

VARRO VILLE

4 February 2019

Ms Anna Summerhayes
A/Executive Director,
NSW Independent Planning Commission
Level 3, 201 Elizabeth Street
SYDNEY NSW 2000

Sent by email to ipcn@ipcn.nsw.gov.au

Dear Ms Summerhayes:

Re: Review of the recommendation to list the curtilage extension of the Varro Ville Homestead & Estate (SHR00737) (Review)

I refer to your letter of 31 January, concerning a letter of 25 January 2019 from Mills Oakley, acting for the Catholic Metropolitan Cemeteries Trust (CMCT), regarding the availability of our curtilage study on a 'view only' basis.

We appreciate being invited to comment, however it is not clear why this has been referred to us *two days after* the closure of submissions and *six days after* it was received by the Independent Planning Commission (Commission) when it is too late to consider it.

As you know, despite our grave concerns for the protection of heritage identified in our study and the Commission's unwillingness to fully address these concerns, we agreed to make the study available, as per the conditions set out in the Commission's letter of 28 November 2018, by email at 10.52pm of 21 January 2019, meeting the deadline urged by the Commission. On 24 January 2019 I emailed the Commission again, noting that it had still not acted on it. Had it done so the study would have been available for a full week which was sufficient time for the CMCT's numerous consultants to verify that it was the same as the copy they had already admitted to having and if not, conduct a further review.

You would also be aware that we too asked for an extension of time for submissions due to the two-day delay by the Commission in publishing the transcript, the poor quality of the transcript and the fact that the deadline was preceded by the Australia Day weekend. I note that we were only asking for an extension of time to compensate for errors on the part of the Commission, but this was denied. I thus had three hours' sleep over two days to complete our submission, lodged at 4.57pm on Tuesday. This did not allow us time to respond to the detail of submissions made on behalf of the CMCT at the Hearing, or give our own consultants the opportunity to respond to the 'peer' review of our curtilage study.

Had the Commission considered our request to compensate us for its delay, then the CMCT and its advisers would have received the same compensation, however that opportunity has now passed.

Having met that deadline at great personal cost, and further, having complied with every demand and short deadline set by the Commission in this project, we now consider the matter closed. If the Commission were to now change its stance and decide to provide an extension of time, we would not be in a position to respond at short notice and it would be procedurally unfair to us. Given the imbalance in resources between us and the CMCT, the Commission's demands and deadlines have been far more onerous on us than the CMCT such that if there is any procedural unfairness it is to us rather than the CMCT.

As further support for our view, we feel that the Commission was, at the very least, remiss in keeping from us that the CMCT had an army of consultants scheduled to speak for it at the Hearing of 14 January 2019. We raised the issue of the speaking schedule with the Commission twice in conversation and by letter of 7 January that remained unanswered at the date of the Hearing. We were thus blindsided when I arrived to speak for my husband and me, and Mills Oakley arrived with ten people. Had we known the speaking line-up we would have brought our own consultants to respond to the issues raised. We also do not know why a representative of Netcorp, an apparent construction company for the CMCT, was allowed to be present at the hearing, given that it had apparently not applied to speak and was not on the schedule. This imbalance in our treatment was compounded by the fact that the Commission published all our correspondence on its website, but none from the CMCT or its advisers. It was only after we raised our concerns *twice*, that the Commission finally published this correspondence, thus revealing that the Commission had known all along that Mills Oakley had arranged eight speakers under its name – five of which were giving formal presentations.

Notwithstanding the above, I do not believe that the amount of time provided to the CMCT and its advisors to review our study on a 'view only' basis at the Commission's offices is procedurally unfair and feel that Mills Oakley is being disingenuous in its claims as follows:

1. Eight people for the CMCT (including its lawyer, heritage advisors, planners, and cemetery designer) admitted at the Hearing of 14 January 2019 to having had a copy of our study for *one month*, courtesy of Mills Oakley. Mills Oakley would not confirm where it got the copy and would not say what was missing from its copy that caused a '*serious problem with the material*'. When I pointed out that the study pages are numbered making it easy to determine what was missing Mills Oakley declined to say - instead using this issue to demand that we hand over copies of the study. Mills Oakley cannot thus be considered as acting in good faith on this matter.

Following feedback from the Commission, we have now confirmed that the only government agency that gave Mills Oakley access to our study was Campbelltown City Council, which did so on a 'view only' basis under its policy of 'open access information' relating to the Varroville Cemetery development application (DA). In taking and distributing copies, Mills Oakley would therefore appear to have breached copyright. However the key issue here (as I highlighted at the Hearing) was that there was only *one page* missing from the Council copy which I quickly corrected the day after submitting it. Assuming Council forgot to later include that page, this is hardly detrimental to any assessment of the study. The provision of the study on a view only

basis at the Commission's offices would have quickly confirmed this and Mills Oakley clearly knew this when it declined to reveal where it got the copy and what pages were missing.

2. We dispute a number of claims made by Mills Oakley in its letter:
 - a. It had *three business days*, or *two business days* if one excludes the day it was advised of its availability, to further review the study (not one).
 - b. It is clear from the Hearing that only *one* of the eight people referenced by Mills Oakley as needing access to the study *actually* needed access *for the purpose of the curtilage expansion*. That person is the one who has already carried out the 'peer' review. Every other presenter (including the Urbis heritage consultants) referred to the study in the context of the Varroville cemetery DA. This is a matter for the DA panel and is more appropriately dealt with there at the appropriate time. Further, since there was only one page missing and the 'peer' review had already been completed, it would have taken little time for the reviewer to confirm his assessment.
 - c. We note that while there is no legislative requirement for the Commission to *publish* beforehand all the material that it considers, nevertheless the Commission has made clear that it will only consider information that has been made available to all parties beforehand. However '*same form*' does not mean '*having a personal copy*', only that the information is available to consider. If Mills Oakley wants to split hairs and the Panel deemed it important, the Panel could simply deal with this by reviewing the study in its own offices.
 - d. Mills Oakley's claim that it does not know the reason for restricting access to the report is disingenuous. Our reasons for withholding the report's detail is contained in correspondence published on the Commission's website but has also been written about and discussed in detail in numerous requests for information under the *Government Information (Public Access) Act 2009 (GIPAA)* launched by Mills Oakley on behalf of another landowner Scenic NSW Pty Ltd. We are not aware that Mills Oakley has ever previously acted for the CMCT in trying to source this information.
 - e. The suggestion that visiting the Commission's offices restricted the equipment the CMCT's advisers could take there is absurd. Most people would simply take a laptop (and phone if permitted). A printer is certainly not required.
 - f. The requirement that the CMCT and its advisers be given *four weeks* to further review the study is double the time it stated in its earlier correspondence. This gives the appearance of a disingenuous attempt to delay the Commission's advice to the Minister such that the Minister could not make the decision before the NSW election in March, thus facilitating the inappropriate consideration of the Varroville cemetery DA before the curtilage expansion could be decided.

- g. The request for four weeks does, however, confirm that *the month* the CMCT's advisors have already had to review the study has been sufficient to make its submissions.
3. We further note the following:
- a. The CMCT supported the recommended curtilage during the relevant time frame based on its own heritage assessment and the extensive information from our curtilage study that was provided during the public exhibition. Everything it needed to know regarding the impact of the curtilage on its 'propriety interests' was available in that information. If it had any concerns, it should have withdrawn its support, with relevant reasons under the *Heritage Act 1977*, at that time. The real issue here is that - as evidenced in its submissions to the Hearing - Mills Oakley's claim of 'adverse impact' relates to development that was not approved at the time the curtilage was being considered and therefore was not a relevant consideration, and this remained the case when submissions closed on 29 January 2019. Further, since the CMCT and its advisers are withholding information regarding its change of mind (currently the subject of a GIPAA request) information potentially germane to this Review is missing if the Commission is to give serious consideration to Mills Oakley's request at this late stage.
 - b. Mills Oakley's undertaking that *'our client and its advisers would be prepared to agree to reasonable conditions restricting onward disclosure of the Study in order to preserve any confidentiality of its contents'* can no longer be taken seriously given the breach of copyright and confidentiality that has already occurred.
 - c. Mills Oakley has been aware of the study's availability as *open access information* on a view only basis at Campbelltown City Council since 24 October 2018 when it first lodged a request to view it (and viewed it on 22 November 2018). If the CMCT has not sought access there and Mills Oakley has not sought further access either at Council or at the Commission's offices then it is fair to assume that it is because it is not required. I also find it hard to believe that Mills Oakley has not also given a copy of our study to its client. The CMCT's CEO Mr Peter O'Meara claimed at the Hearing *'we only obtained access to this report about a month ago'* though he did not state to the Commission, when asked, that he had a copy himself.

In summary

The Commission stated in a letter to our legal advisers of 28 November 2018 (when the Hearing was set for 3 December 2018): *'If your clients confirm that they wish the Commission to have regard to the Study, either in its entirety or in a partially redacted form, the same material will be available to the other parties subject to the condition that access be limited to the interested parties' legal advisers and heritage experts only and on the basis that those parties will not disclose the contents of the Study.'*

On 30 November it reaffirmed this decision saying the Commission *'is prepared to limit disclosure of the Study, in whichever form your client wishes it to be considered, to interested parties' legal advisers and*

heritage experts. This measure is intended to minimise your clients' concerns regarding risk of harm or destruction of areas of significant heritage value.'

We have since complied with this request, as with every other demand the Commission has placed on us. If the Commission now feels that it has made a mistake and that it compounded this by its own delays in responding to interested parties, this is not our fault and we should not be put at any disadvantage because of it.

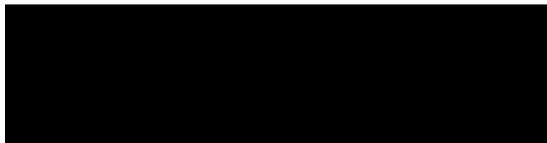
The CMCT's advisers have admitted on record that they have had copies of our study for their stated 'required period' of one month and this has informed its submissions to the Commission. It is more than unfortunate that the CMCT *et al* acquired the copy the way they did, but this fact cannot now be ignored. The concerns about whether this copy is complete or true was/is easily confirmed by its availability at the Commission's offices.

For our part, the Commission has been unwavering in denying every request from us for an extension of time for various parts of this project even when the reason for our request was due to errors and delays by the Commission. If we can meet these deadlines and demands then the CMCT, with its vast resources, should be able to too, and much more easily.

In conclusion

Mills Oakley's letter of 25 January 2019 would appear to be a transparent attempt to delay the Commission's review of the curtilage expansion so that the Heritage Minister would not be able to make the decision prior to the NSW Elections in March, thus assisting the Varroville cemetery DA's assessment prior to the curtilage being decided and gazetted. If the Commission decides, *after the closure of the submissions period*, to reverse its own decisions in a way that facilitates this, while simultaneously renegeing on its undertakings to us, then this will reinforce our and others perception of a perversion of process in relation to the CMCT's purchase of this land in what was, at the time, an environmentally protected area where commercial development in general, and 'cemeteries' in particular were prohibited and a curtilage expansion was under new investigation following its nomination in 2000. In this situation we could have no faith in either the Commission's independence from the government of the day, or from large powerful developers such as the CMCT, or have any faith in the Commission's commitment to proper process. We feel that the Commission has been harsh in its rulings but if there is one mantra in the community it is that we all have to play by the *same* rules. The government and its appointed planning panels cannot keep shifting the goal posts to accommodate large developers every time the outcome does not look to be going in their favour.

Yours sincerely



For: Jacqui Kirkby and Peter Gibbs

