

VARRO VILLE

NSW 2566

NSW 2566

7 December 2018

Director Secretariat,
NSW Independent Planning Commission
Level 3, 201 Elizabeth Street
SYDNEY NSW 2000

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

Dear Sir/Madam:

Re: Heritage Minister's referral to Independent Planning Commission (IPCN): 'Varroville: Request for Advice on proposed listing on State Heritage Register'- use of our curtilage study in the IPCN review

We write to you as the owners of state-listed Varro Ville Homestead (SHR #00737) and nominators of the curtilage expansion for Varro Ville on the State Heritage Register (SHR) that is the subject of the above request to the Independent Planning Commission of NSW (IPCN).

We refer to our prior correspondence in this matter, including copies of letters sent to government Ministers of Planning and of Heritage, and correspondence between the IPCN and EDONSW acting on our behalf with particular reference to the matter of how our curtilage study, ***Curtilage Study Varro Ville by Orwell & Peter Phillips, May 2016 (the Study)***, is to be considered by the IPCN. The IPCN has stated that it will only consider this Study to the extent that we are prepared to make it available, from the outset of this review, to the lawyers and heritage consultants of other landowners who have an interest in this matter.

This letter responds to that, but we wish to preface our response with the following:

We appreciate the IPCN giving us the opportunity to appear at its public hearing into this matter and we appreciate and support the IPCN's wish to be transparent and fair. However we are deeply concerned that issues raised by us have not been adequately addressed by the IPCN, including that legal issues raised on our behalf by EDONSW have been dismissed without legal justification and that the options offered to us by the IPCN represent a 'Sophie's Choice'¹ risking the destruction of Varro Ville's state significance no matter which choice we make, thus predefining the outcome before we even start.

Contributing to our concerns is that we feel the IPCN is conducting itself as if it does not have to have regard for the legislation that would normally apply in this matter – being the *Heritage Act 1977* and the *Government Information (Public Access) Act 2009 (GIPAA)*.

It is further concerning that the IPCN has discretion to make decisions about processes that overturn the processes that we all were subject to in arriving at this point and that the decisions it is making weigh the

¹ <https://www.urbandictionary.com/define.php?term=Sophie%27s%20choice>

process in favour of landowner-developers in a way that the above legislation and prior processes did not. We note that the Planning Minister, in referring a development application (DA) for the same land as the curtilage expansion (***Crown Cemetery Development Varroville (A085/18)***), expressed the view that the IPCN *‘is the best placed to exercise my functions under the Act as it can appropriately balance the various interests.’* The outcome of the IPCN’s decision regarding this curtilage expansion is a key input to that process where we feel it has already re-weighted the process unfairly to one side, favouring proponents of development over us the owners of Varro Ville Homestead at the centre of this project, the community and the public interest.

To illustrate our concerns we note the following:

1. In our prior correspondence we raised concerns that under s.34 of the Heritage Act, the Heritage Minister had to refer this to the IPCN within 14 days of receiving a recommendation to list, which we understand was provided on 31 October 2017. In accepting to advise the Minister ‘out of time’ the IPCN appears to us to be condoning the Minister’s breach of the Act - noting that the delay in the Minister’s decision also has the effect of weighting the pending DA assessment for the same land (now also with the IPCN) in favour of the DA proponent if the ongoing delay causes the DA to be decided before the curtilage expansion is gazetted. The referral of this matter to the IPCN also weights the DA assessment in favour of the DA proponent if the IPCN’s expansion review process predetermines the outcome in favour of development.
2. In correspondence with government Ministers of 1 November 2018 (copied to the IPCN and included again with this letter) we raised concerns about the IPCN being used to circumvent the GIPAA. The GIPAA has been our only protection in the absence of an Interim Heritage Order (IHO) for the proposed curtilage land while this was being decided (an IHO being the normal process for dealing with such sensitive proposals).² The IPCN is now taking away that protection, without putting anything else in its place, risking unfortunate consequences that compromise the purpose of this review, which is to identify and protect state significant heritage. We note the following:
 - a. The IPCN has published documents on its website without subjecting these documents to the processes that apply in assessing whether information should be made public under the GIPAA’s public interest test. For example the Ministerial Briefing was withheld from us in a GIPAA search on the basis that it was ‘privileged’ and that it also contained legal advice. While we have benefited by the IPCN’s actions in this instance, we respected the prior decision of the Office of Environment and Heritage (OEH) to withhold it as everyone benefits from the proper operation of the GIPAA. The flipside of this is that, although the IPCN has been prepared to withhold our Study until now, other documents that we have objected to being released in prior GIPAA searches *were* published by the IPCN (albeit partially redacted) without giving us the opportunity to review these under the GIPAA as third parties. As a consequence we also have no way of knowing whether the redacted parts are parts that we might have been happy to release since we were not further consulted.

² An IHO was requested by the NSW Heritage Council for most of this land in 2014 but it was refused by a prior Heritage Minister. We understand that the NSW Heritage Council has been reluctant to request it of the Minister again given the prior refusal. We regard the initial refusal and the context in which it was made as Ministerial interference in the process favouring development.

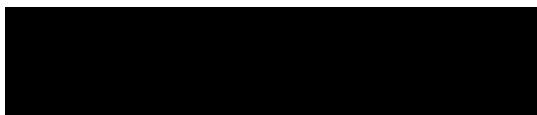
In summary

In order to avoid compromising the purpose of this review, to preserve integrity in the process and to ensure the best outcome, the IPCN must consider our Study in full but without putting the heritage in question at risk. The options so far offered by the IPCN do not resolve this issue and are unfair to us and to heritage. The Study is a comprehensive whole of 149 pages that is difficult to pull apart and still have relevance. The information we would need to redact is precisely that needed to support the Study's conclusions and recommendations. However, we have nothing to fear from legal or professional scrutiny of it by other participants in this process *providing* legal protections are put in place for the curtilage area under investigation while this process is still in play. The area needing protection roughly equates to the *contiguous* land mass in the minimum curtilage proposed by our consultants on p.119 of the Study, which, in addition to the land currently under consideration (Lot B DP 370979, Lot 22 DP564065, Lot 1 DP 218016 and Lot 4 DP239557), includes a small portion owned by Scenic Pty Ltd that the NSW Heritage Council has flagged for future investigation (part Lot 1 DP 541916). The simplest way to protect it is if the Minister can be persuaded to make an IHO over this area, or the designated parts thereof. If the Study *as a whole* is then made available on the restricted basis offered by the IPCN (i.e. to the CMCT's lawyer and heritage adviser) and in accordance with the OEH's Permission to Use the material signed by us on 14 May 2016 (i.e. '*limited to a resolution unsuitable for publication-quality printing*'), it may also preserve the process currently before the NCAT.

If the IPCN is not prepared to canvas either of the options we have put forward, or cannot find another method for achieving the same effect, then the only part of our Study that we can release is pp.102-120 (with everything else being redacted), and with the same restricted access because the map on p.119 identifies heritage on land owned by Scenic Pty Ltd. These pages comprise the assessment of significance, conclusions and recommendations of the Study's authors. They are augmented by a submission from the Study's lead consultant that is available on the IPCN's website and by those parts of the Study necessary to the curtilage expansion process that have already been published by the OEH on the following link: <https://www.environment.nsw.gov.au/heritageapp/ViewHeritageItemDetails.aspx?ID=5063550>. In doing this, we are *not* withdrawing the Study as whole from the OEH or from its use in the process that led to the NSW Heritage Council's recommendation to the Minister to expand the curtilage of 31 October 2017. *Nor* are we withdrawing the Study as a whole from the IPCN's consideration of this matter. It is entirely up to the IPCN if it decides *not* to consider that part that we have asked be redacted. We do not feel that this is our fault as the IPCN processes and the way these are being applied in this project do not appear to be fit for purpose.

We would be grateful if you would advise receipt of this letter and the decision of the IPCN in relation to this matter. We would also be happy to meet with the IPCN to discuss the issues raised here if there is some way to arrive at a fairer process.

Yours sincerely



For: Jacqui Kirkby and Peter Gibbs

Cc Dr Mark Dunn, Deputy Chair, Heritage Council of NSW (copied due to the NSW Heritage Council's role in the making of IHOs under the Heritage Act).



1 November 2018

The Hon. Anthony Roberts MP
Minister for Planning
GPO Box 5341
SYDNEY NSW 2001

Sent via website: www.nsw.gov.au/your-government/ministers/minister-for-planning-minister-for-housing-and-special-minister-of-state/

Dear Minister:

Re: Role of the Independent Planning Commission in the Crown Cemetery Development Varroville (A085/18) AND the Heritage Minister's subsequent referral to the same: 'Varroville: Request for advice on proposed listing on State Heritage Register'

I write again on behalf of the Scenic Hills Association and as an owner of Varro Ville Homestead located in the middle of the proposed cemetery land. My husband and I are also the recent nominators of the Varroville curtilage expansion on the State Heritage Register (SHR) – noting that there was a deferred nomination in existence since 2000, lodged prior to all current landowners purchasing the affected land.

We wrote to you on 19 October 2018, and previously on 10 July and 21 August, raising concerns about unclear processes of the Independent Planning Commission of NSW (IPCN) and other matters that lie outside the delegation of your functions to the IPCN. One concern was that the Heritage Minister, in breach of s.34 of the *Heritage Act 1977*, had not made the decision to expand Varro Ville's curtilage on the SHR within 14 days of receiving a recommendation from the Heritage Council of NSW (NSWHC).

The IPCN contacted me on Tuesday, 30 October 2018, to advise that it had received a request from the Heritage Minister for advice on the curtilage expansion on 12 October 2018 and that it had only listed it on its website that morning along with all materials received. I advised the IPCN Secretariat that the listing of the materials was potentially in breach of the *Government Information (Public Access) Act 2009* (GIPAA). The material was subsequently removed from the website pending advice.

We wish to advise you of two ongoing concerns that affect our perceptions of the planning process:

Firstly, the request for advice continues the Minister's breach of s.34 of the Act because any referral to the IPCN had to be made within 14 days of receiving the recommendation to list by the NSWHC. While we do not have a problem with it otherwise being referred to the IPCN, information recently sourced under the GIPAA supports our ongoing concern that the Minister's referral could inappropriately weight the process in favour of land developers, in particular the Catholic Metropolitan Cemeteries Trust (CMCT). The belated referral coincides with an apparent change of stance by the CMCT confirming (as we had suspected) that it did not support the conservation of the heritage of the site if it interfered with its plans to put a cemetery on the land. If this referral to the IPCN gives the CMCT another 'bite at the cherry' to revise its prior stance – a stance that it had used to persuade planning authorities to rezone the site to permit 'cemeteries' – and if this referral is used to further delay the curtilage expansion

decision allowing the Varroville cemetery development application (DA) to be decided first, then this would greatly increase perceptions of large developers' inappropriate influence in the planning process.

We also reiterate our concerns that the IPCN does not yet have clear procedures to deal with matters outside its major role of deciding State Significant projects. The publication of materials yesterday in breach of the GIPAA is a deep concern and we will be writing to the IPCN specifically on this matter. I do not feel that this is the fault of the IPCN Secretariat with most of the staff new to their roles, noting that they acted to quickly correct the situation. However we are deeply concerned, for example, at the publication of names and contact details of all those who made submissions supporting the curtilage expansion. We are concerned about potential bullying in this matter, as documented in our submission during the rezoning. Recently, adjoining landowners who oppose the cemetery received letters from the CMCT's lawyers containing unsubstantiated allegations of trespass. I attach a copy of the letter and the article that appeared in the local newspaper to which the letter pertains. A letter was sent separately to me, my husband, the Carmelite nuns, the Carmelite Friars (monasteries adjoining the cemetery), our local MP (Anoulack Chanthivong) and the local newspaper. We understand that the farmer leasing the cemetery land may also be facing eviction relating to the photograph that appeared in the paper. This is deeply disturbing coming as it does from an entity, not only of the Sydney Catholic Archdiocese, but one acting for the Crown. We have had further cause to be concerned that the CMCT is not treating the heritage of the site respectfully and have had correspondence with the Heritage Division in this matter.

For all these reasons we do not want certain confidential information relating to the curtilage expansion process made public *at this point in time* and are concerned if the Heritage Minister's referral to the IPCN seeks to avoid the operation of the GIPAA to the benefit of various developers/land speculators including, but not limited to the CMCT. In particular my husband and I have opposed the publication of a curtilage study commissioned by us to support our re-nomination of a curtilage expansion for Varro Ville. We object primarily on the basis that it identifies elements in the landscape that are critical to Varro Ville's state significance that can be destroyed without penalty by those seeking to develop the land. The correct process for dealing with these kinds of controversial assessments is for the Minister to make an Interim Heritage Order (IHO) over the land proposed for listing (at least the 'minimum curtilage' proposed in our study) until such time as the matter is resolved. Under an IHO, information, including our curtilage study, could be made available to all parties for a fairer, more transparent process. It is the intervention by successive Heritage Ministers, contrary to the Heritage Act and potentially breaching the Ministerial Code of Conduct in one instance, to favour development, along with other actions of the Department of Planning under Ministerial delegation, which has created the current situation.

As previously advised, we consider that this goes to *whole of government* integrity and requires a *whole of government* response. We have copied the Heritage Minister on this letter.

Yours sincerely



Jacqui Kirkby
Convenor

Cc NSW Heritage Minister, the Hon. Gabrielle Upton; IPCN Secretariat; Deputy Secretary Mr Marcus Ray.



STOREY & GOUGH
LAWYERS

Our Ref: [REDACTED]

21 September 2018

Ms. Jacqui Kirkby

[REDACTED]
VARROVILLE NSW 2566

Dear Ms. Kirkby,

Re: Catholic Metropolitan Cemeteries Trust
Property: 166, 176 & 278 St Andrews Road, Varroville

We are the solicitors for Catholic Metropolitan Cemeteries Trust, the owner of the properties known as 166, 176 and 278 St Andrews Road, Varroville.

We have been provided with a copy of the attached newspaper article which contains a photograph showing a group of people in a rural setting with a white building in the background. We are instructed that you are one of the persons in the photograph.

You would have been aware at the time the photograph was taken that the land upon which you were standing was private property as it is part of our client's properties at Varroville.

We are instructed that you did not seek nor were granted permission to enter our client's land for the taking of the photograph or for any purpose. Our client's land is fenced with gated padlocks which do not permit public access.

You are hereby put on notice that your presence on our client's property constituted a trespass to land and that our client will assert its rights as owner in the event that a similar event occurs in the future.

Our client's actions may include calling the police to have you removed from the land together with taking action against you in the Court for trespass and/or seeking an injunction that you refrain from trespassing on our client's land in the future. Our client may seek damages and that you pay its legal costs.

We recommend you seek legal advice in respect to the serious matter raised in this letter.

Yours faithfully,
STOREY & GOUGH


[REDACTED]
Chris Gough
Senior Partner, Acc. Spec. (Loc Govt & Plan)

Email: [REDACTED]

September 17 2018 - 2:37PM

Minister condemned for failing to act on curtilage approval



 Wanting action: Anoulack Chanthivong (second from left) with Jacqui Kirkby, her husband Peter Gibbs and members of the Carmel of Mary and Joseph Convent.

State Environment and Heritage Minister Gabrielle Upton has come under fire from Macquarie Fields MP Anoulack Chanthivong and local heritage campaigner Jacqui Kirkby for the minister's inaction in extending the protection zone around the historic Varro Ville House.

The condemnation comes after a *Sydney Morning Herald* report revealed the minister's office had gone through a staggering staff turnover in the past 18 months and a senior minister labelled Ms Upton "the weakest performer in the Cabinet".

Mr Chanthivong said Ms Upton had failed to make a move on the Varro Ville House curtilage-extension in 12 months, despite a strict legal obligation requiring her to endorse or reject the listing within two weeks of receiving a recommendation.

"The recommendations made to the Heritage Minister were clear and unambiguous," Mr Chanthivong said.

"If adopted, the Varro Ville property and curtilage would be protected in law forever.

"Yet despite the urgency of the matter, the silence from the Minister is deafening. Has the Minister forgotten her [legal] obligations or does she simply not care? The Minister's inaction over Varro Ville is disgraceful.

"No more excuses. Enough is enough. The time to protect Varro Ville is now. I call on the Minister to immediately fulfill her obligations with respect to Varro Ville."

Ms Upton rejected the allegations that her office was a "toxic environment" and said in a statement to Fairfax Media that "I work very hard on behalf of the state government and so do my staff... I value their efforts and commitment".

However, a former staff member painted a different picture.

"Departmental briefs sat on her desk for months and months without her even looking at them," the staffer told Fairfax. "Nothing ever got done."

Ms Kirkby, who owns and lives at Varro Ville House with her husband, said she was beyond frustrated with the lack of action.

"I am alarmed and disturbed that a government minister can set such a poor standard for the community by flouting her own legislation and ignoring her own advisors," she said.

"We could be forgiven for feeling we need to have a high profile, be a powerful developer or live in a Liberal electorate to get recognised."

Ms Kirkby said she was investigating the effectiveness of the Minister's office and would be making a statement in the future.

The *Advertiser* contacted the Minister's office twice this year to enquire about the curtilage extension and were told the listing was "progressing through the necessary administrative processes".