

444-454 Waverley Road, Mount Waverley

Cultural Heritage Advice

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Andrew Long + Associates Pty Ltd

9th September 2021

A Cultural Heritage Management Plan (CHMP) has previously been prepared for the subject land in support of an earlier planning permit application. The CHMP in question is:

- CHMP 14454 – Blue Cross Community Care Development. 444-454 Waverley Road and 1 Betty Court, Mount Waverley – approved 4th November 2016 (Andrew Long and Associates).

This assessment was prepared for a proposed hospital/retirement village, a high impact activity as per r.46 of the *Aboriginal Heritage Regulations 2018* and was approved by Aboriginal Victoria in the absence of a Registered Aboriginal Party for the area at the time.

The present matter relates to whether the previously prepared and approved CHMP remains valid for the current proposed activity which is seeking to develop part of the original activity area for use as a childcare centre.

The question of whether a CHMP prepared for one activity can be transferred to another activity has been dealt with in some depth at VCAT, most specifically in two decisions - *Three*

Pillars Property Group v Brimbank CC (Red Dot) [[2012 VCAT 368](#)] (hereafter ‘Three Pillars’) and *Lake Park Holdings Pty Ltd v East Gippsland SC & Ors (Red Dot)* [[2014 VCAT 826](#)] (hereafter ‘Lake Park’).

In Lake Park, Dwyer considered the test for determining when a pre-existing CHMP can be used for an amended development proposal, reformulating an earlier approach as set out in the previous Tribunal decision, Three Pillars. Dwyer considered the test set out in Three Pillars to be too broadly stated and capable of leading to unintended outcomes. Three Pillars essentially allowed for a CHMP prepared for an activity to be transferable to any other activity to be undertaken within the same activity area without consideration of the nature of the assessment undertaken or the relative impacts to ground surfaces and thus Aboriginal cultural heritage of the two activities. As a consequence, Dwyer stated that it is not sufficient to broadly characterise the ‘activity’ at some generic level, or to allow a pre-existing CHMP to be applied to *any* high impact activity.

The following statements from the *Lake Park* decision (2014 VCAT 826) are reproduced here verbatim:

If a new statutory authorisation (i.e. a new permit) is sought for a different development proposal, the question should simply be posed as to whether, on a fair and objective reading of the pre-existing CHMP as a whole, the CHMP still reasonably covers or contemplates the activity now proposed in the amended development proposal that requires the new permit. This may involve an examination of the extent of any amendment to the particular development or use comprised in the activity, compared with the activity for

which the pre-existing CHMP was initially prepared, in the context of the assessment undertaken, and any recommendations made, in that pre-existing CHMP. It may involve looking at whether a simple or complex assessment has been undertaken, and whether the CHMP itself provides any guidance about its intended ambit and the scope of any changes to the activity that might still be covered by its assessment and approval.

In light of the above the following sets out to address the below matters for consideration in the question of whether CHMP 14454 remains valid for the purposes of the current proposed development:

- a. Whether the description of the activity in the previously approved CHMPs is exclusively tied to a particular development/activity;
- b. The extent of changes in the proposed development/activity since the previously approved CHMPs were prepared;
- c. Whether the CHMPs were undertaken as a 'complex' assessment across the entire activity area such that any changes in the development do not affect the specific outcomes contemplated in the already approved CHMPs; and
- d. Whether any changes in the development/activity affect any recommendations contained in the already approved CHMPs.

The approach taken here has been previously accepted and endorsed by VCAT (see Attachment 1).

a) Is the description of the activity in the previously approved CHMP exclusively tied to a particular development/activity?

In section 2, CHMP 14454, sets out a broadly defined description of the proposed activity and notes the expected works to be involved as follows:

The proposed activity comprises the construction of an aged-care facility. Ground works associated with the development will include excavations to a depth of approximately 1.0 metres within the footprints of the proposed structures (Plate 1). The existing carpark entry ramp will be widened to 4.7m, and the existing bike path will be demolished and a new alignment constructed along Scotchmans Creek. The remaining ground surfaces within the activity area will be subject to landscaping activity, resulting in soil cutting of approximately 300mm. The activity will include:

- *Mechanical grading and removal of soils across the activity area.*
- *Trenching for foundations and supports.*
- *Establishment of subsurface utilities*
- *Surface grading and levelling for associated paved surfaces and garden areas.*
- *Facility construction activities*

While the purpose of the works within the activity description for CHMP 14454 was a nominally different activity the actual disturbance to ground surfaces anticipated for the development was such that to large extent it is irrelevant for what purposes the proposed buildings were intended as the CHMP was prepared and approved on the basis that essentially all ground surfaces within the activity area would be impacted. Ground surfaces within the footprints of the buildings themselves were anticipated to be excavated to a depth of 1 metre and other surface would be subject to gradings and levelling for landscaping purposes and construction of paved areas.

b) What is the extent of changes in the proposed development/activity since the previously approved CHMP was prepared?

The following considers whether the proposed change in activity entails an increase in the potential impact or harm to Aboriginal cultural heritage within the activity area. The following figures (Figure 1- Figure 3) show the proposed activity as contemplated in the approved CHMP, the overall design response for the present proposal and a comparison between the footprint of the current and previously and proposed developments. The comparison between the two proposals highlights the fact that the anticipated footprint of the current proposal is almost wholly contained within the footprint of the previous proposal and indeed occupies a significantly smaller area. As a consequence, it is clear that the level of impact anticipated during the preparation and approval of CHMP 14454 was substantially greater in extent than the impact likely to occur under the current proposal



Figure 1: Proposed activity anticipated under the approved CHMP 14454.



Figure 2: Proposed activity considered in this assessment.

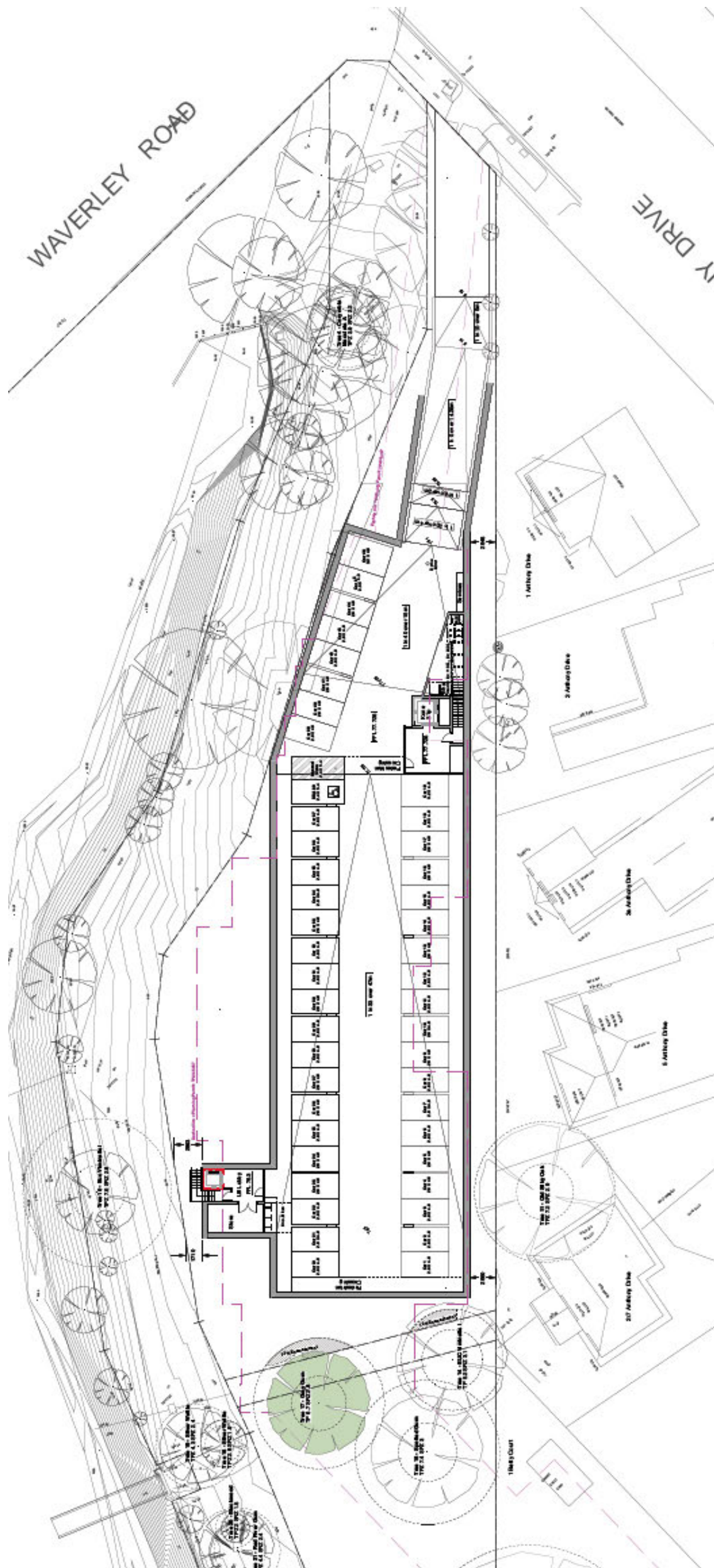


Figure 3: A comparison between the footprint of the current proposal (basement carpark) and the previous proposal (pink dashed line) indicating that overall the current proposal occupies a significantly smaller footprint.

- c) **Was the CHMP undertaken as a ‘complex’ assessment across the entire activity area such that any changes in the development do not affect the specific outcomes contemplated in the already approved CHMP?**

CHMP 14454 was prepared as a complex assessment CHMP. The complex assessment for CHMP 13572 involved the excavation of thirteen test pits broadly running down the centre of the activity area as well within a property facing onto Betty Court. The sampling strategy for the complex assessment was stated as follows:

A number of variables relating to landform and prior investigations/ disturbance contributed to the development of a sampling strategy:

- *The standard assessment demonstrated the presence of a single landform within the activity area: a gently sloping-level surface. This landform has undergone modification during the development of the activity area.*
- *The rear yard surface of 1 Betty Court was determined to be the area least impacted by prior disturbance.*

On this basis, the sampling strategy was designed to assess the identified landform within the activity area, both in in the Betty Court and Waverley Road properties. This strategy focussed on the area of least disturbance for the excavation of a 1x1 metre test pits; the rear yard of 1 Betty Court. A second 1x1 (b) was excavated within 444-454 Waverley Road to provide a comparable stratigraphic profile and ascertain the level of prior impacts to this area. Further testing was achieved through the excavation of a series 0.5m x 0.5m STPs excavations the focused on areas of to be impacted by the proposed activity. The complex testing program resulted in the excavation of 2 1x1 m test pits and 11 STPs.

The excavation of 1x1 B, broadly speaking with the footprint of the current proposal, revealed significant levels of landscape modification with introduced European inclusions occurring with frequency to a depth in excess of 1000 mm. The results of investigations throughout the footprint of the current proposal were characterised as:

The observed soil profile comprised deep deposits (800-1200mm) of disturbance clayey silts and silty clays with intermixed gravels and clayey nodules through the entirety of the soil profiles (See Figure 2, and Appendix 5: Table 20). The stratigraphy is indicative of significant mechanical impacts to deposits, attributed to ground works evident in Plate 4, Plate 5 (Section 4.10).

The complex assessments undertaken, effectively and systematically sampled the activity area in a manner in keeping with the observed prior disturbance which had occurred and in a manner which was clearly to the satisfaction of the approval authority.

d) Do any changes in the development/activity affect any recommendations contained in the already approved CHMP?

Due to the fact that no Aboriginal cultural heritage was identified in the section of the activity area which is subject to the present assessment there are no specific recommendations to be fulfilled ahead of the commencement of the activity in this area aside from a cultural heritage induction to be provided by a heritage advisor and the RAP to key personnel involved in ground disturbing works.

On the basis of the above it is clear that the proposed change in the development of the land at 444-454 Waverley Road will not result in an increased potential for impact to as yet unidentified Aboriginal cultural heritage and will not compromise or in any other way change the recommendations in the approved CHMP.

The methodology employed during the CHMP assessment was based upon an essentially complete impact to the entirety of the activity area and as such CHMP 14454 is sufficient for the purposes of the current proposal which entertains a significantly reduced impact in terms of overall footprint of the proposed development. The findings of CHMP 14454 satisfies the criteria set out in Lake Park:

- The approved CHMP references plans as part of the description of the activity which demonstrates the future development of the current activity area.
- The new development proposal is not strictly for the same type of development, however, the nature of the works to be undertaken are essentially identical and are in keeping with the planning scheme zoning of the land.
- The proposed new development occupies the same location within the activity area as the original proposal, albeit with a reduced footprint.
- The approved CHMP was undertaken as a 'complex' assessment systematically across the activity areas. The CHMP allows for the low potential of the proposed activity to impact Aboriginal cultural heritage on the basis of the findings of the complex assessment.
- The proposed changes will not entail an increased risk of impact to Aboriginal cultural heritage within the activity area.
- The CHMP allow for the disturbance of the entire activity area.

On the basis of the above discussion it is my professional opinion that the proposed development plan changes do not require a new mandatory CHMP or an amendment of the approved CHMP to be prepared prior to the issuing of a statutory authorisation.

Please feel free to contact me directly should you require anything further on this matter.


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Executive Director