

Development Victoria (ABN ~~TBC~~61 868 774 623)

AND

**Kew Development Corporation Pty Limited (ABN 58 119 766
264)**

AND

Heritage Council of Victoria (ABN 87 967 501 331)

Covenant Pursuant to Section 134 of the Heritage Act 2017

**Subject Land:
1-8 Main Drive, Kew VIC 3121**

Heritage Register Number H2073

Covenant pursuant to section 134 of the Heritage Act 2017

COVENANT Dated the _____ day of _____, 2019.

Parties

Name	Development Victoria (ABN TBC61 868 774 623)
Address	Address, Suburb, Victoria postcode <u>Level 9, 8 Exhibition Street, Melbourne VIC 3000</u>
Short Name	Development Victoria
Name	Kew Development Corporation Pty Limited (ABN 58 119 766 264)
Address	C/- Walker Corporation, Level 21, governor <u>Governor</u> Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
Short Name	Owner <u>KDC</u>
Name	Heritage Council of Victoria (ABN 87 967 501 331)
Address	8 Nicholson Street, Melbourne, Victoria, 3812
Short Name	Heritage Victoria

Background

- a. Heritage Register Number H2073 lists Former Kew Cottages (Kew Residential Services) at Princess Street (**Heritage Place**) as a Heritage Place pursuant to Part 3 of the *Heritage Act 2017 (Act)*.
- b. The Heritage Place is located on part of the land comprised in Certificate of Title Volume 12159 Folio 025, described as Lot W on PS 826461G, known as 1-8 Main Drive, Kew VIC 3101 (**Land**).
- c. Development Victoria is the current registered proprietor of the Land.
- ~~d. Development Victoria and the Owner are parties to a development agreement whereby the Owner is entitled to become the registered proprietor of the Land and develop the Land.~~
- e.d. The Executive Director, Heritage Victoria has granted the Owner, Heritage Permit number P26760, dated 25 September 2018 (**Permit**), which allows “*construction of a three-storey apartment complex with three above ground storeys and a basement at 1 Main Drive, Kew in accordance with the endorsed plans and subject to below conditions*”.
- f.e. A key feature of the Heritage Place is the heavily vegetated character of the Heritage Place and its immediate surrounds.
- g.f. To ensure that the vegetated character of the Heritage Place is maintained, condition 14 of the Permit requires the Owner to enter into a covenant with Heritage Victoria pursuant to section 134 of the Heritage Act 2017 (Vic), in order to protect and preserve established trees on the Land.
- g. Development Victoria and KDC are parties to a development agreement whereby KDC is entitled to develop the Land.
- h. By executing this Covenant, Development Victoria consents to ~~the Owner~~KDC entering

into this Covenant.

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OPERATIVE PART

The Parties agree

1. Definitions

In this Covenant unless the context admits otherwise:

Act means the *Heritage Victoria Act 2017* (Vic).

Apartment Lot means that part of the Land shown as Lot 8 on the Draft Plan.

Business Day means a day that is not a Saturday, a Sunday or a public holiday in the Melbourne metropolitan area.

Commencement Date has the meaning given under clause 3.

Covenant means this covenant and any covenant executed by the parties expressed to be supplemental to this Covenant.

Development means the apartment development authorised under the Permit.

Development Works means any building or works in connection with the Development.

Draft Plan means proposed plan of subdivision PS733220X, a copy of which is contained in Appendix 1.

Executive Director means the executive director of Heritage Victoria.

Expiry Date means 15 years after the Tree Management Approval Date, being 16 October 2034.

First Review Date means 5 years after the Tree Management Approval Date, being 16 October 2024.

Heritage Place has the meaning given under Background recital (a).

Land has the meaning given under Background recital (b).

Original Owner means the Owner (as named in the Covenant) on the Commencement Date, or a related entity of the Original Owner as may be nominated in writing by the Original Owner from time-to-time.

Owner means the person or persons entitled from time to time to be registered by the Land Titles Office as the proprietor or proprietors of the Land, being Development Victoria as of the date of this deed.

Owners Corporation has the meaning given under the *Owners Corporation Act 2006* (Vic).

Permit has the meaning given under Background recital (c).

Second Review Date means 10 years after the Tree Management Approval Date, being 16 October 2029.

Tree Management Plan means the document entitled '*Tree Management Plan 1-8 Main Drive, Kew*' dated 8 October 2019, prepared by John Patrick Landscape Architects' endorsed by Heritage Victoria on 16 October 2019 (as may be amended by Heritage Victoria from time-to-time). A copy of the Tree Management Plan is

contained in Appendix 2.

Tree Management Plan Approval Date means 16 October 2019.

2. Section 134 Covenant

This Covenant is made under section 134 of the Act to bind ~~the Owner~~KDC and successors as to the conservation of the Heritage Place.

3. Commencement

This Covenant commences from the date this Covenant is executed by all of the parties (**Commencement Date**).

4. Covenant

4.1 The Owner and Heritage Victoria covenant and agree that on and from the Tree Management Plan Approval Date, the Owner will (at its own expense):

- a) comply with all requirements, directions, guidance and recommendations contained in the Tree Management Plan;
- b) engage a suitably qualified consulting arborist with heritage expertise (**Consultant Arborist**) to review the ongoing appropriateness of the Tree Management Plan, at least two (2) months prior to the expiry of both the First Review Date and the Second Review Date.

4.2 In the event that the Consultant Arborist recommends changes be made to the Tree Management Plan under clause 4.1, the Owner will apply to the Executive Director to amend the Tree Management Plan to give effect to those recommended changes in accordance with Condition 4 of the Permit.

4.3 Before any Development Works may commence on the Land, the Owner ~~or KDC~~ must provide Heritage Victoria with financial security (either in the form of an unconditional bank guarantee, or insurance bond, or other instrument as agreed in writing by the Executive Director) for the amount of \$150,000.00 (**Security Deposit**).

4.4 The Security Deposit must be unconditional with regard to expiry date and must provide that:

- a) \$50,000.00 of the Security Deposit will be returned to the Original Owner ~~or, if the Security Deposit has been provided by KDC, to KDC~~ on the First Review Date (subject to satisfactory compliance with Conditions 4, 5 and 6 of the Permit during this initial 5-year period, to the satisfaction of the Executive Director (acting reasonably));
- b) a further \$50,000.00 of the Security Deposit will be returned to the Original Owner ~~or, if the Security Deposit has been provided by KDC, to KDC~~ on the Second Review Date (subject to satisfactory compliance with Conditions 4, 5 and 6 of the Permit during this second 5-year period, to the satisfaction of the Executive Director (acting reasonably));
- c) the remaining \$50,000 of the Security Deposit will be returned to ~~the~~ Original Owner ~~or, if the Security Deposit has been provided by KDC, to KDC~~ on the Expiry Date (subject to satisfactory compliance with Conditions 4, 5 and 6 of the Permit during this third 5-year period, to

the satisfaction of the Executive Director (acting reasonably)); and

- d) any or all of the Security Deposit will be forfeited to Heritage Victoria, in the event of non-compliance with Conditions 4, 5 and 6 of the Permit during either the initial five year period, second five year period or third five year period, as described in clauses 4.4(a), 4.4(b) and 4.4(c) above.

4.5 The parties agree that Heritage Victoria will not be entitled to drawdown on any or all of the Security Deposit under clause 4.4(d), unless it has first:

- a) provided the Owner **and KDC** with notice of any non-compliance with Conditions 4, 5 and 6 of the Permit and an opportunity to rectify any alleged compliance within a reasonable period of time (being not less than 28 days from the date of any notice); and
- b) attempted to resolve any dispute regarding alleged non-compliance in accordance with the dispute resolution procedure under clause 8.

4A. KDC

4A.1 During the period in which Development Victoria is the Owner of any part of the Land, KDC must carry out and be bound by Development Victoria's obligations as Owner under this Covenant. On the date Development Victoria is no longer the Owner KDC is released from its obligations under the Covenant.

4A.2 If KDC reasonably requires the assistance of Development Victoria (in its capacity as Owner) to comply with clause 4A.1, then Development Victoria must use best endeavours to do or cause to be done all things necessary or reasonably desirable (including the execution of any documents) in order for KDC to comply with clause 4A.1.

4A.2 Heritage Victoria acknowledges that all of the covenants made by Development Victoria in its capacity as an Owner in this Covenant may be carried out by KDC and agrees to deal with KDC with respect to the matters set out in this Covenant.

4A.3 Except to the extent that such costs, expenses, losses or damages have been caused or contributed to by Development Victoria, including a failure by Development Victoria to meet its obligation in clause 4A.2, KDC will indemnify and keep indemnified Development Victoria in relation to any direct and actual costs, expenses, losses or damages reasonably incurred by Development Victoria in respect of any breach by KDC's obligations in clause 4A.1 of this Covenant or in respect of any costs incurred by Development Victoria as a result of any party to this Covenant seeking to resolve a dispute in accordance with the dispute resolution provisions contained in this Covenant.

4.A.4 The indemnity from KDC to Development Victoria only applies while Development Victoria is the registered proprietor of any part of the Land and ceases upon the earlier of:

- a) Development Victoria being no longer noted as the registered proprietor of any part of the Land; or
- b) the ending of this Covenant.

5. Notice of Covenant

- 5.1 The Owner ~~Agrees~~ agrees to reimburse the Executive Director for the cost of publishing a notice of the Covenant in the Government Gazette.
- 5.2 The Owner agrees to reimburse the Executive Director for the cost of publishing a notice of this Covenant in a newspaper circulating generally in the area in which the Land concerned is situated.

6. Registration on Title

- 6.1 Pursuant to section 140 of the Act, the Owner agrees to apply to the Registrar of Titles (at its cost), to make any recordings in the Register as are necessary to record the effect of this Covenant against the title of the Land.
- 6.2 The Owner will provide the Executive Director with confirmation that this Covenant has been recorded by the Registrar of Titles within 14 days of the registration of the Covenant.

7. Variation or ending of Covenant

- 7.1 Heritage Victoria and the Owner agree that:
- a) upon registration of the Draft Plan, this Covenant will only encumber the Apartment Lot and will be removed from title of the balance of the Land;
 - b) in the event that an Owners Corporation is created for the Apartment Lot upon registration of the Draft Plan, or separately following completion of the Development, the Covenant will be amended to record the Owners Corporation as the 'Owner' responsible for the performance of the Owner's obligations under this Covenant;
 - c) in the event that the Apartment Lot is subdivided in the future, resulting in any or all of the trees protected under the Tree Management Plan no longer being located on child titles (**Future Child Titles**) under the ownership or control of the Owner, the Owner must consult with and engage with the registered proprietor of the Future Child Titles until the Expiry Date;
 - d) this Covenant will end on the Expiry Date and may be removed from title of the Apartment Lot on and from the Expiry Date; and
 - e) this Covenant may otherwise be varied with the written consent of the parties in accordance with the Heritage Act. Where consent is granted the Owner will, at its own cost and expense, apply to the Office of Titles under section 140 of the Act to have the Covenant varied.
- 7.2 As soon as practicable following the Expiry Date, at the request of the Owner, Heritage Victoria must apply to the Registrar of Titles to release the Covenant from the Heritage Place under section 140 of the Act. The Owner will be responsible for all of Heritage Victoria's reasonable costs in connection with any such request (including registration fees).

8. Dispute Resolution

- 8.1 **Best Endeavours**
Each of the parties will use its best endeavours to co-operatively resolve a dispute.

8.2 Mediation

- (a) If any dispute in relation to this Covenant arises between the parties and the parties cannot resolve it informally any party to the dispute may be notice to the other party refer the dispute to a mediator for resolution.
- (b) If any dispute in relation to this Covenant arises between the parties and the parties cannot resolve it informally any party to the dispute may be notice to the other party refer the dispute to a mediator for resolution.
- (c) The parties agree that:
 - (i) Each will bear their respective costs of the mediation save that the mediator's fee, fees for mediation rooms and costs of shared equipment facilities and services of the mediation will be shared equally;
 - (ii) The venue for the mediation will be agreed between the parties or, failing such agreement, will be nominated by the mediator;
 - (iii) Each party may be legally represented if they so wish; and
 - (iv) Complete confidentiality will be preserved in respect of the mediation and any documents and information used at or in relation to the mediation.

8.3 Condition Precedent

It will be a condition precedent to the commencement to any litigation of any dispute that the issues arising in the dispute will have been the subject of reference under the procedures referred to in clause 8.2.

If the dispute has not been resolved or mediated within 60 days (or some other time agreed by the parties) of receipt of the notice specified in clause 8.2(a), the condition precedent established by clause 8.3 will be deemed to have been satisfied.

8.4 Performance of Obligations Pending Resolution of Dispute

Prior to resolution of a dispute, each of the parties will continue to perform their obligations under this Covenant.

9. General Matters

9.1 Notices

A notice or other communication required or permitted to be served by a Party on another Party must be in writing and may be served:

- (a) personally on the person;
- (b) by leaving it at the person's current address for service;
- (c) by posting it by prepaid post addressed to that person at the person's current address for service;
- (d) by email to the person's current email address for service.

9.2 No waiver

Any time or other indulgence granted by Heritage Victoria to the Owner or any variation of this Covenant or any judgment or order obtained by Heritage Victoria against the Owner does not amount to a waiver of any of Heritage Victoria's rights or remedies under this Covenant.

9.3 Severability

If a court, arbitrator, tribunal or other competent authority determines that any part of this Covenant is unenforceable, illegal or void then that part is severed with the other provisions of this Covenant remaining operative.

9.4 No fettering of Heritage Victoria's powers

Heritage Victoria and the Owner expressly acknowledge that any obligation imposed upon Heritage Victoria under this Covenant does not fetter the future exercise of any statutory discretion of Heritage Victoria or Executive Director, whether in relation to any permit or otherwise, and the provisions of this Covenant must be read accordingly.

9.5 Governing law

This Covenant is governed by and is to be construed in accordance with the laws of Victoria.

10. Interpretation

In this Covenant unless the context admits otherwise:

- (a) the singular includes the plural and vice versa;
- (b) a reference to a gender includes all genders;
- (c) a reference to a person includes a reference to a firm, corporation or other corporate body and that person's successors in law;
- (d) any agreement, representation, warranty or indemnity by 2 or more persons (including where 2 or more persons are included in the same defined term) binds them jointly and severally;
- (e) a term used has its ordinary meaning unless that term is defined in this Covenant. If a term is not defined in this Covenant and it is defined in the Act, it has the meaning as defined in the Act;
- (f) a reference to an Act, regulation or the Planning Scheme includes any Act, regulation or amendment amending, consolidating or replacing the Act, regulation or Planning Scheme;
- (g) the Background forms part of this Covenant;
- (h) the Owner's obligations take effect as separate and several covenants which are annexed to and run at law and equity with the Subject Land;
- (i) any reference to a clause, page, condition, attachment or term is a reference to a clause, page, condition, attachment or term of this Covenant;
- (j) a reference to Heritage Victoria means the body created by the Act and includes its successors and assigns; and
- (k) a reference to the Executive Director means the person required to be employed pursuant to the Act and includes his successors and assigns.

Signing Page

SIGNED AS A DEED BY:

The official seal of Development Victoria is affixed in accordance with the Development Victoria Act 2003 in the presence of:

In the presence of: Signature of Chief Executive Officer



Signature of General Counsel



Full name Name of witness: Chief Executive Officer

Name of General Counsel

Position:

Address:



~~Kew Development Corporation Pty~~)
~~Limited~~ EXECUTED by KEW)
DEVELOPMENT CORPORATION PTY LTD)
ACN 119 766 264 by:

Full Name:

Position:

Address:

In the presence of:

(Signed)

Full name Signature of ~~Witness:~~ director

Position:

Address:

Full Name:

Signature of director/company
secretary
(delete as applicable)

Position:

Address:

In the presence of:

Full Name:

Position:

Address:

In the presence of:

(Signed)

Full name of ~~Witness:~~director (print)

Full name of director/company
secretary (print) (delete as
applicable)

Position:

Address:

Full Name:

Position:

Address:

In the presence of:

The Common Seal of
**HERITAGE COUNCIL OF
VICTORIA** was hereunto
affixed in the presence of
authorised person

Full Name:

Position:

Address:

In the presence of:

(Signed)

Full name of Witness:

Position:

Address:

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Appendix 1: Draft Plan

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Appendix 2: Tree Management Plan

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