

Gateway Determination Review – PP_2018_WOOLL_001_00
518a Old South Head Road, Rose Bay

Submission by The Uniting Church in Australia Property Trust (NSW)

Introduction

1. This submission is made to the Independent Planning Commission (**Commission**) on behalf of The Uniting Church in Australia Property Trust (NSW) (**The Uniting Church**).
2. The Uniting Church is the owner of the land at 518a Old South Head Road, Rose Bay (**Site**) containing the Rose Bay Uniting Church and Wesley Hall Group.
3. On 16 August 2018, the Greater Sydney Commission (**GSC**) by its delegate, issued a Gateway Determination for a planning proposal to identify the Site as an heritage item under the *Woollahra Local Environmental Plan 2014*.
4. Relevantly, the Gateway Determination:
 - 4.1 was subject to a condition requiring the planning proposal to include a savings provision to apply to any development application lodged but not determined before the making of the planning proposal (condition 1); and
 - 4.2 declined to authorise Woollahra Municipal Council (**Council**) to make the local environmental plan to which the planning proposal relates.
5. Council has sought a review of these aspects of the Gateway Determination.
6. The Department of Planning & Environment has requested the Commission to provide advice concerning the Council's request.
7. For the reasons that follow, the Commission should advise the Department that:
 - 7.1 Condition 1 of the Gateway Determination should be retained; and
 - 7.2 The decision to not authorise Council as the local plan-making authority should stand.
8. Importantly, The Uniting Church and Council are also opposing parties in pending Class 1 proceedings in the Land and Environment Court, relating to a development

application proposing adaptive reuse of the Church building. The hearing of these proceedings is imminent, commencing on 13 March 2019.

9. It is also important to note that the Commission is not enquiring into the appropriateness of the proposed heritage listing, or the appropriateness of the development proposal before the Land and Environment Court.

Uniting Church's submissions

The reasons for requiring a savings provision, and declining delegation, were sound

10. The GSC's reasons for requiring a savings provision, and for declining to delegate plan-making power to the Council, were relatively simple.
11. In summary, the GSC recognised that since The Uniting Church and Council were engaged in an adversarial contest in the Class 1 proceedings, it was appropriate that the progression of the planning proposal not confer an advantage on one party, or another.
12. This decision was sound, and consistent with good administrative practice and established common law principles that changes to legislation should not inappropriately impair vested rights¹ or to unfairly change the law, upon which persons have relied and acted².
13. The Uniting Church is precisely in this position. It consulted with Council about proposed development of the Site as early as March 2017, and thereafter made the extensive preparations to lodge the subject development application on 20 April 2018.
14. In making the Gateway Determination the GSC was concerned to not alter (and not permit the Council to unilaterally alter) the legal landscape in which the Court process was to occur.
15. This is not to deny that, in an appropriate case, such a change of planning law may occur – but to recognise that the GSC did not consider the present situation to be such a case. Nothing in Council's justification demonstrates otherwise.

¹ cf. *Maxwell v. Murphy* (1957) 96 CLR 261 at 267 (Dixon CJ).

² eg. *Australians for Sustainable Development Inc v. Minister for Planning (No. 2)* [2011] NSWLEC 70 (Biscoe J), in which costs were awarded against the Minister because of a change in the relevant law after judicial review proceedings had been conducted.

Council's justification for changing the Gateway Determination are without substance

16. The Council's review request is supported by a detailed justification document dated 27 September 2018. Nothing in it demonstrates that the Commission should alter the Gateway Determination.
17. Section 4 of the review request contains Council's justification for changing the Gateway Determination. None of the matters raised are of any substance.
18. Addressing each of the substantive matters, briefly:

- 18.1 Section 4.1 – Council is wrong that the condition nullifies the purpose of the planning appeal.

The impact of the proposed development on the existing Church building, and its significance is squarely raised for determination by the Land and Environment Court: cf. Council's Amended Statement of Facts and Contentions filed 18 February 2018. The heritage contention alone occupies some 8 pages.

The Commission would readily accept that the Land and Environment Court will determine the issues raised by Council as part of the appeal.

Council's justification, in part, asks the Commission to enter into the merits of the development proposal. This is inappropriate.

- 18.2 Section 4.2 – Council is wrong that the Gateway Determination condition is susceptible to challenge as if it were a condition of development consent, or that it is legally unreasonable.

Council's justification invokes a familiar formula for a challenge to a consent authority's power to impose conditions of consent³. This is inappropriate to an evaluative and policy-laden decision such as the present.

For the reasons explained earlier, the GSC's decision was sound.

- 18.3 Section 4.3 – Council is wrong that the condition has any potential to subvert established practice for managing heritage significance.

³ cf. *Western Australian Planning Commissioner v. Temwood Holdings Pty Ltd* (2004) 221 CLR 30.

There is nothing to preclude Council, in support of its heritage contention in the Land and Environment Court appeal, from advancing evidence prepared in accordance with the Burra Charter framework. Indeed, this would be expected and is entirely in the Council's hands.

Council's justification implies, inappropriately, that the Land and Environment Court would not determine the contentions in an independent fashion. Any such implication would be rejected by the Commission.

- 18.4 Section 4.4 – the degree of support for the planning proposal, or otherwise, is irrelevant to the aspects of the Gateway Determination sought to be changed.

Council's justification again conflates the merits of the planning proposal with the procedural aspects of the Gateway Determination.

- 18.5 Section 4.5 – Council's concern about precedent is, in truth, a fundamental disagreement with the established statutory avenues for development in heritage contexts.

- 18.6 Section 4.6 – There are no implications for interim heritage orders (IHOs). Council fails to recognise the parallel regimes.

An IHO would result in development being the subject of the approval process under the *Heritage Act 1977* and, additionally, as integrated development under the *Environmental Planning and Assessment Act 1979*.

The Commission should note that, so far as the Uniting Church is aware, Council has never sought an IHO in relation to the Site.

The failure to seek such an IHO, coupled with Council's attempts to secure a unilateral ability to make the local environmental plan arising from the planning proposal tends to reinforce that it is concerned primarily with securing an advantage in the upcoming Land and Environment Court hearing.

This is why the GSC's requirement for a savings provision, and to not delegate plan-making powers was, and is, appropriate.

Summary

19. The Uniting Church notes the Department has assessed the Council's justification and remains of the view that the Gateway Determination should remain unchanged.
20. Although differing slightly in emphasis, which reflects the different perspectives of the Department and a landowner, The Uniting Church agrees with the Department's assessment.
21. The requirement for a savings provision, and not delegating plan-making power to Council was balanced, and well-considered.
22. The Commission should advise that the Gateway Determination should remain unchanged.

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Counsel for The Uniting Church

28 February 2019