

## SCCPP

**TO:** Sydney Central City Planning Panel – 31 July 2018

**REPORT:** SCCPP Report - 2015SYW068

**SUBJECT:** Lot 8 DP 270668, Lot 8 Main Avenue, LIDCOMBE

**FILE No:** DA-110/2015

<b>Application lodged</b>	26 March 2015
<b>Applicant</b>	Australand Property Group
<b>Owner</b>	Australand Industrial No. 16 Pty Limited
<b>Application No.</b>	DA-110/2015
<b>Description of Land</b>	Lot 8 DP 270668, Lot 8 Main Avenue, LIDCOMBE
<b>Proposed Development</b>	Adaptive re-use of the former Nurses Quarters into 8 dwellings, including refurbishment and demolition of various minor works, construction of 2 x 3 storey residential flat buildings containing a total of 24 dwellings, basement & at-grade car parking, strata subdivision, site reshaping & benching, tree removal and associated landscaping, civil works and provision of site services (Stage 82) - Integrated Development (Heritage Act, 1977)
<b>Site Area</b>	6165.00m <sup>2</sup>
<b>Zoning</b>	Zone R3 - Medium Density Residential
<b>Disclosure of political donations and gifts</b>	Nil disclosure
<b>Heritage</b>	Heritage Conservation Area
<b>Issues</b>	Applicability of heritage incentives clause 5.10(10) of Auburn Local Environmental Plan 2010

## SUMMARY

- Development Application No. DA-110/2015 was received on 26 March 2015 for the Adaptive re-use of the former Nurses Quarters into 8 dwellings, including refurbishment and demolition of various minor works, construction of 2 x 3 storey residential flat buildings containing a total of 24 dwellings, basement & at-grade car parking, strata subdivision, site reshaping & benching, tree removal and associated landscaping, civil works and provision of site services (Stage 82)*
- The application was publicly notified to occupants and owners of the adjoining properties for a period of 30 days between 27 May 2015 and 26 June 2015. One (1) submission was received.*
- The subject site is on the NSW State Heritage Register and the integrated approval of the Office of Environment and Heritage was therefore, sought. The Heritage Council issued General Terms of Approval on 25 September 2016.*

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4. *At its meeting held on 16 March 2017 the Panel resolved to defer consideration of the application primarily to allow for legal advice to be sought with respect to reliance on Clause 5.10(10) of Auburn Local Environmental Plan 2010 (LEP), and in particular whether the building is a heritage item for the purposes of the LEP.*
5. *Legal advice has been sought and Council's solicitors have advised that the building/site is not considered to be a heritage item for the purposes of the LEP and Clause 5.10(10) cannot therefore, be relied upon to allow an otherwise prohibited development in the zone.*
6. *The application is therefore, recommended for refusal on the grounds that the proposed residential flat development is prohibited in the R3 Medium Density Residential zone.*

## REPORT

## SUBJECT SITE AND SURROUNDING AREA

The subject site is legally described as Lot 8 in DP 270668 and is known as Lot 8 Main Avenue, Lidcombe. Located on the southern side of Andrews Road, and bounded by Main Avenue to the east and Weeroona Road to the south, the site is irregular in shape and has a site area of 6, 165sqm.

There are three existing heritage buildings on the site which were formerly used as Nurses' Quarters in association with the Hospital. The buildings are each two storeys in height and are orientated towards Andrews Road. The central building (B- 72) was constructed in 1910 and the buildings either side (B-73 and B-74) were constructed in the late 1930's. A later addition to Building 72, referred to as the "Building 69 – Annex to Nurses Quarters No.1 in the Conservation Management Plan prepared by Godden Mackay Logan and dated July 2002, was demolished subsequent to consent being granted in 2011. The building's demolition has left the southern part of the site vacant. A number of significant trees are located along Main Avenue and throughout the site.

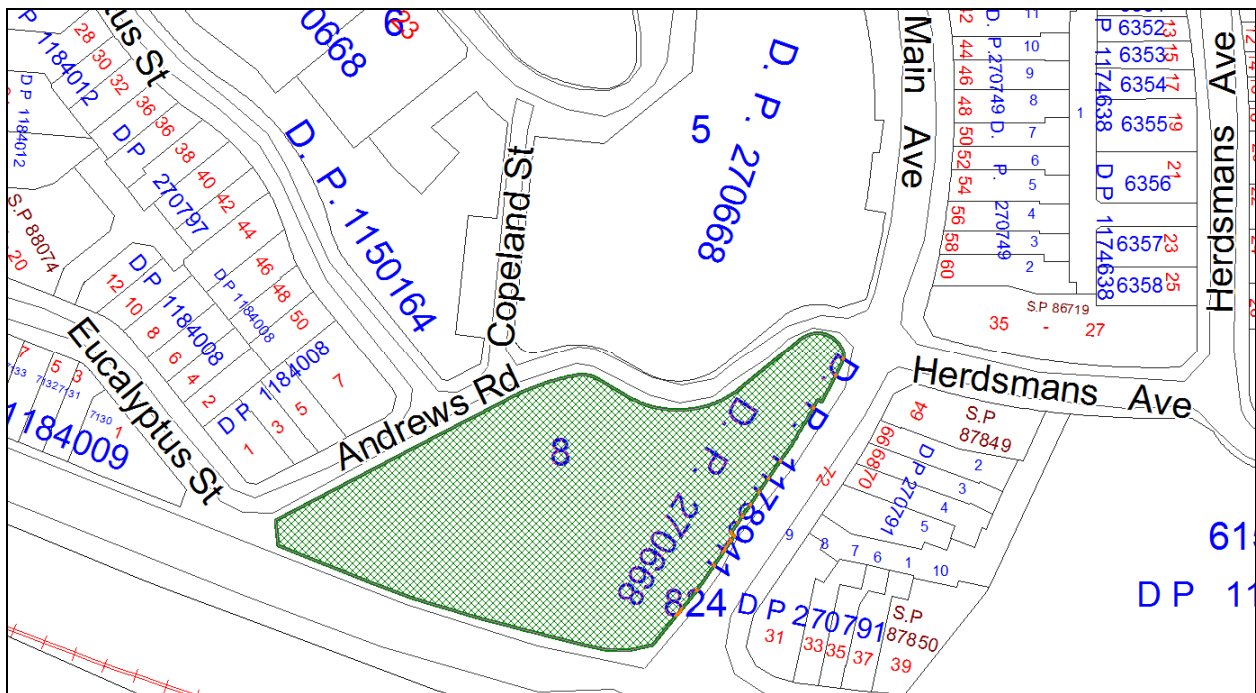


Figure 1 – Locality Plan of subject site



Figure 2 – Aerial view of subject site

The site is located within an area known as the former Lidcombe Hospital Site (named “Botanica” by the site’s developer). The former Lidcombe Hospital site is located on the eastern side of Joseph Street, Lidcombe, and is bounded by The Multiple Sclerosis Society site to the north, Ferguson Lodge, the TAFE and University campuses to the east, Weeroona Road to the south, and the EPA Research/Testing facility to the south-west. Carnarvon Golf Course is located on the western side of Joseph Street. The site is located at the southern end of the area listed on the State Heritage Register and is also within the Former Lidcombe Hospital Site Heritage Conservation Area under Auburn Local Environmental Plan 2010.

Development surrounding the site includes newly constructed multi dwelling housing to the east and north-east on the opposite side of Main Avenue; existing heritage buildings the subject of approved residential conversion, and a public reserve to the north; newly constructed multi dwelling housing to the north and north-west on the opposite side of Andrews Road; and the railway line to the south on the opposite side of Weeroona Road.

## DESCRIPTION OF THE PROPOSED DEVELOPMENT

Council has received a development application for the following works (NB: the applicant refers to the development as ‘Stage 82’):

- Demolition of intrusive building elements, conservation works and alterations to existing openings of the retained buildings known as Buildings 72, 73 and 74;
- Refurbishment of Buildings 72, 73 and 74 for residential adaptive reuse and construction of new residential flat buildings A and B with associated basement car parking;



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- A total of eight (8) new refurbished dwellings within the retained heritage buildings comprising:

*Building 72 (Residential Flat Building)*

- 4 x 3 bedroom dwellings with at grade and basement car parking;

*Building 73 (Multi Dwelling housing)*

- 2 x 3 bedroom dwellings with at grade car parking;

*Building 74 (Multi Dwelling housing)*

- 2 x 3 bedroom dwellings with at grade car parking

- A total of twenty fours (24) units within two new residential flat buildings comprising

*Building A (Residential Flat Building)*

- 12 x 2 bedroom units with basement car parking

*Building A (Residential Flat Building)*

- 12 x 2 bedroom units with basement car parking

- Construction of a basement car park comprising thirty (30) car parking spaces, bicycle, storage, plant and garbage rooms;
- Construction of sixteen (16) at grade car parking spaces, including four(4) carports;
- Tree removal and relocation, landscaping, fencing, footpath construction and associated facilities; and
- Provisions of site services and stormwater drainage.

## HISTORY

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The subject site is located within the Former Lidcombe Hospital Site Heritage Conservation Area under Auburn Local Environmental Plan (ALEP) 2010 and is also within the listing on State Heritage Register for the Lidcombe Hospital Precinct (Item No.01744). The application relied on Clause 5.10(10) *Conservation incentives* of ALEP 2010 which allows, under certain circumstances, for consent to be granted to development for any purpose of a building that is a heritage item, or of the land on which such a building is erected, that would otherwise not be allowed by the LEP.

The site is zoned R3 Medium Density Residential under ALEP 2010. In addition to the conversion of two existing buildings (Buildings 73 and 74) into multi dwelling housing, which is permissible with consent in the zone, the application also proposes the conversion of an existing two storey building (Building 72) into a residential flat building and the construction of two new

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three storey residential flat buildings. A *residential flat building* is a type of *residential accommodation* which is prohibited in the zone.

A report was referred to the meeting of, the then named, Sydney West Central Planning Panel for consideration at its meeting held on 16 March 2017 (a copy of the report is provided as an attachment). The matter was deferred for the following reasons:

1. *The Panel resolved to defer the matter for further information to be provided:*
  - i. *Written legal advice from the applicant regarding the reliance on Clause 5.10 of Auburn Local Environmental Plan 2010 (LEP), and in particular whether the building is a heritage item for the purposes of the LP. The advice is to be provided to the Council for its legal review and in turn the Council will provide this information to the Panel.*
  - ii. *In the event that advice sought in item (i) above confirms that the building is a heritage item and the development is permissible under Clause 5.10 of the LEP, the applicant be invited to submit amended plans that:*
    - a) *increase the separation distance between Building 72 and Building 73 and Building A, and Building 74 and Building B, to improve the aural and visual privacy between all buildings as well as the spatial qualities between buildings.*
    - b) *relocate the balconies of the southern units A2.4 and above and B2.1 and above to improve the separation and privacy of balconies between these units; and*
    - c) *redesign the determination of the tops of Buildings A and B to achieve a more sympathetic response to the heritage buildings.*
2. *The Panel requests that the legal advice and further report from Council is provided electronically within 28 days.*
3. *In the event that the advice is positive in confirming permissibility then the applicant is requested to submit amended drawings within a further 21 days to the Council and Heritage Office.*
4. *Following comments from the Heritage Office the Council provide a further report to the Panel, that may be able to be considered electronically.*
5. *In the event that the advice to the Panel is negative regarding permissibility, then the matter is to be reported to a publicly convened meeting of the Panel as soon as possible.*

As discussed in further detail below, the applicant submitted legal advice and Council sought a review of that advice from its own solicitors. Council solicitors considered a 'heritage conservation area' is not a 'heritage item' and that clause 5.10(10) of ALEP 2010 clearly relates only to heritage items. Furthermore, the listing of the site on the State Heritage Register does not make the site a 'heritage item' under ALEP 2010. It was therefore, concluded that the heritage incentives clause (clause 5.10(10)) of ALEP 2010 cannot be relied upon in the development application in relation to the prohibited residential flat buildings.

This advice was relayed to the applicant who then sought additional legal advice which was referred to Council's solicitors for review, whose opinion regarding the matter was not altered.

The applicant was advised accordingly and discussions have taken place regarding potential amendments to the LEP, including allowing for additional permitted uses on the site, rezoning the site to R4 High Density Residential, and listing buildings within the Former Lidcombe Hospital site

as heritage items. In a meeting held on 19 February 2018 the applicant also requested that the application be referred to the Panel for determination and advised that further legal advice would be sought. This advice has not been submitted to date.

## LEGAL ADVICE

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The applicant has provided legal advice dated 8 February 2013, accompanied by confirmation dated 29 March 2017 that the advice remains current and still stands. The justification contained in the Statement of Environmental Effects for the reliance on the conservation incentives clause 5.10(10) of ALEP 2010, which was quoted within the content of the original report to the Panel under the heading *Auburn Local Environmental Plan 2010*, appears to have been based on this advice.

In summary, it was argued that the definition of a 'heritage item' in ALEP 2010, being "*a building, work, place, relic, tree, object or archaeological site the location and nature of which is described in Schedule 5*" does not refer to any specific parts of Schedule 5, but rather it picks up the whole of Schedule 5 which includes heritage items, heritage conservation areas and archaeological sites. The argument goes on to categorise the heritage conservation area as a "place" for the purposes of the definition of "heritage item" in ALEP 2010 and, thereby, clause 5.10(10) of ALEP 2010 applies. A copy of the applicant's legal advice is provided in full as an attachment to this report.

Council subsequently sought legal advice, the response to which is provided below:-

2. *The applicant provided written legal advice ... dated 29 March 2017 and the summary of their advice is as follows:*

*Question: Do the heritage incentive provisions under clause 5.10(10) of the Auburn Local Environmental Plan 2010 (Auburn LEP) apply to the Former Lidcombe Hospital Site considering the buildings at the Former Lidcombe Hospital Site are contained within part 2 Schedule 5 of the Auburn LEP?*

*Answer: We are of the opinion that the heritage incentive provisions apply to the Former Lidcombe Hospital Site on the basis that the heritage conservation area is a "place", which includes the buildings in that place, for the purpose of the definition of "Heritage Item" under the Auburn LEP.*

**(*"the [applicant's] advice"*.)**

3. *The site for the development is located within the Former Lidcombe Hospital site which is an item on the State Register kept by the Heritage Council under the Heritage Act 1977 (listed on 24 February 2006).*
4. *The listing refers to a Local Environmental Plan listing as whole of site with specified elements. This reference is no doubt a reference to the listing of the site as a heritage group under Auburn Local Environmental Plan 2000. However, the listing changed when the LEP [ALEP 2010] commenced.*
5. *The Former Lidcombe Hospital site is listed as its own heritage conservation area under the LEP. The development site is part of this listing. No part of the Former Lidcombe Hospital site is listed as a heritage item under the LEP.*
6. *The listing of the whole of the site as a State heritage item does not make the development site a heritage item under the LEP.*

7. Clause 5.10(10) of the LEP is in the following terms:

*Conservation incentives*

*The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:*

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and*
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and*
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and*
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and*
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.*

8. The terms of this clause state that the clause applies only to:

- a) a building that is a heritage item,*
- b) the land on which such a building is erected, or*
- c) an Aboriginal place of heritage significance.*

9. Importantly the clause does not make any reference to a heritage conservation area.

10. Clause 5.10(10) is part of Clause 5.10 which is the standard compulsory heritage conservation clause from the Standard Instrument and throughout clause 5.10 there is consistent references to the following specific terms:

- a) heritage item,*
- b) heritage conservation area,*
- c) Aboriginal objects,*
- d) Aboriginal place of heritage significance, and*
- e) archaeological sites.*

11. Clause 1.4 of the LEP states:

*The Dictionary at the end of this Plan defines words and expressions for the purposes of this Plan*

*and all these terms are separately defined in the LEP.*

12. Specifically, heritage conservation area and heritage item are defined as follows:

**heritage conservation area** means an area of land of heritage significance:

- (a) shown on the Heritage Map as a heritage conservation area, and*
- (b) the location and nature of which is described in Schedule 5 and includes any heritage items situated on or within that area.*

**heritage item** means a building, work, place, relic, tree, object or archaeological site the location and nature of is described in Schedule 5.



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*Note. An inventory of heritage items is also available at the office of the Council.*

13. *In the definitions of heritage item and heritage conservation area there is a reference to Schedule 5.*
14. *Schedule 5 is titled Schedule 5 Environmental Heritage and there is a reference in the Schedule to clause 5.10. The words Schedule 5 do not appear in any of the substantive provisions of clause 5.10. The words "Schedule 5" only appears in the note under the heading of clause 5.10 as follows:*

*Note. Heritage items (if any) are listed and described in Schedule 5. Heritage conservation areas (if any) are shown on the Heritage Map as well as being described in Schedule 5.*

15. *This note makes the distinction between heritage items and heritage conservation areas listed in Schedule 5.*
16. *Schedule 5 also contains further headings as follows:*
- a) Part 1 Heritage Items,*
  - b) Part 2 Heritage conservation areas,*
  - c) Part 3 Archaeological sites.*

*Again there is the consistent distinction between heritage items and heritage conservation areas.*

17. *The Former Lidcombe Hospital site is described and identified under the Part 2 Heritage conservation area section of Schedule 5 and the whole of the site is shown with red hatching on the heritage map as per this listing.*
18. *The Former Lidcombe Hospital site is not listed as heritage items under the Part 1 heritage item section of Schedule 5.*
19. *There can be no dispute that the development site is part of a heritage conservation area and that the development site is not specifically listed as a heritage item in Part 1 of Schedule 5.*
20. *The reference to the words which is described in Schedule 5 in the definition of heritage item refers, in my opinion, to those heritage items which are described under the heading Part 1 Heritage items in Schedule 5.*
21. *Clause 1.4 of the LEP provides that the dictionary section defines words and expressions for the purposes of this plan. The words Heritage items as a heading in Schedule 5 are therefore defined by the definition of heritage item in the dictionary. There is a connection between the heading Heritage items and the description of those items as they appear in the Part 1 Heritage items list. In this way the heritage items listed under the Part 1 Heritage items are the relevant "places "as described in the definition of heritage items".*
22. *Similarly the definition of heritage conservation area refers to the heritage map and the location and nature of the areas described in Schedule 5. There is a connection between the definition of heritage conservation area and the words Heritage conservation area as they appear in the heading Part 2 Heritage conservation areas in Schedule 5. In the same way as for heritage items, the heritage conservation areas listed under the Part 2 Heritage Conservation areas are the relevant areas described in the definition of heritage conservation areas. Also the definition of heritage conservation area includes any heritage items situated on or within that area which is consistent with the distinction between heritage items and heritage conservation areas.*
23. *The result is that the matters listed under the Part 1 Heritage items section of Schedule 5 are the heritage items and the matters listed under the heading Part 2 Heritage conservation areas in Schedule 5 are the conservation areas for the purposes of the LEP (this accords with Schedule 5 having effect according to its tenor as referred to in clause 64A of the Interpretation Act).*

24. *The [applicant's] advice focuses on the definition of 'heritage item' and in particular the word 'place' in that definition. It asserts that the development site is a place as that term would ordinarily be understood. Importantly for the advice are the words which is described in Schedule 5 in the definition of heritage item. Putting these two concepts together, the assertion is that because the development site is a place which is described in Schedule 5 in the definition of 'heritage item' without any specific reference to any specific part of Schedule 5, the listing of the development site as a place in Schedule 5, irrespective of the fact that it appears under the heading of Heritage Conservation Area, means that the development site must fall within the definition of heritage item so that clause 5.10(10) becomes operative.*
25. *In my opinion the focus in the advice on the definition of heritage item in this way is not correct because this interpretation does not properly consider the text of clause 5.10(10) in its statutory context of clause 5.10, Schedule 5 and the LEP generally. In my opinion the structure of the LEP and in particular clause 5.10 is clear in distinguishing between heritage items and heritage conservation areas. Further, clause 5.10(10) clearly applies only to a heritage item and not to a heritage conservation area by its terms.*
26. *The [applicant's] advice also refers to the note to the definition of "heritage item" regarding an inventory of heritage items being available at the office of the Council. In my view this note would not particularly be relevant to the proper interpretation of clause 5.10 and any document provided by the Council in response to a request from the solicitors (as referred to at paragraph 7 of the main advice) would not alter the proper interpretation of clause 5.10.*
27. *There are two other matters to note. First, in the decision of Heatscape Pty Ltd v Mahoney (No.2) [2016] NSWLEC 45 Pepper J in a prosecution case accepted the principle that the heritage conservation areas for the Gloucester LEP were the listed areas in Part 2 of Schedule 5 of that LEP (also a standard instrument LEP – see paragraphs 153-164). While this is not directly on point the Court adopted an interpretation of clause 5.10, Schedule 5 and the definitions of heritage conservation areas and heritage items consistent with there being a distinction between heritage items and heritage conservation areas.*
28. *Secondly, if the [applicant's] advice is correct, it would have widespread implications to the consideration of heritage matters in New South Wales. Most LEPs are now standard instrument LEPs which contain the 5.10 heritage conservation compulsory clause which includes 5.10(10). The broad effect of the Corrs advice is that any allotment of land that is contained within a conservation area is in effect a heritage item because that allotment of land would be a "place". There are many local government areas that contain extensive areas identified as heritage conservation areas under the various LEPs. If clause 5.10(10) applies to every allotment of land that is in a conservation area this could potentially involve proposed prohibited development on land which, in my opinion, would not be intended to be the subject of conservation incentives under clause 5.10(10).*

The above advice was relayed to the applicant who then sought additional legal advice in response. An executive summary was provided with the applicant's advice, dated 25 July 2017, and is provided below (a fully copy of the applicant's additional advice is provided as an attachment to this report):

- 1 *The Site is located within the former Lidcombe Hospital Site, which is identified as a Heritage Conservation Area (HCA) under Part 2 of Schedule 5 of the LEP.*
- 2 *The former Lidcombe Hospital Site and the Nurses Home buildings referred to above are listed on the State Heritage Register as heritage items.*
- 3 *The three existing buildings on the Site, namely the: Nurses Home 1 (Building 72); Nurses Home 2 (Building 73); and the Nurses Home 3 (Building 74), are heritage items on the Council's heritage inventory register.*

- 4 *The definition of “heritage item” under the LEP is not confined to the items listed in Part 1 of Schedule 5. Therefore, in our view, it is reasonable to conclude that it applies to the items in Schedule 5 generally.*
- 5 *While we appreciate that an interpretation of the provision is that heritage items are buildings identified in Part 1 of Schedule 5 of the Standard LEP template, having regard to the facts in relation to the listing of this specific Site and for the detailed reasons set out in this advice, we consider it is open to the Planning panel to approve DA. 110/2015 in reliance on Clause 5.10(10) of the LEP.*
- 6 *We note that Frasers Property and Cumberland Council agreed upon the broader interpretation of the Heritage Incentive Clause in November 2013 and have proceeded with the development program for the site based upon this interpretation. The Heritage Office has also provided its support for the proposed development by the issue of General Terms of Approval.*
- 7 *As this is a unique site which contains three heritage buildings that are identified as heritage items in Council’s inventory as well as on the State Heritage Register, we do not consider that the application of clause 5.10(10) of the LEP would have any significant precedent or State-wide ramifications.*

Council’s solicitors provided the following in response to the applicant’s additional legal advice:

1. *Further to our discussion, I confirm that the further advice from [the applicant’s] lawyers dated 25 July 2017 has not changed my opinion as set out in my [original advice].*
2. *While, as a matter of merit, the hospital site or any of the buildings should be listed as a local heritage item given that they are listed as State heritage items, in my view it is reasonably clear that they are not listed as local heritage items at this stage.*
3. *Further, while this may be an oversight in the drafting of the LEP, this does not change the position in relation to the manner in which heritage items and conservation areas are listed in Schedule 5 of the LEP (and all other standard instrument LEPs).*

Based on Council’s legal advice a “heritage conservation area” is not a “heritage item” and as clause 5.10(10)) specifically states that it applies to heritage items, it does not therefore apply to the subject site so as to permit a prohibited form of development, being residential flat buildings in this instance.

## CONCLUSION

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Having regard to the relevant matters of consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*, and Council’s legal advice, it is considered that Clause 5.10(10) of Auburn Local Environmental Plan 2010 is not applicable to the development application, insofar as the site and buildings located thereon, is not a “heritage item” for the purposes of the LEP. The clause cannot therefore, be relied upon to permit a form of development that would otherwise not be allowed by the LEP which, in this instance, are residential flat buildings in the R3 Medium Density zone. It is recommended that the development application be refused.

**RECOMMENDATION**

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1. That Development Application No. DA-110/2015 for Adaptive re-use of the former Nurses Quarters into 8 dwellings, including refurbishment and demolition of various minor works, construction of 2 x 3 storey residential flat buildings containing a total of 24 dwellings, basement & at-grade car parking, strata subdivision, site reshaping & benching, tree removal and associated landscaping, civil works and provision of site services (Stage 82) - Integrated Development (Heritage Act, 1977) on land at Lot 8 main Avenue, LIDCOMBE be refused for the reason listed in the attached schedule.
2. Persons whom have lodged a submission in respect to the application be notified of the determination of the application.

**ATTACHMENTS**

1. Report referred to the Sydney Central West Planning Panel meeting held on 16 March 2017
2. Reason for refusal

**CONFIDENTIAL ATTACHMENTS**

1. Applicant's legal advice dated 29 March 2017 and 8 March 2013
2. Applicant's legal advice dated 25 July 2017