

## Place, Design and Public Spaces

### Plan finalisation report

Local government area: Ryde

File Number: IRF20/592

#### 1. NAME OF PLANNING PROPOSAL

The planning proposal seeks to heritage list a dwelling house and its curtilage at 68 Denistone Road, Denistone (site) by identifying the site as a local item of heritage significance in Schedule 5 of Ryde Local Environmental Plan 2014 (Ryde LEP 2014) (Dept reference: PP\_2019\_RYDEC\_001\_00).

#### 2. SITE DESCRIPTION

The planning proposal (**Attachment A**) applies to land at 68 Denistone Road, Denistone and consists of three parcels of land legally known as Lots 1-3 DP 1096437 (Figures 1 and 2). The site is generally rectangular, has a total area of approximately 1,606 m<sup>2</sup> and is in an elevated corner location with frontages to Denistone Road and Florence Avenue.

The site contains an Inter-War period 'Californian Bungalow' (dwelling house) constructed in 1920 and a garage added in 1926. The house sits within a generously proportioned landscaped garden setting and contains a number of mature trees. The garden setting of the property extends from the dwelling outward to the site boundaries and includes the front fencing, boundary hedging, open lawn area, pathways, and specimen plantings both of trees and shrubs.



Figure 1 | Aerial image of site (outlined in red) (Source: Nearmap)

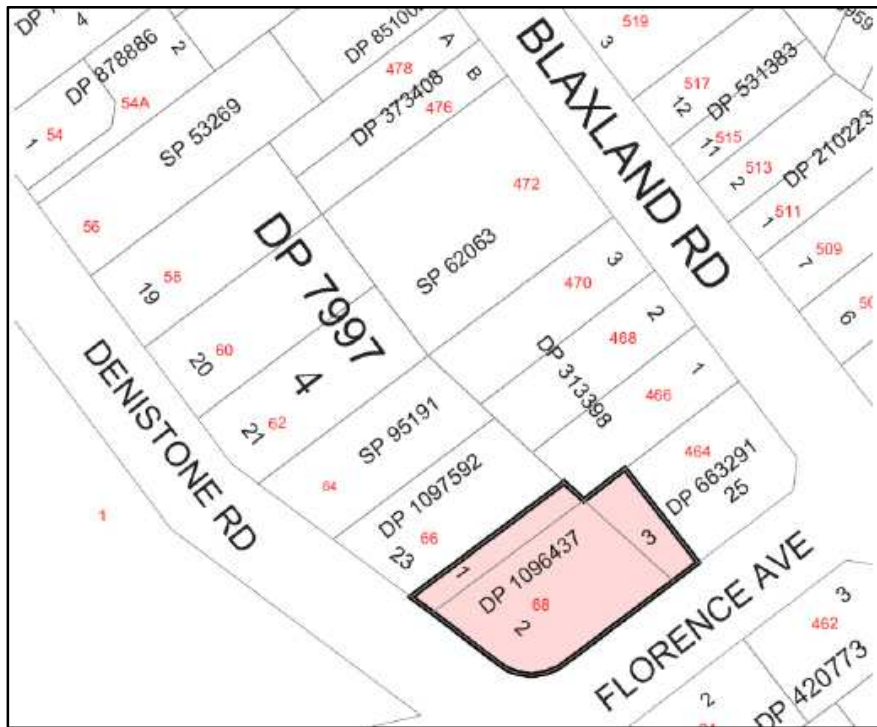


Figure 2 / Legal description of site shaded in red (Source: Planning Proposal)

Immediately adjoining the subject site is low-scale residential development comprising of single storey dwelling houses. Further along the eastern side of Denistone Road, residential development consists of one and two storey dwelling houses. Ryde Hospital is located on the western side of Denistone Road, while Denistone Park is located south of the property on the southern side of Florence Avenue (Figure 3).

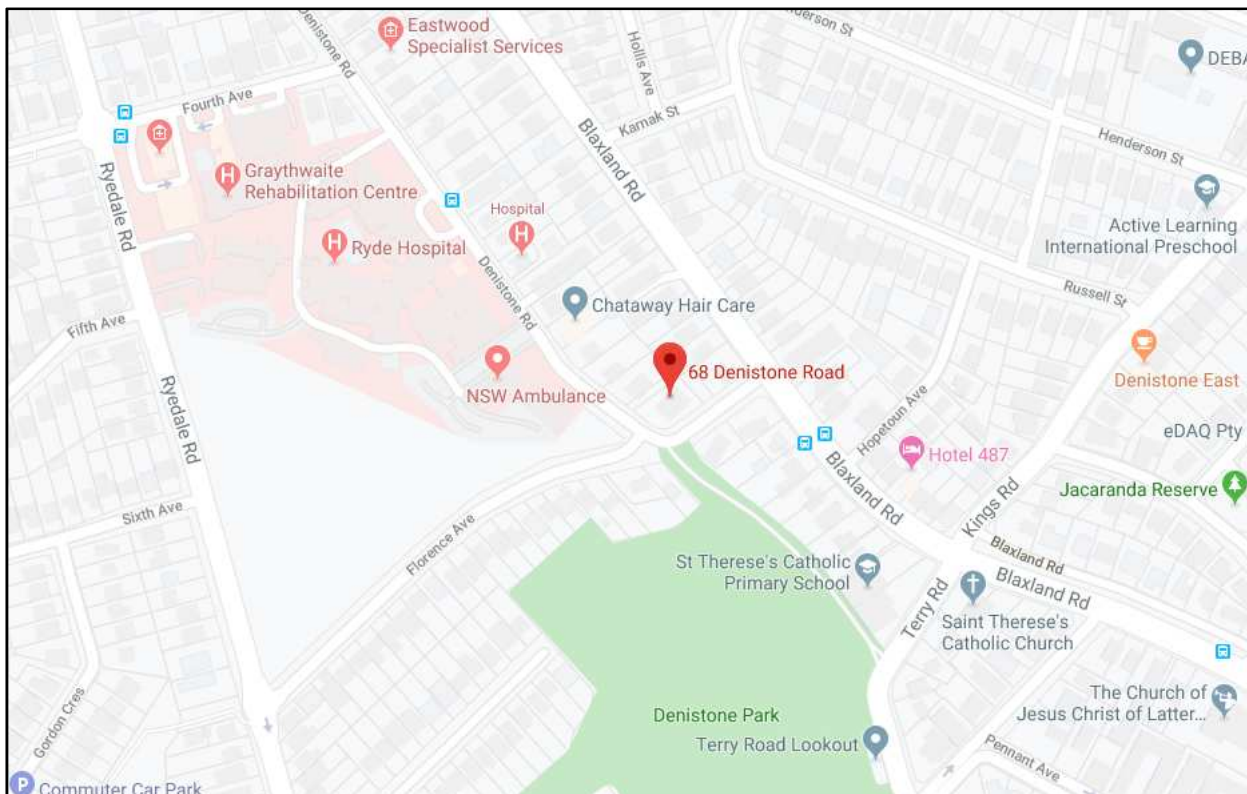
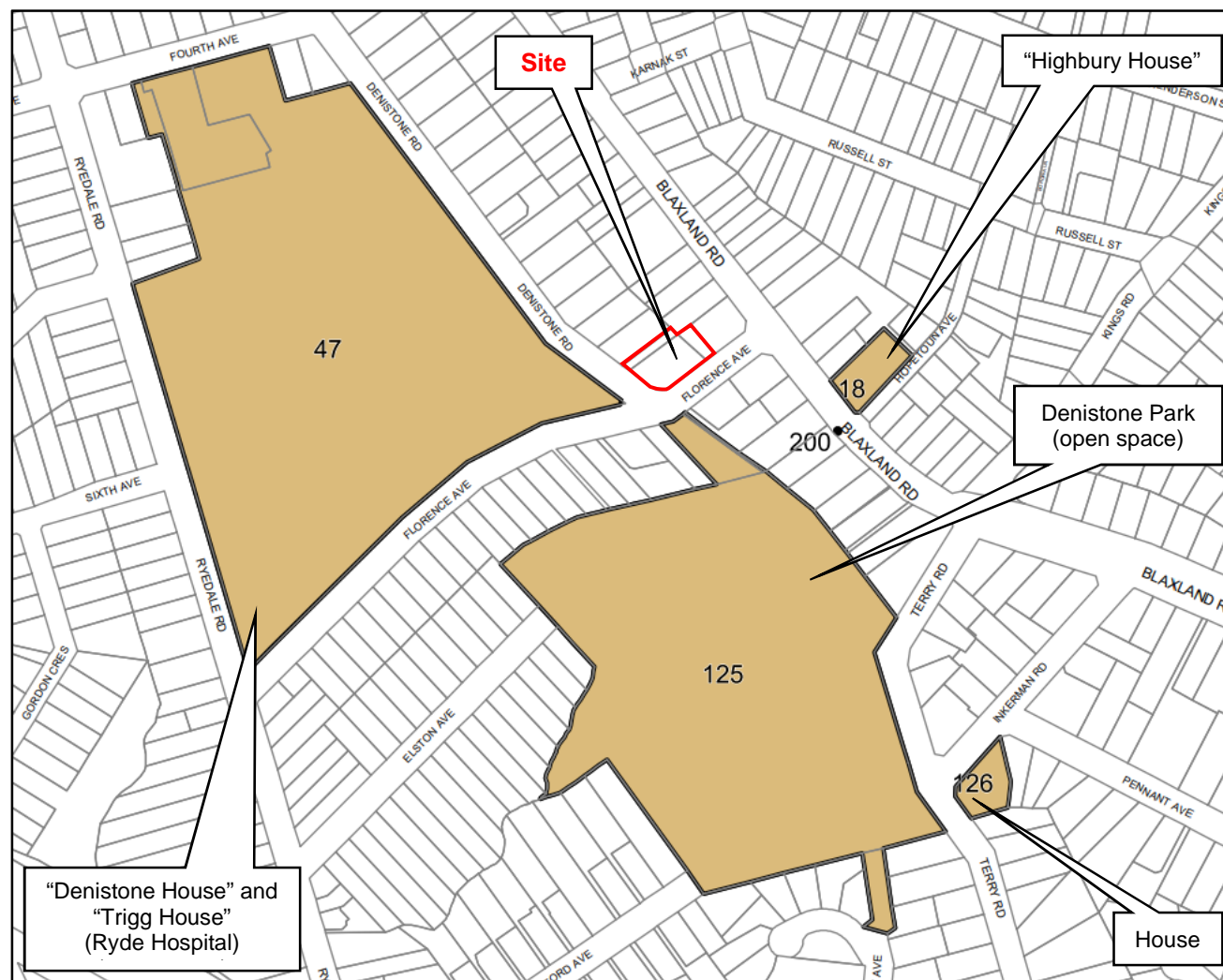


Figure 3 / Site context map (Source: Google Maps)



The site is located within close proximity of a number of local heritage items including (buildings within) Ryde Hospital at 1 Denistone Road approximately 50m to the west of the site; Denistone Park opposite the site to the south; and 'Highbury House' at 495 Blaxland Road approximately 90m to the east of the site (Figure 4).



**Figure 4 / Heritage items within proximity (extract of Ryde LEP 2014 Heritage Map sheet HER\_002) (Source: NSW Legislation)**

The site is zoned R2 Low Density Residential and has a 9.5m maximum building height control and 0.5:1 maximum floor space ratio.

### 3. PURPOSE OF PLAN

The planning proposal seeks to identify the dwelling house and curtilage at 68 Denistone Road, Denistone (Lots 1-3 DP 1096437) as an item of local heritage significance by including the property in Schedule 5 Environmental Heritage and on the Heritage Map under Ryde Local Environmental Plan 2014.

### 4. STATE ELECTORATE AND LOCAL MEMBER

The site falls within the Ryde state electorate. Mr Victor Dominello MP is the State Member. The site falls within the Bennelong federal electorate. Mr John Alexander MP is the Federal Member.

To the North District team's knowledge, neither MP has made any written representations regarding the proposal.

**NSW Government Lobbyist Code of Conduct:** There have been no meetings or communications with registered lobbyists with respect to this proposal.

**NSW Government reportable political donation:** There are no donations or gifts to disclose and a political donation disclosure is not required.

## 5. GATEWAY DETERMINATION

The Gateway determination issued on 4 April 2019 (**Attachment B**) determined that the proposal should proceed subject to conditions. Of note, a condition required that prior to public exhibition, Council is to include an amended Heritage Assessment Report which addresses the current condition on the dwelling and if practical be based on internal inspection, subject to access being granted by the owner.

An updated HSA (dated 21 May 2019) prepared by Paul Davies Pty Ltd for Council incorporates new information arising from inspection of the dwelling's interior, further assessment of the building, site and setting, as well as provision of a structural engineer's report on the condition of the house, commissioned by Council. The May 2019 HSA was exhibited with the planning proposal and notes the dwelling has fallen into "such a sudden and dramatic state of disrepair" however concludes that the dwelling's condition does not affect the assessment of significance.

Authorisation was not given to Council to exercise delegation to make the plan as there is disagreement between Council and the land owner over the heritage value of the site.

The Department is satisfied that Council has met the conditions of the Gateway determination.

On 25 September 2019, the Department received a request from Council to finalise the planning proposal.

## 6. PUBLIC EXHIBITION

In accordance with the Gateway determination, the proposal was publicly exhibited by Council for the required 28 day consultation period.

Exhibition of the planning proposal occurred from 29 May to 28 June 2019. 66 submissions were lodged in response, of which 20 supported the proposed heritage listing whilst 46 opposed it (**Attachment C**).

Community concerns raised during the consultation period included:

- Unfair to the owner who relied on planning information issued by Council at the time of purchasing the property.
- Harms the heritage protection system as other land owners are/would wilfully remove heritage features on their properties to avoid heritage listing.
- Unreasonable financial burden on the owner of the property owner.
- Inappropriate development and loss of local history and character in the area.
- Condemns wilful damage inflicted upon property.
- Need to preserve heritage and the environment.
- Questions the heritage value of the property in light of its recent identification of heritage significance.
- Dwelling house is condemned and should be redeveloped for safety reasons.
- Critical of Council's approach to managing the protection of local heritage.

- Seemingly ad-hoc process for heritage listing is undermining a rules based planning system and public confidence in the current heritage protection system.
- Heritage listing the property will infringe the land owner's right and will devalue the property.
- The property is the most impressive of all residential homes in the immediate area and contributes to a sense of place, to the character, ambience and history of the area. Local sense of place is rapidly being lost to over-development.

A summary of the issues raised in the community submissions and Council's response to the issues is provided in **Attachment D**.

In addition, a submission was made by Mills Oakley Lawyers, acting on behalf of the land owner, objecting to the proposal (**Attachment E**). The submission was accompanied by several reports, including a structural report (Northrop Consulting Engineers dated 18 February 2019), heritage significance assessment (Urbis dated 18 March 2019) and preliminary heritage assessment (Sue Rosen and Associates Pty Ltd dated 1 April 2019).

Key concerns raised by the owner include:

- No visual inspection of the building's internal condition or consideration of the building's structural integrity in initial assessment reports which Council relied on in preparing the planning proposal.
- No thorough consideration of the building's structural adequacy or its present condition.
- Planning proposal based on historical photos which do not depict the property's current condition and no physical inspection of the building's interior was undertaken.
- Heritage assessment undertaken by Paul Davies Pty Ltd, as engaged by Council, claims the "house is remarkably intact".
- Two heritage assessments obtained by the owner indicate the property does not meet the requirements for listing and claim the building is structurally unsound and beyond repair.
- A structural assessment obtained by the owner that concluded the dwelling should be condemned and that significant structural remedial works would be required to bring the dwelling to a structurally sound condition was not considered.

The Department considers that Council has adequately addressed issues raised by the community, however is of the view that the matters raised in the owner's submission have not been thoroughly assessed. In particular, the Department considers that the owner's concerns related to the structural condition of the property and conflicting heritage assessments have not been sufficiently considered by Council staff as part of post exhibition report tabled at Council meeting of 25 September 2019 (**Attachment F**).

Ryde Local Planning Panel considered the planning proposal under section 2.19(1)(b) of the *Environmental Planning and Assessment Act 1979* at a meeting held on 14 February 2019. The Panel unanimously determined to defer its decision pending further advice from Council. Following receipt of additional information in the form of a memorandum dated 15 February 2019, the Panel made an electronic

determination on 21 February 2019 recommending that Council forward the planning proposal to the Minister for Gateway determination.

The Department notes that Council's memorandum to the Panel (**Attachment G**) states "the owner's alternate Heritage Assessment would be considered should the proposal receive a Gateway determination to proceed to public exhibition. Council may choose to have both reports peer reviewed during the exhibition period."

To the Department's knowledge an independent peer review of the three conflicting heritage assessments was not undertaken. In the outcomes of exhibition report tabled at Council meeting 24 September 2019, Council staff did not provide a direct response to the owner's two heritage assessments. Instead the Council report focuses on the conclusions drawn from the Council commissioned heritage assessment undertaken by Paul Davies Pty Ltd which recommends the property should be heritage listed.

## **7. ADVICE FROM PUBLIC AUTHORITIES**

Council was required to consult with the former Office of Environment and Heritage (OEH) (now known as Heritage NSW and part of Department of Premier and Cabinet) in accordance with the Gateway determination.

Council has consulted this authority and the former OEH provided a written response dated 28 June 2019 (**Attachment H**).

The former OEH's response acknowledged the property was, at the time, subject to an Interim Heritage Order. OEH provided a general statement about supporting the identification and listing of new heritage items, providing due diligence, assessments and notifications have been undertaken. The former OEH did not raise any objection to the planning proposal.

## **8. POST-EXHIBITION CHANGES**

No amendments were made to the planning proposal following public exhibition.

## **9. DEVELOPMENT APPLICATION AND HERITAGE LISTING HISTORY**

On 28 August 2018, a development application (DA) was lodged with Council by the owner (LDA2018/0340) that sought approval for consolidation of the existing three lots and subdivision of the site into two new lots.

While the DA did not propose demolition of the existing dwelling on the site, the owner provided indicative building footprints for future development on the proposed lots. These comprised an attached dual occupancy and multi-dwelling housing with three units. It was therefore evident that as a consequence of undertaking the subdivision, demolition would be required.

The DA was notified in September 2018 and received six objections. Key concerns raised included heritage significance of the existing dwelling and associated garden; impact of future development on parking and traffic and on the privacy of adjoining dwellings; as well as perceived overdevelopment of the site.

On 25 September 2018, a Mayoral Minute was moved which sought to place an interim heritage order (IHO) pursuant to the *Heritage Act 1977* over the property. At this same Council meeting, Council resolved to commence preparation of a planning proposal to heritage list the site. An interim heritage order (IHO) was gazetted over the property the following day on 26 September 2018.

On 31 October 2018, the development application was refused.

Council subsequently engaged an external heritage consultant, Paul Davies Pty Ltd, to conduct a heritage significance assessment (HSA) for the property. The report prepared by Paul Davies Pty Ltd in November 2018 established the property is of local heritage significance and recommended heritage listing of the site under Ryde LEP 2014.

On 14 February 2019, the Ryde Local Planning Panel considered a planning proposal to heritage list the site and determined on 21 February 2019 to recommend that Council forward the planning proposal to the Minister for Gateway determination.

On 4 April 2019, the Minister's delegate issued a Gateway determination for the planning proposal to proceed subject to conditions. One of the conditions imposed on the Gateway determination required an updated HSA which addresses the current condition of the dwelling and if practical be based on internal inspection, subject to access being granted by the owner.

On 30 April 2019, an appeal under section 8.7 of the EP&A Act was lodged by the owner (applicant) with the Land and Environment Court (the Court) against the refusal by Council of the DA (*777 Trading Pty Ltd v City of Ryde Council* [2019] NSWLEC 1619).

The Court granted the applicant leave to amend the DA to specifically include demolition of existing structures given that Council's main contention in opposition to the DA was that it required demolition of dwelling housing. Expert written evidence was filed dealing with the condition of the dwelling and potential impacts on its garden, requiring expert advice from structural engineers and arborists, as well as advice related to heritage and planning matters.

On 13 December 2018, the Court handed down its decision to uphold the appeal and approved the DA for demolition of existing structures, consolidation of 3 lots and subdivision of the consolidated lots into 2 new lots subject to conditions.

It is noted from the court case expert evidence:

- The structural engineers for the applicant and Council agreed in their expert Joint Report that:
  - the dwelling has suffered considerable damage due to movement of foundations being on highly reactive clay and on unstable brick footings;
  - the dwelling is in need of extensive underpinning or reconstruction;
  - the dwelling in its current condition is structurally unsound and unsafe for occupation;
  - the extent of remedial action required is extensive and, given the current condition of the dwelling, is not a reasonable extent of works compared with demolition; and
  - the cost of works associated with retention and restoration will be substantially greater than that of reconstruction. It was estimated that this cost would be in excess of \$1 million.
- The structural engineers also agreed that there was no guarantee that, even with underpinning, the dwelling could be retained or the extent of its intactness.
- Council's heritage expert's acceptance that the NSW Heritage Office 2001 guidelines state that 'loss of integrity or condition may diminish significance'.



It is noted from the court case finding made by Commissioner Smithson:

- The key contention in the proceedings, following amendment of the application, was the demolition of the dwelling and its heritage significance, including its landscaped (garden) setting.
- At the time the planning proposal commenced, the site, including the dwelling and its generous landscaped garden and corner setting, would have had sufficient heritage value to warrant potential listing of the site as a local heritage item in the LEP.
- Assessment of, and conclusions on, intactness, particularly of the dwelling's interiors, should not have been solely based on the photos provided with the sale of the property.
- Based on the expert evidence at the hearing, from the structural engineers in particular, given the state of the dwelling and the reasons for this, when considered in conjunction with the costs and impacts associated with remediation of the dwelling, the site no longer warrants listing;
- The Court did not accept that the heritage listing of the site in the LEP is certain and imminent for several reasons, including that there is expert advice now in evidence of the extent of physical deterioration of the dwelling, the reason for this, and the consequence for remediation. Such remediation would not only be at a cost not reasonable to impose on the owner but involve significant removal of original fabric such as to destroy the heritage significance of the proposed item.
- Refusal of the application on the basis of the demolition of the dwelling is not justified even with such a listing given the state of the dwelling, the cost and consequence to original fabric associated with remediation works, and the expert advice that such works may not in any event result in the dwellings retention.
- The current state of the dwelling, and the cost and impact of remediating it, reduces the heritage significance to such an extent that demolition, as proposed by the applicant, is justified.
- In circumstances where a building cannot be repaired and reconstructed so as to retain its heritage significance, and the costs of doing that work imposes an unacceptable burden on the owner, demolition should be permitted.
- Applications for future development will need to address the landscaped setting of the site, retention of trees associated with a Critically Endangered Ecological Community as listed in Schedule 2 to the *Biodiversity Conservation Act 2016*, being Sydney Turpentine-Ironbark Forest, and other significant trees as well as the ability to provide safe access, noting the concerns raised by objectors in terms of such access.

## **10.ASSESSMENT**

It is recommended that the proposed LEP amendment not be made due to:

- the extent of physical deterioration of the dwelling is extensive, with the structural engineers for Council and the land owner both in agreement that the building is structurally unsound and unsafe for occupation;
- remedial rectification works to bring the dwelling back to a habitable condition is excessive, both in terms of schedule of works and cost;
- the expert advice from the structural engineers is that the extent of the remediation works required may not in any event result in the dwelling's retention;



- it is considered unreasonable to impose a major cost burden on the owner when the experts agree that there is no guarantee that, even with the rectification works, the dwelling could be retained or the extent of its intactness;
- the loss of integrity and poor condition of the dwelling has diminished the heritage significance of the proposed item; and
- considering the current state of the dwelling, and the cost and impact of remediating it, the Department forms the view that the site no longer warrants heritage listing.

## **11. Local Planning Directions (Section 9.1 Directions)**

The proposal is consistent with relevant Local Planning Directions (section 9.1 directions).

Direction 2.3 was noted as relevant to the planning proposal at the time of issuing the Gateway determination. The Direction provides that a planning proposal must contain provisions which facilitate the conservation of items, areas, objects and places of environmental heritage significance and indigenous heritage significance.

The physical deterioration and poor condition of the dwelling and impact on the original fabric and loss of integrity has diminished the proposed item's heritage significance. Taking into consideration the dwelling's current state, as well as there being no guarantee that even with rectification works the extent of the dwelling's intactness could be retained, the Department recommends the site no longer warrants heritage listing.

Notwithstanding, the planning proposal does not detract from the heritage protection provisions which already exist within Ryde LEP 2014.

## **12. State environmental planning policies**

The proposal is consistent with all relevant State Environmental Planning Policies.

## **13. State, regional and district plans**

The North District Plan (Greater Sydney Commission, March 2018) gives effect to the Greater Sydney Region Plan, *A Metropolis of Three Cities* (Greater Sydney Commission, March 2018). The North District Plan encompasses the Ryde LGA.

*Planning Priority N6 – Creating and renewing great places and local centres, and respecting the District's heritage* is relevant to the planning proposal. The proposal is considered to be consistent with this priority as it seeks to identify and conserve environmental heritage.

## **14. MAPPING**

It is recommended that the proposed LEP amendment not be made, therefore, no mapping is required.

## **15. RECOMMENDATION**

It is recommended that the Minister's delegate as the local plan-making authority determine not to make the proposed LEP amendment under clause 3.36(2)(a) of the Act due to:

- the extent of physical deterioration of the dwelling and original fabric is substantial, to the extent impacting the building's heritage integrity and substantially diminishing the heritage significance;
- rectification works to restore the structural integrity of the dwelling so that the dwelling may be habitable are prohibitively expensive and would require so much interference with the dwelling that they would not reasonably be undertaken; and
- a recent decision of the Land and Environment Court on 13 December 2019 in relation to development application LDA2018/0340 approved the demolition of

existing structures onsite and concluded that demolition of the existing dwelling is in the public interest.



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