

DTI:Planning Review

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Subject: Submission on South Australia's planning system - FOCHHA
Attachments: Opinion - Gawler Church Hill State Heritage Area.pdf; Opinion - Response to HZC opinion and Heritage SA.pdf

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Friends of Church Hill Heritage Area

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14 December 2022

Planning Review Panel

DTI.PlanningReview@sa.gov.au

Submission on South Australia's planning system

Dear Panel

Background

Friends of Church Hill Heritage Area is a community organisation representing residents and landowners in the Church Hill State Heritage Area and other interested people. Our members have been actively involved in the process leading up to the declaration of the Church Hill State Heritage Area in 1985 and since.

Our members were involved in lobbying for a Management Plan for the Church Hill SHA from the late 1980s when inconsistencies were occurring with decisions about development in the area from both State Heritage Branch and Gawler Council. After many years of negotiation, the Church Hill Management Plan was approved by the Minister responsible for State Heritage and Gawler Council and published in 1998.

https://www.gawler.sa.gov.au/_data/assets/pdf_file/0030/219549/church-hill-management-plan-february-1998-taylor-weidenhofer-for-corporation-of-the-town-of-gawler.pdf

Subsequently in 2000 the Gawler Development Plan was amended by two heritage DPAs which set out specific policies for both the Light Historic Conservation Zone (based on the original 1839 Light Finnis & Co plan) and specific policies for the Church Hill State Heritage Area'. Further the Development Plan set out that for the Church Hill State Heritage Area that "*development in this area is controlled by the Church Hill Management Plan pursuant to the Heritage Act, 1993*". Those provisions remained in force until being replaced by provisions of the Planning Code in April 2021.

Planning Code

How a document can have official status in 2018 to replace or supersede the Management Plan which had official and legal priority will take some explaining. The priority of the Management Plan as set out in the Development Plan was in place from the incorporation of Heritage DPAs into the Gawler Development Plan in 2000 until the new Planning Code was introduced in 2021.

Imagine our surprise when responding to an application for demolition of tennis courts in the centre of the Church Hill SHA to be told by the relevant authorities that the assessment was to be conducted based on a statement of a few lines setting out a summary of the significance of the area in 1985:-

“The Gawler Church Hill State Heritage Area is located in the centre of the plan for Gawler devised by Light, Finniss & Co in 1839. It has a distinctive character deriving from the consistent scale, form and density of the houses. Church Hill was planned with three central parks along Cowan Street and the three most dominant churches (Anglican, Catholic and Presbyterian) in Gawler had their buildings located adjacent to or in those parks. The Area forms part of a relatively intact example of mid-nineteenth century town planning and exhibits a high degree of integrity.”

and that the Church Hill Management Plan was not a relevant document. This was based on the following Planning Code provision related to State Heritage Areas:

<i>Desired Outcome</i>	
DO 1	<i>Development maintains the heritage and cultural values of State Heritage Areas through conservation, ongoing use and adaptive reuse consistent with Statements of Significance and other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Places Act 1993.</i>
Note	<i>Statements of Significance and other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Places Act 1993 can be found here</i>

Further some of the people involved, including Heritage SA staff and consultants, were happy to quote the “Heritage South Australia, 2018, Gawler Church Hill State heritage area: guidelines, DEW Technical report 2018/, Government of South Australia”. This document had been published without any consultation with Gawler Council or the Gawler community. We had never heard of it.

How this “Guidelines” document could displace a document that was officially supported by the relevant Minister and set out for 21 years as the basis for planning decisions in the official planning documents of successive governments (including the time when the “Guidelines” was published is a mystery.

Concerned members of our Friends group initiated obtaining legal advice at significant expense from Brian Hayes QC and Katarina Grenfell which is attached. Subsequently that advice was queried by the developer applicant for tennis court demolition and Gawler Council officers (who had been supporting the tennis court demolition throughout the last 2 years or so) undertook to obtain, also at significant expense, legal advice from Michael Roder QC and James Roder. We are unable to attach this document because it is locked in the agenda documents for the Council Assessment Panel (another mystery). We then obtained further advice from Brian Hayes QC and Katarina Grenfell (again at significant expense) which is attached and which provides enough information to understand the Roder advice.

The development applications.

As background an application for development of several dwellings on the land which is owned by the Anglican Synod of Adelaide was under consideration in 2007. That application was eventually not proceeded with – no doubt due to the strict provisions of the Church Hill Management Plan which required that no additional lots were to be created and that only one dwelling could be built on each lot – apart from the difficulty of getting approval for removal of the tennis courts which were noted in the Management Plan as a significant feature of the Area.

Development Act application

In 2020 a development application to demolish the tennis courts was lodged. This was a Category 3 non-complying matter under the Development Act 1993. Curiously the development consultant application reported that discussion had occurred with Heritage SA prior to the application being lodged and that Heritage SA had expressed support for the application (this was not the official referral which was required to occur after the application was lodged)

With the start of the PDI Act in March/April 2021 the applicant withdrew this application- clearly to take advantage of the loss of Category 3 appeal rights available to residents such as ourselves.

DPI Act application

Another application was lodged under the PDI Act. The only residents notified were those in close proximity (c 60m) to the tennis courts. Heritage SA and Council planning officers recommended approval. The applicant refused to indicate what subsequent applications were proposed. The Council Assessment Panel refused the application. The applicant appealed. A resident of the Church Hill SHA applied to be joined to the appeal. That application was refused mainly on the basis that the person lived more than 60 metres away. At the same time the applicant went back to the CAP with additional advice and at a closed CAP meeting without any available agenda or opportunity for community members to know what was happening, the CAP reversed its decision. Subsequently in the ERD Court a second resident who lived opposite the tennis court site was accepted as a joined party. The applicant appealed this decision to the Supreme Court.

The applicant then also put in a further application to the CAP. This was a public matter and representations were able to be made. The CAP made a split decision to approve the demolition application. Subsequently the Supreme Court appeal was withdrawn. Our only option for this matter was Judicial Review in the Supreme Court. The costs projected were prohibitive for us. The demolition now had approval.

Most recently the applicant has submitted a land division application. We have provided further commentary on this although there is no statutory basis for this. We expect this application and potential future applications for dwellings will not be notified publicly but rather decided by Council staff under the very wide delegation powers apparently set out in the PDI Act.

Frankly we are appalled at the changes made to planning legislation which have resulted in the events set out above. We are also aware of other applications for development which are following similar very narrow community involvement and policies which are almost completely obscure and inadequate

We have undertaken correspondence with relevant authorities but with little effective response to date. We are hoping the Review Panel can wade through the fog that we seem to be enveloped in and find some fair and adequate proposals to restore some balance and credibility into our planning system.

We have been lucky to have assistance of people with legal and planning skills to assist in understanding the process and trying to have informed input. For people without such resources the ability to effectively

understand and make suitable submissions is mostly just not there. Even this process of understanding the issues in the Planning Review is very challenging.

For a system which claimed that community input via appeals or even notification and submissions was not needed because the community would be able to have its say up front about relevant policies has been shown to be a sham. The changes which have replaced relevant guidelines for local development in the Development Plan with a one size fits all Planning Code have pretty much eliminated effective community input.

We are happy to provide additional information if requested.

Yours faithfully

Stephanie Evans

Convenor
Friends of Church Hill Heritage Area

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22 April 2022

Dear Mr Shackley,

Advice regarding Gawler Church Hill State Heritage Area – Development Application for demolition of Tennis courts at 41- 45 Cowan St, Gawler

Thank you for your instructions in relation to the above. You seek our advice in connection with a development application to demolish the tennis courts and associated fencing in the Gawler Church Hill State Heritage Area at 41-45 Cowan St, Gawler.

Background

1. We set out hereunder the background facts and circumstances relevant to the issues that we have been asked to consider.
 - 1.1 On 2 June 2021, Development Application (DA 21012808) was lodged under the PDI Act to develop the land at 41-45 Cowan St, Gawler. DA 21012808 is for “*demolition of the two hard-surfaced tennis courts, associated chain-link fencing, light poles and relocation of two commemorative plaques*”. DA 21012808 is identical to a previous application DA 490/823/2020.
 - 1.2 DA 21012808 was referred to Heritage SA, Department for Environment and Water (“Heritage SA”), as a mandatory referral under s122 of the PDI Act.
 - 1.3 By letter dated 8 July 2021, Heritage SA indicated that it supported the application. It stated that the “*tennis courts (fences and bitumen) do not contribute to the heritage value of the Gawler Church Hill State Heritage Area.*”
 - 1.4 DA 21012808 was subject to public notification. Objections were lodged against the proposal.
 - 1.5 On 9 September 2021, DA 21012808 was presented to the Gawler Council Assessment Panel (CAP) for consideration. The CAP resolved to refuse the application on grounds that it was contrary to the State Heritage Area Overlay DO 1 and PO 5.1 and 6.1 and would detract from the heritage value of the State Heritage Area.
 - 1.6 On 6 October 2021, the applicant appealed the decision to refuse DA 21012808 to the Environment, Resources and Development Court. As part of the appeal proceedings, the applicant sought for the matter to be further considered by the CAP, and provided additional information to the CAP.

- 1.7 On 9 December 2021, a further CAP meeting was held “in confidence”. Additional information was provided by the applicant including Heritage SA comments on DA 21012808 and the previous application; DASH Architects reports and legal advice by the applicant’s solicitor. The Gawler Council provided additional information including legal advice from its solicitors and a report from a heritage architect that it would be unable to support the refusal of the development should the matter proceed to a ERD Court hearing.
- 1.8 On 9 December 2021, the CAP consented to DA 21012808 on conditions. It considered:¹

“it was required to apply the Heritage SA advice which left it with no alternative but to consent to the ERD Court overturning its approval as a result of the additional information provided to it”.

- 1.9 On 6 January 2022, the prospective owner of the land lodged a new Development Application for the land (DA 21042203). DA 21042203 is again for “*demolition of the two hard-surfaced tennis courts, associated chain-link fencing, light poles and relocation of two commemorative plaques*”.
- 1.10 On 10 February 2022, Michael Llewellyn-Smith, the Presiding Member of the CAP, wrote to the Gawler Council and provided information as to the CAP’s decision-making process on 9 December 2021 when it consented to demolition of the tennis courts.
- 1.11 DA 21042203 is to be assessed by the CAP on 5 May 2022.

Request for advice

2. You seek our advice in connection with the position taken by Heritage SA following referrals made under section 122 of the *Planning, Development and Infrastructure Act 2016* (“PDI Act”) in connection with the development application. We note that Heritage SA supported DA 21012808 on the basis that it considered that:

“the items to be removed are not considered to contribute to the heritage significance of Gawler Church Hill. Therefore, the proposed development will not affect the heritage values of the State Heritage Area”.

3. You refer to an exchange of emails between yourself and Michael Queale, Principal Heritage Conservation Architect, Heritage SA between 1 and 4 March 2022, regarding why Heritage SA did not take into account the Gawler Church Hill State Heritage Area: Guidelines for Development published by the Department for Environment and Water in 2018 (“the Guidelines”) and the 1998 Church Hill Management Plan (“CHMP”), as “*other relevant documents*” in Heritage SA’s consideration of the development application against the State Heritage Area Overlay.
4. In particular, you seek our advice as to the position adopted by Heritage SA, i.e. that they will only refer to “designated instruments” made under section 71 of the PDI Act and that they do not consider that the Guidelines and Management Plans fall within

¹ Letter from Presiding Member of the CAP to the Gawler Council dated 10 February 2022 at [7] on page 6.

the reference to “*other relevant documents*” in DO1 of the State Heritage Area Overlay.

5. You also seek our advice as to whether (i) the assessment by Heritage SA as per its letter dated 8 July 2021; and (ii) the process adopted by the CAP in approving the development application as referred to in the letter of the Presiding Member of the Gawler CAP dated 10 February 2022, accord with the requirements of the State Heritage Area Overlay.
6. Please see our advice regarding these matters below.

Heritage SA’s position regarding the Church Hill Management Plan and Guidelines

7. The PDI Act and Regulations do not stipulate how Heritage SA is required to consider matters within its relevant field of expertise of operation. Rather, the legislative framework is provided by the Planning and Design Code (PDC) as established by the PDI Act and the *Heritage Places Act 1993*.
8. Pursuant to section 3 “Interpretation” of the PDI Act, a “state heritage place” includes

“a place within an area established as a State Heritage Area under the State Heritage Places Act 1993.”
9. The *Heritage Places Act 1993* defines a “State Heritage Area” as “*an area established as a State Heritage Area by a Development Plan*”.
10. As the PDI Act has now replaced the *Development Act 1993*, the PDC applies.
11. As the site of the proposed development falls within the State Heritage Area Overlay of the PDC, Heritage SA was required to apply the provisions of the State Heritage Area Overlay in responding to the referral. Desired Outcome 1 of the State Heritage Area Overlay provides:

<i>Desired Outcome</i>	
DO 1	<i>Development maintains the heritage and cultural values of State Heritage Areas through conservation, ongoing use and adaptive reuse consistent with Statements of Significance and other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Places Act 1993.</i>
Note	<i>Statements of Significance and other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Places Act 1993 can be found here</i>

12. Reference to the “Statements of Significance and other relevant documents” via the link in the “Note” on Plan SA, takes the viewer to a page referring to “Heritage Standards”. No Heritage SA Heritage Standards have as yet been included in respect of the Gawler Church Hill State Heritage Area. The Plan SA page states:

“Heritage SA’s Heritage Standards are an assessment tool, linked to the State Heritage Area Overlay within the PDC. Heritage Standards provide principles and acceptable minimum standards for development proposals and form the basis of Heritage SA’s decisions on proposed development referrals.

Heritage Standards will be developed for all State Heritage Areas, in consultation with landowners and key stakeholders, replacing the current State Heritage Area Guidelines for development.

Heritage South Australia will continue to use the existing Guidelines for Development for other State Heritage Areas as the basis of heritage assessments and decisions for any referred development proposals, until such time as new Heritage Standards are developed.”

13. Church Hill was designated as a State Heritage Area by the Minister for Environment and Planning in the Government Gazette of 6 June 1985 pursuant to the *South Australian Heritage Act 1978*. The legal basis of that designation can be discerned by reference to section 13 of the said Act.

14. Section 13 of the *South Australian Heritage Act 1978* relevantly provided:

“Designation of State Heritage Areas

13. (1) Subject to this section, where the Minister considers-

(a) that an area of land is part of the environmental, social or cultural heritage of the State; and

(b) that the area is of significant aesthetic, architectural, historical, cultural, archaeological, technological or scientific interest,

the Minister may, by public notice, designate that area as a State Heritage Area.”

15. That legal basis has been carried forward to the current PDI Act through the reference in the State Heritage Area Overlay referred to above.

16. The designation of the Church Hill State Heritage Area includes a description of the land and a map, which includes the area of the tennis courts. Thus, the tennis courts which are a feature of the State Heritage Area fall within the “Statements of Significance” as referred to in the State Heritage Area Overlay.

17. The CHMP was prepared on behalf of, and published by, the Gawler Council and the State Heritage Branch of the Department of the Environment and Natural Resources (DENR). The latter is clearly the predecessor of Heritage SA.

18. The CHMP was prepared for the express purpose of providing policy for the Church Hill State Heritage Area. The introduction to the CHMP states:²

“While the current Development Plan policies for Church Hill and the broad strategies adopted by the State Heritage Branch, Department of Environment and Natural Resources encapsulate the most significant characteristics of Church Hill, the prescriptive detail has not been specifically documented to ensure that the heritage objectives can be achieved. The purpose of this document therefore is to strengthen the existing policies by investigating, in more detail, both public and private spaces with the Church Hill State Heritage Area”

² “Church Hill Management Plan” at p1.

19. The CHMP specifically addresses the Church Hill State Heritage Area, defines it, and refers to the qualities of the area which give rise to its “significance as a State Heritage Area”. The tennis courts are specifically noted as a “Major Feature”³ within the State Heritage Area on the map of the area. The said map states that its “source” is “*State Heritage Branch DENR*”.

20. Regarding the extent of the Church Hill State Heritage Area, the CHMP states:⁴

“The State Heritage Area of Church Hill includes all the elements within its boundaries, including individual dwellings and other buildings, walls, fences, trees and major landscape features such as street trees, roadways, bluestone guttering and cobblestones and fire hydrants. Other significant aspects of the State Heritage Area are the placement of the dwellings on the allotments”.

21. The Guidelines are another “relevant document” as referred to the State Heritage Area Overlay. They also include a map defining the State Heritage Area, which includes the tennis courts. The Guidelines set forth the following “Statement of Significance”:⁵

“The Gawler Church Hill State Heritage Area is located in the centre of the plan for Gawler devised by Light, Finniss & Co in 1839. It has a distinctive character deriving from the consistent scale, form and density of the houses. Church Hill was planned with three central parks along Cowan Street and the three most dominant churches (Anglican, Catholic and Presbyterian) in Gawler had their buildings located adjacent to or in those parks. The Area forms part of a relatively intact example of mid-nineteenth century town planning and exhibits a high degree of integrity.”

22. The Guidelines are accessible via the Plan SA website, following the links via the Note in DO 1, and as such appear to be anticipated to fall within the scope of the documents referred to in DO 1.

23. In our view, notwithstanding that the CHMP is not included within the documents accessible via the link on Plan SA, both the CHMP and the Guidelines fall within the scope of DO 1. Both are relevant to the “heritage and cultural values” of the Gawler Church Hill State Heritage Area and were prepared and published by Heritage SA or in the case of the CHMP, its predecessor. There is nothing in the text of DO 1 to indicate that the documents accessible via the Note to DO 1 are the *only documents* that may be referred to by Heritage SA or the CAP in assessing the development application.

24. We note that as per the email of Michael Queale of 1 March 2022 that it may be open to Heritage SA to prepare a Heritage Standard as a “designated instrument” on the basis of Regulation 19(ab) of the PDI Regulations and section 71(b) of the PDI Act. However, we note, the definition of “designated instrument” in section 70 of the PDI Act⁶, and question whether guidance as to the protection and preservation of State

³ “Church Hill Management Plan” at p6.

⁴ “Church Hill Management Plan” at p2.

⁵ “Gawler Church Hill State Heritage Area: Guidelines for Development” published by the Department for Environment and Water in 2018, at section 2.2.

⁶ Section 70 of the PDI Act provides:

Heritage Areas, properly falls within the scope of a “designated instrument”. Mr Queale seems to suggest that a “design standard” can be prepared as a “designated Instrument”. The “criteria for registration” in section 16 of the *Heritage Places Act 1993* in respect of the “heritage significance” of places to be registered, make it clear that protection of a heritage area extends beyond merely matters of “design”.⁷

25. Irrespective of the position taken by Heritage SA and the Department for Environment and Water that “*existing Guidelines, Conservation Studies and Management Plans wouldn’t be considered ‘other relevant documents’ within the context of the Overlay*”, the terms of DO 1 do not exclude consideration of the CHMP and the Guidelines, which as outlined above, are clearly relevant to the assessment to be conducted.
26. It is noteworthy that the Gawler Development Plan 2019 specifically refers to the Church Hill State Heritage Area and provides that “*development in this area is controlled by the Church Hill Management Plan pursuant to the Heritage Act, 1993*”. This very recent Development Plan underscores that the CHMP is a relevant document to be taken into account in accordance with the requirement of DO1 to assess the development application against “*heritage and cultural values of State Heritage Areas through conservation, ongoing use and adaptive reuse consistent with Statements of Significance and other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Places Act 1993.*”

70—Interpretation

In this Subdivision— **designated instrument** means—

- (a) a state planning policy; or
- (b) a regional plan; or
- (c) the Planning and Design Code; or
- (d) a design standard.

⁷ Section 16 of the *Heritage Places Act 1993* provides:

16—Heritage significance

1. (1) A place is of heritage significance if it satisfies one or more of the following criteria:
 - (a) it demonstrates important aspects of the evolution or pattern of the State's history; or
 - (b) it has rare, uncommon or endangered qualities that are of cultural significance; or
 - (c) it may yield information that will contribute to an understanding of the State's history, including its natural history; or
 - (d) it is an outstanding representative of a particular class of places of cultural significance; or
 - (e) it demonstrates a high degree of creative, aesthetic or technical accomplishment or is an outstanding representative of particular construction techniques or design characteristics; or
 - (f) it has strong cultural or spiritual associations for the community or a group within it; or
 - (g) it has a special association with the life or work of a person or organisation or an event of historical importance.

Position taken by CAP in approving the Development Application

27. In his letter dated 10 February 2022 to the Gawler Council, the Presiding Member of the CAP stated that CAP could not reasonably have continued to defend the refusal of DA 21028085 in light of the advice provided by Heritage SA and in circumstances in which the CAP was unable to obtain an expert opinion which would support a refusal of the development application.
28. In our opinion, the approach by the CAP was misconceived in a number of respects. In accordance with the referral made to Heritage SA under section 122 of the PDI Act, and table 3(17) of the *Planning, Development and Infrastructure (General) Regulations 2017* (the PDI Regulations), the purpose of the referral was for Heritage SA to provide “direction”⁸ as to whether the application should be refused, or if conditions should be imposed. Heritage SA’s expression of “support” for the application did not entail that the CAP was required to approve it.
29. The Presiding Member of the CAP further stated that the “*relevant provisions of the State Heritage Overlay to DA 21012805 (DO 1, PO 5.1 and PO 6.1) do not allow for cultural heritage to be considered*”. This is plainly incorrect. DO 1 expressly refers to the maintenance of “*cultural values of State Heritage Areas*”, and PO 5.1 and PO 6.1 are to be interpreted against the broader principle expressed by DO 1.

Narrow and inadequate approach taken by Heritage SA

30. The report of Denise Schumann (a recognised expert on cultural heritage planning and policy) dated 4 March 2022 makes it abundantly clear that the approach taken by Heritage SA in assessing the impact of the proposed demolition of the tennis courts was overly narrow and inadequate.
31. Ms Schumann notes that the assessment failed to consider the cultural significance of the tennis courts⁹, and that the statement of significance which was referred to by Heritage SA was taken from the Guidelines which contain “*factual mistakes and a limited historical analysis about what is valued and defined as heritage within the Gawler Church Hill State Heritage Area*”¹⁰.

⁸ The “function” of Heritage SA listed in the schedule 9: 3(17) is listed as “Direction”.

Schedule 9: 1(1c) of the PDI Regulations defines the term “Direction” as follows:

*(c) the term **Direction** specified in column 3 in Part A of the table means that the prescribed body may direct the relevant authority (subject to any qualification referred to in the relevant item)—*

(i) to refuse the relevant application; or

(ii) if the relevant authority decides to consent to or approve the development— subject to any specific limitation under another Act as to the conditions that may be imposed by the prescribed body, to impose such conditions as the prescribed body thinks fit,

(and that the relevant authority must comply with any such direction);

⁹ Report prepared by Denise Schumann OAM dated 4 March 2022 “Proposed Demolition of Tennis Courts – 41-45 Cowan Street, Gawler Church Hill State Heritage Area Heritage ID 13948” at p5.

¹⁰ Ibid, p8.

32. Ms Schumann highlights that a State Heritage Area is comprised of more than merely buildings, but is a:¹¹

“clearly defined region with outstanding natural or cultural elements significant to South Australia’s development and identity”.

She concludes that the tennis courts were:

“listed as a major feature in 1985 of the Gawler Church Hill State Heritage Area as part of an urban environment they contribute to the historical character and identity and sense of place”.

Conclusion

33. In conclusion, we consider that the approach taken by Heritage SA in not considering the CHMP was flawed. The CHMP is directly relevant to the issue on which Heritage SA was consulted and falls within the scope of the documents referred to by DO 1.
34. We also consider that the approach taken by the CAP in assessing DA 21012808 was misconceived. The CAP was required to consider the cultural heritage values of the tennis courts, as specifically referred to by DO 1. Further, the CAP was under no obligation to approve the development application on the basis that Heritage SA had not directed the CAP to refuse the application.
35. Please do not hesitate to contact us should you wish to discuss the above advice, or if we can assist further,

Yours sincerely,



Brian Hayes QC



& Katarina Grenfell

¹¹ Ibid, p8.

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5 May 2022

Dear Mr Shackley,

**Response to Howard Zelling Chambers Opinion & Heritage SA Supplementary Advice
– Application for demolition of Tennis Courts at 41- 45 Cowan St, Gawler**

1. We refer to the memorandum of advice prepared by Michael Roder QC and James Roder of Howard Zelling Chambers dated 29 April 2022 (“the “HZC opinion”) which was provided to the Council Assessment Panel in connection with our advice to you dated 22 April 2022.
2. We respectfully consider that the HZC opinion is incorrect in its approach to:
 - (i) the role of Heritage SA;
 - (ii) assessment against the State Heritage Area Overlay; and
 - (iii) identification of Heritage Value.

The reasons for our disagreement with the HZC opinion are set forth below.

(i) The role of Heritage SA

3. The HZC opinion at [11] and [16] disagrees with the Murray Chambers Advice that the referral body was required to consider the provisions of the Code in responding to the referral.
4. In taking issue with the Murray Chambers Advice, it referred at [14]-[15] to excerpts from cases decided by the ERD Court with respect to the repealed *Development Act 1993*, that had previously determined the role of the Minister for Heritage as a referral body. It stated at [15]:

“we do not consider there to be any reason why the Court’s approach to referrals under the PDI Act to differ from its approach to referrals under the Development Act 1993.”

5. In our view, the HZC opinion fails to take into account the significant changes to the legislation since the introduction of the Planning, Development and Infrastructure Act (PDI Act) and the *Planning, Development and Infrastructure (General) Regulations 2017* (“PDI Regulations”). These changes are outlined below.
6. Section 37 of the *Development Act 1993* refers to regulations relating to the task of the referral body. Schedule 8 of the *Development Regulations 2008* addressed “referrals and concurrences”. Schedule 8 of the *Development Regulations* states the following in respect of State Heritage Places, but contains no provision regarding State Heritage Areas:

“5—State heritage places

(1) Other than development to be undertaken in accordance with a Heritage Agreement under the Heritage Places Act 1993 or in a River Murray Protection Area under the River Murray Act 2003, development which directly affects a State heritage place, or development which in the opinion of the relevant authority materially affects the context within which the State heritage place is situated.

(2) Development where a consent or approval proposed by a council as a relevant authority in relation to the development does not totally adopt the recommendation or any condition proposed in a report forwarded by the Minister under subclause (1).

7. Schedule 9 of the PDI Regulations addresses “referrals” under section 122 of the PDI Act and includes a table which addresses “State Heritage Places”. Table 3(17) relevantly provides:

“17—State heritage places

Development that is—

(a) in the State Heritage Place Overlay, State Heritage Area Overlay or the Heritage Adjacency Overlay under the Planning and Design Code; and

(b) specified by the Planning and Design Code as development of a class to which this item applies.”

8. As may be seen from the above, table 3(17) of the PDI Regulations expressly refers to the State Heritage Overlay under the PDC. By contrast, Schedule 8 of the Development Regulations makes no reference to State Heritage Areas, and when referring to State Heritage Places, make no reference to any Development Plan.
9. We agree with the HZC opinion in its reference to the general role of the Minister for Heritage as a referral body for matters of State Heritages Places, as per the ERD Court in *David Cheney Pty Ltd v City of Adelaide & Anor* [1998] SAERDC 476. While that case primarily concerned the delegation of the authority of the Minister, we agree that the ERD Court observed at p6 that:

“the Minister might take into account the relevant heritage place and its particular attributes, the nature of the proposed development and its likely affect on the heritage place and then exercise a discretion as to whether to make a report and, should she so decide, as to whether to recommend refusal or the granting of consent, subject to conditions, and if so, the nature of the conditions”.

10. We note, however, that there is nothing in the above passage which states how, and on what basis, the Minister is to consider the relevant heritage place and its attributes. In our view, the above approach is compatible with Heritage SA taking into account the documents referred to in DO 1 in advising on the impact of the proposed development on a State Heritage Area. Further, we note that Heritage SA has indeed followed DO 1 to the extent that it has referred to the “statement of significance” as set forth in the Guidelines. In our view, it is clear that Heritage SA

had to have regard to the State Heritage Overlay in providing advice in relation to the proposed development. To suggest that Heritage SA would operate in a vacuum, without looking at the relevant overlay, is misconceived.

11. As per our initial advice, we maintain that Heritage SA has taken an unduly narrow approach by failing to consider the Church Hill Management Plan (CHMP), which was directly and uniquely relevant to the issue under consideration, and which fell within the description of the documents referred to in DO 1. In our view, the direct and unique relevance of the CHMP to the issue at hand is underscored by the fact that the Gawler Development Plan 2019 (and as we understand, earlier versions thereof dating back to 2000) specifically refers to the Church Hill State Heritage Area and provides that *“development in this area is controlled by the Church Hill Management Plan pursuant to the Heritage Act 1993”*.

(ii) Assessment against the State Heritage Area Overlay

12. The HZC opinion refers at [24]-[27] to the approach to be taken when making an assessment against the provisions of the State Heritage Overlay.

13. We agree that as per the PDC “Rules of Interpretation” that “Desired Outcomes”:

“are policies designed to aid the interpretation of performance outcomes by setting a general policy agenda for a zone, subzone, overlay or general development policies module. Where a relevant authority is uncertain as to whether or how a performance outcome applies to a development, the desired outcome(s) may inform its consideration if the relevance and application of a performance outcome, or assist in assessing the merits of the development against the applicable performance outcomes collectively”.

14. As such, DO 1 provides overall policy guidance, and the POs are intended to implement such policy. As per our initial advice, we reiterate that DO 1 is relevant to be taken into account when assessing PO 6.1. We note that PO.1 relevantly provides:

“Buildings and other features of identified heritage value within a State Heritage Area are not demolished, destroyed or removed in total or in part unless:

1. *The portion of any building or other feature is determined to not contribute to the heritage value of the State Heritage Area...”*

15. There is nothing in the terms of PO 6.1 which excludes consideration of “cultural heritage value”. Rather, PO 6.1 refers broadly to “heritage value”. DO 1 is clearly relevant to any assessment of the development proposal against PO 6.1 as it clarifies that the general policy for the overlay includes maintaining *“the heritage and cultural values of State Heritage Area”*. The term “heritage in PO 6.1 is broad enough to include cultural heritage and DO 1 aids in this interpretation. In this regard, we note that none of the POs in the Overlay make express reference to “cultural values”. As a matter of interpretation, it is our view that the POs used the broad term “heritage values” to include cultural heritage values. A contrary interpretation would make the reference to “cultural values” in DO 1 redundant, and would be inconsistent with the Overlay as a whole.

(iii) Identification of Heritage Value

16. The HZC opinion disagrees with our analysis that the CHMP falls within the documents referred to in DO 1 – i.e. *“other relevant documents prepared and published by the administrative unit of the Public Service that is responsible for assisting a Minister in the administration of the Heritage Place Act 1993.”*
17. In our view, the statement at [36] that *“there seems to be little basis to assert that the Management Plan was prepared for or by the Department such that it might be captured by Desired Outcome 1”* is not borne out. The so called *“singular reference”* to the fact that the CHMP was *“prepared for the State Heritage Branch, Department of the Environment and Natural Resources”*, is significant. In our view, the fact that the Management Plan was prepared *“at the request for the Corporation of the Town of Gawler and the Church Hill Heritage Area Residents Group”* does not diminish this fact in any way, but rather adds to its relevance to the issue in question.
18. Although not acknowledged by the HZC opinion, the three maps¹ included in the CHMP state that their source was “State Heritage Branch, DENR”. The map at page 6 titled “Diagrammatic plan – Church Hill State Heritage Area Gawler, SA” lists the “Major Features” of the State Heritage Area, which include the tennis courts at item 6, and thus clearly identifies them as being significant in the State Heritage Area. Contrary to the HZC opinion, the said map is not just “a map”, but is a map issued by the “State Heritage Branch, DENR”, which identifies the “major features” of a State Heritage Area.

Position taken by the CAP in approving DA 21028085

19. Regarding the comments made in the HZC opinion as to how the CAP approached DA 21028085 in December 2021 at [49]-[56], we note that HZC is commenting on “instructions”. The Murray Chambers Advice was prepared on the basis of the public disclosures made in the letter of the Presiding Member of the CAP dated 10 February 2022. We understand the Presiding Member of the CAP to be the spokesperson of the CAP. Should the public account of the Presiding Member be disputed, we would be grateful to receive any other relevant documents and material.

Heritage SA Supplementary Advice

20. We note that in the supplementary advice provided by Heritage SA via email dated 28 March 2022 (at p185 of the Attachment documents), Heritage SA noted:

“We considered that the removal of the tennis courts did not have an adverse impact on the state heritage values of the State Heritage Area because:

- *The tennis courts are not a part of the distinctive 1839 town plan for Gawler devised by Light, Finniss and Co. (roads planned with three squares and churches, all aligned in response to topography). Each Square was surrounded by allotments intended for development.*
- *The tennis courts are not a part of the identified special mid-nineteenth century character of the Area, as they were erected some years later. The*

¹ Church Hill Management Plan, 1998 at pages 3, 5 and 6.

consistent 'scale, form and density' of houses (and other buildings) illustrate the mid-nineteenth century values and character of the town plan.

The tennis courts may be considered of social value to the local community as recreational open space, but they are not of social significance to the whole of South Australia, the threshold test for a State Heritage Area." (emphasis added)

21. In our view, the test adopted by Heritage SA, as per the underlined text above, is legally questionable in the context of assessing the heritage value of a place within a State Heritage Area.
22. As outlined in our advice of 22 April 2022, Church Hill was designated by the Minister of Environment and Planning as a State Heritage Area pursuant to section 13 of the *South Australian Heritage Act 1978*. Section 13 refers for the purposes of designation as a State Heritage Area to "an area of land" which the Minister considers is part of the "*environmental, social or cultural heritage of the State*" and "*is of significant aesthetic, architectural, historical, cultural, archeological, technological or scientific interest*".
23. As such, in our view, the approach taken by Heritage SA in applying a test as to whether the tennis courts, taken in isolation, have "social significance to the whole of South Australia", is incorrect. In our view, the correct approach to determining the heritage significance of the tennis courts is to view them as a part of the "area of land" designated as a State Heritage Area, which contributes to the heritage values (social, cultural, historical) of the State Heritage Area.
24. Please do not hesitate to contact us should you wish to discuss the above advice, or if we can assist further,

Yours sincerely,



Brian Hayes QC



& Katarina Grenfell