

CL22.589 Report Back - Short Term Protection Options - Former Anglican Church, Huskisson

HPERM Ref: D22/445321

Department: Strategic Planning

Approver: Carey McIntyre, Director - City Futures

Reason for Report

The purpose of this report is to respond to Part 4 of Council's 20 September 2022 (MIN22.618) resolution that required the following:

"Report back to Council as soon as possible on additional measures that Council can take to immediately protect the site while its heritage listing is being pursued."

Recommendation

That Council

1. Receive and note the options outlined in this report.
2. Note that the landowner has been advised in writing that development consent is required to carry out scraping work within 1m of lot boundaries and a written undertaking sought to the effect that no works will be done in that area unless and until development consent is obtained

Options

The following options are presented for Council's consideration and are not necessarily mutually exclusive.

1. Take the necessary steps to enable Council to seek an injunction in the event that scraping works are undertaken within 1 m of lot boundaries without the required development consent.

Implications: If scraping is not undertaken within 1m of lot boundaries, it could be undertaken as 'exempt' development. If scraping is undertaken within 1m of lot boundaries, development consent is required.

Council has written to the owner of Lots 7 and 8 and advised that development consent is required to carry out the scraping works within 1m of lot boundaries and sought a written undertaking to the effect that no works will be done in that area unless and until development consent is obtained. The letter also foreshadowed Council seeking an injunction if necessary if the undertaking is not provided.

This option would require legal services to be provided in advance so that an injunction could be sought at short notice, if necessary.

2. Write to the NSW Minister for Heritage and ask that an Interim Heritage Order (IHO) be made for the site under s.24(1) of the Heritage Act.

Implications: If the Minister is not prepared to make an IHO, Council could request that the Ministerial Order be amended or a new authorisation under s.25 of the NSW Heritage Act be issued, that enables the Council to make an IHO specific to the site.

3. Consider:
 - a. Writing to the NSW Heritage Council requesting that it revoke the s.140 Excavation Permits that have been issued.
 - b. Writing to the Secretary of the NSW Department of Planning and Environment requesting that the Secretary consider making a stop works order and/or recommend that the Minister issue an Interim Protection Order under the NPW Act over the Site. Council could also request that the Minister consider declaring the Site to be an Aboriginal place by notice in the Gazette.

Implications: If a permit is revoked (not guaranteed), the holder of the permit may appeal to the Minister of Heritage (under s145) but does not have the ability to seek a merits review in the Land and Environment Court.

4. Seek assurance from the landowner that the surface scraping will be deferred for an appropriate period while offering to facilitate with external independent assistance a negotiation/conciliation process with the key parties.

Implications: This option could only succeed if the key parties are willing to explore a potential negotiated outcome. This appears to be unlikely at present, given the nature of the issues and conflicting views and interests of the key parties. Furthermore, Council currently has no legal obligation or role to try and facilitate a negotiated outcome. However, given the strong community interest in former Huskisson Church site, it could be argued that Council should offer to assist negotiations between the key parties.

Background

As a result of a Mayoral Minute considered by Council on 20 September 2022, it was resolved as follows (MIN22.618):

That Council

1. *Affirms that it fully supports the application made to the Department of Climate Change, Energy, the Environment and Water by the Jerrinja LALC, seeking a declaration of emergency protection for lots 7 and 8 in DP 758530 on the corner of Hawke, Bowen and Currumbene Streets, Huskisson NSW (including the former Anglican Church at Huskisson).*
2. *Commence the process to immediately list the Former Anglican Church, Huskisson and any associated items on the site (including Lots 7 and 8 Section 3 DP 758530) as a 'Heritage Item' of local significance in Schedule 5 of the Shoalhaven Local Environment Plan 2014, including the preparation of an updated statement of heritage significance and any other required supporting information*
3. *As part of the Gateway determination submitted to the NSW Department of Planning and Environment, note that although a development consent for the relocation of the church has been issued and commenced, that this is not the will of the current Council elected in December 2021.*
4. *Report back to Council as soon as possible on additional measures that Council can take to immediately protect the site while its heritage listing is being pursued.*
5. *Confirm 29 September 2022 as the date for a comprehensive briefing on the matter with Councillors and stakeholders.*

This report specifically addresses Part 4 of the resolution.

Matters Considered

The following matters have been investigated:

- a) Council's ability to make an Interim Heritage Order (IHO) over the site, having regard also to development consent DA18/2102 and the s.140 Excavation Permit that have been issued for the site;
- b) Any short-term protection options under the NSW National Parks and Wildlife Act 1974 (NPW Act) potentially available to Council or the Secretary of the relevant NSW Government Department;
- c) Any short-term protection options available under the NSW Environmental Planning and Assessment Act 1979 (EPA Act), including whether a 'stop work' order may be given;
- d) Process for seeking an injunction under the EPA Act and/or NPW Act, including the steps that could be taken now to prepare for this.

Summary

- Short of seeking an injunction to prevent the scraping works within 1m of each Lot boundary, there are presently limited options for the Council to take to prevent the scraping works from proceeding.
- Council cannot make an IHO for the site whilst the development consent DA18/2102 and the s.140 Excavation Permits are in force – see explanation below. It also cannot issue a 'stop work' order under the EP&A Act to stop the scraping from proceeding.
- Legal precedent indicates that a Court is unlikely to find that the possibility that Aboriginal remains exist on the Site, and nothing more, is sufficient to attract the protections which apply under the NPW Act, notwithstanding that there may be a strongly held belief in the community that such remains are present.
- Aside from taking steps to enforce the EPA Act with respect to the requirement to obtain development consent for earthworks within 1 m of lot boundaries, the Council's present options to prevent the scraping works from proceeding are limited to making representations to various NSW Ministers, the NSW Heritage Council, and the Secretary of Department of the NSW Planning and Environment for intervention. This includes asking the NSW Heritage Minister to make an IHO for the Site, or making a new authorisation allowing the Council to do so. It also includes requesting the making of a 'stop work' or interim protection order under the NPW Act, or declaring the Site to be an 'Aboriginal place'. Further details of these options are set out below.

Interim Heritage Order (IHO)

Council was authorised by the NSW Minister of Heritage to make IHO's by a Ministerial Order published in the Government Gazette on 12 July 2013, subject to conditions. The conditions specified in Schedule 2 of the Order contain important qualifications on the ability of the Council to make an IHO in this case. Of particular significance/relevance are conditions (2)(d) and (4).

Condition 2(d) is in the following terms (emphasis added):

A council must not make an IHO where: ... (d) a development consent (other than a complying development certificate), has been granted in relation to the item that permits the item to be harmed, and the development consent is still in force.

Condition (4) is in the following terms (emphasis added):

A Council must not make an IHO in respect of an item (which includes a building, work, relic, or place) that is subject to an approval, consent, licence, permit, permission or any other form of authorisation that requires or permits the item to be harmed and that is issued by the Crown, an officer or employee of the Crown or a Minister.

What options are available to Council?

The options available to Council are outlined below:

1. Write to the landowner and put them on notice of the Council's view that development consent is required to carry out the scraping works within 1m of lot boundaries and seek a written undertaking from them by a particular date, to the effect that no works will be done in that area, unless and until development consent is obtained. This letter would foreshadow the Council's intention to seek an injunction if the undertaking is not provided. See point 4 below.

Note: Council wrote to the landowner in early October 2022, noting the community concern re the possible scraping and that the permit has a range of conditions that need to be considered and complied with. The letter requested that the applicant not proceed with the scraping and continue the dialogue with Council and the community re the future of the site.

2. Write to the NSW Minister for Heritage and ask that an IHO be made for the Site under s.24(1) of the NSW Heritage Act. If the Minister is not prepared to make an IHO, the Council could then request that the Ministerial Order be amended or a new authorisation under s.25 of the Heritage Act be issued that enables the Council to make an IHO specific to the Site.
3. Consider:
 - a. Requesting the NSW Heritage Council to revoke the s.140 Excavation Permits that have been issued;
 - b. Writing to the Secretary of the NSW Department of Planning and Environment and request that the Secretary consider making a stop works order and/or recommend that the Minister issue an Interim Protection Order under the NPW Act over the Site. The Council could also request that the Minister consider declaring the Site to be an Aboriginal place by notice in the Gazette.
4. If Council wishes to be prepared to seek an urgent injunction at short notice, the necessary Summons, Notice of Motion and supporting affidavit would need to be drafted and Counsel briefed.

Update - Application for Emergency Protection under Federal Legislation

It is understood that the application for emergency protection lodged by the Jerrinja Local Aboriginal Land Council (LALC) under the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is still being assessed by the Department of Agriculture, Water and Environment (DAWE). Council Staff will continue to liaise with DAWE officers and update the Council if/when a decision is made.

Update - Heritage Listing Process

Part 2 of Council's resolution on 20 September 2022 was to:

Commence the process to immediately list the Former Anglican Church, Huskisson and any associated items on the site (including Lots 7 and 8 Section 3 DP 758530) as a 'Heritage Item' of local significance in Schedule 5 of the Shoalhaven Local Environment Plan 2014, including the preparation of an updated statement of heritage significance and any other required supporting information

As advised at the Councillor briefing on 29 September 2022, the Heritage listing process involves the preparation of a Planning Proposal (PP) under part 3 of the EPA Act. There are 6 stages in the PP process:

1. Pre-lodgement
2. PP preparation (including supporting information)
3. Gateway determination
4. Post gateway (addressing gateway conditions)
5. Public exhibition & assessment
6. Finalisation

A pre-lodgement meeting was held with the Department of Planning and Heritage NSW on 13 October 2022 and early work has commenced on preparing the PP. The PP will need to be supported by an updated heritage assessment prepared by an appropriately qualified heritage consultant. In accordance with Council's procurement procedures, a project brief is being prepared to enable fee proposals to be sought for this key supporting information.

Financial Implications

The options outlined in this report would need to be funded using Council's existing resources and internal budget allocations (e.g. for procuring legal services).

If the landowner were to undertake work without the necessary approval (i.e. surface scraping within 1m of property boundaries) Council could seek an injunction, in which case, the usual rule is that the unsuccessful party is ordered to pay the successful party's costs.

Risk Implications

As noted above, if Council does ultimately seek an injunction (in the event that scraping commences within 1m of any property boundaries without development consent) and Council is unsuccessful, costs are likely to be awarded against Council (The reverse is also true, however, this is not a risk to Council).

If Council prepares to seek an injunction but the need does not arise (because scraping does not occur within 1m of any property boundaries) any costs incurred by Council will not be able to be recovered.