



Land and Environment Court New South Wales

Case Name: **The Trustees of the Roman Catholic Church for the Diocese of Broken Bay v Willoughby City Council**

Medium Neutral Citation: [2024] NSWLEC 1010

Hearing Date(s): 24, 26 October 2023

Date of Orders: 17 January 2024

Date of Decision: 17 January 2024

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders:
(1) The appeal is dismissed.
(2) The exhibits, other than Exhibit A and 1 are returned.

Catchwords: INTERIM HERITAGE ORDER – appeal against an interim heritage order – interim heritage order made by the Council – the conditions of the Ministerial order authorising the Council to make interim heritage orders – whether the item is being or is likely to be harmed – appeal dismissed

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 3.34, 8.7
Heritage Act 1977, ss 4, 4A, 25, 29, 30, 57
Land and Environment Court Act 1979, s 39
Willoughby Local Environmental Plan 2012, cl 5.10, Sch 5, Pt 1

Cases Cited: Beaches Capital Ventures Pty Ltd v Wingecarribee Shire Council [2022] NSWLEC 1504
Byron Ventilink Pty Ltd v Byron Shire Council (2005) 142 LGERA 215; [2005] NSWLEC 395
Forte Construction Group Pty Ltd v Inner West Council [2018] NSWLEC 1400
Kelly v North Sydney Council [2017] NSWLEC 1546

	<p>Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council (2010) 210 LGERA 126; [2010] NSWLEC 48</p> <p>Skermanic Pty Ltd v North Sydney Council [2023] NSWLEC 1396</p> <p>Zhao v Ku ring gai Council [2022] NSWLEC 1729</p>
Texts Cited:	<p>New South Wales Government Gazette, No 90, 12 July 2013</p> <p>NSW Department of Planning and Environment, Assessing Heritage Significance: Guidelines for assessing places and objects against the Heritage Council of NSW criteria, May 2023</p>
Category:	Principal judgment
Parties:	<p>The Trustees of the Roman Catholic Church for the Diocese of Broken Bay (Applicant)</p> <p>Willoughby City Council (Respondent)</p>
Representation:	<p>Counsel:</p> <p>A Galasso SC (Applicant)</p> <p>P Larkin SC (Respondent)</p> <p>Solicitors:</p> <p>Mills Oakley (Applicant)</p> <p>HWL Ebsworth (Respondent)</p>
File Number(s):	2023/196667
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** On 22 May 2023, the Respondent, Willoughby City Council resolved pursuant to s 25(2) of the *Heritage Act 1977* (the Heritage Act) to make an interim heritage order (IHO). The IHO was published on 26 May 2023 in NSW Government Gazette Number 227. The IHO contains the following terms:

“Under section 25(2) of the *Heritage Act 1977*, Willoughby City Council does by this order:

(i) make an Interim Heritage Order to cover the item of heritage significance specified or described in Schedule A; and

(ii) declare that the Interim Heritage Order shall apply to the curtilage or site of such item, being the land described in Schedule B.

...

Schedule A

The place located at 43 Donnelly Road, Naremburn (Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984), except for all the land described as Item 1160 listed in Schedule 5 to the *Willoughby Local Environmental Planning 2012*, described as ‘St Leonards Church (including original interiors)’.

Schedule B

All those pieces or parcels of land legally described as Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984, excluding all the land described as Item 1160 listed in Schedule 5 to the *Willoughby Local Environmental Planning 2012*, described as ‘St Leonards Church (including original interiors)’.

(Exhibit A)”

- 2 Consistent with the requirements of Ministerial Guidelines, the IHO excludes the land of the existing local heritage item of ‘St Leonards Church (including original interiors)’ which is also present on the site at 43 Donnelly Road Naremburn.
- 3 These proceedings are a Class 1 appeal pursuant to s 30(1) of the Heritage Act against the making of the preceding IHO. Specifically, the Applicant appeals against the making of the IHO over Lot A in DP 341975 and Lot 1 in DP 320984, the location of the School Building and School Annex buildings. The Applicant does not appeal the making of the IHO over Lot 1 in DP 115889, the location of

the Presbytery and garage (identified in green below). The extent of the appeal is identified in the following figure outlined in red.



Figure 1: Extent of IHO under appeal.

- 4 Despite the Applicant only appealing a portion of the land to which the IHO applies, the reference to 'place' in the terms of the IHO is a reference to the land identified in both green and red in Figure 1.

Background

- 5 On 9 November 2021 a development application (DA-2021/340) was lodged by Metro Donnelly Road Pty Ltd on behalf of the owner of the land. As lodged the development application sought consent for a mixed-use development comprising the demolition of the School Building and School Annex, construction of multi-dwelling housing development with a new parish hall, a new presbytery, conversion of the existing presbytery to a dwelling and the construction of a new dwelling house. That development application is not the

subject of the appeal, but for reasons detailed commencing at [69] is relevant to the context of the making of the IHO.

- 6 In April 2023 Vanessa Holtham Heritage and Architecture prepared a preliminary heritage assessment for 43 Donnelly Road, Naremburn (Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984) (the preliminary assessment). After documenting an assessment of the St Leonards Church, presbytery and school buildings against the NSW Heritage criteria extracted from the May 2023 NSW Department of Planning and Environment publication 'Assessing Heritage Significance: Guidelines for assessing places and objects against the Heritage Council of NSW criteria' (Heritage Guidelines), Ms Holtham concluded that the 'whole property' met the criteria for listing on four grounds. Extracts of her reasoning are included below:

"(a) Historical Significance

An item is important in the course, or pattern, of NSW's cultural or natural history (or the cultural or natural history of the local area).

St Leonards Church, presbytery and school buildings have local historical significance for their association with the early development of religious, educational and supporting accommodation buildings in the area. The building group represents a clear chronology of development occurring in the early twentieth century typical of a growing and expanding religious and/or educational precinct.

...

(c) Aesthetic and/or Technical Significance

An item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in NSW (or the local area)

The complex of buildings is considered a key landmark within the local area and as individual entities the buildings have landmark qualities within different streetscapes.

...

The presbytery is an early interwar two-storey domestic style building with Old English and Gothic style influences. A visually prominent and well-maintained building, the presbytery has aesthetic value as standalone building, notwithstanding its clear physical and social connection to the Church and the wider precinct. The original 1917 garage, which sequentially follows the construction of the Church and fronts Donnelly Road in the south-eastern corner of the site, also appears to remain intact.

The 1932 school building has aesthetically (sic) qualities as a prominent and attractive element within the Willoughby Road streetscape and as a foreground to the Church when approaching from the north. Whilst it is, to some extent utilitarian in nature, the two-storey building is highly intact externally with only simple measures required to remove later accretions. The 1936 single storey school building is also largely intact externally and has a pleasant but less imposing presence as a secondary school building, which appears to be constructed of materials salvaged from an earlier and more decorative building. This is of interest to the group. These school buildings also provide a visual and physical conduit between this group and the adjacent Sisters of St Joseph's building and St Cuthbert's Church on Merrenburn Avenue and former Naremburn Public School on the opposite side of Willoughby Road.

All the buildings in the group appear to have been maintained to a reasonably high degree externally with evidence that the Church and presbytery also retain a high degree of internal integrity. The internal integrity of the school buildings is unknown at this stage, however does not affect their contribution to the group or respective streetscapes.

(d) Social and/or cultural significance

An item has strong or special association with a particular community or cultural group in NSW (or the local area) for social, cultural or spiritual reasons.

This group of buildings has social significance for the Naremburn and Diocesan Catholic community, for the long-term use of the site for a school and as a place for public worship and the symbiotic operation of these functions, which were closely related.

...

(g) Representativeness

An item is important in demonstrating the principal characteristics of a class of NSW's cultural or natural places; or cultural or natural environments (or a class of the local area's cultural or natural places; or cultural or natural environments).

The complex of buildings is representative of the symbiotic operation of religious and educational functions contained within a single precinct, supported, and complemented by the accommodation offered by the presbytery."

(Exhibit 3)

- 7 The preliminary assessment made a number of recommendations of which the following are relevant to the IHO:

"Based on these preliminary investigations and external inspection of the site, it is evident that the entirety of the property at 43 Donnelly Road, Naremburn has sufficient heritage significance to warrant its listing as a local heritage item in Schedule 5 of Willoughby Local Environmental Plan 2012. The site is not within a conservation area and current planning instruments do not provide sufficient protection for the buildings that are not covered by the (existing)

heritage listing or mapped curtilage. It is suggested that Heritage Item I160 be re-mapped to the property boundaries and re-defined as: 'St Leonards Catholic Church, Presbytery and School Buildings'.

Extending (or re-stating) the listing that affects 43 Donnelly Road, Naremburn to be relevant to the entirety of the property will enable its full heritage significance to be appreciated, understood and protected."

(Exhibit 3)

- 8 On 22 May 2023, at its ordinary meeting Willoughby City Council (the Council) considered a report recommending the making of an IHO in respect of all currently unlisted parts of 43 Donnelly Road, Naremburn, namely: Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984. Council resolved to make the IHO.
- 9 On 26 May 2023 the IHO was published in NSW Government Gazette 227.
- 10 In addition to the IHO, the Council proposed to list all currently unlisted parts of 43 Donnelly Road, Naremburn, namely: Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984 as an item of local significance under Pt 1 of Sch 5 of the Willoughby Local Environmental Plan 2012 (LEP 2012). To this end, on 23 December 2023, the Council resolved, in part, to forward a draft planning proposal to the Department of Planning and Environment as delegate to the Minister for Planning requesting 'Gateway Determination' under s 3.34 of the *Environmental Planning and Assessment Act 1979*. Additionally, Council resolved to exhibit the draft planning proposal following 'Gateway Determination' in accordance with conditions of the Gateway Determination.
- 11 As a result, pursuant to s 29 of the Heritage Act, the IHO remains in force for a period of 12 months (until 26 May 2024).

Statutory Framework

- 12 Section 25 of the Heritage Act is in the following terms:

Part 3 Interim heritage orders for items of State or local heritage significance

...

25 Minister can authorise councils to make interim heritage orders for items of local heritage significance

(1) The Minister may, by order published in the Gazette, authorise a council to make interim heritage orders for items in the council's area.

(2) A council authorised under this section may make an interim heritage order for a place, building, work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.

(3) An interim heritage order made by a council is of no effect in so far as it applies to any of the following items—

(a) an item to which an interim heritage order made by the Minister applies,

(b) an item listed on the State Heritage Register.

(4) An authorisation under this section can be given subject to conditions and a council cannot act in contravention of the conditions of its authorisation.

(5) The Minister may at any time by notice published in the Gazette withdraw a council's authorisation or change the conditions of its authorisation. The withdrawal of a council's authorisation does not of itself affect any interim heritage order made before the authorisation was withdrawn.

- 13 The effect of the IHO is set out at s 57(1) of the Heritage Act, which precludes a range of actions being undertaken with respect to the nominated property including:

...

(a) demolish the building or work,

(b) damage or despoil the place, precinct or land, or any part of the place, precinct or land,

(c) move, damage or destroy the relic or moveable object,

(d) excavate any land for the purpose of exposing or moving the relic,

(e) carry out any development in relation to the land on which the building, work or relic is situated, the land that comprises the place, or land within the precinct,

(f) alter the building, work, relic or moveable object,

(g) display any notice or advertisement on the place, building, work, relic, moveable object or land, or in the precinct,

(h) damage or destroy any tree or other vegetation on or remove any tree or other vegetation from the place, precinct or land.

- 14 “Harm”, “item” and “local heritage significance” have the following meaning under the Heritage Act, s 4:

Part 1 Preliminary

...

4 Definitions

...

harm means—

(a) in relation to a building or work—demolish, or

(b) in relation to a relic or moveable object—damage, despoil, move or alter, or

(c) in relation to a place or precinct—damage, despoil or develop the land that comprises the place or is within the precinct or damage or destroy any tree or other vegetation on, or remove any tree or other vegetation from, the place or precinct.

item means a place, building, work, relic, moveable object or precinct.

local heritage significance has the meaning given by section 4A.

- 15 Pursuant to s 4A of the Heritage Act, heritage significance, includes the following:

Part 1 Preliminary

...

4A Heritage significance

(1) In this Act—

...

local heritage significance, in relation to a place, building, work, relic, moveable object or precinct, means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

...

- 16 Pursuant to s 25(1) of the Heritage Act, an order was made by the then Minister for Heritage in New South Wales Government Gazette, No 90, 12 July 2013, at 3421-3424 (the Ministerial order).
- 17 The Council's authorisation is conditional under Schedule 2 to the Ministerial order, as follows:

"Conditions for Local Councils to make Interim Heritage Orders

(1) A council must not make an Interim Heritage Order (IHO) unless:

(a) an environmental planning instrument containing a schedule of heritage items derived from a heritage study and provisions for the management of those items is in force in the Local Government Area; and

(b) it has considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the council and considers that:

(i) the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance;

(ii) the item is being or is likely to be harmed;

(iii) the IHO is confined to the item determined as being under threat; and

...

(2) 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; or

(e) a complying development certificate has been granted for the demolition of an existing dwelling and the erection of a new single storey or two storey dwelling house, and the complying development certificate is still in force."

...

(5) An IHO made by a Council must contain the following condition:

"This Interim Heritage Order will lapse after six months from the date it is made unless the Council has passed a resolution before that date, and

(i) in the case of an item which, in the Council's opinion, is of local heritage significance, the resolution seeks to place the item on the

heritage schedule of a local environmental plan with appropriate provisions for protecting and managing the item; or

...

- 18 Pursuant to s 39(2) of the *Land and Environment Court Act 1979* (the LEC Act) the Court re-exercises the functions of the Council in determining whether to issue the IHO. I concur with the reasoning of Gray C in *Forte Construction Group Pty Ltd v Inner West Council* [2018] NSWLEC 1400 at [20] that the Court's power permits it to exercise the discretion conferred at s 25(2) of the Heritage Act, but that discretion is subject to the limitations imposed by the terms of the Ministerial Order. It is the role of the Court to determine if the necessary threshold tests of the Ministerial Order are met (*Byron Ventilink Pty Ltd v Byron Shire Council* (2005) 142 LGERA 215; [2005] NSWLEC 395 at [56]). At (1)(b)(i) in the terms of the Ministerial order, and specifically the use of the word "or", makes it clear that there are two alternate states of satisfaction, at least one of which must be reached in order to satisfy section (1)(b)(i) of Schedule 2 of the Ministerial order. The first is that "the item is... of local heritage significance" and the second is that "the item... is likely to be found on further inquiry and investigation, to be of local heritage significance". This reflects that the words 'the item is' and 'of' are conjunctive, as are the words 'is likely to be found' and 'to be of'.
- 19 On the preceding basis the effect of the statutory regime requires that, for the Court to exercise the discretion at s 25(2) of the Heritage Act, the following conditions must be met:

Heritage Act

- (1) The conditions on the exercise the power detailed in the Ministerial Order must be met: s 25(1) of the Heritage Act. Those are as follows:
- The Council needs to be a Council listed in Schedule 1 of the Ministerial Order as authorised to make IHO's: Schedule 1 of the Ministerial order

- An environmental planning instrument applies to the Council's local government area that contains a schedule of heritage items: Schedule 2 (1)(a) of the Ministerial order
 - Consideration of a preliminary heritage assessment by a suitably qualified expert: Schedule 2 (1)(b) of the Ministerial order
 - The Court considers that the item is or is likely to be found on further inquiry or investigation, be found to be of local heritage significance: Schedule 2 (1)(b)(i) of the Ministerial order
 - The item is being or is likely to be harmed: Schedule 2 (1)(b)(ii) of the Ministerial order
 - The IHO is confined to the item determined as being under threat: Schedule 2 (1)(b)(iii) of the Ministerial order
- (2) The subject of the IHO needs to be a place, building, work, relic, moveable object or precinct in the council's area: s 25(2) of the Heritage Act,
- (3) The subject of the IHO needs to be one that the Court considers may, on further inquiry or investigation, be found to be of local heritage significance: s 25(2) of the Heritage Act,
- (4) The Court considers the subject of the IHO is being or is likely to be harmed: s 25(2) of the Heritage Act.

20 The Heritage Guidelines list the NSW Heritage assessment criteria as:

"Criterion (a): Historic significance

'An item is important in the course, or pattern, of NSW's cultural or natural history (or the cultural or natural history of the local area)';

Criterion (b): Historical association

'An item has a strong or special association with the life or works of a person, a group of persons, of importance in NSW's cultural or natural history (or the cultural or natural history of the local area)';

Criterion (c): Aesthetic/ creative/ technical achievement

'An item is important in demonstrating aesthetic characteristics and /or a high degree of creative or technical achievement in NSW (or the local area)';

Criterion (d): Social, cultural, and spiritual

'An item has strong or special association with a particular community or cultural group in NSW (or the local area) for social, cultural or spiritual reasons.'

Criterion (e): Research potential

'An item has the potential to yield information that will contribute to an understanding of NSW's cultural or natural history (or the cultural and natural history of the local area)';

Criterion (f): Rare

'An item possesses uncommon, rare or endangered aspects of NSW's cultural or natural history (or the cultural or natural history of the local area)';

Criterion (g): Representative

'An item is important in demonstrating the principal characteristics of a class of NSW's

- cultural or natural places; or
- cultural or natural environments.

(or a class of the local area's

- cultural or natural places; or
- cultural or natural environments.)"

Consideration of preconditions

Ministerial Order Conditions

- 21 Willoughby City Council is listed under Schedule 1 of the Ministerial order as a Council that is authorised to make IHO's under s 25 of the Heritage Act.
- 22 It was uncontroversial in the proceedings that condition (1)(a) of Schedule 2 to the Ministerial Order was met when the IHO was made. LEP 2012 includes, at Sch 5, a list of heritage items derived from a heritage study. Further, LEP 2012 at cl 5.10 includes provisions for the management of those items.

- 23 The Council, and the Court, have preliminary (and other) heritage assessments, of the items the subject of the IHO. There is no contention raised that those assessments are not prepared by a person who has appropriate heritage skills and experience. I accept that the preliminary heritage assessment, the peer reviews and the heritage evidence discussed later in this judgement satisfy Schedule 2 (1)(b) of the Ministerial order.

Is the place of local heritage significance, or is it likely to be found on further inquiry or investigation to be so?: Schedule 2(1)(b)(i) of the Ministerial order

Expert evidence

- 24 The Court was assisted in the proceedings by expert heritage evidence from Mr John Oultram for the Applicant and Ms Vanessa Holtham for the Respondent.

- 25 In addition to the expert evidence, the following assessments of the area of 43 Donnelly Road, Naremburn (excluding the heritage listed St Leonards Church) forms part of the evidence in the proceedings:

- (1) Preliminary Heritage Assessment: 43 Donnelly Road, Naremburn. Vanessa Holtham April 2023 (*"Preliminary Heritage Assessment"*)
- (2) Heritage Assessment: 43 Donnelly Road, Naremburn. Vanessa Holtham 22 August 2023 (*"Heritage Assessment"*)
- (3) Interpretation Strategy, St Leonards Church Complex, 43 Donnelly Road, Naremburn. Heritage 21. March 2023
- (4) Heritage Peer Review, 43 Donnelly Road, Naremburn by John Oultram dated July 2023
- (5) Weir Phillips, Peer Review Heritage Assessment St Leonards Catholic Church, No 43 Donnelly Street, Naremburn.

(6) Conservation Management Plan, St Leonards Church Complex, 43 Donnelly Road, Naremburn. Heritage 21. March 2023 (*"the CMP"*)

- 26 In considering the condition at Schedule 2(1)(b)(i) of the Ministerial order I have read and taken into account these assessments. In particular I have considered the analysis of each of these assessments against the criterion in the Heritage Guidelines.
- 27 The experts disagree on the contribution of the St Leonards School Buildings (referred to at [para 3] as the School Building (1932) and School Annex buildings (1936)) and their significance in relation to the overall significance of the place.
- 28 Applying the Heritage Guidelines, the Preliminary Heritage Assessment and the subsequent Heritage Assessment conclude that the place meets four of the criteria listed at [20].
- 29 In the joint report the experts agree that the threshold is not met for associate significance. The criterion in dispute between the experts are: (a): Historic Significance; (c) Aesthetic/ creative/ technical achievement; (d) Social cultural and spiritual significance; (g) Representativeness.
- 30 Applying the Heritage Guidelines, a finding that the place meets the threshold for one criterion is sufficient to meet the threshold for listing as an item of local heritage significance. To meet the condition at Section 1(b)(i) of Schedule 2 of the Ministerial Order, the Court is required to consider whether "the item *is or is likely to be found*, on further inquiry and investigation, to be of local heritage significance" (Emphasis added).
- 31 Mr Oultram's evidence is organised into two considerations. Firstly, are the school buildings (School Building (1932) and School Annex buildings (1936)) of sufficient significance to be considered local heritage items in their own right. Secondly, does the school make a sufficient contribution to the place to justify the listing of the place as a local heritage item.

32 Mr Oultram argues the conclusion to both considerations is no.

33 In response to the first question Mr Oultram provides the following conclusions relevant to the specific criteria.

Historic significance

34 Mr Oultram's conclusions in relation to the criterion (a) can be summarised as follows:

- The 1932 School Building is at the lower end of historical and aesthetic significance.
- That he disagrees with the evidence of Ms Holtham that the group of buildings on the site clearly represent an historically connected complex. He argues that not all observers would link the school buildings to the Church and that there is no link in architectural merit of the buildings.
- That the loss of the historic use of the site as a school has diminished its historical significance.

35 In the joint report Mr Oultram notes that the CMP does not make the case that the School, even as part of the complex, should be listed as a heritage item in LEP 2012. He concurs with this conclusion.

Aesthetic/ creative/ technical achievement

36 In considering this criteria Mr Oultram makes the following points and concludes an assessment against the preceding criteria does not support listing:

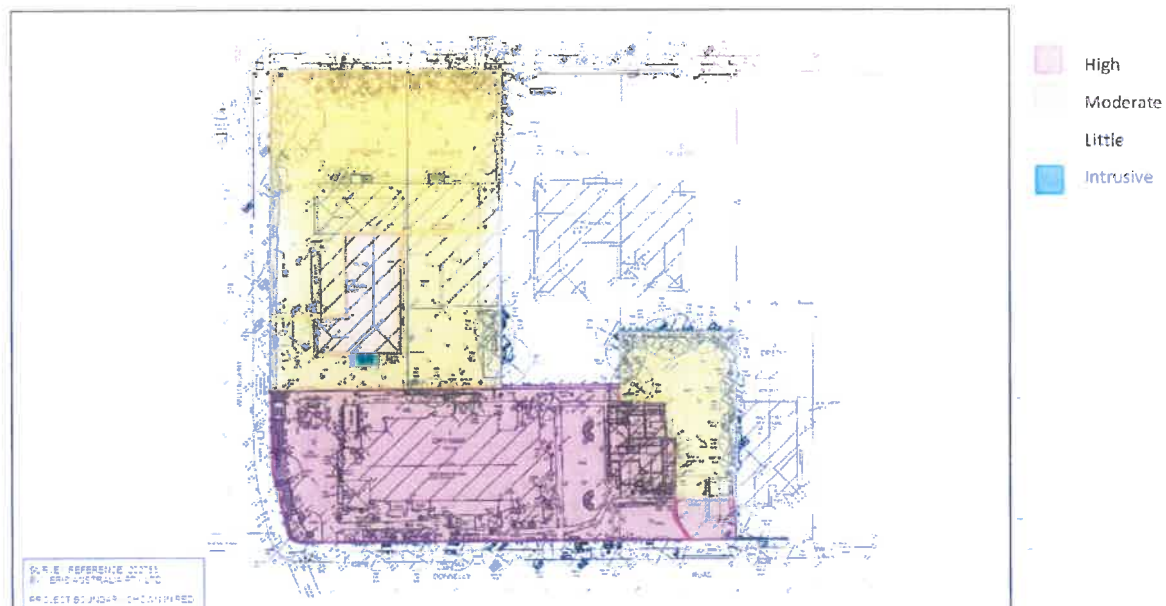
- He supports the assessment of significance of fabric detailed in the CMP.
- Applying the sub criteria of inclusion in the Heritage Guidelines under this criterion, none apply.

- Further, he argues that the school:

- “ • is a modest and largely undesigned example of Interwar school building.
- is not a seminal or important work by a designer or architect of note.
- may have been designed by the parish priest Father J Rohan.
- has none of the architectural qualities of the Church or presbytery”

(Exhibit 2)

- 37 In addition to his expert evidence, I note that in his peer review Mr Oultram agreed with the delineation of the gradings of significance noted in the CMP. Those gradings are extracted below:



Social cultural and spiritual significance

- 38 In response to this criteria Mr Oultram disagrees with the evidence of Ms Holtham that the purpose of the IHO is to expand the curtilage of the Church (being the currently listed item on the site). In contrast he argues the purpose is to determine if the place itself (being Lot A in DP 341975 and Lot 1 in DP 320984) is, or is likely to be found on further investigation or enquiry, to be of local heritage significance. I agree with Mr Oultram’s evidence that this is the appropriate enquiry given the terms of the IHO.

- 39 Further, Mr Oultram concludes that the social significance of the School has been severely diminished by its closure in 1996 and what remains is better characterised as an association for former pupils, staff and the religious which is not sufficient to support a conclusion of local significance.

Representativeness

- 40 In relation to representativeness Mr Oultram concludes that:

“it is not in question that The subject site is also representative of an early Catholic church and school complex/ precinct. This is self-evidently the history of the place. It is the degree to which it demonstrates this i.e. it represents this [in] a meaningful way.

The school has been closed for almost thirty years and this aspect of its representativeness has been largely lost. It is also a poor example of its type and, on a stand-alone basis, we consider that the school building would not meet the criterion.”

(Emphasis added.) (Exhibit 2)

- 41 Further, Mr Oultram concludes that analysing the second question, “does the school make a sufficient contribution to the place to justify the listing of the place as a local heritage item”, the answer is also no. His reasoning can be summarised as follows:

- The provision of the land for a school in proximity to the church is a common feature with numerous examples detailed in the CMP and the Heritage Assessment.
- The 1932 School Building is modest, mundane and of little aesthetic significance.
- The 1936 single storey school building appears to have been built using salvaged materials, but there is no evidence that those materials came from the 1932 building. Consistent with the 1932 School Building it is also a simple, unattributed design.
- The construction techniques employed in both buildings are not complex or unique.

- The buildings have been significantly altered and the northern addition is intrusive.
- Social significance is a common theme for such buildings as they were built to serve the local catholic community. The School ceased usage thirty years ago and any social significance can be readily interpreted in the Heritage 21 Strategy of March 2023.
- The buildings are of little aesthetic merit and play little role in providing a setting to the Church.

(Exhibit 2)

- 42 The Heritage Assessment prepared by Ms Holtham is annexed to the joint report. In that report she includes an assessment of the significance of whole site against the criteria in the Heritage Guidelines. For example, under the criterion of “Social and Cultural significance” she concludes that:

“This group of buildings has social significance for the Naremburn and Diocesan Catholic community for the long term use of the site for a school and a place of public worship and the symbiotic operation of these functions, which were closely related. *The complex satisfies this criterion.*”

(Emphasis added.)

- 43 As extracted at [1] the terms of the IHO applies to the land excluding the bounds of the St Leonards Church which is already listed. On its terms IHO is not imposed to redefine the curtilage of that item, but to separately list the additional land identified in Figure 1 (see [3]) and the buildings which they contain.

- 44 In the Heritage Assessment Ms Holtham concludes that, consistent with the Preliminary Heritage Assessment the place meets the following criterion in the Heritage Guidelines (see her reasoning summarised at [6]):

- Criterion (a): Historic significance
- Criterion (c): Aesthetic/ creative/ technical achievement

- Criterion (d): Social, cultural, and spiritual
- Criterion (g): Representative

(Exhibit 2)

- 45 Ms Holtham's analysis summarised at [6] is consistent with her evidence in the joint report which argues that the preceding four criteria in the Heritage Guidelines are met at a local level. She maintains the conclusion that "the complex of buildings contained within 43 Donnelly Road Naremburn "Lot 1 DP 320984, Lot A DP 341975, Lot 1 DP 115889) meets the threshold for heritage listing at a local level for its continued and recognised significance to the Willoughby Local Government Area." (Exhibit 2). Where her reasoning extracted from the Heritage Assessment provided at [6] is duplicated in the joint report, I have not repeated it in the following summary.
- 46 In the joint report Ms Holtham addresses the opportunity of the IHO to define (and expand) the curtilage of the listed St Leonards Catholic Church. She concludes that "(t)he definition of the curtilage is clearly the crux of the Interim Heritage Order not whether each individual building meets the threshold for heritage listing as an individual entity." (Exhibit 2). As noted at [43], the IHO is not imposed to redefine the curtilage of the Church, but to separately list the additional land identified in Figure 1 (see [3]) and the buildings which they contain. To the extent the curtilage is a consideration, I accept it is captured by the second question posed by Mr Oultram namely, 'does the school make sufficient contribution to the place to allow the listing of the whole site as a heritage item'.
- 47 In the joint report Ms Holtham argues that the historical significance of the school, and its importance to the catholic community of St Leonard's Church is underpinned by two key facts: firstly, that the funding for the school was achieved by fund raising by the parish; and secondly, that it was built before the final stage of the Church was completed. She argues these facts emphasises the importance placed on catholic education by the community and the link between the school buildings and the development of the site as a whole. Ms

Holtham concludes that “education and religion were and still are symbiotic in nature and the existence of the St Leonard’s school is every part as significant to the complex as the Church and Presbytery’. (Exhibit 2)

48 Further, Ms Holtham disagrees with Mr Oultram’s interpretation of the CMP in relation to the criteria of Historic Significance. She argues that the CMP is aligned with the conclusion in the Heritage Assessment that the place satisfies this criterion for listing at a local level.

49 In her expert evidence Ms Holtham maintains her view that the school buildings form part of an integral part of a complex of buildings on the site as the church, presbytery and school operated together and are understood together. Applying the Heritage Guidelines, she concludes that the place warrants listing as it meets the threshold for aesthetic significance at a local level.

50 In relation to the social significance criteria Ms Holtham notes in the joint report that the CMP aligns with her conclusions in the Heritage Assessment that the that the place warrants listing as it meets the threshold for social significance at a local level.

Findings

51 The CMP includes an assessment of the place against the State Historical Themes and the Heritage Guidelines. Relevantly it notes that:

- against the theme “Developing local, regional and national economies”:

“The subject site has been the location of the St Leonards Catholic church since 1912 and seen the congregation and the local community meet at the subject site for key occasions. The main school hall of the St Leonard’s Catholic School was also a key place of convention where the local community met for social functions including dances.”

- against the theme “Educating”:

“The St Leonard’s Catholic School moved to the subject site at the corner of Willoughby and Donnelley Roads in 1933. Previously it was located at Market Street in Naremburn but moved as the number of students increased. Therefore, the subject site has key historical significance for educating the local

community and students from surrounding suburbs till the St Leonard's Catholic School shut down in 1996."

- against the theme of "Developing Australia's cultural life":

"The St Leonards Catholic School is socially significant to the local community of Naremburn as well as the alumni of the school as it was started in 1894 in Market Street in Naremburn and was one of the earliest Catholic education site. The school hall was the location of multiple social activities for the local community."

(Exhibit 2)

52 By reference to the Heritage Guidelines a place is of historic significance (criterion (a)) if the place is important in the course, or pattern, of the local area's cultural or natural history.

53 The Heritage Guidelines note that a place is no less important, or should be excluded from consideration for listing, on the basis that other places or items with similar characteristics have already been listed. In this case other religious schools in the vicinity. Accordingly I have given Mr Oultram's reasoning that the existence of other catholic school/church relationships on sites in the vicinity counts against the sites significance little weight.

54 I note that the CMP concludes that the place demonstrates historic significance at a local level. The reasoning in support of that conclusion is extracted below:

"The subject site shows the historical development of the residential subdivision of the Naremburn locality in the late Victorian period. The subject site indicates historical significance for being owned by Alexander Dodds who was one of the earliest landowners in Naremburn. The subject site also used to be the location of the residence of Alexander Dodds – '*Merrenburn*', which was constructed sometime between 1875-1885. This residential building was purchased by the Sisters of St Joseph in 1912 and was used as a convent until it was demolished in 1935 to construct the new convent which is currently located at 36 Merrenburn Avenue.

St Leonard's Catholic Church illustrates historical significance for its association with the early development of religious buildings in Naremburn. The presbytery and school located on the site also document the growth and evolution of the Catholic education in the twentieth century in the Lower North Shore of Sydney and within the locality of Naremburn. The presbytery has also retained its original historic use as a residence. The St Leonards Catholic school started in Market Street within Naremburn and moved to the school site, at the corner of Merrenburn Avenue and Willoughby Road in 1932. The school

continued to function at the subject site till it shut down in 1996. The subject school therefore attains historical significance for imparting Catholic education within the locality of Naremburn and other surrounding suburbs of the lower North Shore.

As such, the subject site demonstrates historic significance at a local level.”

(Exhibit 2)

- 55 Given the above analysis, I am satisfied that the CMP does not restrict its conclusion of historical significance at a local level to the Church and Presbytery land portion of the site (Lot 1 in DP 115889) but extends that finding to the land subject of the IHO (Lot A in DP 341975 and Lot 1 in DP 320984), the location of the School Building and School Annex buildings. Such a conclusion is supported by the nomination in the CMP of the majority of the 1932 School Building fabric as being of moderate significance.
- 56 I am satisfied on the evidence of the heritage experts in the proceedings and the Heritage Assessment and the CMP that the place meets the threshold of local heritage significance on the basis of historical significance. I agree with the reasoning in the CMP that the presbytery and school located on the site of the Church document the growth and evolution of the Catholic education in the twentieth century in the Lower North Shore of Sydney and within the locality of Naremburn. In my view the funding and construction of the school by the parish demonstrates the expansion, and priorities of the parishioners, and the role that agenda had in shaping the urban development of the locality is consistent with a finding of local historical significance. The parish and diocese has made an important contribution to the locality and that contribution has a direct association with the place, relevantly the School Building and School Annex buildings contained in Lot 1 DP 320984 and Lot A DP 341975.
- 57 Further, I accept and prefer the evidence of Ms Holtham that the place warrants listing as it meets the threshold for social significance at a local level on the grounds of the use of the site by the community for worship and social events since the purchase by the Sisters of St Joseph in 1912. I am satisfied that the place is important by reason of its special association with the St Stephen’s parish, the Broken Bay diocese, and the Catholic community of Naremburn at

large. Further, I accept that the place contributes to that community's sense of identity.

58 Whilst I accept Mr Oultram's evidence that the social significance of schools is a common theme, as many of these buildings were constructed to serve the community, I am persuaded that the place the subject of the IHO is more than common. I base this conclusion on the following factors: its early establishment; its source of funding through fundraising by the church parish; the priority given to the establishment of the school over the completion of St Stephen's Church; the use of part of the school as a church hall; and the association with the Sisters of St Joseph from 1912. On this basis I accept and prefer the evidence of Ms Holtham that the place containing the School Building and School Annex buildings (Lot 1 DP 320984 and Lot A DP 341975) meets the threshold for listing at a local level for social, cultural and spiritual significance.

59 I am satisfied the condition at Schedule 2(1)(b)(i) of the Ministerial order is met.

Is the item being or is likely to be harmed?: Schedule 2 (1)(b)(ii) of the Ministerial order

60 Mr Galasso SC for the Applicant argues that condition sch 2(1)(b)(ii) the Ministerial Order is not met as the item is not being or likely to be harmed'.

61 The Applicant, details this position in their statement of facts and contentions (SOFC) as follows:

"9. The IHO should be revoked as there was no basis for the Council to have considered, and there is no basis for this Court on appeal to consider, that the buildings on Lot A in DP 341975 are being or are likely to be harmed

Particulars

a. Subsection 25(2) of the Heritage Act requires as a precondition to the discretion to make an interim heritage order the forming of the view that the place, building, work, relic, moveable object, or precinct is being harmed, or is likely to be harmed.

b. Schedule 2 clause (1)(b)(i) of the Ministerial Order Gazetted on 12 July 2013, as made pursuant to s 25(1) of the Heritage Act, requires as a precondition to the discretion to make an interim heritage order the forming of the view that the

place, building, work, relic, moveable object, or precinct is being harmed, or is likely to be harmed.

c. As at the date of the lodgement of the development application as referred to at [39] above, and as at the date of the Council's resolution as referred to at [65] above, and as at the date of the hearing of this appeal, the buildings on Lot 1 in DP 320984 and Lot A in DP 341975 are not being harmed.

d. In so far as the matter of the consideration of whether the buildings on Lot 1 in DP 320984 and Lot A in DP 341975 are likely to be harmed is concerned:

(i) As referred to at [40] above, the development application referred to at [39] above sought consent for the demolition of the buildings on Lot 1 in DP 320984 and Lot A in DP 341975

(ii) As at date of Council's resolution as referred to at [65] above and as at the date of the hearing of this appeal, the only factual basis for considering that the buildings on Lot 1 DP 320984 and Lot A DP 341975 are likely to be harmed via the development application, and then only upon the assumption that development consent for the demolition of those buildings is likely to be granted or should be assumed to be granted.

(iii) In the circumstances of the refusal of the development application as referred to at [46] above, and the filing of the Council's Statement of Facts and Contentions as referred to at [49] above, including, in particular, Contention 5, there was, and there is presently, no foundation for considering that in the absence of a grant of consent for demolition the buildings on Lot 1 in DP 320984 and Lot A in DP 341975 are likely to be harmed.

e. Accordingly, there was no basis, and there is no basis, for considering that the buildings on Lot 1 in DP 320984 and Lot A in DP 341975 are likely to be harmed, as distinct from might be harmed (in the sense of being demolished) upon the grant of development consent for the application referred to in [39] above.

f. In the foregoing circumstances, and for the purposes of s 25(2), and the Ministerial Order, there was, and there is, no foundation for making of the interim heritage order in so far as the matter of harm to the buildings on Lot 1 in DP 320984 and Lot A in DP 341975 is concerned."

(Exhibit B)

62 The relevant development application referred to in the preceding extract is DA/2021/340. By reference to the SOFC that development application, as lodged, seeks consent for a proposed mixed-use development. The works comprise the demolition of the School Building and School Annex construction of a multi dwelling housing development with a new parish hall, a new presbytery, conversion of the existing presbytery to a dwelling and construction of a dwelling house. I note that the development application has subsequently

been amended, however the demolition of the School Building and School Annex is still proposed.

- 63 The Council resolution of 23 October 2023 referred to in the extract at [10] is extracted below:

"1. Upon consideration of a report prepared Vanessa Holtham, heritage architect, titled '43 Donnelly Road, Naremburn Heritage Assessment', the Presbytery and School Buildings located at 43 Donnelly Road, Naremburn (Lot 1 in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984) form, with the St Leonard's Catholic Church, a complex of buildings that are of local heritage significance such that the Council proceed with the Planning Proposal to list the complex of buildings as a local heritage item.

2. Council place on Schedule 5 of the *Willoughby Local Environmental Plan 2012* the complex of buildings located at 43 Donnelly Road, Naremburn (Lot 1 in Deposited Plan 115889, Lot A in Deposited Plan 341975 and Lot 1 in Deposited Plan 320984), by:

a. Forwarding the Planning Policy Proposal to the Minister administering the *Environmental Planning and Assessment Act 1979* for a Gateway Determination under section 3.34 of the Act,

b. Endorsing the Planning Proposal for public exhibition which is to be undertaken in accordance with the requirements of any Gateway Determination from the Minister; and

c. Requesting that the Minister nominate Council as the plan making authority pursuant to section 3.31 of the Act and delegate to the Head of Planning authority to make, as required, minor amendments to the Planning Proposal which do not alter its policy intent.

3. Council notes a further report will be provided to Council after the public exhibition of the Planning Proposal."

(Exhibit 4)

- 64 In his oral submissions Mr Galasso SC emphasised two elements. Firstly, that the fact of lodgement of a development application for demolition is not sufficient for the view to be formed pursuant to Schedule 2 (1)(b)(i) of the Ministerial order that there is a likelihood of harm to the place. Secondly, that the term "likely" should be given its ordinary meaning as described in the Macquarie Dictionary:

"Likely

(1) probably or apparently going or destined (to do, be, etc): likely to happen

(2) seeming like truth, fact or certainty, or reasonably to be believed or expected; probable: a likely story

...

(Macquarie Dictionary 8th Edition, Volume 2)

65 Mr Larkin SC, for the Respondent argues that the Applicant's submission should not be accepted by the Court. Firstly, he submits it would lead to the unreasonable outcome that when a development application is lodged seeking demolition any unlisted item would be rendered ineligible for protection, via an IHO. Secondly, that Schedule 2 (1)(b)(i) of the Ministerial order would only be met once a consent was granted or is likely to be granted.

66 Further, Mr Larkin SC submits that the approach of Mr Galasso SC is not consistent with previous decisions of the Court and the consideration of the criteria at Schedule 2 (1)(b)(i) of the Ministerial order, citing: *Kelly v North Sydney Council* [2017] NSWLEC 1546 at [33] and [39]; *Zhao v Ku-ring-gai Council* [2022] NSWLEC 1729 at [65(1)]; *Beaches Capital Ventures Pty Ltd v Wingecarribee Shire Council* [2022] NSWLEC 1504 at [51]-[55] and *Skermanic Pty Ltd v North Sydney Council* [2023] NSWLEC 1396 at [53].

67 In applying the criteria at Schedule 2 (1)(b)(i) of the Ministerial order Mr Larkin SC argues that the Court should apply an interpretation of 'likely' consistent with the decision of Preston CJ in *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* (2010) 210 LGERA 126; [2010] NSWLEC 48 at [84]. That being that "likely" simply means "a real chance or possibility".

68 The experts in their joint report note their agreement that "the site is partly under threat and likely to be harmed because of the current development application". (Exhibit 2).

Findings

69 Schedule 2 (1)(b)(i) of the Ministerial order is satisfied by a finding that either the item or place is being harmed, or is likely to be harmed. There is no evidence

that the place the subject of the IHO is currently being harmed. I consider that the place is likely to be harmed if the IHO over Lot 1 in DP 320984 and Lot A in DP 341975 is revoked. My reasoning follows.

- 70 At the time that the IHO was gazetted there was a development application lodged with the Council that, as detailed at [5] sought demolition of key physical elements of the place (the School Building and School Annex) and the construction of new development on the land. That development application was refused by the Respondent on 26 July 2022.
- 71 The Applicant has appealed that refusal to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). Whilst this judgment does not infer any particular outcome in the development application under appeal, the fact of the appeal means the exercise of power to determine the development application will be assessed de novo by the Court and the development application has not, as yet, been finally determined.
- 72 If consent is granted to the development application, demolition of key physical works (the School Building and School Annex) and the construction of new development will occur on the land covered by the IHO. Those works will harm the place as listed in the IHO. Adopting either of the alternative interpretations of the parties of the term 'likely', I find Schedule 2 (1)(b)(i) of the Ministerial order is satisfied by the fact of the development application which seeks consent for demolition and its appeal to the Court pursuant to s 8.7 of EPA Act.
- 73 Further, in reaching this finding I agree with and adopt the reasoning of O'Neill C in *Beaches Capital Ventures Pty Limited v Wingecarribee Shire Council* [2022] NSWLEC 1504 at [54]-[55] as extracted below. In those proceedings the Court held that the test at condition (1)(b)(ii) of the Ministerial order was satisfied even in circumstances where the relevant development application was withdrawn. I agree and adopt the reasoning of O'Neill C, extracted below, that the threshold test of 'likely' should be applied in the context of the further condition at (2)(c) of the Ministerial order. That condition prevents the Council from making an IHO where one had been previously made

on the land. A circumstance that, in my view, argues for a lower threshold to be given to the term 'likely'.

"[54] On the applicant's case, it would be appropriate for an IHO to be revoked whenever a development application (that satisfied the threshold test for condition (1)(b)(ii) of Sch 2 to the Ministerial order at the time of making the IHO) is withdrawn. Yet once an IHO is revoked, under condition (2)(c) of Sch 2 to the Ministerial order, a council cannot make an IHO where the council has previously placed an IHO on the item. If a fresh development application is made following the revocation of the IHO, and the Council again considers the heritage significance of the item would be harmed by the proposed development, the Council is prevented by the conditions of the Ministerial order from making another IHO over Lot 110. Read in context, condition (1)(b)(ii) of Sch 2 to the Ministerial order does not require that an IHO be revoked simply because the circumstance at the time of the making of the IHO that fulfilled the condition has been changed. The lodging of the development applications alerted the Council to the potential harm of the item and met the requirement of the Ministerial order authorising the Council to make the IHO. The potential harm to the item posed by a development consent still exists, despite those particular development applications being withdrawn.

[55] I am satisfied that the development applications lodged with the Council at the time the IHO was made satisfied the threshold test for condition (1)(b)(ii) of Sch 2 to the Ministerial order and that the threat of harm continues to exist, despite the withdrawal of those development applications, because a new development application could be lodged, or a CDC issued, prior to the commencement of the amending LEP 2010 to include Karingal under Sch 5 as a local heritage item."

74 The condition at Schedule 2 (1)(b)(i) of the Ministerial order is met.

Conclusion

75 As detailed at [19] the statutory regime requires the satisfaction of a number of conditions in the Ministerial Guidelines be met prior to the making of an IHO. I am satisfied those conditions are met:

- (1) As found at [21] the Respondent is a Council listed in Schedule 1 of the Ministerial Order;
- (2) LEP 2012 is an environmental planning instrument applies to the Council's local government area that contains a schedule of heritage items: see [22];

- (3) The Court has before it a Preliminary Heritage Assessment by a suitably qualified expert;
- (4) The place is of local heritage significance, meeting criterion (b) Historical association and criterion (d) Social, cultural and spiritual significance of the Heritage Guidelines: see [59];
- (5) I am satisfied the item is being or is likely to be harmed: see [74].

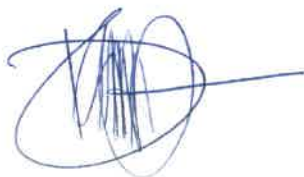
76 Further, on the same reasoning I am satisfied the terms of s 25(2) of the Heritage Act are met and it is not appropriate to revoke the IHO over Lot A in DP 341975 and Lot 1 in DP 320984, the location of the School Building and School Annex buildings.

Orders:

77 The Court orders:

- (1) The appeal is dismissed.
- (2) The exhibits, other than Exhibit A and 1 are returned.

I certify that this and the preceding 27 pages are a true copy of my reasons for judgment.



.....

D Dickson

Commissioner of the Court
