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1 November 2019

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Our reference:
4023927

Dear Sophie

**ADVERTISED
PLAN**

**St Kevin's College – Glendalough – CHMP
73-75 Lansell Road, Toorak (Land)**

We are instructed that St Kevin's College is proposing to undertake works to upgrade its junior school campus known as Glendalough at 73-75 Lansell Road, Toorak.

You have requested advice as to whether a cultural heritage management plan (**CHMP**) is required under the *Aboriginal Heritage Act 2006 (AH Act)* and *Aboriginal Heritage Regulations 2018 (AH Regulations)* for the proposed works.

Executive Summary

In our view, a CHMP is not required for the proposed works under the AH Act and AH Regulations on the basis that the proposed works are exempt under regulation 46(3) of the AH Regulations.

Background

On 26 May 1971, Planning Permit 70/261 was issued on the Land for buildings and works for the purpose of a junior school for boys at 75 Lansell Road, Toorak.

A copy of the endorsed plan is shown in Figure 1 below.

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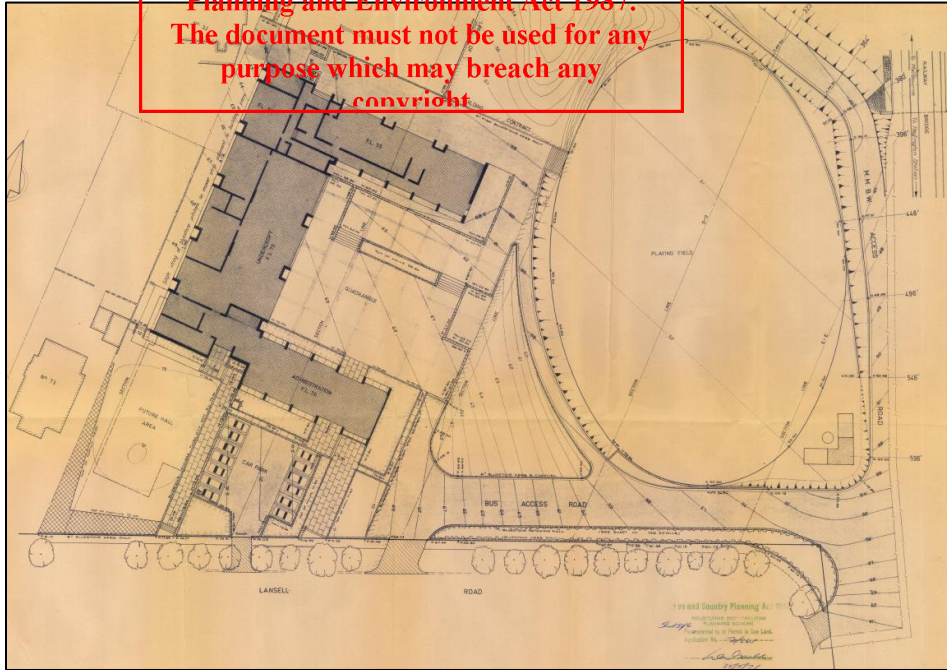


Figure 1 - Endorsed Plans under Planning Permit 70/261

In 1973, planning approval was granted for St Kevin's to use the existing building on the land at 73 Lansell Road, Toorak for an education centre in association with St Kevin's College. Since that time, the land at 73-75 Lansell Road, Toorak has been used for the purpose of an education centre.

ADVERTISED PLAN

Since its initial construction, numerous planning approvals have been issued for buildings and works, the most recent of which was the construction of the Boyd Egan Hall and the McMahon Music Centre in 2014.

We are instructed that St Kevin's proposes to construct a new school building for administration and class rooms adjacent to the existing school structures that front Lansell Road and to excavate the existing oval to allow for the construction of a basement car park. A new oval will be re-laid on the roof of the car park.

A plan showing the location of the proposed works within the Land is shown in Figure 2 below.

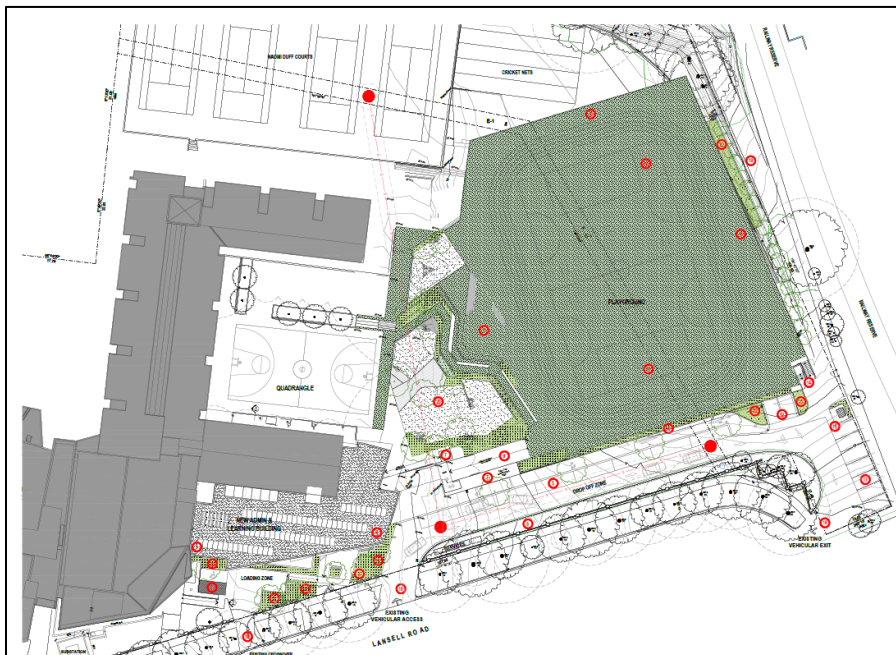


Figure 2 - Proposed works

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Is a CHMP required under the AH Act or AH Regulations?

A CHMP is required for high impact activities on land located within an area of cultural sensitivity (that has not been subject to significant ground disturbance). The list of high impact activities set out in the AH Regulations is exhaustive and includes an education centre (see r46(1)(b)(viii)).

St Kevin's is located within an area of cultural sensitivity. Unless an exemption applies, the construction or carrying out of works for the purpose of an education centre is a high impact activity requiring the preparation of a CHMP.

Regulation 46(3) provides that:

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.

To our knowledge, this exemption has not been considered by a Tribunal or Court. In our view, we consider the exemption applies where:

- (1) The construction or carrying out of works is associated with a purpose listed under r46(1)(b);
- (2) The land was being lawfully used for that purpose immediately before 28 May 2007; and
- (3) 'the land' for the purpose of the exemption is the land upon which the use is being carried out, as opposed to the specific building footprint.

ADVERTISED PLAN

In our view, this exemption applies to the works proposed at St Kevin's on the basis that:

- (1) The proposed works are for, or associated with, the purpose of an education centre, which is a purpose listed under s46(1)(b) of the AH Regulations; and
- (2) The land (being 73-75 Lansell Road, Toorak), was lawfully being used as an education centre immediately before 28 May 2007.

On this basis, we are of the view that a CHMP is not required in respect of the proposed works on the Land.

Yours faithfully



Jessica Kaczmarek
Special Counsel
Norton Rose Fulbright Australia
Partner: Tamara Brezzi