



Department of Environment, Land, Water & Planning

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Permit No: P26760
File No: FOL/15/25330 [1 - 5]

Mr Brian Walsh - President
Kew Cottages Coalition

Email: admin@kew.org.au
bwa007@gmail.com

Dear Brian

RE: PERMIT NUMBER P26760 - FORMER KEW COTTAGES (KEW RESIDENTIAL SERVICES), PRINCESS STREET, KEW (H2073)

Thank you for your email and attachments of 16 July 2020 in response to notice of the proposed covenant being published in the Government Gazette of 18 June 2020 as required under s.137 of the *Heritage Act 2017* ('the Act').

Your five attachments consisted of the following documents:

1. Your written submission in 13 pages dated 16 July 2020
2. Decision of the Heritage Council re Permit Review P28100, issued 21 September 2018, setting aside the determination under review and issuing permit P26760 with conditions
3. Copy of permit P26760 as issued on behalf of the Executive Director on 25 September 2018
4. Copy of Planning Permit PA1900661 creating Lot 8, as issued on 5 March 2020 by the Minister for Planning - currently the relevant Responsible Authority
5. Copy of Proposed Plan of Subdivision PS733220X which was the subject of PA1900661

Your written submission makes numerous observations and suggestions which perhaps are best dealt with in tabular form. However, I would preface my responses with the comment that the intent of the covenant requirement under condition 14 of permit P26760 is clearly to protect the

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significant trees in the area bounded by Main Drive and Oak Walk. This is to be achieved by implementation of the Tree Management Plan required under condition 3 of the permit.

Submission	Executive Director's comments
Concern regarding length and timing of advertising	This was in accordance with the requirements of s.137 of the Heritage Act.
Not having the documents advertised on the website	Heritage Victoria takes this on notice and may consider having covenants advertised on the website as we do for permits. However, this is not a requirement of the Heritage Act.
Inconsistencies between the Heritage Council determination version of the permit and the permit issued on behalf Executive Director and therefore a concern that the permit is not enforceable	The numbering inconsistencies may unfortunately have originated when the Heritage Council's permit text as provided was converted to the required permit format. However, no changes to textual content occurred and it is evident to a reader of either version in isolation what was intended without contradiction.
Concern that Kew Development Corporation is entering into the covenant not the 'owner' as required by the Act	The covenant includes Development Victoria as a party. It is understood that the complex contractual arrangement between the State of Victoria and Kew Development Corporation (KDC) for the purposes of jointly developing the subject land requires KDC to act for the owner in numerous circumstances.
Questions validity of address '1-8 Main Drive Kew' noting permit is for '1 Main Drive Kew' and definition of the land in the Covenant at background recital (b)	There appear to be a variety of addresses given for the subject site – being the area bounded by Main Drive and Oak Walk. However, it's final postal address would be allocated by Australia Post on conclusion of the development. Perusal of the covenant including its appendices leaves no doubt as to the land that is the subject of the covenant.
Incorrect postcode on cover page of Covenant – which is 3121 instead of 3101	The incorrect postcode and any other typographical errors would be corrected in preparing the final Covenant.
Questions why the Tree Management Plan doesn't cover other trees at the site	<p>The permit does not require the covenant to apply to trees outside the land bounded by Main Drive and Oak Walk and Heritage Victoria cannot unilaterally alter the requirements of the permit. The Tree Management Plan only includes the trees on the south side of F7 (Oak Walk) as these are within the subject site of the permit application.</p> <p>It is a valid point that consistent management of the trees on either side of Oak Walk is desirable – however those on the north side of Oak Walk are not located within the building development project. All the trees in this vicinity are under KDC's management until they are formally handed over with the land they are on to the Council as public open space. KDC is seeking formal agreement from Council to take over the management of the trees as per the Tree Management Plan.</p>

Concern re Fire Memorial management	The roses/rosemary are included in the TMP including the proposed Landscape Plan
Question re landowner and Kew Development Corporation and why they are included in the covenant	As previously noted, it is understood that the joint development contract between the State of Victoria and Kew Development Corporation requires KDC to take on some of the responsibilities of the landowner. KDC would have no reason to be a party to the covenant unless it was mandated under their development agreement, the terms of which are outside the ambit of the Heritage Act
Questions validity of condition re covenant in the case of subdivision, and the protection of trees at the place but outside the development lot.	The covenant requirement derives from a specific permit condition stipulated by the Heritage Council in consequence of its setting aside the determination of the Executive Director. The draft covenant is considered to adequately provide for the trees and for their succession management via the Tree Management Plan. The covenant provides for the eventuality that the current owner(s) will sell the new apartments on completion to new owners who may be represented by an owners' corporation in discharging the obligations of the covenant. It is the owner/owners of the apartment block who are bound to discharge certain obligations with regard to the nearby trees, not the owner of the land on which those trees are located, which will eventually be Boroondara City Council.
Lack of Phytophthora cinnamomi management plan, recommends reinstating	As previously discussed, there is no evidence of Cinnamon fungus at the site following extensive testing by both KDC and the Council (independently). Both parties are aware of the potential issue, however there is no evidence that this is currently required. Furthermore there is a bond required against the trees so it is in KDC's best interests to maintain the trees in good condition throughout the development.
Failure to address the history of noncompliance by developer, recommends Executive Director assesses owners contractual arrangements	This is not relevant to the covenant. Assessment of the owners contractual arrangement is outside the remit of Heritage Victoria via the Heritage Act. The principle of administrative fairness requires that decisions are made on the merits of the relevant factors and not on perceptions of past performance.
Recommends withdraw and readvertising of covenant	There is also no provision in the Act for Heritage Victoria to have to readvertise or to advertise for 60 days as requested, due to COVID-19 lockdown. There is no provision in the Act requiring a sign within the property alerting the public to a proposed covenant agreement. The stipulated advertising is confined to notices in the Government Gazette and in a newspaper circulating in the area.
Recommends removing Kew Development Corporation as a party to	Development Victoria are party to the covenant and require KDC to also be a party due to the mutual

the covenant	obligations in their joint development contract. Their obligations under the covenant will transfer to the owners of the new apartments and most likely to the new owners' corporation on their collective behalf. None of this compromises the effectiveness of the covenant in achieving the intention of protecting the trees within the development lot. Covenant obligations registered on a land title pass to the new owners on sale of the encumbered land.
Recommends extending tree protection to full site	Heritage Victoria does not have the capacity to do that as the permit is only in relation to the development site for the apartment block.
Recommends schedule for transfer of ownership of public land to Council	This is outside the jurisdiction of Heritage Victoria as the Executive Director is not empowered to control the ownership of land, registered or otherwise.
Require Development Victoria to seek approval from the Executive Director on annual basis on the contractual arrangements for the Tree Management Plan	This is beyond the remit of Heritage Victoria; the covenant is considered adequate to ensure the intent of the permit is achieved in respect of protecting the trees in the vicinity of the development. There is no statutory basis for Heritage Victoria to determine which contractor is to be appointed to undertake the required work.

In conclusion, I am satisfied that the intention of permit P26760 with respect to protecting the nearby specimen trees during and after the approved works will be adequately achieved by the proposed covenant, albeit with the necessary typological corrections.

Thank you for your submission and interest in this matter.

Yours sincerely



JANET SULLIVAN

Principal Heritage Permits

Heritage Victoria

(As delegate for the Executive Director, Heritage Victoria pursuant to the Instrument of Delegation)

11 August 2020