



GATEWAY REVIEW Justification Assessment

Purpose: To outline the planning proposal, the reasons why the original Gateway determination was made and to consider and assess the request for a review of a Gateway determination.

Dept. ref. no	GR_2018_WOOLL_001_00
LGA	Woollahra
LEP to be amended	Woollahra LEP 2014
Address/location	518a Old South Head Road, Rose Bay (Lot 37 Sec A DP 4567)
Proposal	The planning proposal seeks to introduce a new local heritage item (the Rose Bay Uniting Church and Wesley Hall Group).
Review request made by	<input checked="" type="checkbox"/> The council <input type="checkbox"/> A proponent
Reason for review	<input type="checkbox"/> A determination has been made that the planning proposal should not proceed. <input type="checkbox"/> A determination has been made that the planning proposal should be resubmitted to the Gateway. <input checked="" type="checkbox"/> A determination has been made that has imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or council thinks should be reconsidered.

BACKGROUND

Details of the planning proposal

The planning proposal seeks to list the Rose Bay Uniting Church and Wesley Hall Group as a local heritage item under schedule 5 of the Woollahra LEP 2014.

The planning proposal, as submitted to the Department, is provided at **Attachment F**.

Background

- On 18 December 2017, Council adopted two notices of motion to explore the heritage listing of Rose Bay Church and Wesley Hall. Council engaged external heritage consultant Robert Moore to undertake a heritage assessment of the subject site.
- Completed in March 2018, the assessment concluded that the subject site meets the criteria for local heritage listing as the buildings on the site are a focal point for their historic, social and aesthetic significance.
- On 20 April 2018, the landowner lodged a development application (DA 160/2018) with Council. The application seeks the adaptive reuse of the 1905 church building and demolition of the hall, 1924 church extensions (not including the 1924 front entry porch) and 1970s additions. It also seeks to facilitate the development of a four-storey shop-top housing development with ground-floor retail and 10 three-bedroom apartments, that will integrate the retained part of the church building.
- The development application is accompanied by a statement of environmental effects (**Attachment I**) that concludes the development has benefits, including the adaptive reuse of the 1905 church building, the introduction of community functions to the site and the delivery of new retail, business and residential accommodation to meet the needs of the existing and future community. A heritage impact statement was prepared by Conrad Gargett (**Attachment J**) and submitted as part of the development application.
- On 24 April 2018, Conrad Gargett lodged submissions to Council on behalf of the land owner in response to the heritage report. The landowner's consultants supported the local heritage listing of the site but requested consideration that the listing be limited to the 1905 original church building with the 1924 entry porch.
- On 7 May 2018, the Woollahra Environmental Planning Committee recommended the listing of the property after considering the heritage assessment report by Robert Moore and Conrad Gargett's submission on behalf of the landowner.
- On 21 May 2018, Council supported the committee's recommendation and determined that the heritage listing proposal proceed.
- On 22 June 2018, the landowners lodged a class 1 appeal with the Land and Environment Court based on a deemed refusal by Council. A hearing has been set down for March 2019.
- On 16 July 2018, Council resolved to affirm its decision of 21 May 2018 to prepare the planning proposal.
- On 19 July 2018, the Department received Council's planning proposal and issued a Gateway determination on 16 August 2018 (**Attachment G**).

Reasons for Gateway determination

The Gateway determination report (**Attachment G**) determined that the planning proposal should proceed subject to several conditions, including:

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.
2. The planning proposal be amended prior to community consultation as follows:
 - (a) remove the clause on explanation of provisions and replace it with a plain English explanation of provisions; and
 - (b) update the project timeline.
3. Consultation is required with the landowner during public exhibition.

The Gateway determination was issued on the basis that the proposal has merit as:

- the proposal is consistent with the Greater Sydney Region Plan, the Eastern City District Plan and relevant section 9.1 Ministerial Directions and state environmental planning policies;
- the proposal is supported by an independent, Council engaged heritage assessment report by Robert A Moore that identifies the site as having local heritage significance; and
- the proposal will enlist the subject site as a heritage item to provide a more appropriate reflection of the heritage significance of the site.

The Gateway determination included condition 1 as there is a development application before Council that is subject to a class 1 appeal in the Land and Environment Court and the DA was submitted prior to the Council's resolution to list the site as a heritage item. Given this planning proposal could directly affect the outcomes of the court case, the condition was added to ensure the court process can continue and make an independent determination on the extent of the heritage of the site.

It is the Department practice to impose requirements on gateway determinations to require savings and transitional provisions for development application lodged prior to commencing a rezoning process but not yet determined.

The Gateway determination also requires consultation with the landowner during public exhibition. This is due to the disagreement between the landowner and Council regarding the extent of the heritage listing. Both parties have their own independent heritage reports and the landowner supports some, but not all, aspects of Council's heritage assessment findings.

The Department determined not to condition the Gateway for Council to be authorised as the local plan-making authority because of:

- the differences of opinion between the landowner and Council in relation to the extent of the heritage listing; and
- the development application proceedings in the court set down for March 2019.

COUNCIL'S JUSTIFICATION FOR REVIEW

<p>Details of justification</p>	<p>On 24 August 2018, the Department received a notice of intention from Council to request a Gateway review.</p> <p>On 27 September, the Department received Council's formal Gateway review request. The request is in response to condition 1 imposed on the planning proposal as part of the Gateway determination issued on 16 August 2018 (Attachment D).</p> <p>Council requests the deletion of condition 1 requiring 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.</p> <p>Council also asks that reconsideration be given to its request to be the local plan-making authority.</p> <p>Council's request is accompanied by a submission that discusses:</p> <ul style="list-style-type: none"> • the condition has the potential to nullify the purpose of the planning proposal; • the imposition of the condition is unreasonable, not for a proper planning purpose and takes into account an irrelevant consideration; • the condition has the potential to subvert the proper and well-established practice for managing the heritage significance of heritage items; • the condition contradicts the predominant support for the planning proposal provided in the Department's Gateway determination report; • the condition will set a precedent for similar planning proposals; • the condition has likely implications for the use of interim heritage orders; and • the Department erred in not obtaining advice from the Office of Environment and Heritage on the impact of condition 1. <p>The information supplied by Council is provided at Attachment D.</p>
<p>Material provided in support of application/proposal</p>	<p>In addition to the planning proposal documentation originally submitted to the Department, Council has provided the following documents to support the Gateway review request (Attachment D):</p> <ul style="list-style-type: none"> • Gateway review request application form; and • Gateway review request submission.

ASSESSMENT

Department's assessment

The Department's position on the Gateway determination review application is that the Gateway should remain unchanged. Reasons for this position are outlined below.

Response to Council's justification for a review of condition 1

Council notes the condition has the potential to nullify the purpose of the planning proposal

The Land and Environment Court still has the opportunity to support and recognise the heritage of the buildings to determine what impact the proposed development pursuant to the development application will have on any heritage significance and whether the partial demolition of the buildings on the site is suitable.

The development application seeks to adaptively reuse and retain the 1905 church building and the 1924 front entry porch and seeks partial demolition of the site as it proposes the demolition of the hall, the 1924 church extensions (not including the 1924 front entry porch) and 1970s additions. The development application recognises that while the site is not included in the Woollahra LEP as a local heritage listing and is not on the NSW State Heritage Register, it has cultural significance that is recognised by the local community.

Council adopted two notices of motion in November 2017 to explore the potential for heritage listing for the site. However, it wasn't until 21 May and 16 July 2018 that Council resolved to lodge the planning proposal with the Department; which was after the landowner lodged the development application on 20 April 2018.

As recognised by Council in its submission, the Department has identified that there are conflicting opinions between the landowner and Council relating to the extent of the heritage listing. This is evident in the conflicting heritage impact statements from Council and the landowner, and the degree of retained buildings under the development application. It is clear however, that both parties recognise the heritage significance of the original 1905 church building, and this was stated in the Department's Gateway determination report. Both heritage reports also find there is moveable heritage of significance that would need to be appropriately managed through identification and inventory.

The proposal to list the site as a heritage item is not in dispute; rather, the degree to which all or some of the buildings are to be included under this listing is in dispute. Therefore, the planning proposal is not nullified as the site's listing is supported by the Department, Council and the landowner. Condition 1 will not nullify the purpose of the planning proposal as recognition of the heritage significance of the site and moveable heritage elements within the site can still be achieved.

Council notes that the imposition of the condition is unreasonable, is not for a proper planning purpose and takes into account an irrelevant consideration

As evidenced in section 9 of Council's planning proposal report (**Attachment F**), there was a clear intent by Council to heritage list the site and its buildings under the LEP by March 2019, potentially prior to the development application proceeding to the court hearing. Therefore, if the LEP amendment to list the whole site was to have been made without the savings provision ahead of the court hearing, this could potentially affect the court's views when it considers the development application.

Therefore, Council's intention to seek to implement the planning proposal without the savings provision and make the LEP by March 2019 could suggest Council sought to undermine or affect the court's decision-making process for the development application.

Although it is recognised that the court may still determine the level of heritage significance of the site and its buildings and determine that the proposed partial demolition of the buildings is not suitable, condition 1 seeks to give the development application the opportunity to run its course in the court and provides due process to allow it to proceed as it was lodged prior to the planning proposal. Therefore, condition 1 provides procedural fairness for the current development application to be determined by the court as sought when the development application was submitted to Council.

The concept of whether a condition is for a 'planning purpose' is derived from the Newbury tests that should be applied when consideration is given to appropriate use of conditions of consent for development applications. Although not generally applied for Gateway conditions, the premise of this test is that a condition must be derived from the *Environmental Planning and Assessment Act 1979* (EP&A Act) and should not be based on preconceived concepts of what constitutes a planning purpose.

Using this test, condition 1 of the Gateway determination has been derived from the EP&A Act on the basis that both the proposal and the development application are in the public interest as they both seek to retain the heritage significance of the site (albeit to different degrees). Given the development application has proceeded ahead of the planning proposal, procedural fairness is considered to be appropriate and therefore condition 1 is for a planning purpose.

Based on the above, condition 1 is not considered to be unreasonable as it is for a planning purpose because the timing of the development application and the planning proposal and the degree of the site's heritage listing were key and relevant considerations for the Gateway determination.

Council notes the condition has the potential to subvert the proper and well-established practice for managing the heritage significance of heritage items

As outlined above the condition does not subvert the practice of managing heritage.

The proper and well-established practice is for councils to proactively review schedule 5 heritage lists, undertake heritage assessments and, if appropriate, resolve to prepare a planning proposal to include heritage items in the LEP.

The Department notes that Council resolved to explore the heritage listing of the site in November 2017 and yet only submitted the planning proposal to the Department in July 2018 after the development application was lodged in April 2018. Council and landowner discussions about redevelopment of the site were held in March 2017, well in advance of any action taken by Council to list the site.

Where a council perceives a threat to a potential heritage item, it is able to seek an interim heritage order (IHO). This could have been sought at any time by Council.

Section 25(2) of the *Heritage Act 1977* (NSW) states that:

A Council authorised under this section may make an interim heritage order for a place, building work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.

It is common practice for councils to seek an IHO in response to community concerns about a potential development (including a development application), which was the case in this instance.

Therefore, Council has not taken proactive approaches to managing the potential heritage significance of the site and condition 1 is considered appropriate.

Council notes the condition contradicts the predominant support for the planning proposal provided in the Department's Gateway determination report

The Department's *A guide to preparing planning proposals* states at page 4 that *"the purpose of the Gateway determination is to ensure there is sufficient justification early in the process to proceed with a planning proposal"*.

While the Department found sufficient justification for the planning proposal, it raised concerns about the extent of the heritage listing as there are opposing heritage assessment reports by Council and the landowner. The Department does not dispute there is merit in the site's listing but there is uncertainty as to the degree to which the site's buildings and built fabric should be recognised as part of this listing. The differing opinions of what built form is to be conserved on the site is also evident in the development application submitted by the landowner. The retention of some of the buildings may not undermine the listing, particularly as the landowner has supported the site's listing. Therefore, Condition 1 allows the development application to be determined on merit.

The consultation process required by the Gateway determination will allow for consideration of the site's listing by the public and others (including the Office of Environment and Heritage – OEH) to form their views on what degree the buildings should be protected by the heritage listing. The Gateway determination does not indicate that the LEP will proceed; it is a means of determining in-principle suitability subject to consultation and exhibition and recognised there is predominant support for the planning proposal.

Council notes the condition will set a precedent for similar planning proposals, thereby undermining the process for protecting heritage-significant buildings

The Department considers each individual planning proposal on its merits. The Department considers any Council or proponent's heritage assessment reports and any OEH-endorsed heritage strategies.

The Department encourages a proactive response to the listing of heritage items and encourages councils to review their schedule 5 lists in their LEPs to maintain the currency of these listings, whereas this proposal has taken a site specific approach to heritage.

The 2014 Woollahra LEP review provided the opportunity for Council to undertake a heritage review. The Department does not have information on whether a comprehensive heritage review was undertaken but notes that this proposed listing was not the consequence of Council strategically reviewing its heritage.

As mentioned earlier in this report, Council has not taken a proactive approach in considering the heritage significance of the site. Considering the timing of events relating to the site (with the development application prepared and submitted prior to the planning proposal), hence condition 1 allows for the development application to run its course and allow for procedural fairness.

As the condition will serve to encourage the pursuit of a preferable proactive approach to the identification and protection of heritage items and will provide for procedural fairness, the Department does not feel this will set a negative precedent.

Council notes the condition has likely implications for the use of interim heritage orders

Council explains in its Gateway review documentation that:

“An interim heritage order (IHO) is most commonly triggered when a DA is lodged with a Council. The purpose of an IHO is to allow a moratorium on the assessment and determination of any DA in order to allow investigation of heritage significance.”

The Department notes that Council did not seek an IHO for this site despite the development application clearly seeking to demolish part of the site’s buildings and has still not sought this order.

At the time of the Gateway determination, the Department did not have an independent heritage review or advice that an IHO would be sought. Where there is an IHO in place for a site, the Department does not usually require any saving provision for a development application under a Gateway condition as the heritage significance of the site is already safeguarded by the IHO. Without the IHO, the buildings on the site are potentially at risk of demolition, irrespective of the development application and/or the Gateway determination.

As there was no IHO sought or in place at the time of Gateway determination, the Department does not feel that the savings provision condition would have implications for instances where this is the case.

Council notes the Department erred in not obtaining advice from OEH on the impact of condition 1

The Department’s *A guide to preparing planning proposals* specifies at page 4 that:

“A planning proposal is a document that explains the intended effect of a proposed local environmental plan (LEP) and sets out the justification for making that plan... The Gateway determination will confirm the information (which may include studies) and consultation required before the LEP can be finalised.”

It is Department practice to require consultation with agencies as part of the public exhibition stage and not prior to issuing Gateway. In line with this, the Department included a Gateway condition requiring consultation with OEH. This also accords with requirements under section 3.34(2) of the EP&A Act.

Consultation with OEH is not precluded from taking place prior to the planning proposal proceeding to Gateway. Therefore, Council could have consulted with OEH prior to submission of the planning proposal to the Department for Gateway determination.

Submission to the Department by the landowner’s lawyers

The Department received a letter on 8 August 2018 from the landowners’ lawyers, Mills Oakley. The letter notified the Department of a review into the conduct of Council surrounding the preparation of the planning proposal and supplied additional information on the planning proposal.

This letter was not relied on in the preparation of the Gateway determination. However, the Department sought to release the letter to Council with approval from Mills Oakley or the landowner. However, despite making contact several times, the Department was unable to obtain this approval to release the letter to Council.

Summary of reasons to retain condition 1

The Department remains of the view that condition 1 should be retained as it:

- ensures the court process can continue and provides due process to the landowner, who lodged the development application for permissible development under the current Woollahra LEP 2014 provisions;
- the court still has the opportunity to support and recognise the heritage of the buildings and determine the impact the development application will have on heritage significance; and
- 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.

Plan-making authority

The Department remains of the view that Council should still not be authorised to be the local plan-making authority for the proposal.

Authorisation is not considered appropriate as there is disagreement between the landowner and Council in relation to the extent of the heritage listing. The landowner seeks the listing to be limited to the original 1905 church building and the 1924 front entry porch, whereas Council seek to list the entire church, additions and the hall.

Authorisation is also not considered appropriate as the development application for the site is subject to an appeal in the Land and Environment Court. As Council is a party to the court proceedings, it is considered that delegation to make the plan should not be given.

It is common practice for authorisation for local plan-making authority to not be given in circumstances where there is disagreement between Council and the landowner/developer about the heritage listing of a site, or where there is a related matter before the court and/or where it has not been demonstrated that all landowners were fully supportive of the proposed heritage listings. Given that two of these factors apply in this instance, the Department retains the view that Council should not have local plan-making authority.

COMMISSION'S RECOMMENDATION

Reason for review: A determination has been made that has imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or council thinks should be reconsidered.

Recommendation	<input type="checkbox"/>	The planning proposal should not proceed past Gateway.
	<input type="checkbox"/>	<input type="checkbox"/> no amendments are suggested to original determination. <input type="checkbox"/> amendments are suggested to the original determination.
	<input type="checkbox"/>	The planning proposal should proceed past Gateway in accordance with the original Determination.

Any additional comments: