

16 July 2020

Steven Avery,
Executive Director
Heritage Victoria,
E. heritage.permits@delwp.vic.gov.au

Dear Steven:

Re: Proposed Kew Cottages Heritage Covenant, Heritage Permit P26760

The Heritage Council of Victoria has requested public comment on the Draft Kew Cottages Heritage Covenant that was Gazetted on 18 June 2020 and advertised a week later in The Age on 26 June 2020.

The Kew Cottages Coalition welcomes the opportunity to make submissions on this Section 134 Draft Covenant because the stated aim of protecting the Kew Cottages development Stage 8 Heritage listed landscape and trees, as set out in the Conditional Heritage Permit P26760 is a most desirable objective, and one that we believe of considerable significance to all Victorians.

However, we have serious concerns regarding the unfinished nature of the Proposed Covenant in its current form, the long delay before it was advertised in the Age, the failure of Heritage Victoria to publish the Draft Covenant documents on your website, and the very limited opportunity that the public has had to access and comment on the documents because of the added difficulties posed by COVID-19.

Indeed, in summary, we believe that many of the numerous errors and omissions in the Proposed Covenant are so serious that if there is to be any realistic hope of the Heritage listed trees being properly protected as is required by Heritage Permit P26760 then the Draft Covenant must be withdrawn, redrawn, and re-advertised for public comment. We, therefore, respectfully request that once the Draft has been adequately and comprehensively amended that it be exhibited for public comment on the Heritage Victoria website for a minimum of 28 days, and preferably for 60 days subject to the COVID-19 restrictions in force at that time.

We would welcome the opportunity to make further representations on this matter if requested to do so.

Yours sincerely,

Brian Walsh

President

Kew Cottages Coalition

E. admin@kew.org.au

KCC Submission.

Key Issues

The Covenant obligation as Gazetted is:

The Covenant will bind the owners of 1-8 Main Drive at the above Heritage Place to the implementation of the approved Tree Management Plan for 1-8 Main Drive, approved under permit P26760 in accordance with the terms of the Covenant.

Government Gazette 18 June 2020

The source of the Obligation' documents

There appear to be 2 versions of the Covenant Permit source documents

1. The Heritage Council Permit Review P28100 decision (Attachment 2 sets out the new Permit P26760 Conditions), 21 Sep 2018
2. The Heritage Permit P26760 issued by the Executive Director, Heritage Victoria, four days later on 25 Sep 2018

Issue 1. Permit P26760 Drafting Errors

Unfortunately there are significant inconsistencies between the two versions of Permit P26760 as published in the above documents. (See copies attached):

This raises the question as to whether it is even possible for a reasonable person to understand what is being proposed in the Gazetted Public Notice and Draft Covenant?

Because the Permit P26760 issued by the Executive Director appears to have at least 3 significant drafting errors in the numbering system applied to the conditions.

So the two versions of the published permit do not match eg Condition 15 in the Heritage Council version is Condition 14 in the Heritage Victoria (issued) version.

This makes nonsense of much of the wording in the issued Permit P26760 Conditions

e.g. The 'Covenant' section in the issued permit (25 Sep 18) says:

... *"The Tree Management Plan required by condition 4 of the permit.."*

However, the "condition 4" that it is referring to appears to be numbered 3 not 4 in the issued permit.

Unfortunately, the public will need to have access to both published versions of the permit to even start to understand what is actually being proposed.

Similar errors can be found in the financial security section of the permit conditions.

In summary the numbering errors in the permit issued to Walker appear to include:

- Two Conditions both being labelled "Condition 1" - resulting in all subsequent conditions having the wrong number
- Two Conditions both being labelled 'Condition 14. a)' - resulting in all subsequent clauses having the wrong number
- Two Conditions both being labelled "Condition 14 e) i." - resulting in all subsequent clauses having the wrong number

As a consequence, the version of Permit P26760 as issued makes no sense.

We are therefore, concerned that the Permit is potentially not enforceable, and must be corrected before the Proposed Covenant can be properly gazetted, and advertised for public comment in accordance with the Act.

Issue 2. Limited statutory powers with respect to Heritage Council Covenants (S.134 Heritage Act 2017)

S.134 (1) of the Act states that:

Part 7—Covenants ***134 Land owner may enter covenant with the Heritage Council***

- (1) An owner of a registered place or land on which a registered place is situated may enter into a covenant with the Heritage Council which binds the owner as to—*
- (a) the development or use of the place or the land; or*
 - (b) the conservation of the place and any registered object at the place.*

The question that arises in relation to S.134 of the Act, therefore, is whether it allows the Heritage Council to enter into a Covenant with the Kew Development Corporation (KDC) – as is proposed in the Draft Covenant ?

The Kew Development Corporation is a subsidiary of Australia's largest privately owned developer, and major political donor, Walker Corporation. Neither KDC nor Walker Corporation is currently an owner of the registered subject land.

On the contrary the subject land is currently Public Land owned by Development Victoria , on behalf of the Victorian Government.

We understand that all of the subject land containing the trees identified in the Tree Management Plan must remain public land in perpetuity in order to meet the 29% public land requirement of the Kew Cottages Walker Development Plan.

We fail to understand, therefore, how either KDC or Walker Corporation can be made a Party to this S.134 Covenant.

Issue 3. Wrong street address

The use of the wrong street address throughout the Covenant and Tree Management Plan appears too many times to be coincidental. So what is the public to make of the street addresses used in the Covenant ?

Is it clear for example exactly which trees the “*Owners of 1-8 Main Drive Kew, will at their own expense care for and manage* “ ?

In our submission the Public Notice is not only very unclear, it is also very misleading.

1. Both the Government Gazette and The Age Public Notice say that:

“..The Covenant will bind the owners of 1-8 Main Drive at the above Heritage Place to the implementation of the approved Tree Management Plan for 1-8 Main Drive approved under permit P26760 in accordance with the terms of the Covenant.”

However Permit P26760 narrowly defines the works allowed to **1 Main Drive Kew** (not 1-8 Main Drive) ie:

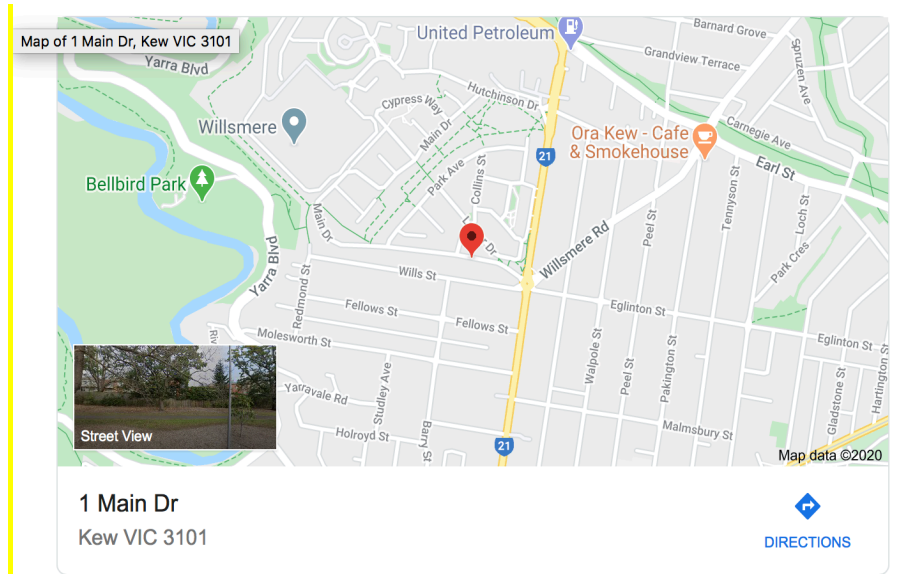
THIS PERMIT ALLOWS: *Construction of a three-storey apartment complex with three above ground storeys and a basement at 1 Main Drive, Kew in accordance with the endorsed plans and subject to the below conditions.*

So is the 1-8 Main Drive, Kew location simply a typographical error in these Public Notices ?

This appears to be most unlikely, as it is reasonable for the public to expect that all formerly Gazetted Public Notice have been properly proof read before publication. Moreover there was plenty of time for a correction to be published, as the Age Public Notice did not appear until a week after the Notice in the Government Gazette.

There is no map or plan provided in either the Government Gazette or The Age Public Notice, nor on the Heritage Victoria website to help resolve this inconsistency.

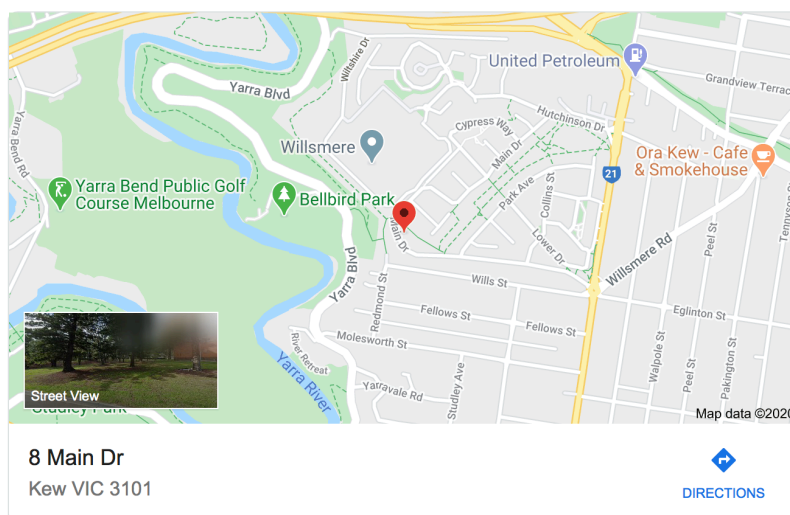
So precisely where is 1 Main Drive Kew as far as the public is concerned ?



According to Google Maps **1 Main Drive, Kew** is located, as is to be expected, close to the start of Main Drive at the Princes Street entrance where the former Asylum Gatehouse was located.

The 1 Main Drive, Kew address therefore appears to be some considerable distance - nearly 500m - from **8 Main Drive, Kew** (Stage 8) – see below).

As a consequence it is likely, therefore, that interested members of the public, such as Wills Street residents who read the Age Public Notice could be misled into believing that the proposed Heritage Covenant and Tree Management Plan is a positive move to help protect most of the Heritage listed Main Drive Avenue Trees (F4, H2073) ¹, rather than just a few of the heritage trees close to the proposed **Walker (Oakwood) Apartments**, at the **8 Main Drive**. (Currently being advertised for sale online)



¹ This interpretation by nearby residents would be consistent with the Main drive covenant process adopted by the Government in 1988 when it placed S173 covenants on the Kew Cottages Wills Street subdivision property titles in order to help protect all of the historic Main Drive Avenue Trees.

(Other online mapping and real estate websites provide similar results eg: domain.com.au, maps.land.vic.gov.au/lassi etc..)

2. The Cover Page of the proposed Covenant also claims that the Subject Land is *1-8 Main Drive, Kew, VIC*

But the Cover Page has the Kew postcode wrong too ie:

1-8 Main Drive, Kew, VIC 3121 (sic)

3121 is actually Richmond's Postcode

3. Covenant Definitions.

On its Definitions Page (p4) the Proposed Covenant claims that:

“ Land has the meaning given under Background recital (b) ”

Background recital (b) on Page 2 then goes on to correct the Kew Postcode to 3101, but **fails to correct the 1-8 Main Drive address error** when it says:

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).*

However, the latter recital fails to clarify precisely which *“part of the land”* it is referring to, or to clarify that:

The Heritage Place (H2073) is not actually part of Lot W

(Indeed the converse is true - Lot W is part of the Heritage Place (H2073). Lot W extends far from the proposed Walker apartments all the way to the Heritage Core buildings which are located 500m north of the proposed apartments.)

So the question remains, how is a reasonable member of the public supposed to locate the subject land based on the Public Notice and the Draft Covenant Definition of the Land ?

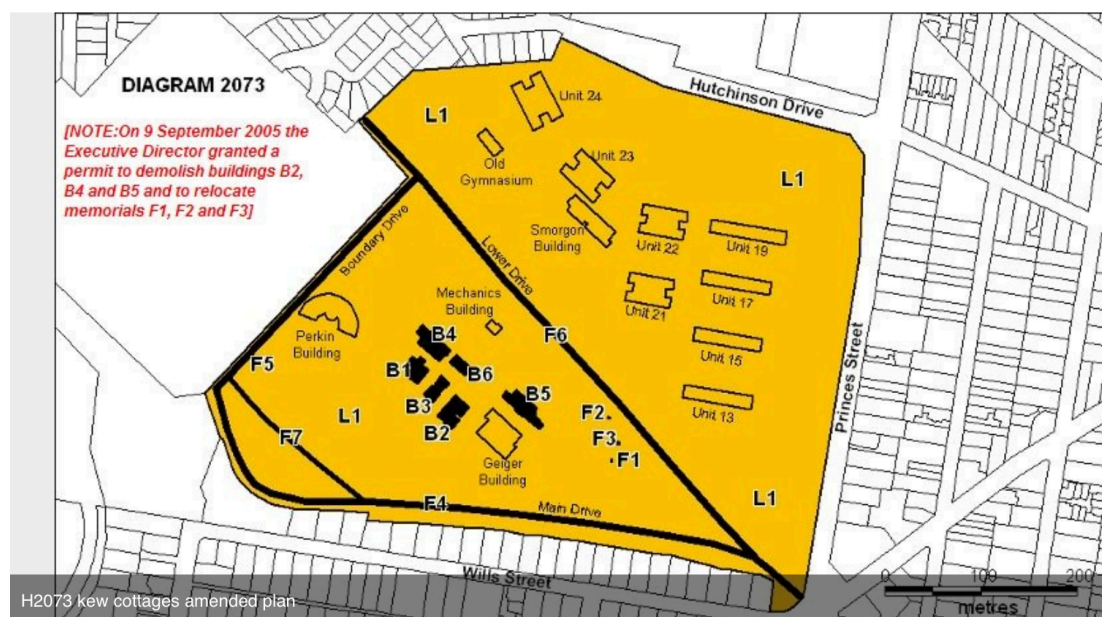
Issue 4. Misleading Maps & Plans

Members of the public who have applied to Heritage Victoria for copies of the relevant Covenant documents in order to help identify exactly which part of Lot W, and which listed Heritage features the Agreement relates to have faced additional problems.

Firstly, we understand public access to the detailed 104 page Endorsed Tree Management Plan prepared by Michael Rogers, John Patrick Architects as presented to Heritage Victoria over 6 months ago on 8 October 2019 and endorsed on 16

October 2019 was refused by Heritage Victoria on privacy grounds until the Covenant was Gazetted on 18 June 2020

Secondly, now that the Tree Management Plan (TMP) is a public document, we discover that it is still not clear precisely how the proposed Covenant and TMP will protect each of the H2073 heritage listed features F1, F2, F4, F5, F7 (see H2073 State Heritage Register Plan below) because although all of these listed Heritage Features are now located in Lot W, none of them appear to be identified as such in either the Covenant Tree Protection Map (Appendix 1) nor the TMP Site Maps (Appendix 2)



Instead, it appears from the latter maps now available, that only half of F7 (ie; the southern side only of Oak Walk), and half of the western section of F4/F5 (ie: the northern side only of Main Drive/Boundary Drive) are included in the TMP.

(This can be deduced by the location of the boundary lines shown in the TMP plans)

This does not make any sense to us at all. In simple terms, deciding to protect and maintain only one side of a listed avenue of trees sounds like a recipe for disaster. It sounds like asking your hairdresser to only look after the hair one side of your head....!

A similar cavalier approach – appears to exist with respect to the Kew Cottages memorials . For example, whereas the F1(Fire Memorial plantings) receives a brief mention as the last entry on the last page of the TMP, neither the Fire Memorial nor F2 (Long Term Residents Memorial) appear to be shown on any of the Covenant/TMP maps or plans despite both F1 and F2 now having been relocated to the F4/F7 intersection. (see above)

Issue 5. Failure to properly the identify the land owner and their responsibilities

The Draft Covenant is confused and confusing in how it attempts to addresses the identity of the land owner and their responsibilities.

The Draft is confused because it provides no statutory basis for seeking to include KDC as a party to the proposed Covenant (p.2), and instead appears to merely rely on its claim that “*Development Victoria consents to KDC entering into this Covenant*” (p.2)

The Draft is confusing because in *Clause 4A KDC* the Draft appears to be inserting KDC as a surrogate for the land owner , and for KDC to be bound by Development Victoria’s obligations, for as long as Development Victoria is “*the Owner of any part of the land*”. Clause 4A.1 p.6)

However, according to the terms of the Covenant, Development Victoria, may potentially be the owner of part of the land for up to a period of 15 years.

Whereas, according to the Victorian Governments Contracts website, the Kew Cottages “*development agreement*” referred to in the Draft (Background p.2.g) “*whereby KDC is entitled to develop the Land*” is due to expire in less than 6 months time on 31 December 2020.

The proposal to include KDC in the Draft Covenant, therefore, at face value appears to currently have no substance and to be totally unnecessary.

It is unnecessary because how the owner chooses to discharge their future responsibilities under the Act, will be a matter for the owner to decide. The owner may choose to contract heritage tree management experts in order to help them implement the Tree Management Plan, alternatively they may choose to contract a private developer such as KDC, or they may choose to make other arrangements, it appears that they now have many options to choose from.

Issue 6. Failure to provide long term tree protection

According to Permit P26760 Condition:

- 15 g) *In the event that the land is subdivided, the covenant will not be binding on any part of the land which does not contain any part of the apartment building allowed by this permit; (HC Version 21.9.2018 = Permit Condition 14 f)in HV Version issued 25.9.2018)*

This appears to us to create a number of serious problems.

On the basis of the Planning Permit PA1900661 issued by the Minister for Planning to the Kew Cottages Developer on 5 March 2020 we understand a conditional subdivision for the land has already been approved by the Minister, and is awaiting endorsement. (Copy attached)

It appears from the latter Subdivision plan PS733220X that none of the trees listed in the Heritage P26760 Tree Management Plan will be located in that part of the land which contains the proposed apartment building allowed by Heritage Permit P26760.

The following questions, therefore, arise:

1. If the covenant will now no longer be binding on any of the land, containing the trees, then what protection, if any will be provided to the listed heritage trees and landscape identified as Lot Q in the Plan PS733220X ?
2. What heritage protection, if any, will be provided to the balance of the public land in the development, not under Boroondara Council's control, including significant elements of listed Heritage Features F1, F2, F4, F5, and F7 (H2073) ?
3. What long term enforcement of Permit P26760 conditions will be implemented, and by whom ?
4. Indeed, is there any point in registering the proposed Heritage Covenant in any form on the current Land Title at all ?

According to Permit Condition

15 h) In the event that the land is subdivided, and in the event that any or all of the trees to be protected by the Tree Management Plan to be approved pursuant to condition 4 of the permit are no longer located on land within the ownership or control of the person bound by the obligations of this covenant, the person bound by the obligations of this covenant must consult with and engage with the owner of the land where those trees are located; (HC Version 21.9.2018)

5. What will “..must consult with and engage with the owner of the land where those trees are located “ actually mean in practice ?
6. What heritage protection, if any, will continue to be provided for the next 15 years referred to in Permit P6760 ?

Issue 7. Failure to reinstate deadly tree pathogen permit controls

We understand that in July 2006, following the death of a rarely cultivated Bishops Pine Tree on Brady Lane, (Heritage Tree 295) the Executive Director approved a site wide *Phytophthora Cinnamomi* Management Plan for the Walker Main Drive Kew Cottages Development.

The *Phytophthora* Management Plan provided for a number of important tree and plant protection measures to be implemented including the erection of quarantine fencing and public warning notices, Phytophthora induction training for all

contractors, wash down facilities for construction equipment, and soil testing for this deadly plant pathogen across the site.

Fortunately, while it appears that *Phytophthora Cinnamomi* (Pc) like COVID-19 cannot be eradicated, it can be contained with the help of on going soil testing and wash down facilities to help reduce its spread for example on earth moving equipment, vehicles, tools and boots used on construction sites.

As a consequence, we understand that at the start of the Walker Development, Major Projects Victoria, as the then owner of the site on behalf of the Victorian Government promised to undertake annual Pc testing and tree monitoring for the duration of the Kew Cottages Main Drive development.

It now appears, however that the *Phytophthora Cinnamomi* Management Plan has been discontinued without any explanation for some stages of the development , and the current P26760 Stage 8 Tree Management Plan fails to include any of Pc protection measures required by earlier Heritage Permits.

Issue 8. Failure to address the history of non compliance by the developer

We understand that the Heritage Council in its September 2018 Permit P26760 Review Decision P28100 formed the view that:

42 ... the previous conduct of the Permit Applicant, such as alleged non-compliance with permits, is not relevant to this proceeding. The Committee does not consider itself empowered by s.101(2) of the Act to consider matters of previous conduct or compliance on the part of the Permit Applicant and has therefore not done so in reaching its decision.

In our respectful submission, however, if public confidence in Victoria's State Heritage watchdog is to be retained then the public is entitled to expect that all Heritage Permit Conditions must be demonstrably capable of being enforced, and proven to be fit for purpose.

This goes to the question, for example in the case of the proposed Covenant, as to the whether a potential fine of \$150,000 is perceived as any form of effective deterrent by a large developer, such as Walker Corporation, or does the developer just perceive it as a potential additional cost of doing business, and factor the possible fine into their spreadsheets accordingly ?

For example, Corporate wide aggravating factors identified regarding the Kew Cottages developer, KDC, and parent company Walker Corporation appear to include a very poor track record on environmental management in three other States, besides Victoria eg:

NSW

Walker fined \$200,00 for clearing native vegetation 2011

TAS

Walker fails to pay \$700,000 Government debt after their proposed Ralphs Bay Development refused 2012

<https://tasmaniantimes.com/2012/08/labor-wipes-walkers-700000-debt/>

QLD (Current. ACF legal challenge pending)

Walker applies to drain RAMSAR listed wetland (Toondah Harbour, Moreton Bay) 2016

Conclusions.

- 1. The multiple drafting errors in the proposed Covenant require further investigation, explanation, and correction.**
- 2. The Statutory grounds for including a non-owner as a party to the proposed S134 Covenant need to be fully investigated and explained.**
- 3. The inconsistencies in the street addresses and land locations used in the Permit and Draft Covenant need to be further investigated and corrected.**
- 4. The reason for the 8-month delay in the public release of the Endorsed Tree Management Plan needs to be investigated, including Heritage Victoria's claim to 'privacy' for this Public Land Tree Plan endorsed as part of a public Heritage Permit**

The failures to properly identify and address the nature and extent of the H2073 Heritage listed Features F1, F2, F4, F5, and F7 in the proposed Covenant maps and plans requires further investigation, and correction.

- 5. The Draft Covenant needs to be redrafted in order to clarify the Owner's responsibilities, how the Owner's implementation of the Tree Management Plan will be monitored, and in order to demonstrate how the permit conditions will be capable of being enforced.**
- 6. The matters to be dealt with in the Draft Covenant need to be reviewed in light of recent events, including the death of Heritage Tree 191, and the issue of Planning Permit PA1900661 (5/3/20)**
- 7. The failure to include the endorsed Kew Cottages *Phytophthora Cinnamomi* Management Plan (2006) in the Heritage P26760 Tree Management Plan must be rectified.**
- 8. The effectiveness of current permit conditions and enforcement practice requires further investigation, with particular attention being given to the history of non-compliance by large developers on both a site wide, and corporate wide basis.**

Recommendations.

1. Withdraw, redraw, and re-advertise the proposed Draft Covenant. Advertise the revised Draft Covenant on the Heritage Victoria website for a minimum period of 28 days, and extend this to 60 days if COVID restrictions continue.
2. Legitimise and strengthen the proposed Covenant by removing all references to the Kew Development Corporation
3. Extend the tree protection provisions to cover all listed trees on the public land not currently managed by Boroondara Council
4. Provide a schedule for the orderly transfer of ownership of the public land containing the protected trees and Heritage listed features F1, F2, F4, F5, and F7 from Development Victoria to Boroondara Council.
5. In order to achieve a better heritage outcome based on the opportunities provided by the new Planning Permit PA1900661, and Subdivision Plan PS733220X update Heritage Permit P26760 Conditions and the Draft Covenant as follows:
 - (A) Amend the P26760 Tree Management Plan to apply to Lot Q, with heritage easements added for the purpose of maintaining H2073's listed features F1, F2, F4, F5, and F7.
 - (B) Amend the Draft Covenant Background recital (b) to read:

(b) The land is identified as Lot Q on Subdivision Plan PS733220X
 - (C) Bind Development Victoria, as the owners of Lot Q as identified in Plan PS733220X to the implementation of the updated Tree Management Plan.
6. Require Development Victoria as the land owner to seek approval from the Executive Director, on an annual basis, for Development Victoria's proposed Tree Management contractual arrangements for each 12 month period.
7. Re-instate the missing site wide *Phytophthora Cinnamomi* Management Plan as approved by the, former Executive Director of Heritage Victoria, Ray Tonkin, in July 2006
8. Require the Executive Director to assess the Owner's contractual arrangements and associated penalties for non-compliance with close consideration to not only the contractor's demonstrated expertise in heritage tree management, but also to the site history of non-compliance, and associated aggravating factors identified on both a site wide and corporate wide basis. For example:

1. **Site wide aggravating factors** identified at Kew Cottages (H2073) appear to include:

The introduction of the deadly plant pathogen *Phytophthora Cinnamomi* to the site (2006);

Long standing non-compliance with Heritage Permit Conditions including:

- Failure to replace the Heritage listed Bishop's Pine Tree 295 (Stage 1, 2006)
- Prosecution by Heritage Victoria for tree damage in Red Gum Park, (Stage 2, 2008)
- Damage to the Heritage listed Canary Island Pine Tree 191 (Stage 8, 2011)
- Unauthorised removal of Heritage Tree 160 (Stage 8, 2014)
- Unauthorised soil excavations (Stage 8, 2017)
- Failure to maintain replacement trees (Stages 3-8, 2011-2019)
- The death of Canary Island Pine Tree 191 (Stage 8, 2019)

APPENDICES.

1. The Heritage Council Permit Review P28100 decision
(Attachment 2 sets out the new Permit P26760 Conditions), 21 Sep 2018

2. The Heritage Permit P26760 issued by the Executive Director,
Heritage Victoria, four days later on 25 Sep 2018

3. Planning Permit No. PA1900661 5 March 2020

4. Plan of Subdivision PS733220X (Modified accordingly)