



Heritage Victoria and Heritage Council of Victoria Policy Guideline

MATTERS TO BE CONSIDERED IN DETERMINING A PERMIT APPLICATION UNDER SECTION 73(1)(b) OF THE HERITAGE ACT 1995

Adopted 1 May 2012

Purpose

1. This Guideline is intended to provide guidance as to the matters that should be considered by the Executive Director of Heritage Victoria (the Executive Director) in determining a permit application where 'the reasonable or economic use' and 'undue financial hardship to the owner' are relevant matters under s73(1)(b) of *the Heritage Act 1995* (the Act).
2. The Guideline is intended to assist:
 - 2.1. Heritage Victoria staff assessing a permit application in relation to a place or object entered on the Victorian Heritage Register.
 - 2.2. The Executive Director in fulfilling his/her obligations under s73(1)(b) when determining a permit application.
 - 2.3. The Heritage Council of Victoria (the Heritage Council) in determining any appeal against a decision of the Executive Director to refuse a permit or to issue a permit subject to conditions.
 - 2.4. Persons submitting a permit application to the Executive Director or making a submission to the Heritage Council in respect of a decision by the Executive Director in which they wish matters to be considered under s73(1)(b).

Relevant legislation

3. This Guideline relates to s73(1)(b) of the Act which provides:
 - 73(1) *In determining an application for a permit, the Executive Director must consider:*

.....
 - (b) *the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object, or cause undue financial hardship to the owner in relation to that place or object.*



Policy Statement

4. The following policy and guidelines apply to applications for a permit lodged under s67 of the Act, where the Executive Director is considering refusing the permit.
5. If the Executive Director forms the opinion that the proposed development will have a detrimental effect on the cultural heritage significance of the registered place or registered object then the Executive Director must consider section 73(1)(b).
6. Section 73(1)(b) requires the Executive Director to consider:
 - 6.1. The extent to which the refusal would affect the reasonable or economic use of the heritage place or registered object; or
 - 6.2. The extent to which the refusal of the application would cause undue financial hardship to the owner in relation to that place or object.

The extent to which the application, if refused, would affect the reasonable use of the registered place or registered object

7. When considering section 73(1)(b) the Executive Director needs to first determine what is the reasonable use of the heritage place or registered object.
8. A reasonable use is to be assessed objectively having considered the particular circumstances of the proposal before the Executive Director. In forming a view the Executive Director might consider (1) the historic and recent uses of the place or object (2) other potential uses, of the place or object, (3) the context within which the place or object is located, and (4) the long-term financial viability of the place or object if the current use is maintained.
9. An example of a use which might be considered unreasonable could be a proposal to convert a commercial property within a strip shopping centre into a residence. A refusal of a permit for this conversion would not affect the reasonable use of the building for commercial purposes.
10. An example where the Executive Director may form the view that the refusal to grant a permit would interfere with the reasonable use might be applications to upgrade facilities to bring them to contemporary or safe standards. For example, new bathrooms, kitchens, access provisions or other necessary facilities to meet current regulations or legislation.
11. If the reasonable use of the premises will be adversely affected by the refusal of the permit, the Executive Director may determine to grant a permit.



The extent to which the application, if refused, would affect the economic use of the registered place or registered object

12. As an alternative to the reasonable use criterion the concept of 'economic use' of the registered place or registered object may be considered. The Executive Director may request further evidence from the permit applicant regarding this criterion.
13. The Act does not provide a timeframe for which the assessment of the economic use of the heritage place is to be considered. If the permit applicant contends that the future economic use of the registered place or registered object may be affected for some time in the future, they must provide the Executive Director with evidence to substantiate this contention, the basis of their suggested timeframe and the likely impacts on the economic use of the heritage place or object.
14. Another potentially relevant situation is where refusal of the permit would affect the economic functioning of the place or object in terms of limiting its ability to generate income to fund future conservation and maintenance of the place or object. For example, disallowing a place to be developed so that it can be used for commercial purposes to generate funds necessary for:
- the future conservation and maintenance of the heritage significance of the registered place or object and/or
 - meeting the cost of capital improvements relating to the conservation of the registered place or object (including reasonable debt repayment and interest costs); and/or
 - property ownership costs (rates and taxes) directly associated with the registered place or object
- may amount to adversely affecting its economic use.
15. Another example may be to allow works which enable a more sustainable use of the registered place to ensure that the historic or current use continues to be economically and financially viable.
16. The assessment of the economic use of the registered place or object may require evidence from the permit applicant that demonstrates:
- the degree to which the economic functioning of the place will be affected, for example in terms of income generated; and
 - that the income generated will be used for the conservation and maintenance of the place or object, property ownership costs (rates and taxes) or servicing debt associated with the proposed works.
- It may be appropriate to address these matters in permit conditions.
17. Material submitted by the permit applicant with regard to the economic function of the registered place or object will be used by the Executive Director to make the decision on the permit application. The Executive Director will normally require that the permit applicant makes this material



(or an edited version of this material) publicly available to enable third parties to make submissions under s69 of the Act.

Undue financial hardship to the owner

18. The assessment of undue financial hardship relates to the owner of the registered place or object in relation to that place or object. It is to be assessed as at the date the permit application is being considered by the Executive Director. The Executive Director may request evidence from the owner that details the undue financial hardship to the owner that will result from a refusal of the permit. A causal link must be demonstrated between the refusal of the permit and the undue financial hardship claimed by the owner.
19. It emphasised that it is not simply financial hardship to the owner which must be demonstrated. Rather, *undue* financial hardship to the owner must be demonstrated. Undue financial hardship will be financial hardship which is not reasonable.
20. The Executive Director should consider the imposition of a condition which ties the permit to the owner of the registered place at the time of the assessment of the permit application. For example a condition in the following terms: 'This permit expires upon [the name of the registered proprietor at the date of the application] no longer being the registered proprietor of the [identify the registered place or object].'
21. Material submitted by the owner in support of a claim of undue financial hardship will be used by the Executive Director to make the decision on the permit application. The Executive Director will normally require that the owner makes this material (or an edited version of this material as provided by the owner) publicly available to enable third parties to make submissions under s69 of the Act.