

**Permit Review P28100**

**Former Kew Cottages (Kew Residential Services), H2073, Permit Number P26760**

**Heritage Council Registrations and Reviews Committee  
Hearing – 18-21 June 2018**

**DECISION OF THE HERITAGE COUNCIL**

After considering all submissions received in relation to the permit review, and after conducting a hearing pursuant to Section 108 of the *Heritage Act 2017*, the Heritage Council has determined to set aside the determination under review and make another determination in substitution for it, by issuing permit P26760 with conditions.

**Heritage Council Permits Committee:**

**Jennifer Moles (Chair)**

**Patrick Doyle**

**Jeffrey Robinson**

**Decision Date:** 21 September 2018

## **APPEARANCES**

### **Executive Director, Heritage Victoria ('the Executive Director')**

The Executive Director was represented by Mr Peter Brooks, Senior Heritage Officer (Permits) of Heritage Victoria.

### **Kew Development Corporation ('the Permit Applicant')**

The Permit Applicant was represented by Ms Susan Brennan SC and Ms Emily Porter, instructed by Ms Eliza Minney of Best Hooper Lawyers. The Permit Applicant's written submissions were supported by statements of evidence from Mr Peter Lovell of Lovell Chen, Ms Helen Lardner of Helen Lardner Conservation & Design, Mr John Patrick of John Patrick Landscape Architects Pty Ltd, and Mr Way Choong of Scharp Pty Ltd.

Ms Brennan and Ms Porter also made oral submissions and called Mr Lovell, Ms Lardner, Mr Patrick and Mr Choong to give expert evidence.

### **City of Boroondara ('Boroondara')**

Boroondara was represented by Mr John Rantino of Maddocks. Boroondara's written submissions were supported by a statement of evidence from Mr Bruce Trethowan of Trethowan Architecture.

Mr Rantino also made oral submissions in support of the decision of the Executive Director and called Mr Trethowan to give expert evidence. Ms Fiona Troise, Coordinator Statutory Planning, City of Boroondara, was also present and available to answer questions.

### **Kew Cottages Coalition ('KCC')**

KCC was represented by Mr Brian Walsh, President, KCC. KCC's written submissions included statements of evidence from Mr Maxwell Jackson and Mr David Pym.

Mr Walsh also made oral submissions in support of the decision of the Executive Director and called Mr Jackson and Mr Pym to give evidence.

### **Mr Kenneth Wayne Fitzsimmons**

Mr Fitzsimmons made written and oral submissions in support of the decision of the Executive Director.

### **Ms Geraldine Hopper**

Ms Hopper made written and oral submissions in support of the decision of the Executive Director.

### **Dr Nick Stavrou**

Dr Stavrou made written and oral submissions in support of the decision of the Executive Director.

**Ms Lin West**

Ms West made written and oral submissions in support of the decision of the Executive Director.

**WRITTEN SUBMISSIONS**

Written submissions in support of the decision of the Executive Director were also received from the following persons:

Mr David Arnold  
The Hon. Michael Black AC and Mrs Margaret Black  
Mr Henry Jaworski  
Kew Historical Society  
Ms Margaret Ryan  
Mrs Mary Stella

## INTRODUCTION/BACKGROUND

### The Place

- 1 The Former Kew Cottages (Kew Residential Services) ('the Place') is now a residential neighbourhood on the western side of Princess Street, Kew. It largely comprises individual residential properties and town houses with frontage to an internal road system. The Place also contains centrally located public open space areas and a small number of heritage buildings which are currently disused. There are significant tree plantings across the Place including formal walks and other avenues, some of which have identified heritage significance. There are also a number of memorials of heritage note. The Place as a whole has frontage to Princess Street. Access to Princess Street is provided by Main Drive which runs along the southern boundary of the Place and Hutchinson Drive towards the Place's northern end. The land generally slopes towards the north and west.
- 2 The Place is included in the Victorian Heritage Register as a place of Cultural Heritage Significance to the State of Victoria.
- 3 The Statement of Cultural Heritage Significance ('Statement of Significance') for the Place is outlined below:

*What is significant?*

*The Former Kew Cottages (Kew Residential Services) initially consisted of three cottages, school house and kitchen constructed from 1887 to the east of the Kew Lunatic Asylum. The present buildings stand in extensive grounds with avenues of oaks lining the internal roads and mature plantings between the buildings.*

*The surviving buildings at the site include two of the three cottages built in 1887, now known as Unit 10 and House Hostel. The original School House (Parent's Retreat/Chapel) was built at the same time. A further cottage (Unit 11) was built in 1891 and has also been altered. The ward (Unit 9) built as the female ward dates from 1898-1900. A separate dining room (STAD building) was built in 1917. Units 9, 10, 11 and the House Hostel have been much altered and extended. The three cottages and the female ward were updated in the wave of reform initiated by Dr E. Cunningham Dax, the first Chairman of the Mental Health Authority, in the 1950s and many of the changes made to these buildings reflect this era. The School House and the Dining Room are relatively intact although used for various purposes over the years.*

*The Former Kew Cottages (Kew Residential Services) site deteriorated dramatically in the first half of the twentieth century, with severe overcrowding and lack of maintenance.*

*There were two waves of reform to the institution in the later twentieth century. The first was initiated by Dr Cunningham Dax with the support of a*

*media campaign launched by journalist E.W. (Bill) Tipping in the Melbourne Herald brought the overcrowding and poor conditions of the Kew Cottages to the community's attention, with the establishment of the Kew Cottages Appeal in 1953 raising £47,798. The first £10,000 was spent on modern plumbing, new kitchens, refrigeration and renovations to the original cottages. Four H-shaped dormitory blocks based on Dutch models seen by Dr Dax were built in 1958. A new ward (Ward 13) was completed in 1960 as was the Geiger Playhouse.*

*In 1973 a further appeal was initiated by Graham Perkin, Editor of the Age newspaper. This became known as the Minus Children Appeal. There were over 500 children on the waiting list for places at Kew Cottages at that time. Four major buildings were constructed in this period to cater for daytime activities and education and named the Hamer Centre (day activity centre), the Smorgon Centre (medical and dental centre) and the Perkin Art Centre and the Age/Geiger Centre (theatre and kindergarten), which incorporated the Geiger Playhouse, were built as a result of this appeal.*

### *Landscape*

*The Kew Lunatic Asylum (Willsmere) had been constructed between 1868 and 1872. The principal access to the complex was from a drive from Princess Street culminating in an elliptical carriageway in front of the main building. A gate lodge and large ornamental gates were designed in 1873 and erected at the entrance. These were later demolished (1940s?) for the straightening of Princess Street. The gates were relocated to the entrance of Victoria Park in High Street, Kew.*

*In the 1880s the grounds were planted with many conifers and large growing trees, oaks, elms and Moreton Bay Figs, and trees indigenous to the area, River Red Gum, Yellow Box and Lightwood were retained in the landscape. In 1913 the landscape gardener Hugh Linaker was employed to layout the grounds of Mont Park (est. 1910). As landscape gardener for the State Lunacy Department he commenced a program of landscape improvements and tree plantings at asylums in Victoria.*

*The conifer plantings and oak avenues were well established and a mature size by the 1940s. Conifers were widely planted from the 1860s along with Moreton Bay Figs and occasionally Oaks. Oaks and elms were more widely planted from the 1880s. It is not known if Linaker was responsible for the oak avenues, but it appears that many of the conifers, Monterey Pines, Canary Island Pines, Monterey Cypress, Hoop Pine, Bunya Bunya Pines and Himalayan Cedars, predate Linaker and the oaks and elms may have been planted soon after his appointment. The use of Bhutan Cypress in the landscape is almost certainly due to Linaker as he favoured upright trees. It is possible that the two remnant Monterey Cypress along Main Drive and a Monterey Pine along Lower Drive are trees from an earlier planting scheme.*

*In the late 1960s-70s a new layer of planting was established to the north and east of the site. Amongst the complex are many fine Spotted Gums (*Corymbia maculata*), Lemon-scented Gums, (*Corymbia citriodora*), Flowering Gum*

*(Corymbia ficifolia) Blue Gums (Eucalyptus globulus subsp. globulus), Swamp Mallet (Eucalyptus spathulata), Argyle Apple (E. cinerea), Narrow-leaf Black Peppermint (E. nicholii) and a few unknown (rare/significant [sic]) eucalypts. North of the Perkins Centre are two fine, and rare, gums, Eucalyptus occidentalis, and E. macrandra, and to the east 2 E. camaldulensis and a E. spathulata. On the Princess Street frontage (SE corner) is a young Syncarpia glomifera, an unknown Eucalyptus sp. and scattered throughout the site are a few Callitris trees, C. rhomboidea, C. columinaris and C. glaucophylla, and River Red Gums (Eucalyptus camaldulensis)*

*How is it significant?*

*The Former Kew Cottages (Kew Residential Services) site is of architectural, historical, aesthetic, scientific (horticultural) and social significance to the State of Victoria*

*Why is it significant?*

*The Former Kew Cottages (Kew Residential Services) site is historically significant as the first government institution to be established for intellectually handicapped children in Australia. Its design and construction in 1885-87 represented a new and progressive move for the care and accommodation of people with intellectual disabilities, in that it removed them from the general lunatic asylums and provided opportunities for education and training. The six buildings constructed between 1887 and 1917 are of particular significance as the core of the site, demonstrating the form and function of the original institution.*

*The Former Kew Cottages (Kew Residential Services) site is historically and architecturally significant as the first example of the cottage system based on the European 'Cottage System' applied in full to the intellectually handicapped. While the surviving original cottages have been extended and upgraded, their siting and, in part, their form and remaining fabric, point to the original arrangement of the institution. In addition, the changes made in the period 1958-1960 demonstrate the wave of reform initiated by the newly-appointed Chairman of the Mental Hygiene Authority in 1952, Dr Eric Cunningham Dax and the Tipping Appeal. It was the condition of the House Hostel and Unit 9 which demonstrated to the reading public in the 1950s the needs of the residents in the whole institution.*

*The Former Kew Cottages (Kew Residential Services) site is historically significant in demonstrating changing attitudes to the care of the intellectually disabled from 1887 to the present.*

*The Former Kew Cottages (Kew Residential Services) site is historically significant for its association with Dr Ernest Jones, first Inspector General for the Insane from 1905 and Dr Eric Cunningham Dax, first Chairman of the Mental Hygiene Authority from 1952, whose reforms are reflected in the development of the site and buildings.*

*The cottage now known as Unit 10 is historically significant as one of the original cottages for boys opened in 1887, but considerably altered, especially in the years 1954 to 1960 but retaining the domestic scale of the original.*

*The House/Hostel (1887) is historically significant as one of the original 1887 cottages for girls. Although much altered by changes made mainly in the period 1954-60, the building (and Unit 10 and 11) demonstrates in its siting and remaining fabric, the first stage of development of the institution. Additional facilities were added on the south side, replacing an existing verandah. The changes of the 1950s and 1960s demonstrate the wave of reform initiated by the newly-appointed Chairman of the Mental Hygiene Authority in 1952 and the Tipping Appeal and it was this cottage and Unit 9 whose condition demonstrated to the public in the 1950s the needs of the residents in the whole institution.*

*The building constructed as the School House (Parents Retreat/Chapel) (1887) is architecturally and historically significant as the first building constructed to provide education and training for the residents and demonstrates the innovative educational function of the institution from its earliest period. This school was the predecessor of special schools for the intellectually handicapped in Victoria.*

*The cottage now known as Unit 11 (1887) is historically significant as one of the original 1887 cottages. It has been considerably altered by changes made mainly in the period 1954-60.*

*The building now known as Unit 9 (1898-1900) is of historical significance as one of the early wards, which has been considerably altered by changes made mainly in the period 1954-60.*

*The former Dining Room (STAD Building) (1917) is of historical and architectural significance in demonstrating the development of the institution in the early twentieth century. The dining room was constructed to improve food hygiene as part of the reforms introduced by Dr Ernest Jones, Inspector General of Lunatic Asylums, in response to the regular outbreaks of typhoid and scarlet fever and the increase in the institution's population to over 300.*

*The landscape at Kew Cottages is of historical and aesthetic significance at a state level. The planting is dominated by towering conifers from the nineteenth century, including Hoop Pines, Bunya Bunya Pines, Monterey Pines, Canary Island Pines, and Monterey Cypress. The landscape was further enhanced by avenue plantings of English Elms, English Oaks and Algerian Oaks along the Drives and in the landscape. The Main Drive comprises an unusual double avenue of trees, the outer rows are planted with Algerian Oaks, and the inner avenue with English Elms. Towards the western end the avenue changes to alternating Elms and Moreton Bay Figs. On the north side near the centre is a short row of Bhutan Cypress. The Boundary Drive is planted with an avenue of Algerian Oaks and the planting along Lower Drive mostly features pairs of alternating English Oaks and Algerian*

*Oaks along the avenue. The grounds also feature an Oak Walk, asphalt path edged with uncommon glazed spoon drainage tiles and planted with Algerian Oaks, and a few English Oaks. Retained in the landscape are several old River Red Gums and a number of regenerating saplings, some now semi-mature and two Yellow Box and a fine Lightwood tree.*

*The Main Drive is of historical significance for its association with the Kew Lunatic Asylum (Willsmere), the largest nineteenth century mental institution in Victoria and later its use by the Kew Cottages complex. The landscape is significant for its association with the prominent landscape gardener, Hugh Linaker who was appointed by the State Lunacy Department in 1913. He later became State Superintendent of Parks and Gardens from 1933, and prepared landscape plans for the Buchan Caves reserve in 1929 and the new Shrine of Remembrance in 1933. Linaker was one of the most significant landscape designers in Victoria in the early 20th century His landscape style included mixing exotics and native trees and contrasting forms especially narrow crowned and fastigiata forms and palms. These were often planted in alternate arrangements in the landscape to give a striking and contrasting image.*

*The planting is of scientific (horticultural) significance for its collection of trees rarely cultivated in Victoria and trees of outstanding size and form. The grounds include three specimens of the rarely cultivated *Prunus ilicifolia*. The only other known trees are an old tree at Willsmere, now coppicing from a stump and a young sapling in the entry courtyard and a large tree in Caulfield Park. The planting also includes an uncommon *Pinus muricata*, *Brachychiton roseus* subsp. *roseus*, and three *Cupressus macrocarpa* 'Fastigiata'. Beside the workshop is a stand of the rarely grown *Wigandia caracasana* and north of the Chapel two young trees of *Arbutus canariensis*.*

*The Algerian Oaks (*Quercus canariensis*), (about 80 trees) at Kew Cottages are highly significant. For some unknown reason the trees have been grafted onto English Oak (*Quercus robur*) rootstock. The location of the graft union ranges from ground level to about two metres above ground level. Algerian Oaks are readily grown from acorns and this form of propagation is only known to occur in Rosalind Park Bendigo, where there are three grafted Algerian Oaks in an avenue.*

*The Former Kew Cottages (Kew Residential Services) site is of social significance in demonstrating the position of the intellectually disabled in society. Public awareness campaigns such as the very successful Tipping and Minus Children Appeals for improvements at the Cottages have been influential in changing public perceptions of the disabled. The Kew Parents Association founded in 1957 was the first such organisation in Australia, acting as an advocacy group for their children and for all intellectually disabled citizens.*

*The memorial structures at Kew Cottages commemorating the long term residents and the nine men who died in a fire in Unit 31 in 1996 are of social significance as a reminder of society's duty of care to the intellectually*



*disabled.*

*[NOTE: On 9 September 2005 the Executive Director granted a permit to demolish buildings B2, B4 and B5 and to relocate memorials F1, F2 and F3]*

4 The part of the Place relevant to this matter is an ‘island site’ bounded by Main Drive to the south and west, and Oak Walk to the north-east. It is located on the high ground at the south-western corner of the Place’s registered extent (‘the Subject Site’).

5 The following description of the Subject Site is taken from page 7 of the *Heritage Impact Statement* prepared by Lovell Chen on behalf of the Permit Applicant, dated June 2017<sup>1</sup>:

*The area is occupied by a single-storey brown brick office building, formerly used for administrative purposes associated with the Kew Residential Services. The building is understood to have been constructed in two stages, with the first stage dating from the mid-1960s and the second stage from the late 1980s. Prior to this time the site appears to have been part of the general open landscaped surrounds to the institution. The building is of no heritage value.*

*The registered Fire Memorial (identified as F1 in the VHR extent of registration), constructed in 1996, is situated at the eastern end of the area where it was relocated from its original position west of Lower Drive. Four concrete lamps line the south-east [sic – western] side of Oak Walk. In addition, numerous trees of various species surround the existing administration building. Oak Walk, as the name implies, is lined by an avenue of oaks; while the various mature and specimen trees include Canary Island Pines, Moreton Bay Figs, and other pines, elms and oaks.*

### **Previous Development of the Place**

6 Since 2005, the Place has been redeveloped to accommodate a large number of residential structures, including townhouses and detached dwellings. The redevelopment has occurred gradually, over several development stages.

7 Permits previously issued by Heritage Victoria in conjunction with previous development stages include<sup>2</sup>:

- P9639 – Demolition of three buildings included within the extent of registration for the Place (B2, B4 and B5), relocation of three memorials, removal of vegetation and approved site layout (issued 9 September 2005)
- P10367 – Stage 1 residential development (issued 13 April 2006)
- P13872 – Stage 2 subdivision (issued 9 February 2009)
- P15474 – Stage 3A subdivision (issued 4 May 2010)
- P15955 – Stage 3B works (issued 31 August 2010)
- P16912 – earthworks, landscaping and removal of two trees (issued 14

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<sup>1</sup> Note: in-text references to Figures contained within the *Heritage Impact Statement* report have been removed from this excerpt.

<sup>2</sup> As summarised from page 9 of the *Heritage Impact Statement*, Lovell Chen, June 2017.

June 2011)

- P17156 – Tree removal, and subdivision of the remainder of the Place into 86 allotments (issued 17 November 2011; amended 9 February 2012)
- P17513 – Stage 4A subdivision and works (issued 20 January 2012)
- P17514 – Stage 4B works (issued 24 February 2012)
- P18057 – Stage 4C works (issued 23 February 2012)
- P18058 – Stage 5A works (issued 2 March 2012)
- P18838 – Stage 6B works (issued 15 August 2012)
- P18919 – Stage 6 works (issued 18 September 2012)
- P19000 – Stage 6A1 works (issued 30 October 2012)
- P19001 – Stage 6A2 works (issued 2 November 2012)
- P19004 – Stage 5B works (issued 13 November 2012)
- P18838 – Stage 6B works (issued 15 August 2012)
- P18763 – Stage 7 works (issued 27 August 2012)
- P24993 – works and additions to registered buildings B1, B3 and B6 (issued 30 November 2016).

### **Previous Permit Applications Relating to the Subject Site**

- 8 In November 2014, an application was made to Heritage Victoria for a permit to undertake works associated with ‘Stage 8’ at the Place (P22396). Stage 8 proposed development of the Subject Site, in particular the construction of a five storey residential building with a two level basement. The proposal necessitated the demolition of the existing 1960s/1980s brick building and included the removal of a tree on the site (Tree 157).
- 9 The Executive Director, Heritage Victoria, purported to permit the demolition of the 1960s/1980s brick building, but refused permission for the erection of the five storey apartment building on the Subject Site. The following reasons were given:
- *The proposed residential apartment building is shown located on land set aside in the Site Context Plan endorsed as part of permit P9639 as open public 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.*<sup>3</sup>

- 10 Following the Executive Director's refusal to issue a permit for the new building, the Permit Applicant lodged a Permit Appeal with the Heritage Council. A hearing proceeded over two days and was then adjourned. The Permit Appeal was ultimately withdrawn in April 2016, and the Heritage Council was therefore not required to determine the matter.

### **Permit Application P26760**

- 11 On 8 May 2017 the Permit Applicant made an application to Heritage Victoria pursuant to s.67 of the *Heritage Act 1995* for a permit to 'construct a three (3) level residential apartment building with a single level basement' at the Subject Site ('the Application').
- 12 The description of the Application below is taken from pages 13–14 of the *Heritage Impact Statement* prepared by Lovell Chen, dated June 2017, and submitted as part of the Application:

*The proposal involves the demolition of the existing administration building and the construction of a new three storey apartment building with one level of basement car parking.*

*The new apartment building will adopt a similar footprint as the existing building and will rise to a height in the order of 10.5 metres with a lift overrun of 1.6 metres. The new building will present as two distinct built forms separated by a three storey glazed curtain wall element with a dry stack stone wall to the lift lobby. The main lobby entrance will be located in the centre of the building, with the curtain wall building component.*

*The building will predominantly be constructed over a dry stack stone wall plinth. The eastern component of the building will be constructed of precast concrete panels with an off white coloured finish, and features of grey brickwork, steel 'C' section to the second floor level, clear and grey tinted double glazing in charcoal coloured aluminium frames, and clear glass balcony balustrades. The western component of the building will be clad in zinc wall cladding with a vertical standing seam in a charcoal coloured finish, precast concrete panels with an off white coloured finish, with features of grey brickwork, steel 'C' sections to the first floor level, clear and grey tinted double glazing within charcoal aluminium frames, and clear glass balustrades to the balconies.*

*Vehicle access to the building will be via Main Drive from a ramped driveway to the basement. A louvred aluminium roller door will be located to the west elevation of the building. Also proposed are three at-grade visitor car parking spaces and four bicycle hoops to the south of the building, accessed from Main Drive; a pedestrian footpath accessed from the east of the site running along the north side of Main Drive, and further bluestone paved pathways (2 metres wide)*

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<sup>3</sup> Notice of Refusal to Grant a Permit Under Section 74 of the Heritage Act 1995 (Permit Application P22396), 17 May 2017.

*to the main north and south entrances to the central lobby of the building accessed from Oak Walk and Main Drive.*

*The proposed works will not result in the removal of trees, the concrete lampposts or memorial from the site.*

- 13 Pursuant to s.68(1)(a) of the *Heritage Act 1995* the Application was required to be advertised.
- 14 A total of 21 submissions were lodged with the Executive Director pursuant to s.69 of the *Heritage Act 1995* in response to the advertised Application.

#### **Determination of the Executive Director**

- 15 On 18 October 2017 the Executive Director determined to refuse to issue permit P26760, on the following basis:
  - *The proposed residential apartment building is intended to be located on land identified in the Site Concept Plan endorsed as part of permit P9639 as open space devoid of buildings. The Site Concept Plan was intended to apply for the duration of the staged redevelopment works on the broader site. Any construction on that part of the registered land bounded by Main Drive (F4) and Oak Walk (F7) is considered detrimental to the cultural heritage significance of both this registered place and of the adjacent registered place – being the Former Willsmere Hospital (H0861).*
  - *The island site where construction is proposed has served historically as one of the chief features contributing to the parklike setting on the final approach to the Willsmere Asylum. Any construction on this site would have an unacceptable detrimental impact on Willsmere’s cultural heritage significance.*<sup>4</sup>

#### **The Permit Review**

- 16 On 15 December 2017, the Heritage Council received correspondence from the Permit Applicant, seeking a Permit Review pursuant to s.106 of the *Heritage Act 2017* (‘the Act’) in relation to the Executive Director’s refusal to issue permit P26760. In accordance with s.106(1)(a) of the Act, a Permit Review Hearing was required to be held.
- 17 A Permit Review Hearing was scheduled by the Heritage Council over two days: 20–21 March 2018. A Registrations and Reviews Committee of the Heritage Council (‘the Committee’) was constituted to consider and determine the matter.

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<sup>4</sup> *Notice of Refusal to Grant a Permit Under Section 74 of the Heritage Act 1995 (Permit Application P26760) [‘the Officer’s Report’]*, 18 October 2017.

## **PRELIMINARY AND PROCEDURAL MATTERS**

### **Request for Adjournment and Directions Hearing**

- 18 On 18 January 2018 the Heritage Council received *Heritage Council Form E – Request for Adjournment* from the Permit Applicant. A Directions Hearing was subsequently scheduled for 31 January 2018.
- 19 At the Directions Hearing, the Committee heard submissions from the Applicant and other hearing participants about the Permit Applicant’s request for adjournment. After hearing the submissions, and considering the availability of all hearing participants, it was determined to reschedule the Permit Review Hearing for four days being 18–21 June 2018 (‘the hearing’).

### **Conflicts of Interest and Reconstitution of the Committee**

- 20 At the Directions Hearing, the Committee members made declarations in relation to any matters that may potentially give rise to an actual or apprehended conflict of interest. After some submissions were received in relation to this matter, Ms Louise Honman decided to withdraw from the Committee. It was, however, agreed by the Committee and all hearing participants that the Committee would stand as constituted for the purpose of the Directions Hearing.
- 21 Following the Directions Hearing, the Committee was reconstituted, and Mr Jeffrey Robinson was appointed to the Committee. Mr Robinson had no actual or potential perceived conflict of interests to declare.

### **Repeal of the *Heritage Act 1995* and application of the Act**

- 22 On 1 November 2017, the *Heritage Act 1995* was repealed, and the Act was gazetted. The Committee noted that the Application was made and determined by the Executive Director, under the *Heritage Act 1995*, but the Permit Review was requested following the introduction of the Act. No transitional provisions of the Act apply in these circumstances, and this matter has been considered by the Committee in accordance with the s.108 of the Act.

### **Site Inspection**

- 23 The Committee undertook a site inspection of the Place and Subject Site on 8 June 2018, accompanied only by the Heritage Council Hearings Coordinator and Business Support Officer.
- 24 Following the conclusion of the hearing on 21 June 2018, the Committee undertook a site inspection of the Former Willsmere Hospital (H0861) [‘Willsmere’] accompanied by the Heritage Council Hearings Coordinator. Access to Willsmere was facilitated by resident, Mr Adam Jones Dean.
- 25 No submissions were made, heard, or received at the time of either site inspection.

### **Information Provided by the Decision Maker**

- 26 On 20 December 2017, the Heritage Council requested that Heritage Victoria provide the Heritage Council with documentation associated with the Application. This information was received by the Heritage Council on 18 January 2018 and was circulated to hearing participants.

- 27 Upon receipt of the Application documents, a number of omissions from this documentation were detected. Omitted documents were requested from Heritage Victoria, and upon receipt were circulated to hearing participants. The Committee thanks all hearing participants for their patience in relation to the circulation of Application documentation.

### **Hearing Participants and Admissibility of Hearing Submissions**

- 28 In accordance with s.106(5) of the Act, the owner or government asset manager of the Place (Development Victoria); the responsible authority for the area in which the Place is situated (City of Boroondara); and the National Trust of Australia (Victoria) were required to be notified of the Permit Review. All above parties were invited to participate in the hearing and make submissions.
- 29 Additionally, all parties who lodged submissions with the Executive Director pursuant to s.69 of the *Heritage Act 1995* in response to the advertised Application were notified of the Permit Review and were invited to participate in the hearing and make submissions.
- 30 Prior to the hearing, the Heritage Council received two additional written submission from other persons. These written submissions were from Mr Henry Jaworksi and the Kew Historical Society. The matter of whether or not to admit these submissions was considered as a preliminary matter at the hearing. The Committee sought the views of all hearing participants, and after receiving no objections, it was determined to admit the written submissions of Mr Jaworksi and the Kew Historical Society for consideration.

### **Request for an Extension of Time to Lodge Hearing Submissions**

- 31 On 26 April 2018 the Heritage Council received a request from the Permit Applicant for an extension of one week to the date by which hearing submissions were due to be received. The Committee determined to grant the extension, which was afforded to all hearing participants.

### **Late Material**

- 32 At the commencement of the hearing, Dr Stavrou sought to introduce material that had not been submitted as part of the hearing submissions process, including four supporting letters and a signed petition. After seeking the views of other hearing participants, the Committee allowed the admission of this material for consideration.
- 33 Throughout the course of the hearing and the presentation of oral submissions, several hearing participants sought to introduce additional material. Requests to admit additional material for the consideration of the Committee were determined by the Committee on a case-by-case basis.

### **Amendment to Plans**

- 34 At the hearing, the Permit Applicant clarified that the plans submitted as part of its hearing submissions ('the amended plans') were different from the plans submitted as part of the Application. The Permit Applicant confirmed that the amended plans demonstrate a reduction to the proposed building height by 300mm; a reduction in the size of the plant and equipment located on the

building roof; and changes to the materials palette.

- 35 The Permit Applicant clarified that it did not wish to formally apply to amend the plans; rather, it was the submission of the Permit Applicant that if the Committee determined to issue a permit, the Committee could impose conditions to require plans to be endorsed in accordance with those amended plans.

### **Requests for Further Information**

- 36 At the close of the hearing, the Committee requested the Executive Director to prepare ‘without prejudice’ draft permit conditions to assist the Committee in the event that it determined to issue permit P26760 with conditions. This information was received on 29 June 2018.
- 37 Hearing participants who attended the hearing and made oral submissions were invited to make written submissions and submissions in reply in response to the draft permit conditions provided by the Executive Director.

## **CONTEXT OF DECISION**

### **Alternative Proposals for Future Use of the Subject Site**

- 38 The Committee notes that submissions made by a number of hearing participants contained arguments relating to how the Subject Site ‘ought’ be used, or alternatively developed (i.e. turning the Subject Site into a public arboretum; demolishing the existing 1960s/1980s brick building to return the Subject Site to its ‘original state’), as opposed to the proposal that forms the subject of the Application.
- 39 The Committee notes that it is not able to consider alternative proposals for the use of the Place and Subject Site. Rather, for the purpose of this Permit Review the Committee is bound to consider the Application in accordance with s.101(2) of the Act [s.108(8)], including whether the Application, if approved, would affect the cultural heritage significance of the Place [s.101(2)(a)] (**Attachment 1**).
- 40 The Committee has therefore not considered alternative (or hypothetical) proposals for future use or development of the Subject Site in reaching its decision.

### **Previous Conduct and Compliance of the Permit Applicant**

- 41 The Committee notes that submissions made by a number of hearing participants strongly relied and focused on allegations of previous poor conduct, or non-compliance with previous permits issued under the *Heritage Act 1995*, on the part of the Permit Applicant. Such concerns are referenced in the Officer’s Report and relied upon as part of the justification for the Executive Director’s determination to refuse to issue permit P26760.
- 42 The Committee is of the view that 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.

### **Statements of Significance Relevant to the Application**

- 43 A number of hearing submissions received make reference to the Subject Site's contribution to both the cultural heritage significance of the Place, and the cultural heritage significance of Willsmere. The Committee agrees that the Statements of Significance for both places are relevant to the consideration of this matter.
- 44 The Committee notes, however, that the two Statements of Significance vary in format and detail. The Statement of Significance for the Place was prepared in 2004 at the time of registration and is therefore in the contemporary format. The Statement of Significance for Willsmere, however, has not been updated since 1999 and provides comparatively minimal detail compared to more recent registrations.
- 45 The Committee notes that it may be preferable for the Statement of Significance for Willsmere to be updated and improved, should the opportunity arise in the future.
- 46 The Committee acknowledges that the Place and Subject Site sit outside of the extent of registration for Willsmere. The Committee acknowledges, however, that there are elements of Willsmere's broader surrounding context and landscape that may have the potential to contribute to the understanding of the cultural heritage values of Willsmere. This may be true of much of the Place, and the Committee finds that it is true in respect of the Subject Site.

### **ISSUES**

- 47 The following section is not intended to be a complete record of submissions that were made to the Committee. It is a summary of what the Committee considers to be the key issues, followed by an explanation of the position the Committee takes on each key issue.
- 48 From the submissions received, three main issues emerged: the relevance and effect of permits previously issued by Heritage Victoria; the impact of the Application on the cultural heritage values of the Place; and the impact of the Application on the cultural heritage values of Willsmere.

### **Previous Permits and Intentions Relating to the Subject Site**

#### *Submissions and evidence*

- 49 Submissions were made by a number of hearing participants in relation to the bearing of previously issued permits on the consideration of this Permit Review, with particular reliance placed on permit P9639 and, to a lesser extent, plans endorsed pursuant to permit P16912.
- 50 The Executive Director's refusal, of 18 October 2017, was on the basis of two stated grounds, as quoted above at paragraph 15. The first of those two grounds relate to this broad area of dispute.



- 51 That ground relies entirely on permit P9639, issued by the Executive Director, pursuant to the *Heritage Act 1995*, on 9 September 2005. It was the first permit to authorise the redevelopment of the Place for residential purposes, following the inclusion of the Place in the Victorian Heritage Register on 25 November 2004. Permit P9639 gave permission in the following terms in relation to the Place (all subject to thirteen conditions):
- Demolition of three Heritage Registered places, known as B2, B4 and B5, relocation of three memorials, removal of specified vegetation, and approval of the layout of the site, as set out on drawings HVS\_1B, HVS\_3B, HVS\_4, HVS\_5, HVS\_6, HVS\_7, prepared by dKO architecture Pty Ltd, dated July 2005, drawing 00009976/SD-00/4/01 dated 9/09/2005 [and various other documents].
  - Development of Stages 1 and 2 for residential development including community houses as set out on drawing HVS\_2B dated July 2005, endorsed by the Executive Director and forming part of this permit [and various other documents].
- 52 The permission that P9639 gave in relation to demolition is not pertinent to the present discussion, noting that P9639 did not authorise the demolition of the building that was then (and is now) located on the Subject Site, and further noting that the demolition of that building has never required permission pursuant to the *Heritage Act 1995*, due to its demolition being the subject of a permit exemption within the terms of the registration.
- 53 Further, the permission given by P9639 in relation to the development of Stages 1 and 2 for residential purposes is not pertinent to the present discussion since those stages were located in the south-eastern portion of the Place, well away from the Subject Site.
- 54 Most pertinent, for present purposes, is the reference to ‘*approval of the layout of the site*’ as set out in certain drawings. In that regard, the Executive Director and others placed great reliance on the document entitled ‘Site Concept Plan’, dated July 2005, and endorsed on behalf of the Executive Director, pursuant to P9639, on 9 September 2005 (‘the Site Concept Plan’). It is identified as HVS\_3B, and it therefore appears to be one of the drawings referred to in the citation of permit P9639.
- 55 The Site Concept Plan shows a residential development across much of the Place, including residential lots, apartment buildings, road alignments and open space reserves (amongst other things). The Site Concept Plan shows no building within the Subject Site itself – not even the building which was at that time – and remains – located there. Rather, the Site Concept Plan shows numerous trees within the Subject Site, potentially giving the impression of a public park or reserve.

- 56 Proceeding from this point, the Executive Director, supported by many of the objecting submitters, sought to argue that the Application is inconsistent with P9639, and should be refused for that reason alone. The thrust of these submissions was to the effect that *no* built form should be permitted within the Subject Site: that the Subject Site should be ‘open space devoid of buildings’, to quote from the Executive Director’s first reason for refusal – to give effect to the intent of P9639, in relation to the Subject Site. These submissions relied, in part, on a belief that P9639 was intended to serve as an ‘overall / master’ permit, to guide or regulate the entire redevelopment of the Place, from beginning to end.
- 57 In this regard, it was argued that not even the *existing* building should be allowed to remain – indeed, that its ongoing presence offended or contravened P9639. The Executive Director and others argued that P9639 *impliedly* authorised the demolition of the existing 1960s/1980s brick building, mainly by virtue of its not being shown on the Site Concept Plan.<sup>5</sup> This submission overlooked the fact that no permission was required for the demolition of that building pursuant to the *Heritage Act 1995*, for the reasons given above, so no permit could validly grant such permission in any event (whether impliedly or otherwise). Further, that submission was made despite no condition of P9639 requiring the removal of that building, and despite the lack of any suggestion that the building had been erected unlawfully.
- 58 The Executive Director did not refer to any enforcement action brought or threatened in respect of this alleged contravention of permit P9639. The present proceeding is not an enforcement proceeding and this Committee has no enforcement role in the present context. However, the Committee notes the lack of any such action, which casts some doubt on the seriousness of the Executive Director’s allegation.
- 59 The Committee also notes that the Executive Director regards P9639 as having expired.<sup>6</sup> If this is true, this might pose some difficulty to any such enforcement action. It might also raise questions about how an ‘expired’ permit might continue to constrain the grant of other permits, as the Executive Director urged.
- 60 One obvious difficulty for the Executive Director and others, in their reliance on P9639, is the fact that numerous permits have been issued pursuant to the *Heritage Act 1995* subsequent to P9639 (apparently at least 18 such permits, as referred to a paragraph 7 above). All of these permits apparently authorised some form of development within the Place. All authorised development which was, to some extent, a departure from what had been authorised by P9639. A comparison of the existing state of the Place, versus the development shown on the Site Concept Plan, demonstrates several obvious differences.
- 61 These circumstances left the Executive Director with little option but to concede that there is no legal impediment to the grant of a permit, pursuant to the Act,

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<sup>5</sup> At page 17 of the Officer’s Report in support of the refusal of the Permit Application, it is stated that the demolition of this building was ‘approved by default’.

<sup>6</sup> By virtue of condition 1 which provides that the permit would expire if the permitted works were not completed within 7 years, i.e. by 9 September 2012, unless extended.

albeit it is inconsistent with a previous permit applying to the same land.

- 62 However, the Executive Director sought to rationalise these circumstances by distinguishing the Application from those previous 18 permits in relation to the Place. In particular, the Executive Director asserted that the Application represents a *more detrimental* heritage impact on the Place than P9639, and that the other intervening 18 permits all authorised development which actually represented an *improved* heritage outcome for the Place, as compared to P9639. Accordingly, the Executive Director submitted that a permit can be issued, which is inconsistent with an earlier permit in relation to the same place, only where the subsequent permit represents a lesser impact on heritage values, as compared with the relevant earlier permit. This submission was made not in relation to the exercise of discretion; rather, the Executive Director submitted that there is no legal power to consider or grant a permit in these circumstances.
- 63 The Permit Applicant refuted these submissions, arguing that there is nothing to prevent multiple permits allowing different forms of development of the same land. The Permit Applicant also refuted the suggestion that a subsequent permit can only be considered or granted if it represents a more favourable heritage outcome for the site, as compared to the previous permit.
- 64 Boroondara, notwithstanding its strong opposition to the Application, conceded that there was no legal basis to require or compel the demolition of the existing building. Boroondara further conceded that P9639 did not fetter the ability of the Executive Director (or this Committee, on review) to determine the Application on its merits, having regard to relevant considerations under the Act.
- 65 Having said that, Boroondara maintained that the Committee ought to give weight to permit P9639 and the Site Concept Plan, in its assessment of the Application. On that basis Boroondara argued that only a very 'low profile' form of development (at most) should be approved for the Subject Site.
- 66 Finally, the KCC led a separate (but related) argument in relation to permit P16912. In particular, reliance was placed on a landscaping plan, endorsed pursuant to permit P16912. More particularly, reliance was placed on the following annotation which relates to a footpath serving the existing 1960s/1980s brick building, and located immediately to the north of that building:

*Note: 'Existing paths to remain' are to be removed upon demolition of existing site office building*

#### *Discussion and conclusion*

#### Does permit P9639 pose a legal impediment to consideration of the Application?

- 67 The Committee is satisfied that permit P9639 poses no legal impediment to the consideration of the Application, and the grant of a permit, if warranted under the Act.

- 68 In particular, the Committee is not persuaded that permit P9639 compels (or compelled) the demolition or removal of the existing 1960s/1980s brick building from the Subject Site. It is a very serious matter for a government body to require the demolition of a lawfully existing building. It would be most surprising for a statutory decision-maker to seek to achieve this by way of mere implication or inference. Putting aside the interesting question of the Executive Director's legal ability to compel the demolition of an existing building, if that had indeed been the intention, we would have expected the Executive Director to do so in clear and unambiguous terms. Permit P9639 contains no such terms in relation to the existing building. No party identified any other relevant legal instrument in that regard.
- 69 Similarly, the Committee is not persuaded that permit P9639 effectively precludes consideration or approval of any form of development on the Subject Site. Again, it would be a serious matter for any instrument under the *Heritage Act 1995* (or the Act) to preclude consideration of *any* form of development on land, as contended by the Executive Director and others. Again, if that was the intention, for example at the time of the granting of P9639, the Committee would have expected this to have been put in clear and unambiguous terms. Again, this did not occur.
- 70 The Committee finds that neither the Act nor its predecessor preclude the consideration of multiple applications, and the grant of multiple permits (or other forms of permission) in relation the same site. There is no logical reason that the grant of one form of permission should preclude the consideration and grant of some other form of permission. It is clear from the Act (and its predecessor) that the role of the Executive Director (and the Committee on review) is to consider and determine each application under the Act on the basis of the relevant considerations under the Act.
- 71 It follows that the Committee is unpersuaded by the Executive Director's submissions to the effect that a subsequent application may be considered only if it results in a less detrimental heritage impact than an earlier permit. There is no basis for such an interpretation on the face of the Act, and no authority was relied upon in support of that analysis. In any event, the Committee finds it hard to accept the bald assertion that all of the post-P9639 permits necessarily resulted in an improved outcome, in heritage terms, as compared with P9639.
- 72 The most obvious way that the Executive Director might have regulated the future use or development of the Subject Site, at the time of the grant of permit P9639, would have been to enter into a covenant with the land owner, pursuant to Part 4 Division 2 of the *Heritage Act 1995*.<sup>7</sup> Perhaps it may have been open to the Executive Director to impose a condition on P9639 requiring execution of such a covenant. Given the Executive Director's contentions to the effect that permit P9639 was intended to guide the overall redevelopment of the Place from start to finish, and given that permit P9639 clearly did not specify or authorise all aspects of that anticipated redevelopment across the whole of the Place, this kind

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<sup>7</sup> Similar provisions are now found at part 7 of the Act.

of covenant would appear to have served some of the relevant purposes which the Executive Director now seeks to attribute to P9639.

- 73 The Committee makes no formal finding as to whether the proposed development should be regarded as contrary to (or inconsistent with) permit P9639. Presumably, if any party asserts that permit P9639 operates in such a way as to preclude any built form on the Subject Site, this argument would need to be made on the basis that permit P9639 remains ‘alive’ in some sense. This would seem to leave open the prospect that the Permit Applicant might apply to amend permit P9639, if indeed this were necessary.

#### Question of weight to be given to P9639

- 74 Having dealt with the suggestion that the permit P9639 constitutes any kind of legal impediment to the grant of the permit now sought, the remaining question is the relevance of P9639, in relation to the exercise of the Committee’s discretion.
- 75 The Committee is not persuaded that it is necessary or appropriate to give any weight to permit P9639, for the purposes of the assessment of the Application pursuant to s.101(2) of the Act.
- 76 Put simply, permit P9639 allowed one form of development within the Place (albeit somewhat vaguely defined in some respects), whereas the permit now sought relates to a particular proposal within a particular part of the Place (that is the Subject Site) which was not the subject of any particular attention or consideration in the context of the grant of permit P9639.
- 77 The Committee is not persuaded that any of the circumstances relating to permit P9639 have any particular bearing on the proposal that is now before it. At the most, the Permit Applicant might be said to have changed its (corporate) mind. Even if there was previously an intention to leave the Subject Site undeveloped, as an open treed area, such an intention would in no way preclude the Permit Applicant from later formulating and pursuing some different proposal (such as the Application), in the absence of any legally effective mechanism to preclude this (such as a covenant pursuant to the *Heritage Act 1995*, or the Act).

#### Does permit P16912 pose a legal impediment to consideration of the Application?

- 78 For many of the reasons discussed above, in relation to permit P9639, the Committee finds that neither permit P16912, nor the plans endorsed pursuant to that permit, pose any legal impediment to consideration of the Application.
- 79 The Committee accepts that the annotation quoted above, particularly the reference to ‘*demolition of the existing site office building*’, evinces either an intention or an expectation for that building to be demolished at some time. This is not entirely surprising, given that the demolition of that building is contemplated (and effectively allowed) by the permit exemptions applying to the Place, in the terms of its registration.

80 However, the language of that annotation on the endorsed plan in no way mandates the demolition of the building. The reference to the demolition of the building is qualified in temporal terms; that is to say, any purported obligation to remove the path is only activated upon the demolition of the building. It is also significant that two separate annotations on the same plan, in relation to the same path, state ‘*Existing path to remain*’.

81 Again, if the Executive Director had intended to require the demolition of the existing building and the retention of the Subject Site as an open landscaped area, it would have been necessary to pursue that outcome in a more sophisticated and transparent way, rather than by simply endorsing a landscaping plan which happened to include this annotation.

#### Concluding observations regarding the submissions made about previous permits

82 The Committee notes the submissions made on behalf of the Permit Applicant to the effect that the Executive Director’s assessment of the Application demonstrated a lack of objectivity, and featured some unusually emotive and pejorative language.<sup>8</sup>

83 At least in relation to this broad question of the relevance of earlier permits, the Committee agrees with those submissions. It is also unfortunate that the submissions on behalf of the Executive Director in this proceeding were lacking the proper legal and factual basis that would normally be expected of a statutory decision-maker whose decision is subject to review.

84 The Committee found Boroondara’s submissions of greater assistance in relation to these matters, albeit that the Committee was not ultimately persuaded by them.

### **Impact of the Application on the Cultural Heritage Significance of the Place and Willsmere**

#### Current State of the Subject Site

##### *Submissions and evidence*

85 The Executive Director submitted that, despite their separate listings, the cultural heritage significance of the Place and Willsmere can only be properly appreciated by considering them together.

86 It was the view of the Executive Director that any construction on the Subject Site would have an unacceptable detrimental impact on Willsmere’s cultural heritage significance. As such, the Executive Director submitted that the Subject Site should be returned to unoccupied parkland.

87 Boroondara accepted that the Committee is not empowered by the provisions of the Act to consider alternative development proposals for the Subject Site as

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<sup>8</sup> Submission in reply dated 4 June 2018.

part of this Permit Review, and that the Subject Site must be considered in its current state.

- 88 Boroondara adopted the views of its expert witness, Mr Trethowan, who put forward the view that, if approved, the Application would have a detrimental impact upon both the cultural heritage values of the Place and Willsmere compared to the building currently located on the Subject Site. Mr Trethowan expressed the view that a three storey building would compromise the landscape character of the Subject Site, given its height, mass, and uncomplimentary finishes. It was Mr Trethowan's opinion that any proposal that further obscured views of the landscape and trees would be detrimental, when compared to what he considered to be the neutral and architecturally inconspicuous 1960s/1980s brick building currently on the Subject Site.
- 89 A number of submitters put forward the view that the cultural heritage significance of the Subject Site in its current state had been elevated since the redevelopment of the Place had been undertaken, given that the Subject Site is now one of the few remaining areas of the Place that has not been subjected to contemporary residential development.
- 90 Mr Fitzsimmons submitted that the site in its current state is a peaceful and quiet reserve, as was the original aesthetic intent of the Place.
- 91 As discussed above, a number of hearing participants made submissions relating to alternative proposals for the Subject Site, many of which discussed the importance of demolishing the 1960s/1980s brick building and 'returning' the Subject Site to unoccupied parkland.
- 92 The Permit Applicant submitted that the Committee is not empowered by the provisions of the Act to consider alternative development proposals for the Subject Site as part of this Permit Review, and that the Subject Site must be considered in its current state.
- 93 The Permit Applicant submitted that the Application did not demonstrate a detrimental heritage outcome when compared with the Subject Site in its current state, acknowledging that whilst the proposed three storey apartment building would indisputably be larger than the 1960s/1980s brick building currently on the Subject Site, the new construction would still read as a building sitting among trees.
- 94 In his expert evidence, Mr Lovell expressed the view that recent development at the Place had meant that the original setting and use of the Place and Subject Site was 'now transformed'. It was Mr Lovell's view that while the Application proposed the construction of a three storey building on the Subject Site, it would remain a building within a landscape, and that the cultural heritage significance of the Place and Willsmere, as they stand, would be maintained. Mr Lovell concluded that the three storey building proposed by the Application would constitute a 'neutral impact' compared to the extant 1960s/1980s brick building.

- 95 In her expert evidence, Ms Lardner disagreed with Mr Trethowan's assertion that the 1960s/1980s brick building currently on the Subject Site has a 'heritage neutral' presence; rather she regarded its presence as having a detrimental impact. She said that the proposed three storey apartment building offered a better articulated building, utilising improved materials.
- 96 Ms Lardner put forward the view that the cultural heritage values of the Place are still discernable, despite its substantial redevelopment in recent years. This was said to be due to the retention of original trees, some buildings, the memorials, and the retained alignments of Main Drive and Lower Drive (at least in part). Ms Lardner did not accept that the heritage setting of the Place had now been irrevocably transformed, nor that the Application would further disrupt its cultural heritage values.

#### *Discussion and conclusion*

- 97 Having regard to the matters discussed at paragraphs 85-96 above, the starting point for the Committee, in assessing the heritage impacts associated with the proposal, is to have regard to the Subject Site as it now exists – developed with the 1960s/1980s brick building.
- 98 The Committee accepts that it is not empowered by the provisions of the Act to consider alternative proposals for the use of the Subject Site.
- 99 After considering all submissions and undertaking two site visits to the Place and the Subject Site, and one to Willsmere, the Committee does not consider that the Application would result in an unacceptable outcome in relation to the cultural heritage significance of the Place or Willsmere, when compared to the 1960s/1980s brick building currently located on the Subject Site. The Committee does not accept that the 1960s/1980s brick building is 'heritage neutral', but rather considers its presentation to be somewhat unattractive and detrimental to the heritage qualities of the Place.
- 100 The Committee accepts the position of the Permit Applicant, as informed by its expert witnesses, that the Application would have a relatively neutral impact on the Subject Site given its current state. Whilst the Committee acknowledges that the three storey apartment building would be of a greater mass and height than the 1960s/1980s brick building, the Committee accepts the views of Ms Lardner and Mr Lovell that the proposed new building would not compromise the cultural heritage values of the Subject Site, and would result in a built form that is better articulated and comprised of more appropriate materials for its setting than the building currently occupying the Subject Site. The Committee also finds that the modified materials and finishes palette, as depicted on the plans dated 16 April 2018, and which are included amongst the plans referred to in condition 1 of the permit, will better enable the development to blend into the landscape, and generally represents a more sympathetic presentation, as compared to the original palette of materials and colours.
- 101 The Committee is also of the view that, in assessing the impacts on the wider Place and Willsmere, it must similarly consider their current states. Whilst the



Committee understands the strong attachment of many hearing participants to undeveloped portions of the Place as being remnants of the former state of the Place, the Committee agrees with the views put forward by Mr Lovell that, in many ways, the settings of both Willsmere and the Place have been transformed by the substantial residential development each has undergone in recent years. Although different factors might lead to a different conclusion in other cases, in this case the Committee does not consider that the relatively undisturbed nature of the Subject Site has elevated its heritage significance when compared to its significance prior to the redevelopment of much of the Place for residential purposes. In accepting the transformed state of both Willsmere and the Place, the Committee is further satisfied that the Application is consistent with the character of its surrounding setting, and that the Application proposes an outcome that does not constitute an unacceptable impact upon the cultural heritage values of the Place, or Willsmere, in their current states.

### Design and Alignment of Main Drive

#### *Submissions and evidence*

- 102 The Executive Director submitted that the highly modelled landscape of Main Drive, on the highest and therefore most prominent portion of the Place, can still be appreciated today as it was intended by its original designers. The Executive Director stressed the importance of the ‘deliberate’ design feature of the approach to Willsmere involving the use of topography and plantings to first conceal, and then reveal, the hospital, as similarly employed at contemporary mansion complexes such as Government House [H1620], Werribee Park [H1613] and Stonington [H1608].
- 103 The Executive Director submitted that the Subject Site is the prime example of a deliberately created landscape within the Place, noting its heavily wooded nature with primarily exotic evergreen tree species planted to obscure viewlines to Willsmere until the western curve of Main Drive is entered. In the view of the Executive Director, the intended effect of the approach to Willsmere would be substantially reduced with the introduction of an apartment building on the Subject Site.
- 104 A number of submitters, including Mr and Mrs Black, Ms Stella and KCC supported the opinion of the Executive Director that there had been a deliberate design intent in the alignment of Main Drive linking the Place and Willsmere, and in particular the likely role of botanist Baron von Mueller in the Subject Site’s design and creation.
- 105 Mr Trethowan gave evidence that the design and layout of Main Drive was a key example of the ‘Victorian concept of arrival.’ Mr Trethowan’s opinion was that the historic experience of arriving at Willsmere via Main Drive was still understandable, despite Main Drive’s truncation and realignment in recent times. It was the view of Mr Trethowan that the treed nature of the Subject Site is crucial to the understanding of the design intent of the historic approach to Willsmere.

- 106 Much of the written material submitted on behalf of the Permit Applicant seemed to take issue with the claimed design intent, in relation to the bend in Main Drive, and its purpose in concealing and then revealing Willsmere. In giving oral evidence to the Committee, however, both Mr Lovell and Ms Lardner appeared to largely concede that this was the likely intent of the designer of the alignment of the relevant portion of Main Drive.
- 107 The Permit Applicant put forward the view that the historic link between Willsmere and the Place was lost with the truncation of Main Drive and the development of a basketball court on the Willsmere side of the dividing fence.
- 108 Mr Lovell emphasised that views along Main Drive to the three storey apartment building proposed by the Application would not be dissimilar to the current view of the existing 1960s/1980s brick building within the landscape, being largely screened by existing vegetation. He also said that the experience of glimpsing Willsmere from Main Drive occurred at a point *after* the viewer has passed the developed portion of the island site and in this sense the ‘reveal’ moment would be no different if the apartment complex was constructed.
- 109 Ms Lardner’s expert view was similarly that there was no evidence to suggest that the proposed three storey building would obstruct the view to Willsmere from Main Drive on approach.
- 110 It was the view of Ms Lardner that the Executive Director had attributed a particular role to the Subject Site within the landscape of the Place and Willsmere which has not been highlighted in the Statement of Significance for either place, nor in previous heritage assessments for the sites. She argued that the trees planted at the Subject Site are likely to have been planted as part of a broader ‘arboretum of mixed exotic trees’ rather than specifically as a ‘sylvan device’ for Main Drive.
- 111 Ms Lardner acknowledged that other contemporary grand residences, such as Werribee Park, Stonington and Government House, included driveways with ‘conceal and reveal’ alignments. It was, however, her view that Main Drive was not strictly comparable with these examples, given the absence of what she described as a ‘big reveal’ experience, particularly in light of historic plantings in front of Willsmere, rather than a more undeveloped area. Ms Lardner also noted the absence of this ‘reveal’ mechanism at other asylums designed and constructed by the Public Works Office in Victoria, and asserted that a distinction should be made between the design intent behind residential mansions and public asylums.
- 112 Ms Lardner additionally noted that four assessments of the Place previously undertaken by qualified landscape architects did not reach the conclusion of the Executive Director that the purpose of the Subject Site was to conceal and then reveal Willsmere, instead finding the south-west portion of the Place, including but not limited to the Subject Site, to be an important and rare collection of mature exotic trees.

### *Discussion and conclusion*

- 113 The Committee accepts the likelihood that Main Drive's alignment and landscaping was deliberately cultivated and designed to provide a picturesque sense of arrival to Willsmere.
- 114 However, the Committee considers that the ability to understand this design intent is now seriously eroded, given that Main Drive no longer serves as a means of approach to Willsmere, lessening the drama of the viewer's 'glimpses', and given that the remaining views to Willsmere from this section of Main Drive are relatively interrupted, mainly by trees.
- 115 Most relevantly, the Committee considers that, in any event, the proposed development would not substantively alter the 'arrival experience' of Main Drive, in terms of the 'conceal' and 'reveal' characteristic. The pertinent comparison is between the impacts of the Application building, and the existing impact of the 1960s/1980s brick building. The Committee's site inspection confirmed the correctness of the views of Mr Lovell and Ms Lardner that the buildings are and would be sited *before* someone approaching from the east entered into the 'reveal' component of the designed approach to Willsmere.
- 116 Also, even if it is correct that this bend in Main Drive was designed to conceal, and then reveal, Willsmere, it is difficult to understand how this factor would weigh against built form on the Subject Site. If the historic function of the Subject Site included the initial concealing of views of Willsmere for those approaching from the east, it is not especially troubling that a building on the Subject Site would to some extent contribute to the concealment of those views.
- 117 The Committee does note, however, that some components of the Application have the potential to detract from the heritage significance of the immediate environs of the island site by cluttering the surrounds of the building and disrupting the 'clean sweep' of the view along Main Drive itself. In particular, the Committee considers that some of the proposed ancillary components of the building would cause visual interruption to the current park-like setting of the Subject Site, namely the installation of a footpath, visitor car parking and bicycle parking hoops. The Committee finds such additions, as proposed, to be inappropriately disruptive to what may still be discerned of the historic alignment and arrival experience of Main Drive, and has accordingly imposed conditions (see **Attachment 2**) on the approved permit requiring the removal of the footpath, and either the modification or removal of visitor car parking spaces and bicycle parking hoops, subject to consideration of any subsequent planning approval in relation to those car spaces and bicycle hoops.
- 118 The Committee also considers that it is important that the park-like open feel created by tall trees and lawn on the Subject Site should be retained and the views beneath the trees should not be disrupted by plantings of medium scale shrubs. The conditions require that generally below tree plantings are to be confined to lawn, ground covers and low bedding plants.

## Impact of the Application on Memorials

### *Submissions and evidence*

- 119 The position of the Executive Director as outlined in the Officer's Report dated 18 October 2017 stated that:

*Relocation of the registered Fire Memorial Column (F1) to the [Subject Site] was approved under permit P9639 in order to facilitate the broader site redevelopment works on the lower land north of Main Drive and Oak Walk with the new siting considered to provide an appropriate separation and prominence. Construction on the [Subject Site] would contradict the intent of the relocation and deprive the monument of the benefits of its new setting.*

- 120 The Executive Director and other submitters also referred to the Long Term Residents' Memorial, which had also been relocated, albeit not onto the Subject Site, but in the vicinity of the eastern part of the Subject Site (on the northern side of Oak Walk).
- 121 The Executive Director submitted that the Application would intrude on the current context of the memorials, emphasising the appropriateness of their current setting to allow for contemplation and reflection, and stressing their social significance to the Place.
- 122 Ms Ryan and KCC agreed with the reasons for the previous relocation of the memorials to the Subject Site as provided by the Executive Director in the Officer's Report, submitting that the Subject Site provides a unique and highly visible public setting for the memorials, and that any development on the Subject Site would detract from the intent and benefits of the memorials in their relocated setting.
- 123 Mr Jackson, in his witness statement in support of KCC, submitted that the memorials located on the Subject Site, are included in the extent of registration for the Place as being of social significance to the State of Victoria. It was his view that the erection of an apartment building in such close proximity to the memorials would be in conflict with the sensitivity and character of the Subject Site.
- 124 Ms West submitted that the memorials form a prominent part of the broader history of the Kew Cottages and Willsmere sites, and any construction on the Subject Site would diminish the importance of the memorials and be disrespectful of the people they serve to remember.
- 125 Ms Hopper submitted that the proposed development on the Subject Site would intrude unacceptably on the environs of the memorials which should remain a place of sacredness and reflection. Ms Hopper submitted that it would be difficult to visit these memorials with the same privacy and sensitivity, should the memorials be overlooked by a three storey apartment building, and possibly residents on their balconies.

- 126 Mr Lovell expressed the view that whilst the memorials are unquestionably of importance, the new built form proposed by the Application should not be seen as insensitive to the current placement of the memorials. He further expressed the view that the ways in which the memorials are experienced is not something mandated by heritage citations, and was more relevant to planning considerations.
- 127 Ms Larder noted that the original location of the memorials was near a barbeque area, playground and administration building. She put forward the view that the intention of these memorials, as opposed to private grave sites, is to ensure that the events and lives commemorated are not forgotten, and not '*put quietly away.*' Ms Lardner's opinion was that the memorials have been appropriately relocated to the Subject Site as it is a place where people can walk past and have access to them. It was the view of Ms Lardner that the Application does not detract from the intentions behind the relocation of the memorials to (or near) the Subject Site.

### *Discussion and conclusion*

- 128 The Committee acknowledges that the memorials located on and nearby the Subject Site are of social significance to the Place, and that some submissions expressed strong emotional connections to the memorials. The Committee thanks submitters for sharing their personal experiences in relation to the memorials.
- 129 The Committee does accept that the construction of a three storey apartment building on the Subject Site will increase visitation and foot traffic to the Subject Site and its immediate surrounds. However, the Committee is not persuaded that the Application would compromise the current setting of the memorials. The Committee considers that it is acceptable for these memorials to be located in public and accessible spaces. In forming this view, the Committee has been mindful that the original locations of the memorials were in a busier part of the Place, suggesting that a more public and frequented setting for the memorials would not be in conflict with their cultural heritage significance.
- 130 The Committee is of the view that the Application would not disrupt the appropriateness of the memorials in their current location.

### Impact of the Application on Trees

#### *Submissions and evidence*

- 131 A number of submissions put forward the view that the Place's trees – particularly those located on the Subject Site – were intrinsic to the State-level cultural heritage significance of the Place, and also expressed concern about the likely impact of the Application on the registered trees located on the Subject Site.
- 132 Mr Stavrou submitted that the root system of trees located on the Subject Site would be impacted by the required excavation associated with the construction

of a three storey building with basement.

- 133 Ms West put forward the view that the Application, if approved, would detract from the ability to see different types of trees and their trunks and thus affect the overall appreciation of the Subject Site. She expressed additional concern that the trees would be further impacted by excavation, heavy machinery, and the overshadowing caused by the three storey apartment building.
- 134 In her expert evidence, Ms Lardner emphasised the importance of ensuring there would be appropriate measures to protect the trees at the Subject Site during construction. She deferred to the expertise of other witnesses for the Applicant in relation to how significant trees might best be protected.
- 135 Ms Lardner conceded that the Application, if approved, was likely to obscure the views of trees on the Subject Site from certain angles. However, it was the view of Ms Lardner that the current experience of travelling and walking through the landscape would be retained.
- 136 In his expert evidence, Mr Patrick put forward the view that the construction works associated with the Application would involve only modest incursions to tree roots, given that incursion was most likely to occur under the extant 1960s/1980s brick building, a low oxygen and low moisture environment unlikely to harbour significant roots.
- 137 It was Mr Patrick's opinion that as long as the established Australian Standards for protecting trees on development sites were observed, including the employment of appropriate fencing and supervision, then the Application could be executed without any negative impact upon the trees located on the Subject Site.

#### *Discussion and conclusion*

- 138 The Committee notes that a number of submissions were made that related to allegations of previous poor conduct on the part of the Applicant with relation to the management of trees at the Place. As stated in paragraph 58, the Committee does not consider such allegations relevant to their determination of this proceeding, and therefore such submissions have not been considered.
- 139 The Committee recognises the State-level cultural heritage significance of the trees located the Subject Site as reflected by their inclusion in the Victorian Heritage Register, and the need for the registered trees to be adequately protected in the course of construction activities associated with the Application.
- 140 In accordance with the expert evidence on this matter provided by Mr Patrick, the Committee is satisfied that the construction works associated with the Application may be completed without any negative impacts to the registered trees. In reaching its determination, the Committee has given due consideration to existence of Australian Standards for protecting trees on construction sites, and has determined to impose a number of conditions on the issued permit for

the Application relating to tree management before, during and following construction (see **Attachment 2**). Such permit conditions are discussed in further detail below at paragraphs 162–167.

### Impact of the Application on the Landmark Status and Viewlines of Willsmere

#### *Submissions and evidence*

- 141 The southern part of the Place including the Subject Site and the Willsmere site are elevated above nearby residential areas, surrounding roadways and parkland along the river. The Willsmere building with its distinctive towers forms a prominent component of public views from surrounding land. A number of hearing participants expressed concern that the Application, if approved, would interrupt or intrude upon views to Willsmere from outside the site. There were also concerns about interruption to views between the Place and Willsmere.
- 142 The Executive Director submitted that, despite the current physical divide between the Place and Willsmere, effected by the separate redevelopment of each place for residential purposes, the original physical connection between the two places remains visually discernible. The Executive Director also submitted that the construction of a three storey apartment building on the Subject Site, which the Executive Director considered to comprise '*a contrived landscape feature (arboretum)*', would be a detriment to the setting and aesthetic values of Willsmere.
- 143 In his expert evidence, Mr Trethowan expressed the concern that the Application, if approved, would mean that the three storey apartment building would sit higher in the tree canopy and would be glimpsed from distant vantage points. Mr Trethowan also put forward the view that it was important to recognise the age of the some of the trees located on the Subject Site, and that the Committee ought to consider the visual impact of the three storey apartment building proposed by the Application, should any mature trees to be lost or damaged in the future.
- 144 It was the view of the Permit Applicant that historical views to Willsmere from Main Drive are unlikely to be readily available in the current context, due to the dense canopy cover surrounding the landscape of the Place. The Permit Applicant further submitted that the that distant views to the towers of Willsmere would remain unaffected should the Application be approved.
- 145 In his expert evidence, Mr Lovell accepted that the siting of the proposed three storey building within a mature landscape contributed to its acceptability in a heritage context. Mr Lovell noted, however, that mature specimens on the Subject Site may require replacement, and a careful replanting strategy would be required.
- 146 Ms Lardner agreed that the proposed siting of the three storey apartment building within the tree canopy of the Subject Site was important to its acceptability within its current setting. Ms Lardner also acknowledged the importance of future landscape management of the Subject Site.

- 147 Ms Lardner expressed the opinion that the Application, if approved, would possibly allow the three storey apartment building to be glimpsed from distant vantage points, such as Yarra Bend Park, but that the muted nature of the materials palette would prevent the apartment building from standing out or diminishing the visual dominance of Willsmere.
- 148 Mr Patrick gave evidence that it was the location of the Application within a treed canopy that made it acceptable within a heritage context. He stressed that a number of trees currently providing canopy cover to the Subject Site are over-mature, however, and that a proactive tree-replanting program would be required in order to recruit the next generation of canopy cover. He said that all of the trees on the Subject Site will die within a 20 to 40 year period and the outcome of a building sitting alone in the landscape should be avoided. He said the intent of the tree-replanting program should be to introduce younger trees onto the site which would succeed the existing older specimens. This needed to be a gradual replacement so that it enabled the canopy to be continuously maintained.
- 149 Mr Patrick also emphasised the need for a tree replacement program that accounted for adverse climate conditions, environmental changes, and the consideration of specimens that would be appropriate within the Subject Site's setting and planting palette, rather than slavishly insisting on 'like-with-like' replanting at the risk of reintroducing weed species or specimens that are less likely to thrive.

#### *Discussion and conclusion*

- 150 After considering the above submissions and expert evidence, as informed by its site inspections of the Place, the Subject Site, Willsmere, and surrounding vantage points to Willsmere, the Committee is satisfied that the three storey apartment building proposed by the Application will not detrimentally affect the landmark status of, nor distant viewlines to, Willsmere.
- 151 The Committee considers, however, that the acceptability of the Application in heritage terms relies heavily on the siting of the three storey apartment building within a substantial treed canopy and hence it being largely concealed from various viewpoints.
- 152 The Committee agrees with Mr Patrick that it is imperative that a treed canopy surrounding the building be retained and that there is both a requirement for good management of the existing trees to ensure their health and longevity, and the design and implementation of a tree-replanting strategy to ensure the ongoing recruitment and maintenance of canopy cover for the Subject Site.
- 153 The Committee, in reaching its determination, has imposed a number of permit conditions reflecting the requirement to proactively maintain canopy cover of the Subject Site (see **Attachment 2**). These conditions are discussed in further detail below at paragraphs 162–167.



## Consideration of ‘Without Prejudice’ Permit Conditions

- 154 Several submissions were made in response to the ‘without prejudice’ draft permit conditions provided by the Executive Director.
- 155 As submitted by the Permit Applicant, the Committee has not considered submissions to the extent that some seek to re-agitate arguments against approval of the Application. Some conditions which were suggested also go beyond what can be fairly or legally be imposed.
- 156 The Committee does not intend to deal with every matter arising from submissions in relation to the draft conditions. However, the following general explanation is given in respect of the form of conditions which has ultimately been determined by the Committee (**Attachment 2**).
- 157 Boroondara sought to argue that the relevant subject site had not been sufficiently identified in the Application. The Committee does not accept that submission. There is no doubt about the land in respect of which permission is sought. Put simply, it is the area where buildings and works are proposed, as identified on the plans associated with the Application.
- 158 The motivation behind this submission on behalf of Boroondara seemingly relates to the likelihood that the Subject Site will be subdivided at some point in future, and in particular the likelihood that Boroondara will be asked to accept the vesting of a large portion of the Subject Site as a reserve or the like. It is true that the delineation of any such future reserve is not yet clear, but that degree of uncertainty has not prevented the Committee from formulating appropriate conditions, including in relation to tree protection and management.
- 159 Perhaps Boroondara’s real concern in this regard is to protect against the imposition of obligations on Boroondara, under the permit. The Committee does not intend to impose any conditions which would directly bind Boroondara. Indeed, no hearing participant advocated for such an outcome. Rather, the conditions which the Committee has required are intended to bind the holder of the permit, that is the person (or people) deriving benefit from the permit. This clearly includes the owner of the Subject Site. Assuming the Subject Site will be subdivided at some time in the future, the conditions have been designed so as to bind the owner of any part of the (current) Subject Site that includes any part of the three storey apartment building authorised by the permit. The conditions are not intended, however, to bind the owner of any future public open space reserve or the like.
- 160 Also in this regard, Boroondara made submissions in support of a condition requiring Boroondara to approve a plan for certain components of the proposed development (again, given the likelihood that Boroondara will be asked to accept the vesting of part of the Subject Site in future). The Committee does not agree, noting firstly that the whole of the Subject Site falls within an existing Certificate of Title, and secondly that there will be a separate process to be followed in the event that this title is to be subdivided, including whether or not Council accepts the vesting of any proposed reserve. The granting of the present permit is not

conditional on the creation or vesting of any public open space reserve (although that possibility is clearly understood by the Committee). Given the circumstances, it may well be prudent for the permit holder to engage with Boroondara in relation to any components of the development that are proposed for land intended to vest in Boroondara at some stage, but the Committee considers it unnecessary to impose any legal requirement in that regard by way of condition.

- 161 The Executive Director's original proposed conditions 6 and 7 required an archival quality photographic survey in relation to the existing building on the Subject Site. Although the Permit Applicant ultimately did not oppose this condition, the Committee considers this unnecessary and inappropriate, so no such requirement has been included. The Committee makes this finding on the basis that the demolition of the building has never required a permit pursuant to the *Heritage Act 1995* or the Act, and the permit sought will not authorise the demolition of that building. The Committee would comment here that there would be considerable irony in requiring such a photographic survey, given that the Executive Director and other opponents of the Application had argued strenuously that the fact that the existing building remains extant is somehow unlawful, and that its mere persistence on the Subject Site constitutes a detrimental heritage impact.
- 162 The greatest complexity arose in relation to the appropriate mechanism to ensure protection and management of the existing trees on the Subject Site, and the implementation of a regime for medium-term management of those trees, including replacement planting, as recommended by Mr Patrick.
- 163 The Executive Director's draft conditions proposed a 'Tree Replanting Schedule' with five-year establishment plan, after which time this plan would presumably cease to apply. However, having regard to the evidence of Mr Patrick, including his reference to a possible 10 or 15 or 20 year period to actively manage the replacement and recruitment of trees on the Subject Site, the Committee considers it appropriate for the condition to operate for 15 years from the date of commencement.
- 164 The Committee has seen fit to extend that period recommended by the Executive Director from 5 to 15 years having regard to the role that the existing trees are expected to play, in terms of screening views of the proposed development, from both within the vicinity of the Subject Site (that is, from Main Drive), but also from more distant views. Indeed, the evidence of Mr Lovell and Ms Lardner suggested that the development may not be regarded as acceptable, in terms of its heritage impact, in the absence of such trees and their screening potential.
- 165 Allied with this extended timeframe for tree-management obligations, the Committee considers it appropriate for the bond, associated with tree protection, to be increased by a commensurate amount, from \$50,000 to \$150,000. The relevant condition has been formulated in such a way as to enable staged repayment of the bond, intended to give rise to a clear financial incentive to continue complying with relevant requirements over time.

- 166 Of course, the Committee expects the trees (and any replacement trees) to remain, and to be responsibly managed, well after the expiry of that 15 year timeframe – effectively in perpetuity for the life of the proposed development. At least in relation to ‘heritage’ trees, the ongoing registration of the Place is likely to play a protective role in this regard. Perhaps more importantly, if the trees are ultimately included in an open space reserve to vest in Boroondara, as anticipated by all hearing participants, this is likely to provide a protective function, having regard to Boroondara’s role as a manager of many public reserves and custodian of valued trees, not only within the Place but also more broadly.
- 167 The Committee considers it appropriate to require a covenant, pursuant to Part 7 of the Act, to ensure ongoing compliance with all requirements in relation to trees on the Subject Site. Having regard to the likelihood that many or all of the significant trees within the Subject Land will be located on land that will vest in Boroondara at some stage, as a reserve or the like, the covenant must be clear that the obligations are to bind the owners of the particular land where the proposed building is to be located. The Committee is also conscious of the possibility that the building, or rather the land comprising the footprint of that building, may itself be subdivided. The covenant must enable the relevant obligations to rest with any Owners’ Corporation arising from such subdivision, since that is likely to be a more convenient arrangement than obligations attaching to separate residential lots. It is intended that future residential lot owners will be burdened with the obligation to comply with the proposed covenant, but that can be achieved indirectly via an Owners’ Corporation for which lot owners share liability, in the event that the covenant is ultimately drafted and agreed between the parties in that form.
- 168 Various submitters urged the amendment of plans to remove the proposed visitor car parking spaces, bicycle parking hoops and a footpath. As discussed at paragraph 117, the Committee accepts that all of those elements will impact on the heritage significance of the Place, particularly in terms of visual intrusion from the Main Drive environs. In relation to the footpath, the rationale for its inclusion was not compelling, and the Committee has not been persuaded to approve it. In relation to the visitor car parking spaces, bicycle parking hoops, the Committee is attracted to the suggestion of the Permit Applicant that the fate of those elements should effectively be deferred until after planning permission has been sought for the development, and particularly permission to waive or vary any relevant requirements of the Boroondara Planning Scheme in relation to visitor car parking and bicycle parking. The Committee accepts that the Permit Applicant can, and should, seek to do so. The Committee expects the Permit Applicant to exercise its best endeavors in that regard. However, if the ultimate decision-maker for the purposes of the Boroondara Planning Scheme requires those components as part of any approval, the permit issued by the Committee is intended to encompass those components, albeit subject to certain modifications to reduce detrimental heritage impacts.

## CONCLUSION

169 After considering all submissions received in relation to the permit review, and after conducting a hearing pursuant to Section 108 of the *Heritage Act 2017*, the Heritage Council has determined to set aside the determination under review and make another determination in substitution for it, by issuing permit P26760 with conditions (**Attachment 2**).

## ATTACHMENT 1

### s.101 of the *Heritage Act 2017* (Vic)

1. After considering an application the Executive Director may—
  - a. approve the application and—
    - i. issue the permit for the proposed works or activities; or
    - ii. issue the permit for some of the proposed works or activities specified in the application; or
  - b. refuse the application.
  
2. In determining whether to approve an application for a permit, the Executive Director must consider the following—
  - a. the extent to which the application, if approved, would affect the cultural heritage significance of the registered place or registered object;
  - b. the extent to which the application, if refused, would affect the reasonable or economic use of the registered place or registered object;
  - c. any submissions made under section 95 or 100;
  - d. if the applicant is a public authority, the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the public authority to perform a statutory duty specified in the application;
  - e. if the application relates to a listed place or to a registered place or registered object in a World Heritage Environs Area, the extent to which the application, if approved, would affect—
    - i. the world heritage values of the listed place; or
    - ii. any relevant Approved World Heritage Strategy Plan;
  - f. any matters relating to the protection and conservation of the registered place or registered object that the Executive Director considers relevant.
  
3. In determining whether to approve an application for a permit, the Executive Director may consider—
  - a. the extent to which the application, if approved, would affect the cultural heritage significance of any adjacent or neighbouring property that is—
    - i. included in the Heritage Register; or
    - ii. subject to a heritage requirement or control in the relevant planning scheme; or
  - b. any other relevant matter.

## ATTACHMENT 2

**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.*

### THE FOLLOWING CONDITIONS APPLY TO THIS PERMIT:

#### Amended Plans

1. Before the development starts, amended plans to the satisfaction of the Executive Director must be submitted to and approved by the Executive Director. When approved, the plans will be endorsed and will then form part of the permit. The plans must be drawn to scale with dimensions and supplied in PDF format to [heritage.permits@delwp.vic.gov.au](mailto:heritage.permits@delwp.vic.gov.au). The plans must be generally in accordance with the following plans:
  - Architectural plans prepared by Max Architects and lodged with Heritage Victoria on 11 May 2017, being AR08-00.00 (Rev D), AR08-01.01 (Rev B), AR08-01.02 (Rev F), AR08-01.03 (Rev D), AR08-01.04 (Rev D), AR08-01.05 (Rev D), AR08-01.06 (Rev E), AR08-01.07 (Rev G), AR08-01.10 (Rev B), AR08-01.11 (Rev D), AR08-24.01 (Rev E), AR08-24.02 (Rev G), AR08-24.03 (Rev G), AR08-24.04 (Rev H), AR08-24.10 (Rev E), AR08-25.01 (Rev B), AR08-25.02 (Rev B), AR08-25.03; and
  - Architectural plans prepared by Max Architects and circulated as part of the Heritage Council proceeding, being AR08-01.08 (Rev G), AR08-01.09 (Rev F), AR08-24.05 (Rev G), AR08-24.06 (Rev F), AR08-24.07 (Rev G), AR08-24.08 (Rev F), AR08-24.09 (Rev E); and
  - Landscape Concept Plan prepared by MDG Landscape Architects and circulated as part of the Heritage Council proceeding, being Drawing Number 1542 B 01[d], Issue D dated 4 May 2018.

But modified to show:

- All externally visible plant and equipment and any required safety barriers;
- Deletion or relocation of the visitor bicycle spaces and associated hoops and paving. If bicycle spaces are required in accordance with planning approval, bicycle spaces are to be relocated either to the basement, or within two metres of the building;
- The removal or modification of visitor car parking spaces. If car parking spaces are required in accordance with planning approval, bluestone paving is to be replaced with permeable paving material that allows grass coverage in the parking area;
- The retention of all curbing along Main Drive, except for the entrance to the basement car park, entry to the pedestrian path, and any visitor car parking that may be required; and
- Deletion of the proposed footpath following the alignment of Main Drive.

### Landscape Plans Required

2. Before the works begin, a complete and detailed **Existing Landscape Conditions Plan, Proposed Landscape Plan** and associated written **Existing Condition Report** on the trees and lawn within the area bounded by Main Drive and Oak Walk is to be prepared by a landscape architect with heritage expertise and an experienced consulting arborist and submitted to the Executive Director for approval. The Plans must be drawn to scale and the Plans and Report must be submitted to the Executive Director in PDF format. The **Existing Condition Report** is to identify each Heritage Registered tree with its location cross-referenced to the associated **Existing Landscape Conditions Plan** and **Proposed Landscape Plan**. The **Existing Condition Report** must include an assessment of the existing condition and estimated remaining healthy lifespan of each of the Heritage Registered trees. *Note: one specimen of Pinus canariensis (Canary Island Pine) is already in decline.* When approved, the **Existing Landscape Conditions Plan, Proposed Landscape Plan** and **Existing Condition Report** will be endorsed and will then form part of this permit
  
3. The **Proposed Landscape Plan** must be generally in accordance with the Landscape Concept Plan prepared by MDG Landscape Architects and circulated as part of the Heritage Council proceeding, being Drawing Number 1542 B 01[d], Issue D dated 4 May 2018, and must show:
  - a) All existing vegetation (including botanical names) to be retained and/or removed;
  - b) A planting theme which principally comprises trees in a lawn setting;
  - c) Apart from trees:
    - only plants which grow to a height of not more than approximately 0.5 metres except where taller planting may be required such as to act as a security barrier near the vehicle entrance; and
    - no invasive ground cover plants including *Agapanthus sp.*;
  - d) A planting schedule of all trees, ground covers and bedding plants, including botanical names, common names, sizes at maturity and quantities of each plant. All species selected must be to the satisfaction of the Executive Director;
  - e) Details of surface finishes of pathways and the driveway; and
  - f) Details of an in-ground irrigation system to be provided to all landscaped areas.

### Tree Management Plan Required

4. Before the works begin, a **Tree Management Plan**, which includes a **Tree Replanting Schedule** of trees of the same species as the Heritage Registered trees, or suitable alternative species that reflect the heritage significance and values of the site, is to be prepared by a landscape architect with heritage expertise and an experienced consulting arborist and submitted to the Executive Director for approval. The plan must be drawn to scale with dimensions and must be submitted to the Executive Director in PDF format. The **Tree Management Plan** must apply to the entire area bounded by Main Drive and Oak Walk. When approved, the plan will be endorsed and will form part of this permit.

5. The **Tree Replanting Schedule** must include a fifteen-year **Tree Establishment Plan**, including proposed replacement trees for existing senescent and diseased trees, and a removal and replacement planting program designed to achieve a continuous tall tree canopy within this 'island' section of Main Drive. Botanical names, common names, and sizes at maturity for each proposed replacement tree must be provided. The **Tree Replanting Schedule** must include a written explanation in relation to the principles that will apply to consideration of removal of trees and selection of species and proposed locations of all proposed new trees.
6. The permit holder must complete tree removal and replanting in accordance with the **Tree Replanting Schedule** prior to the Executive Director confirming that the works have been satisfactorily completed in accordance with condition 15 below.

#### **Tree Protection During Construction**

7. To ensure protection of the Heritage Registered trees within the area bounded by Main Drive and Oak Walk, all works approved by or otherwise required by this permit must be carried out in accordance with the requirements and recommendations of Australian Standard AS 4970-2009 '*Protection of Trees on Development Sites*'.
8. Before the works approved or required by this permit (including demolition works) begin, a scaled plan showing the location of Tree Protection Fences and any associated tree protection measures required under condition 7 above is to be submitted to the Executive Director for approval. Once approved, the plan will be endorsed and will then form part of this permit.
9. Except with the prior written consent of the Executive Director, within the Tree Protection Zones:
  - a) No vehicular or pedestrian access, trenching or soil excavation is to occur; and
  - b) No storage or dumping of tools, equipment or waste is to occur.
10. The Tree Protection Fences and associated protection measures must be erected before the works approved or required by this permit (including demolition works) begin, and must remain in place until all construction works have been completed. Before the development starts, the ground surface of the Tree Protection Zones must be covered by a 100mm deep layer of mulch. The Tree Protection Zones must be watered regularly to the satisfaction of the Executive Director.
11. The Tree Protection Fences and associated tree protection measures may only be removed after completion of all approved construction works to facilitate the landscape works approved by this permit. The Executive Director must be informed when the approved works have been completed.
12. Any pruning that is required to be done to the canopy of any Heritage Registered trees is to be done by a qualified arborist to Australian Standard – Pruning of Amenity Trees AS4373-1996. Any pruning of the root system of any Heritage Registered tree is to be done by hand by a qualified arborist.



### Financial Security

13. Before the permitted works begin, in accordance with the provisions of s.103 of the *Heritage Act 2017* ('the Act'), financial security in the form of an unconditional Bank Guarantee or Insurance Bonds (or other instrument as agreed in writing by the Executive Director) must be lodged with the Executive Director, issued in favour of the **Heritage Council of Victoria** (ABN 87 967 501 331) **in the amount of \$250,000-00** (two-hundred-and-fifty-thousand-dollars). It must be unconditional with regard to expiry date and provide that it will be returned to the issuing institution at the request of the permit holder on the completion of the approved works and any works required by this permit to the satisfaction of the Executive Director.
14. The financial security referred to in condition 13 shall be forfeited to the favouree, being the **Heritage Council of Victoria**, if the works for which it is lodged have not been completed within the validity period of this permit to the satisfaction of the Executive Director.

### Covenant

15. Before the works begin, the owner of the land must enter into a covenant with the Heritage Council of Victoria pursuant to s.134 of the Act, and must ensure that the Registrar of Titles makes a recording of the covenant pursuant to s.140 of the Act. The covenant must provide for the following matters, all to the satisfaction of the Heritage Council of Victoria:
  - a) The covenant will commence operation upon the approval of the **Tree Management Plan** required by condition 4 of the permit;
  - b) The owner must comply with all requirements, directions, guidance and recommendations contained in the **Tree Management Plan** required by condition 4 of the permit, as amended from time to time, all in accordance with any relevant timeframes referred to in that plan;
  - c) The owner must engage a suitably qualified consulting arborist with heritage expertise to review the ongoing appropriateness of the **Tree Management Plan** approved pursuant to condition 4 of the permit prior to the expiry of 5 years of the commencement of this covenant;
  - d) The owner must engage a suitably qualified consulting arborist with heritage expertise to review the ongoing appropriateness of the **Tree Management Plan** approved pursuant to condition 4 of the permit prior to the expiry of 10 years of the commencement of this covenant;
  - e) In the event that a suitably qualified consulting arborist with heritage expertise recommends changes to the **Tree Management Plan** approved pursuant to condition 4 of the permit at any time, the owner will apply to the Executive Director to amend that plan pursuant to condition 4 of the permit, so as to give effect to that professional's relevant recommendations;
  - f) Before the works begin, the owner must ensure that a person with the benefit of the permit provides a 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) to the **Heritage Council of Victoria**, in accordance with s.103 of the Act. That financial security must be **in the amount of \$150,000** (one-hundred-and-fifty-

thousand-dollars). It must be unconditional with regard to expiry date and must provide that:

- i. \$50,000 of that financial security will be returned to the person who provided it upon the expiry of 5 years of the commencement of this covenant, subject to satisfactory compliance with conditions 4-6 of the permit during that 5 year period to the satisfaction of the Executive Director;
  - ii. A further \$50,000 of that financial security will be returned to the person who provided it upon the expiry of 10 years of the commencement of this covenant, subject to satisfactory compliance with conditions 4-6 of the permit during that 10 year period to the satisfaction of the Executive Director;
  - iii. The remaining \$50,000 of that financial security will be returned to the person who provided it upon the expiry of 15 years of the commencement of this covenant, subject to satisfactory compliance with conditions 4-6 of the permit during the total 15 year period to the satisfaction of the Executive Director;
  - iv. Any or all of the total financial security will be forfeit to the favouree, being the Heritage Council of Victoria, in the event of non-compliance with conditions 4-6 of the permit to the satisfaction of the Executive Director;
  - v. In the event that the land is sold or subdivided, the person who provides the financial security may assign its entitlement to return of the financial security, or any portion thereof, to the person or people subject to the ongoing obligation to comply with conditions b, c, d and e of this 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;
  - 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;
  - i) In the event that the land is subdivided in a way which creates an Owners' Corporation associated with the apartment building allowed by this permit, the covenant may provide for the substantive obligations to be binding on the Owners' Corporation, rather than being directly binding on owners of any residential lots to be created;
  - j) The covenant will end after the completion of 15 years from the date of the approval of the **Tree Management Plan** pursuant to condition 4 of this permit; and
  - k) The owner must pay the legal costs associated with the preparation, execution and recording of the covenant, including the reasonable legal costs of the Heritage Council of Victoria.

### **General Conditions**

- 16.** Subject to condition 11 (in relation to Tree Protection Fences), no fencing is allowed within the area bounded by Main Drive and Oak Walk except as may be required to serve as safety barriers adjacent to the proposed driveway, or to prevent public access to any plant or equipment.
  - 17.** This permit will expire if the permitted works have not commenced within three (3) years of the date of issue of this permit and are not completed within five (5) years of the date of issue of this permit unless otherwise agreed in writing by the Executive Director.
  - 18.** The Executive Director is to be given five working days' notice of the intention to commence the approved works.
  - 19.** Approved works or activities are to be planned and carried out in a manner which prevents damage to the registered place. However, if other previously hidden original or inaccessible details of the place are uncovered, any works that may affect such items must immediately cease. The Executive Director must be notified of the details immediately to enable Heritage Victoria representatives to inspect and record the items, and for discussion to take place on the possible retention of the items, or the issue of a modified approval.
  - 20.** All works must cease and Heritage Victoria must be contacted if historical archaeological artefacts or deposits are discovered during any excavation or subsurface works. Should any munitions or other potentially explosive artefacts be discovered, Victoria Police is to be immediately alerted and the site is to be immediately cleared of all personnel.
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