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MINISTER FOR HERITAGE

THE CLIFFE, PEPPERMINT GROVE

ISSUE:

Legal advice on the actions by the owner in the Supreme Court and the State Administrative Tribunal (SAT) against the application of the *Heritage of Western Australia Act 1990* (the Act) to the place known as The Cliffe, Peppermint Grove, and the subsequent exposure of the State to considerable compensation claims depending on the action taken as recommended by the State Solicitor's Office (SSO).

RECOMMENDATION:

That a meeting be urgently arranged involving the Minister, SSO and the Heritage Council to discuss the ramifications and options available in this legal matter.

BACKGROUND:

1. In 2004 the owner of the registered place known as The Cliffe in Peppermint Grove launched a Supreme Court action to challenge the significance of the place and thereby its inclusion in the State Register of Heritage Places.
2. In 2005 the owner changed legal representation and, while not withdrawing the Supreme Court matter, commenced a new legal approach to force the purchase of the property by the State or the force the State to enter a legal agreement to move the house from the property top a public park to allow development of the site. [sic]
3. When these proposals were considered by the Heritage Council in September 2006, the ramifications of the implementation of the Act in Western Australia was not apparent. It is now clear that not only the current operation of the Act is under threat but the exposure of the State to further similar actions is real and extensive in terms of compensation claims or the undermining of the Register. Serious consideration needs to be considered to amending the Act remove the clauses that expose the State to these undermining claims.
4. It is understood that the Minister has advice from SSO about the options available to the State Government in relation to this matter. The Heritage Council is advised by SSO that the Minister has met with the owner without the assistance of either SSO or HCWA, It is also understood that the Minister has not had the opportunity to have the advice of the Heritage Council on the ramifications of adopting any of the suggested solutions identified by the SSO to date.

5. The next status conference for 6th Supreme Court matter is on 6 June 2007 and SSO have advised that policy decisions need to be made in relation to this matter before 30 May 2007 to ensure that appropriate notice is provided to the owner's legal representative on this matter

There are a number of concerns with the conclusions and recommendations proposed by SSO. In essence the SSO recommendations appear to be based on these factors:

1. There is a covenant on the title of the land, which limits development to a single residence. This covenant has nothing to do with the entry of the place in the Register or the operation of the Act but everything to do with protecting the amenity of those who live close to the Cliffe.
2. SSO have concluded that SAT would find that there is no reasonable and beneficial use for the property based on a cost estimate proposed by a builder. These estimates are not supported by conservation architects, as the work required is not defined and therefore the estimate is baseless and should not be relied upon for making decisions in relation to this matter.

Further it is the view of the HCWA that:

1. The option of the Minister exercising her discretion not to refer the request by the owner under section 76 of the Act, as discussed by SSO, should be followed. The Act is not prescriptive in this area and does not set out how and when to apply it. There are also no policies in place that would guide the use of discretion.
2. The recommended SSO approach to remove the place from the Register cannot be supported by HCWA as it undermines the value of the Register and the intent and operation of the Act and introduces a precedent whereby other owners would seek similar treatment.

Pertinent matters

The Restrictive Covenant on the title

The Restrictive Covenant was placed on the title in 1962. It limits the development achievable on the site to a single residence. The site is close to 5000 square metres or 10 times the size of a normal suburban block. It is understood that such a covenant may be able to be amended or lifted and SSO is investigating what this process would entail. This covenant is not related in any way to the entry of the place in the State Register. If it is able to be lifted then there is the possibility of more intensive development on the land, which could assist the conservation of the place.

The interpretation of reasonable and beneficial use

This term has not been tested in law in this State and not in relation to the Act. Counsel for the owner appears to argue that Section 78 of the HWA Act requires the State to purchase the property because, in their view, entry of the Place on the Register has precluded any reasonably beneficial use of the land, and no "reasonable" measures can render a beneficial use. The proper interpretation of "reasonably beneficial use" does not seem to have been decided by an Australian court in the context of a heritage or planning regulation by which a land-owner claims to have been deprived of the use of their land.

“Reasonable beneficial use” has been interpreted in other Commonwealth jurisdictions, notably Canada. There the rule appears to be that, where the value of the land is diminished, the owner can seek compensation if it available by statute, but otherwise no such compensation is payable. As stated in a leading Canadian decision (*Harvard Investments v Winnipeg* [1994] CarswellMan 71):

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is ‘injuriously affected’, unless he can establish a statutory right.

Unlike compensation provisions found in many town planning statutes in Australia, the wording of section 76 does not suggest it is to provide “compensation” for “injuriously affection” nor does it set out a procedure for determining the appropriate level of compensation. Rather, it requires a finding that “no reasonably beneficial use” remains available for the Place, and no reasonable measures can render the place beneficially useful. In this wording it more closely resembles a provision to compensate for a “taking”, or an acquisition of all beneficial uses by the Government.

The court in *Harvard Investments* rejected an owner’s claim to compensation when an historic hotel was listed as an “historic place” by the city of Winnipeg and the owner was forbidden from demolishing it. The court stated that this was:

Merely an exercise of a regulatory power similar to the regulation of the use of lands through a zoning by-law. While it may have the effect of limiting and curtailing the use of the lands, it does not amount to a taking.

There are ample possibilities for reasonably beneficial uses of the Place that do not involve demolition. The Cliffe’s owner’s [*sic*] have in fact discussed such possibilities with HCWA and received approval for some. Thus, there is no basis on which to determine if there is *no* reasonably beneficial use, aside from the highly questionable conclusions in the Colgan report which state that the minimum cost to restore the Place to a habitable standard would be \$2.2-\$2.8 million.

Use of the expert HCWA witness statements

SSO obtained expert witness statements in relation to the Supreme Court matter – from Mr Ian Hocking, Mr Ian Kelly and Mr Martin Colgan – on behalf of the Heritage Council. Mr Kelly and Mr Hocking are conservation architects and Mr Colgan is a specialist builder. Mr Hocking’s report includes a schedule of possible conservation works and Mr Colgan’s report suggests that the building is structurally sound but to make it liveable for today’s requirements could cost up to \$2.8 million. Both Mr Kelly and Mr Hocking refute Mr Colgan’s estimate and suggest that it is not necessarily going to cost this amount and it is not based on an overall scheme for the building.

It is the Heritage Council’s view that not all of the works proposed by either Mr Hocking or Mr Colgan are necessary to make the building attractive to a more sympathetic owner

with the desire to develop the place to live in. In fact it would not be desirable for remedial works to be undertaken until such time as an overall scheme for the place was resolved.

Removal of the Place from the Register of Heritage Places

The concluding suggestion SSO have made to the Heritage Council is that the place should be removed from the Register to avoid undefined costs to the State.

While this may in the short term deal with this particular dispute it has dramatic ramifications for the operation of the Act and the perception of the community which believes that the State has legislation in place to protect places of cultural heritage significance.

Removal from the Register of this place would be a dangerous precedent and signal to owners that all they need to do is follow the legal path that these owners have followed to be removed from the Register. This scenario would concern the broader community and possibly see a vocal campaign against such actions and any government that allowed it to happen.

Acquisition of the property

There are essentially three scenarios whereby the Heritage Council could possibly purchase the property in terms of the Act.

The first scenario was put before the Heritage Council in September 2006 and was couched in terms of Section 74 of the Act, which sees an agreed price being reached between the Heritage Council and an owner. The proposal for purchase of the place for \$20 million was declined by the Heritage Council, as the Council has no funding to undertake such an acquisition. It was also considered a dangerous precedent for the Council and the State Government.

In declining this proposal, the owners of the property were then able to exercise a right under section 76 of the Act (2nd option) to seek the Minister's direction to SAT for determination on the matter. It is our understanding that this referral has not been made to date.

The third scenario, under section 73 of the Act, is compulsory acquisition, with a view to achieving a conservation outcome and to ensure the continual existence of the place.

The implications that are associated with an acquisition direction by SAT would be creating a legal ruling which would then form a precedent to other places where owners object to listing and request demolish are involved. [*sic*]

Heritage Council conclusions and comments

There is demonstrable potential to extend, adapt and change the existing house into a very desirable home in this location. There have been several previous plans discussed

and approved by the Heritage Council with the current owners, but none have been carried out.

There may also be opportunities for lifting the covenant and therefore unlocking other potential for subdivision/development of the site.

There may be a case for the Heritage Council to reconsider the previous resolution not to pursue an acquisition on the basis that the alternatives are significantly more damaging in terms of the conservation of the State's heritage and the impact they would have on the administration of the Act.

If the Government adopted a proactive role in the acquisition of the property then the process can be controlled such that a conservation outcome could be achieved.

To pursue this course of action would require:

- the support of the Minister and the Cabinet
- undertake a market valuation of the property
- undertake inquiries to ascertain the level of interest in acquisition by private parties prepared to work with the existing buildings
- investigate the covenant removal and subdivision potential of the site
- prepare a schedule of works to address the structure and waterproofing issues (possibly around \$200,000 or less) sufficient to market the property
- prepare a heritage agreement to run with the land
- agree a process with Treasury to borrow the funds required together with funds for minimal conservation works and holding costs prior to sale.

The benefit of the approach is that it limits the precedent for future situation because it can be demonstrated that the Council has been unable to achieve support for conservation from the owner over an extended period of time (13 years) and this approach is seen as the only feasible action to ensure the conservation of the place.

It doesn't therefore signal to other owners that is easy to force acquisition, and it also says the Government is concerned about and committed to conserving the State's heritage.

(signed)

Ian Baxter
DIRECTOR

28 May 2007