

10.16.Gateway Determination Refusal - Holt Avenue Heritage

AUTHOR: Marcelo Occhiuzzi, Manager Strategic Planning

ENDORSED BY: Joseph Hill, Director City Strategy

ATTACHMENTS:

1. DPE Letter dated 11 August 2022 [**10.16.1** - 2 pages]
2. Ltr to DPE re Holt Ave PP 18082022 [**10.16.2** - 1 page]
3. DPE Letter to Council - Holt Avenue Cremorne [**10.16.3** - 2 pages]
4. Ltr to DPE re Holt Ave PP 10102022 [**10.16.4** - 2 pages]

PURPOSE:

To advise Council of the Department of Planning's refusal to support the progress of a Planning Proposal which sought to list several properties as heritage items in Holt Avenue Cremorne, and to explore options to respond.

EXECUTIVE SUMMARY:

In January 2022, Council resolved to investigate the preparation of an Interim Heritage Order (IHO) for land at Holt Avenue Cremorne. In response, Council staff appointed GML as the heritage specialist to perform the heritage investigations to underpin this work. On 11 March 2022, an IHO was gazetted which applied to properties at 115, 117, 119, 131, 133 Holt Avenue, Cremorne ("the properties"), in response to GML's preliminary assessment.

An IHO is a temporary measure to enable a more detailed assessment of the heritage status significance of a particular building(s) or place. It provides temporary protection in order for Council to conduct more comprehensive investigations into the potential significance of items.

The more comprehensive analysis was completed by GML on 3 June 2022 which reinforced its earlier findings. In response to that report, staff prepared a Planning Proposal to amend NSLEP 2013 to include the properties as heritage items under the North Sydney LEP 2013 as a more permanent planning response.

The Planning Proposal was considered by the North Sydney Local Planning Panel on 13 July 2022. For various reasons as outlined in this report, the Panel did not support the progression of this Planning Proposal. Notwithstanding this, Council considered the Planning Proposal at its 25 July 2022 meeting and resolved to support its progression to Gateway Determination.

Partly in response to the Local Planning Panel's recommendations and an upheld appeal by the applicant (of a Development Application that partly applied to 131 and 133 Holt Avenue) against the IHO, the Department of Planning and Environment (DPE) wrote to Council on

11 August 2022 requesting that the Planning Proposal be withdrawn or reconsidered. Council responded on 18 August 2022 and acknowledged that the appeal for 131-133 Holt Avenue had been upheld and the IHO revoked for those properties, but that the other Land and Environment Court appeal for 115-119 Holt Avenue had been rejected by the Court. The Department was therefore requested to proceed with the processing of the Planning Proposal on this basis.

In response, the DPE wrote to Council on 7 October 2022 formally rejecting the Planning Proposal and declining the Gateway Determination.

This report outlines various options available to Council to respond to the rejected Gateway Determination by the DPE. The options include accepting the DPE's determination, preparing an amended Planning Proposal or challenging this determination, and the implications of each option.

FINANCIAL IMPLICATIONS:

There are no financial implications for Council associated with the response to the Department of Planning and Environment's effective refusal of the Planning Proposal. If Council wishes to challenge that decision through the Independent Planning Commission, this will represent an investment of staff time and resources.

RECOMMENDATION:

- 1. THAT** Council determine its preferred response to the refused Gateway Determination by the Department of Planning and Environment.
- 2. THAT** should Council choose to pursue a Gateway Determination review by the Independent Planning Commission, and in the event that the review is successful, that the Minister for Planning be requested to extend the application of the Interim Heritage Order for a period that is reasonable to complete finalisation of the Planning Proposal.

LINK TO COMMUNITY STRATEGIC PLAN

The relationship with the Community Strategic Plan is as follows:

3. Our Innovative City

3.3 Distinctive sense of place and design excellence

5. Our Civic Leadership

5.1 Lead North Sydney's strategic direction

5.2 Strong civic leadership and customer focussed services

5.3 Community is engaged in what Council does

BACKGROUND

On 24 January 2022, Council resolved to investigate the preparation of an Interim Heritage Order (IHO) into land at Holt Avenue Cremorne as follows:

1. *THAT Council obtain urgent advice, including review of existing studies, in relation to whether an Interim Heritage Order(s) can be supported in respect of a group of dwellings known as 115, 117,119, 121, 123, 125 and 131, 133 Holt Avenue, Cremorne.*
2. *THAT Council prepare an urgent report, including review of existing studies, to assess whether a new Heritage Conservation Area ought to be identified and adopted in relation to the area bounded by Spofforth Street, Military Road, Cranbrook Avenue and Cabramatta Road, Cremorne and that such review consider the inclusion of the group of dwellings at 115, 117,119, 121, 123, 125 and 131, 133 Holt Avenue, Cremorne and be informed by the provisions relating to Mosman Council's Holt Estate Conservation Area.*
3. *THAT the review consider whether there are contributory items within any recommended conservation area.*

An Interim Heritage Order is a temporary measure to enable a more detailed assessment of the heritage status and significance of a particular building(s) or place(s). It provides temporary protection in order for Council to conduct more comprehensive investigations into the potential significance of items.

The following timeline summarises the preparation of the IHO in the first instance, and the subsequent Planning Proposal process that has followed:

15 February 2022 - Council staff appoint GML as the heritage specialists to perform this work after a competitive process to determine appropriate expertise and best value for money.

11 March 2022 - an IHO was imposed on properties at 115, 117, 119, 131 and 133 Holt Avenue, Cremorne under the delegated authority of the General Manager in response to GML's preliminary heritage assessment (note that numbers 121, 123 and 125 were not the subject of the IHO as they were not under immediate threat and therefore could not satisfy that requirement under the Heritage Act).

25 March 2022 – Council is served with appeal documentation against the imposition of the IHO in relation to 131-133 Holt Avenue and 115-119 Holt Avenue respectively.

3 June 2022 - The detailed analysis was completed by GML which more comprehensively reinforced its earlier findings and also identified numbers 121, 123 and 125 as worthy of listing. In response to this report, staff commenced preparation of a Planning Proposal to amend NSLEP 2013 to include the properties as heritage items under the North Sydney LEP 2013.

6-7 June 2022 – The Land and Environment Court hears the appeal for 131-133 Holt Avenue against the IHO. (On 29 July 2022, the Court’s decision was handed down, upholding the appeal).

13 July 2022 - The Planning Proposal is considered by the North Sydney Local Planning Panel. The Panel noted that there were various heritage studies that differed significantly in terms of their conclusions. It concluded that, contrary to the staff advice:

On the information before it, the Panel is not persuaded the properties meet the threshold for listing under the Heritage Assessment Guidelines and that the current Planning Proposal lacks both site specific and strategic merit and does not meet the objectives of the Act.

18-19 July 2022 - The Land and Environment Court hears the appeal for 115-119 Holt Avenue against the IHO. (On 17 August 2022 the Court’s decision was handed down, dismissing the appeal).

25 July 2022 - Notwithstanding the North Sydney Planning Panel’s advice of 13 July 2022, Council considered the Planning Proposal at its meeting and resolved to support its progression to Gateway Determination.

11 August 2022 – The Department of Planning and Environment (DPE) requests that the Planning Proposal be withdrawn or reconsidered (Attachment 1).

18 August 2022 - Council responds to the DPE and acknowledges that the appeal for 131-133 Holt Avenue had been upheld by the Court and the IHO revoked for those properties, but that the other Land and Environment Court appeal for 115-119 Holt Avenue had been rejected by the Court and that on this basis the Department should proceed with the processing of the Planning Proposal (Attachment 2).

7 October 2022 - the DPE writes to Council, formally rejecting the Planning Proposal and declining the Gateway Determination (Attachment 3).

11 October 2022 – Council writes to the DPE, expressing disappointment with the Department’s decision and foreshadowing the request for a review by the Independent Planning Commission (Attachment 4).

CONSULTATION REQUIREMENTS

Community engagement is not required.

DETAIL

Of the recent historical background as outlined above, the most significant is the DPE's rejection of the Planning Proposal on 7 October 2022.

It is acknowledged that the formal acknowledgement of heritage significance under a planning instrument can contain an element of subjectivity. There are judgements and discretionary matters to be weighed up and considered. This is not unusual in the NSW Planning system.

It is also acknowledged that there two active development applications within the Holt Avenue precinct that Council resolved to initially conduct an urgent heritage review upon. A matter that was persuasive for the North Sydney Local Planning Panel in its deliberations in July 2022 was the volume of heritage studies that found that the various properties did not meet any of the thresholds for heritage listing. Clearly, applicants of development are not motivated to include heritage studies that do not support their development aspirations.

The Department's rejection of 131-133 Holt Avenue is acknowledged and is consistent with the Court Orders relating to that site that the IHO be revoked. The dwellings have recently been demolished. Their inclusion in the Planning Proposal was clearly not able to be supported.

The Department's rationale for the removal of the remaining six (6) sites, however, is disappointing. The appeal to revoke the IHO for land at 115-119 Holt Avenue was dismissed by the Court. Council's appointed heritage expert concluded that there were clear grounds to support the inclusion of these properties in Schedule 2 of the North Sydney Local Environmental Plan 2013 as heritage items of local significance. The Court accepted Council's evidence and the investigations of the independent heritage expert, and confirmed that all items identified in the Planning Proposal were worthy of listing.

In the context of the various heritage reports provided, it was Council's GML report that was the only true independent report. In addition, citing the previous local government-wide heritage studies as supporting evidence to conclude that the subject properties are not worthy of heritage listing, is flawed. By definition, a local government-wide assessment clearly runs the high risk that individual properties may be missed given the wide-ranging scope of such work. Given the intense level of investigation and review that was conducted by GML, it stands to reason that such work provides for a more site-specific level of evidence of a site's heritage value compared with a Local Government-wide review.

The character and heritage values of North Sydney's neighbourhood are, to a large extent, underpinned by protections afforded by the North Sydney LEP. Council continues to diligently adhere to its wider planning responsibilities of meeting job, dwelling and density targets, and

the increasing array of NSW Government-imposed responsibilities. It does so responsibly and consistently. In this context, it is disappointing that the Department of Planning chose to impose its legislative power on such a local and detailed level. A level that really should be the domain of local decision making.

Options for response to the Refused Gateway Determination

1. Do Nothing

The DPE has determined that the Gateway Determination has been rejected. Council can accept this decision and channel its energies and resources into the wider Local Government-wide Heritage study, which is scheduled to commence in the first quarter of 2023.

2. Prepare a New Planning Proposal

It is reasonably likely that, amongst other factors, the DPE reacted to the impact of the proposed listings on the basis of two relatively long-standing development applications impacting on 4 of the sites which were the subject of the Planning Proposal.

Council could potentially pursue a new Planning Proposal to just list the properties at 121, 123 and 125 Holt Avenue. These were not the subject of the IHO and are not under immediate “threat” of development. It is more likely (but not certain) that such a planning proposal stands a better chance of support from the DPE than the planning proposal that it rejected.

Alternatively, Council may elect to prepare a planning proposal for all previously identified properties, with the deletion of 131 and 133 Holt Avenue (so 115, 117, 119, 121, 123, 125 Holt Avenue). The risk with this is clearly that, with the exception of 131 and 133 Holt Avenue, the DPE has only just rejected a similar planning proposal.

a. Process and timing

In terms of process, if Council chose to pursue either of the options described above, the process would need to commence with the preparation of an amended planning proposal and referral to the North Sydney Local Planning Panel (NSLPP). The Panel’s recommendation would then need to be referred to Council to formally seek a Gateway Determination from the DPE, to seek to move the process to public exhibition.

In terms of timing, referral to the NSLPP would probably occur in early December, with a report to Council in February 2023. On this basis, if support from the DPE was forthcoming to issue a positive Gateway Determination, public exhibition would likely occur in April/May 2023, with final determination and gazettal occurring some time in mid to late 2023.

3. Challenging the DPE’s Gateway Determination

a. Process and timing

Under Section 3.34 of the Environmental Planning and Assessment Act, the Minister may refer a Planning Proposal to the Independent Planning Commission (IPC) for review.

The LEP Making Guidelines that provide the administration detail for this process, require that notice be given to the DPE of Council's intentions to undertake this action. Council staff indicated this intent on 11 October 2022 to the DPE, to preserve the option available to Council to challenge the GD. Thereafter, Council has 42 days in which to commence such action, which, in the view of staff, is a matter for the elected body to resolve on.

Given that this step is rarely taken, it is unclear what timelines may be involved. This is important because whilst the IHO continues to have force, it automatically ceases to exist 12 months after it was created (i.e. 11 March 2023).

It is likely (but not certain) that an IPC hearing may not occur until 2023 given the typical timing constraints associated with the December- January holiday season. Even if a hearing can be arranged prior to Christmas and the IPC finds in Council's favour, the issue of a Gateway Determination and subsequent exhibition of the Planning Proposal would not occur until late January/February 2023 at the earliest. A very optimistic conclusion of this process, ending in the gazettal of the various Holt Avenue items, is estimated to occur in April/May 2023 (but more likely later). This means that there will be a period, post the expiry of the IHO, where there is no heritage protection for the properties while the planning proposal heads towards finalisation. During this time, Complying Development Certificates for demolition may be issued privately without reference to Council.

Council cannot legally extend the application of the IHO. It will therefore be important, if Council wishes to undertake this process, that the Minister be requested to extend the IHO timeframe (by say 6 months) in the event that the IPC review is successful.



Department of Planning and Environment

Mr Robert Emerson
Acting General Manager
North Sydney Council
PO Box 12
NORTH SYDNEY NSW 2059

Our ref: IRF22/2673

Via email: Marcelo.Occhiuzzi@northsydney.nsw.gov.au
Via Planning Portal

Attention: Marcelo Occhiuzzi, Manager, Strategic Planning

Dear Mr Emerson

Planning Proposal (PP-2022-2712) for heritage listing of 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue, Cremorne

I am writing in relation to planning proposal (PP-2022-2712) for the proposed heritage listing of 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue, Cremorne which was lodged on the planning portal on 28 July 2022.

The Department has undertaken a preliminary review of the planning proposal. I note Council's advice that on 7 March 2022 two interim heritage order's (IHO) were imposed under delegation by Council's General Manager on 115, 117, 119 and 131, 133 Holt Avenue respectively, and subsequently published in the NSW Government Gazette on 11 March 2022. It is also noted that these orders are subject to Class 1 appeal proceedings in the Land and Environment Court which seek the revocation of the orders. I understand that an outcome has been reached in one of these cases relating to 131 and 133 Holt Avenue.

Upon review of the information submitted on the planning portal for this planning proposal, it is considered that further justification is required to be provided in the planning proposal as follows to support this request. The Department requests Council to respond to the outcome of court proceedings and decision for Helm No. 18 Pty Ltd v North Sydney Council [2022] NSWLEC 1406 (29 July 2022) relating to 131 and 133 Holt Avenue, which was issued following lodgement of the planning proposal for Gateway determination.

The court findings for 131 and 133 Holt Avenue considered that the IHO has served its statutory purpose and subsequent research undertaken has established that neither 131 or 133 Holt Avenue are of heritage significance, and that the court was not persuaded that the properties are worthy of a local heritage listing on any other subsequently discovered grounds. On that basis, the Court determined it appropriate to revoke the IHO. It was also noted in the court decision that the property at 125 Holt Avenue was previously listed under the North Sydney LEP 2013 and was removed from Schedule 5 in a recent heritage review.

The Department requests Council to address the North Sydney Local Planning Panel's recommendations to Council on the matter from the meeting held 13 July 2022. In the opinion of the Panel, the subject properties require a more thorough and lengthy inquiry and the Panel advice was that it was not persuaded the properties meet the threshold for listing under the Heritage Assessment Guidelines and that the current Planning Proposal lacks both site specific and strategic merit and does not meet the objectives of the Act. The proposal should provide more information as to why further work is not considered necessary to address the Panel's concerns that the listings do not meet the threshold under the Heritage Assessment Guidelines.



Department of Planning and Environment

It is requested that Council withdraw the planning proposal and re-submit the proposal to address the above decisions and recommendations, as well as incorporate Council response to the outcome of the pending decision relating to the appeal for 115, 117 and 119 Holt Ave Cremorne once it is available.

Should you have any further enquiries about this matter, I have arranged for Brendan Metcalfe, Director of the Department's North District team to assist you. Mr Metcalfe can be contacted on

Yours sincerely

A handwritten signature in cursive script that reads "Alison McLaren".

Alison McLaren
Executive Director
Metro Central and North
Planning and Land Use Strategy
11/8/2022



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Alison McLaren
Executive Director
Metro Central and North
Planning and Land Use Strategy

By Email: metrocentralnorth@dpie.nsw.gov.au

18 August 2022

Dear Ms McLaren

**Planning Proposal (PP-2022-2712) for heritage listing of 115, 117, 119, 121, 123, 125,
131 and 133 Holt Avenue, Cremorne - Gateway Determination Request**

I refer to your letter dated 11 August 2022 regarding the Planning Proposal (PP2022-2712) for the heritage listing of various properties in Holt Avenue, Cremorne.

It is acknowledged that several properties included in this Planning Proposal were the subject of legal proceedings. The Land and Environment Court decision for Helm No. 18 Pty Ltd v North Sydney Council [2022] NSWLEC 1406 (29 July 2022) relating to 131 and 133 Holt Avenue, was issued following lodgement of the Planning Proposal for Gateway determination. It is acknowledged that the Court upheld the appeal and the Interim Heritage Order was revoked by the court as it applies to those properties.

Further to this, a Complying Development Certificate was lodged on 29 July 2022 for the demolition of 131 Holt Avenue. In this context, it is very conceivable that this dwelling will be demolished in the short term.

With regard to the Court proceedings (2022/81791) relating to 115-119 Holt Avenue, however, it is noted that the Land and Environment Court has dismissed the applicant's appeal against the issue of the Interim Heritage Order. We maintain that as per Council's Planning Proposal submission, these items should therefore remain as proposed heritage items under schedule 5 of the North Sydney LEP 2013.

The most efficient manner in which to resolve the Planning Proposal pathway of this process, would be for the Department to consider a Gateway Determination based on the available information before it, including the two Court judgments discussed above.

Council looks forward to the Department's determination.

Yours sincerely,

Joseph Hill
DIRECTOR CITY STRATEGY
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Department of Planning and Environment

Mr Robert Emerson
A/General Manager
North Sydney Council
PO Box 12
NORTH SYDNEY NSW 2059

Our ref: IRF22/2946

Via email: council@northsydney.nsw.gov.au

Attention: Joseph Hill, Director City Strategy

Dear Mr Emerson

Planning proposal PP-2022-2712 to amend North Sydney Local Environmental Plan 2013

I am writing in response to the planning proposal you have forwarded to the Minister under section 3.34(1) of the *Environmental Planning and Assessment Act 1979* (the Act) in respect of the planning proposal to identify the properties at 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue, Cremorne as local heritage items under the North Sydney LEP 2013.

I note that a previous letter was sent to Council requesting that it withdraw the planning proposal on 11 August 2022 due to concerns regarding the justification provided in the proposal, specifically requesting Council address:

- Court decision for Helm No. 18 Pty Ltd v North Sydney Council dated 29 July 2022;
- North Sydney Local Planning Panel's recommendations; and
- Court decision for Holt Avenue Cremorne Pty Ltd v North Sydney Council once the outcome was published.

The letter also requested that Council submit a revised proposal that addressed the above recommendations and decisions. The Department received a response letter on 23 August 2022 that requested it consider the planning proposal as submitted for a Gateway determination.

As delegate of the Minister for Planning and Homes, I have determined that the planning proposal should not proceed due to the following reasons:

Further Justification Required to Support the Proposal

North Sydney Local Planning Panel Recommendation

The Department notes the unanimous opinion of the North Sydney Local Planning Panel (LPP) that recommended the planning proposal not proceed as it lacks both site specific and strategic merit. The Panel considered based on the reports, information and submissions they are not persuaded given the extensive alterations and additions, that these properties would warrant listing as heritage items in their own right.

The Panel recommended the subject properties require a more thorough and lengthy inquiry to fully review and reconcile whether the properties warrant being listed as heritage items and meet the necessary threshold for heritage listing under the North Sydney LEP 2013.

Interim Heritage Order Court Appeal Decisions

The Department reiterates its position that Council should respond in a modified planning proposal to the two Land and Environment Court (LEC) decisions applying to properties

subject to Interim Heritage Order's (IHO) imposed by Council on sites included in this proposal.

While the LEC only upheld the appeal relating to 131-133 Holt Avenue, it is important to note both decisions identified that the proposal in its current form does not warrant heritage listing of the proposed items. The Holt Avenue Cremorne Pty Ltd v North Sydney Council case that dismissed the appeal identified there is a real chance that further inquiry and investigation of the properties 115-119 Holt Avenue may support a finding of heritage significance. Council has not provided any of the required further justification and these decisions have not been adequately addressed.

Heritage Assessment Reports

The Department has received three further heritage assessment reports from the landowners of 115-119 Holt Avenue, Cremorne in addition to the GML heritage assessment and stated previous LGA wide heritage studies conducted on behalf of Council. These are listed in table 4 of the Gateway determination report.

I note the findings of these further studies that have identified the properties at 115-119 Holt Avenue as not satisfying any criteria for local heritage listing. I also note the findings of GML that identifies the properties in their desired collective, pairing and individual, satisfy at least three listing criteria each. The Department is not satisfied without further heritage justification that the properties can be heritage listed as local items under the current criteria.

Demolition of 131-133 Holt Avenue

The Department does not support the listing of 131 and 133 Holt Avenue, Cremorne as local heritage items under the circumstances of the revocation of the IHO and current demolition works underway on the sites.

Should you have any enquiries about this matter, I have arranged for Brendan Metcalfe, Director, North District to assist you. Mr Metcalfe can be contacted on 9860 1442 or email Brendan.Metcalfe@planning.nsw.gov.au

Yours sincerely



Alison McLaren
Executive Director
Metro Central and North
7 October 2022

Encl: Gateway determination



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Alison McLaren
Executive Director
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By Email: metrocentralnorth@dpie.nsw.gov.au

11 October 2022

Dear Ms McLaren

Planning Proposal (PP-2022-2712) for heritage listing of 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue, Cremorne

I refer to your letter dated 7 October 2022 regarding the Planning Proposal (PP2022-2712) for the heritage listing of various properties in Holt Avenue, Cremorne.

Council's correspondence dated 23 August 2022 acknowledged that the properties at 131-133 Holt Avenue were the subject of a successful Land and Environment Court appeal and subsequent Complying Development Certificate for demolition. In this context, the removal of these properties from the Planning Proposal is warranted and accepted.

Your rationale for the removal of the remaining six (6) sites, however, is most disappointing. The appeal for the application of the Interim Heritage Order for land at 115-119 Holt Avenue was dismissed by the Court. Council's appointed heritage expert concluded that there were clear grounds to support the inclusion of these properties in Schedule 2 of the North Sydney Local Environmental Plan 2013 as heritage items of local significance. The Court accepted Council's evidence and the investigations of the independent heritage expert, confirmed that all items identified in the Planning Proposal, were worthy of listing.

All the heritage reports that were presented to the Local Planning Panel, aside from Council's expert's report, were prepared on behalf of the affected property owners or their agents. The fact that these studies did not support the proposed listings, is hardly surprising. It was Council's GML report that was the only true independent report. In addition, citing the previous local government wide heritage studies as supporting evidence to conclude that the subject properties are not worthy of heritage listing, is flawed. By definition, a local government wide assessment clearly runs the high risk that individual properties may be missed given the wide-ranging scope of such work.

The character and heritage values of North Sydney's neighbourhood are, to a large extent, underpinned by protections afforded by the North Sydney LEP. Council continues to diligently adhere to its wider planning responsibilities of meeting jobs, dwelling and density targets and the increasing array of NSW Government imposed responsibilities. It does so responsibly and consistently. In this context, it is most disappointing that the Department of Planning chooses to impose its legislative power on such a local and detailed level. A level that really should be the domain of local decision making.



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In this context, please note that Council will be commencing the process to seek a Gateway Review from the Independent Planning Commission. Please accept this as due notice for such action.

Please call me on 9936 6300 if you would like to discuss this further.

Yours sincerely,

Joseph Hill

DIRECTOR CITY STRATEGY

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CC Brendan Metcalfe – Director North District