

TRIM: FOL/15/35751  
Permit Appeal: P23350

10 February 2016

Brian Walsh  
President – Kew Cottages Coalition  
PO Box 2317  
KEW VIC 3101



Heritage Council of Victoria  
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Dear Mr Walsh

**PERMIT APPEAL – FORMER KEW COTTAGES (KEW RESIDENTIAL SERVICES), PRINCESS STREET (H2073)**

The Heritage Council has received an application from Planning & Property Partners, on behalf of Kew Development Corporation, to reconstitute the Committee for the above appeal. Copies of the letter and attachments setting out that application are enclosed.

The Committee has determined to adjourn the final day of the hearing, scheduled for Monday, 15 February 2016, to allow time for consideration of the application, and any material submitted by parties in relation to it.

***Making submissions***

If you wish to comment on the application to reconstitute the Committee you may provide a written submission to the Heritage Council by **Monday, 22 February 2016**.

***Decision on application***

The Committee will consider the application, including any written submissions and other material relating to it, and notify you of the Committee's decision on the application as soon as practicable after 22 February 2016.

You will be notified of the Committee's decision on the application when it has been made.

If you require any further assistance contact the Heritage Council secretariat at [heritage.council@delwp.vic.gov.au](mailto:heritage.council@delwp.vic.gov.au) or by telephone on (03) 9208 3666.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Rhonda McLaren'.

*for* **Rhonda McLaren**  
**Manager, Heritage Council Secretariat**

- Encl. Letter from Planning & Property Partners dated 5 February 2016 including:
- Application for the Heritage Council to be Reconstituted; and
  - Affidavit in support of the application by Scott Stewart

5 February 2016

Planning & Property Partners Pty Ltd

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Rhonda McLaren  
Acting Manager - Secretariat  
Heritage Council of Victoria  
Department of Environment, Land, Water & Planning  
Level 9, 1 Spring Street  
MELBOURNE VIC 3000



By Courier

Dear Rhonda

**FORMER KEW COTTAGES (KEW RESIDENTIAL SERVICES) (HERITAGE REGISTER NO. H2073)  
PERMIT APPEAL TO HERITAGE COUNCIL**

We continue to act for the appellant, permit applicant and refer to the committee's directions in the letter from the Heritage Council dated 16 December 2016 concerning the filing of further material by 12pm today.

Attached for the attention of the Heritage Council are:

1. Application for the Heritage Council to be Reconstituted; and
2. Affidavit in support of the application by Scott Stewart of our office.

The contents of the application are self-explanatory and we await advice from the Heritage Council how it intends to rule on the reconstitution application. We note that the application also contains an application for an adjournment.

Our client awaits the outcome of its reconstitution application before responding as may be appropriate, to the matters raised in the correspondence from the Heritage Council dated 16 December 2016 and the draft permit conditions in the 19 January 2016 letter.

Please contact Scott Stewart or Reto Hofmann on 8626 9071 if we can be of any further assistance in this matter.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Scott Stewart'.

Scott Stewart  
Planning & Property Partners Pty Ltd

Encl



IN THE HERITAGE COUNCIL OF VICTORIA  
AT MELBOURNE

BETWEEN

KEW DEVELOPMENT CORPORATION PTY LTD

AND

HERITAGE VICTORIA

Application No. P22396

Permit Applicant/Appellant



**Name of Place/Object:** Former Kew Cottages (Kew Residential Services)

**Heritage Register Number:** H2073

**Location of Place/Object:** Princess Street, Kew

### **APPLICATION FOR THE HERITAGE COUNCIL TO BE RECONSTITUTED**

1. This application is made by the appellant permit applicant, Kew Development Corporation Pty Ltd and supported by an affidavit of Scott Brian Richard Stewart dated 5 February 2016.

#### **Background to the application**

2. The applicant has appealed to the Heritage Council against a determination by the Executive Director to refuse to issue a permit, pursuant to s 75(2)(a) of the Heritage Act 1995 (Vic).
3. In accordance with s 7(2) (vi) of the Heritage Act, the Heritage Council must include persons possessing recognised skills in a number of specified areas including the area of "planning law".
4. The Heritage Council has delegated its function (pursuant to s 8(f) of the Heritage Act) to conduct the hearing of this appeal (such hearing being required by s 76(2)) to a committee consisting of members of the Heritage Council (as required by s12 (2)). The

Heritage Council (as constituted for the hearing of this appeal) does not include any member possessing recognised skills in the area of planning law.

5. The appeal raises questions of law including questions of law concerning a new issue raised at the behest of the Heritage Council but not otherwise raised by any party including the Executive Director. Furthermore, the new issue raised by the Heritage Council was framed and discussed by the Heritage Council in terms where the presiding member has expressed a view on the facts absent submissions, evidence or material before the Council and in circumstances where no witness before it supported the view expressed by the presiding member and where there is otherwise no evidence to support the view expressed by the presiding member.
6. The applicant does not consent to the determination of any of the questions of law by the Heritage Council as presently constituted and seeks the reconstitution of the Heritage Council to include a person possessing recognised skills in the area of planning law. The applicant therefore seeks to have the Heritage Council differently constituted for the purpose of the hearing and determination of this appeal.

#### **Reconstitution of the Heritage Council**

7. The reconstitution of a statutory decision-making body may be appropriate even where the common law would not require the original decision-makers to disqualify themselves on the ground of a reasonable apprehension of bias: *Kidd v Resource Management and Planning Appeal Tribunal (No 2)* [2012] TASSC 79 at [33]. It may be particularly appropriate where a member has already expressed a view upon facts which will have to be determined: see eg *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* (1990) 26 FCR 39.
8. In the absence of clear contrary legislative intent, the Heritage Council is bound to observe the requirements of natural justice and procedural fairness: *Kioa v West* (1985) 159 CLR 550 at 632; *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648 at 652–653.

9. In the present circumstances, it would be procedurally unfair to have the questions of law (including those to be inferred from the new issue raised by a member of the Council and not supported by any evidence or contended for by any party) heard and determined by the Heritage Council without the inclusion of a member possessing recognised skills in the area of planning law pursuant to s 7(2)(vi) of the Heritage Act. Recognition of skills in law is governed by the Legal Profession Uniform Law.

**The questions of law**

10. The questions of law include questions arising from submissions and questions arising from the new issue raised by the Heritage Council through the presiding member.
11. The questions of law arising from submissions can be summarised in the following propositions:
- a. the correctness or otherwise of the submissions of the Executive Director as to the effect and operation of previous decisions of the Heritage Council affecting the land;
  - b. the appropriateness and lawfulness of revisiting or looking behind previous decisions of the Heritage Council imposing building height limits on the site;
  - c. whether decisions of other statutory bodies including VCAT and the Minister for Planning concerning heritage significance of the landmark buildings and landscape are relevant considerations for the purpose of the determination of the appeal by the Heritage Council (having regard to the submissions made by the Executive Director to the effect that these decisions are irrelevant);
  - d. the context and relevance to heritage significance of the new issue raised by the Heritage Council given the following circumstances:
    - i. the correct interpretation of the Statement of Significance;
    - ii. the absence of the new issue from the grounds of the executive director and where the executive director is partly represented by an experienced landscape expert;

- iii. the correct characterisation of the new issue given the vagueness of the proposition that a relationship between the trees is a matter of cultural significance and its resemblance to a proposition that the land was intended to be set aside, maintained, or planned as a parkland;;
- iv. whether there is any legal premise that the subject land was set aside, planned or intended as a parkland;
- v. the effect of the actions of the owners of the land to construct a building on the subject site including the assessment of existing use rights and development potential of the building;
- vi. the relevance of the findings of VCAT on these matters;

12. The question of law can also be framed as a question of jurisdiction. There is no evidence to support the proposition that there is a relationship between the trees that will be affected by the proposed development. A finding in the absence of any evidence to support it would amount to a jurisdictional error: *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [57]. The making of a finding of fact when there is no evidence to support that finding amounts to an error of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 355–356. The question is whether the Council has the jurisdiction to make such a finding in the absence of any evidence.

#### **Procedural concerns**

13. Although it is not necessary to establish a reasonable apprehension of bias to find that a decision-making body ought to be reconstituted, the applicant has serious concerns about the conduct of the hearing of the appeal to date.
14. The following occurrences during the hearing give rise to a reasonable apprehension on behalf of the applicant that the Heritage Council as constituted for the hearing of this appeal does not have the suitable experience to deal with the issues of procedure and questions of law that arise in this appeal:

- a. At the commencement of the hearing the presiding member announced that she would “open the meeting”. This mischaracterisation shows a lack of understanding of the process for a public hearing. There are separate provisions under the Act for meetings;
- b. At the outset the applicant’s Counsel requested to be heard on preliminary matters for the conduct of the hearing but no opportunity to do so was given;
- c. The legal representative for the City of Boroondara opened his case with oral submissions addressing the statutory framework and disagreed with the legal context within which the Executive Director had made his submissions. The effect of the submissions was to put squarely in issue aspects of the Executive Director’s decision and to introduce an argument by the City of Boroondara that despite these shortcomings the Executive Director’s ultimate conclusion could be supported. The representative’s oral submission on these matters lasted for approximately 15-20 minutes. There was no interjection or remark from the Presiding member. Counsel for the applicant opened his case with an oral submission similarly addressing the statutory framework and responding to the oral submission by the legal representative for the City of Boroondara. The address lasted 10-15 minutes. At the end of the address the presiding member remarked sarcastically “thanks for the lesson”.
- d. The circumstances described in the paragraph above set the scene for one of two occasions where Counsel for the applicant was placed in the embarrassing and awkward situation of having to explain basic rules of procedural fairness to the presiding member. The second occasion was when the presiding member had suggested at the conclusion of day 2 that the applicant sum up its case in 5-10 minutes. On both occasions the presiding member made remarks to the effect that the Heritage Council is an expert body and can have regard to such matters as it considers relevant. On both occasions Counsel for the Applicant explained that the principle relied upon by the presiding member is not unfettered and that a



public hearing requires that the parties each be given a fair and proper opportunity to put their case and respond to the case put by others. Counsel for the Applicant also had to explain to the presiding member the importance of legal questions being properly ventilated and considered in circumstances of recourse to administrative review.

- e. Shortly into the cross -examination of Mr Trethowan, Counsel for the applicant was interrupted by the presiding member to “ make your point”. The interjection was inappropriate. The questions concerned whether the witness had examined the photo montages and whether the witness was familiar with the technique used in preparing them (notably these very matters were also raised later by Ms Moles on behalf of the Heritage Council and are also the subject of a request by the Heritage Council for further submissions). The questions were framed properly, put by experienced Queens Counsel, had a logical purpose, and were completed within a self imposed timeframe of 10 minutes for the total cross examination. On this occasion Counsel for the Applicant explained to the presiding member that cross examination was not an opportunity for him to make a point but to put questions fairly to the witness and that it was important to the process that he was allowed to do so.
- f. The Heritage Council was invited by Counsel for the Applicant to advise that it did not need to be addressed on the new issue given the answers of witnesses rebutting the proposition of the presiding member. Instead the Heritage Council invited further submissions and evidence from the Applicant. While this is not an inappropriate course in itself it is unsafe in the circumstances because it is apparent the Heritage Council has a concluded view. But for the resistance of the Applicant the heritage Council was prepared to make a decision on these matters absent further material.

15. The applicant's concerns confirm the importance of the very significant procedural and legal issues being dealt with by the Heritage Council that includes a member possessing recognised skills in the area of planning law.
16. As a reconstituted Council (with the addition of a member possessing recognised skills in the area of planning law) will be required to conduct a rehearing with the same evidence, it is submitted that the appropriate course is for different members to conduct the rehearing of the appeal, uninfluenced by any prior events or conduct.
17. The applicant appreciates that reconstitution of the Heritage Council will cause procedural delay . The applicant consents to an adjournment of the appeal to facilitate the reconstitution and the matters set out above should be taken as the reasons for the request for an adjournment for the purposes of the Heritage Act if so required.

**Dated:** 5 February 2015



C. TOWNSHEND QC

C VAN PROCTOR

Instructed by Planning & Property Partners



IN THE HERITAGE COUNCIL OF VICTORIA  
AT MELBOURNE

BETWEEN

KEW DEVELOPMENT CORPORATION PTY LTD

AND

HERITAGE VICTORIA

Application No. P22396

Permit Applicant/Appellant



**Name of Place/Object:** Former Kew Cottages (Kew Residential Services)  
**Heritage Register Number:** H2073  
**Location of Place/Object:** Princess Street, Kew

**AFFIDAVIT OF SCOTT BRIAN RICHARD STEWART**

Date of document: 5 February 2016

Filed on behalf of:

Filed by:

Planning & Property Partners Pty Ltd

Duckboard House,

Level 2, 91-93 Flinders Lane

MELBOURNE VIC 3000

5 February 2016

The Applicant/Appellant

Solicitor code: CR103127

Tel: 8620 9075

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Attn: Scott Stewart

Email: [stewart@pppartners.com.au](mailto:stewart@pppartners.com.au)

I, **SCOTT BRIAN RICHARD STEWART**, Principal Solicitor, of Level 2, 91-93 Flinders Lane, Melbourne in the State of Victoria, do solemnly and sincerely declare and affirm:

1. I am a Principal Solicitor at Planning & Property Partners Pty Ltd. I have the care and conduct of this matter on behalf of the Appellants and am authorised to make this affidavit on the Appellants' behalf.
2. I make this affidavit from my own knowledge except where expressly indicated to the contrary, in which case I make it on information and belief. Where I swear to a matter from my information and belief I verily believe it to be true.

**Heritage Victoria Application**

3. By letter dated 21 November 2014, the Appellant filed a permit application with Heritage Victoria seeking permission to construct a residential apartment building at this Heritage Place. The

application was supported by several consultant reports including a Heritage Impact Statement prepared by Lovell Chen.

4. A number of objections were filed in response to the permit application and further information was requested and provided by the Appellant.
5. Following a detailed assessment by the officers of Heritage Victoria, on 17 May 2015, the Executive Director partially refused the application (permission to demolish the existing building on the subject site was granted although this permission was not independently sought) and issued a Notice of Refusal to Grant a Permit with two, dot-point grounds of refusal:

- *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. The Site Context Plan has remained an endorsed document without amendment for the duration of the now almost completed redevelopment of the registered land. Any construction on the part of the registered land bounded by Main Drive and Oak Walk is considered detrimental to the significant cultural heritage values of both this Heritage Place and the adjacent Heritage Place – the Former Willsmere Hospital (H0861).*
- *Construction of the proposed residential building would require the removal of Tree 157, a Narrow Leaved Peppermint (*Eucalyptus radiata*) of some 40 years growth and of Tree 185A, an Algerian Oak (*Quercus canariensis*) which was planted to complete the oak avenue. Construction may also cause unacceptable damage to the root system of Tree 158, a mature Hoop Pine (*Auricularia cunninghamii*). These are all considered to be significant trees whose loss would be detrimental to the cultural heritage values of this Heritage Place.*


6. Within the 60 day prescribed period for filing an appeal against the refusal in accordance with section 75 of the *Heritage Act* 1995, a permit appeal to the Heritage Council was filed with the Heritage Council. The appeal provided five reasons for the appeal as follows:



1. *The development will not be detrimental to the cultural heritage values of the Heritage Place or the adjacent Heritage Place (the Former Willsmere Hospital (H0861)).*
2. *Heritage Victoria Permit Number P9639, which endorsed the Site Context Plan, has expired.*
3. *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 approved development of the Heritage Place.*
4. *Construction will not cause unacceptable damage to the root system of Tree 158, a Hoop Pine (*Auricularia cunningghamii*).*
5. *The development would not result in the loss of significant trees which would be detrimental to the cultural heritage values of the Heritage Place.*

#### **Heritage Council Appeal**

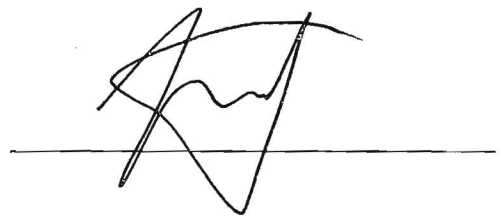
7. Following the normal administrative processes, the Heritage Council appointed a committee to conduct the hearing and hearing dates of 10 and 11 December 2015 were set. Dates were established for the filing and exchange of expert evidence and submissions by the parties, as well as the provision of material in reply in advance of commencement of the hearing. The parties filed an outline of submissions, expert evidence statements and supporting background material and additional material was filed by way of reply in accordance with the Heritage Council's directions.
8. I have had the conduct of the Heritage Council appeal since joining Planning & Property Partners Pty Ltd in or about September 2015, having advised the client concerning the permit application and related Victorian Civil and Administrative Tribunal proceedings concerning a planning permit application at my former firm, Moray & Agnew Lawyers.
9. I note that I was first admitted to practice in 1995 and have practised as a solicitor in both Queensland and Victoria, specialising in planning and environmental law since 1996. During this time, I have appeared as advocate, junior counsel and instructing solicitor in hundreds of matters involving a variety of Courts and Tribunals.



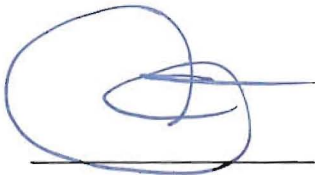
**Conduct of Hearing by the Heritage Council**

- 10. Chris Townshend QC was briefed, and appeared at the hearing on 10 and 11 December 2015 and I appeared as his instructing solicitor. I was present throughout the hearing, other than the occasional time when I was absent from the room to obtain instructions, contact witnesses and similar tasks necessary to the conduct of the hearing. Given that the Heritage Council does not provide a transcript of its proceedings, I took extensive notes during the hearing.
- 11. I have referred to these notes to assist me in preparing this affidavit.
- 12. In my opinion, there were a number of procedural irregularities and conduct by the committee members during the hearing which were unusual in my experience and led me to be concerned about the ability for the Appellant to obtain a fair hearing before the committee when it does not contain a legally qualified member.
- 13. I have assisted with the preparation of the document titled "Application for the Heritage Council to be Reconstituted" dated 5 February 2015. I note that the document formulates a number of legal issues and describes a number of procedural issues which arose during the hearing. My recollection of the hearing, the discussions I had with Mr Townshend QC during and subsequent to the hearing and my notes, are all consistent with the matters outlined in the application document and I believe them to be an accurate summary of both the legal issues and procedural matters.

**SWORN** by the said **SCOTT BRIAN RICHARD** )  
**STEWART** at Melbourne in the State of Victoria this )  
5<sup>TH</sup> day of February 2016 )



Before me:



An Australian legal practitioner  
within the meaning of the  
Legal Profession Uniform Law  
(Victoria)

CHRISTOPHER TAYLOR

LEVEL 2, 91-93 Flinders Lane  
MELBOURNE.