



PLANNING PROPOSAL

**ROSE BAY UNITING CHURCH AND WESLEY HALL
518a OLD SOUTH HEAD ROAD ROSE BAY**

**REQUEST BY WOOLLAHRA COUNCIL
FOR REVIEW OF GATEWAY DETERMINATION**

27 September 2018

1. Details of planning proposal, gateway determination and review

Relevant planning authority	Woollahra Council
Planning proposal	List the Rose Bay Uniting Church and Wesley Hall at 518a Old South Head Road Rose Bay as a local heritage item in Schedule 5 of Woollahra LEP 2014.
Department reference	PP_2018_WOOLL_001_00
Gateway determination date	16 August 2018
Gateway determination signature	Amanda Harvey Director, Sydney Region East Planning Services Department of Planning and Environment Delegate of the Greater Sydney Commission
Council's intention to request review	24 August 2018
Alteration sought	Delete condition 1 of the determination
Reason for review	The determination imposes requirements (other than consultation requirements) or makes variations to the proposal that the Council thinks should be reconsidered.

2. Introduction

On 24 August 2018 the Council wrote to the Department of Planning and Environment indicating its intention to request a review of the gateway determination for a planning proposal to list the Rose Bay Uniting Church and Wesley Hall at 518a Old South Head Road Rose Bay as a local heritage item in Schedule 5 of Woollahra LEP 2014. The gateway determination was issued on 16 August 2018.

Woollahra Council now requests a review of the gateway determination with the purpose of deleting condition 1 which states:

The planning proposal is to be updated to include a reference to a savings provision to apply to any development application lodged but not determined.

In light of this request, the Council also asks that reconsideration be given to the granting of a written authorisation for the Council to exercise the functions of the Minister for Planning under section 3.36 of the *Environmental Planning and Assessment Act 1979* (the Act).

In preparing this request the following documents have been accessed and considered:

- Department of Planning and Environment, 16 August 2018, Gateway Determination Report, Laura Locke and Amanda Harvey
- Gateway Determination, 16 August 2018, signed by Amanda Harvey, Director Sydney Region East, Planning Services
- Department of Planning and Environment, August 2016, *A guide to preparing local environmental plans*
- Department of Planning and Environment, August 2016, *A guide to preparing planning proposals*
- Planning Circular 16-004, *Independent reviews of plan making decisions*, issued 30 August 2016.
- Australia ICOMOS, October 2013, *The Burra Charter*

- Robert A Moore Pty Ltd, March 2018, Rose Bay Uniting Church and Wesley Hall Group Heritage Significance Assessment
- Robert A Moore Pty Ltd, March 2018, Heritage Data Form – Rose Bay Uniting Church and Wesley Hall Group

3. Background

3.1 Assessment of heritage significance

On 18 December 2017 the Council adopted two notices of motion requiring the investigation of heritage significance for the Rose Bay Uniting Church and Wesley Hall. To undertake that investigation the Council engaged Robert A Moore Pty Ltd: Heritage Architect and Heritage Consultant.

The assessment of heritage significance was undertaken using the guidelines and criteria contained in the publication *Assessing Heritage Significance*, 2001, published by the NSW Heritage Office.

The landowners and/or their consultants were involved in the process at particular stages including:

- Notice of the Council’s initial decision made on 18 December 2017.
- A site inspection with the Council’s heritage consultants on 8 February 2018.
- Invitation on 4 April 2018 to comment on the draft report and draft heritage data sheets prepared by Robert A Moore.
- Attendance at the Council’s Environmental Planning Committee meeting on 7 May 2018.
- A site inspection with members of the Woollahra Local Planning Panel on 5 July 2018.
- Attendance at the Woollahra Local Planning Panel meeting on 5 July 2018.

The above points clearly indicate that the process conducted by the Council has been an open one whereby the landowners and/or their consultants have been actively engaged.

The assessment report concluded that:

the property meets the threshold for LEP heritage listing on historical, associational, aesthetic and social values, and that it is a representative of the type of property once well represented and common, but now becoming uncommon on a local level. Further research and analysis may also identify research and rarity values. (p.46)

The report recommended that the church and hall be listed as a group heritage item in Schedule 5 of Woollahra LEP 2014.

The statement of significance provided in the report and data sheets is:

The Rose Bay Uniting Church group, formerly the Rose Bay Methodist Church, and associated Wesley Hall, and their site at the corner of Old South Head and Dover Roads, is of local heritage significance for its historic, aesthetic social and associative values within the Rose Bay locality. Retaining a high degree of authenticity and integrity, and including an associated moveable heritage collection, the group is of significance as the site of the first Methodist church in the area, constructed and extended by the Methodist community as the suburb around it was established and quickly developed.

Reflecting three phases of development by successive notable architects, the complex began with the initial church designed by A. L and G McCredie and Sons (1904), which was extended in 1924 by architect Dallas E Walsh, and then complemented by the Wesley Hall designed by architect Byera Hadley (later the donor of the Byera Hadley Travelling Scholarship) in 1929. The buildings are complemented by supporting documents and records, and a moveable heritage collection of furnishings and church furniture.

A local landmark and well known community complex, significant to the Methodist community and their successors the Uniting Church, the group illustrates the role of ecclesiastic architecture in local development and community life in late 19th century and early 20th century NSW, with successive architects contributing to the staged, harmonious completion of a church complex providing for religious worship and education in Australian communities, before the advent of the more secular lifestyles of the succeeding late 20th century. (pp.45-46)

The assessment report and the heritage data sheets are provided as part of the planning proposal.

3.2 Woollahra Local Planning Panel

The planning proposal was considered by the Woollahra Local Planning Panel at its meeting on 5 July 2018 in accordance with the Local Planning Panels Direction – Planning Proposals issued by the Minister for Planning on 23 February 2018. Prior to the meeting the Panel inspected the site and the two buildings.

The Panel provided the following advice to the Council:

THAT Council reaffirm its decision of 21 May 2018 as follows:

- A. THAT Council prepare a planning proposal to list the Rose Bay Uniting Church and Wesley Hall Group at 518a Old South Head Road, Rose Bay as a heritage item in the Woollahra Local Environmental Plan 2014.*
- B. THAT the planning proposal describes the item as follows: Rose Bay Uniting Church and Wesley Hall Group - church and interiors (including moveable heritage, vestry and 1924 additions), Wesley Hall and interiors.*
- C. THAT the planning proposal be forwarded to the Greater Sydney Commission requesting a gateway determination to allow public exhibition.*

- D. *THAT when requesting a gateway determination for the planning proposal, the Council seek delegation of the plan-making steps under section 3.36 of the Environmental Planning and Assessment Act 1979.*
- E. *The Panel endorses the decision on 21 May, 2018 and recommends that the applicant prepare a conservation management plan for the property as soon as possible.*

3.3 DA160/2018/1 – appeal to the Land and Environment Court

DA160/2018/1 was lodged with Council on 20 April 2018 after Council had commenced investigation of the heritage significance of the buildings. The DA sought consent for:

- Demolition of the Wesley Hall.
- Substantial demolition of the Church leaving a portion of the 1905 Church building.
- Demolition of other structures on the site.
- Removal of existing vegetation.
- Construction of a four story shop top housing development comprising ten residential apartments above two retail units and a community space.
- Re-use of the remaining section of the church incorporating an open courtyard.
- Construction of two basement car parking levels.
- Landscaping and associated site infrastructure works.

A Class 1 appeal was lodged with the Land and Environment Court on 22 June 2018 against the deemed refusal of the DA. The orders sought were that the appeal be upheld and consent be granted to the DA.

Advertising and notification of the DA resulted in a petition with 948 signatures of people opposing the development proposal and 34 letters of opposition. There was one letter of support.

The DA was considered by the Woollahra Local Planning Panel on 16 August 2018. The Panel refused the DA for 33 reasons. The following three reasons are particularly relevant:

3. The proposal is inconsistent with aims (b), (e), (f), (g), (j) and (l) under Part 1.2 of Woollahra LEP 2014. [aim (f) is “to conserve built and natural environmental heritage”]
9. Due to the extent of demolition the integrity of the original church building and Wesley Hall will be severely and irrevocably compromised. This will remove a local landmark which contributes to the Rose Bay precinct. The subject buildings are the subject of a planning proposal for inclusion as a heritage item under Schedule 5 of Woollahra LEP 2014, which has been referred to the Department of Planning and Environment for a Gateway Determination.
15. The proposed development is inconsistent with the desired future character of the Rose Bay South Centre under Part D2.4.2 of Woollahra DCP 2015 in that the proposal will compromise the significance of the site as a ‘local landmark’ and will detract from the amenity of the adjoining Rose Bay residential centre.

4. Justification for alteration to gateway determination

The Council requests that the gateway determination issued on 16 August 2018 be altered by deleting condition 1. The reasons for this alteration are:

- (a) The condition has the potential to nullify the purpose of the planning proposal.
- (b) The imposition of the condition is unreasonable, not for a proper planning purpose and takes into account an irrelevant consideration.
- (c) The condition has the potential to subvert the proper and well-established practice for managing the heritage significance of heritage items.
- (d) The condition contradicts the predominant support for the planning proposal provided in the DPE's gateway determination report.
- (e) The condition will set a precedent for similar planning proposals thereby undermining the process for protecting heritage significant buildings.
- (f) The condition has likely implications for the use of interim heritage orders.
- (g) The DPE erred in not obtaining advice from the Office of Environment and Heritage on the impact of condition 1.

4.1 The condition has the potential to nullify the purpose of the planning proposal

The purpose of the planning proposal is to list the Rose Bay Uniting Church and Wesley Hall Group as a local heritage item in Schedule 5 of Woollahra LEP 2014. The intention, therefore, is to provide ongoing protection and recognition of the heritage significance of the buildings, including their interiors and moveable heritage. The moveable heritage includes furniture and fittings within the church and Wesley Hall such as the stained-glass windows, pews, original font and the preacher's rostrum said to be from the first Methodist Church in Australia.

Condition 1 has the potential to nullify the precise intention of the planning proposal, namely the protection and conservation of the buildings. Irrespective of the current DA which is the subject of the appeal, condition 1 has the effect of allowing any DA lodged but not determined before the heritage item is formally listed in Woollahra LEP 2014 to be assessed and determined without consideration of the heritage conservation provisions contained in clause 5.10 of Woollahra LEP 2014. Condition 1 is therefore illogical.

The current DA seeks consent to fully demolish the hall and substantially demolish the church (refer to **attachment 1 - demolition plan**). It is estimated that more than 85% of the proposed item is to be demolished.

The significant fabric of the small section of the original church building that is proposed to be retained will be adversely affected through the loss of the original diamond patterned roof, including the roof members and coffered ceiling and the removal of the hardwood floors and other significant interior fabric. Furthermore, large sections of the original side walls will be removed to provide openings for connections to proposed additions that wrap around both sides of the original 1905 church building.

The small section of the original significant church building that is proposed to be retained will be visually dominated by the proposed additions comprising a four storey addition to the rear and wrap-around additions to both sides of the church (refer to the **attachment 2 –**

perspectives). The setting for this remaining part of the church and its landmark qualities will be lost.

Clearly, the small remaining part of the original 1905 church building does not represent adaptive reuse as described in the DPE's gateway report (p.5). The Burra Charter describes adaptation as:

Article 21 Adaptation

21.1 Adaptation is acceptable only where the adaptation has minimal impact on the cultural significance of the place.

21.2 Adaptation should involve minimal change to significant fabric, achieved only after considering alternatives.¹

The DPE's report does not provide any understanding of the implications of the DA on the heritage significance of the buildings. The DPE's report fails to give any recognition to the widely practiced heritage conservation principles contained in the Burra Charter. Given the intention of the planning proposal, these are factors that should have been taken into account by the DPE when considering the need to impose condition 1.

4.2 The imposition of the condition is unreasonable, not for a proper planning purpose and takes into account an irrelevant consideration

Condition 1 fundamentally alters the planning proposal submitted to the DPE not on the basis of a matter of strategic planning merit but solely on a view that the proposal "could directly affect the outcome" of an appeal in the Land and Environment Court. It is submitted that this reason is an irrelevant consideration which has led to the imposition of an unreasonable condition that undermines the intent of the planning proposal.

The Council undertook the assessment of heritage significance for a proper planning purpose, being to establish whether the buildings have sufficient heritage significance to be listed as a local heritage item in Schedule 5 of Woollahra LEP 2014 and a state item on the State Heritage Register under the *Heritage Act 1977*.

It cannot be reasonably argued that Council undertook the investigation of heritage significance and preparation of the planning proposal in order to frustrate, defeat or thwart the outcome of litigation. To the contrary, the Council identified the site for consideration in December 2017. The Council's investigation of heritage significance and preparation of the planning proposal are valid exercises of its functions under the Act and have been undertaken for a proper planning purpose.

Similarly, the gateway determination, without the imposition of condition 1, would be for a proper planning purpose notwithstanding that the applicant for the DA commenced an appeal prior to that decision being made.

The landowner was informed of the Council's decision of 18 December 2017 to explore listing of the subject site. It is clear that the landowner was aware of the action that had been commenced and the purpose of that action.

¹ Australia ICOMOS, October 2013, *The Burra Charter*, p.7

Additionally, the landowner was invited to participate in the heritage assessment process and through their consultants were involved in the investigation steps and preparation of the draft assessment of heritage significance. Draft copies of the Heritage Significance Assessment Report and the heritage data sheets prepared by the Council's heritage consultant Robert A Moore in March 2018 were made available to the landowner's consultants on 19 March 2018 for their comment.

It cannot be reasonably argued that the landowner has been uninformed or omitted from the Council's investigations.

The DA the subject of the appeal was lodged on 20 April 2018 four months after the Council resolved to investigate the heritage significance of the buildings and after the Council provided to the landowner's consultants the draft assessment of heritage significance which recommended the listing of the building group in Schedule 5 of Woollahra LEP 2014. It was the landowner's decision to pursue a DA that seeks to substantially demolish the proposed heritage item.

The DPE's role in considering whether to issue a gateway determination is to "ensure there is sufficient justification early in the process to proceed with a planning proposal."² Importantly, in this case, the DPE must consider whether the planning proposal has provided sufficient justification about the heritage significance of the buildings. It is irrelevant to couple this consideration with the outcome of an appeal which is considering the merit of a development proposal.

In imposing condition 1 the DPE did not take into account matters that should have been considered in the application of the condition. There is no evidence in the DPE's gateway determination report that consideration was given to the potential impact on the intent of planning proposal as a consequence of condition 1. Clearly, the DPE did not apply a balanced consideration of the facts.

The DPE's consideration of whether the planning proposal would directly affect the outcome of the current appeal is an irrelevant consideration and not for a proper planning purpose. Condition 1 is also considered to be *Wednesbury* unreasonable. That is, the decision to apply the condition was so unreasonable that no reasonable authority would ever consider imposing it.

4.3 The condition has the potential to subvert the proper and well-established practice for managing the heritage significance of heritage items

The heritage significance of the buildings has been established through the standard criteria and processes contained in the document titled "Assessing heritage significance", published by the Heritage Office in 2001. This document forms part of the NSW heritage management system which consists of three steps for managing heritage items:

- Step 1 - Investigate significance
- Step 2 - Assess significance
- Step 3 - Manage significance

² NSW Department of Planning and Environment, August 2016, *A guide to preparing planning proposals*, p.4

Steps 1 and 2 have been completed. These steps have been carried out by a highly qualified and experienced heritage consultant engaged by the Council in an open and cooperative manner which has involved input from the landowner. Step 3 will usually occur through the heritage listing of the item under a statutory document and use of a heritage conservation management plan.

The three-step process is consistent with the Burra Charter Process which comprises an initial step of understanding cultural significance, followed by development of policy and finally management in accordance with the policy.

Managing the significance of an item through a policy document such as a heritage conservation management plan will involve consideration of a landowner's needs, constraints and opportunities applicable to the item and other factors including physical condition and compliance with relevant building and occupation standards. The policy document can be an important and necessary guiding tool for the preparation of development schemes.

An effect of condition 1 of the gateway determination is to let the DA direct the manner in which the buildings are to be conserved thereby subverting the proper heritage conservation process. The policy preparation step, which is critical because it guides the scope of change to the item, is being bypassed.

Local heritage listing will not sterilise the site, nor prohibit the proposed development which is the subject of the appeal. The effect of any heritage listing will not be to prohibit development on the site. Rather, the effect of local heritage listing is to require that any proposed development (including the current DA) must have regard to the heritage provisions in Woollahra LEP 2014.

4.4 The condition contradicts the predominant support for the planning proposal provided in the DPE's gateway determination report

The DPE's gateway determination report agrees that the planning proposal is consistent with:

- The Greater Sydney Region Plan - A Metropolis of Three Cities
- The Eastern City District Plan
- Relevant section 9.1 Ministerial Directions
- Relevant state environmental planning policies

The report contains the following comments:

The planning proposal is consistent with the Region Plan as heritage listing of the Rose Bay Uniting Church and Wesley Hall Group will provide ongoing protection and recognition of the heritage significance of the site. (p.7)

The planning proposal is consistent with the outcomes and direction in the [Eastern City District Plan. (p.8)

The planning proposal is consistent with the applicable section 9.1 Ministerial Directions. (p.9)

It is considered that the proposed amendments [to the LEP] will list and thereby facilitate the conservation of the item for heritage purposes. (p.11)

The planning proposal is consistent with the Greater Sydney Region Plan and the Eastern City District Plan as it provides long-term protection of the heritage and social significance of the subject site. (p.12)

The gateway determination report also notes the differing views of the landowner's heritage consultant and the Council's heritage consultant regarding the extent of the heritage listing. However, the report does not consider these differing views are of such magnitude to withhold the issuing of a gateway determination. Importantly, the report does not conclude that the Council's assessment of heritage significance is flawed or inadequate otherwise it would not have recommended that the planning proposal proceed.

Instead, the report considers further consultation should be carried out with the landowner as part of the exhibition process thereby allowing the landowner an opportunity to submit additional reports or studies to "support the claim that the 1924 additions and hall should not be considered." (p.11)

The DPE considers the planning proposal has sufficient merit to be placed on public exhibition. The DPE considers that issues relating to the extent of the listing can be addressed as part of the planning proposal process.

However, despite the substantial support advanced in the report for the planning proposal and what it aims to achieve, condition 1 has been imposed. Condition 1 clearly contradicts this support and the purpose of the planning proposal. In effect, the savings provision has the potential to undermine the intent of the planning proposal which is to protect two buildings that to a degree depend on each other for their heritage significance.

As mentioned in points 4.1 and 4.2, above, we consider condition 1 is illogical and unreasonable. We say this because the DPE has advanced the planning proposal to the gateway determination stage on the basis that the planning proposal has merit yet the DA, if approved by the Court, will allow full demolition of the hall and substantial demolition of the church. In total this represents more than 85% demolition of the proposed item. In addition, the remaining part of the church will be dominated by the proposed residential units and ground level extensions.

Clearly the planning proposal, as burdened by condition 1, cannot provide the long-term protection of the heritage and social significance of the subject site as concluded in the DPE's gateway determination report (p.12). Furthermore, it is arguable that condition 1 has the effect of making the planning proposal inconsistent with the relevant matters in The Greater Sydney Region Plan, the Eastern City District Plan and the Council's Community Strategic Plan.

4.5 The condition will set a precedent for similar planning proposals thereby undermining the process for protecting heritage significant buildings

Should condition 1 be retained it would set a very poor and dangerous public precedent. It would send a message to landowners and developers that they could thwart the proper and widely practiced heritage conservation investigations and processes and the use of State-wide

heritage conservation controls by lodging a development application and an appeal to the Land and Environment Court. We consider that the DPE would be lobbied by landowners and applicants to impose a savings condition to similar planning proposals.

We do not consider the DPE has given proper consideration to the precedent issue and the likely impact on heritage conservation practices and protection measures. In this regard, we submit that the DPE erred in not taking into account matters that it should have considered. There is no evidence in the gateway determination report to indicate the DPE considered that the circumstances of the appeal to the Court are so unique that condition 1 should be imposed. The precedent issue was not considered. We consider the imposition of condition 1 is unreasonable.

4.6 The condition has likely implications for the use of interim heritage orders

An interim heritage order (IHO) is most commonly triggered when a DA is lodged with a Council. The purpose of an IHO is to allow a moratorium on the assessment and determination of any DA in order to allow investigation of heritage significance and, if appropriate, amendment to an environmental planning instrument to facilitate heritage listing. Very often, the DA that brought the heritage significance of a site to notice is the subject of an appeal to the Land and Environment Court. This is fairly common across the State.

The imposition of condition 1 on a planning proposal will set a dangerous precedent. That is, if a savings provision is applied for DAs that are lodged but not determined at the time that an IHO and subsequent planning proposal (seeking to implement the recommendations of the investigation carried out under an IHO) are made, there will be little utility to the IHO process. For example, if a DA, lodged but not determined, seeks demolition of the proposed heritage item, the effect of the savings provision is that the heritage listing and heritage provisions of any LEP will not apply to that application. The savings provision therefore directly conflicts with an intent of the IHO. It undermines the heritage conservation and protection purpose of the regime.

The precedent concern is also relevant in this situation. It is a matter which should have been considered by the DPE. Again, there is no evidence this issue was considered by the DPE. In this regard we again submit that condition 1 is unreasonable.

4.7 The DPE erred in not obtaining advice from the Office of Environment and Heritage on the impact of condition 1

The planning proposal deals expressly with the listing of a heritage item. Given the implications that condition 1 imposes on the planning proposal and the likely precedent it sets for heritage conservation across NSW, advice from the Office of Environment and Heritage (OEH) should have been obtained as part of the DPE's considerations.

4.8 Submission to DPE by landowner's lawyers

We understand that the landowner's lawyers have made a submission to the DPE. We requested a copy of that submission but the DPE declined the request. A further request was made but at the time of lodging our submission for a review of the determination we have not received a response from the DPE.

In the absence of a copy of that submission, we are unable to provide relevant details or further comments in relation to any assertions, facts or assumptions (including any information provided in relation to the current DA and appeal) that may have influenced the gateway determination.

We reiterate our request for a copy of that submission and an opportunity to provide further comments in reply, if necessary.

5. Request for delegation

The DPE's letter of 16 August 2018 which accompanied the gateway determination informed Council that an authorisation to exercise the functions of the Minister for Planning under section 3.36 of the Act would not be granted. The authorisation was declined on the basis of the "discrepancies between the land owner and Council in relation to the extent of the heritage listing on the site."

The landowner's differences of opinion about the extent of the heritage listing are very much influenced by the development proposal contained in the DA which is now the subject of the appeal. This highlights an approach adopted by the landowner which is out of step with the process for managing heritage items as mention in point 4.3, above.

The Council has undertaken a thorough assessment of heritage significance using best practice methods. It has taken a proactive and cooperative step by involving the landowners and their consultants prior to submitting the planning proposal.

The landowner will be given further opportunity to comment on the heritage listing during the pubic exhibition stage as will all interested parties.

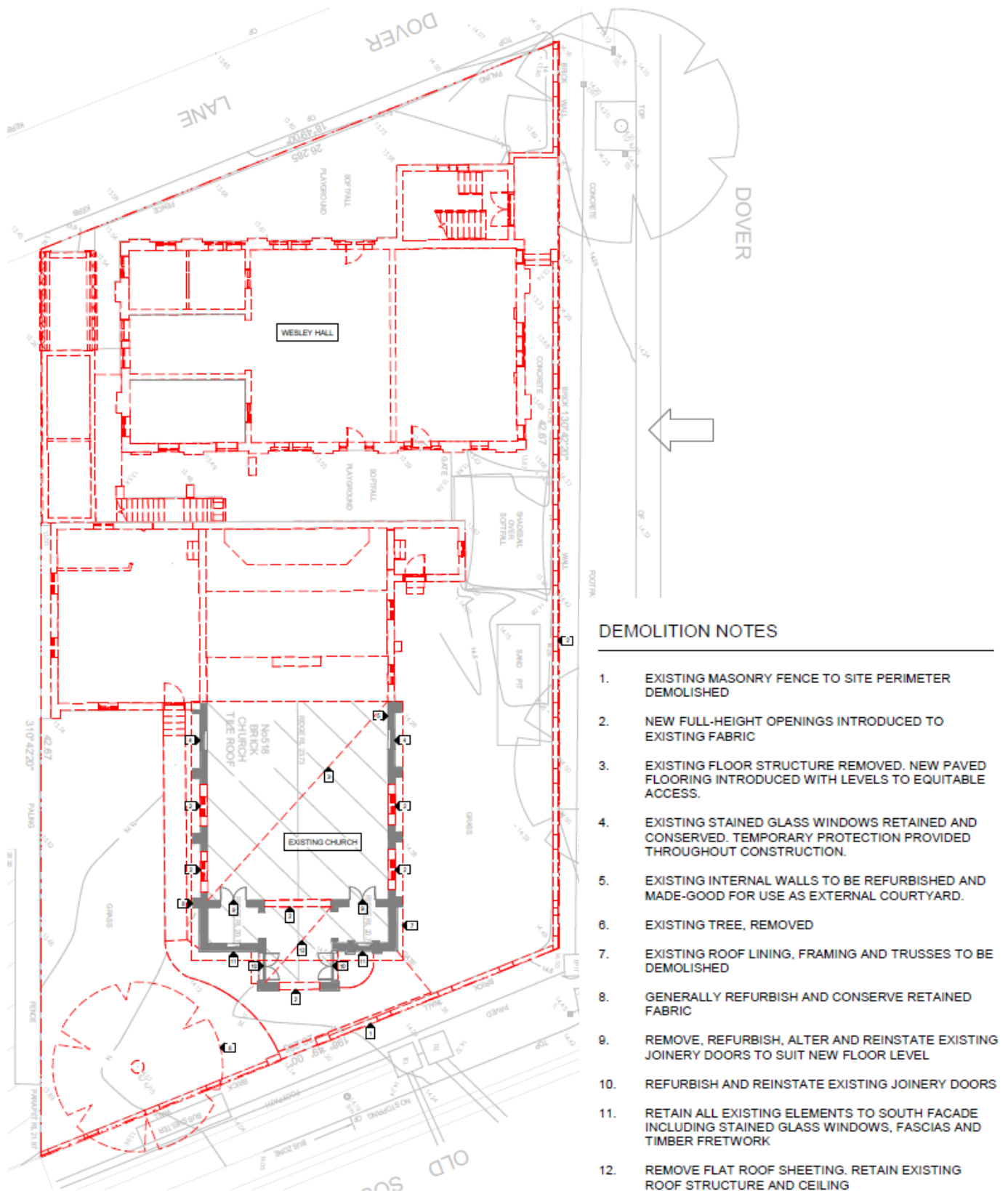
The listing of the buildings as a heritage item does not prevent changes and adaptive reuse. These are considerations which are commonly addressed through a process which is guided by a heritage conservation management plan. Should the buildings be heritage listed, there is ample opportunity for the landowner to explore changes and uses for the buildings within a heritage conservation framework.

Essentially the planning proposal is a local matter. The DPE has found no issues with the assessment of heritage significance undertaken by the Council.

If the DPE's view is influenced by the extent of works proposed in the DA which is the subject of the appeal we have already expressed an opinion that this action is irrelevant to the planning proposal.

We therefore request that the Council be provided with an authorisation to exercise the functions of the Minister for Planning under section 3.36 of the Act.

Attachment 1 – DA160/2018/1 Demolition plan



Demolition plan

Source: Conrad Gargett DA issue plans 4 March 2018

Attachment 2 - DA160/2018/1 Perspectives



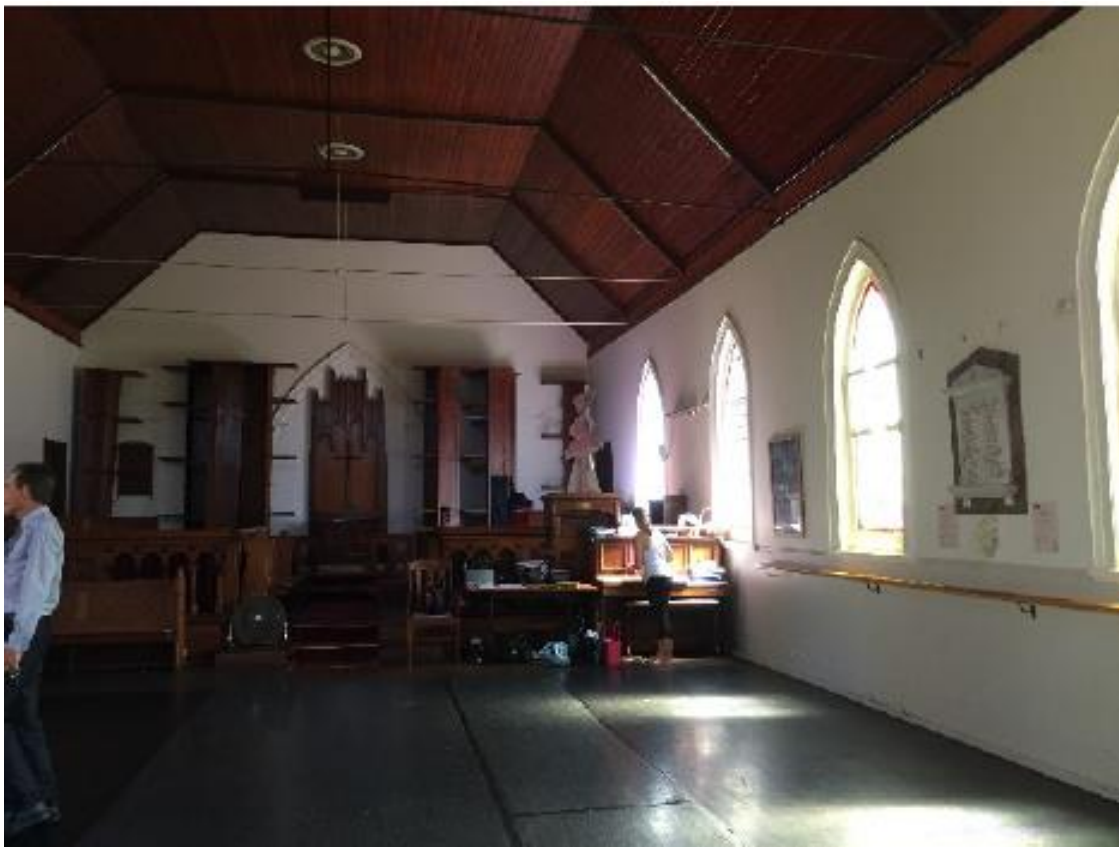
Photomontage – view of proposed development from intersection of Old South Head Road and Dover Road
Source: Conrad Gargett DA issue plans 4 March 2018



Existing view from intersection of Old South Head Road and Dover Road
Source: Conrad Gargett DA issue plans 4 March 2018



Photomontage – reuse of 1905 section of church
Source: Conrad Gargett DA issue plans 4 March 2018



Existing view – interior of church showing part of the 1905 section in the foreground and the 1924 extension in the background
Source: Robert A Moore February 2018