



Heritage Council Registrations and Reviews Committee

Flemington Racecourse

448-550 Epsom Road, Flemington, Melbourne City Council

Hearing – 20-21 March 2019

Members – Professor Andrew May (Chair), Dr Christine Phillips and Ms Penelope Smith

DETERMINATION OF THE HERITAGE COUNCIL

After considering all submissions received in relation to the permit review, and after conducting a hearing pursuant to section 108 of the *Heritage Act 2017*, the Heritage Council has determined to vary the conditions of Permit No. P28548 for the development of land at 448-550 Epsom Road, Flemington.

Andrew May (Chair)
Christine Phillips
Penelope Smith

Decision Date – 22 May 2019

APPEARANCES/SUBMISSIONS

EXECUTIVE DIRECTOR, HERITAGE VICTORIA ('THE EXECUTIVE DIRECTOR')

Submissions were received from the Executive Director, Heritage Victoria ('the Executive Director'). Ms Janet Sullivan, Permit Principal, appeared on behalf of the Executive Director.

PACE DEVELOPMENT GROUP PTY LTD ('THE PERMIT APPLICANT')

Submissions were received from Pace Development Group Pty Ltd, the applicant for the permit and requestor of the review ('the Permit Applicant'). Mr John Cicero of Best Hooper Lawyers appeared on behalf of the Permit Applicant.

The Permit Applicant's submissions included statements of evidence from Mr Peter Lovell of Lovell Chen Pty Ltd, Mr Bryce Raworth of Bryce Raworth Pty Ltd, and Mr John Patrick of John Patrick Landscape Architects Pty Ltd. Mr Lovell, Mr Raworth and Mr Patrick were called to give expert evidence and were available to take questions from other parties.

INTRODUCTION/BACKGROUND

THE REVIEW

01. This proceeding is a review of conditions imposed by the Executive Director on Permit No. P28548 pursuant to section 102(2) of the *Heritage Act 2017* ('the Act' or 'the Heritage Act'), in respect of land at 448-550 Epsom Road, Flemington ('the Review').

THE PLACE

02. Flemington Racecourse is approximately 127 hectares in area and generally bounded by Smithfield Road and the Maribyrnong River to the south, Epsom Road to the east, Flemington Racecourse Railway to the north and Fisher Parade to the west.
03. The southern portion of Flemington Racecourse is predominantly flat and dominated by the racecourse track, stables, outbuildings and a series of stands located to the north-west of the racecourse track. The northern portion of the site contains a large grassed area, car parking areas, access roads, gardens and administrative buildings. A raised escarpment runs along the northern and north-eastern property boundaries.
04. The land subject of the Review is approximately one hectare in area and located in the north-eastern corner of Flemington Racecourse ('the Subject Land'). It is bounded by the Quest Apartments to the south-east, Epsom Road to the east, and the offices of the Victorian Racing Club to the north-west. Land to the south-west falls sharply away towards Stables Drive. The former Jockeys' Convalescence Lodge ('the Lodge') stands in the southern portion of the Subject Land.

THE SIGNIFICANCE OF THE PLACE

05. Flemington Racecourse is the oldest racecourse in Victoria. It is included in the Victorian Heritage Register ('the Register') as a place of cultural heritage significance to the State of Victoria, being registered place H2220 ('the Place'). The extent of registration is shown in the diagram on page 2 of the written submission prepared by the Executive Director, dated 28 February 2019 ('Diagram 2220'). The extent of registration includes the Subject Land.
06. The Statement of Significance for the Place includes the following summary of its history:

Flemington Racecourse has operated continuously since 1840, when the first race meeting was held here on the Maribyrnong River flats north of the city, and in 1848 352 acres of Crown Land was reserved as a public racecourse. Since then the course has undergone continual development and change. In the 1850s racing in Victoria boomed, with many courses established throughout the colony, but the annual autumn meeting at Flemington was already established as the main event on the racing calendar. In 1859 the results of the Australian Championship Sweepstakes were telegraphed to Sydney, a first for an Australian sporting event, and a railway line to the course opened in 1861. In the same year the first Melbourne Cup was run, over a two mile course, an event which has been held annually since then and has become internationally famous. The Victorian Racing Club (VRC) was formed in 1864 to organize racing at Flemington, and major improvements at the racecourse were carried out under the administration of the first two secretaries, Robert Cooper Bagot (secretary 1864-1881) and his successor

Henry Bryon Moore (secretary 1881-1925). Bagot replaced the coarse grass on the track, graded the lawns, and drained the swampy land in the centre of the course to make 'the Flat', with that area and 'the Hill' becoming the main viewing areas. In 1873 he built a members' grandstand, known as Bagot's Cowshed, at the base of the hill. Moore built four new grandstands, one a bluestone stand built in 1883-86 and incorporating elegant vice-regal facilities, elements of which survive beneath the Old Hill Stand...

- 07.** The Statement of Significance describes the Place as being of aesthetic, architectural, historical and social significance to the State of Victoria. The most significant features of the Place are described as follows (emphasis added):

...the main race course, including the old distance post, the oldest feature at the course, and the horse walk from the track to the mounting yard; the 1924 Inter-War Stripped Classical style Members' Stand; the remains of the 1880s bluestone stand (part of which lies beneath the Old Hill Stand terraces); the 1880s bluestone walls at the base of the Hill and along Fisher Parade, Leonard Crescent and adjacent to the Hill Gate (which retain some remnant painted signage); the picturesque octagonal former Convalescent Jockey's Lodge near Epsom Road; the betting ring with its old elm trees, bordered by the 1930s tote buildings and the 1920s men's toilets; the statues of Phar Lap, Bart Cummings and Makybe Diva; the chronographic clock in the VRC Committee Rooms; the 1870s brass bell near the Racecourse Manager's Office; the murals by Harold Freeman depicting the history of thoroughbred racing in the Hill Stand; the Members' Drive, its extensive plantings, and the entrance box at the Epsom Road end; and the plantings, particularly the roses throughout the public and members' areas and the elms at the western end of the course and in the betting ring.

- 08.** The above buildings, features and objects are shown on Diagram 2220. The Lodge is identified as 'B3' on that diagram.
- 09.** The cultural heritage significance of the Lodge and its circular garden setting are discussed in more details in paragraphs 52 to 61 below.

PERMIT NO. P18542

- 010.** On 10 July 2014, the Executive Director issued Permit No. P18542 to allow, among other things, the demolition of the existing Old Members' Stand at the Place and to construct a new Stand. Relevantly to this Review, the following conditions were included on the permit:
- a) Condition 3 – This condition requires that before any works approved by the permit commence, a condition assessment and conservation schedule of the remaining heritage buildings, features and objects identified within the extent of registration of the Place must be prepared and lodged with the Executive Director for endorsement.
 - b) Condition 6 – This condition requires the Conservation Management Plan of December 2012, prepared by Lovell Chen Pty Ltd (described in more detail in paragraphs 056 to 061 below), to be updated to take account of works approved by the permit.
 - c) Condition 7 – This condition requires that before any works approved by the permit commence, the permit holder must lodge an unconditional bank guarantee in favour of the Heritage Council of an amount of \$250,000 to ensure the satisfactory completion of permit conditions 2, 3, 4, 5 and 6.

- 011.** The Lodge is one of the heritage buildings affected by Conditions 3, 6 and 7.
- 012.** In 2015, Lovell Chen Pty Ltd prepared a conditions assessment and conservation schedule as required by Condition 3. According to Mr Lovell's written witness statement, dated February 2019 (see pages 5 and 6), the schedule recommends the following conservation works to the Lodge:
- a) install a new below ground storm water system;
 - b) patch and repair missing, damaged or broken slates to all roof slopes;
 - c) replace decayed and rusted gutters and flashings, and prepare and paint the gutters and flashings;
 - d) treat rust staining to upper flat roof sheets and prepare and paint these sheets;
 - e) replace existing galvanized downpipes and connect to new stormwater system;
 - f) repair all timber fascias and scotia mouldings, retain existing decorative cast metal clip details to fascia and replace where existing;
 - g) repair and replace the existing timber plinth;
 - h) replace the section of decayed timber structure on the south elevation and repair sections of existing cladding on the west elevation; and
 - i) repair missing or damaged glazing putty and repair sashes to the west entry window.
- 013.** Conditions 3 and 7 have both been discharged.

THE PERMIT APPLICATION

- 014.** On 23 July 2019, the Permit Applicant applied to the Executive Director for a permit to develop a 15-storey apartment building on the Subject Land, immediately to the north of the Lodge.
- 015.** The proposed development may be summarised as follows:
- a) The construction of a u-shaped apartment building with a maximum height of 15 storeys above ground level, an accessible roof deck, three full car parking basement levels and a part basement.
 - b) The u-shaped building is oriented to present two tower forms on the Epsom Road frontage and a curved frontage to Flemington Racecourse (which is the 'base' of the u-shape).
 - c) The northern arm of the u-shaped building is 15 storeys and has a finished floor level of 74000. The southern arm (which is closest to the Lodge) is 13 storeys and has a finished floor level of approximately 63000.
 - d) From Level 6 upwards, the upper levels of both arms of the building are progressively stepped back from the base of the u-shape to create a terraced-like effect.
 - e) The southern arm has a large void extending from the ground level to the underside of Level 3, which provides a view to the Lodge from Epsom Road.
 - f) At ground level, between the southern arm and the Lodge, a driveway from Epsom Road is proposed to be constructed, which leads to an entry ramp to the basement car parking and five at-grade car parking spaces.

g) At its closest point, the southern arm is set back approximately 18.5 metres from the face of the closest external wall of the Lodge (or approximately 25 metres from the centre point of the Lodge).

- 016.** The proposed development does not include any works to the Lodge but does include landscaping works within and around the circular garden setting of the Lodge.

DETERMINATION OF THE EXECUTIVE DIRECTOR

- 017.** On 2 November 2019, the Executive Director determined to approve the application and issue Permit No. P28548 ('the Permit') subject to the imposition of two special conditions and five standard conditions.

- 018.** Condition 1 of the Permit consists of 15 sub-conditions. The Review concerns the following parts of Condition 1 shown in bold:

1. *Prior to the commencement of any works approved by this permit the following must be approved in writing by the Executive Director, Heritage Victoria:*

...

- 1.3** *An unconditional Bank Guarantee made out to the Heritage Council (ABN 87 967 501 331) for two and a half million dollars (\$2,500,000). The period of validity of the Bank Guarantee is to be unspecified. The Bank Guarantee will forfeit to the Heritage Council of Victoria if a tenant for the [Lodge] is not secured by lease or other binding written agreement within the permit validity period and if the approved works are not completed (including works required by permit conditions) to the satisfaction of the Executive Director, Heritage Victoria, within the permit validity period.*

...

- 1.5** *Final design drawings for the new tower that:*
- 1.5.1** *Omit all development that encroaches into the circular garden setting of the [Lodge]. There must be no development within five metres from the centre point of the outer circular hedge (Pittosporum undulatum).*
- 1.5.2** *Omit the proposed ground level carpark to the east of the development site.*
- 1.5.3** *Increase visibility of the [Lodge] from Epsom Road by increasing the setback of the proposed tower from the proposed Epsom Road shared pedestrian access and basement carpark driveway.*

- 1.6** *An External Material and Finishes Schedule for the new tower. The south elevation of the tower must visually respond to the landscaped grounds of the [Lodge] and the wider Flemington Racecourse site. Examples of how this might be achieved include the use of non-reflective materials in muted colours that blend with the landscape or the introduction of an external green façade/wall.*

- 1.11** *A revised Landscape Plan for the [Lodge] prepared by a suitably qualified landscape architect that is informed by the recommendations from the landscape report approved under Condition 1.10 and includes:*

...

- 1.11.2** *Full retention the circular garden setting to the original extent, including 100% of the existing hedge and reinstatement of the hedge where missing or in poor health.*
- 1.11.3** *Retention of Tree 4 (Peppercorn Tree) and Tree 16 (Apple).*
- 1.11.4** *Replanting of a new Apple tree to replace the dead Tree 14 (Apple) in the same location.*
- 1.11.5** *Replanting of new trees in the location of the three Elm tree stumps.*
- 1.11.6** *A widened and distinctive north-east pedestrian accessway between Epsom Road and the [Lodge].*

THE PERMIT REVIEW

- 019.** On 13 December 2018, the Permit Applicant requested a review of the above permit conditions and a hearing into the review. In accordance with section 108(4) of the Act, the Heritage Council must conduct a hearing into the review if a hearing is requested.
- 020.** A Registrations and Reviews Committee of the Heritage Council ('the Committee') was constituted to consider and determine the matter and a hearing was held for two days on 20 and 21 March 2019.

PRELIMINARY AND PROCEDURAL MATTERS

AMENDED PLANS

- 021.** On 15 February 2019, the Permit Applicant submitted amended plans prepared by ARM Architecture, dated 14 February 2019 ('the Amended Development Plans') together with:
 - a) a brief statement describing the changes from the permit application plans considered by the Executive Director (being the plans prepared by ARM Architecture dated July 2018);
 - b) an updated landscape plan prepared by John Patrick Landscape Architects Pty Ltd, marked drawing number L-H01, Revision A, dated 28 February 2019 ('the First Amended Landscape Plan'); and
 - c) proposed changes to Conditions 1.3, 1.5.1, 1.5.2, 1.5.3, 1.11.2 and 1.11.6, which represent the Permit Applicant's position on these conditions ('Proposed Amended Conditions').
- 022.** The Permit Applicant also advised that if the Amended Development Plans and First Amended Landscape Plan were acceptable to all parties, it would not pursue the review of Conditions 1.11.3, 1.11.4 and 1.11.5.
- 023.** The changes made by the Amended Development Plans may be summarised as follows:
 - a) The height of the southern arm of the apartment building has been increased to match the height of the northern arm. Both have a finished floor level of 76500 at their highest point.
 - b) The top profile of the northern and southern arms of the apartment building has been modified.

- c) The void in the southern arm of the apartment building has been increased in width and height.
 - d) The landscaping and public accessible plaza through the southern arm to the Lodge has increased in size due to the larger void.
 - e) The lobby and retail floor space in the southern arm has been reduced.
 - f) The landscaping around the Lodge has been simplified.
 - g) The southern carpark entry ramp is no longer enclosed by walls.
- 024.** On 19 February 2019, the Amended Development Plans and First Amended Landscape Plan were circulated to all parties.
- 025.** On 28 February 2019, the Executive Director requested a direction from the Committee requiring the Permit Applicant to provide the following information:
- a) an analysis from a heritage consultant of the heritage impacts of the Amended Development Plans on the cultural heritage significance of the Lodge and wider Flemington Racecourse site;
 - b) a landscape plan detailing the area around the new apartment building, including the area south of its southern arm;
 - c) amended plans for the ground level and Levels 1 to 3 of the apartment building, which show the previous scheme and the extent of changes proposed by the Amended Development Plans; and
 - d) updated shadow plans comparing the overshadowing impact of the previous scheme and the Amended Development Plans.
- 026.** On 8 March 2019, the Permit Applicant submitted the following plans in response to the Executive Director's request without waiting for a direction from the Committee:
- a) plans for the ground level and Levels 1, 2 and 3 of the proposed apartment building, prepared by ARM Architecture, dated 8 March 2019, showing the differences between the previous scheme and the Amended Development Plans;
 - b) an amended landscape plan prepared by John Patrick Landscape Architects Pty Ltd, marked drawing number L-H01, Revision C, dated 7 March 2019 ('the Second Amended Landscape Plan'); and
 - c) updated shadow plans as requested by the Executive Director.
- 027.** On 12 March 2019, the above plans were circulated to the Executive Director. In relation to the heritage analysis referred to in paragraph 25(a) above, the Permit Applicant confirmed that it would be relying on the expert witness statements of Mr Lovell, dated February 2019 and Mr Raworth, dated 27 February 2019, in this regard.
- 028.** At the hearing, the Permit Applicant confirmed that the Committee should refer to the Second Amended Landscape Plan in making its determination.

SITE/OBJECT INSPECTION

- 029.** On 19 March 2019, the Committee conducted a site inspection of the Subject Land. The Hearings Coordinator and Project Officer of the Heritage Council Secretariat accompanied the Committee. Access to the Lodge was provided by Ms Carmel Ferrigno, Project Manager, Victorian Racing Club. No submissions were sought or received at the time of the site inspection.

LATE MATERIAL

- 030.** At the commencement of the hearing, the Permit Applicant submitted the following documents:
- a) a photo montage prepared by ARM Architecture showing a view of the Lodge and the southern arm of the proposed building from the east side of Epsom Road;
 - b) 12 plans prepared by ARM Architecture, dated 22 November 2018, depicting the curtilage impact of Condition 1.5.1 on the previous scheme put forward by the Permit Applicant; and
 - c) a site survey plan prepared by ARM Architecture, dated 7 March 2019.
- 031.** The Committee accepted those documents and gave the Executive Director seven days to provide written comments. Those comments were received on 25 March 2019 and circulated to the Permit Applicant.

ISSUES

- 032.** The following section is not intended to be a complete record of submissions that were made to the Committee. It is a summary of what the Committee considers to be the key issues, followed by an explanation of the position the Committee takes on each key issue. All references to permit condition numbers are based on the numbering used in the Permit issued by the Executive Director unless specified otherwise.
- 033.** From the written and oral submissions received, four key issues emerged:
- a) whether the unconditional bank guarantee required by Condition 1.3 is proportionate and appropriate;
 - b) the impact of the proposed development on the cultural heritage significance of the Lodge;
 - c) the impact of the proposed development on the cultural heritage significance of the circular garden setting of the Lodge and, in particular, the existing perimeter *Pittosporum undulatum* hedge ('the Hedge'); and
 - d) the importance of creating and maintaining views to the Lodge from Epsom Road.
- 034.** These key issues will be addressed where relevant to the conditions under review. However, before turning to the conditions, it is necessary first to discuss:
- a) the relevance of planning and urban design considerations to the Review; and
 - b) the cultural heritage significance of the Lodge and its circular garden setting.

Relevance of planning and urban design considerations to the Review

Planning considerations

- 035.** The Subject Land is included in Schedule 4 of the Comprehensive Development Zone in the Melbourne Planning Scheme ('CDZ4').
- 036.** One of the stated purposes of CDZ4 is:

To ensure that the design of buildings respect and enhance the heritage significance of the [Lodge] and its landscape setting, which is identified in the

statement of significance for the Flemington Racecourse Heritage citation within the Victorian Heritage Database (H220) (sic).

- 037.** Clause 5.0 of CDZ4 requires the preparation of a Comprehensive Development Plan ('CDP'). A stated objective of the CDP (as set out in Clause 5.0) is:
- To protect and enhance the [Lodge] including retaining a visual relationship between the Lodge and the Racecourse.*
- 038.** Clause 5.0 of CDZ4 also states that the CDP must be prepared to include (among other things):
- a) a site master plan which includes a "minimum curtilage of 25m surrounding the [Lodge], within which no development is to occur, with the exception of landscaping"; and
 - b) a landscape plan which "promotes the reinstatement of the original garden and planting of the [Lodge] to its original early configuration (being an area of 19m from the edge of the building)".
- 039.** Both parties made submissions about how the CDZ4 curtilage requirements should be interpreted and applied by the Committee, particularly in relation to Conditions 1.5.1 and 1.11.2. Among other things, the parties referred to the *Flemington Hill and Epsom Road Advisory Committee Stage 4 Report*, dated June 2016, and the involvement of Heritage Victoria in making submissions to that Advisory Committee (which was established under section 151 of the *Planning and Environment Act 1987* to provide advice to the Minister for Planning in relation to two draft planning scheme amendments).
- 040.** The Executive Director submitted that the CDZ4 curtilage requirements are consistent with the requirements of Conditions 1.5.1 and 1.11.2, and that the 25 metre minimum curtilage should be measured from the external face of the Lodge.
- 041.** The Permit Applicant submitted that the 25 metre minimum curtilage is to be measured from the centre point of the Lodge and that the proposed development has been designed in accordance with this requirement.

Urban design considerations

- 042.** The Executive Director made submissions to the effect that Conditions 1.5.2 and 1.5.3 are required to improve the visibility of the Lodge from Epsom Road. This is to ensure the proposed development is properly integrated into the heritage site and to maximise visibility to the Lodge.
- 043.** In Mr Raworth's statement of evidence he expressed the view that these requirements do not respond to identified heritage considerations and are more related to urban design issues.

Discussion and conclusion

- 044.** A purpose of the Act is "to provide for the protection and conservation of the cultural heritage of the State".¹
- 045.** Pursuant to section 108(7) of the Act, in undertaking a review the Committee may decide to affirm or vary the determination under review, or to set aside the determination under review and make another determination in substitution for it.

¹ *Heritage Act 2017* s 1(a) ('Act').

- 046.** In determining a review, the Committee must consider the matters set out in section 101(2) of the Act (see **Attachment 1**).² Those matters include:
- (a) *the extent to which the application, if approved, would affect the cultural significance of the registered place or registered object;*
 - (b) *the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;*
 - (c) *any submissions made under section 95 or 100;*
 - (d) *[not relevant for present purposes];*
 - (e) *any matters relating to the protection and conservation of the registered place or registered object that the Executive Director considers relevant.*
- 047.** In performing its functions or duties or exercising its powers, the Committee may also have regard to any information it considers appropriate.³ The Committee notes that both parties considered the CDZ4 curtilage requirements to be relevant to the Review and they placed significant weight on them.
- 048.** The Committee accepts that the CDZ4 curtilage requirements (and other provisions in CDZ4 relating to the Lodge) were developed to take into account heritage considerations (among other things). However, the Committee also notes that the requirements apply to the preparation and content of a CDP to be approved by a responsible authority under the *Planning and Environment Act 1987*. They are not directed towards the assessment or review of a permit application under the Heritage Act.
- 049.** The role of this Committee is to determine the effect of the proposed development on the cultural heritage significance of the Place having considered the matters set out in section 108(8) of the Act. The Committee must form its own view about whether the impact of the proposed development – having regard to its height, setback, layout, landscaping and other matters – is acceptable based on cultural heritage considerations. Therefore, while the Committee has had regard to the CDZ4 requirements (particularly in reviewing Conditions 1.5.1 and 1.11.2), ultimately the Committee did not find it necessary to reach a conclusion about how the 25 metre minimum curtilage should be measured.
- 050.** It is also not the role of this Committee to determine whether the proposed development achieves acceptable urban design outcomes. In assessing the impact of the proposed development on the Place and views to or from Epsom Road, the Committee must focus on cultural heritage significance considerations.
- 051.** This is not to say that in seeking to make a determination that achieves a reasonable and acceptable cultural heritage outcome, the Committee should ignore or close its mind to other potential impacts that might flow from that determination (as evidenced by section 108(8)(b) of the Act, which requires the Committee to consider certain matters where a refusal is contemplated). However, the impact of the proposed development on the cultural heritage significance of the Place is the necessary starting point in any assessment.⁴

² Act s 108(8).

³ Act s 14(1)(d).

⁴ See *Hotel Windsor P15781* [2010] VHerCI (8 November 2010) [116]–[118]. These paragraphs concerned s 73(1)(a) of the *Heritage Act 1995*, which is now reflected in s 101(2)(a) of the Act.

The cultural heritage significance of the Lodge and its circular garden setting

Statement of significance

- 052.** The Statement of Significance refers to the Lodge in several places.
- 053.** Under “What is Significant?” the Statement identifies the Lodge as one of the initiatives of Henry Byron Moore, the Secretary of the Victorian Racing Club between 1881-1925, as follows:

Another initiative of Moore’s was to establish a Distressed Jockey’s Fund to assist injured jockeys, and in 1893 he built at the course a Jockeys’ Convalescent Lodge, designed by the architect William Salway.

- 054.** The Statement identifies the Lodge as a significant feature of the Place (see paragraph 7 above).
- 055.** Under “Why is it significant?” the Statement describes the Lodge as being architecturally significant (emphasis added):

Flemington Racecourse is architecturally significant for its collection of structures relating to racing in Victoria since the nineteenth century, which demonstrate the various stages of development of the course. The most significant of these are the remaining nineteenth century structures (the 1880s bluestone stand remnants and bluestone walls and the former Convalescent Jockeys’ Lodge)...The former Convalescent Jockeys’ Lodge is of significance as a possibly unique example in Victoria of a centralized hospital building, a form which became popular in the 1880s in England. It is an exceptional example of a picturesque structure of the late nineteenth century...

Conservation Management Plan

- 056.** In December 2012, a Conservation Management Plan for the Place, entitled ‘Flemington Racecourse, 448 Epsom Road, Flemington, Victoria, Conservation Management Plan’ (CMP) was finalised and published. The CMP was prepared by Lovell Chen Pty Ltd, in collaboration with John Patrick Landscape Architects Pty Ltd, for the Victorian Racing Club. The CMP superseded earlier drafts and included updated research on the Lodge.
- 057.** In describing the phases of development at the Place since the 1840s, the CMP notes that:

By the 1890s there were several picturesque timber structures at Flemington, including a pagoda serving as a wine and spirit bar, a Swiss Chalet serving tea, coffee and ice cream, a rustic fruit kiosk, an oyster pavilion and a new grandstand on the Hill. The Jockey’s Convalescent Lodge was erected in 1893 on elevated ground abutting Epsom Road.⁵

- 058.** The CMP describes the history of the Lodge as follows (citations and figure references omitted):⁶

This building was constructed in 1893 as convalescent lodge for injured jockeys after they had been dismissed from hospital...

⁵ Lovell Chen Pty Ltd, Architects and Heritage Consultants, *Flemington Racecourse, 448 Epsom Road, Flemington, Victoria, Conservation Management Plan* (December 2012) p 42 (‘CMP’).

⁶ CMP p 61-62.

The architect for the building was William Salway, who also designed the Alexandra Club, Collins Street (1887), and the Australian Church, Flinders Street (1887)...

The building was almost completed by August 1893 as indicated in the following description:

The convalescent home for disabled jockeys, situated on the hill overlooking the Flemington training ground, is fast approaching completion. It is a most appropriately designed structure for the use to which it is devoted, reflecting creditably on the club's architect...the new edifice will for years to come be a testimony to the philanthropic spirit which actuates the premier turf organization in administering to the welfare of the most unfortunate members of the jockey brotherhood.

The site of the [Lodge] overlooking the racecourse would have taken advantage of the high ground for the benefit of the patients. Additionally, the construction of the building in an isolated and secluded location may have been chosen because of its distance from the busy operations of the course, and to provide the convalescing jockeys with a quiet and restful environment...

Designed in an exotic Victorian cottage ornée style, it is a single-storey pavilion octagonal in plan with timber boards fixed vertically to masonry walls. The building has a central lantern and wide eaves supported on deep brackets with moulded ends, which provide shade to the rooms within. The slate roofs are of different pitches, have galvanized steel flashings and are penetrated by three rendered chimneys with moulded caps and pots (flues). The corners of the plain timber eaves are embellished with anthemions in what appears to be cast metal...

A red brick paved apron surrounds the building. The interior is laid out on an octagonal plan with a central octagonal hall below the lantern. The building is generally intact internally. However, externally it is showing evidence of decay included a collapsed finial to the lantern.

- 059.** The CMP describes the cultural heritage significance of the Lodge⁷ and concludes that:⁸

The [Lodge] is the only structure remaining from the decorative suite of nineteenth century buildings which were mostly removed as a consequence of the 1920s redevelopment of the racecourse, and which up until that time had largely contributed to the picturesque nature of Flemington. As a small hospital pavilion, it is a rare surviving structure in Victoria with a centralised plan and internal arrangement, and is an excellent example of the cottage ornée style popular around the turn of the nineteenth century.

- 060.** The CMP states that the Lodge and its associated landscape is of architectural, aesthetic and historical significance.⁹ It includes the following comments on the Lodge and its garden setting:¹⁰

The [Lodge] is architecturally significant as an unusual, if not rare, intact example of a hospital/medical building of the late nineteenth century on an octagonal plan, with a circular internal arrangement. It is a fine example of the

⁷ CMP p 112-114.

⁸ CMP p 114.

⁹ CMP p 126.

¹⁰ CMP p 126.

cottage ornée style popular around the turn of the nineteenth century; is the only intact building at the racecourse surviving from the nineteenth century; and the only timber structure remaining at the racecourse from the picturesque suite of late nineteenth century buildings, the majority of which were removed during the 1920s redevelopment. The building is also historically significant as a rare surviving purpose-built structure associated with the convalescence of jockeys. The circular garden setting to the building including its elevated siting on the east of the racecourse, is of aesthetic value. The circular landscaping echoes the building's octagonal plan, and further distinguishes the building in the racecourse setting.

061. The CMP recommends the following conservation strategy for the Lodge:¹¹

The significant [architectural, historic and aesthetic values of the Lodge], combined with the high level of intactness of the building, would potentially make adaptation of this building a difficult and problematic exercise, where it involved substantial changes to the plan and form of the building, including internally. It is also important that this building retain its freestanding octagonal form, including its roof form, roof lantern and chimneys. An addition or extension may be possible, including to the rear (south) side, but should be linked to or set off from the building. Minor internal works would also be supportable, but the objective is to retain the overall internal planning and layout, including the central octagonal hall below the lantern. The circular garden setting, while not original in terms of plantings, echoes the building's octagonal plan, and further distinguishes the building in the racecourse context. Maintaining this overall approach to landscaping around the building is recommended. There is limited potential for new development within the circular garden setting. Finding an active use for the building is also desirable from a heritage perspective, not least as a means of retarding further deterioration.

Submissions from the Executive Director

062. The Executive Director referred to the Statement of Significance in describing the significance of the Place. The Executive Director submitted that the Lodge is one of the few nineteenth century structures remaining at the Place and is a rare and excellent example of the cottage ornée architecture style.

063. The Executive Director also made the following submissions in respect of the circular garden setting of the Lodge:

- a) the circular garden is of aesthetic significance as it echoes the building's octagonal plan and distinguishes the building in the racecourse context;
- b) the circular garden serves the purposes of and contributes to the enjoyment of the Lodge and is necessary for its conservation;
- c) the Hedge is an original or early landscape design element that represents the strong relationship between the garden and the original use of the Lodge;
- d) the Hedge reinforces the octagonal design and use of the building as a place of respite;
- e) the garden (including the existing trees and Hedge) plays an important role in enhancing the aesthetic significance of the Lodge; and

¹¹ CMP p 151.

- f) the full reinstatement of the Hedge and retention of existing trees within the circular garden are essential to maintaining an appropriate historic garden setting for the Lodge.

Submissions from the Permit Applicant

- 064.** The Permit Applicant also submitted that the Lodge is of architectural, aesthetic and historical significance.
- 065.** Mr Lovell expressed the view that the significance of the Lodge is strongly related to its design, intact fabric and immediate remnant garden setting. In respect of the latter, Mr Lovell considered the enclosure of the building within a semicircular hedge to be of more importance than the surviving plantings within the circular garden.
- 066.** Mr Lovell's evidence included a series of aerial images depicting the Lodge over a period of 90 years. In his view, those images show that the layout of the Lodge's garden setting has remained relatively simple, the semicircular garden has truncated over the years, and plantings within the circular garden have been relatively unstructured from the 1930s onwards.
- 067.** The evidence of Mr Raworth described the significance, architecture and radial plan of the Lodge. In respect of the latter, he noted that radial floor plans were (and remain) unusual in Victoria's hospital or convalescent home designs and that free-standing octagonal forms are uncommon in Victoria.
- 068.** The Permit Applicant also contended that there is no conservation imperative to reinstate the missing portion of the Hedge or to retain all existing portions of the Hedge.

Discussion

- 069.** There was common ground among the parties that the Lodge itself is of architectural, aesthetic and historical significance. The parties also generally agreed that the circular garden setting contributes to the significance of the Lodge. However, there was disagreement about the significance of the Hedge, the extent to which it needs to be fully reinstated, and the significance of plantings within the circular garden. The distance that the proposed development should be setback from the Lodge and circular garden was also in dispute.
- 070.** Both parties referred to the Statement of Significance in describing the cultural heritage significance of the Place and the Lodge in particular. The Statement of Significance is a useful summary of what it is about the Place that led to it being included in the Register and relevant to the consideration of this matter. The Committee notes that the Statement of Significance in this case is quite a succinct account for the Place (which is perhaps understandable given that the Place is 127 hectares in area). Nevertheless, it is clear from the Statement that the Lodge was identified as being a particularly significant feature of the Place at the time of registration.
- 071.** While the Statement of Significance does not identify either the circular garden setting of the Lodge or the Hedge as significant features, this is not determinative of whether those features are significant. In the Committee's view, part of the purpose of the permit process is to enable a more fine-grained and careful assessment of the cultural heritage significance of a registered place (including evaluating the relative importance of the features of the place) to be made at the time a proposal is put forward.

- 072.** Both parties also referred to the CMP. The CMP provides more detailed information about the history and significance of the Lodge and it specifically addresses the circular garden setting. Notably, the conservation strategy in the CMP recommends that the circular garden be retained to reinforce the Lodge's octagonal plan and to distinguish it from the broader racecourse context. Like the Statement of Significance, the Committee considers the CMP to be relevant to, but not determinative of, the issues in this matter.
- 073.** All parts of a place in the Register do not have the same degree or type of cultural heritage significance. In relation to a particular place, some parts may be of particular significance, while other parts may have moderate, little or no significance.
- 074.** In the Committee's view, the Lodge is of considerable cultural heritage significance for historical, aesthetic and architectural reasons. It is the only intact building at the Place surviving from the nineteenth century and the only timber structure remaining at the Place from the picturesque suite of late nineteenth century buildings. It is historically significant as a rare surviving purpose-built structure associated with the convalescence of jockeys. It is also an excellent example of the cottage ornée style.
- 075.** The Committee also agrees that the circular garden setting contributes to the cultural heritage significance of the Lodge. It reinforces the octagonal shape of the Lodge and conveys its early use as a place of respite or convalescence. It provides a setting within which the aesthetic and architectural values of the Lodge (particularly its free-standing octagonal form) can be viewed and appreciated without obstruction. The circular garden setting also distinguishes the Lodge from its broader racecourse setting and gives it a sense of seclusion. In the Committee's view, retaining a circular garden setting is necessary to protect and conserve the cultural heritage significance of the Lodge and to visually separate it from the proposed development.
- 076.** The Committee also considers that the perimeter of the circular garden should be clearly delineated and be designed to give the Lodge a sense of enclosure.
- 077.** However, the Committee is not persuaded that the Hedge itself is of such cultural heritage significance that it must be reinstated in full or that a planted hedge is the only means by which a circular garden setting can be created. The Committee considers that an appropriate circular garden perimeter can be achieved through a combination of hedge planting and landscape and built form elements.
- 078.** The Committee is also not persuaded that existing trees and shrubs within the circular garden setting, the missing Apple tree to the north-west of the Lodge, or the three missing Elm trees to the south of the Lodge, are of cultural heritage significance such that they should be retained or reinstated.
- 079.** Where necessary, the Committee expands on its reasons for reaching these conclusions in its discussion of each condition below.

Condition 1.3

- 080.** Condition 1.3 as originally proposed by the Executive Director requires:

An unconditional Bank Guarantee made out to the Heritage Council (ABN 87 967 501 331) for two and a half million dollars (\$2,500,000). The period of validity of the Bank Guarantee is to be unspecified. The Bank Guarantee will forfeit to the Heritage Council of Victoria if a tenant for the [Lodge] is not secured by lease or other binding written

agreement within the permit validity period and if the approved works are not completed (including works required by permit conditions) to the satisfaction of the Executive Director, Heritage Victoria, within the permit validity period.

- 081.** The Permit Applicant proposes that Condition 1.3 be amended to read as follows:

An unconditional Bank Guarantee made out to the Heritage Council (ABN 87 967 501 331) for four hundred thousand dollars (\$400,000) to secure the carrying out by the owner of the works referred to in the Conservation Schedule approved under condition 1.9. The bank guarantee must be returned to the owner upon completion of these works to the satisfaction of the Executive Director.

Submissions and evidence

- 082.** In written submissions dated 28 February 2019, the Executive Director advised that he no longer pursues a bank guarantee in relation to securing a tenant for the Lodge as Conditions 1.1 and 1.2 provide adequate safeguards for preventing the dilapidation of the Lodge. However, the Executive Director maintains that a bank guarantee is required to ensure the satisfactory completion of works and activities required under Conditions 1.1 and 1.8 to 2 of the Permit. In summary, those permit conditions require:

- a) the following plans to be prepared before the commencement of any works:
 - i. a heritage audit management plan that incorporates a regime for the ongoing conservation, maintenance and interpretation of the Lodge (Condition 1.1);
 - ii. an archival quality photographic survey of the Lodge (Condition 1.8);
 - iii. a conservation schedule for all internal and external conservation and repair works for the Lodge (Condition 1.9);
 - iv. a landscape report that analyses historical evidence and the existing conditions to determine the most appropriate landscape design for the Lodge (Condition 1.10);
 - v. a revised landscape plan for the Lodge (Condition 1.11);
 - vi. a historical archaeological assessment report (Condition 1.12);
 - vii. a heritage interpretation plan for the Lodge (Condition 1.13);
 - viii. a signage plan for all new signage (Condition 1.14); and
 - ix. an external lighting plan for all new lighting (Condition 1.15).
- b) implementation of an approved conservation schedule for the Lodge within the permit validity period (Condition 1.9); and
- c) the preparation of a final dilapidation report at the completion of all works approved by the Permit.

- 083.** The Executive Director conceded that a security of \$2,500,000 (as originally proposed) was high and that an amount of \$534,800 (inclusive of a 20% contingency amount) would more accurately reflect the cost of undertaking the works and activities required by the above conditions. The Executive Director submitted that a contingency amount is required in case the bank guarantee is called in and the Executive Director is required to carry out the works.

- 084.** The Permit Applicant submitted that Condition 1.3 is excessive, unnecessary and without proper basis.
- 085.** The Permit Applicant noted that a bank guarantee of \$250,000 is already in place in respect of Permit No. P18542 to (among other things) secure the completion of a conservation schedule for the Lodge.
- 086.** Mr Lovell gave evidence that the estimated cost of conservation works to the Lodge was \$35,000 as at October 2015. Mr Lovell also gave evidence that the Lodge is in good condition and only needs repair and maintenance works.
- 087.** The Permit Applicant estimated that a security amount of \$400,000 more accurately reflects the cost of complying with Conditions 1.1 and 1.8 to 2. In support of this estimate, the Permit Applicant provided a breakdown of the estimated cost for each item required by these conditions. The estimated cost of preparing the landscape report required by Condition 1.10 is \$8,000.
- 088.** The Permit Applicant further submitted that linking the guarantee to finding a suitable tenant for the Lodge has no proper or justifiable basis. Mr Lovell expressed the view that the occupation of the building is not a matter that is regulated by the Act and that the imposition of this type of condition is unusual.

Discussion and conclusion

- 089.** Section 103(1) of the Act provides that:

A permit issued to a person under section 102 may be subject to a condition that a security be given by the person to ensure—

(a) the satisfactory completion of the works or activities: or

(b) compliance with another condition imposed by the permit.

- 090.** The Committee notes that this power to impose a security is discretionary. Secondly, it notes that in determining the form and content of a security imposed to ensure compliance with another condition of the permit, the Executive Director must have regard to the nature of the condition to be complied with.¹²
- 091.** In the Committee's view, a security imposed to ensure compliance with a permit condition should fairly and reasonably relate to the things that must be done by the permit condition, having regard to the impact on the cultural heritage significance of the registered place if those things are not done (that is, if the condition is not complied with).
- 092.** The Committee is concerned that Condition 1.3 as originally proposed by the Executive Director was imposed without adequate justification or explanation. The Heritage Victoria Officer Report for the Permit¹³ provided no explanation for the security amount of \$2,500,000 or for linking the bank guarantee to finding a tenant for the Lodge. These are significant impositions and should have been properly explained.
- 093.** Nevertheless, the Committee accepts that the Permit allows the construction of a significant development close to the Lodge and its circular garden setting. The Committee also acknowledges that a security can provide an appropriate financial incentive to a permit holder to comply with the conditions of a permit. Conditions 1.1 and 1.8 to 2 are concerned primarily with the preparation of plans

¹² Act s 102(2)(b).

¹³ Heritage Victoria, *Report and Recommendation to Executive Director on Application for a Permit, for Permit No. P28548*, dated 1 November 2019.

and other documents for the conservation, maintenance and interpretation of the Lodge and the Committee agrees with the Executive Director that it is important to ensure these conditions are complied with.

- 094.** In determining the form and content of any security, the Committee considers the following factors are relevant:
- a) The estimated cost of the works or activities to be completed under the applicable permit conditions. The Permit Applicant estimates the total cost to be approximately \$382,000 based on the likely cost of the works to be completed under each condition. In contrast, the Executive Director estimates the cost to be \$534,800 based on a proportion of the overall project cost and factoring a contingency amount of 20%.
 - b) The scope of works allowed by the Permit. In this regard, the Committee notes that while the Permit allows landscaping works around the Lodge, it does not allow any works to the Lodge itself.
 - c) The condition of the Lodge and the scope of any conservation works required to it. The Committee accepts the evidence of Mr Lovell that the Lodge is essentially in good condition and any required conservation works are largely in repair and maintenance.
 - d) The fact that a Permit has already been issued for the Place which includes a condition requiring the provision of a security to (among other things) ensure the completion of a conservation schedule for the Lodge.
 - e) The risk of harm to the cultural heritage significance of the Lodge if the conditions are not complied with.
- 095.** Having regard to these factors, the Committee considers that an unconditional bank guarantee of an amount of \$450,000 is appropriate in the circumstances. This amount is based on the cost of complying with Conditions 1.1, 1.8, 1.9 and 1.11 to 2 as estimated by the Permit Applicant (approximately \$374,000) and a 20% contingency amount (\$75,000). Further, the Committee considers that the security should be returned to the Permit Applicant once the works required by the relevant conditions have been completed.
- 096.** For reasons explained in paragraphs 149 to 152 below, the Committee considers that Condition 1.10 is unnecessary. Therefore, the Committee has excluded this condition in calculating the above amount of \$450,000.
- 097.** The Permit Applicant's alternative Condition 1.3 referred only to securing works identified in a conservation schedule approved under Condition 1.9 of the Permit. However, the Committee considers that Condition 1.3 should expressly state that the bank guarantee is required to secure the satisfactory completion of Conditions 1.1, 1.8, 1.9 and 1.11 to 2 (or, based on the renumbered conditions shown in **Attachment 2**, Conditions 1.1 and 1.7 to 2).
- 098.** In relation to the requirement for a tenant to be secured, the Committee finds that the inclusion of this requirement in the original proposed condition was unreasonable and goes beyond what may be regulated under the Heritage Act. In any case, the Committee notes that the Executive Director no longer presses this requirement.
- 099.** Accordingly, the Committee determines that Condition 1.3 be amended to read as follows:
- "An unconditional Bank Guarantee made out to the Heritage Council (ABN 87 967 501 331) for four hundred and fifty thousand dollars (\$450,000) to secure the carrying out by the owner of the satisfactory completion of Condition 1.1

and Conditions 1.7 to 2 (inclusive) of this Permit. The bank guarantee must be returned to the owner upon completion of these works to the satisfaction of the Executive Director.”

Conditions 1.5.1 and 1.11.2

0100. Conditions 1.5.1 and 1.11.2 as proposed by the Executive Director require:

Final design drawings for the new tower that:

1.5.1 Omit all development that encroaches into the circular garden setting of the [Lodge]. There must be no development within five metres from the centre point of the outer circular hedge (Pittosporum undulatum).

A revised landscape plan for the [Lodge]...[that] includes:

1.11.2 Full retention the circular garden setting to the original extent, including 100% of the existing hedge and reinstatement of the hedge where missing or in poor health.

0101. The Permit Applicant proposes that Conditions 1.5.1 and 1.11.2 be amended to read as follows:

Revised drawings for the new tower that:

1.5.1 Reflect the form and massing of development shown in the amended drawings prepared by ARM Architecture dated 14 February 2019 and landscape plan prepared by John Patrick Pty Ltd dated February 2019.

A revised landscape plan for the [Lodge]...[that] includes:

1.11.2 Retention of the existing hedge and reinstatement of hedge which is missing or in poor health in the location shown on the landscape plan prepared by John Patrick Pty Ltd dated February 2019 and continuation of the “hedge” in an interpretative way in the location shown (and consistent with the form and materials nominated) on the landscape plan prepared by John Patrick Pty Ltd dated February 2019.

Submissions and evidence

0102. The proposed development is setback approximately 20 metres from the northern external wall of the Lodge. The Executive Director submitted that at this setback, the development will encroach on the existing circular garden setting and have an unacceptable impact on the cultural heritage significance of the Lodge.

0103. Referring to the CDZ4 curtilage requirements, the Executive Director submitted that an unobstructed 25 metre curtilage should be provided around the Lodge (measured from the external face of the building). Further, because of the assumed significance of the Hedge to the Lodge (see paragraph 063 above), no development within five metres from the centre point of the Hedge should be allowed. This is to allow hedge maintenance, root development and protection, avoid excessive overshadowing, provide access for any works, and enable the Hedge to be seen and valued as a significant landscape feature.

0104. The Permit Applicant takes a different view. It submitted that the CDZ4 curtilage requirement establishes a 25 metre curtilage to be measured from the centre point within the Lodge. According to the Permit Applicant, Condition 1.5.1 goes much further than this by requiring an additional 10 metre setback from the Lodge.

0105. In relation to the Hedge, the Permit Applicant submitted that the Second Amended Landscape Plan significantly reinstates and retains the semicircular

hedge arrangement and reinforces the line of the original enclosure. The Permit Applicant relied on the evidence of Mr Lovell that the reinstated landscape will enhance the Lodge setting and achieve an acceptable heritage outcome.

- 0106.** Mr Lovell gave evidence that the construction of a large tall building in the proposed location will have a significant impact on the Lodge irrespective of whether it is setback 20 or 25 metres from the Lodge. In his view, the more critical issue is the treatment of the apartment building at its lower levels and its interface with the Lodge.
- 0107.** In Mr Lovell's view, the Amended Development Plans significantly open up and lighten the interface between the Lodge and proposed development by:
- a) reducing the building footprint of the southern arm at the lower levels, providing greater space around the Lodge; and
 - b) creating a generously proportioned void in the southern arm which provides visibility to the Lodge from Epsom Road.
- 0108.** Mr Raworth also gave evidence that the Amended Development Plans provide an appropriate visual separation between the Lodge and proposed development and a curtilage that allows the Lodge to be read as a free-standing object. In his view, the additional 10 metre setback required by Condition 1.5.1 would make minimal difference to the contrast between the two buildings.

Discussion and conclusion

- 0109.** There is no doubt that the proposed development will result in a substantial degree of change. It is a large, tall and modern development with a brightly multi-coloured façade. By comparison, the Lodge is a small, single-storey Victorian style pavilion painted in muted tones. The contrast between the two could not be greater.
- 0110.** Given this contrast, the Committee agrees with Mr Lovell that the sensitive treatment of the built form of the southern arm of the proposed development is more critical than whether it is setback 20 or 25 metres from the Lodge. A solid built form at ground level that is setback 25 metres from the Lodge is likely to have a much greater impact than a more open and permeable built form that is setback 20 metres.
- 0111.** As discussed in paragraphs 74 and 75 above, the Committee considers that the retention of a circular garden setting to the Lodge is essential to conserve its architectural, historical and aesthetic values. However, the Committee is not persuaded that the full reinstatement of the Hedge is essential to achieve this; nor is it persuaded that the Lodge should be fully enclosed by hedged planting.
- 0112.** In the Committee's view, the Amended Development Plans provide sufficient space between the southern arm and the Lodge to enable a circular garden setting to be established. In addition, the building footprint of the southern arm at ground level has been substantially reduced and the void is much larger. In the Committee's view, these changes make the southern arm much less imposing, even though the height of the building has increased. In addition, the larger void enables the circular garden setting and any entrance into it from the proposed building to be carefully integrated.
- 0113.** In the Amended Development Plans, the western half of the southern arm forms a curved edge to the circular garden. The Second Amended Landscape Plan proposes to use an interpretative path to connect this curved built form edge to a reinstated northern entrance path to the Lodge and to the Hedge. To complete

the semi-circular effect, hedge planting will be reinstated west of the southern arm and south of the Lodge to enclose the circular garden. The Committee is satisfied that this combination of built form, hedge planting and interpretative paving to delineate the perimeter of the circular garden will reinforce the octagonal design and use of the building as a place of respite, provide an appropriate sense of enclosure and provide sufficient space to establish a garden setting appropriate for a nineteenth-century building.

0114. Mr Lovell's statement of evidence indicated that perimeter hedging formed part of the early landscape design for the Lodge. In oral evidence, Mr Patrick suggested that the Hedge may be approximately 60 years old but conceded he had not undertaken any research to confirm this. In the Committee's view, while hedge planting should be used to delineate the circular garden perimeter, it is not imperative that it be planted with *Pittosporum undulatum* shrubs if a more appropriate hedging species is available.

0115. The Committee also considers that the circular garden setting should include the provision of a path leading from the front door of the Lodge to the garden perimeter and lawn surrounding the Lodge, as shown in the Second Amended Landscape Plan.

0116. Accordingly, the Committee determines that Condition 1.5.1 be amended to read as follows:

“Reflect the form and massing of development shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.”

and that Condition 1.11.2 be replaced with the following (numbered Conditions 1.9.2, 1.9.3 and 1.9.4 in **Attachment 2**):

“1.9.2 Provision of a planted hedge in the locations shown as ‘existing hedge to be retained’ or ‘reinstated hedge’ on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019. The planted hedge may be planted with *Pittosporum undulatum* or another plant species suitable for hedging.

1.9.3 Provision of a curved natural stone path that provides for the interpretative continuation of the planted hedge in the form and location shown on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019.

1.9.4 Provision of a path leading from the front door of the Lodge to the perimeter garden hedge and lawn as shown on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019.”.

0117. Because of new Condition 1.9.4, the Committee also determines that Condition 1.11.8 be deleted.¹⁴

Conditions 1.5.2, 1.5.3 and 1.11.6

0118. Conditions 1.5.2, 1.5.3 and 1.11.6 as proposed by the Executive Director require:

Final design drawings for the new tower that...

1.5.2 *Omit the proposed ground level carpark to the east of the development site.*

¹⁴ Condition 1.11.8 requires the revised landscape plan to include “interpretation of the original and/or early entrance pathway to the [Lodge] and its garden design”.

1.5.3 *Increase visibility of the [Lodge] from Epsom Road by increasing the setback of the proposed tower from the proposed Epsom Road shared pedestrian access and basement carpark driveway.*

A revised landscape plan for the [Lodge]...[that] includes:

1.11.6 *A widened and distinctive north-east pedestrian accessway between Epsom Road and the [Lodge].*

0119. The Permit Applicant proposes that these conditions be amended to read as follows:

Revised drawings for the new tower that...

1.5.2 *Reflect the changes proposed to the ground level carpark to the east of the development site as shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.*

1.5.3 *Increase visibility of the [Lodge] from Epsom Road consistent with the form and massing shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.*

A revised landscape plan for the [Lodge]...[that] includes:

1.11.6 *A widened and distinctive north-east pedestrian accessway between Epsom Road and the [Lodge] consistent with the amended drawings prepared by ARM Architecture dated 14 February 2019.*

Submissions and evidence

0120. The Executive Director's submissions placed significant emphasis on the need for the proposed development to provide views to the Lodge from Epsom Road. The Executive Director conceded that the Amended Development Plans increase visibility to the Lodge through the enlarged void in the southern arm of the proposed development. However, the Executive Director is not satisfied that the modifications to the ground level car park south of the southern arm will increase visibility of and access to the Lodge from Epsom Road.

0121. The Executive Director submitted that Condition 1.11.6 complements Conditions 1.5.2 and 1.5.3 and is designed to achieve greater visibility and improved pedestrian access to the Lodge from Epsom Road.

0122. The Permit Applicant questioned the necessity for these conditions but in any event suggested an alternative condition to reflect the modifications made to the void and ground level car spaces in the Amended Development Plans.

0123. The evidence of Mr Raworth was that Condition 1.5.2 is onerous and not justified from a heritage perspective.

0124. In Mr Lovell's view, while the proposed development introduces a driveway and access point from Epsom Road to the north-east of the Lodge, this has no impact on the heritage significance of the Lodge.

Discussion and conclusion

0125. The CMP recommends that certain significant views and vistas in the Place be retained and protected.¹⁵ The CMP identifies significant views as those which have historically been associated with race watching at the racecourse, have provided views of significant elements of the Place, or have provided views into the racecourse from vantage points outside the Place.

¹⁵ CMP p 133-135.

- 0126.** Having inspected the Subject Land and its surrounds, the Committee is not persuaded that existing views or sight lines of the Place from Epsom Road, in the immediate vicinity of the intersection with Ascot Vale Road, are significant.
- 0127.** The Committee is also not persuaded that creating or maintaining views to the Lodge from Epsom Road is essential for cultural heritage reasons. Existing views to the Lodge from Epsom and Ascot Vale Roads are limited due to the fall of the Subject Land, the height of the Hedge and existing trees within the circular garden. Apart from the roof of the Lodge, the building is largely obscured from Epsom Road.
- 0128.** While the provision of views to the Lodge from Epsom Road may be desirable for urban design reasons, the Committee does not consider that this is essential to protecting and conserving the Lodge. Indeed, given that the Lodge will continue to be encircled by hedge planting on its eastern side, views of the Lodge from the east will continue to be limited.
- 0129.** However, the Committee agrees with the Executive Director that the interface between the Lodge and the proposed development should be appropriately designed and landscaped to enable the full extent of the Lodge and its circular garden to be viewed and appreciated.
- 0130.** The Committee is satisfied that the Amended Development Plans and the Second Amended Landscape Plan achieve this. The building footprint of the southern arm at ground level has been reduced in size and a large void has been created. The void space is linked to the Lodge via a large pedestrian accessway that connects to the reinstated northern path to the Lodge. In addition, the void is angled to permit direct views to the Lodge from Epsom Road.
- 0131.** The Committee therefore determines that Conditions 1.5.2 and 1.5.3 be amended to read as follows:
- “1.5.2 Reflect the changes proposed to the ground level carpark to the east of the development site as shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.
 - 1.5.3 Reflect the changes to the archway/void in the southern arm of the proposed tower consistent with the form and massing shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.”.
- 0132.** The Committee also determines that Condition 1.11.6 (renumbered to Condition 1.9.6 in **Attachment 2**) be amended to read as follows:
- “A widened and distinctive north-east pedestrian accessway between Epsom Road and the former Jockeys’ Convalescent Lodge consistent with the amended drawings prepared by ARM Architecture dated 14 February 2019.”.

Condition 1.6

- 0133.** Condition 1.6 as proposed by the Executive Director requires:

An External Material and Finishes Schedule for the new tower. The south elevation of the tower must visually respond to the landscaped grounds of the [Lodge] and the wider Flemington Racecourse site. Examples of how this might be achieved include the use of non-reflective materials in muted colours that blend with the landscape or the introduction of an external green façade/wall.

Submissions and evidence

- 0134.** The Executive Director submitted that the southern façade of the proposed development is harsh, visually obtrusive and does not relate to the materials and appearance of the Lodge, its circular garden setting or to the wider racecourse site. Condition 1.6 includes some examples of how the Executive Director considers the façade could be modified.
- 0135.** However, the Executive Director considers the proposed western, northern and eastern facades to be acceptable.
- 0136.** The Permit Applicant submitted that the southern elevation forms part of a consistent design response for the entire development and should not be considered in isolation. It further submitted that the proposed development will have a significant visual presence and be visible from many vantage points.
- 0137.** Mr Lovell conceded that the façade design does not have any particular deference to the Lodge. However, in his view this is acceptable because the Lodge and proposed development are distinct buildings and, although linked at ground level, will present as discrete spaces.

Discussion and conclusion

- 0138.** As noted in paragraph 109 above, the proposed development will result in a substantial degree of change. It is a large, tall and modern development which has a broad interface with the Racecourse. It also has an eye-catching colourful façade that seeks to incorporate the colours of jockey silks. In contrast, the Lodge is much smaller in size and scale and muted in appearance. As a result, the two buildings will read as very distinct and separate buildings from very different eras. The Committee supports this approach.
- 0139.** Having regard to the above, the Committee considers that changing the southern façade to include muted tones or a green facade is unnecessary. The two buildings are strongly contrasting in size, scale and appearance and modifying the southern façade to take its cues from the Lodge or its circular garden setting will not change this.
- 0140.** Accordingly, the Committee determines that Condition 1.6 be deleted.

Conditions 1.11.3, 1.11.4 and 1.11.5

- 0141.** Conditions 1.11.3 to 1.11.5 as proposed by the Executive Director require:
- 1.11.3 Retention of Tree 4 (Peppercorn Tree) and Tree 16 (Apple).*
 - 1.11.4 Replanting of a new Apple tree to replace the dead Tree 14 (Apple) in the same location.*
 - 1.11.5 Replanting of new trees in the location of the three Elm tree stumps.*
- 0142.** The tree numbering referred to in these Conditions is used in an arboricultural report prepared by Treelogic Pty Ltd for the Permit Applicant, dated 4 May 2018 ('the Arboricultural Report').¹⁶ This numbering is also used on the Second Amended Landscape Plan.

¹⁶ Treelogic Pty Ltd, *Arboricultural Assessment and Report: Flemington Racecourse Development, Ref. 009159* (4 May 2018) ('Arboricultural Report').

Submissions and evidence

- 0143.** The Executive Director submitted that Conditions 1.11.3 to 1.11.5 are required to preserve and enhance the circular garden. In the Executive Director's view, the original or early plantings within the garden contribute to the Lodge's aesthetic significance and are a visual reminder of its early use as a place for respite. These conditions seek to reinstate an appropriate historic landscape to a known early period.
- 0144.** The Permit Applicant noted that the Second Amended Landscape Plan retains Tree 4 and Tree 16 as required by Condition 1.11.3, proposes a new Apple tree to replace Tree 14 as required by Condition 1.11.4, and proposes three English Elm trees as required by Condition 1.11.5.
- 0145.** The Arboricultural Report describes the tree population on the Subject Land as follows:¹⁷

Thirty-six (36) individual trees and three (3) tree groups were assessed [on the Subject Land]. Several undersized trees and small shrubs were observed on site but were not included in this report.

*In general, the trees within and immediately surrounding [the Lodge] comprised predominantly of Peppercorn Tree (*Schinus areira*) specimens which were providing screening and landscape benefits, however displayed accumulating deficiencies and were of a reduced arboricultural value.*

...

The assessed trees were generally a mix of exotic deciduous and Australian native species. Based on the spatial arrangement of the trees it was concluded that the majority of assessed trees were introduced species planted for screening, garden and amenity purposes. Several trees were recognized weed species which had self-sown throughout the site.

- 0146.** Mr Raworth gave evidence that the Hedge is the only garden element known with certainty to have formed part of the Lodge's early planting scheme and that little else is known about the original garden design. Mr Raworth also observed that the garden appears to have evolved organically, with various trees being planted over time and others possibly self-sown. In his view, the garden is not of sufficient integrity or significance to warrant reconstruction from a heritage perspective. Instead, it is a situation where the significance of the landscaped surrounds could be recognised by means of interpretation rather than the reinstatement of fabric.
- 0147.** Mr Patrick gave evidence that the circular garden is in a somewhat neglected state, includes a significant amount of regrowth and includes trees (particularly the *Schinus areira* or Peppercorn trees) that are likely to be self-sown due to lack of garden maintenance. He questioned the rationale of retaining the Peppercorn trees as they mask the early character and form of the garden.
- 0148.** In his oral evidence, Mr Patrick confirmed that the Second Amended Landscape Plan only shows some of the existing trees to be retained. Trees 2, 3, 6, 10, 11 and 44 are also proposed to be retained.

Discussion and conclusion

- 0149.** The Committee accepts the evidence of Mr Patrick and Mr Raworth that the existing circular garden is a largely unplanned garden that has evolved rather unsystematically over time (except for the Hedge). Some trees and shrubs

¹⁷ Arboricultural Report p 3-4.

appear to have been planted (such as the Apple and Elm trees) while others may be self-sown (such as the Peppercorn trees).

- 0150.** The Committee agrees with the parties that a hedge is an original or early element of the circular garden. However, it also notes that evidence of the original garden design is otherwise somewhat limited. While the aerial photographs in Mr Lovell's written statement of evidence, dated February 2019 (see pages 13 to 17) show that trees and shrubs likely formed part of the original or early design, little is known about the plant species used. The age of the existing Hedge and trees within the circular garden is also unclear.
- 0151.** The Committee agrees with the Executive Director that the circular garden setting should be laid out and planted to provide a landscape appropriate to the Lodge. However, the Committee is not persuaded that it is necessary to retain any of the existing trees within the Hedge perimeter or to replant the Apple tree or three Elm trees to achieve this. Nor is it persuaded that the landscape design should be based on an original or earlier planting design for the Lodge. The Lodge is a picturesque late-nineteenth century timber structure with a unique octagonal form. In the Committee's view, the proposed development presents an opportunity to implement a new landscape design that complements and enhances the aesthetic significance of the Lodge.
- 0152.** The Committee notes that the original proposed landscaping plan for the Lodge¹⁸ incorporated plants that formed part of the historical planting scheme for the broader Flemington Racecourse site, including Old Fashioned China Rose, Creeping Rosemary, and palms such as Wild Date Palm and European Fan Palm. The Committee supports the implementation of a new landscape design for the Lodge that takes its cues from the broader historical planting theme for the Place.
- 0153.** Accordingly, the Committee determines that Conditions 1.11.3, 1.11.4 and 1.11.5 be deleted and a new condition be inserted (numbered Condition 1.9.5 in **Attachment 2**) that requires the revised Landscape Plan for the Lodge to include:
- "Plants that formed part of the historical planting scheme for the broader Flemington Racecourse site."
- 0154.** Because of the above amendments, the Committee also determines that Conditions 1.10 and 1.11.9 be deleted.

Consequential changes arising from the above amendments to permit conditions

- 0155.** As a consequence of the above amendments to permit conditions, the Committee considers that the Permit preamble, which sets out what the Permit allows, should be amended to:
- a) delete references to the revised proposed curtilage drawings, dated August 2018, and the revised curtilage massing, dated 27 August 2018, prepared by ARM Architecture; and
 - b) refer to the amended drawings prepared by ARM Architecture dated 14 February 2019.

¹⁸ Prepared by Rush Wright dated August 2018.

CONCLUSION

0156. After considering all submissions received in relation to the Review, and after conducting a hearing pursuant to section 108 of the *Heritage Act 2017*, the Heritage Council has determined to vary the conditions of Permit No. P28548 (and make consequential changes to the Permit preamble) as shown in **Attachment 2**. Other conditions not the subject of this decision have been re-numbered and amended, where necessary, for consistency.

ATTACHMENT 1

SECTION 101 OF THE *HERITAGE ACT 2017* (VIC)

101 Determination of permit applications

- (1) After considering an application the Executive Director may—
 - (a) approve the application and—
 - (i) issue the permit for the proposed works or activities; or
 - (ii) issue the permit for some of the proposed works or activities specified in the application; or
 - (b) refuse the application.
- (2) In determining whether to approve an application for a permit, the Executive Director must consider the following—
 - (a) the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object;
 - (b) the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;
 - (c) any submissions made under section 95 or 100;
 - (d) 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 perform a statutory duty specified in the application;
 - (e) 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;
 - (f) any matters relating to the protection and conservation of the registered place or registered object that the Executive Director considers relevant.
- (3) In determining whether to approve 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) included in the Heritage Register; or
 - (ii) subject to a heritage requirement or control in the relevant planning scheme; or
 - (b) any other relevant matter.

ATTACHMENT 2

AMENDED PERMIT CONDITIONS FOR PERMIT NO. P28548

THE PERMIT ALLOWS: Residential tower development at 448-550 Epsom Road, generally in accordance with the following documents prepared by ARM Architecture:

Master Plan drawings dated 13 July 2018

Façade Design Report dated June 2018

Amended drawings dated 14 February 2019 (comprising drawing numbers TP-0070, TP-A1204, TP-A1205, TP-A1206, TP-A2000, TP-A2001, TP-A2002, TP-A2003, TP-A2004, TP-A2005, TP-A3000, TP-A3002, TP-0074, TP-0074B and TP-0075).

THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

Special Conditions

1. Prior to the commencement of any works approved by this permit the following must be approved in writing by the Executive Director, Heritage Victoria:

Security

- 1.1 A Heritage Audit Management Plan prepared by the consultant approved under condition 1.4 that incorporates a regime for the ongoing conservation, maintenance and interpretation of the former Jockey's Convalescent Lodge and associated landscape.
- 1.2 A covenant under the provisions of the *Heritage Act 2017* must be registered on the relevant land title to ensure the implementation of the Heritage Audit Management Plan approved under Condition 1.1.
- 1.3 An unconditional Bank Guarantee made out to the Heritage Council (ABN 87 967 501 331) for four hundred and fifty thousand dollars (\$450,000) to secure the carrying out by the owner of the satisfactory completion of Condition 1.1 and Conditions 1.7 to 2 (inclusive) of this Permit. The bank guarantee must be returned to the owner upon completion of these works to the satisfaction of the Executive Director.
- 1.4 The name of the heritage consultant engaged to fulfil the requirements of Conditions 1.1 and 1.8.

New Tower

- 1.5 Final design drawings for the new tower that:
 - 1.5.1 Reflect the form and massing of development shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.
 - 1.5.2 Reflect the changes proposed to the ground level carpark to the east of the development site as shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.
 - 1.5.3 Reflect the changes to the archway/void in the southern arm of the proposed tower consistent with the form and massing shown in the amended drawings prepared by ARM Architecture dated 14 February 2019.
- 1.6 A Construction Management Plan that includes a sequencing program for the approved works including installation of temporary infrastructure, all services, work site layout and protection methods for the former Jockey's Convalescent Lodge and its landscape setting (hedge and vegetation) and a dilapidation

report for the former Jockey's Convalescent Lodge to record its condition prior to the commencement of works approved by this permit (including images).

Former Jockeys' Convalescent Lodge

- 1.7 An archival quality photographic survey of the former Jockey's Convalescent Lodge. The survey must be prepared in accordance with the Heritage Council/Heritage Victoria Technical Note 'Photographic Recording of Heritage Places and Objects'. The approved survey must be lodged with the La Trobe Picture Collection, State Library of Victoria and a copy of the lodgment receipt must be submitted to the Executive Director, Heritage Victoria.
- 1.8 A Conservation Schedule of all internal and external conservation and repair works for the former Jockey's Convalescent Lodge prepared by the consultant approved under Condition 1.4. When approved by the Executive Director, Heritage Victoria, the schedule will be endorsed as part of this permit and must be implemented within the permit validity period.
- 1.9 A revised Landscape Plan for the former Jockey's Convalescent Lodge prepared by a suitably qualified landscape architect that includes:
 - 1.9.1 A stormwater drainage and irrigation plan, including details of any additional services including but not limited to water, power, gas and phone.
 - 1.9.2 Provision of a planted hedge in the locations shown as 'existing hedge to be retained' or 'reinstated hedge' on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019. The planted hedge may be planted with *Pittosporum undulatum* or another plant species suitable for hedging.
 - 1.9.3 Provision of a curved natural stone path that provides for the interpretative continuation of the planted hedge in the form and location shown on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019.
 - 1.9.4 Provision of a path leading from the front door of the Lodge to the perimeter garden hedge and lawn as shown on the landscape plan prepared by John Patrick Pty Ltd dated 7 March 2019.
 - 1.9.5 Plants that formed part of the historical planting scheme for the broader Flemington Racecourse site.
 - 1.9.6 A widened and distinctive north-east pedestrian accessway between Epsom Road and the former Jockeys' Convalescent Lodge consistent with the amended drawings prepared by ARM Architecture dated 14 February 2019.
 - 1.9.7 An inventory of ground treatment materials and colours, all proposed permanent elements including fencing, paving and proposed plantings.
- 1.10 A Historical Archaeological Assessment report that identifies whether the works may impact any potentially significant historical archaeological remains. If the report identifies potential impact on significant historical archaeological remains, a historical archaeological program must be approved in writing by, and completed to the satisfaction of the Executive Director, Heritage Victoria, prior to the commencement of any works approved by this permit.
- 1.11 A Heritage Interpretation Plan prepared by a suitably qualified interpretation specialist that includes permanent and fixed interpretation of the history and significance of the former Jockey's Convalescent Lodge. When approved by the Executive Director, Heritage Victoria, the plan will be endorsed as part of this permit and must be implemented within the permit validity period.

Signage and Lighting

- 1.12 A Signage Plan for all new signage, including but not limited to way-finding and identification signage.
 - 1.13 An External Lighting Plan for all new lighting to the new tower and the surrounding landscape, including landscaping around the former Jockey's Convalescent Lodge.
- 2 At the completion of all works approved by this permit (including works required by permit conditions) a final dilapidation report must be approved in writing by the Executive Director, Heritage Victoria. The report must compare the condition of the former Jockey's Convalescent Lodge pre-work and post-work and include recommendations for any repair works required to rectify any damage that might have occurred because of the adjacent development. When approved by the Executive Director, Heritage Victoria, the report will be endorsed as part of this permit and all recommendations must be implemented within the permit validity period.

Standard Conditions

- 3 This permit shall expire if the permitted works have not commenced within two (2) years of the date of issue of this permit, and 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.
- 4 The Executive Director, Heritage Victoria is to be given five (5) working days' notice of the intention to commence the approved works.
- 5 Approved works or activities are to be planned and carried out in a manner which prevents damage to the registered place/object. However, if other previously hidden original or inaccessible details of the object or place are uncovered, any works that may affect such items must immediately cease. The Executive Director, Heritage Victoria must 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.
- 6 All works must cease and Heritage Victoria must 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 and the site is to be immediately cleared of all personnel.
- 7 The Executive Director, Heritage Victoria must be informed when the approved works have been completed.