

8 May 2025

Ms Kiersten Fishburn
Secretary of the Department of Planning, Housing and Infrastructure Dept
Department of Planning, Housing and Infrastructure
Locked Bag 5022
Parramatta NSW 2124

By email Kiersten.Fishburn@planning.nsw.gov.au

Our ref: S Vatala/44014155

Dear Ms Fishburn

URGENT

**Kur-ring-gai Council's Preferred Housing Scenario and TOD Provisions
Site Isolation Concerns**

1. We act for the owners of 9 Middle Harbour Road, Lindfield, a property which is presently zoned R2 and listed as a local heritage item under the *Ku-ring-gai Local Environmental Plan 2015*. We note, however, that the property is not within a Heritage Conservation Area.
2. As a heritage item, our clients' property is presently excluded from the provisions of the Transport Oriented Development in Chapter 5 of the *State Environmental Planning Policy (Housing) 2021 (TOD Provisions)*.
3. We are aware that Kur-ring-gai Council and the Department are in Land and Environment Court proceedings concerning the validity of the TOD Provisions in so far as they relate to Kur-ring-gai. As part of the mediation agreement, Council released for public consultation its "Preferred housing scenario between Roseville and Gordon" (**Preferred Scenario**). We have made two submissions to Council in response to its Preferred Scenario (copies **enclosed**).
4. We now write to you to draw your attention to a possible unintended consequence of the Council's Preferred Scenario being adopted (if it is) and the implementation of the savings and transitional provisions foreshadowed by the Department for DAs lodged but not yet determined before the coming into effect of the Council's Preferred Scenario. We understand the Department's intention is to ensure that DAs lodged but not yet determined prior to the coming into effect of the Preferred Scenario will continue to be assessed and determined under the existing TOD Provisions.
5. Both we and our clients are concerned that this approach will result in our clients' site (and others in a similar position) being isolated and incapable of development with land on either side. We draw your attention to the following factual matters to illustrate the point:

- The residential properties at nos. 5-7 Middle Harbour Road (immediately to the west of our clients' property "**Western Properties**") are the subject of a recent development application lodged with Kur-ring-gai Council for redevelopment of those sites under the TOD Provisions. The proposed development will have a height of 27.4m.
 - The residential properties at nos. 11-19 Middle Harbour Road (immediately to the east of our clients' property "**Eastern Properties**") are the subject of an application for the Secretary's environmental assessment requirements (**SEARs**) for a concept plan approval under the existing TOD Provisions. The concept plan approval proposes, we understand, a development height of 28.6m.
6. As you know, the Council's Preferred Scenario (if implemented) would enable the redevelopment of heritage listed properties including our clients' property. However, this is not possible under the existing TOD Provisions which means that, at present, our clients' property is, legally, incapable of being incorporated into either of the applications referred to in paragraph 5 above.
 7. Our clients have written to the developers of the Western and Eastern Properties about incorporation of their property but, unsurprisingly given the TOD Provisions do not presently apply to our clients' property, they have not received a reply.
 8. While the Council has an "isolated" site provision in its Development Control Plan (presumably to avoid a situation such as this), it is difficult to see how that provision could be applied in circumstances where the properties on either side of our clients' property are redeveloped under the TOD Provisions and the TOD Provisions do not, presently, apply to our clients' property.
 9. It seems to us that including our clients' property (and other similarly affected heritage properties) in the TOD Provisions, in this instance, can only lead to increased housing supply. Council appears to have acknowledged this by including our clients' property (and other heritage properties) in the Preferred Scenario. There is a lost development opportunity by our clients' property not being capable of incorporation into either of the adjoining developments.
 10. Our clients ask that the Department give urgent consideration to:
 - a. Amending the TOD Provisions so the TOD Provisions apply to our clients' property (and possibly other sites in a similar position to our clients' property) to enable redevelopment of the property with either the Eastern or Western Properties – this would be consistent, in our view, with the Council's position that our clients' property be capable of redevelopment under its Preferred Scenario; and/or
 - b. Encouraging the Council to amend the LEP to remove our clients' property as a heritage item – this appears consistent with the Council's incorporation of our clients' property under the Preferred Scenario; and
 - c. Drafting the foreshadowed savings and transitional provision in a manner which ensures that "saved" applications which are to be assessed and determined under the TOD Provisions can be amended to include heritage listed properties (such as our clients' property) or delisted heritage properties, with the amended application being accepted by the consent authority and "saved" for the purposes of assessment under the TOD Provisions.

11. Our clients request an urgent meeting between their legal representatives and the Department to discuss the circumstances of their case and the broader planning implications. In our opinion, there are strong planning reasons why the TOD Provisions should be amended to include heritage properties such as our clients' property (or the LEP amended to delist our clients' property and similar such properties) and the savings and transitional provisions drafted in the manner suggested above.
12. We look forward to your urgent reply.

Yours sincerely



Stephanie Vatala
Partner
Dentons Australia

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