

Our ref: IRF23/2218

Ms Gail Connolly
Chief Executive Officer
City of Parramatta Council
PO Box 32
PARRAMATTA NSW 2124

Attn: Jennifer Concato
Via email: jconcato@cityofparramatta.nsw.gov.au

18 August 2023

Subject: Rezoning Review RR-2022-31 for PP-2021-3409 at 361-365 North Rocks Road, North Rocks

Dear Ms Connolly

I refer to the recent rezoning review for the above land at North Rocks and the Sydney Central City Planning Panel (the Panel) decision on this matter.

As you will be aware, the Panel's record of decision stated the Panel found that the site had potential for greater density beyond the existing R2 low density residential zoning. However, the majority of the Panel found that the proposal did not satisfy the strategic merit test as the proposed density exceeded that envisaged within Parramatta's Local Strategic Planning Statement.

Since the Panel's decision on the rezoning review for North Rocks, the Minister for Planning and Public Spaces has written to all mayors and the planning panel chairs within the six cities stating that the delivery of housing is a strategic priority for NSW. In light of this change in strategic circumstances the Department has sought to reconvene a panel to reconsider the rezoning review having regard to the capacity of the proposal to deliver housing.

In seeking to reconvene the Panel, the Department has underscored the Panel's concerns with the density of the proposal to the proponent. The Department has suggested the proponent explore opportunities to reduce density and address matters raised in the Panel's record of decision.

The Panel's secretariat will liaise with City of Parramatta Council regarding a meeting for the reconvened Panel where Council will be provided an opportunity to speak to the proposal.

Should you wish to discuss this matter further please contact Jazmin van Veen, Director Central (GPOP) on 9373 2877 or via Jazmin.VanVeen@planning.nsw.gov.au.

Yours sincerely



Leah Schramm
A/Executive Director
Metro Central and North



CITY OF PARRAMATTA

Mr Paul Scully MP
Minister for Planning and Public Spaces
Scully Office Email
office@Scully.minister.nsw.gov.au

Contact

Gail Connolly

Telephone

9806 5058

Email

gconnolly@cityofparramatta.nsw.gov.au

By email

Copy to:
Ms Kiersten Fishburn
Secretary
Department of Planning and Environment
kiersten.fishburn@dpie.nsw.gov.au

Mr Stephen Murray
Chair, Strategic Planning Panel of
Sydney Central City Planning Panel
corindiboy@gmail.com

Aiofe Wynter
Director Regionally Significant Development
Department of Planning and Environment
Aoife.Wynter@planning.nsw.gov.au

Tuesday, 19 September 2023

Dear Minister Scully

RE: Rezoning Review RR-2022-31 for PP-2021-3409 at 361-365 North Rocks Road, North Rocks

I am writing to you to express my surprise and disappointment at being notified that the Department of Planning and Environment is seeking to reconvene a panel to reconsider this Rezoning Review.

Council:

1. understands that the planning panel, in this case, the Sydney Central City Planning Panel, is responsible for undertaking the Rezoning Review, and its decision is final, with no right of appeal or other opportunity to reconvene the panel to reconsider its decision;
2. has received internal and external legal advice, confirming that the Minister or his authorised delegate do not have the power to reconvene a strategic planning panel, whether made up of the same panel members or different panel members, to reconsider the decision of the Sydney Central City Planning Panel;
3. is of the view that the intention to reconvene such a panel adversely impacts the integrity of the rezoning review process, as a whole; and
4. requests that you confirm the basis upon which you claim the necessary power exists, to direct the strategic planning panel be convened to reconsider its final decision.

Council further notes that:

5. there will not be any Council nominees able to form part of the reconvened planning panel, on the basis that all of Council's nominees were identified by the Department as being conflicted;
6. officers were only given four business days' notice of the intention to reconvene the panel; and

Contact us:

council@cityofparramatta.nsw.gov.au | 02 9806 5050
@cityofparramatta | PO Box 32, Parramatta, NSW 2124
ABN 49 907 174 773 | [cityofparramatta.nsw.gov.au](https://www.cityofparramatta.nsw.gov.au)



7. subject to the Minister identifying his power to reconvene the panel, if Council was given sufficient time, alternate Council nominees would have been nominated, who would not have been conflicted, to form part of the reconvened panel.

On these bases, Council will not be engaging any further in this Review process or attending any panel meetings until such time as it has been provided with evidence that the process the Department is undertaking is lawful.

Whilst Council acknowledges the State Government's desire to address the housing crisis, it needs to be done in a way that respects due process and the public policy principle of finality. Otherwise, the time and expense associated with local government and applicants engaging with planning panels will amount to wasted resources and will diminish the credibility of the local environmental plan making process.

I look forward to receiving your urgent response to this letter.

Yours sincerely

Gail Connolly
Chief Executive Officer

Gail Connolly
Chief Executive Officer
City of Parramatta
PO Box 32
PARRAMATTA NSW 2124
gconnolly@cityofparramatta.nsw.gov.au

Dear Ms Connolly,

22 September 2023

Rezoning Review 2022-31 for PP-2021-3409 at 361-365 North Rocks Road, North Rocks

Dear Ms Connolly,

Thank you for your correspondence on Rezoning Review 2022-31 for PP-2021-3409 at 361-365 North Rocks Road, North Rocks. The Minister and the Secretary have asked me to reply on their behalf. Council's letter and this response will be uploaded to the planning portal.

The Panel's 11 May 2023 rezoning review for this proposed planning proposal found that the site had potential for greater density beyond the existing low density residential zoning. However, the majority of the Panel found that the proposal did not satisfy the strategic merit test because of its inconsistency with Council's Local Strategic Planning Statement.

In early August, the Minister wrote to all mayors and planning panel chairs within the six cities asking that they prioritise the delivery of housing as part of merit considerations.

The urgency of addressing the housing crisis has become even more acute since then. On 16 August, National Cabinet endorsed a new national target to build 1.2 million homes over the next 5 years. This sets a NSW-specific target of up to 376,000 new homes by June 2029. Delivering this target is a priority of the NSW Government and the department is tasked with ensuring NSW meets this commitment.

I note that section 2.15(c) of the *Environmental Planning and Assessment Act 1979* specifies that one of the functions of Sydney district and regional planning panels is to advise the Minister on planning or development matters if requested to do so. In this regard, the Minister's delegate requested the Alternate Chair of the Central Sydney Strategic Planning Panel to reconsider the Panel's decision of 11 May 2023 in light of the changed circumstances, namely the Minister's request to prioritise the delivery of housing in merit considerations, and the 2029 homes target.

The advice sought was whether the proposed planning proposal should be forwarded for a gateway determination. This advice was duly sought, in light of the change of strategic circumstances outlined in the Minister's recent letter to panel chairs.

In providing that advice, the Panel would not be bound by the previous rezoning review decision of 11 May, nor would the Panel's previous decision form part of the reconvened Panel's considerations. However, for the avoidance of uncertainty, a new panel was convened consisting of members with no actual or perceived conflicts of interest in the matter.

I acknowledge there was short notice of the specifics of the meeting and the agenda of the Panel to meet to consider the proposed planning proposal.

The panel in its deliberations on 20th September acknowledged that it would benefit from hearing Council's position on the proposal. Accordingly, it resolved that it would defer the matter to enable time for Council to participate in the briefings and to nominate new local members once the panel reconvenes. The matter has now been deferred, which should provide Council with sufficient time to nominate alternate council nominees to form part of the panel.

The Department is committed to the involvement of councils in the rezoning review process. We highly value Council's involvement and time commitment to this matter. To ensure the panel benefits from Council's comprehensive knowledge of the site, we would strongly encourage you to engage in the process and nominate new council members.

Can you please advise by close of business 29 September, whether Council will participate in the Panel process. Should you have any questions, please contact me on 02 9274 6267 or malcolm.mcdonald@planning.nsw.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read "M. McDonald".

Malcolm McDonald
Executive Director, Local & Regional Planning

CC: Stephen Murray A/Chair Strategic Planning Panel

Mr Paul Scully MP
Minister for Planning and Public Spaces
Scully Office Email
office@scully.minister.nsw.gov.au

13 October 2023

Our ref EBM 236199

By email

Copy to:
Ms Kiersten Fishburn
Secretary
Department of Planning and Environment
Kiersten.fishburn@dpie.nsw.gov.au

Mr Malcolm McDonald
Executive Director, Local and Regional Planning
Department of Planning and Environment
Malcolm.mcdonald@dpie.nsw.gov.au

Dear Minister Scully

RE: Rezoning Review RR-2022-31 for PP-2021-3409 at 361-365 North Rocks Road, North Rocks

1. We act for the City of Parramatta Council (**Council**).
2. We refer to the following:
 - a) Letter from the Minister of Planning & Public Spaces, dated 5 August 2023, addressed to the City of Parramatta Lord Mayor; and
 - b) Letter from the Department of Planning and Environment dated 22 September 2023, addressed to the Council's CEO.

156446461 - 236199 (EBM)

3. We understand that your delegate or delegates within the Department of Planning and Environment is or are seeking to reconvene the Sydney Central City Planning Panel (Panel) to reconsider its decision of 11 May 2023.
4. As you are no doubt aware, that Panel was convened to consider a “rezoning review” request (RR-2022-31) by the proponent of the Planning Proposal for a site at 361-365 North Rocks Road, North Rocks (PP), that Proposal having been first lodged with the Council in May 2021.
5. The Council has already corresponded with you in respect of this matter. We refer to its letter of 19 September 2023 addressed to you.
6. As detailed in that letter, the Council does not support the actions of the Department in seeking to reconvene a further meeting of the Panel.
7. Nonetheless, the Panel did meet at the Department’s request on 26 September 2023 but, as we are instructed, then resolved to defer any decision until such time that Council is given the opportunity to brief the Panel.
8. The Council’s position is that there is no statutory basis upon which the Department or your delegate is legally able to require the Panel to reconvene for the purpose of reconsidering the determination it made on 11 May 2023; specifically, that the planning proposal lodged with the Council in May 2021 “should not proceed for a Gateway determination”, for failure to demonstrate strategic merit.
9. The Council’s position is explained below.

Statutory framework

10. There are two administrative ‘processes’ adopted by the Department intended to facilitate implementation of the provisions of Div 3.4 of Pt 3 of the *Environmental Planning and Assessment Act 1979 (EPA Act)* albeit that those ‘processes’ are not the subject of any express provisions of that Division or Part of the EPA Act. The ‘processes’ to which we refer are:
 - a) rezoning reviews; and
 - b) gateway reviews.
11. Those ‘processes’ are the subject of the following Departmental documents:
 - a) Planning Circular PS 22-003 – Independent reviews of plan-making decisions issued on 26 January 2022 (**the Planning Circular**).
 - b) The Local Environmental Plan Making Guideline published in August 2023 (**the Guideline**).

12. Under the Planning Circular and the Guideline, if a private proponent has requested that a council prepare a planning proposal for a proposed instrument, the proponent may ask for a rezoning review if:

- a) the council has notified the proponent that its request to prepare a planning proposal is not supported; or
- b) the council has failed to indicate its decision after 90 calendar days for a basic proposal and 115 calendar days for a complex proposal after the proponent submitted the request; or
- c) the council has failed to submit a planning proposal to the Department for a Gateway determination within 28 calendar days after the council has indicated its support.

The request for review is made to the Department. These reviews are allocated by the Department to the relevant Sydney district panel, the relevant regional panel or the Independent Planning Commission. As is apparent, the entitlement to review only arises in respect of a planning proposal that has first been the subject of a request made to a council.

13. Under the protocol directed by the Planning Circular and the Guideline, the Department is required to notify the council to whom the zoning proposal request was initially made upon the Department receiving a request for a rezoning review. The council is then requested to provide within 21 days:

- a) any comments and any additional information;
- b) confirmation that the proposal is consistent with the original planning proposal as requested of the council; and
- c) whether council intends to nominate itself as the planning proposal authority (**PPA**).

14. Section 3.32 (1) and (2) of the EPA Act provides:

3.32 Planning proposal authority

(1) For the purposes of this Division, the planning proposal authority in respect of a proposed instrument is as follows—

- (a) the council for the local government area to which the proposed instrument is to apply, subject to paragraph (b),*
- (b) if so directed under subsection (2)—the Planning Secretary, a Sydney district or regional planning panel or any other person or body prescribed by the regulations.*

(2) The Minister may direct that the Planning Secretary (or any such panel, person or body) is the planning proposal authority for a proposed instrument in any of the following cases—

- (a) the proposed instrument relates to a matter that, in the opinion of the Minister, is of State or regional environmental planning significance or of environmental planning significance to a district under Division 3.1,*
- (b) the proposed instrument makes provision that, in the opinion of the Minister, is consequential on the making of another environmental planning instrument or is consequential on changes made to a standard instrument under section 3.20,*
- (c) the Planning Secretary, the Independent Planning Commission or a Sydney district or regional planning panel has recommended that the proposed instrument*

should be submitted for a determination under section 3.34 (Gateway determination) or that the proposed instrument should be made,
(d) the council for the local government area concerned has, in the opinion of the Minister, failed to comply with its obligations with respect to the making of the proposed instrument or has not carried out those obligations in a satisfactory manner,
(e) the proposed instrument is to apply to an area that is not within a local government area.

15. Under what we understand to be a delegation from the Minister, a Sydney district panel has authority to appoint itself to be the PPA for the purpose of s 3.32 where a planning proposal is the subject of a request for a rezoning review. Whether, in the present case, the Panel appointed itself as the PPA or was otherwise given such appointment in respect of the May 2021 planning proposal is not known to us.
16. The Guideline further stipulates that a council cannot be appointed as the PPA if it did not initially support the planning proposal. This is to avoid any conflicts that may arise and ensure efficiency and resolution of matters.
17. At its meeting on 28 November 2022, the Council resolved to refuse the May 2021 Planning Proposal (**PP**).
18. To determine whether a proposal should proceed to a Gateway determination under s 3.34 of the EPA Act, the proposal is to be assessed by a council or a reviewing panel as to the proposal's strategic merit, having regard to the matters outlined in Section 2, Part 3 of the Guideline. According to the Guideline, the 'Strategic Merit Test' requires assessment of the proposal so as to determine if it:
 - a) gives effect to the relevant regional plan outside of the Greater Sydney Region, the relevant district plan within the Greater Sydney Region, and/or corridor/precinct plans applying to the site. This includes any draft regional, district or corridor/precinct plans released for public comment or a place strategy for a strategic precinct including any draft place strategy; or
 - b) demonstrates consistency with the relevant local strategic planning statement or strategy that has been endorsed by the Department or required as part of a regional or district plan or local strategic planning statement; or
 - c) responds to a change in circumstances that has not been recognised by the existing strategic planning framework.
19. If the proposal meets the Strategic Merit Test, the council or the reviewing panel is next required to determine whether the proposal has "site-specific merit". This involves consideration of the following:
 - a) the natural environment on the site to which the proposal relates and other affected land (including known significant environmental areas, resources, or hazards);
 - b) the built environment, social and economic conditions;
 - c) existing, approved and likely future uses of land in the vicinity of the land to which the proposal relates; and/or

- d) services and infrastructure that are or will be available to meet the demands arising from the proposal and any proposed financial arrangements for infrastructure provision.
20. According to the Planning Circular and the Guideline, planning proposals that, in the opinion of the assessing council or reviewing planning panel, do not reasonably meet the strategic and site-specific assessment criteria, will not be able to proceed to Gateway determination. On 11 May 2023, the Panel determined that the PP should not be submitted for a Gateway determination on the basis that the PP, as then formulated, did not demonstrate strategic merit.
21. The Planning Circular and Guideline reflect the prospect that a reviewing panel may recommend conditions to be included in the proposal to be forwarded to the Minister for Gateway determination under s 3.34 of the EPA Act. Alternatively, the reviewing panel may recommend changes to the planning proposal based on site-specific matters that will result in substantially the same proposal being advanced. Where such changes are suggested, the Guideline allows of the reviewing panel that it seek the “feedback” of both the council to whom the planning proposal was made and also from the proponent, before that panel resolves its position. However, these options are only available to a reviewing panel where it has first found that a planning proposal has strategic merit but changes to the planning proposal are required to achieve site-specific merit.
22. In the present case, the Panel neither formulated any conditions upon which the planning proposal might advance to the s 3.34 stage nor did it formulate any amendment to the proposal for consideration by either the Council or the proponent. We would presume this to be on the basis that the Panel determined that the PP did not demonstrate strategic merit.
23. Under s 3.35(1) of the EPA Act, the PPA may also vary a planning proposal, provided the proposal is substantially the same, does not increase the scale and intensity, or the variation results in a reduced environmental impact. The scheme of Div 3.4 of Pt 3 of the EPA Act suggests that this power may only be exercised, once the planning proposal has been submitted to the Minister pursuant to s 3.34(1).
24. Coinciding with the Panel’s determination on 11 May, the Acting Chair of the Panel, wrote to the Council’s Chief Executive Officer that same day, informing of the determination made by the Panel, that the PP “should not be submitted for Gateway determination because the proposal has not demonstrated strategic merit”. In that letter, the Acting Chair added: “[t]his decision is final and there are no opportunities for it to be reconsidered or challenged on its merits”. By reason of that decision, the planning proposal submitted to the Council in May 2021 has not been forwarded for the Minister’s determination under s 3.34 of the EPA Act.
25. The finality of the Panel’s decision on 11 May 2023 is reflected in an entry on the NSW Planning Portal. Under the NSW Government logo and heading “Planning Proposal Online”, the text of that entry records the “recommendation” of the Panel that the proposal “not proceed”. The text continues –

“The Department of Planning and Environment has confirmed that decision. The Rezoning Review request and the related Planning Proposal are now closed.”

Powers of the Minister

26. The statutory process under Div 3.4 of Pt 3 of the EPA Act for the making of local environmental plans (including their amendment) relevantly involves two entities, each exercising a different function. Relevant to the present circumstances, these entities are:

- 1) the “plan making authority”, being the Minister (s 3.31(3)); and
- 2) the “planning proposal authority”, being the council or, if the council is not supportive of the application, as in the present case, a Sydney district panel appointed by the Minister under s 3.32.

27. It is the function of the PPA to determine if a proposal is to be forwarded to the Minister for Gateway determination. Once the PPA has made its decision whether or not to forward the proposal, it has completed the exercise of its function under ss 3.32 and 3.33. If the PPA decides not to forward the proposal, that is the end of the application and if the proponent wishes to have the matter reconsidered, a new proposal will need to be submitted.

28. The Minister has broad powers conferred under s 3.34 of the EPA Act to review and determine the following:

- a) whether the matter should proceed (with or without variation),
- b) whether the matter should be resubmitted for any reason (including for further studies or other information, or for the revision of the planning proposal),
- c) the minimum period of public exhibition of the planning proposal (or a determination that no such public exhibition is required because of the minor nature of the proposal),

Note—

Under Schedule 1, the mandatory period of public exhibition is 28 days if a determination is not made under paragraph (c).

- d) any consultation required with State or Commonwealth public authorities that will or may be adversely affected by the proposed instrument,
- e) whether a public hearing is to be held into the matter by the Independent Planning Commission or other specified person or body,
- f) the times within which the various stages of the procedure for the making of the proposed instrument are to be completed,

- g) if the planning proposal authority is a council—whether the council is authorised to make the proposed instrument and any conditions the council is required to comply with before the instrument is made.
29. However, these powers are only engaged once the PPA has “forwarded” a proposal to the Minister under s 3.34(1). Where no such event has occurred, the Minister has no statutory power to make any directions or decisions with respect to that proposal of the kind identified in that section.
30. We acknowledge that the Panel can be requested to advise the Minister “as to planning or development matters” pertinent to the area for which the Panel is constituted (s 2.15(c)). However, in providing advice following a request made under s 2.15, the Panel would not be exercising its function as the PPA for a particular planning proposal. In the present case, the proposal has been determined in the terms earlier quoted, with the consequence that the Minister’s functions under s 3.34 are not engaged.
31. The Minister is seeking to direct the Panel to reconsider its 11 May determination, by reviving the process under ss 3.32 and 3.33, in the absence of any statutory basis upon which to do so. That said, there is nothing preventing the proponent from lodging a new proposal with the Council. No doubt, any such proposal will seek to address the “housing crisis” to which the Minister’s letter of 5 August refers and weigh that consideration with the other considerations that bear upon both the strategic merit as well as the site-specific merit of the new proposal. Any new proposal will be assessed in accordance with the process outlined under Div 3.4 of Part 3 of the EPA Act. The fact that the Minister’s correspondence as well as that received from the Department since May, bringing attention to the “housing crisis” as relevant to the consideration of a planning proposal, identifies an issue not previously brought to bear either by the proponent or any planning authority that considered the May 2021 proposal. That circumstance makes abundantly clear that a new proposal is required if a rezoning of the North Rocks site is to be pursued.
32. Further, s 2.12(3) of the EPA Act expressly states that a Sydney district or regional planning panel is not subject to the direction or control of the Minister, except in relation to directions given under s 9.1. Section 9.1 of the EPA Act relevantly provides:
- (1) The Minister may direct a public authority or person having functions under this Act or an environmental planning instrument to exercise those functions at or within such times as are specified in the direction.*
- (2) In addition to any direction which may be given under subsection (1), the Minister may direct a council—*
- (a) to exercise its functions under section 3.21 or Division 3.4 of Part 3 in relation to the preparation of a local environmental plan in accordance with such principles, not inconsistent with this Act, as are specified in the direction, and*
- (b) without limiting paragraph (a), to include in a planning proposal prepared by the council provisions which will achieve or give effect to such principles or such aims,*

objectives or policies, not inconsistent with this Act, as are specified in the direction, and

(b1) on a matter relating to the establishment and procedure of a local planning panel, on the development applications (including applications to modify development consents) that are to be determined on behalf of a council by a local planning panel and on the planning proposals that are required to be referred to a local planning panel for advice, and

(c) to provide the Minister, in the manner and at the times specified in the direction, with reports, containing such information as the Minister may direct, on the council's performance in relation to planning and development matters.

(2A) A direction under subsection (2)—

(a) may be given to a particular council or to councils generally, and

(b) may require the inclusion in planning proposals of provisions to achieve or give effect to particular principles, aims, objectives or policies, and

(c) may require planning proposals to be strictly consistent or substantially consistent with the terms of the direction (or provide for the circumstances in which an inconsistency can be justified).

Any such direction may be given to councils generally by its publication in the Gazette or on a website maintained by the Department (or both).

(2B) A reference to a council in subsections (2) and (2A) includes a reference to a planning proposal authority under Division 3.4 that is not a council.

(3) A public authority or person to whom a direction is given under subsection (1) or (2) shall comply, and is hereby empowered to comply, with the direction in accordance with the terms of the direction.

33. We are not aware of any such Ministerial Direction having been issued that would empower the Minister to direct the Panel to revisit its decision of 11 May last.


Next Steps

34. For these reasons, it is our opinion that the Minister, by himself or through his delegate, does not have the power to reconvene the Panel, whether constituted by the same or different panel members, to reconsider the decision on the Panel made on 11 May 2023 in respect of the May 2021 planning proposal for the North Rocks site. Despite repeated requests from the Council, the Department has failed to identify the statutory power under which that action purports to have been taken. We again seek a response to this request.

35. As indicated at the outset of this letter, we understand that the Panel meeting of 20 September 2023, convened by direction from the Department, is adjourned until Council has been given the opportunity to respond.
36. We are instructed that the Council did not have any delegates in attendance at the Panel meeting of 20 September 2023. Given the adjournment of the panel meeting and rescheduling of another panel meeting on 31 October 2023, we require a response to this letter by no later than 20 October 2023.
37. Council will consider taking legal action in the event that the Panel proposes to proceed with its reconsideration of the decision made by it on 11 May 2023 in respect of the May 2021 planning proposal, or the Minister, by himself or his delegate, persists with the direction that the Panel continue to undertake that reconsideration.
38. Finally, we reiterate the Council's desire to avoid potential legal action. For this reason, while it is ultimately for the proponent of the planning proposal, the Council notes that agitation of the issues raised by us through potential legal action, with its attendant costs and use of resources, can be avoided by the proponent lodging with the Council a new planning proposal.

Yours faithfully

Bartier Perry



Dennis Loether | Partner

D 8281 7925 **F** 8281 7838 **M** 0402 891 641
dloether@bartier.com.au



Emily McKillop | Lawyer

D 9259 9638 **F**
EMcKillop@bartier.com.au