



"Walker's Wooden Horse Appeal" - Kew Cottages Coalition Submission to Heritage Council, Nov 2015. (Email 1 of 2.)

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Cc: heritage.council@delwp.vic.gov.au

9 November 2015 at 16:55

To: Rhonda McLaren, Hearings Coordinator, Heritage Council Victoria.
Re: Permit Appeal Kew Cottages (H2073)
From: Brian Walsh, President, Kew Cottages Coalition
Date: 9 Nov 2015



Walker's Wooden Horse Appeal. A Submission to the Heritage Council of Victoria Kew Cottages Coalition Nov 2015

1. Introduction

The Kew Cottages Coalition supports the Executive Director's decision to refuse Walker Corporation's Heritage Permit Application P22396.

This submission is in addition to, and is to be read in conjunction with our earlier submissions on this matter, including:

1. "Objection to Heritage Permit Application P22396 (To:Heritage Victoria Feb 2015)
2. "Beware Developers Bearing Gifts" (To: Heritage Council Aug 2015)
3. "Objection to Amended Plans" (To: Heritage Council Oct 2015)
4. "Application for Directions" (To: Heritage Council Oct 2015)

Copies of the above documents, and other supporting material are available online via our website www.kew.org.au (See Links below).

2. Matters for Consideration (Sect 73)

2.1 VCAT Planning Decision (Sep 2015)

This submission is made following the planning decision by VCAT in September 2015 to direct the Minister for Planning to amend the Walker Development Plan- Kew (2006), and to give planning permission for Walker's proposed Stage 8 apartment blocks.

The question now arises as to whether the VCAT Planning decision should be a matter for consideration by the Heritage Council in this Appeal, and if so what weight, if any should be given to that Planning decision.

For example, the suggestion has been made that VCAT's Planning decision will give the Heritage Council grounds to accept Walker's Heritage Permit Appeal, by in turn now amending the Kew Cottages Heritage Site Concept plan, that was endorsed as part of Heritage Permit 9639 in Sep 2005.

However, in our respectful submission the VCAT Planning decision is with regard to s73(1A)(b) of the Act simply not a "relevant matter" for consideration, and thereby not relevant to Walker's Appeal to the Heritage Council because:

1. State Planning approvals and State Heritage approvals are subject to two separate and distinct Acts of Parliament;
2. The Kew Cottages Heritage Permit 9639 Site Concept Plan, and Conditions (2005), predate the Walker Development Plan - Kew (2006), and are in no way varied by VCAT, nor subject to amendment in this Heritage Permit Appeal.
3. The Executive Director's decision (5/15) to refuse Walker's Stage 8 Heritage Permit Application predates the VCAT Planning decision (9/15) to vary the Walker Development Plan - Kew.

However, if we are wrong, and the Heritage Council chooses to consider the VCAT Planning decision, then we say that when the primary matters to be considered pursuant to s.73(1)(a) , s.73(1)(c), s.73(1)(f), and S73(1A) of the Act are taken to account, including the significant impact of the proposal on the cultural heritage significance of both of the two adjacent Registered Places (Kew Cottages, and Willsmere), then the recent VCAT Planning decision will be found to be of little assistance, and it will be clear that from a heritage perspective a very different outcome is required.

2.2 Main Drive Avenue of Trees Buffer Zone

We believe that the primary matters to be considered, for example, should include the nature and extent of an appropriate buffer zone each side of the Main Drive and Oak Walk Avenues of Trees, as set out in our original nomination, and as evident in:

- The Urban Design Framework (Built Form at Edge Condition, Yarra Bend Connection, p.13, Oct 2003)
- The Statements of Significance (2004);
- Heritage Permit P9639 and Endorsed Plans (2005);
- The Executive Director's Refusal to grant a permit for the construction of a five storey apartment building on land bounded by Main Drive and Oak Walk (2015);

2.3 History of Registration

The Kew Cottages Coalition nominated the Double Avenue of Trees on Main Drive for State Heritage listing in January 2004. (Copy attached)

We said that:

2.3.1 Extent of Nomination (2004)

The land shall include a buffer zone each side of Main Drive extending from Princess Street to the intersection with Boundary Road in the west, at the south-eastern corner of the Willsmere development. The northern boundary of the buffer zone shall be ten metres north of the centre-line of the outer northern row of trees. The southern boundary of the buffer zone shall be formed by the rear of properties facing Wills Street, or ten metres from the centre-line of the southern row of trees.

Similarly, shortly, thereafter, Ms. Louise Godwin, Executive Director, Kew Cottages Parents Association nominated all six of the original Cottages that still remained on the site for State Heritage listing.

In August 2004 Mr. Ray Tonkin, Executive Director, Heritage Victoria subsequently recommended to the Heritage Council that Kew Cottages and all of the grounds should be registered

At its meeting of 15 November 2004 the Registration Committee of the Heritage Council resolved to include the Former Kew Cottages (Kew Residential Services) in the Victorian Heritage Register under S.42(1)(b) of the Heritage Act. The Committee determined that all of the land and the specific buildings and landscape features (including trees) in the Executive Director's registration should be included in the Victorian Heritage Register.

2.4 Owner has allowed Heritage Fabric to Fall into Disrepair. (S.160)

It is significant, therefore, to note that now almost 11 years to the day after that historic Heritage Council decision, it is precisely those particular Kew Cottages landscape features and buildings first nominated, that appear to be now the most at risk from the combined threats posed by the owner's neglect and the appellant's commercial activities i.e.:

1. The Main Drive Avenue of Trees and buffer zone that the Kew Cottages Coalition nominated are now seriously threatened by Walker's proposal, and
2. The Heritage listed buildings that still remain (now sadly reduced from 6 to 3) have been allowed to fall into disrepair as a result of the owner's long standing and what appears to be carefully cultivated neglect.

2.5 Owner has breached Government Heritage Policy.

We believe that owner's long standing practice of supporting Walker's commercial interests at the expense of Government Heritage conservation is a relevant matter for the Heritage Council in terms of S.73(1)(f) because the owner's neglect of Kew Cottages Government heritage conservation to date appears to have been actively compounded by a strategy of:

1. Failing to monitor compliance with permit conditions; (2005-2015)
2. Seeking inappropriate and informal approvals designed to help reduce heritage conservation in favour of commercial gain; (See: Ombudsman's Report 2010)
3. Amending contractual arrangements in order to help minimise the developer's heritage conservation responsibilities; (See Fourth Deed of Variation, Walker KRS Contract, 2014)
4. Amending contractual arrangements in order to effectively barter Government Heritage assets in exchange for developer's commercial risk; (2014)
5. Making a contractual undertaking to the developer to endeavour to obtain the return to the State of the \$800,000 Heritage Guarantee from Heritage Victoria. (2014)

These practices might perhaps be more understandable if they were open and transparent, and undertaken in accordance with the Victorian Government Cultural Heritage Asset Management Principles adopted by the Heritage Council at its meeting on 6 September 2007.

However, that is clearly not the case at Kew Cottages.

In our submission there has been a long standing absence of transparency in terms of both the informal advice, and compliance exemptions sought on behalf of the owner from Government regulatory agencies, as well as serious criticism from the Auditor General regarding the management practices of Major Projects Victoria (2012 and 2015),

As a consequence many significant trees have been damaged or destroyed since the re-development

commenced, and the Ombudsman has reported to Parliament that Heritage Victoria is inadequately funded to monitor compliance with permit conditions at Kew Cottages. In his Report he said:

A considerable amount of time was expended by Heritage Victoria officers in handling the compliance issues following the issue of permits at the Kew site. It is clear that this role has been a reactive one, responding to residents' concerns about actions undertaken by the developer. Indeed, had the residents not reported issues, it appears quite possible that further damage could have occurred to heritage listed trees. The Executive Director, Heritage Victoria acknowledged this and stated that he is not resourced to proactively inspect and monitor compliance with heritage permits. (p.76 2010)

2.6 Conservation Risk Management (S.73(1)(f))

The risk, therefore, to the long term conservation of the land between Main Drive and Oak Walk, and indeed the heritage fabric of the site overall appears to be unacceptably high,

We understand that the Heritage Act requires owners to maintain registered places to the extent that their conservation is not threatened.

However, in the case of not only the land between Main Drive and Oak Walk, but also the three remaining listed Cottages (B1, B3, and B5), Major Projects Victoria has we submit failed to comply with the Act.

Firstly, in the case of the three remaining Cottages MPV appears to have simply put up a fence, and left the heritage buildings to fall into disrepair for over a decade.

Secondly, in the case of the land between Main Drive and Oak Walk, MPV have allowed the developer to 'squat' in a building which would have been demolished years ago if MPV had complied with Government Heritage policy, and

'set the standard for the community in the management of heritage assets...' (Vic Gov 3. Lead by example 2009)

Thirdly, MPV have compounded their latter failure, by actively supporting Walker's proposal, instead of conserving the landscape's heritage significance **"to the greatest extent feasible"**, in accordance with both they Victorian Government Heritage policy on asset Management. (5. Conservation Outcomes, 2009), and the endorsed 'Site Concept Plan' (2005)

We understand that the redevelopment is scheduled to finish within a year (Oct 2016), and there is still no resolution to these long standing problems in sight.

We submit, therefore, that the Heritage Council should lead by example, and take adequate and comprehensive steps to help reduce the current high level of conservation risk to an acceptable level. We recommend as follows:

1. Kew Cottages should be treated as a high risk Government Heritage site, for as long as it continues to be owned by Major Projects Victoria, and/or developed by Walker Corporation;
2. The nature and extent of that risk should be a matter for consideration by the Heritage Council in determining this Appeal;
3. The Appeal should be rejected; and
4. Following a site inspection by the Heritage Council;
 - A written notice should be served on the owner, Major Projects Victoria, requiring that they show cause why an order should not be made obliging the owner to carry out specified conservation works to the listed buildings B1, B3, and B6, and to all of the land between Main Drive and Oak Walk.
 - The specified works shall include but not be limited to demolition of the former administration building located on that part of the land bounded by Main Drive and Oak walk as prescribed in Permit 22396 with conditions (Sep 2015. [HC27](#))

Reason: So that the heritage buildings, landscape, plantings, avenues, concrete lamp posts, and the following features as marked on Diagram 2073 are properly conserved without further delay.

- F1-3 Residents' Memorials and Sculpture
- F4 Main Drive
- F5 Boundary Drive
- F7 Oak Walk

2.7 Plans Provided

2.7.1 No available land

It appears clear from the plans received that there is insufficient space available to accommodate any new building on the site once the former administration office has been demolished, and the double Avenues of trees along Main Drive and Oak Walk have been properly reinstated in accordance with the Site Concept Plan, including the recommended buffer zone as set out in our original nomination. (Copy attached.)

2.7.2 Request for Schedule of Amended Plans.

For the sake of clarity, however, we request that a schedule of the amended plans accepted by the Heritage Council be distributed to all parties, because it appears at the time of writing (9/11) that some parties may not have received all of the amended plans.

We submit that consideration of plans currently provided by the appellant must take account of past problems experienced with the provision of plans by the owner, as well as current errors and omissions.

2.7.3 Significant Errors

For example it appears that the owner has a history of providing Kew Cottages plans that are either inaccurate, or incomplete, and/or out of date, or otherwise misleading and deceptive

We note that errors found in the past that posed a potentially detrimental heritage impact included:

1. The plan submitted by the owner to Heritage Victoria showing relative heights of proposed five storey apartment blocks and Willsmere (Corrected by Owner 2005)
2. The plan used by the developer's earth moving contractor that resulted in significant root damage to 300 year old heritage listed River Red Gums (Appellant prosecuted for breach of Heritage Act 2007).
3. The Kew Main Drive Construction Staging Plan Rev 'C' (2012) that was published in such a manner that it failed to show the land located between Main Drive and Oak Walk. i.e.: the subject site of the current Walker Stage 8 proposal. (Uncorrected)

2.7.4 Significant Omissions

A. "Site Concept Plan" (Permit P9639)

The appellant has failed to provide a copy of the endorsed Heritage 'Site Concept Plan' as incorporated in Permit P9639 (2005).

Preferring instead, it appears, to :

- 1) Claim, somewhat ambiguously, that:

The Site Context Plan endorsed under Heritage Victoria Permit number P9639 does not reflect the 'as built' context of the Heritage Place, which has resulted from subsequent approved development of the Heritage Place. (HC28),

and to

- 2) Rely on their own 'Planning Permit Drawings' (2014) (HC06), plus 'Plan of Existing Conditions' (Dwg 3332-51-01, 26.11.14), as amended by their Alternative Plan retaining Tree No 157, (dated 13 July 2015, and lodged 2 October 2015)

This is a significant omission because:

1. It goes to the very basis of the Executive's Director's refusal to grant a permit i.e.:

"The proposed residential apartment building is shown located on land set aside in the Site Context Plan

| endorsed as part of permit P9639 as public open space with all trees retained..." (HC26); and

2. None of the alternative plans provided by the appellant show otherwise.

B. Comprehensive Landscape Management Plan (P9639 Condition 9)

The appellant has failed to provide a copy of the comprehensive Landscape Management Plan that the owner was required:

| "... to prepare and submit for the approval of the Executive Director **before re-development on the site commences..**" (P9639 Condition 9 - emphasis added)

This is a significant omission because our understanding is that the owner failed to prepare and submit a comprehensive Landscape Management Plan, failed to comply with Condition 9, and notwithstanding this serious breach, commenced re-development works on the site anyway.

Moreover, we understand from Heritage Victoria, that there is no record of a comprehensive Landscape Management Plan, that includes the land between Main Drive and Oak Walk, as required by Condition 9, ever being submitted for approval.

2.7.5 Potential Breach of S.160 of the Act by the Owner. (Conservation threatened)

It would appear, therefore, in our respectful submission, that at face value a serious breach of S.74A of the Act occurred at the commencement of the re-development works, and should be properly investigated in order that the Heritage Council is fully informed.

2.8 Effect Refusal would have on reasonable or economic use of the place (S.73(1)(b))

In addition to our earlier submission on this matter we submit that any consideration in terms of S.73(1)(b) must take account of the Kew Residential Services Development Agreement which sets out the contractual relationship, including inter alia the financial arrangements between the developer and the owner regarding the proposed Stage 8 development on the land between Main Drive and Oak Walk.

In particular we refer to the extraordinary Fourth Deed of Variation to this Agreement (Dated 18-6-2014 - copy attached) which makes substantial references to changes regarding

a) **"Redevelopment of Project Office Precinct"**, which is defined as:

"that part of the site used by the Developer as a project office for the Project and which comprises Stage 8 on the Staging Plan (Clause C14 p5), (i.e.: the land between Main Drive and Oak Walk); and

b) **Heritage Buildings** (Clause B15 is deleted and replaced with a new clause. p8)

In our submission:

1. It appears clear from the Agreement that potential refusal of "Planning Permits and other Authorisations" has been taken to account, and is a risk to be born by, and agreed to as an acceptable commercial risk by the developer (C.14 (e)),. As a consequence we submit that the Executive Director's refusal is both reasonable and appropriate.
2. However, it also appears clear that in exchange Major Projects Victoria (On behalf of the 'State') as the owner has agreed to not only delete the Developer's obligation to restore the Kew Cottages Community facilities and Heritage buildings, but also to

"use its reasonable endeavours to:

1. **Assist the Developer to obtain all relevant Planning Permits and other Authorisations which are necessary or desirable to facilitate the Additional Sale Lots in the Project Office Precinct.**

- (C14(c)) and
2. **Obtain the return to the State of the Heritage Guarantee from Heritage Victoria.**(B.15.9)

In our submission such an agreement by the owner constitutes a severe and on going threat to the conservation of not only the heritage landscape between Main Drive and Oak Walk, but also to the remaining Heritage Cottages, which it appears are now to effectively remain 'mothballed' in the same state of disrepair that they had already fallen into at the time of this Agreement in June 2014, after more than a decade of neglect by the owner.

We respectfully submit, therefore, that the Executive Director, Major Projects Victoria, and the Secretary of the Department of Economic Development, Jobs, Transport and Resources, be requested to give evidence in this Appeal Hearing and to show cause why an order should not be made obliging the owner to carry out specified conservation works to the listed buildings B1, B3, and B6, and to all of the land between F4,F5,and F7 (i.e.: between Main Drive and Oak Walk).

- The specified works shall include but not be limited to demolition of the former administration building located on that part of the land bounded by Main Drive and Oak walk as prescribed in Permit 22396 with conditions (Sep 2015. [HC27](#)) and
- The reinstatement of the Main Drive and Oak Walk Avenues of Trees in accordance the the endorsed Government Heritage 'Site Context Plan" (The Masterplan, Permit P9639, 2005)

2.9 Other Matters - Views of Willsmere and Main Drive.

In addition to our earlier submissions on Views of Willsmere and Main Drive, we note and support Heritage Victoria Officer's Report, including the Officer's comments on the photomontage images provided by the appellant ([HC25](#) p.15)

We only add that we think it both somewhat imprudent and disrespectful for the appellant in response to a request for distant views of one of Melbourne's most prominent and distinctive landmarks to have provided a series of photographs which, accepting the cover image, instead appear to show predominantly large areas of carpark, playing fields, roadway, roadsigns, and railway track, but very little of Willsmere. ([HC24](#))

We are confident that Members of the Council will already be quite familiar with the the landmark qualities of Willsmere, and able to make their own assessment at first hand from vantage points of their choice.

We will make further views of Willsmere, Main Drive, Oak Walk, and the Heritage Buildings publicly available for consideration on our website, should they be required by any of the parties to the Hearing.

However, as our own Nomination for the Main Drive Avenues of Trees, the Endorsed Government Heritage 'Site Context Plan, and the Urban Design Framework for the site are all in agreement that there will be insufficient space for new buildings of any height to be constructed between Main Drive and Oak Walk, once the heritage fabric has been adequately and comprehensively restored in accordance with the Act, then the Appeal should be rejected on those grounds alone.

3. Summary Conclusions.

1. The Executive Director's Refusal should be affirmed without qualification.
2. The VCAT Planning Decision (Sep 2015) is not relevant to this Heritage Appeal.
3. The Endorsed Government Heritage Site Concept Plan (Attachment 4 P9639), which shows no buildings on the land between Main Drive and Oak Walk, is in accord with both:
 - The Kew Cottages Coalition original nomination (Jan 2004) which nominated a buffer zone with a northern boundary set 10m north of the centre line of the Avenues northern trees; and with
 - The Urban Design Framework . which shows no buildings between Main Drive and Oak Walk. (p.13 UDF Oct 2003)

4. Our reading of the amended plans, avenue locations and dimensions provided by the appellant indicates that there will be insufficient space to accommodate any new building or sale lots on the site once the former Administration Building is demolished, and the avenues of trees on Main Drive and Oak Walk are properly reinstated, in accordance with the Endorsed Government Heritage Site Concept Plan, including the 10m buffer zones for the avenues of trees as set out in the Kew Cottages Coalition Nomination (2004)

5. Potential Breach of S.160 of the Act by the Owner. (Conservation threatened)

The owner allowed the Heritage Core Buildings to fall into disrepair, and failed to maintain the land between Main Drive and Oak Walk to the extent that its conservation is threatened.

6. Potential Breach of S.74A of the Act by the Owner. (Non compliance with Permit P9639 Condition 9)

The owner appears to have commenced the redevelopment and undertaken significant works without first submitting a Comprehensive Landscape Management Plan for approval as required by Condition 9 of Permit 9639.

4. Summary Recommendations.

We submit that the Heritage Council should lead by example, and take adequate and comprehensive steps to:

- Have the above potential breaches of the Act fully investigated;
- Reduce the current unacceptably high level of conservation risk at Kew Cottages, and
- Restore the core heritage fabric that has been neglected, damaged or fallen into disrepair.

We recommend as follows:

1. Kew Cottages should be treated as a high risk Government Heritage site, for as long as it continues to be owned by Major Projects Victoria, and/or developed by Walker Corporation;
2. The nature and extent of that risk should be a matter for consideration by the Heritage Council in determining this Appeal;
3. In order to fully inform the Council on this matter, the Director, Property and Development Group, Major Projects Victoria, and the Secretary of the Department of Economic Development, Jobs, Transport and Resources, should be requested to give evidence in this Appeal Hearing and to show cause why an order should not be made obliging the owner to carry out specified conservation works to the listed buildings B1, B3, and B6, and to all of the land between F4,F5,and F7 (i.e.: between Main Drive and Oak Walk)
4. The Permit Appeal should be rejected; and
5. Following a site inspection by the Heritage Council, and evidence by MPV, and the Secretary of the Department;
 - The definition of the 'Heritage Core' shall be extended to include all of the open space surrounding B1,B3, and B6, together with all the open space between F4, F5, and F7;
 - A written notice should be served on the owner, Major Projects Victoria, requiring that they show cause why an order should not be made obliging the owner to carry out specified conservation works to the listed buildings B1, B3, and B6, and to all of the land between F4,F5,and F7 (i.e.: between Main Drive and Oak Walk).
 - The specified works shall include but not be limited to demolition of the former administration building located on that part of the land bounded by Main Drive and Oak walk as prescribed in Permit 22396 with conditions (Sep 2015. [HC27](#)) and
 - The reinstatement of the Main Drive and Oak Walk Avenues of Trees in accordance the the endorsed Government Heritage 'Site Context Plan" (The Masterplan, Permit P9639, 2005)

Reason: So that the heritage buildings, landscape, plantings, avenues, concrete lamp posts, and the following features as marked on Diagram 2073 are properly conserved without further delay.

- F1-3 Residents' Memorials and Sculpture
- F4 Main Drive
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5. Links

Kew Cottages Coalition

www.kew.org.au

1. ["Objection to Heritage Permit Application P22396 \(To:Heritage Victoria Feb 2015\)](#)
2. ["Beware Developers Bearing Gifts" \(To: Heritage Council Aug 2015\)](#)
3. ["Objection to Amended Plans" \(To: Heritage Council Oct 2015\)](#)
4. ["Application for Directions" \(To: Heritage Council Oct 2015\)](#)
5. [Kew Cottages Coalition Heritage Nomination \(2004\)](#)
6. [Victorian Government Cultural Heritage Asset Management Principles \(2009\)](#)
7. [Ombudsman's Investigation into the Probity of the Kew Cottages Development \(2010\)](#)
8. [Fourth Deed of Variation, Walker KRS Development Agreement \(2014\)](#)

End Note:

Submission: Email 1 of 2.:

Appendices:..

See: Email 2 of 2

**** Kew Cottages Coalition **** 9 Nov 2015