

Cultural Heritage Assessment and Implications for Development at Killester College – 5-7 Ann Street, Springvale

Prepared for:

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12th August 2021

Introduction

The following report presents a desktop audit of known and predicted Aboriginal cultural heritage values, which may have implications for the proposed development at 5-7 Ann Street, Springvale. In particular the requirements for undertaking a Cultural Heritage Management Plan (CHMP) under the *Aboriginal Heritage Act 2006* and *Aboriginal Heritage Regulations 2018* are assessed in detail.

Findings

This report finds that a mandatory CHMP is not required to be prepared prior to DELWP issuing statutory authorisation for the proposed activity at 5-7 Ann Street, Springvale.

The Activity Area

The activity area is located in Springvale, approximately 23km southeast of the Melbourne CBD. The activity area comprises two small residential properties, approximately 1085 m² in total size and is located on effectively level ground (Figure 1). The land is bounded by existing residential properties to the east and west, Killester College to the north and Ann Street to the south.

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Figure 1: The activity area with adjacent, residential premises.

The Proposed Activity

The proposed activity comprises development of a car park to service the school, Killester College, located to the north of the activity area.

Scope of Prior Assessment

The subject land has not been subject to prior archaeological or heritage assessments.

Existing Heritage Listings

The following register sources were checked for existing heritage listings (both statutory and non-statutory):

- Victorian Aboriginal Heritage Register (VAHR) – no listings
- Victorian Heritage Register- no listings
- Victorian Heritage Inventory- no listings
- Register of the National Estate- no listings
- Commonwealth Heritage List- no listings
- National Heritage List- no listings
- Australian Heritage Places Inventory- no listings
- LGA Planning Schemes Heritage Overlay- no listings

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- National Trust of Australia (Victoria) (non-statutory) - no listings

There are no previously registered Aboriginal cultural heritage places within the activity area for this Cultural Heritage Assessment, nor were there any listings on the Register of the National Estate or the Victorian Aboriginal Places Register.

Implications for Development

The following sections outline the triggers and issues which will affect the proposed works in relation to the *Aboriginal Heritage Act 2006* and *Aboriginal Heritage Regulations 2018*, specifically as these relate to the need to undertake a mandatory Cultural Heritage Management Plan.

When is a cultural heritage management plan required?

A CHMP is required for an activity if (Regulation 7)-

- (a) all or part of the activity area for the activity is an area of cultural heritage sensitivity; and
- (b) all or part of the activity is a high impact activity.

Is the activity area an area of cultural heritage sensitivity?

The activity area is an area of cultural heritage sensitivity, as follows:

Regulation 34 Koo Wee Rup Plain

- (1) Subject to subregulation (2), the Koo Wee Rup Plain is an area of cultural heritage sensitivity.
- (2) If part of the Koo Wee Rup Plain has been subject to significant ground disturbance, that part is not an area of cultural heritage sensitivity.
- (3) In this regulation, *Koo Wee Rup Plain* means an area identified as "Qg" and "Qm1" in the Surface Geology of Victoria 1:250 000 map book.

The activity area is located entirely within a geological formation defined as an area of cultural heritage sensitivity for the purposes of the *Aboriginal Heritage Regulations 2018*.

Is the activity a high impact activity?

Regulation 46 Buildings and works for specified uses

- (1) The construction of a building or the construction or carrying out of works on land is a high impact activity if the construction of the building or the construction or carrying out of the works—
 - (a) would result in significant ground disturbance; and
 - (b) is for, or associated with, the use of the land for any one or more of the following purposes—

- ...
- (iii) a car park;
- ...

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- (2) The terms used in subregulation (1)(b) have the same meanings as they have in the VPP.
- (3) Despite subregulation (1), the construction of a building or the construction or carrying out of works on land is not a high impact activity if it is for, or associated with, a purpose listed under subregulation (1)(b) for which the land was being lawfully used immediately before 28 May 2007.
- (4) In this regulation, **linear project** has the same meaning as in regulation 81.

The above definition defines the proposed activity as a high impact activity, as defined in Regulation 5 and Division 5 of the Regulations.

Has the activity area been subject to significant ground disturbance?

Pursuant to **subregulation 34(2)**, and in accordance with **Regulation 5 – Definitions:**

significant ground disturbance means disturbance of -

- a. *the top soil or surface rock layer of the ground; or*
- b. *a waterway –*

by machinery in the course of grading, excavating, digging or dredging.

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Recent VCAT 'red dot decisions'¹ have addressed a number of issues as to the circumstances when a CHMP is required, and the level of inquiry required by a planning decision maker to determine whether significant ground disturbance has occurred. The principles established have formed the basis for a Practice Note regarding Significant Ground Disturbance (AAV 2009).

The following statements from the Mainstay decision (2009 VCAT 145) are reproduced here verbatim:

Many parts of the state are not areas of cultural heritage sensitivity, and many activities are exempt requiring a CHMP. Use should be made of the AAV on-line 'Aboriginal heritage planning tool' to determine if a CHMP is required;

It is the fact of significant ground disturbance that creates an exception under the Regulations, and determines if a CHMP is not required. The actual likelihood of Aboriginal heritage existing in the area is irrelevant to this determination;

The timing of the significant ground disturbance is irrelevant. It may have occurred many years ago in the early history of European settlement in the state;

If only part of the land has been subject to past significant ground disturbance, and the remaining part is still in an area of cultural heritage sensitivity, a CHMP will still be required for the whole development activity;

The burden of proving that the land has been the subject of significant ground disturbance rests with the applicant. The planning decision maker (and, on review, the Tribunal) must feel an actual persuasion of the existence of that fact to its reasonable satisfaction. This should not be derived or produced by inexact proofs or

¹ Mainstay Australia Pty Ltd vs Mornington Peninsula SC & Ors VCAT 145 (24 February 2009); Azzure Investment Group Pty Ltd vs Mornington Peninsula SC VCAT 1600 (14 August 2009).

indirect inferences, and little weight should be given to a mere assertion by an applicant or landowner;

In assessing whether significant ground disturbance has occurred, there are four levels of inquiry that might commonly arise, and the assessment should be dealt with at the lowest applicable level. These levels are:

- (1) common knowledge,*
- (2) publicly available records,*
- (3) further information from the applicant, and*
- (4) expert advice or opinion;*

If the decision maker is not persuaded by the applicant that there has been significant ground disturbance, the 'default' position is that a CHMP is required. This accords with the purpose and intent of the Aboriginal Heritage Act 2006;

'Significant ground disturbance' is defined in the Regulations. The disturbance must have been caused by machinery in the course of grading, excavating, digging, dredging or deep ripping. Ploughing other than deep ripping is expressly excluded. 'Deep ripping' is also a defined term that requires the use of a ripper or subsoil cultivation tool to a depth of 60 cms or more. By reference to these definitions, past ground disturbance caused by conventional ploughing (such as by a disc plough or a rotary hoe) does not constitute significant ground disturbance. Both the depth of ploughing and the type of machinery used are relevant to whether deep ripping (as defined) has occurred.

The Mainstay decision (2009 VCAT 145) is further complemented by the Azure decision (2009 VCAT 1600), which addresses difficulties in the application of the *Aboriginal Heritage Regulations 2007* to determine whether land has been subject to past 'significant ground disturbance'.

The activity area is located adjacent to Killester College within an established residential area the creation of which commenced in approximately the late 1950s to early 1960s. Available aerial photography shows that 1956 the alignment of Ann Street had not yet been created. At that time the area where the street would run and where the associated housing would ultimately be constructed was heavily treed (Figure 2). The location of the future 5 and 7 Ann Street was particularly heavily vegetated (indicated in red).



Figure 2: The location of Ann Street in 1956. The house located at the south corner of Ann Street and Springvale Road had been constructed by this time, however, there is no sign of works associated with the construction of Ann Street or the associated housing along it.

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By 1968, the next available aerial photograph, the land had been cleared, Ann Street constructed, and the majority of residences along the street completed (Figure 3). The land immediately to the west of 5 Ann Street was yet to be developed at this date, however, the nature of the ground surface visible along with the ground surface of several vacant properties on the south side of the street are indicative of extensive disturbance associated with the development of the street and residential properties and the variety of utilities which would have been required (Figure 4).



Figure 3: Ann Street in 1968. Road construction had been completed and the majority of housing constructed.

Geotechnical investigations undertaken in support of the proposed development included four probes within the land at 5-7 Ann Street. These probes undertaken in the front and rear yards of the two properties revealed depths of fill ranging from 300mm (BH11) to 500mm (BH10) with a uniformly present silty sand layer below this fill.



Figure 4: Ann Street in 1968 (detail). Numbers 5 and 7 Ann Street are shown to right of the image with adjacent vacant land to the left (west).

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While the geotechnical results do not immediately indicate significant ground disturbance has occurred the relatively uniform depth of the fill layer coupled with the marked change in character of the activity area seen in the aerial photography between 1956 and 1968 is here taken to indicate that such disturbance has indeed occurred. The absence of remnant tree roots in the silty sand layers below the fill can be taken to indicate that the layers bearing these roots had been removed as part of the original clearance of the land for the development of Ann Street and the associated residential properties along that street.

The extent of tree cover present in 1956, particularly where numbers 5 and 7 Ann Street would ultimately be built was extensive and removal of this vegetation to create cleared and levelled sites for future residential development, as are evident in 1968, would have been extensive and occurred at a time when mechanical earthmoving equipment was increasingly used for such task. Moreover. the fact that the entirety of the Ann Street alignment and associated residential properties were developed at the same time means that the likelihood that the entire area was developed as part of a concerted development which, given the large area involved increase s the likelihood that mechanical earthmoving equipment was used.

In accordance with r. 5 and r.34 (2) cited above, the activity area in its entirety is no longer considered an area of cultural heritage sensitivity and is exempt from the preparation of a CHMP prior to the proposed activity.

Do any Exemptions or other Arrangements as outlined in the Aboriginal Heritage Regulations 2007 apply?

No exemptions apply.

Will a cultural heritage management plan be required for the activity?

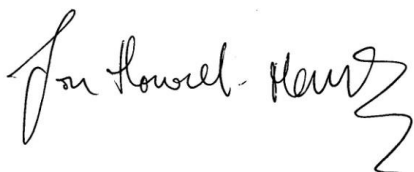
According to the criteria and definitions listed above it is my professional opinion that the *Aboriginal Heritage Regulations 2018* do not require the proponent to lodge a CHMP as part of an application for approval for the activity.

Conclusions and Recommendations

As discussed above it is considered that although the activity area does nominally fall within an area of cultural heritage sensitivity, and the proposed activity is high impact, nevertheless, it has been subject to significant ground disturbance a fact demonstrable through a combination of publicly available records, historical aerial photography, and an examination of the soil profile across the activity area.. As a consequence, a mandatory CHMP in accordance with section 46 of the *Aboriginal Heritage Act 2006* is not required prior to council issuing planning authorisation.

This cultural heritage assessment does not constitute a CHMP as defined in Division 1 of the *Aboriginal Heritage Act 2006*.

Please feel free to contact me directly should you require anything further on this matter.



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Executive Director



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