

14 August 2025

Ms Prity Cleary
Department of Planning, Housing and Infrastructure
Locked Bag 5022
Parramatta NSW 2124

Our ref: S Vatala/44014155
Your ref: SSD-82900461

Dear Ms Cleary

SUBMISSION - SSD-82900461, 11-19 MIDDLE HARBOUR ROAD, LINDFIELD

Background & Context

1. We act for the owner of 9 Middle Harbour Road, Lindfield (**Property**), which is a single storey dwelling house and is presently listed as a local heritage item under the *Kur-ring-gai Local Environmental Plan 2015*.
2. This objection is lodged on our client's behalf in opposition to the concept proposal for state significant development at 11-19 Middle Harbour Road, Lindfield (**Development Site**).
3. The Development Site is located immediately to the east of our client's Property and proposes a concept proposal, by SSD-82900461, for a 9-storey residential flat building, with a maximum building height of 33.6 metres and a floor space ratio of 3:25:1 (**SSD Proposal**). The SSD Proposal is in breach of the controls contained within the Transport Oriented Development in Chapter 5 of the *State Environmental Planning Policy (Housing) 2021 (TOD Provisions)*.
4. Our client, through her town planner, Kerry Nash, has raised various planning issues with the SSD Proposal (**Nash Submission**) – please refer to the Nash Submission. In this submission, we address the key issue of site isolation.
5. Contextually, it is important for the Department to be aware that there is another 9-storey residential flat building proposed immediately to the west of client's Property, at 5-7 Middle Harbour Road, Lindfield (**DA Proposal**). The DA Proposal relies on the TOD provisions and has a maximum building height of 27.4 metres and a floor space ratio of 2.83:1. The Applicant for the DA Proposal has appealed to the Land and Environment Court and there is a conciliation conference scheduled for 1 December 2025. The DA Proposal, if approved, will, in conjunction with the SSD Proposal, result in our client's property being completely isolated; an outcome which should be avoided at all cost. We have written to the Department previously about the need to avoid site isolation and refer to that correspondence (copies of which are **enclosed**).

6. For context, we extract below the amended TOD Sites Map which we have annotated with a red arrow to show our client's site in between the two TOD Provision development sites.



Site Isolation

7. In addition to the matters raised in the Nash Submission, our client strongly objects to the SSD Proposal on the basis that, if approved, the SSD Proposal will result in our client's Property becoming an isolated site.
8. Site isolation is recognised as an adverse planning outcome by the Land and Environment Court and should be avoided.
9. In *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 the Land and Environment Court set out the two questions to be asked in determining whether a site is isolated and the relevant principles to be applied:

"[17] The general questions to be answered when dealing with amalgamation of sites or when a site is to be isolated through redevelopment are:

- Firstly, is amalgamation of the sites feasible?*
- Secondly, can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible?"*

*18 The principles to be applied in determining the answer to the first question are set out by Brown C in *Melissa Grech v Auburn Council* [2004] NSWLEC 40. The Commissioner said:*

Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application. Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of the properties. These details should include offers to the owner of the isolated property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, is to be based on at least one recent independent valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.

Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s 79C of the Environmental Planning and Assessment Act 1979.

19 In the decision Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189, I extended the principles of Brown C to deal with the second question and stated that:

The key principle is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls would be required, such as non compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity. To assist in this assessment, an envelope for the isolated site may be prepared which indicates height, setbacks, resultant site coverage (both building and basement). This should be schematic but of sufficient detail to understand the relationship between the subject application and the isolated site and the likely impacts the developments will have on each other, particularly solar access and privacy impacts for residential development and the traffic impacts of separate driveways if the development is on a main road. The subject application may need to be amended, such as by a further setback than the minimum in the planning controls, or the development potential of both sites reduced to enable reasonable development of the isolated site to occur while maintaining the amenity of both developments.”

10. The Department will be aware that Kur-ring-gai Council has submitted to the Department an alternative plan to replace the TOD provisions (**Alternative Plan**). Under this Alternative Plan, our client's property and surrounding properties on the southern side of Middle Harbour Road will be zoned R4 – High Density Residential, with a maximum building height of 18.5 metres and a maximum of floor space ratio of 1.3:1. If the Alternative Plan is made (there is no suggestion it will not be), our client's property should be able to be developed for its highest and best use having regard to the R4 zone. That will not be possible if the SSD Proposal is approved given the impacts on our client's property arising from the SSD Proposal – please refer to the merit issues raised in the Nash Submission.
11. In *Hamdan Co Group Pty Ltd v Canterbury-Bankstown Council* [2018] NSWLEC 1255, the Land and Environment Court determined that site isolation is a relevant planning consideration whether or not the DCP provisions say so (see [89]). It is important to observe at this juncture that that analysis can also be applied, in our submission, in this circumstance where DCP controls do not apply nor are required to be taken into account in the assessment of a state significant development. In *Hamdan*, the development site and the isolated site were both zoned R4 high

density. The developer had made an offer to purchase the isolated site, but that offer was declined. Here, the developer of the SSD Proposal has not made an approach at all to our client in respect of the sale or development of her Property. Our client has, through her agent, approached the developer to discuss the opportunities but, to date, has not received a response.

12. Approval of the SSD Proposal, as it presently stands and with all of its adverse impacts (please see the Nash Submission), will result in our client's Property being isolated and will frustrate the orderly and economic use and development of our client's Property which is inconsistent with:
 - (a) the objectives of the *Environmental Planning & Assessment Act 1979 (EP&A Act)*;
 - (b) the aims of the TOD Provisions; and
 - (c) the objectives of the R2 zone under the *Ku-ring-gai Local Environmental Plan 2015 (LEP)*.
13. We submit that the scale of the SSD Proposal, which goes well beyond the controls in the TOD Provisions (refer to the Nash Submission), is not compatible with the existing environment and built character of Ku-ring-gai. In the SSD Proposal's Environmental Impact Statement, the bulk and scale of the development is justified by asserting that the Site's surrounds may also benefit from the same TOD Provisions. This is not the case. Our client's Property, which is heritage listed, is presently excluded from the TOD Provisions. So too are the five other heritage items on Middle Harbour Road, and a number of other heritage items which are proximate to the SSD Proposal.
14. Having regard to the Nash Submission, the scale of the SSD Proposal is:
 - (a) Contrary to the aims of the TOD provisions which are:
 - (i) to deliver mid-rise residential flat buildings... that:
 - (A) are well designed, and
 - (B) are of appropriate bulk and scale, and
 - (C) provide amenity and liveability.
 - (b) Contrary to the objectives of the R2 zone which are:
 - (i) To provide for the housing needs of the community within a low-density residential environment.
 - (ii) To enable other land uses that provide facilities or services to meet the day-to-day needs of residents.
 - (iii) To provide for housing that is compatible with the existing environmental and built character of Ku-ring-gai.

Conclusion

15. In our submission given the matters raised above and in our previous letters to the Department on site isolation (copies enclosed), the SSD Proposal should be not determined until such time as the isolation of our client's Property is resolved. To do otherwise would be to endorse the isolation of our client's Property, contrary to accepted planning principles and the objectives of the EP&A Act, TOD provisions and LEP.

Yours sincerely



Stephanie Vatala
Partner
Dentons Australia

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