

2 July 2025

Ms Kiersten Fishburn  
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Department of Planning, Housing and Infrastructure  
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Our ref: S Vatala/44014155

Dear Ms Fishburn

## URGENT

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

#### **Introduction**

1. We refer to our previous correspondence dated 8 May 2025 and the response from the Department of Planning, Housing and Infrastructure (**DPHI**) dated 3 June 2025.
2. We continue to act for the owners of 9 Middle Harbour Road, Lindfield (**Property**), a property which is locally heritage listed. The Property is a single storey federation style house that has undergone extensive alterations.
3. Properties immediately surrounding the Property are located within the Transport Oriented Development Sites Map (**TOD Sites Map**) under Chapter 5 - Transport oriented development (**TOD Provisions**) of the *State Environmental Planning Policy (Housing) 2021* (**Housing SEPP**). The Property is, presently, excluded from the TOD Sites Map due to it being a local heritage item.
4. Since the date of our previous correspondence, there have been a number of developments in this matter, as set out below.

#### **Recent Developments**

5. As you would be aware, at the Extraordinary Meeting on 5 June 2025 (**Extraordinary Meeting**), Ku-ring-gai Council (**Council**) resolved to submit to the DPHI an alternative plan (**Alternative Plan**) to replace the TOD provisions. Under this Alternative Plan, the Property and surrounding properties on the southern side of Middle Harbour Road would 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.

6. However, despite Council's Alternative Plan, development applications have already been lodged under the TOD Provisions for 9-storey residential flat buildings on both sides of our clients' Property, being:

- development application no. eDA0182/25, lodged with Council for the properties immediately to the west of our clients' Property at 5-7 Middle Harbour Road; and
- state significant development application no. SSD-82900461 for the properties immediately to the east of our clients' Property at 11-19 Middle Harbour Road (noting that only Secretary's Environmental Assessment Requirements have been issued for this application, and the environmental impact statement is still being prepared),

(together, the **Development Applications**).

7. We understand from the meeting agenda for Council's Extraordinary Meeting that DPHI proposes to "save" the above Development Applications so that the TOD Provisions will continue to apply to these applications, even if Council's Alternative Plan is accepted by the DPHI.

8. Indeed, DPHI has already amended the TOD Sites Map to show that it applies to the properties the subject of the Development Applications (being the properties on either side of our client's Property) and other properties where development applications have been lodged under the TOD Provisions. However, it does not apply to other properties, such as our clients' Property. We refer to the below extract of the current TOD Sites Map, which clearly shows our clients' Property (with a red arrow) isolated between two development sites under the TOD Provisions.



9. Both we and our clients are concerned that, unless urgent action is taken by DPHI and Council to rectify the position, our clients' Property will continue to be isolated and incapable of development even if Council's Alternative Scenario is approved.

### **Urgent Heritage Delisting**

10. At the Extraordinary Meeting, Council also resolved to commission a preliminary assessment of heritage items proposed to be retained in the TOD Sites Map, under Council's Alternative Plan or that are impacted by development applications lodged under the TOD Provisions. Council also recorded that it will request that the Minister for Planning work collaboratively with Council to develop a solution for stranded heritage items (such as our clients' Property). Council's meeting minutes note that "*DPHI has advised that unjustified de-listings will not be considered and that the process for Council or the Department to unilaterally delist heritage items requires a justified position through a full planning proposal process*".
11. Our clients have a Heritage Assessment Report prepared by GBA Heritage which concludes that the Property:
  - does **not** meet the threshold for local heritage listing,
  - is of **low** heritage significance because of the extensive alterations and additions carried out to the Property (prior to its listing) and the change in the setting of the Property arising from the TOD Provisions, lodgement of the Development Applications and Council's Alternative Plan.

A copy of this Heritage Assessment Report is **enclosed**.

12. Given the strong heritage justification for de-listing of our clients' Property, we ask that DPHI urgently work with Council to de-list our clients' Property as a heritage item. This could be achieved by a State Environmental Planning Policy or an expedited amendment to the *Ku-ring-gai Local Environmental Plan 2015* under s 3.22(1)(c) of the *Environmental Planning and Assessment Act 1979*. This is an urgent matter given the Development Applications lodged under the TOD Provisions for the adjoining properties, which, if approved, will have the effect of isolating our clients' Property unless an urgent solution is adopted.
13. The suggestion by DPHI that a full planning proposal process should be followed for heritage de-listing will not address the isolation of our clients' Property, given that the Maximum Benchmark Timeframe for a "basic" planning proposal is approximately 7 months (see the Local Environmental Plan Making Guideline, August 2023), and, by that time, the opportunity for our clients' Property to be incorporated in the Development Applications for the adjoining properties will have been lost.
14. The situation our clients find themselves in is as a direct result of the TOD Provisions and Council's Alternative Scenario. It is incumbent on both DPHI and Council to work together collaboratively and with speed to urgently rectify the position so that our clients' Property does not continue to be isolated. It is not reasonable nor appropriate in these circumstances to insist on an applicant-initiated planning proposal. Furthermore, the Council's fees for an applicant led planning proposal (including Council's lodgement fee of \$15,000 plus advertising costs) are not reasonable or justified in the circumstances.

### **Savings and Transitional Provisions**

15. In addition to urgent heritage de-listing, we urge DPHI and Council to work cooperatively to implement a solution to allow the Development Applications to be amended to incorporate our clients' Property. Given the TOD Provisions do not currently apply to our clients' Property, even if

the Property is de-listed as a heritage item and Council's Alternative Plan is introduced, our clients' Property will still be isolated because under the TOD Provisions it is not capable of being incorporated into the Development Applications.

16. Therefore, in addition to the delisting:

- the TOD Provisions must be amended to include our clients' Property so that the same planning controls applying to the adjoining properties, the subject to the Development Applications, also apply to our clients' Property; and
- a savings and transitional provision should be introduced which permits the Development Applications to be amended to incorporate our clients' Property.

### **Conclusion & Summary**

17. At present, our clients' Property is isolated. This will continue if the Development Applications are approved without amendment to incorporate our clients' Property. However, to enable the incorporation of our clients' Property in either of the Development Applications, one of the following is required:

- Urgent delisting, incorporation of our clients' Property in the TOD Provisions and introduction of a savings and transitional provision which permits the Development Applications to be amended to incorporate our clients' Property; or
- Incorporation of our clients' Property in the TOD Provisions and introduction of a savings and transitional provision which permits the Development Applications to be amended to incorporate our clients' Property.

18. We ask that DPHI urgently review this letter and the GBA report enclosed with this letter and confirm that it will now take steps to work with Council to urgently:

- Delist our clients' Property as a heritage item, without a planning proposal;
- Include our clients' Property in the TOD Provisions, such that the same planning controls apply to our clients' Property as the properties on either side of our client's property which are the subject of the Development Applications; and
- Introduce savings and transitional provisions to ensure the Development Applications are capable of being amended to incorporate our clients' Property.

19. We confirm that we have also written to Council regarding the above matters.

20. If you would like to discuss this further, please contact me on 0402 215 970.

21. We otherwise look forward to your urgent response.

Yours sincerely



Stephanie Vatala  
**Partner**  
Dentons Australia  
Enc.