



ADDENDUM TO REPORT OF NEAL McCARRY, ACTING MANAGER STRATEGIC PLANNER

SUBJECT: 10.02 Planning Proposal - 115-125 Holt Avenue Cremorne
AUTHOR: Neal McCarry, Acting Manager Strategic Planning
DATE: 14 August 2023

Attachment:
Letter Mills Oakley – 11 August 2023 (6 pgs)

SUMMARY

This addendum report has been prepared in response to a letter received (copy attached) from the representative of (unspecified) owners of properties within Holt Avenue Cremorne. The letter requests that Council's consideration of the draft Planning Proposal (seeking Local Heritage Listing) be deferred to allow Council time to review and consider several Heritage reports that present alternate conclusions to that presented in the Heritage Assessment Report prepared by GML Heritage (on behalf of Council).

The letter also contends that Council may be in breach of its obligations under the Local Government Act and Code of Conduct around acting fairly, giving regard to all known relevant facts and procedural fairness. Specifically, the contention focuses around not adequately drawing to Councilor's attention the various heritage consultants reports that present a contrary view.

This addendum report summarises key relevant aspects of the history of this Planning Proposal and outlines the various instances where regard has been given to the contents of these reports.

The report before Council recommends that Council request a Gateway Determination from the Department of Planning and Environment. Should a Gateway Determination be issued the Planning Proposal would be the subject of a formal public exhibition process. Any submissions received during any public exhibition process would be given consideration before any further decision is made by Council.

BACKGROUND

The report presented to the North Sydney Local Planning Panel of 19 July 2023 (link included within Item 10.2) includes a detailed history (pages 4-7) of the key elements of relevance with respect to the events and processes that have occurred with respect to these sites. Further background information is also contained within the Planning Proposal document itself (at pages 3-6 & 28-30).

Of particulate note are the following matters;

18 - 19 July 2022 - The Land and Environment Court heard the appeal for 115-119 Holt Avenue against the Interim Heritage Order issued on the site. On 17 August 2022 the Court's decision was handed down, dismissing the appeal. In coming to this decision, the Commissioner found that after hearing evidence from respective parties that the dwellings may, upon further enquiry, be found to be worthy of Heritage listing. As part of these court proceedings, the expert witness appearing for Council had the benefit of review of all alternate Heritage reports that had been put forward by the (DA) applicant.

13 July 2022 - The North Sydney Local Planning Panel considered a draft Planning Proposal for the heritage Listing of the subject sites. At this meeting, the Panel heard from the applicants various Heritage advisors as to why they felt that the items in question were not of Heritage value.

25 July 2022 - Council considered the Planning Proposal at its meeting and resolved to support its progression to Gateway Determination. In this report (Refer item 8.5 – Executive Summary Page 2) the Council were made aware of various alternate views held by the (DA) applicant's Heritage consultants. These alternate views are also reflected in the advice and Minutes of the North Sydney Local Planning Panel which were attached to this report.

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

21 November 2022 – Following a Council resolution of 14 November 2022, a Gateway Review Request formally lodged with DPE.

23 February 2023 – The Gateway Review request was heard by the Independent Planning Commission.

9 March 2023 – The Independent Planning Commissions issued its advice. The IPC did not recommend a change to the Gateway Determination but did recommend that any new planning proposal should, among other matters, respond to the findings of the heritage reports.

Following the receipt of this advice from the Independent Planning Commission, Council engaged GML Heritage to undertake further work to respond to the both the reasons for non-issue of the Gateway Determination and the advice of the Independent Planning Commission as well as conduct further investigation to support any listing that Council may seek to pursue. This work included a review of the applicant's Heritage reports. A revised Study was subsequently prepared.

Re: Planning Proposal – 115 - 125 Holt Avenue, Cremorne

19 July 2023 - The North Sydney Local Planning Panel (NSLPP) considered a draft Planning Proposal for the heritage Listing of the subject sites. At this meeting the Panel heard from the (DA) applicant's various Heritage advisors as to why they felt that the items in question were not of Heritage value. Attendees at this meeting are included in the minutes of the NSLPP and are included in Council's business paper. The panel's advice to Council concluded that the Panel is of the opinion that the Planning Proposal should proceed to exhibition notwithstanding the contrary heritage views presented.

CONCLUSION

As part of the preparation of the new Planning proposal, Council has had the benefit of advice from GML Heritage as to whether any information (original and revised) presented by the applicants' heritage consultants has altered their professional opinion with respect to heritage listing. GML Heritage did not form the view that these alternate opinions changed their recommendation. GML discusses these reports in its findings at pages 127-129 of that report.

With respect to the contentions contained in the attached letter, throughout the events associated with these properties, Councillors have been made aware that the (DA) applicant has received advice from Heritage consultants that offer a differing view. It is held that in now presenting this matter to Council due regard has been given to these Heritage reports.

The matter currently before Council recommends that a Gateway Determination be sought from the Department of Planning and Environment. Should a Gateway Determination be issued the Planning Proposal would be the subject of a formal public exhibition process. Any submissions received during any public exhibition process would be given consideration before any further decision is made by Council.

The request to defer the matter to allow further consideration of alternate Heritage reports is ultimately a decision for Council, however, any decision to do so should be cognisant of the time limitation of the Interim Heritage Order (IHO) that currently applies to the site and the fact that this report merely seeks approval to formally exhibit the Proposal for public comment and input. The IHO offers temporary protection and is due to expire in March 2024.

RECOMMENDATION:

1. THAT Council note the attached letter and information contained in response within this addendum report.

SIGNED

N. McCarry

Neal McCarry – Acting Manager Strategic Planning

From: "Madison Champion" <mcampion@millsoakley.com.au>
Sent: Fri, 11 Aug 2023 11:39:30 +1000
To: "council" <council@northsydney.nsw.gov.au>
Cc: "Ben Salon" <bsalon@millsoakley.com.au>
Subject: Letter re Item 10.2 for Council meeting - 14 August 2023 (Planning Proposal 5-23 Holt Avenue)
Attachments: 2023 08 11 - mo letter to nsc re item 10.2 for council meeting on 14 aug 2023 re planning proposal 5-23 (holt avenue).pdf

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Dear Council

Please see **attached** our correspondence of today's date.

Kind regards,
Madison

Madison Champion | Law Graduate | Planning & Environment

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11 August 2023

Your ref:
Our ref: AJWS/BMSS/3687329

Attn: Therese Manns
General Manager

All correspondence to:
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AUSTRALIA SQUARE NSW 1215

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Sydney NSW 2060

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Dear Ms Manns,

**Meeting of the North Sydney Council on 14 August – Agenda Item 10.2
Planning Proposal 5/23: 115 - 125 Holt Avenue Cremorne.**

1. We refer to Planning Proposal 5/23 (the '**Planning Proposal**'), the subject of which is the properties at 115-125 Holt Avenue Cremorne (the '**Properties**'), and confirm we act for the owner of the Properties, Holt Avenue Cremorne Pty Ltd ('**our Client**').
2. On Monday 14 August 2023, North Sydney Council (the '**Council**') will meet to discuss the Planning Proposal under item 10.2 of the agenda for the meeting (the '**Agenda**'). The report to Council set out in the Agenda for the meeting (the '**Report to Council**') recommends, amongst other things, that Council resolve to forward the Planning Proposal to the Department of Planning and Environment and seek a Gateway Determination. As will be detailed below, the Report to Council does not adequately draw the Councillor's attention to seven highly relevant heritage reports in Council's possession that hold contrary views to the recommendation made in agenda item 10.2 of the Report to Council.
3. We write to put Council **on notice** that should it resolve to progress the Planning Proposal to Gateway Determination on basis of the information contained in the Report to Council as set out in item 10.2 of the Agenda, then those resolutions will be **liable to be set aside in Land and Environment Court proceedings** for a breach of the *Local Government Act 1993* (NSW) (the '**LG Act**') and a breach of the rules of procedural fairness. Further, any resolution to progress the Planning Proposal to Gateway Determination on basis of the information contained in the Report to Council as set out in item 10.2 of the Agenda would likely constitute a breach of Council's Code of Conduct which can lead to disciplinary action including the suspension of Councillors and Council staff.
4. Accordingly and in our view, item 10.2 of the Agenda should be **deferred to a subsequent meeting** of Council so that Councillors have a reasonable time to read and appropriately consider all the information that is relevant to that agenda item as is required by the *LG Act*, Council's Code of Conduct and the rules of procedural fairness.

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The Report to Council

5. While the PP Report notes that the Planning Proposal is supported by the heritage assessment completed by Godden Mackay Logan dated July 2023 ('**GML Report**'), and the advice of the North Sydney Local Planning Panel (the '**NSLPP**'), it fails to **expressly acknowledge or put before Council for consideration** the seven heritage reports obtained by our Client from leading heritage experts, all of which note that **none of the Properties, either alone or as a group, have any heritage value that would warrant them being listed as local heritage items**. In summary, the reports find as follows:
- i. Detailed Heritage Assessment Report prepared by Urbis dated 4 July 2022 which concluded:

... that none of the properties located at 115-119 Holt Avenue, Cremorne warrant an individual heritage listing, nor do they warrant a group listing. Therefore, they are not required to be retained on heritage grounds.
 - ii. Detailed Assessment Report prepared by John Oultram Heritage & Design dated June 2022 which concluded:

[t]he properties at 115-119 Holt Avenue do not meet the Heritage Manual criteria for identification as places of local significance ...
 - iii. Heritage Report prepared by Urbis dated July 2022 which concluded:

... none of the three properties meet the criteria for individual heritage listing, nor do they meet the criteria for a group listing at a State or local level ...
 - iv. Detailed Heritage Impact Statement prepared by Weir Phillips Heritage and Planning dated March 2023 which concluded:

... [t]he individual integrity of these dwellings has been reduced through successive alterations and roof additions as well the erosion of the general setting as part of surrounding high-density development ... [t]here are other, better examples of the period to be found throughout the North Sydney Council area that demonstrate the style through their greater integrity or are associated with prominent architects or individuals.
...
 - v. Detailed Heritage Assessment prepared by John Oultram Heritage & Design dated January 2023 which concluded:

... [t]he properties at 115-123 Holt Avenue do not meet the Heritage Manual criteria for identification as places of local significance
 - vi. Detailed Heritage Assessment prepared by City Plan Heritage Pty Ltd dated 7 November 2022 which concluded:

... the five cottages do not, either individually or as a group, meet the threshold for listing as heritage items and the Local or State Level under any of the criteria set out by the NSW Heritage Council for assessing environmental heritage ...
 - vii. Detailed Heritage Assessment prepared by NBRS dated 12 December 2022 which found:

Based on the detailed analysis set out in this report, 115, 117, 119, 121 and 123 Holt Avenue, Cremorne, do not meet the criteria for cultural significance established by Heritage NSW.
- (the '**Seven Heritage Reports**').
6. The Seven Heritage Reports have been in the possession of Council since at least 13 July 2023 and are clearly relevant to the consideration by Council of whether the Planning Proposal should progress towards Gateway Determination. Copies of the Seven Heritage Reports can be downloaded [here](#).

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Council's obligations under the *LG Act*

7. Council has an obligation under section 439 of the *LG Act* to conduct itself with a reasonable degree of care and diligence when carrying out the functions of Council.
8. Further and pursuant to section 440(5) of the *LG Act*, Councillors, Council staff and delegates of Council must comply with Council's adopted code of conduct. Council adopted its current code of conduct on 8 August 2023 (the '**Code of Conduct**').
9. Part 3 of the Code of Conduct stipulates the following:
 - 3.3 *You must consider issues consistently, promptly and **fairly**. You must deal with matters in accordance with established procedures, in a non-discriminatory manner.*
 - 3.4 ***You must take all relevant facts known to you, or that you should be reasonably aware of, into consideration and have regard to the particular merits of each case.** You must not take irrelevant matters or circumstances into consideration when making decisions.* (our **emphasis** added)
10. Section 8A of the *LG Act* provides the guiding principles for Councils. Section 8A(1)(h) of the *LG Act* states that:
 - (h) *Councils should act fairly, ethically and without bias in the interests of the local community*
11. Further to this, section 8A(2)(a) of the *LG Act* prescribes that a decision-making principle that applies to decision-making by Councils, is that Council should consider "**diverse local community needs and interests**".
12. In our view, the requirements of the *LG Act* and Code of Conduct set out above **require** Council staff to expressly draw Council's attention in the Report to the Seven Heritage Reports prepared by leading heritage experts, each of which hold a contrary view on the need for a local heritage listing of the Properties. That is, the Properties should not be listed as local heritage items. **It is misleading to not provide these to the Council for consideration, and with adequate time to consider them.**
13. Further, in our view the requirements of the *LG Act* and Code of Conduct set out above **require Councillors to give adequate and genuine consideration of the Seven Heritage Reports** when deciding on whether to resolve to put the Planning Proposal forward for Gateway Determination. This is for reasons including that failing to include or expressly acknowledge the Seven Heritage Report in the Report to Council:
 - (a) is a failure of Council staff to exercise reasonable care and diligence in the exercise of Council functions as required by section 439 of the *LG Act*;
 - (b) is a failure of Council staff to consider issues **fairly** in the exercise of Council functions as required by clause 3.3 of the Code of Conduct, and prevents Councillors from meeting the same requirement when deciding on whether to resolve to put the Planning Proposal forward for Gateway Determination;
 - (c) is a failure of Council staff to **take all the relevant facts into consideration** as required by clause 3.3 of the Code of Conduct, and prevents Councillors from

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meeting the same requirement when deciding on whether to resolve to put the Planning Proposal forward for Gateway Determination;

- (d) means that the guiding principle for Council in 8A(h) of the *LG Act* has and will be thwarted due to a failure to act fairly, ethically and without bias in the interests of the local community; and
- (e) means that the decision-making principle to consider diverse community interests will not have been applied as required by section 8A(2)(a) of the *LG Act*.

Procedural Fairness: The Hearing Rule

- 14. As Council would be well aware, the rules of procedural fairness require decision makers such as Council to act fairly in the exercise of its functions and in the making of decisions. This is especially so where a decision will have an effect on the interests of an individual, such as here, where the subject of the Planning Proposal is our Client's Properties: *South Australia v O'Shea* (1987) 163 CLR 378 at 389; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 307; *Kioa v West* (1985) 159 CLR 550 ('**Kioa**') at 582.
- 15. In our view, the provisions of the *LG Act* and Code of Conduct referred to above are in place to ensure Council exercises its functions and makes decisions in accordance with the rules of procedural fairness. For that reason alone, the failure to meet those requirements of the *LG Act* and Code of Conduct in our view mean that Council is **breaching its requirements** under the rules of procedural fairness.
- 16. While it is acknowledged that our Client will have an opportunity to speak at the meeting of Council on 14 August 2023, it is our view that the Councillors will not be in a position to give genuine and proper consideration to any submissions on the Seven Heritage Reports, and therefore the Planning Proposal, if they have not had adequate time to specifically read and consider the Seven Heritage Reports which as detailed above, are clearly relevant to the item but have not been included or expressly mentioned in the Report to Council. In our view this means that even if our Client has the opportunity to speak at the meeting, it would **not constitute the requisite reasonable opportunity to be heard, and therefore be a breach of the rules of procedural fairness**: *Kanda v Government of Malaya* (1962) AC 322 at 337; *Kioa* at 569-570 and 628.

Next Steps

- 17. As has been detailed above, should Council resolve to progress the Planning Proposal to Gateway Determination on basis of the information contained in the Report to Council as set out in item 10.2 of the Agenda, then those resolutions will be **liable to be set aside in Land and Environment Court proceedings** for a breach of the *LG Act* and a breach of the rules of procedural fairness. Further, such a resolution would likely constitute a breach of Council's Code of Conduct which can result in disciplinary action including suspension of Councillors and Council staff.

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18. Accordingly and in our view, item 10.2 of the Agenda should be **deferred to a subsequent meeting** of Council so that Councillors have a reasonable time to read and appropriately consider all the relevant information, and in particular the Seven Heritage Reports. In our view this is what is required in order for Council to give genuine and proper consideration of the issues related to item 10.2 of the Agenda, and enable our Client to have the requisite reasonable opportunity to be heard on the issues.
19. As Council is now on notice of this issue, should Council proceed then in our view it will constitute a **direct breach** of the *LG Act*, the rules of procedural fairness, and Council's Code of Conduct. Our client would reserve all of its rights in that regard.

If you have any questions regarding this letter or require further information, please do not hesitate to contact Anthony Whealy at awhealy@millsoakley.com.au or on direct line (02) 8035 7848, or Ben Salon on direct line +61 2 8035 7867 or bsalon@millsoakley.com.au.

Yours sincerely



Anthony Whealy
Partner

Accredited Specialist — Local Government and Planning

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