

30 November 2018

Anna Summerhayes
Acting Director
Secretariat
Independent Planning Commission NSW

By email: ipcn@ipcn.nsw.gov.au

Dear Ms Summerhayes

Review of the recommendation to list the curtilage extension of the Varroville Homestead & Estate (SHR00737) (“Review”)

1. We refer to Ms Stjernqvist’s letter dated 28 November 2018.
2. We are instructed to note the following in relation to that letter (adopting the terms defined therein).
3. Our clients acknowledge that the outcome of the NCAT proceedings between our clients and OEHL concerning the Study will have no bearing on the Commission’s review. This has never been suggested by our clients.
4. However, the NCAT proceedings are relevant to the Commission’s decision not to maintain the confidentiality of the Study (contrary to our clients’ request), in the following circumstances:
 - a. We are instructed that our clients provided the Study to OEHL under strict conditions of confidentiality;
 - b. Notwithstanding that, and contrary to our clients’ express objection, OEHL determined to release the Study under the GIPA Act, following the application of an interested party to the Commission’s review;
 - c. Through the NCAT proceedings our clients are exercising their statutory right to seek administrative review of OEHL’s determination to release the Study. Under the GIPA Act, release of the Study is prohibited until the conclusion of the NCAT proceedings;
 - d. We are instructed that OEHL provided the Study to the Commission without our clients’ consent, and without prior notice to our clients; and
 - e. We are instructed that at no stage did OEHL or the Commission inform our client that there was a possibility that the Commission would publish the Study on its website until 19 November 2018, only two weeks prior to the Commission’s review meeting, and following the commencement of the

NCAT proceedings on 16 November 2018, which was the last day on which our clients could make their review application to the NCAT. In this regard, we also note that in your letter to our clients dated 19 November 2018, you stated that the Study may be made publicly available only after the Minister has made her decision.

5. Accordingly, and having regard to the above, our clients consider that the Commission's failure to maintain the confidentiality of the Study would have direct relevance to the NCAT proceedings, as it would defeat their purpose entirely, and would run counter to our client's statutory right to seek to preserve the confidentiality of the Study by way of the NCAT proceedings. In the circumstances, our clients consider that it is clearly in the public interest for the Commission to maintain the confidentiality of the Study at this stage.
6. Our clients acknowledge the Commission's objective to ensure that its review process is transparent and fair to interested parties. However, our clients do not consider that the maintenance of the confidentiality of the Study would run counter to this objective.
7. In this regard, we are instructed to note that there are no statutory provisions requiring the Commission to publicly release the Study or provide it to other interested parties. We note that in her letter Ms Stjernqvist incompletely quoted section s 36(2) of the Heritage Act, in support of the Commission's decision not to maintain confidentiality of the Report. The part of s 36(2) that was missing from Ms Stjernqvist's quotation provides, "*The Minister is to make copies of the report available to the public **after the Minister decides** whether or not to direct the listing*" (our emphasis).
8. Accordingly, the only statutory requirement to publish submissions made to Commission's review (and thereby the Study) applies to the Minister, not the Commission, and only after the Minister has made her decision.
9. To the contrary, there is clear statutory power for the Commission to decide to maintain the confidentiality of information provided to it as part of its review, where that is in the public interest.
10. In this regard, we are also instructed that the Study identifies the specific locations of areas of significant heritage value within the Varroville Curtilage. As noted in previous correspondence with our clients, our clients hold grave concerns that the release of this information to the public, or interested parties to the review, prior to the Minister's decision, would place those areas of heritage value at a real risk of harm or destruction.
11. Our clients reiterate that the Study is an important and relevant document for the Commission to consider in relation to its review. However, as set out above, our clients consider that there is real public interest in the Commission maintaining the confidentiality of the Study until after the Minister has made her decision, particularly noting:
 - a. Disclosure of the Study would defeat our clients statutory right to preserve the confidentiality of the Study in the NCAT; and

b. Our clients concern that disclosure of the Study would place the specific heritage areas identified in the Study at risk of harm or destruction.

12. Accordingly, our clients respectfully request the Commission to reconsider its decision not to maintain the confidentiality of the Study – at least until the Minister has made her decision, and after that, only publish the Study in a manner consistent with the conditions of the OEH's Permission to Use the material (signed by our clients on 14 May 2016), in accordance with which our client provided the Study to OEH - that is (amongst other things), that images within the Study be reduced to a resolution unsuitable for publication-quality printing.

13. Could you please confirm whether the Commission will reconsider its decision by **4pm today**. If the Commission will not reconsider its decision, our clients would be grateful of the opportunity to make further submissions regarding the use of the Study (in full or part thereof) by the Commission in its review.

14. We look forward to your response. If you have questions or wish to discuss please contact us on [REDACTED] or [REDACTED]

Yours sincerely

EDO NSW

[REDACTED]

Brendan Dobbie
Acting Principal Solicitor

Ref: [REDACTED]