

# Independent Planning Commission - Review of the Recommendation to list the curtilage extension of the Varroville Homestead

## Catholic Metropolitan Cemeteries Trust – Submissions in Reply

### A. Reply to the Submissions of the Owners of Varroville

#### *Nature of the Independent Planning Commission Review*

1. The Catholic Metropolitan Cemeteries Trust (the '**CMCT**') disagrees in part with the submission of Ms Kirkby that the other parties here have misunderstood the nature of this review and that the review has nothing to do with the use of the land and is only about establishing the state significance of the site (T41.30).
2. On 12 October 2018 the NSW Minister for Heritage directed pursuant to section 34(1)(b) of the *Heritage Act 1977* (NSW) (the '**Heritage Act**') that the Independent Planning Commission (the '**IPC**') review the matter. That referral was in line with the statutory direction in section 34(1)(b) of the *Heritage Act* for the IPC to 'review the matter'.
3. The CMCT respectfully submits that the use of the phrase 'review the matter' in section 34(1)(b) of the *Heritage Act* does not confine the review by the IPC to considerations only on the state significance of the item recommended to be listed on the State Heritage Register. Rather, the use of the phrase 'review the matter' in section 34(1)(b) of the *Heritage Act* directs the IPC to review and consider all things relevant to the potential listing of the item the subject of a recommendation to list on the State Heritage Register.
4. This necessarily extends the review by the IPC to the mandatory considerations to be made under section 32 of the *Heritage Act* if the NSW Heritage Minister is minded to pursue a listing of an item the subject of a recommendation to list that item on the State Heritage Register. These considerations, and the role of the IPC in a review of the matter, were confirmed by Molesworth AJ in *Millers Point Community Assoc. Incorporated v Property NSW* [2017] NSWLEC 92 ('**Millers Point**') at [90] where it was stated that should the Minister be minded to pursue a heritage listing then:

... two requirements under s32 are enlivened (1) the requirement to reach a concluded view that the building is of State heritage significance and (2) the requirement to consider the matters in s 32(1). **(In this regard, the Minister may seek assistance by requesting the Planning Assessment Commission to review the matter – s 34(1)(b)).** [our emphasis added].

5. Section 32(1) of the *Heritage Act* provides as follows:

#### **32 Minister can direct listing on State Heritage Register**

(1) The Minister may direct the listing on the State Heritage Register of a place, building, work, relic, moveable object or precinct that the Minister considers is of State heritage significance, but only if the Heritage Council has recommended that the item be listed and the Minister has considered the following:

- (a) the recommendation of the Heritage Council that the item should be listed,
- (b) whether the long-term conservation of the item is necessary,

- (c) whether the listing would render the item incapable of reasonable or economic use,
  - (d) whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.
6. The CMCT therefore agrees that the IPC review is to consider whether the expanded curtilage around Varroville the subject of the Recommendation is of State heritage significance.
  7. However, the CMCT respectfully submits that the matters set out in section 32(1)(a) – (d) of the *Heritage Act* are also matters to be considered in the IPC review of this matter and therefore submissions of the CMCT on the following are properly made:
    - a. the recommendation of the Heritage Council that the item should be listed,
    - b. whether the long-term conservation of the item is necessary,
    - c. whether the listing would render the item incapable of reasonable or economic use,
    - d. whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.
  8. In particular, the consideration in section 32(1)(c) of the *Heritage Act* on whether the listing would render the item incapable of reasonable or economic use requires a consideration of what is a reasonable use of the land proposed to be included in the expanded curtilage around Varroville.
  9. Therefore, the CMCT respectfully submits that its submissions on what are reasonable and economic uses of land included in the proposed extended curtilage around Varroville have been properly made and are to be considered by the IPC Panel undertaking its review of the matter.

*Reasonable and Economic Use of the CMCT Land and Designation for use as a Cemetery*

10. The CMCT disagrees with the submission of Ms Kirkby that the CMCT land over which the expanded curtilage around Varroville is proposed to extend is not specifically designated for use as a cemetery (T42.40).
11. The CMCT is the registered proprietor of Lot B in DP370979, Lot 22 in DP564065 and Lot 1 in DP218016, also known collectively as 166 – 176 St Andrews Rd Varroville NSW (the '**CMCT Land**'). The recommendation by the NSW Heritage Council made on or around 28 September 2017 to list an expanded curtilage around Varroville specifically details that land included in that proposed expanded curtilage includes the CMCT Land.
12. On 9 September 2016 the Sydney West Joint Regional Planning Panel unanimously decided that the *Campbelltown Local Environmental Plan 2015* (NSW) (the '**LEP**') should be amended so that the CMCT Lands are able to be used as a cemetery.
13. The resulting amendment to the *LEP* was the insertion of an additional clause 7.8A that specifically identified only the CMCT Land and specifically provided that the CMCT Land could be used as a cemetery with consent. Clause 7.8A of the *LEP* provides as follows:

### **7.8A Use of certain land at 166–176 St Andrews Road, Varroville**

(1) This clause applies to land at 166–176 St Andrews Road, Varroville, being Lot 1, DP 218016, Lot B, DP 370979 and Lot 22, DP 564065.

(2) Development for the purposes of a cemetery is permitted with development consent, but only if the consent authority is satisfied that:

(a) the development will complement the landscape and scenic quality of the site, particularly when viewed from surrounding areas including the Campbelltown urban area, “Varro Ville” (homestead group at 196 St Andrews Road, Varroville) and the Hume Highway, and

(b) the development will not adversely affect the visual or physical qualities of the site, and

(c) the development will cause minimal effect on the existing landform and landscape, and

(d) the site will also include a publicly accessible passive recreation space, and

(e) the development will be carried out in accordance with the conservation management plan titled “Conservation Management Plan, Varroville Estate: 166–176 St Andrews Road, Varroville”, dated October 2015, and the supplementary information relating to the plan provided by letter by Urbis on 22 August 2016, published on the website of the Department of Planning and Environment.

**Note.** Clause 7.7 (3) restricts development on part of the land to which this clause applies to development for the purposes of a lawn cemetery.

14. The CMCT therefore respectfully submits that the insertion of clause 7.8A of the LEP specifically plans for, and designates, the CMCT Land for use as a cemetery. The CMCT further submits that this specific designation makes it clear that a reasonable use of the CMCT Land is use as a cemetery. That use as a cemetery was proposed by the CMCT in DA 3293/2017/DA-C (the ‘DA’) and on 21 December 2018 the Department of Planning and Environment (the ‘DPE’) recommended the DA for approval subject to conditions. In its assessment report on the DA, the DPE noted that the CMCT’s approach to the assessment of heritage impact in the Heritage Impact Statement and Heritage Archaeological Impact Assessment was considered to be reasonable and appropriate.

15. On that basis, the CMCT respectfully submits that its submissions on the reasonable and economic use of the CMCT Land have properly made and are to be considered by the IPC Panel undertaking its review of the matter.

#### *Submissions to the IPC*

16. The CMCT disagrees with the submission of Ms Kirkby that submissions to the IPC Panel are to be confined to the content of the Heritage Council’s recommendation to the Minister to list an expanded curtilage around Varroville on the State Heritage Register (T49.10).

17. As detailed above, the referral by the Minister under section 34(1)(b) of the *Heritage Act* is for the IPC to review the matter. Section 34(1)(b) of the *Heritage Act* does not confine the IPC’s review to a review of only the Heritage Council’s recommendation itself. Nor is the IPC’s review confined in that way by section 36 of the *Heritage Act* which provides as follows:

#### **36 Independent Planning Commission**

(1) At a review conducted by the Independent Planning Commission each of the following is entitled to appear before the Commission either personally or, unless otherwise provided by the regulations, by an Australian legal practitioner or agent:

(a) an owner, mortgagee or lessee of land to which the proposed listing will apply or of land on which is situated the building, work or relic (being a relic that is attached to or forms part of land) that will be subject to the proposed listing,

(b) an owner of a relic (not being a relic that is attached to or forms part of land) or moveable object that will be subject to the proposed listing,

(c) the council of the area in which the item or precinct concerned is situated,

(d) the Heritage Council,

(e) the Secretary of the Department of Premier and Cabinet or a nominee of the Secretary,

(f) any other person with the leave of the Commission.

(2) At the conclusion of the review, the Independent Planning Commission is to provide a report in writing to the Minister containing a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with. The Minister is to make copies of the report available to the public after the Minister decides whether or not to direct the listing.

18. As can be seen, section 36(1)(a) of the *Heritage Act* provides that the owner of the land to which the proposed listing will apply is entitled to appear before the IPC. Section 36(2) of the *Heritage Act* further provides that the IPC's report is to provide a summary of the submissions made to the review, the findings of the Commission with respect to those submissions and a recommendation as to how those submissions should be dealt with.

19. The CMCT therefore respectfully submits that submissions made to and to be considered by the IPC in this review are not confined to the content of the Heritage Council's recommendation to the Minister to list an expanded curtilage around Varroville on the State Heritage Register. To confine the IPC's review in that way would thwart the purpose and independent nature of the review by the IPC.

#### *The Link Between Reasonable or Economic Use and Financial Hardship*

20. The CMCT disagrees with the submission of Ms Kirkby that there is no link between the reasonable or economic use of an item the subject of a recommendation to list that item on the State Heritage Register and the financial hardship that may result from that proposed listing (T51.30).

21. As detailed above, the requirements of section 32(1)(c) and (d) of the *Heritage Act* mean that it is appropriate for submissions to be made as part of this review on any impact on the reasonable and economic use of CMCT Land resulting from the proposed listing of an expanded curtilage around Varroville, and on any financial impact of that proposed listing.

22. In addition, that Parliament intended before directing a listing on the State Heritage Register that the Minister is to consider a range of broader planning and economic issues was confirmed in *Millers Point* where Molesworth AJ held at [131] as follows:

With both the "incapable of reasonable or economic use" consideration and the "undue financial hardship" consideration, the legislative scheme identifies a number of elements which are relevant components of this equation, elements that one would expect the Minister to consider. The Second Reading Speech of the *Heritage Amendment Act 2009*, which introduced s 32 in its current form, confirms the Legislature's intention that the Minister "consider a range of broader planning and economic issues"

23. The intention of Parliament that the Minister consider a range of broader planning and economic issues makes it clear there is a relevant relationship in this context between the impact on the reasonable and economic use of CMCT Land resulting from the proposed listing of an expanded curtilage around Varroville and the financial impact of that proposed listing.

## **B. Reply to the Submissions of the Heritage Division Office of Environment and Heritage**

### *Submissions on Long Term Conservation, Reasonable or Economic Use and Financial Hardship*

24. The CMCT disagrees with the submission by Mr Dunn that matters relating to the need for long term heritage conservation of the land in the proposed extended curtilage around Varroville were not included in submissions by the CMCT leading up to the Heritage Council's Recommendation. The CMCT also disagrees with the submission by Mr Dunn that matters relating to the impact of the proposed listing of an extended curtilage around Varroville on the reasonable and economic use of CMCT Land and any financial impact of that proposed listing were not included in submissions by the CMCT leading up to the Heritage Council's Recommendation.
25. In the URBIS submission made on behalf of the CMCT on 8 August 2017 made in response to the Notice of Intention to Consider a Listing issued under section 33(1) of the *Heritage Act*, the following requests were made:
- Extension of the curtilage does not preclude the sympathetic development in accordance with Clause 7.8(a) of the Campbelltown LEP 2015 which references the endorsed Conservation Management Plan and site specific requirements for the development of a cemetery.
  - The extended listing should be gazetted with applicable site specific exemptions to facilitate future works in accordance with an endorsed Plan of Management (POM) to be submitted at a future date.
  - The CMCT respectfully requests the opportunity to liaise with the Office of Environment and Heritage with regard to the accompanying revision to the statement of significance, which should have regard to the assessment in the URBIS CMP.
26. The CMCT respectfully submits that the matters raised in the URBIS submission directly relate to the extent of the need for long term heritage conservation of the CMCT Land in the proposed extended curtilage around Varroville, mitigation of the impact of the proposed extended curtilage on the reasonable and economic use of the CMCT Land and in turn, the mitigation of any financial impact of the proposed listing.
27. As detailed above, should the Minister be minded to pursue a listing of an extended curtilage on the State Heritage Register, and form the view that the land the subject of that extended curtilage is of State heritage significance, then the Minister is required to consider the matters set out in section 32(1)(a) – (d) of the *Heritage Act*.
28. In addition to the matters raised in the URBIS submission, the CMCT through its consultants has now made further and more detailed submissions to the IPC on the Heritage Council's recommendation, the necessity for the long term conservation of CMCT Land included in the proposed extended curtilage, the impact of a potential heritage listing on that CMCT Land and the resulting financial impact on the CMCT of that proposed listing.
29. The CMCT therefore respectfully submits that the submissions it has made in the course of the IPC review are highly relevant to the section 32(1) of the *Heritage Act* mandatory considerations to be made should the Minister be minded to pursue a listing of an extended curtilage around Varroville.

### **C. Reply in Relation to the Materials before the IPC Panel**

30. The CMCT supports what was said by the IPC Panel at T6.10 that is the IPC's position that 'everybody who is an interested stakeholder or an interested party

has the same access to the same material to make decision-making and deliberations in submissions equitably.’

31. The CMCT submits that as an interested stakeholder and party that it has not had the same access as other interested stakeholders and parties to the Curtilage Study Varro Ville dated May 2016 co-ordinated by Orwell and Peter Phillips on behalf of the current owners of Varroville (the ‘**OPP Study**’) that is before the IPC Panel.
32. In addition, the CMCT was not in possession of the part publically funded OPP study during the consultation and public notification period leading up to the making of the Heritage Council’s recommendation to the Minister to list an extended curtilage around Varroville on the State Heritage Register.
33. As previously submitted, it appears to the CMCT consultants that the Heritage Council’s recommendation to the Minister made on or around 28 September 2017 to list an expanded curtilage around Varroville on the State Heritage Register relies in its entirety on the OPP Study.
34. The CMCT therefore submits that with no access to the OPP Study, it was prevented from submitting a critical appraisal of the OPP Study prior to the making of the Heritage Council’s recommendation to the Minister to list an extended curtilage around Varroville on the State Heritage Register. The CMCT further submits that without the same access to the OPP Study as the IPC Panel and other interested stakeholders and parties in this IPC review of the matter, it has not had an equitable opportunity to deliberate and make decisions on its submissions to the IPC in the course of this review.
35. In circumstances where there are significant implications for the CMCT, whose proprietary interests in the CMCT Lands may be adversely impacted by any decision to list an expanded curtilage around Varroville on the State Heritage Register, the CMCT respectfully submits that the issues surrounding access to the OPP Study constitute a denial of procedural fairness.
36. Accordingly, the CMCT respectfully submits that until this denial of procedural fairness is properly and completely cured, an expanded curtilage around Varroville resulting from the recommendation to the Minister made on or around 28 September 2017 should not be listed on the State Heritage Register.

28 January 2019

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