

## **KU-RING-GAI COUNCIL**

### **ADVICE REGARDING LIKELY OPERATION OF THE PROPOSED TRANSPORT ORIENTED DEVELOPMENT PROGRAM AND CHANGES TO CREATE LOW AND MID-RISE HOUSING**

1. The state government has published some preliminary materials in support of two proposed new State Environmental Planning Policies, dealing respectively with transport oriented development and changes to encourage the creation of low and mid-rise housing. Council is concerned to understand the likely interaction of those policies, if enacted, with existing development controls in those parts of the LGA would fall within the two policy proposals. In particular, Council is concerned to understand how the policies may interact with the planning controls that apply in heritage conservation areas. I am instructed that significant parts of the land that will be affected by both policies in the vicinity of four railway stations in the LGA fall within existing heritage conservation areas.

#### **Summary of conclusions**

2. It is not possible to express firm conclusions, because of the lack of detail of the proposed policies particularly in relation to transport oriented development. But using the available information, my conclusions are:
  - (i) The proposals will have a significant impact on future development in the affected areas, and will greatly reduce Council's ability to maintain the values reflected in the heritage conservation area listings.
  - (ii) Some existing planning controls in those areas, including minimum lot sizes and prohibitions on multi-occupancy, will be wholly disappplied. In effect, most protections for heritage or environmental values in the HCA's which are currently reflected in prohibitions on types of development will instead be protected only as considerations in a merits review.
  - (iii) Other existing planning controls, including Part 5.10 of the Ku-ring-gai Local Environment Plan, will continue to apply and to be required to be taken into account in assessing development proposals. However, a consent authority or the Court on appeal will also be required to take into account the fact that new types of housing, multi-occupancies, much smaller lot sizes and significantly

greater height and FSR restrictions are now expressly permitted in the relevant areas. A consent authority will not be able to apply Part 5.10, or any other provision of the LEP, mechanically but will need to assess those matters in balance with the relevant proposed policies.

- (iv) Overall, it appears inevitable that the character of the built and natural environment in the affected areas will change significantly and that neither the consent authority nor local residents will be able to prevent such changes.

### Summary of the two policies

3. The NSW government published a discussion paper regarding its Transport Oriented Development (TOD) program in December 2023. It identifies 39 transport hubs, four of which appear to fall within the Ku-ring-gai LGA and proposes that *“housing at these locations will benefit from an assessment pathway to create faster approvals”*. The policy will apply within 400 metres of each of those locations. It appears that if any part of a particular lot is within the 400 metre boundary, then the policy would apply to the whole of that lot. The express purpose of the policy is to permit a large number of new homes to be developed which, by implication, would have been unlikely to be approved under the previous planning regime.
4. The principal changes proposed within that 400 metre boundary are that residential apartment buildings will be permitted in all residential zones (R1, R2, R3 and R4) as well as in local and commercial centres (E1 and E2). New planning controls will include a maximum building height of 21 metres (approximately six storeys), a floor space ratio of 3:1 and the disapplication of any minimum lot sizes or lot widths. There are also to be new design criteria. A statement in the published document says that *“A merit based assessment will continue to apply to developments in the 31 TOD-SEPP locations<sup>1</sup>. Relevant environmental controls will apply to the extent they are not inconsistent with the new standards.”*
5. The document also expressly states that the proposed changes will result in significant change in heritage conservation areas that fall within the 400 metre radius, and that the character of those locations will “evolve”. Again, there is a statement that the new planning controls will have priority over relevant heritage controls.

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<sup>1</sup> The reference to ‘31’ is because eight locations are dealt with separately. All Ku-ring-gai locations are included in the 31, not in the eight.

6. There is a suggestion that the TOD-SEPP controls will cease to apply in any of the relevant areas if the local council completes a strategic planning and re-zoning process that results in zoning and planning controls for those areas at least equal to those in the SEPP.
7. Also in December 2023, the Department of Planning and Environment published a document titled “*Explanation of intended effect: Changes to create low and mid-rise housing*”. Again, it proposes centrally mandated amendment to what would otherwise have been locally approved planning controls in station and town centre precincts.

Key proposals include:

- (i) Residential flat buildings will be permitted in all medium density zones within station and town centre precincts. A station precinct is defined as meaning an area within 800 metres walking distance of a railway station.
- (ii) New non-refusal standards will apply within those zones, unless an area is zoned for low density residential. Those new non-refusal standards will overrule LEP or DCP provisions. A development proposal that complies with the new standards must not be refused on those grounds.
- (iii) The new building controls proposed by those standards will vary according to the distance from the station or commercial centre. Within 400 metres they would be 21 metres and an FSR of 3:1, and outside the 400 metre area a maximum of 16 metres and an FSR of 2:1.
- (iv) Minimum site areas and width standards in LEPs would be “turned off”. In other words, there would be no minima.
- (v) In low density zones within station or town centre precincts, multi dwelling houses and “manor houses” will be permitted with consent. An expanded definition of “manor house” is proposed so that it will apply to any two-storey residential flat building and not be limited by number of dwellings. In those low-density areas, new building controls will apply, generally of a 9.5 metre height limit and a 0.7:1 FSR. Minimum site areas and minimum widths will be retained.
- (vi) Dual occupancies will be permitted within all low density residential zones, not just those falling within station or town centre precincts.

8. I have been provided with notes of a meeting held between Council representatives and Department of Planning Housing and Infrastructure to discuss the transport oriented development program. It largely confirms the matters set out above, including that there is not intended to be any specific heritage control in the TOD-SEPP, and that heritage matters will need to be reflected through merits assessment. They are quoted as saying that “*the policy wants to ensure that heritage does not continue to stop development*”.

### **Likely course of development assessment post-implementation**

9. As I understand the situation, no part of the Ku-ring-gai local government area falls within the eight zones for Part 1 of the proposed TOD-SEPP. Rather, four stations in the LGA fall within Part 2. These are Roseville, Gordon, Killara and Lindfield. The result is that a proposed new application of the state significant development approval pathway will not apply in the Ku-ring-gai LGA. Applications for consent for development of the types of housing newly permitted by the two proposed SEPP's will be made in the first instance to Council which will conduct a merits assessment in accordance with s.4.15 of the EPAA. Consequently, the provisions of the Ku-ring-gai LEP will continue to apply in accordance with s.4.15(1)(a)(i). The general obligation of a consent authority to consider the likely impact of the development, including environmental impacts and social and economic impacts, and the suitability of a site for the development, will also continue to apply. There will be two significant changes however to the manner of application.
10. First, the intention appears to be clear that provisions of environmental planning instruments that are more restrictive than the new SEPP controls will be automatically and wholly disapplied. Examples would include minimum lot sizes and prohibitions on lot occupancy currently contained in the zoning table for zone R2 in the Ku-ring-gai LEP<sup>2</sup>. The second is that in the process of the multi-factoral merits based assessment required under the EPAA, significant and weighty new factors will have been added to the balance weighing in favour of development approval. That is, the land will have been declared by a State Environmental Planning Policy to be at least potentially suitable for the proposed development. A person assessing environmental

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<sup>2</sup> The position in Zone R1 (low density) is less clear. The low and mid-rise policy would leave the minima in place, the TOD-SEPP proposal would remove them. The result appears to be that they will not apply within 400 metres of the station but will apply in the 400-800 circle.

and social impacts will be required to assess them against a background assumption that the relevant precinct is one in which development of that type is permitted and indeed encouraged by relevant planning policy. That is likely to very strongly move the merit based assessment in favour of approval.

11. That conclusion is strengthened by the fact that on every occasion when the government's documents address the question of hierarchy or prioritisation between existing locally opposed planning controls and the controls to be introduced by these policies, the statement is that the new policies will prevail. There is already a "general presumption" that a SEPP prevails over an LEP found in *EPAA* s3.28. It is open to the government to go further and specify in either or both of the new SEPPs that they will always prevail over and LEP. Even if that is not done, a person conducting the merits assessment will be obliged to keep in mind that that is a stated policy of the state's planning laws.
12. Turning specifically to the issue of heritage conservation areas, I have not identified any part of clause 5.10 of the LEP that will be automatically "switched off" by the new controls. Therefore, where a heritage conservation area overlaps with a TOD zone or a station or town centre precinct, clause 5.10 will continue to apply. Consent in accordance with that clause will still be required for the construction of any building on land in the heritage conservation area or for sub-division of land. The consent authority will continue to be obliged to consider the effect of the proposed development on the heritage significance of the area concerned. However, the government's discussion papers are explicit in saying that the intensification of housing in the identified precincts is to have priority over maintenance of area heritage values. Again, the person assessing the effect of the proposed development on the heritage significance of the area must do so against the underlying fact that whatever its heritage character, the area is one in which residential flat buildings of up to six storeys are permitted. The consent authority will not be prohibited from refusing development on the basis of unacceptable impact on heritage value, but must anticipate that such a refusal will be significantly less likely to be upheld on appeal in light of the new SEPP provisions.
13. Very similar considerations apply to other values typically associated with low rise large allotment housing areas. These include retention of viable trees, consideration of the landscape and of view sharing, and protection of the natural environment. All

will remain proper matters for consideration in the merits review, but none will be able to be applied without consideration of the countervailing fact that multi-occupancy, reduced lot sizes and residential flat buildings are all deemed suitable for the locality. In particular, the increased floor space and height limits permissible in the inner, 400 metre, radius must almost certainly be interpreted as intended to take priority over landscaping and visual immunity values, at least to some extent. Similarly, in permitting residential flat development and significantly increased floor space ratios, the policy must be interpreted as contemplating and intending a greater degree of tree removal. That is because it must inevitably be easier to design and construct single dwelling, low-density residential structures without such an impact on the natural environment, than it is to construct residential flat buildings. Again, it must be anticipated that the ability of a consent authority to prioritise tree retention, the landscape or the natural environment will be significantly reduced by the changes.

14. In reaching that conclusion, I have not overlooked that the ADG is intended to continue to apply and regulate the construction of apartment buildings. It of course contains provisions dealing with the natural environment, with tree retention and with landscaping. That does not alter my conclusion that the ability of consent authority to prioritise or protect those values will be reduced by the adoption of the new policies. Anyway the ADG is always subject to review and to amendment without local democratic input such as occurs when an LEP is promulgated or replaced.



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2 February 2024