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7th June 2021

Re: Mentone Grammar

ADVERTISED PLAN

Dear Laura,

I am writing in relation to the matter of Mentone Grammar, Mentone, specifically in relation to the question of whether a mandatory Cultural Heritage Management Plan (CHMP) is required for the proposed works within the school grounds.

Section 46, *Aboriginal Heritage Act* 2006 is clear in indicating that there are only three legislative pathways through which a mandatory CHMP can be required, as follows:

- a) The regulations require the preparation of a CHMP (s.47);
- b) The Minister directs the preparation of a CHMP (s.48); or
- c) The CHMP is required if an Environment Effect Statement, impact management plan or comprehensive impact statement must be prepared (s.49 and s.49A).

It is unlikely, in the current instance, that the Minister will require a CHMP to be prepared and similarly an EES or CIS will not be required and, as such, these pathways are not considered here.

Section 47 states:

47. Regulations may require plan

The regulations may specify the circumstances in which a cultural heritage management plan is required for an activity or class of activity.

Regulation 7, *Aboriginal Heritage Regulations* 2018, thus specifies:

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7. When a cultural heritage management plan is required

A cultural heritage management plan is required for an activity if—

- (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.

Division 3 of the *Aboriginal Heritage Regulations* 2018 defines areas of cultural heritage sensitivity which include, among others, land within 200 metres of a named waterway (r. 26), land within 50 metres of a registered cultural heritage place (r. 25) and land within 200 metres of the high-water mark of the coast of Victoria (r.30). In the current instance, there is a mapped area of cultural heritage sensitivity within the activity area, associated with a geological formation defined as ‘sand sheet’ (r. 41). The subject land is thus affected by an area of cultural heritage sensitivity as defined in the *Aboriginal Heritage Regulations* 2018.

Division 5 of the *Aboriginal Heritage Regulations* 2018, defines high impact activities, including ‘buildings and works for specified uses’ (r.46), specified items of infrastructure (r.47), construction of three or more dwellings (r.48) and subdivision of land into three or more lots (r. 49). The existing use of the land is to be considered within the Victorian Planning Provisions as a ‘secondary school’, nested within ‘education centre’. The proposed works are not seeking to change this use. As such the current and ongoing use is nominally to be considered a high impact activity under r. 46 as follows:

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—

...

(viii) an education centre;

....

Subregulation 46(3), however, states the following:

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- (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

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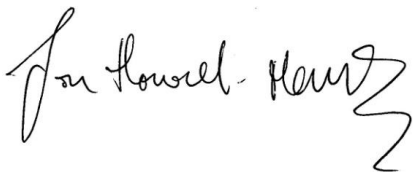
with a purpose listed under subregulation (1)(b) for which the land was being lawfully used immediately before 28 May 2007.

In the current case the subject land was being lawfully used for its current purpose, an education centre, prior to 28th May 2007. As a consequence, any future works for or associated with the prior legal use of the land defined as Mentone Grammar, Mentone would be considered exempt from the need to prepare a mandatory CHMP.

As noted above, Regulation 7 requires both an area of cultural heritage sensitivity and a high impact activity to be present in order for a mandatory CHMP to be required. A mandatory CHMP is not required for the proposed works within the activity area, due to the fact that these works are in keeping with the prior legal use of the activity area.

It is outside the authority of Council or any other authority to require a CHMP to be prepared where one is not required in one of the circumstances outlined in s.46. As a consequence, council or any other statutory authority has no grounds on which to refuse to issue an authorisation as far as Aboriginal cultural heritage is concerned.

Please do not hesitate to contact me should you have any further inquiries regarding this matter.



Jonathan Howell-Meurs (BA(Hons)1994; MA 1997, University of Melbourne)

Executive Director



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