given the Appellant chose to go above and beyond the works required, the question of the cost of the works is a matter for the Appellant and the quantity surveyor. It is the Executive Director’s view that the previously approved 6 lot subdivision allows a reasonable and economic use of the Place, and that the Appellant has failed to show that undue financial hardship will occur if the subdivision is refused.
5. The Appellant drew the Committee’s attention to the costs of work already undertaken to the Place, as well as the perceived difficulties in selling a lot with a historic homestead on it, in this area.

*Discussion*

1. The Committee commends Mr Porritt for the time and effort put into the conservation of the Homestead and detached kitchen. This work will protect the buildings into the future. However, the Committee agrees with the Executive Director that the works undertaken were beyond what was required under the previous permit, and that the additional costs incurred by the Appellant should not be relied upon to support a submission concerning undue financial hardship under s 73(1)(b) of the Act. Neither should the additional costs of landscaping or street works be included in these considerations.
2. The Committee is not persuaded by the Appellant’s argument that he would experience undue financial hardship if the subdivision is not approved.

**s.73(1)(f) any matters relating to the protection and conservation of the Place or object**

*Prescribed building envelope*

1. In submissions, the Appellant stated that the construction of a new dwelling on the Site has already been tacitly approved by Heritage Victoria through the granting of a permit for the single storey building envelope. He argued that Heritage Victoria allowed this with the intention that it would be a caretaker residence.
2. The Executive Director disagreed with the Appellant’s view of this matter, submitting that it was not his intention ‘that the envelope should ever be considered as pre approval for any new structure for the site but rather a means of confining construction of a support structure in this location’. Mr Zweep submitted that the original building envelope was placed on the previous Plan of Subdivision in the context that it would provide the opportunity for a caretaker’s residence while the original homestead was being restored. Given the homestead building is now habitable, the building envelope is no longer required.
3. The Appellant submitted that they would be happy to enter into a covenant or other agreement to ensure that use of the Site and any restrictions are clear for future owners.
4. It is the Executive Director’s view that a covenant is too onerous and any restriction would be an inconvenience on a potential purchaser of Lot A. In the Executive Director’s view, covenants are administratively burdensome and difficult to adequately follow up and enforce.
5. No additional matters were identified as being of relevance.

*Discussion*

1. The Committee considers that the key matter is not whether a caretaker’s residence is no longer required, but whether the Site could contain a building envelope. The Committee considers that proposed Lot A, can be managed to retain a spacious context for Lot B, on the basis that any buildings to be constructed within the building envelope do not exceed one storey in height. The proposed realignment of the building envelope on Lot A to a north/south alignment, instead of the previously permitted east/west alignment (as sought by this application) is more site responsive and is located further from the significant buildings on Lot B. The Committee considers that the access easement E-1, off Wellington Street is a practical outcome for the Site and, irrespective of whether the subdivision was approved or not, is the permitted access point into the Site with a crossover already constructed as part of works associated the previous 5 lot subdivision.

**Conclusion**

1. The Committee has determined to grant the permit sought with the conditions outlined in Attachment 2.
2. Furthermore, a covenant under s 85 of the Act must be registered on the title to the Site, to ensure that there is no further subdivision of Lots A and B and that the only building to be constructed on Lot A must be constructed within the building envelope, and is restricted to a single storey structure.
3. The Committee notes that the permit only allows for the subdivision of the Site. Any future development of the Site (including the construction of a fence etc.) to facilitate the subdivision is likely to require the permission of the Executive Director and the owner of the Place must contact the Executive Director prior to commencing any works. It is the Committee’s view that any future fencing should be at least 70% transparent and no higher than 1.2 metres so as not to inhibit views to and from the Homestead and associated buildings.
4. The Committee further notes that before the certified plan of subdivision for the two lots is lodged with the Titles Office, the owner must provide a copy of the certified plan to the Executive Director for endorsement to ensure that works required by other parties to achieve certification do not compromise the significance of the Place or contravene permissions required under the Act.



**ATTACHMENT 1**

**73. Matters to be considered in determining applications**

(1) In determining an application for a permit, the [Executive Director](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#executive_director) must

consider-

(a) the extent to which the application, if approved, would affect the [cultural heritage significance](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#cultural_heritage_significance) of the [registered place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_place) or [registered object](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_object); and

(ab) if the application relates to a [listed place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#listed_place) or to a [registered place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_place) or [registered object](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_object) in a [World Heritage Environs Area](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#world_heritage_environs_area), the extent to which the application, if approved, would affect -

(i) the [world heritage values](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#world_heritage_values) of the [listed place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#listed_place); or

(ii) any relevant [Approved World Heritage Strategy Plan](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#approved_world_heritage_strategy_plan); and

(b) the extent to which the application, if refused, would affect the reasonable or economic use of the [registered place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_place) or [registered object](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#registered_object), or cause undue financial hardship to the [owner](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#owner) in relation to that [place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#place) or [object](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#object); and

(c) any submissions made under section 69; and

(d) any decision of the [Heritage Council](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#heritage_council) under section 72 which has been

received; and

(e) if the applicant is a [public authority](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#public_authority), the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the [public authority](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#public_authority) to carry out a statutory duty specified in the application; and

(f) any matters relating to the protection and [conservation](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#conservation) of the [place](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#place) or [object](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#object) that the [Executive Director](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#executive_director) considers relevant.

(1A) In determining an application for a permit, the [Executive Director](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#executive_director) may consider-

(a) the extent to which the application, if approved, would affect the [cultural heritage significance](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#cultural_heritage_significance) of any adjacent or neighbouring property that is -

(i) subject to a heritage requirement or control in the relevant planning scheme; or

(ii) included in the [Heritage Register](http://www.austlii.edu.au/au/legis/vic/consol_act/ha199586/s3.html#heritage_register); and

(b) any other relevant matter.



**ATTACHMENT 2**

**Conditions**

1) This permit shall expire if the permitted works have not commenced within two (2) years of the date of issue of this permit, or are not completed within four (4) years of the date of issue of this permit unless otherwise agreed in writing by the Executive Director, Heritage Victoria.

1. Prior to lodgement of the certified plan of subdivision with the Titles Office, the owner shall provide a copy of the certified plan of subdivision to the Executive Director for endorsement. Once endorsed, the certified plan forms part of this permit.
2. Prior to lodgement of the certified plan of subdivision with the Titles Office, the owner shall develop a Heritage Audit Management Plan (HAMP). The HAMP must identify all heritage fabric at the registered place and articulate strategies for its long-term management, maintenance and conservation. The HAMP is to be to the written satisfaction of the Executive Director.
3. Prior to lodgement of the certified plan of subdivision with the Titles Office for the subdivision of the Site, the owner must enter into a covenant pursuant to section 85 of the Heritage Act 1995 which must prohibit the following:

a) any further subdivision of Lots A and B on Plan of Subdivision PS 735198B; and

b) the construction of buildings on Lot A on proposed Plan of Subdivision PS 735198B, except in the area marked ‘Building Envelope’ on proposed Plan of Subdivision PS 735198B; and

c) the construction of a building exceeding a single storey within the Building Envelope on Lot A on proposed Plan of Subdivision PS735198B.

1. The Covenant is to be registered against the title of each lot (Lots A and B on proposed Plan of Subdivision PS 735198B) within the registered place upon registration of the plan of subdivision. A copy of the new titles, with confirmation of registration of the Covenant, is to be provided to the Executive Director within 14 days of registration of the plan of subdivision. All costs relating to the preparation and lodgement of the Covenant are to be met by the owner.
2. Approved works or activities associated with the subdivision are to be planned and carried out in a manner which prevents damage to the registered place. However, if other previously hidden original or inaccessible details of the place are uncovered, any works that may affect such items shall immediately cease. The Executive Director shall be notified of the details immediately to enable Heritage Victoria representatives to inspect and record the items, and for discussion to take place on the possible retention of the items, or the issue of a modified approval.
3. All works must cease and this office be contacted if historical archaeological artefacts or deposits are discovered during any excavation or subsurface works. Should any munitions or other potentially explosive artefacts be discovered, Victoria Police is to be immediately alerted whilst the Site is cleared of all personnel.
4. The development approved by this permit is to be carried out in accordance with the endorsed drawings, unless otherwise agreed in writing by the Executive Director, Heritage Victoria.