



15 March 2019

### Advice for Gateway Determination Review 518a Old South Head Road, Rose Bay (PP\_2018\_WOOLL\_001\_00)

#### 1. INTRODUCTION

1. On 8 February 2019, the Independent Planning Commission of NSW (the **Commission**) received a referral to review a Gateway Determination pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* in relation to a Planning Proposal for the site at 518a Old South Head Road, Rose Bay (the **Site**).
2. Woollahra Municipal Council (**Council**) seeks to amend the planning controls of *Woollahra Local Environmental Plan 2014 (WLEP 2014)* to list the Site as a local heritage item under schedule 5 of the WLEP 2014.
3. On 16 August 2018, the Director, Sydney Region East at the Department of Planning and Environment (the **Department**), as delegate of the Greater Sydney Commission (at the time the relevant authority), had determined that the Planning Proposal should proceed past Gateway subject to several conditions.
4. These conditions included condition 1 which requires the planning proposal to be updated to include a reference to a savings provision to apply to any development application lodged but not determined before the date of making the plan in accordance with the planning proposal. Additionally, the Gateway Determination did not authorise Council as the local plan-making authority.
5. On 27 September 2018, Council sought a review of the Gateway Determination requesting the removal of condition 1 and that reconsideration be given to itself being authorised as the local plan-making authority.
6. The matter was referred to the Commission for advice to the Minister's delegate. In providing its advice the Commission has been:

*"requested to review the Gateway Determination and conditions and prepare advice concerning the merits of the request. The advice should include a clear and concise recommendation to the Minister's delegate confirming whether, in its opinion, condition 1 should be retained and whether the decision not to authorise the Council as the local plan-making authority should stand".*

7. Professor Mary O'Kane, Chair of the Commission, nominated Chris Wilson (Chair) and Soo Tee Cheong to constitute the Commission to undertake the review and provide advice.

#### 1.1 Subject Site

8. The subject Site is legally described as Lot 37, Section A in DP 4567, and is located at 518a Old South Head Road, Rose Bay, at the corner of Dover Road (refer to Figure 1).
9. The Site is wholly zoned B4 Mixed Use under WLEP 2014 and is owned by the Uniting Church in Australia Property Trust NSW (the **Applicant**).

10. The majority of the Site is occupied by church buildings, including the Rose Bay Uniting Church (the **Church**) and Wesley Hall, with two small areas of lawn and landscaping either side of the Church and a play area at the rear of Wesley Hall. A brick and roughcast fence runs along the Site's boundary with Old South Head Road and Dover Street, and a timber paling fence runs along the Site's boundary with Dover Lane and its southern boundary abutting 518 Old South Head Road.
11. The church buildings were constructed in stages on the Site between 1905 and 1970, as illustrated in Figure 2.



Figure 1: Aerial photograph showing the subject Site outlined red. (Source: Woollahra Municipal Council's Planning Proposal Report, July 2018)

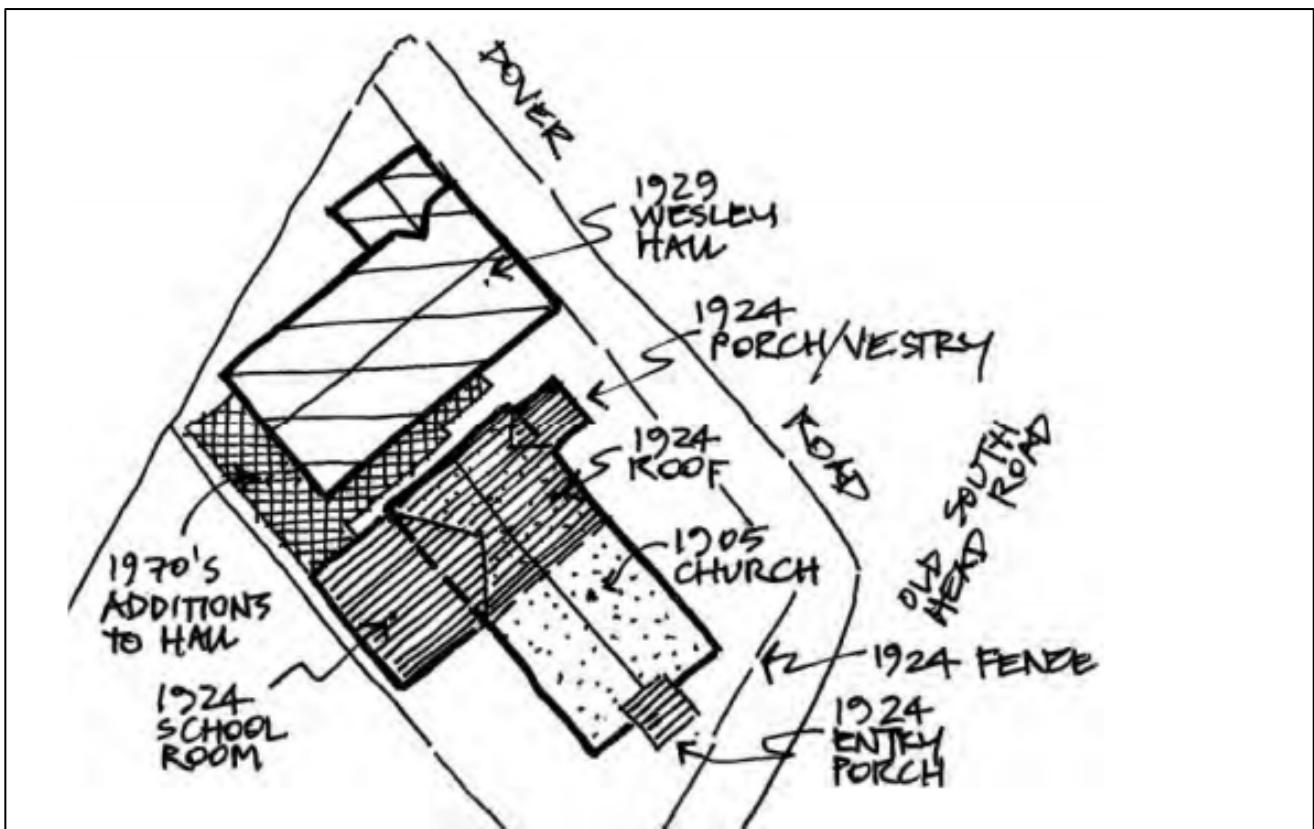


Figure 2: Staged construction of church buildings (Source: Rose Bay Uniting Church and Wesley Hall Group Heritage Significant Assessment, Robert A Moore, March 2018)

## 1.2 History of Planning Proposal and Gateway Determination

12. On 18 December 2017, following concerns raised by the local community, Council resolved to explore the heritage listing of the Site. Council appointed an independent consultant, Robert A Moore, to conduct a heritage significance assessment of the Site in accordance with the relevant guidelines.
13. The assessment, *Rose Bay Uniting Church and Wesley Hall Group Heritage Significance Assessment*, dated March 2018, concluded that the Site meets the criteria required to be listed as a local heritage item as the Site “meets the threshold for LEP heritage listing on historical, associational, social and aesthetic values.” The Commission understands the findings of the assessment were made available to the Applicant at this time.
14. On 20 April 2018, the Applicant lodged a development application (the **DA**) with Council seeking:
  - the adaptive reuse of the original 1905 Church for potential retail or business premises;
  - the demolition of the Wesley Hall, 1924 church extensions (not including the 1924 porch/vestry) and 1970's additions to the Wesley Hall; and
  - the development of a four-storey shop-top housing development with ground-floor retail and 10 three-bedroom apartments, that would integrate with the retained part of the Church.
15. The DA was accompanied by a statement of environmental effects (**SEE**) which included a heritage impact statement.

16. On 24 April 2018, the Applicant made submissions to Council in response to the findings of Council's heritage assessment supporting the listing of part of the Site as a local heritage item but requesting, consistent with the Applicant's DA, that the listing be limited to the original 1905 Church and 1924 porch/vestry extensions.
17. On 7 May 2018, Council's Environmental Planning Committee (the **Committee**) considered the findings of both the Council's heritage assessment and the Applicant's heritage impact statement and recommended that Council proceed to list the Site as a local heritage item consistent with the findings of the Council's assessment, including all of the church buildings.
18. Subsequently, on 21 May 2018, Council supported the Committee's recommendation and resolved to prepare a Planning Proposal to list the Site as a local heritage item in the WLEP 2014.
19. On 22 June 2018, the Applicant lodged a class 1 appeal in the Land and Environment Court (the **Court**) based on a deemed refusal of the DA by Council. The Commission has been advised that a hearing in the Court was set down for 13 March 2019.
20. On 16 July 2018, Council resolved to reaffirm its decision of 21 May 2018 to progress the Planning Proposal and submitted it to the Department on 19 July 2018 for a Gateway Determination.
21. On 16 August 2018, the Director, Sydney Region East at the Department, as delegate of the Greater Sydney Commission, determined the Planning Proposal should proceed as she considered it:
  - was consistent with the *Greater Sydney Region Plan: A Metropolis of Three Cities*, the *Eastern City District Plan* and the relevant section 9.1 Ministerial Directions and State environmental planning policies;
  - was supported by an independent heritage assessment that identified the Site as having heritage significance; and
  - will enlist the subject Site as a local heritage item to reinforce the heritage significance of the Site.
22. Given the DA was current and proceedings had commenced in the Court at the time of the Gateway Determination, the delegate conditioned the determination to include a savings provision to enable the consent authority, in this instance the Court, to determine the DA. The condition (i.e. condition 1) states:
 

*"1. The planning proposal is to be updated to include a reference to a savings provision to apply to any development application lodged but not determined."*
23. Additionally, the delegate did not authorise Council as the local plan making authority in the Gateway Determination for the reasons as outlined in the Department's Gateway Review Justification Assessment, including:
 

*"Authorisation is not considered appropriate as there is disagreement between the landowner and Council in relation to the extent of the heritage listing... Authorisation is also not considered appropriate as the development application is subject to appeal in the Land and Environment Court".*

## 2. THE COMMISSION'S MEETINGS

24. As part of its considerations, the Commission met separately with the Council and the Applicant on 28 February 2019 and the Department on 4 March 2019. Transcripts of each of these meetings were made available on the Commission's website.

### **3.1 Meeting with Woollahra Municipal Council**

25. On 28 February 2019, the Commission met with Council to discuss the Planning Proposal. Issues discussed at the meeting are recorded in the transcript and were made available on the Commission's website on 5 March 2019. A summary of key matters discussed is as follows:
- Council reiterated that it had undertaken an appropriate assessment of heritage significance which informed the Planning Proposal and as part of this process the Applicant had been afforded procedural fairness noting that this process commenced well before the Applicant's DA was lodged;
  - Council submits there was no indication that condition 1 would be imposed noting that the Department, in agreeing to the Planning Proposal, acknowledged the significance of the buildings;
  - Council further submits that the Department imposed condition 1 solely on the basis that the court would determine the heritage matters, specifically the degree of significance;
  - Council's strategic approach to heritage listings and the fact that (based on the advice of the Department at the time), the Council did not undertake a comprehensive heritage study when transitioning the Woollahra Local Environmental Plan 1995 across to WLEP 2014;
  - the prerequisites for seeking an Interim Heritage Order (IHO) including an assessment of significance and the threat of harm noting that Council did not pursue an IHO given the Planning Proposal would afford what it considered appropriate protection;
  - discussion on the operation of clause 1.8 of WLEP 2014 relating to savings provisions; and
  - Council submits that the Planning Proposal involves the listing of a local item on its WLEP 2014 and therefore it is well placed to progress the draft LEP under delegation and therefore should be delegated plan making functions.
26. At the meeting the Council provided to the Commission a letter from Mills Oakley (the Applicant's legal representative) to Wilshire Webb Staunton Beattie Lawyers (Council's legal representative) regarding the Applicant's appeal to the Court. The letter was published on the Commission's website on 5 March 2019. The letter includes a request that Council remove from its statement of facts and contentions all reference to heritage.

### **3.2 Meeting with the Applicant**

27. The Applicant wrote to the Commission on 21 February 2019 requesting a meeting with the Commission *"to provide further detail regarding the details of the development proposed for the subject Site".*
28. On 28 February 2019, the Commission met with the Applicant to discuss the Planning Proposal. Issues discussed at the meeting are recorded in the transcript and were made available on the Commission's website on 5 March 2019. A summary of key matters discussed is as follows:
- the Applicant reiterated that the essence of Council's request for the review relates to procedural matters and should not involve the merits of the Planning Proposal;
  - the Applicant informed that the scheme now before the Court is much different than originally submitted as it now proposes full retention of the church building;
  - the Applicant disputes Council's view that unless the savings provision is removed, the significance of the church will not be appropriately protected within the context of the proceedings; and
29. the Applicant submits that at no time has Council sought an IHO to protect the buildings instead choosing to seek the removal of the savings provision. At the meeting the Applicant provided to the Commission a submission regarding the Planning Proposal. The submission was published on the Commission's website on 5 March 2019 and sets out the Applicant's position on the

retention of condition 1.

### **3.3 Meeting with the Department**

30. On 4 March 2019, the Commission met with the Department to discuss the Planning Proposal. Issues discussed at the meeting are recorded in the transcript and were made available on the Commission's website on 5 March 2019. A summary of key matters discussed is as follows:
- when the Planning Proposal was submitted both Council and the Applicant supported the listing however there was a significant difference on what that listing should entail;
  - the Department in determining the Gateway request noted that the Applicant had submitted a DA to Council (before Council had resolved to proceed with the listing);
  - the Department imposed condition 1 to enable due process and the assessment and determination of the DA noting that it was accepted practice within the Department when determining Gateway requests to impose savings provisions to cover development applications submitted but not determined;
  - the Department noted that Council had not sought an IHO which in its view was normal practice for many councils where there is the potential threat to the buildings; and
  - the Department also reiterated that it was common practice not to delegate local plan making functions where there is a significant disagreement between Council and the Landowner/developer regarding the heritage significance of the Site.

## **3. ADDITIONAL INFORMATION**

31. On 1 March 2019, the Applicant provided a submission (including web links) regarding its amended development application. The advice noted that the amended development application was exhibited by Council in January 2019. The Applicants submission was published on the Commission's website on 5 March 2019.
32. On 4 March 2019, the Commission requested the Department provide precedent examples of Gateway Determinations where savings provisions have been applied in relation to development applications undetermined prior to a Planning Proposal being assessed and subsequently exhibited. The Department provided a response on 7 March 2019 and this response was published on the Commission's website on 14 March 2019.
33. On 7 March 2019 the Commission requested the Council provide information regarding the operation of Clause 1.8 of WLEP 2014 in relation to savings provisions. The Council's response was received on 7 March 2019 and published on the Commission's website on 14 March 2019.

## **4. THE COMMISSION'S CONSIDERATION**

### **5.1 Material considered by the Commission**

34. In reviewing the Gateway Determination and conditions the Commission has carefully considered the following material (the **Material**):
- Council's Planning Proposal, dated 20 July 2018;
  - the Department's Gateway Determination, dated 16 August 2018;
  - the Department's Gateway Determination Report PP\_2018\_WOOLL\_001\_00, dated 16 August 2018;
  - Council's Review Application and attachments, dated 27 September 2018;
  - the Department's referral letter to the Commission, dated 7 February 2019;
  - the Department's Gateway Review Justification Assessment Report dated 7 February 2019 (the **Justification Report**);

- *Greater Sydney Region Plan: A Metropolis of Three Cities*, dated March 2018;
- *Eastern City District Plan*, dated March 2018;
- *Planning Circular – Independent reviews of the plan making*, dated 14 December 2018;
- *Local Environment Plans: A guide to preparing local environment plans*;
- section 9.1 Ministerial Direction 2.3 Heritage Conservation issued 1 July 2009 under the EP&A Act;
- information presented and discussed with the Commission at its separate meetings with Council and the Applicant on 28 February 2019, and the Department on 4 March 2019, set out on the Commission’s website on the 5 March 2019 and 14 March 2019, respectively, and in the publicly available transcripts;
- additional information received from the Applicant on 1 March 2019 (refer to paragraph 31);
- additional information received from the Department on 7 March 2019 (refer to paragraph 32); and
- additional information received from Council on 7 March 2019 (refer to paragraph 33).

## 5.2 Council’s consideration

### Condition 1

35. The Council’s justification for seeking a Gateway Review as set out in its Review Application was based on the following:
- the condition (condition 1 of the Gateway Determination) has the potential to nullify the purpose of the Planning Proposal. The aim of the listing is to provide ongoing protection and recognition of the heritage significance of the buildings. However, condition 1 has the effect of allowing any DA lodged to be determined prior to the formal listing without consideration of the heritage conservation provisions contained in clause 5.19 of W LEP 2014;
  - the imposition of the condition is unreasonable, not for a proper planning purpose and takes into account an irrelevant consideration as it fundamentally alters the Planning Proposal, not on strategic planning merit, but on the basis that it could affect the outcomes of the DA in the Court. The heritage assessment was undertaken for a proper planning purpose being to establish the significance of the buildings. The Department’s consideration of whether the Planning Proposal would directly affect the outcome of the current appeal is an irrelevant consideration and not for a proper planning purpose;
  - the condition has the potential to subvert the proper and well-established practice for managing the heritage significance of heritage items as the effect of condition 1 is to let the DA direct the manner in which the buildings are to be conserved thereby subverting the proper heritage conservation process;
  - the condition contradicts the predominant support for the Planning Proposal provided in the Department’s gateway determination report noting that the Department acknowledges the strategic merit of the listing yet imposed condition 1 which contradicts this support by enabling the progression of the DA and the potential consequences associated with any determination;
  - the condition will set a precedent for similar Planning Proposals given it will send a message to Landowners and developers that they can thwart widely accepted heritage conservation processes and State-wide heritage controls by lodging a development application and an appeal to the Court;
  - the condition has likely implications for the use of interim heritage orders (IHO) as it will set a dangerous precedent as the savings provision directly undermines the heritage conservation and protection purpose of the regime given that the heritage listing and heritage provisions of any LEP will not apply to that application; and
  - the Department erred in not obtaining advice from the Office of Environment and Heritage

(OEH) on the impact of condition 1 given the potential implications of condition 1.

### Plan Making Authority

36. The Council submits that the Planning Proposal is a local matter. It has undertaken a thorough assessment of heritage significance using accepted practices. It has consulted with the Applicant and its consultants prior to submitting the Planning Proposal. It is further noted that the listing would not prevent changes and adaptive reuse of the buildings.

### **5.3 Department's consideration**

37. The Department prepared a *Gateway Review Justification Assessment Report* (the **Justification Report**) and submitted it to the Commission on 8 February 2109. The Justification Report noted that the Gateway Determination was issued on the basis that the proposal had merit (refer to paragraph 21).

### Condition 1

38. The Justification Report also states that the Department's position has not changed that condition 1 should be retained as:
- it ensures the Court process can continue and provides due process to the Applicant, who lodged the DA for permissible development under the provisions of WLEP 2014;
  - the Court still has the opportunity to support and recognise the heritage significance of the buildings and determine the impact of the (now amended) development application will have on heritage significance; and
  - it allows the purpose of the Planning Proposal to continue as the recognition of the heritage significance of the Site and moveable heritage can still be achieved.
39. The Department also addressed the Council's concerns regarding the condition as follows:
- the condition will not nullify the purpose of the Planning Proposal given the listing is supported by all parties and will enable the Court to determine the extent of heritage significance;
  - the condition is for a proper planning purpose and procedurally fair by enabling the current DA to be determined by the Court noting it was lodged before the Planning Proposal was submitted to the Department; and also prior to Council resolving to lodge the Planning Proposal;
  - it is common practice for councils where there is a perceived threat to a potential heritage item to seek an Interim Heritage Orders (IHO) particularly in response to community concerns about potential development. It remains open to the Council to seek an IHO;
  - the condition does not contradict the Department's support for the Planning Proposal. The Department supported the progression of the Planning Proposal on the basis that the listing had strategic merit notwithstanding the disparate views of the Council and the Applicant. The Department also notes that there is no guarantee that the Planning Proposal will ultimately proceed;
  - condition 1 does not set a precedent for similar Planning Proposals. The Department encourages proactive responses to the listing of heritage items and encourages Councils to maintain the currency of Schedule 5 lists and notes that the proposed listing was not a result of a strategic review. The condition enables the DA to run its course;
  - the condition is unlikely to have implications for the use of IHO's. The Department notes that the Council did not seek an IHO for the Site despite the DA clearly seeking approval to demolish part of the Site. In the absence of an IHO, the buildings are potentially at risk regardless of the Gateway Determination; and
  - the Department did not err in not obtaining advice from OEH as it is the Department's

practice to require consultation with agencies as part of the public exhibition stage and not prior to issuing a Gateway Determination.

#### Plan Making Authority

40. The Report also states that the Department considers that Council should not be authorised to be the local plan making authority for the Planning Proposal. The Department states in the Report that:

*"It is common practice for authorisation for local plan making functions to be withheld in circumstances where there is a disagreement between Council and the Landowner/developer about the heritage listing of a Site....".*

#### **5.4 Commission's consideration**

##### Conditions 2 to 7

41. As requested by the Department, the Commission has reviewed the Planning Proposal and the Gateway Determination and its conditions. The Commission notes that conditions 2-7 of the Gateway Determination are not disputed by Council or the Applicant. On review of conditions 2-7 of the Gateway Determination, the Commission is satisfied that these conditions are relevant and applicable and should remain in the Gateway Determination.

##### Condition 1

42. The Commission accepts that the imposition of savings provisions on Gateway Determinations by the Department (i.e. to save development applications that have been submitted but are not yet determined) is accepted practice and implemented regardless of the merits of the relevant applications that remain undetermined.
43. The Commission also accepts that Council has undertaken the heritage assessment of the buildings and prepared the Planning Proposal with proper intent. However, the Commission is not persuaded that other potential options to protect the buildings such as an IHO could not be pursued.
44. This is of particular relevance given:
  - there was never any guarantee that the Planning Proposal would proceed irrespective of condition 1;
  - Council should have been aware that a savings provision was a possibility; and
  - it is understood that the buildings, as outlined in Council's own submission, meet the threshold test required to seek an IHO, as the buildings' heritage significance has been demonstrated and a potential threat to the buildings exists.
45. The Commission also considers it inappropriate that the function of a consent authority (in this instance the Court) in assessing and determining a development application be fettered, particularly given a valid development application for permissible development was submitted prior to Council resolving to proceed with the Planning Proposal. The Court should be able to assess and determine the DA on its merits.
46. This is despite the Commission acknowledging Council's concerns regarding the level of heritage significance that the Court will ultimately afford the heritage significance of the buildings when assessing and determining the DA, as reflected by the Applicant's request for Council to remove all references to heritage from its statement of facts and contentions to the Court. However, this

is outside the Commission's remit.

47. Finally, the Commission accepts that it is Departmental practice to consult with agencies such as OEH as part of the public exhibition stage and not prior to issuing a Gateway Determination.

**Plan Making Authority**

48. While the Commission acknowledges that the listing is primarily a local matter, it accepts the Department's justification in not delegating the plan making functions to Council in relation to the Planning Proposal given the divergent views expressed by the Council and the Applicant on the level of heritage significance of the buildings.
49. The Commission considers that the Department, in retaining the plan making function, will be well positioned to independently finalise the Planning Proposal consistent with its own guidelines, taking into consideration the respective views of each party and any determination of the Court.

**5. THE COMMISSION'S ADVICE**

50. The Commission has reviewed and considered the Material and for the reasons set out in this report the Commission advises the delegate that:
  - condition 1 should remain as part of the Gateway Determination;
  - conditions 2 to 7 of the Gateway Determination are relevant and applicable and should remain; and
  - Council should not be authorised to be the local plan making authority.



**Chris Wilson (Chair)**  
Member of the Commission



**Soo-Tee Cheong**  
Member of the Commission