

Summary of Justification for Gateway Determination Review for Planning Proposal PP-2022-2712

1. Background

1.1 Initiation of Heritage Investigations

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 Heritage 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 and in the context of two development applications apply to those sites.

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 therefore included those properties that were previously identified in the IHP because they were “under threat” as well as 121, 123 and 125 Holt Avenue which were not the subject of imminent development t proposals. In total, the Proposal included 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue, Cremorne.

The map associated with this Planning Proposal, identifying all properties identified as having heritage significance, are shown in Figure 1 below.



Figure 1 – Extract from Planning Proposal showing all subject properties.

1.2 North Sydney Local Planning Panel

The Planning Proposal was considered by the North Sydney Local Planning Panel (NSLPP) on 13 July 2022. The Panel resolved:

In the opinion of the Panel, the subject properties require a more thorough and lengthy inquiry to fully review and reconcile whether these 8 properties warrant being listed as heritage items and meet the necessary threshold for heritage listing under the North Sydney Local. Numerous heritage studies have been undertaken over the years by both the Council and heritage experts, suffice to say the advice differs significantly. 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.

1.3 Land and Environment Court Appeals

Appeals against the imposition of the IHO were lodged by proponents of development of 131-133 Holt Avenue (DA 239/21) and 115-119 Holt Avenue (DA 243/21) respectively.

On 6 and 7 June 2022, the Land and Environment Court heard the appeal for 131-133 Holt Avenue against the IHO. On 29 July 2022, the Court upheld the applicant's appeal.

On 18 and 19 July 2022, the Land and Environment Court heard the appeal for 115-119 Holt Avenue against the IHO. On 17 August 2022 the Court dismissed the applicant's appeal.

1.4 Council Decision

On 25 July 2022, North Sydney Council considered the Planning Proposal at its meeting and resolved to support its progression to Gateway Determination notwithstanding the lack of support by the NSLPP.

1.5 Department of Planning and Environment's Response

Partly in response to the Local Planning Panel's recommendations and an upheld appeal by the applicant (for 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.

2. Justification for Review

2.1 DPE's Refused Gateway Determination

The DPE's refusal to support the Gateway Determination for this Planning Proposal, issued on 7 October 2022, was based on the following reasons:

1. The Department does not support the local heritage listing of the properties specified in this proposal without further inquiry, research and justification as reasoned in this determination to support any progression of the proposal. The Department notes a number of heritage assessments have been conducted by landowners in response to this planning proposal with findings contrary to that identified in Council's commissioned assessment by GML that outline the extent of modifications to the subject properties.
2. The Department wrote to Council 11 August 2022 to provide an opportunity to withdraw, update and resubmit the planning proposal in response to the latest information, court decisions and heritage studies. Council declined this offer and requested that the Gateway determination was made based on the planning proposal as submitted.
3. The planning proposal in its current form seeks to heritage list 131 and 133 Holt Avenue where the Interim Heritage Order has been revoked with the Land and Environment Court unequivocally establishing that neither 131 nor 133 Holt Avenue are of heritage significance. The demolition of the properties has commenced and therefore the listing of these properties is not supported.
4. The proposal has not adequately addressed consistency with Section 9.1 Ministerial Directions - 6.1 Residential zones with regard to the *R3 Medium Density Residential* and *R4 High Density Residential* zonings under the North Sydney LEP 2013 that would allow development controls that provide capacity for higher densities under the current LEP.
5. The Department notes the opinion of the North Sydney Local Planning Panel's 13 July 2022 consideration that due to the extent of alterations and additions to the subject properties, the proposal in its current form lacks both site specific and strategic merit. The Panel in its recommendation was not persuaded the properties meet the threshold for listing under the Heritage Assessment Guidelines.
6. The Interim Heritage Order appeal relating to the properties 115, 117 and 119 Holt Avenue although dismissed, outlines the Land and Environment Court decision on the view that on the basis of the 2022 GML assessment, there is a real chance that further inquiry may support a finding that the properties are of heritage significance. Council has not provided any further inquiry or investigation to satisfy the decision to uphold the Interim Heritage Order on the sites.
7. The property at 125 Holt Street was previously de-listed as a local heritage item due to lack of heritage significance.

2.2 Council's response

Council's responses are outlined below in response to each of the matters raised in the Department's Gateway Determination.

2.2.1 Further Work is Required

It is acknowledged that there is a degree of interpretation associated with assessing heritage values. These values should not be determined by how many consultants share the same view. A number of heritage consultants challenged the Council's GML report. All of these were commissioned by either of the applicants for development proposals whose focus was on the demolition of the properties at 131-133 Holt Avenue and 115-119 Holt Avenue and their redevelopment. The GML report, on the other hand was prepared by an independent heritage consultant, with no brief other than to investigate potential heritage significance of the precinct and individual sites within the precinct. GML is widely recognised for its heritage expertise, independence and track record.

It is noted that of all the heritage studies previously raised as part of this process, it is only three that remain relevant (given the demolition of 131-133 Holt Avenue). It is further noted that with one of these (the Ultram report), Commissioner Horton stated in his judgment in relation to 115-119 Holt Avenue:

As I note the plans and images in the Ultram Assessment, and the Urbis 2022 Assessment are similar, and in some cases identical, I consider the Ultram Assessment of no assistance to the Court and so I admitted the Applicant's Bundle (Exhibit B), excluding the Ultram Assessment

Naturally, the exhibition process associated with a Planning Proposal, offers all parties an opportunity to make submissions and for further information or enquiry to be entered into. The comprehensive views of a respected and impartial heritage consultant has been sought and delivered in an independent manner. Council stands by the findings of the GML report and its recommendations.

2.2.2 and 2.2.3 Department's Request to Withdraw and Amend the Planning Proposal

Council acknowledged in its letter to the Department (18 August 2022) that a Complying Development Certificate had been issued for the demolition of 131-133 Holt Avenue, following the Land and Environment Court's revocation of the IHO. The letter urged the Department that 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 that had been delivered.

Given that the IHO is a time limited instrument (offering only temporary protection against demolition), Council considered that the most efficient approach would be for the Department to sensibly remove 131-133 Holt Avenue from the Planning Proposal (by way of condition) given the changed circumstances, thereby saving significant amounts of time. The alternative would have been for Council to amend the Planning Proposal, refer it to the Local Planning Panel for its review and recommendation, refer it to Council and finally, refer it back to the Department of Planning and Environment. A much more efficient and sensible approach to the planning system, particularly in a time constrained environment, would have been for the Department to simply make the obvious amendment by removing reference to 131-133 Holt Avenue, and continue the process.

Council acknowledges and supports the removal of 131-133 Holt Avenue from the Planning Proposal.

2.2.4 Ministerial Direction 6.1 Not Addressed

The Planning Proposal addressed Ministerial Direction 6.1 as follow:

Clause (4)(a) states that a planning proposal must include provisions that encourage housing that will broaden the choice of building types and locations available in the housing market. The Planning Proposal is therefore consistent with the requirements of the Direction as it will not reduce the ability to undertake residential development on those parcels of land where residential development is currently permitted

It is noted that the only R4 - High Density Residential zone to which this Planning Proposal applied to, were the 131-133 Holt Avenue parcels. Given that they have been demolished, these sites are effectively no longer applicable and a part four part five storey development proposal for these sites, representing increased residential development, has recently been approved.

The Planning Proposal effectively applies to only 6 allotments (115-125 Holt Avenue). They are zoned *R3 - Medium Density Residential* with an 8.5m height limit under the provisions of the North Sydney Local Environmental Plan 2013. Whilst a very minor reduction in development capacity may be expected as a result of this Planning Proposal, it should be noted that development that is sympathetic to the heritage values of the subject dwellings can continue to occur. An example of this is 125 Holt Avenue, which contains four self-contained dwellings.

Given the scale and intent of amendment that is proposed with the Planning Proposal, particularly in the context of the removal of 131-133 Holt Avenue, the Proposal is considered to be consistent with Ministerial Direction 6.1.

2.2.5 Lack of Support from the North Sydney Local Planning Panel

The North Sydney Local Planning Panel heard from six heritage experts all representing either 131-133 Holt Avenue or 115-119 Holt Avenue, both of which were the subject of pending development applications at the time. The Panel by its own admission, did not have any heritage qualifications nor expertise. In addition, it did not allow Council's heritage expert from GML, to be heard, even though she had been on standby (remotely) to answer questions of the Panel. All six heritage consultants that objected to the GML report, on the other hand, were given extensive opportunity to address the Panel. A response to the various observations and criticisms raised by the various consultants was not sought nor heard by the Panel.

It is also noted that the Local Planning Panel was also considering the potential listing of 131-133 Holt Avenue during its deliberations, which are effectively now voided, given their demolition.

Interestingly, in *Holt Avenue Cremorne Pty Ltd v North Sydney Council NSWLEC 1428* Commissioner Horton noted:

"... the recommendation of the NSLPP is in respect of the eight properties listed at [3], and is not particularised with respect to the sites the subject of this appeal. Consequently, it is unknown what weight the NSLPP has given in its recommendation to the sites the subject of the appeal, compared to the weight of the five properties that are not subject to these proceedings."

2.2.6 Land and Environment Court Decisions

With regard to the judgment relating to 115-119 Holt Avenue, the notion that the Court found that further work was required to substantiate the basis for a heritage listing of these properties is a misinterpretation of that judgment. The Court, in Council's opinion, turned its mind to the threshold test for the making of the IHO (which was what was being challenged) and found that the necessary threshold had been met which is a strong affirmation of the position adopted by Council. It did not necessarily make a judgment on the merit of the value of the sites as heritage items for the purposes of a final listing in Schedule 3 of the North Sydney LEP.

When Commissioner Horton made the following finding, referring to "further inquiry", the Commissioner was simply upholding the validity of the imposition of the IHO on 115-119 Holt Avenue. He said:

I consider it a real chance, on the basis of the degree of research contained in the 2022 GML Assessment, that further inquiry may support a finding that the sites at Nos 115-119 Holt Avenue are of heritage significance.

Commissioner Horton was not making a recommendation or determining that further studies be undertaken. This is consistent with finding in *Touma v Randwick City Council [2019] NSWLEC 1395*, where the Commissioner concluded in [59(4)],

Fourthly, I note that a process of further inquiry and investigation is set out, and still to run its course arising from the exhibition of the planning proposal as stated at [19], including public consultation and consultation with the OEH.

If the Planning Proposal proceeds to exhibition, Council has stated in that document, that it will consult with the wider community including the Heritage Council of NSW, the National Trust and the North Shore Historical Society.

2.2.7 Property at 125 Holt Avenue was Previously De-Listed by Council

As a result of a Local Government Area wide heritage review conducted in 2007 by Architectus Sydney Pty Ltd, in association with John Oultram Heritage and Design, the property at 125 Holt Avenue was delisted as part of the finalisation of the North Sydney LEP 2013 making process.

Clearly, heritage values and the community's approach to heritage conservation change over time. By definition, the wide-ranging nature of the 2007 investigations required a high level analysis and review of potential items. It stands to reason that the detailed assessment by GML in 2022 provided the opportunity for a far more thorough and detailed analysis of the potential value of the property and its context.

Council stands by the comprehensive nature of the GML investigations which supersede the brevity of the previous Architectus/Oultram LGA wide recommendations.

3. Closing

Council acknowledges and supports the removal of 131-133 Holt Avenue from the Planning Proposal. These properties have been demolished and development has been approved on these sites. The remaining six sites, however, have been identified as demonstrating heritage significance by Council's independent heritage expert.

The GML Heritage report that supports this, is highly detailed and comprehensive and is considered to be more than adequate to support the progression of Planning Proposal recommending heritage listing of the subject dwellings.

The Planning Proposal is relatively modest in its intentions and is consistent with the strong commitment to heritage preservation and retention of character that is such a unique aspect of the established North Sydney urban environment. These are values that are strongly reinforced in the North Sydney Local Strategic Planning Statement.

Prepared by

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Attachments

1. Planning Proposal (30 June 2022)
2. North Sydney Local Planning Panel Minutes (13 July 2022)
3. Commissioner Horton's Judgment – 115-119 Holt Avenue (Holt Avenue Cremorne Pty Ltd v North Sydney Council NSWLEC 1428)
4. Council report 14 November 2022 (including correspondence between Council and the DPE)