

Permit Appeal Number P27637

**Former Ardoch Educational Centre, H0969, Permit Number P24258
216-238 Dandenong Road and 1-9 Ardoch Avenue and 2-8 Pilley Street and 2-10
Ardoch Avenue, St Kilda East**

**Heritage Council Permits Committee
Hearing – Friday 16 February 2018**

DECISION OF THE HERITAGE COUNCIL

After considering all submissions received in relation to the permit appeal, and after conducting a hearing, pursuant to Section 76(4)(b) of the *Heritage Act 1995*, the Heritage Council has determined to confirm the decision of the Executive Director to include Condition 6 as a condition of Permit Number P24258.

Heritage Council Permits Committee:

Patrick Doyle (Chair)

Paul Coffey

Joanne Guard

Decision Date: 16 February 2018

Reasons for Decision Published: 7 March 2018

APPEARANCES / SUBMISSIONS

Executive Director, Heritage Victoria (‘the Executive Director’)

Mr Martin Zweep, Heritage Officer (Permits) of Heritage Victoria appeared and made verbal submissions representing the Executive Director. Ms Janet Sullivan, Principal - Heritage Permits, of Heritage Victoria was also present and available to answer questions.

Mr Stuart Perry and Mrs Sarah Perry (‘the Permit Applicants’)

Mr Stuart Perry and Mrs Sarah Perry, owners of 4/6 Pilley Street St Kilda East and Applicants in relation to Permit Number P24258 (‘the Permit’), were represented by Ms Maria Marshall of Maddocks Lawyers, who appeared and made verbal submissions generally supporting the Executive Director's decision.

Mr Ian Warren (‘the Appellant’)

Mr Ian Warren, owner of 3/6 Pilley Street St Kilda East, attended the hearing and made verbal submissions in support of the appeal against Condition 6 of the Permit, on behalf of the Appellant, Dundas Terrace Pty Ltd. Mr Warren was accompanied by Mrs Jenni Warren.

Ardoch Owners Corporation

A written submission was received by the Ardoch Owners Corporation, represented by Chairperson Mr David Mayes, indicating that the Owners Corporation had consented to the proposed development, subject to certain conditions. Ms Meredith Doig, Secretary of the Ardoch Owners Corporation was present and available to answer questions, but no verbal submissions were made on behalf of the Ardoch Owners Corporation.

INTRODUCTION/BACKGROUND

The Place

- 1 The 'Former Ardoch Educational Centre' ('the Place') is a complex of residential buildings and grounds, developed primarily between 1920 and 1922. The Place is included in the Victorian Heritage Register as a place of Cultural Heritage Significance to the State of Victoria.
- 2 The part of the Place relevant to this Permit Appeal is the apartment known as 4/6 Pilley Street, St Kilda East.
- 3 The following paragraphs are taken from the Statement of Cultural Heritage Significance ('Statement of Significance') for the Place:

The former Ardoch Flat complex is a rare innovative and intact example of early flat development in Victoria, based on the garden suburb concept derived from England and North America.

The complex of buildings and grounds demonstrates the physical, social and economic changes occurring in St Kilda and other inner Melbourne suburbs during the late nineteenth century and early twentieth century, through its location, sequence of functions, and patterns of occupancy over time.

It represents a sequence of development, from two substantial mid-nineteenth century residential estates, to an early speculative flat development that consolidated rather than sub divided the 7 acre site.

Building ten and the extensive grounds are important for their association with William Wilkinson Wardell, inspector-general of public works (1861-1878), who was the first owner and resident of the building from 1864 to 1869.

Wardell's period of occupancy coincided with his most influential years in Victoria's public works development. His prolific private architectural commissions for the Catholic Church can be seen in St Mary's church, the second parish church designed by Wardell on the site.

The buildings at Ardoch illustrate aspects of flat life in the 1920s and 1930s, including the use of sleep-outs or porches facing a garden to provide a sense of space and healthy living; a semi-enclosed stairwell and front and rear access for tenant privacy; maids rooms in some flats; individual designs and layout to enhance the sense of independent living; and rear milk and bread service hatches in some buildings. The boiler room at the rear of building 3 recalls the original use of the buildings as a restaurant for Ardoch's tenants.

The Ardoch Flats represent an early and outstanding example of the application of the Californian bungalow style to flat development in Victoria, characterised by rustic features such as timber shingles, roughcast render, projecting rafters, and arts and crafts style leadlights.

The purchase of Ardoch by the education department in 1977 and the deliberate retention of the domestic character of the buildings and landscape during its subsequent conversion for educational use, illustrates the department's innovative attempt to educate homeless children in a more domestic environment. However, during conversion, the interiors of buildings B1, B5, B6, B8 and B9 were extensively modified.

Ardoch represents the only known example of flat development converted for use as a secondary school in Victoria.

Permit Application

- 4 On 28 January 2016 the Permit Applicants, represented by Tim Milton of Milton Architecture, made an application to Heritage Victoria pursuant to s 67 of the *Heritage Act 1995* ('the Act') for a permit to 'modify and modernise the internal layout of the existing apartment within the living/kitchen areas and make minor amendments to the recessed external walls to the balcony area' ('the Application').
- 5 According to the *Heritage Impact Statement* prepared by Milton Architecture dated 19 January 2016 provided with the Application, the proposed internal works included:
 - Demolishing the wall between the living and kitchen areas to link the zones
 - Refitting the kitchen and laundry to suit the amended kitchen and bathroom layouts
 - Demolishing and reconfiguring the bathroom area to create a large functional bathroom
 - Refitting the bathroom to suit the amended layout
 - Installing joinery adjacent to the living and dining area fireplaces for storage purposes
 - Installing a study desk arrangement within the master bedroom bay window
- 6 On 4 June 2017, the Permit Applicants provided outstanding documents required by Heritage Victoria to assess the Application, including the written approval from the Owners Corporation for the Place and a current land title for the Place.
- 7 Pursuant to s 68 of the Act the Application was not required to be advertised.

Determination of the Executive Director

- 8 On 24 July 2017 the Executive Director determined to issue the Permit, subject to conditions (pursuant to s 74(1)(a) and s 74(3) of the Act). Condition 6 of the Permit reads as follows:

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.

The Appeal

- 9 On 18 September 2017, the Heritage Council received correspondence from Mr Ian Warren, owner and occupier of the adjacent apartment 3/6 Pilley Street, St Kilda East, which is included within the extent of registration for the Place. In this correspondence, Mr Warren attached *Heritage Council Hearings Protocol 3 – Permit Appeal to the Heritage Council* and a supporting letter, on behalf of a company associated with Mr Warren, namely Dundas Terrace Pty Ltd. There was a degree of ambiguity in that material as to whether Mr Warren was seeking to appeal against a condition of the Permit, or to appeal against the issue of the Permit itself.
- 10 On 27 September 2017 the Heritage Council Secretariat wrote to Mr Warren, advising that pursuant to s 75(3) of the Act, the applicant or owner of a registered place can appeal to the Heritage Council against any condition of a permit imposed by the Executive Director, noting that Mr Warren’s appeal did not stipulate which condition he sought to appeal, and seeking clarification in this regard.
- 11 On 28 September 2017, the Heritage Council received a response from Mr Warren, nominating Condition 6 of the Permit as the condition against which he wished to appeal. Mr Warren stated the reasons for his appeal were that “it is impossible to satisfy this condition. Substantial additional structural works are required which are not shown on the endorsed drawing.”
- 12 A Permit Appeal hearing was scheduled by the Heritage Council for Friday 24 November 2017.

Adjournment

- 13 On 3 November 2017 the Committee advised all parties that, due to the unavailability of a Committee member, the hearing would have to be adjourned. The Committee sought indications as to availability from other parties to the hearing in relation to a prospective new hearing date. After considering all responses received, the hearing was ultimately rescheduled for Friday 16 February 2018 (‘the hearing’).

Site Inspection

- 14 No site inspection of the Place was conducted.

PRELIMINARY AND PROCEDURAL MATTERS

Exchange of Submissions

- 15 The Permit Applicants did not make a substantial hearing submission within the timeframe allowed. The Permit Applicants were provided with an opportunity to make a submission in reply to the hearing submissions of all other parties. All other parties were then provided with an opportunity to reply to the Permit Applicants' submission.

Operation of Transitional Provisions of the Heritage Act 2017 ('the New Act')

- 16 The Committee noted the repeal of the Act, and the commencement of the New Act. The Committee noted that the present appeal appears to fall within the scope of transitional provisions set out at s 272(1) and (2) of the New Act. Submissions were invited and no party disagreed. The Committee has therefore proceeded on the basis that, despite the repeal of the Act, the Act continues to apply to this appeal as if it had not been repealed.

Request for a Document

- 17 By correspondence of 13 February 2018, the Permit Applicants requested that the Appellant provide a copy of legal advice, dated 29 January 2018, which was referred to in the Appellant's submission in reply of 2 February 2018.
- 18 Oral submissions advanced on behalf of the Permit Applicants in this regard were twofold: firstly that the Committee should make an order or direction requiring the document to be produced, and secondly requesting that the Appellant produce that document in any event.
- 19 The Committee invited submissions from all interested persons. The Appellant submitted that it had the benefit of legal professional privilege in respect of the document, and that the Appellant did not consider that such privilege had been waived.
- 20 The Committee declined to make the order or direction sought by the Permit Applicants. This was on the basis that the Committee does not consider it has the power to make such an order.
- 21 The Heritage Council of Victoria is a creature of statute, so its powers are confined to the powers granted by statute. Those powers do not include judicial or declaratory powers.
- 22 As noted by Ms Sullivan, the Heritage Council has a power to ask the Appellant for any additional information that the Heritage Council thinks necessary to assist the determination of the appeal.¹ However, the Committee was not persuaded that this equates to a power to compel the Appellant to produce a

¹*Heritage Act 1995* (Vic) s 75(3).

document.²

- 23 Ultimately the Appellant elected to produce a redacted version of the document, in response to the request on behalf of the Permit Applicants, for perusal or copying by the Committee and the parties. That document has been retained on the file of the Heritage Council of Victoria.

Standing

- 24 Written and oral submissions on behalf of the Permit Applicants contended that the Appellant lacked standing to bring the present appeal, pursuant to s 75(3) of the Act. This was on the basis that, although the Appellant is the owner of a part of the relevant registered place, s 75(3) should not be available to the owner of a part of the relevant registered place other than the particular area to which the relevant permit application (or permit) directly relates.
- 25 No particular authority was advanced in support of this contention. The Permit Applicants referred to the overall scheme of Part 4 of the Act, and in particular s 67(2)(b), which requires a permit application to be accompanied by the consent of the owner of the registered place (in the event that the permit applicant is not the owner).
- 26 Written submissions on behalf of the Executive Director had not addressed the question of the Appellant's standing in this matter. However at the hearing the Executive Director's representatives expressed support for the contentions on behalf of the Permit Applicants in this regard (specifically that the Appellant lacked standing pursuant to s 75(3)).
- 27 The Appellant opposed the above submissions, including by reliance on a previous decision of the Heritage Council of Victoria which dealt with the same question.³ In that case an appeal against conditions had been brought by an owner of part of the registered place to which the permit did not relate, who was effectively an objector to the permit application. The decision included the following passage:

However, [the Committee] considers that [the appellant] has standing to lodge an appeal in relation to conditions of a permit on a literal reading of s.75(3) of the Act. Section 75(3) refers to the owner of a registered place. As owner of part of the registered place [the appellant] is an owner of the registered place and therefore can bring such an appeal. The Committee does not consider that there is any reason for going beyond the clear words of the provision to determine their meaning. It notes that cases like this will be rare where there are more than one owner of a registered place and an owner who is not the permit applicant seeks review of permit conditions.⁴

² This is distinct from some other statutory bodies which conduct hearings. For example, see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 80(3); *Planning and Environment Act 1987* (Vic) s 161(2).

³ Appeal number P15708, dated 26 July 2010, regarding Westerfield, 72-118 Robyns Road, Frankston South.

⁴ *Ibid*, paragraph 13.

- 28 Although that decision is in no way legally binding, this Committee respectfully agrees with that conclusion.
- 29 The Committee accepts that there is a degree of incongruity in giving owners of other parts of the registered place an elevated role in the permits process, including appeal rights which are not available to others. However, the Committee is not persuaded that granting standing to a person such as the Appellant in this case results in an outcome which is inherently absurd or illogical. Ultimately the Committee is not persuaded that the language used in the Act provides a sufficient basis to deny a person such as the Appellant in this case from the right to appeal.
- 30 If the intention was for s 75(3) to operate more narrowly than this, it has long been open to the legislature to give effect to such intent by way of amendment to the Act. Indeed, it remains open to the legislature to arrive at the same result, notwithstanding the repeal of the Act, given that s 106(2) of the New Act is cast in practically equivalent terms to s 75(3) of the Act.
- 31 This Committee's only reservation in relation to the passage quoted above from the previous decision is the suggestion that it "...will be rare where there are more than one owner of a registered place and an owner who is not the permit applicant seeks review of permit conditions". The Committee is of the view that it is certainly not unusual for there to be more than one owner of a registered place, but acknowledges that circumstances may have changed somewhat since the time of the referenced decision. It follows that there may be an increased opportunity (and perhaps incentive) for owners who are not the permit applicant to seek review of permit conditions. If the drafters of the New Act wish to avoid such appeals on a policy basis, it is open to the legislature to give effect to such intent.

Grounds for Appeal and Reasons for Decision

- 32 The material submitted on behalf of the Appellant was extensive, canvassing a number of concerns in relation to the proposed development. These included not only the Executive Director's decision to grant the Permit, but also other matters, including the actions of the Owners Corporation, questions of future compliance (or non-compliance) with the *Building Act 1993*, whether the correct land was identified as part of the Application, as well as matters relating to possible insurance policies.
- 33 The role of the Committee in this case is clear. Having accepted that the Appellant has standing to bring an appeal pursuant to s 75(3) of the Act, it is incumbent on the Committee to conduct a hearing into the appeal⁵ and to determine that appeal.⁶
- 34 The difficulty for the Committee, and indeed for the parties, was that the

⁵ *Heritage Act 1995* (Vic) s 76(2).

⁶ *Ibid*, s 76(4).

Appellant's case had not been squarely directed at Condition 6. The relationship between most of the Appellant's concerns and Condition 6 may be described as tangential, at best. Yet that condition is the only matter that is properly the subject of review in this proceeding.⁷

- 35 At no point did the Appellant clearly indicate its objective in respect of Condition 6. In this context, the other parties experienced difficulty in responding to the Appellant's case.
- 36 When asked about the Appellant's preferred 'fate' for Condition 6, Mr Warren suggested that Condition 6 should be 'modified' and 'beefed up', to 'require other things to be done', including by reference to a conservation management plan. Mr Warren stated that the drafting of Condition 6 needed 'quite some considerable work'.
- 37 When asked to clarify whether the Appellant had, at any stage of the proceeding, articulated its preferred form of modification of Condition 6, Mr Warren answered in the negative, and expressed reluctance to accept responsibility for such a task, suggesting that others may be better qualified or better placed to do so.
- 38 However it is the Appellant, not any other party, and not the Committee itself, who is responsible for articulating what is sought to be achieved by the appeal (in this case, any preferred re-formulation of Condition 6).
- 39 By its nature, this is an appeal *against* Condition 6.⁸ One common outcome sought by an appeal against a permit condition is the deletion of the condition in question. However, in this case it was considered by the Committee to be sufficiently clear that Mr Warren was not seeking to delete Condition 6. Such an outcome is unlikely to be in anybody's interests in any event.
- 40 Alternatively, it is clear that an appeal against a permit condition may result in a modification or reformulation of the relevant condition. However, the Committee does not accept that an appeal against a condition provides an opportunity for an appellant to argue for the permit to be subject to substantial additional restrictions or limitations. It is true that, on its face, s 76(4)(c) of the Act gives the Heritage Council the power to '*vary the conditions on the permit*'. However, that provision must be read in the context of s 75(3) in this case. In the context of an appeal against a condition (or conditions), it is the opinion of the Committee that any power to effectively bolster the existing conditions should only be exercised with considerable caution (if at all).
- 41 Equally, it is clear to the Committee that an appeal against a permit condition does not provide scope for 'clawing back' any substantive permission given by

⁷ The Act does not provide any person with a right of appeal against the grant of a permit. Based on the submissions made by the Appellant, it is the Committee's view that the Appellant would have sought to avail itself of such an appeal if it were available.

⁸ *Heritage Act 1995* (Vic) s 75(3).

way of the relevant permit in question. The Committee is of the view that an appeal against a permit condition does not present an opportunity to reconsider the appropriateness of the decision to grant the permit.

- 42 It is the view of the Committee that Condition 6 was not the true concern of the Appellant. The Appellant's real concerns are those adverted to above. Throughout the course of the hearing process, the Appellant has been reasonably frank in this regard.⁹ No other concern raised by the Appellant in the course of the hearing is within the legitimate scope of the Committee to consider or determine.
- 43 The Committee does not question the Appellant's sincerity in agitating those other various concerns, and the Committee notes that the Appellant has devoted considerable time to this appeal. It is simply beyond the scope of the Committee to form or express any opinions in relation to the various other matters raised by the Appellant (aside from Condition 6).
- 44 To the extent that the Appellant has directly attacked Condition 6, the focus of the challenge is that this condition is inherently incapable of being complied with. The Committee does not accept that argument. From a philosophical perspective, it is difficult to sustain an argument that a condition, which requires that a proposed development comply with specified architectural plans, is inherently incapable of being complied with.
- 45 As contended by the Appellant, it may be that other structural works are required in addition to the works authorised by the Permit. It may be that other permissions will be required (whether for those structural works or for other reasons), and it may be that such permissions might take the form of a further permit pursuant to the Act, or an amendment to the Permit itself. The Committee, however, agrees with the submissions of the Permit Applicants and the Executive Director that it is the Permit Applicants (or any person acting on the Permit) who bear the responsibility for ensuring compliance with Condition 6. It is they who have an incentive to take whatever steps may be necessary to avoid an offence under the Act. To fail to do so would leave themselves vulnerable to the risks associated with the enforcement mechanisms which operate pursuant to the Act (and the New Act).
- 46 Finally, the Committee notes that Condition 6 is an extremely common form of condition. The Committee has no fundamental difficulty with this form of condition. Indeed, it is likely to be problematic if a similar or equivalent condition was *not* included on the majority of permits issued pursuant to the Act (or the New Act).
- 47 For the reasons outlined above, the material advanced by the Appellant has not persuaded the Committee to remove or vary Condition 6 of the Permit.

⁹ For example, in correspondence with the Heritage Council dated 18 September 2017, the Appellant commented that it was unable to identify a Heritage Council protocol for appealing against "the issuing of a permit".

Accordingly the Committee confirms the relevant decision of the Executive Director, namely to include Condition 6 on the Permit, as issued.

CONCLUSION

- 48 After considering all submissions received in relation to the permit appeal, and after conducting a hearing, pursuant to Section 76(4)(b) of the *Heritage Act 1995*, the Heritage Council has determined to confirm the decision of the Executive Director to include Condition 6 as a condition of Permit Number P24258.

ATTACHMENT 1

s 73 of the *Heritage Act 1995* (Vic)

73. Matters to be considered in determining applications

- (1) In determining an application for a permit, the Executive Director must consider-
- (a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object; and
 - (ab) if the application relates to a listed place or to a registered place or registered object in a World Heritage Environs Area, the extent to which the application, if approved, would affect -
 - (i) the world heritage values of the listed place; or
 - (ii) any relevant 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 or registered object, or cause undue financial hardship to the owner in relation to that place or object; and
 - (c) any submissions made under section 69; and
 - (d) any decision of the Heritage Council under section 72 which has been received; and
 - (e) if the applicant is a public authority, the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the public authority to carry out a statutory duty specified in the application; and
 - (f) any matters relating to the protection and conservation of the place or object that the Executive Director considers relevant.
- (1A) In determining an application for a permit, the Executive Director may consider-
- (a) the extent to which the application, if approved, would affect the 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; and
 - (b) any other relevant matter