

Frasers Property Australia
Proposed development of heritage buildings in Lidcombe

Opinion

1. This advice concerns the applicability of a heritage conservation incentives provision to the proposed development of heritage buildings that were formerly part of Lidcombe Hospital.
2. My instructing solicitors, Corrs Chambers Westgarth, act for Frasers Property Australia (**Frasers**). Frasers lodged DA 110/2015 (**DA**) with Cumberland Council (**Council**) on 26 March 2015. The DA is for the proposed development of part of the former Lidcombe Hospital site on the land in Lot 8 DP 270668 known as Lot 8, Main Avenue, Lidcombe (**Site**). The DA is presently before a Planning Panel for determination.
3. In summary, for the reasons and based on the facts and assumptions set out below, in my opinion it is open to the Panel to grant consent to the development proposed by Frasers. That is, assuming that the proposed development otherwise satisfies the matters set out in clause 5.10(10) of the Auburn LEP and other applicable provisions of the LEP, it is open to the Panel to approve the DA on the basis that each of the three existing buildings is a “*heritage item*” within the meaning of the clause and, accordingly, the consent authority may grant consent to development for any purpose of the buildings or of the land on which they are erected.

Auburn LEP 2010

4. The provisions of the *Auburn Local Environmental Plan 2010* (**Auburn LEP**) generally apply to the DA. The presently relevant provisions of the Auburn LEP (that is, clause 5.10 and the definitions of heritage-related terms) are currently in the same terms as they were at the date when the Auburn LEP was made and also the date when the DA was lodged.
5. Clause 5.10 of the Auburn LEP relevantly provides:

5.10 Heritage conservation

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.

(1) **Objectives**

The objectives of this clause are as follows:

- (a) to conserve the environmental heritage of Auburn,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
- (c) to conserve archaeological sites,
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

...

(4) **Effect of proposed development on heritage significance**

The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

(5) **Heritage assessment**

The consent authority may, before granting consent to any development:

- (a) on land on which a heritage item is located, or
- (b) on land that is within a heritage conservation area, or
- (c) on land that is within the vicinity of land referred to in paragraph (a) or (b),

require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.

...

(10) **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.

6. The Dictionary in the Auburn LEP includes the following definitions:

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 conservation management plan means a document prepared in accordance with guidelines prepared by the Public Service agency responsible to the Minister administering the [Heritage Act 1977](#) that documents the heritage significance of an item, place or heritage conservation area and identifies conservation policies and management mechanisms that are appropriate to enable that significance to be retained.

heritage impact statement means a document consisting of:

- (a) a statement demonstrating the heritage significance of a heritage item or heritage conservation area, and
- (b) an assessment of the impact that proposed development will have on that significance, and
- (c) proposals for measures to minimise that impact.

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

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

heritage management document means:

- (a) a heritage conservation management plan, or
- (b) a heritage impact statement, or
- (c) any other document that provides guidelines for the ongoing management and conservation of a heritage item, Aboriginal object, Aboriginal place of heritage significance or heritage conservation area.

Heritage Map means the [Auburn Local Environmental Plan 2010 Heritage Map](#).

heritage significance means historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value.

7. The Heritage Map is a collection of eight maps that is accessible online at <https://www.legislation.nsw.gov.au/#/view/EPL/2010/616/maps>. Three of the sheets of the Heritage Map (see HER_003, HER_007 and HER_008) identify parts of the “*Former Lidcombe Hospital Site*” by red hatching, which the key indicates denotes “*Conservation area – General*”.
8. The Heritage Map also shades various other lots in the local government area in a light brown colour, which the key indicates denotes “*Item – General*”. I note that there is no light brown shaded area(s) in the area of the Former Lidcombe Hospital Site.
9. As set out above, Schedule 5 of the Auburn LEP is referred to in the definitions of “*heritage conservation area*” and “*heritage item*” and in the Note under the heading of clause 5.10.
10. Schedule 5 has the heading “*Environmental heritage*”. It contains a marginal cross-reference to clause 5.10. The Schedule has three subheadings, “*Part 1 Heritage items*”, “*Part 2 Heritage conservation areas*” and “*Part 3 Archaeological*”.

sites". There are 49 entries in Part 1, being heritage dwellings, schools, churches, memorials, trees and other items. There are two entries in Part 2, being the Former Lidcombe Hospital Site and the Silverwater Prison Complex. There are 14 entries in Part 3, being a variety of different sites within the local government area.

Background

11. I am instructed to advise in the context of the background facts set out in paragraphs 12 to 29 below.

12. The proposed development is described in summary form in the Development and Planning Register of the Planning Panels in these terms:

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 - Integrated Development (Heritage Act, 1977)

13. Three existing buildings that were formerly used as Nurses' quarters for Lidcombe Hospital are proposed to be refurbished to provide for 8 dwellings. The two proposed residential flat buildings are new buildings, which will provide for an additional 24 dwellings.

14. The Site is zoned R3 Medium Density Residential under the Auburn LEP. The Land Use Table for that zone provides that:

(a) "*Dwelling houses*" and "*Multi dwelling housing*" are among the uses that are permissible with consent in the zone; but

(b) "*Residential accommodation*" is prohibited in the zone. Residential accommodation is defined to include residential flat buildings.

15. The proposed use of two of the three existing buildings falls within the definition of multi dwelling housing. However, I am instructed that (i) after the proposed works are completed, the third existing building will be characterised as a residential flat building and is therefore prohibited development; (ii) the two proposed new buildings will also be characterised as residential flat buildings and are therefore prohibited development; and (iii) therefore Frasers seeks to take advantage of the heritage conservation incentives provided by clause 5.10(10) of the Auburn LEP for a grant of consent "*even though development for that purpose would otherwise not be allowed by*" the Auburn LEP.

16. For the purposes of this advice on the particular issue whether it is open to the Panel to consider that each of the three existing buildings is a “*heritage item*” within the meaning of clause 5.10(10) of the Auburn LEP, I am also instructed to assume that the proposed development otherwise satisfies the matters set out in clause 5.10(10) of the Auburn LEP (including the five matters set out in clause 5.10(10)(a)-(e)) and other applicable provisions of the LEP.
17. As set out above, the Note under the definition of “*heritage item*” states that “*An inventory of heritage items is also available at the office of the Council*”. I am instructed that the Council’s inventory of heritage items includes the three existing buildings on the Site that were formerly Nurses’ quarters.
18. Since 24 February 2006 the “*Lidcombe Hospital Precinct*” has been listed on the State Heritage Register. The Lidcombe Hospital Precinct includes the Site. The State Heritage Register notes that one of the former Nurses’ quarters was designed by Walter Liberty Vernon and built in 1910 (with a 1919 annex) and the other two were designed by Cobden Parkes and built in 1931 and 1939.
19. The DA was referred to the Office of Environment and Heritage. On 25 September 2016 the Heritage Council indicated that it approved the proposed development subject to conditions set out in General Terms of Approval.
20. On 16 March 2017 at a public meeting of the Sydney West Central Planning Panel, the Panel (comprising Mr Stuart McDonald, Ms Clare Brown and Ms Gabrielle Morrish) resolved to defer the matter for further information to be provided, in particular “*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 LEP*”.
21. My instructing solicitors initially advised on this matter on 8 March 2013, which was confirmed by subsequent advice dated 29 March 2017. Until March 2017, the Council accepted that the DA could rely on clause 5.10(10) of the LEP.
22. After the deferral of consideration of the DA by the Panel on 16 March 2017, the Council also sought its own advice.
23. The Council sent an email to Frasers on 4 July 2017 in which Ms Bernadette Barry provided “*Council’s legal advice*” by reproducing 31 paragraphs of advice (**Council’s Advice**). The email did not identify the firm or solicitor(s) providing the advice and I have not seen a copy of the document by which the Council’s Advice was given to the Council. I assume that the whole of the Council’s Advice was reproduced in the email.

24. Council's Advice refers to the consistent distinction between a heritage item and a heritage conservation area that is made in clause 5.10 and also in Schedule 5. Council's Advice concludes (in para 26) 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 ...*".
25. By letter dated 25 July 2017 my instructing solicitors provided a written advice to Frasers that was in turn provided to the Council and has been provided to the Panel (**Corrs Advice**). The Corrs Advice advises that the definition of "*heritage item*" in the Auburn LEP is not confined to the items listed in Part 1 of Schedule 5 and that it is reasonable to conclude that the definition applies to the items in Schedule 5 generally. The Corrs Advice also advises that it is open to the Panel to approve the DA in reliance on clause 5.10(10).
26. The Council sent an email to Frasers on 12 September 2017 in which Ms Barry reproduced three paragraphs that she states is "*the response from Council's solicitor*", which indicates that the Corrs Advice "*has not changed by opinion as set out in my email of 26 June 2017*", which I assume is a reference to the Council's Advice. Again, the email does not identify the firm or solicitor(s) providing the advice. I note that the email also states:
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).
27. On or about 19 July 2018 the Council provided a supplementary assessment report addressed to the Sydney Central City Planning Panel (**Council SAR**). The Council SAR recommends that the DA be refused (pages 2 and 11). The Council SAR indicates that "*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*" (page 2). The Council SAR reproduces paragraphs 2-28 of Council's Advice and also reproduces paragraphs 1-3 of the subsequent email from Council referred to above.

28. The Council has drafted recommended reasons for refusal of the DA, which are attached to the Council SAR, as follows:

The subject site, and buildings located thereon, is not a heritage item under Schedule 5 of Auburn Local Environmental Plan 2010 and therefore, clause 5.10(10) cannot be relied upon to allow the proposed residential flat buildings component of the development which is otherwise prohibited development within the R3 Medium Density Residential zone under Auburn Local Environmental Plan 2010.

29. The Development and Planning Register of the Planning Panels indicates that the DA is to be considered at a meeting of the Planning Panel on 31 July 2018.

Advice

30. The central question for advice is whether it is open to the Panel to approve the DA on the basis that each of the three existing buildings on the Site is a “*heritage item*” within the meaning of clause 5.10(10) of the Auburn LEP. As I have noted above, I am instructed to assume that the proposed development otherwise satisfies the matters set out in clause 5.10(10) of the Auburn LEP and other applicable provisions of the LEP.
31. In my opinion, for the four primary reasons set out below, it is open to the Planning Panel to grant consent to the DA on the basis that each of the three existing buildings on the Site is a “*heritage item*” within the meaning of clause 5.10(10) of the Auburn LEP and, accordingly, the consent authority may grant consent to development for any purpose of those buildings or of the land on which they are erected.
32. First, and most significantly, in my opinion the ordinary meaning of the words in the definition of “*heritage item*” supports the conclusion. The definition provides that “*heritage item*” means “*a building, work, place, relic, tree, object or archaeological site the location and nature of which is described in Schedule 5*”. The reference to Schedule 5 is not qualified or limited only to one part of Schedule 5. I also note that there is no provision of the Auburn LEP that requires or provides for the division of Schedule 5 into three parts. I consider that the definition is apt to refer to any “*building, work, place, relic, tree, object or archaeological site*” for which it can be said that the “*location and nature*” of the relevant thing is described in any part of Schedule 5.
33. In my opinion, each of the three existing former Nurses’ quarters is a “*building*”, “*the location and nature of which is described in Schedule 5*” by the reference in Part 2 of Schedule 5 to the Former Lidcombe Hospital Site. The definition does not require the buildings to be listed in a particular part of the Schedule or listed

under a particular sub-heading within the Schedule. Rather, the location and nature of the buildings must be “*described*” in Schedule 5, which in my opinion is satisfied by the description in Part 2 of their location (within the area “*Shown by red hatching and labelled “Former Lidcombe Hospital Site”*” in the column titled “*Identification on heritage map*”) and their nature (described as the “*Former Lidcombe Hospital Site*” in the column titled “*Description*”).

34. Secondly, in my opinion it would be artificial and not justified by the text or context of clause 5.10(10) to limit the meaning of the definition of “*heritage item*” only to those things that are described in Part 1 of Schedule 5. That is, I consider that there is insufficient reason to interpret the provision otherwise than in accordance with its ordinary meaning.
35. In this respect, it is instructive to consider the breadth of the matters referred to by the use in the definition of the words “*building, work, place, relic, tree, object or archaeological site*”. The ordinary meaning of those words, taken together, comfortably describes all of the things that are included in one or other of the three parts of Schedule 5. In particular, in my view:
 - (a) the word “*place*” is apt to refer to an area of land that has been identified as a heritage conservation area on the Heritage Map in Part 2 of Schedule 5, including the buildings and other structures upon it; and
 - (b) the term “*archaeological site*” is apt to refer to the archaeological sites that are listed in Part 3 of Schedule 5.
36. Further to (b) above, it would be an odd and artificial result if the reference in the definition of “*heritage item*” to an “*archaeological site*” described in Schedule 5 was interpreted in such a way that it did not include the archaeological sites that are described in Part 3 of Schedule 5. In my opinion, that is a strong factor indicating that the definition of “*heritage item*” should not be interpreted as limited only to the things identified in Part 1 of Schedule 5. Further, in my respectful opinion, this significant factor is not adequately addressed or explained in Council’s Advice.
37. Thirdly, I consider that the conclusion I have expressed above is supported by the application of the relevant provisions of the *Interpretation Act 1987*. The Auburn LEP is an environmental planning instrument made under the *Environmental Planning and Assessment Act 1979* and is thereby an “*instrument*” within the meaning of the *Interpretation Act 1987*.
38. Headings to Chapters, Parts, Divisions, Subdivisions and Schedules of an instrument are taken to be part of the instrument (section 35(1) of the

Interpretation Act 1987). In that respect, Schedule 5 has the heading “*Environmental heritage*”, which is a broad term that is not limited to any particular part of the environmental heritage protected by the Auburn LEP and can be considered to include specific heritage items, heritage conservation areas and archaeological sites.

39. Headings to particular provisions, marginal notes and other notes are taken not to be part of the instrument: see section 35(2) of the *Interpretation Act 1987*. Further, in my opinion, the operation of section 35(2) in this context includes that the sub-headings within Schedule 5 (that is, the identification and description of the three parts of Schedule 5) are taken not to be part of the Auburn LEP. My opinion in respect of the meaning of the definition of “*heritage item*” does not rely on the meaning or effect of any of the marginal or other notes in the Auburn LEP. Notwithstanding section 34 of the *Interpretation Act 1987*, I respectfully suggest that Council’s Advice places undue interpretative weight on the Note under the heading to clause 5.10, and the sub-headings in Schedule 5, to support the view expressed in that advice that the context of clause 5.10(10) demonstrates a consistent distinction between heritage items (that are identified in Part 1 of Schedule 5) and heritage conservation areas (that are identified in Part 2 of Schedule 5): see paragraphs 17 and 18 of Council’s Advice. The Note and sub-headings should not receive that prominence in the interpretation of the definition because they do not form part of the Auburn LEP.
40. Fourthly, I consider that the interpretation I support is consistent with the objectives of clause 5.10, which are set out in clause 5.10(1) reproduced above, and is also consistent with the aim of the Auburn LEP set out in clause 1.2(h), namely to “*identify and conserve the natural, built and cultural heritage*” of the local government area. Both the general law and the *Interpretation Act 1987* prefer a construction of a provision that would promote the objects of the instrument.
41. In providing this advice, I have been asked to consider whether the application to Frasers’ DA of the construction of clause 5.10(10) that I set out above can or would create an adverse precedent for other situations in which a proposed development seeks to rely on the conservation incentives provision. In my opinion, it would not do so because (i) the application of a provision of any LEP in accordance with its proper interpretation cannot properly be regarded as ‘adverse’ – to judge the outcome in that way would involve applying a subjective external standard, rather than applying the terms and standards set out in the instrument; and (ii) in any event, clause 5.10(10) contains its own comprehensive protections for the environment in circumstances in which the consent authority

has the power to grant consent to development that would be prohibited but for the heritage conservation incentive – in particular, the five matters that must be addressed to the satisfaction of the consent authority set out in clause 5.10(10)(a)-(e) and the application must otherwise comply with applicable provisions of the instrument.

42. Further, the circumstances of this DA appear to me to be very unusual and unlikely to operate as a precedent for other decisions. As the extract of advice from Council's solicitor referred to in paragraph 26 above indicates, there is no contest that the three Nurses' quarters buildings in question are significant heritage items (reflected in their listing on the State register) and that they appear to have been omitted by oversight from specific listing in Part 1 of Schedule 5 of the Auburn LEP as individual heritage items. Although those considerations do not have a material bearing on the proper interpretation of the relevant LEP provisions, they do suggest that the unusual circumstances of this matter are unlikely to result in ongoing or precedential effect for the determination of the DA.
43. Finally, I should record that I have carefully reviewed the Corrs Advice and the Council's Advice. I generally agree with the conclusions and reasoning in the Corrs Advice.



Richard Lancaster SC

27 July 2018