

## Miscellaneous Report No. M8/15

**Subject:** Planning Proposal - 270 Malabar Road,  
Maroubra

**Folder No:** RZ/3/2015

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### Introduction

This report assesses the merits of a Planning Proposal relating to 270 Malabar Road, Maroubra (Cnr Lot 3821, DP 752015). The site is zoned SP2 Infrastructure (Place of Public Worship) under the *Randwick Local Environmental Plan 2012* (RLEP 2012). It presently contains a childcare centre lawfully operating under existing use rights (DA/328/1996 approved on 18 December 1996) and a small disused church.

The subject proposal seeks to amend Schedule 1 of the RLEP 2012 to include 'childcare centre' as an additional permitted use on the site. This will serve to reinstate a use that was lawfully permitted on the land under the former special uses zoning of the *Randwick Local Environmental Plan 1998 Consolidation* (RLEP 1998). No changes are proposed to the existing zoning or any other provisions applicable to the site.

The site's current SP2 Infrastructure zoning only permits 'place of public worship' (reflecting the original use being a church), and development that can occur on the land is specific to this use in accordance with the Standard LEP Instrument. This in turn has made the childcare centre on the site an existing use. It should be noted that there are other childcare centres operating on land zoned SP2 Infrastructure (Place of Public Worship) in Randwick City. The RLEP 2012 SP2 Infrastructure (Place of Public Worship) zoning has effectively made these childcare centres subject to the existing use rights provisions of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and Regulations.

A concept plan depicting the expansion of the childcare centre into the adjoining disused church building together with a traffic/parking statement has been submitted as appendices to the proposal. While this information is noted, detailed design and amenity matters have not been addressed in the assessment of this Planning Proposal, as any future proposal to expand the childcare centre into the disused church building would be subject to a separate Development Application (DA) process for consideration under Council's planning framework.

While noting Council's general approach is to not support standalone Planning Proposals to change the zoning of individual parcels of land, the subject proposal is supported on the basis that it is reinstating a formerly permissible use, and the current SP2 Infrastructure (Place of Public Worship) zone is an anomaly as the church has vacated and the childcare centre is now the lawful primary use on this site.

This report recommends that the Planning Proposal be forwarded to the Minister for Planning for gateway determination, which is the next stage of the process to amend the RLEP 2012.

### Background

#### ***Planning Proposal Process***

The *Environmental Planning and Assessment Act 1979* (The Act) and Regulations set out the process for amending the zoning or planning provisions relating to a parcel(s)

of land in NSW (rezoning). Changes to the zoning or planning provisions can only be made via a formal amendment to the Local Environmental Plan (LEP).

A Planning Proposal is the first step to commence changes to the zoning or planning provisions relating to a parcel of land. It is a formal application that sets out the objectives, intended outcomes, and justification for the proposed changes, and also details the community consultation to be undertaken.

Council as the relevant planning authority is required to formally consider any Planning Proposals that are received. If Council resolves to proceed with the proposal, it is forwarded to the Minister for Planning for a 'Gateway Determination'. The 'Gateway Determination' is essentially a checkpoint for Planning Proposals, and enables those proposals that are not well founded, or not in the public interest to be stopped early in the process, before significant resources are committed in carrying out technical studies or investigations.

The Minister's 'Gateway Determination' will stipulate whether the Planning Proposal should proceed, whether it needs to be resubmitted, the timeframe for its completion (usually nine months from the date of the Determination), the community consultation and State/Commonwealth agency requirements and whether a public hearing is needed.

Following the Gateway Determination, a Planning Proposal is formally placed on public exhibition for comment. The final LEP and any accompanying maps which amend the Council's principal planning instrument (i.e. the RLEP 2012) are made by the Minister for Planning (and notified on the NSW legislation web site) in accordance with the Act. Certain LEPs which are of local significance can be finalised by Council via delegation from the Minister (this is determined at the gateway stage).

It is important to note that a Planning Proposal is a separate process to a DA. A Planning Proposal seeks Council's support to commence a process to amend the LEP, whereas a DA seeks Council's consent to enable a development to proceed.

In the circumstance that a Planning Proposal is supported, resulting in amendments to an LEP, the applicant would still be required to submit a DA for assessment so that any design and amenity matters can be thoroughly considered under Council's planning framework.

## ***Historical Context***

### *Zoning under Previous Instruments*

The subject site was originally occupied by the Maroubra Bay Uniting Church and zoned Special Uses 5(a) Church under the *Randwick Planning Scheme Ordinance* (RPSO). In 1997 development consent was granted for the conversion of the existing community facilities hall into a childcare centre accommodating 29 children (DA/328/1996).

The site was subsequently zoned SP5-Special Uses under the *Randwick Local Environmental Plan 1998 (Consolidation)* (RLEP 1998) (now repealed). The childcare centre was consistent with the RLEP 1998 Special Uses zoning at the time, which permitted a broad range of uses with development consent, including childcare centre development.

### *Special Infrastructure Zoning Under the RLEP 2012*

Council embarked on a comprehensive review of the RLEP 1998 in line with the State Government's Standard LEP Template. The State Government direction for standardised LEPs required that only major infrastructure or specialised activity centres retain a SP2 Infrastructure zoning, whereas all other special uses sites (such

as schools and churches) were to be accommodated in the adjacent residential zone (*Department of Planning Practice Notes PN 10-001*).

Council's Special Uses Discussion Paper (which informed the special use zonings and related controls in the RLEP 2012), recommended that the subject site be rezoned to the adjoining residential zone (i.e. R2 Low Density Residential) consistent with the aforementioned State Government direction. Notably, a residential zoning would have recognised the existing childcare centre on the site as childcare centres are permitted with development consent in all residential zones under the RLEP 2012.

The same Paper also raised concerns that an automatic translation of special use sites into an adjoining residential zone may be inconsistent with *State Environmental Planning Policy 55* (SEPP 55), which requires that prior to a zoning change allowing a more sensitive land use (e.g. residential or childcare centre), the consent authority must consider if the subject land is potentially contaminated.

To meet the requirements of SEPP 55 and to ensure a consistent approach, Council wrote to landowners of *all* special use sites (including the landowners of the subject site) requesting that preliminary contamination investigations be undertaken before such sites were zoned residential. As no such investigations were undertaken by the landowner at that time, the site (along with most churches in the Local Government Area) was zoned SP2 Infrastructure (Public Place of Worship) under the RLEP 2012.

The Standard LEP Instrument requires that each site zoned SP2 Infrastructure stipulate a nominated use and development that can occur on such sites is very specific to that use. As the nominated use for the subject site is 'place of public worship' (reflecting the original use being a church), the childcare centre thus became a non-conforming use, however continues to operate lawfully under existing use rights.

It is acknowledged that in this context the SP2 zoning (which specifies a 'place of public worship' as the nominated use) is an anomaly, particularly as the church has vacated the site and the primary use is the childcare centre.

#### Pre- Lodgment Meeting

On 11 March 2015 a pre-lodgment meeting was held with the applicant regarding a proposal to increase the capacity of the childcare centre to 64 children (from 29 children as approved), by expanding into the former church building. As noted earlier in this report an increase in the number of children within this childcare centre will be subject to the development assessment process should an amendment to Schedule 1 of the RLEP 2012 take place.

The applicant was requested to seek legal advice to confirm whether the childcare centre could legally expand into other parts of the site, given that the centre itself is a non-conforming use in the SP2 Infrastructure (Place of Public Worship) zone. Council subsequently received a Planning Proposal (the subject of this report).

An assessment of the Planning Proposal together with a discussion on development limitations under existing use rights legislation is detailed further on in this report.

#### **The Site**

The subject site is approximately 1,012m<sup>2</sup> in area, triangular in shape and occupies a corner allotment bounded by Storey Street and Malabar Road in Maroubra (see Fig 1). Buildings on the site include a community hall which has been occupied by the subject childcare centre since 1997 as well as the aforementioned disused church building located on the south western corner.

The site is sparsely vegetated with the exception of trees and shrubs located along the perimeter of the site. Vehicle access is provided from Storey Street. This side of the street also has indented parking bay for childcare centre users. Pedestrian access is available from both Malabar Road and Storey Street frontages.

### Surrounding Context

The site is situated in a low density residential zoned area. Development to the north of the site along Storey Road predominantly comprises single dwelling houses. There are a number of local to mid-scale residential flat buildings towards the north east of the site along Malabar Road. Further north is a small business centre that services the neighbourhood catchment. Development towards the south of the site, along Malabar Road, features a number of attached dual occupancies.

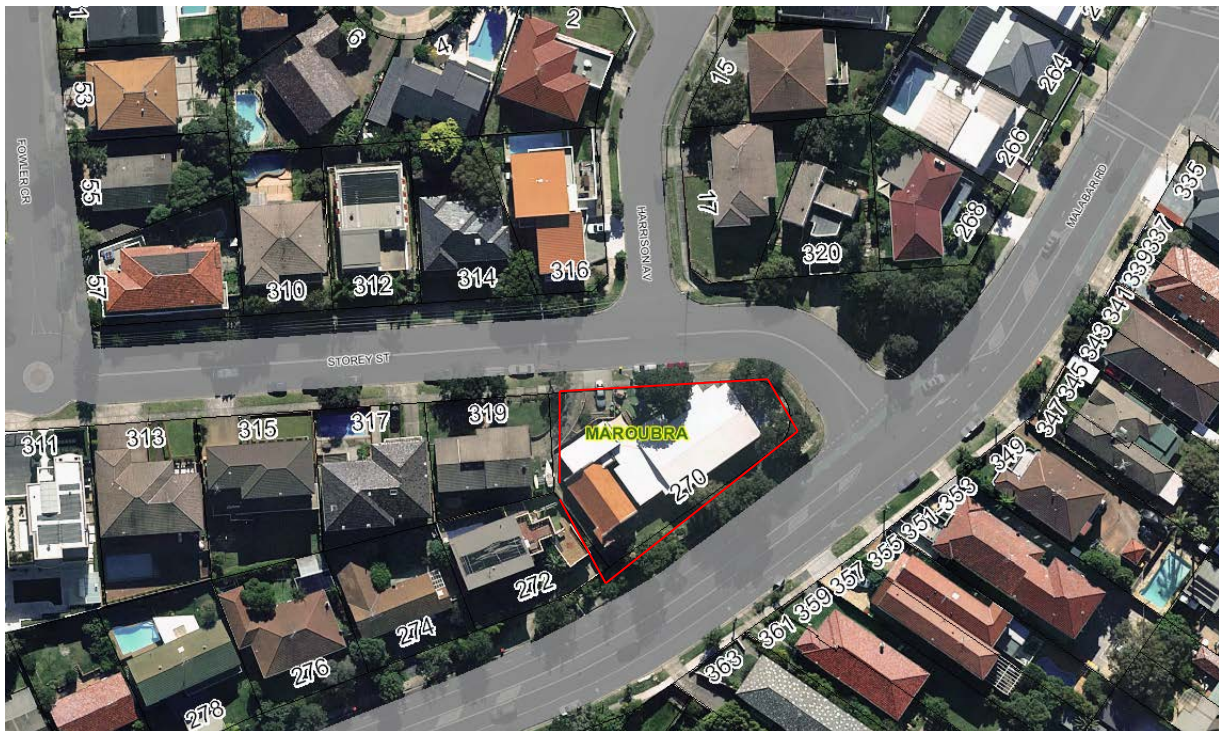


Figure 1- Location of Subject Site

### Local Planning Framework

#### ***Randwick Local Environmental Plan 2012***

The subject site's SP2 Infrastructure (Place of Public Worship) zoning restricts its use to 'places of worship' and ancillary uses. This is further reinforced by the SP2 zone objectives which generally focus on protecting land for infrastructure and community uses.

The RLEP 2012 does not establish generalised development standards for the SP2 zone given the unique nature of such sites. Accordingly no heights or FSR are expressed for the subject site. The site is not affected by other development considerations such as heritage or flooding matters.

The surrounding context is generally zoned R2 Low Density Residential with the low density character reflected and preserved by through a building height limit of 9.5m and FSR of 0.5:1. Dwellings and semis are subject to a separate FSR on a sliding scale depending on allotment size.

**Randwick Development Control 2013**

The *Randwick Development Control Plan 2013* (DCP) does not contain specific controls pertaining to the SP2 zone given the unique nature of special use sites.

Any childcare centre development proposal would be assessed in line with Section D11 of the DCP which sets out controls to maintain a high standard of amenity for childcare centres and the surrounding locality, as well as in conjunction with any other relevant controls (e.g. traffic and parking).

**The Planning Proposal**

The subject Planning Proposal has been prepared by Urbis on behalf of Malek Group Pty Ltd (the proponent) and relates to 270 Malabar Road, Maroubra (Cnr Lot 3821, DP 752015). It seeks to amend Schedule 1 of the RLEP 2012 by including 'childcare centre' as an additional permitted use for the site. No other changes are proposed to the current zoning or planning provisions applicable to the site.

The Planning Proposal states that its primary objective is to facilitate the continued use of the site as a childcare centre and promote the orderly and economic use of the land. It notes that the intended outcome of the proposed RLEP amendment is to enable the future expansion of the childcare centre.

A concept plan showing the expansion of the childcare centre into the disused church building is indicative of the design scheme that may potentially be sought via a DA, should the RLEP 2012 be amended to permit childcare centres on the site. The concept design indicates an increase in gross floor area by 84m<sup>2</sup> (reflecting the area of the existing church building) together with associated parking.

A Traffic Impact Statement (TIS) supplementing the Planning Proposal provides a preliminary assessment of the concept design in line with the parking requirements of the DCP and the RMS Guide to Traffic Generating Developments. The TIS notes that there is no fundamental impediment to the rezoning of the site on parking and traffic grounds and any such impacts are capable of being suitably resolved at the DA stage.

The Planning Proposal further states that amenity matters such as acoustic impacts, waste management and accessibility are all capable of being refined/ resolved at the DA stage.

**Assessment of the Planning Proposal**

The Planning Proposal has been assessed to ascertain whether it has merit to go to the next stage of the planning process to amend the RLEP 2012, which is its referral to the Department of Planning and Environment for a 'gateway determination'.

The assessment gives consideration to the proponent's justification for the RLEP amendment (as required by the NSW Government's *A Guide to Preparing Planning Proposals*) together with feedback from Council technical specialists on key issues, which are discussed as follows.

**Proponent's Justification**

The proponent states that the requested RLEP amendment will provide the planning framework necessary to expand the lawfully established childcare centre in the future (subject to development consent), noting that the RLEP 2012 had the effect of prohibiting this use in the SP2 Infrastructure zone. The proponent contends that the proposed Schedule 1 amendment is the best means of achieving a permissible child care centre on the site while constituting 'best practice' by removing unnecessary existing use rights situations in land use planning.

The proponent considers that by retaining the childcare centre on the site and potentially expanding its operations, the operator could achieve the site's full

potential, while contributing to social infrastructure in the locality as well as additional employment opportunities.

### ***Additional Permitted Uses Under Schedule 1***

Clause 2.5 of the RLEP 2012 allows Council to permit additional uses for particular land. These uses are permitted in *addition* to those identified in the RLEP 2012 zoning land use tables and are listed for each site in Schedule 1 of the RLEP 2012. The inclusion of an additional use under Schedule 1 is generally undertaken where land use permissibility cannot be suitably controlled by the zone and associated land use table.

### ***Expansion Under Existing Use Rights***

Existing use rights provisions under the Act and Regulations are aimed at ensuring that the use of a building, work or land that has been legally permitted through development consent may continue, despite being prohibited under a new LEP. An existing use may only be enlarged, intensified or expanded with development consent as part of a DA merit based process.

When considering the proponent's justification for the Planning Proposal, it is noted that under the Regulations, existing use rights relate to only that part of the land to which the original development consent applies. Legal advice has confirmed that in the context of the subject site, any proposal for expansion would be limited to the building approved as the childcare centre (under DA328/96) as opposed to the disused church building (which itself is subject to a separate development consent).

The expansion of the childcare centre into the disused church building is restricted as childcare centres are not permitted under the present SP2 Infrastructure (Place of Public Worship) zoning. It is agreed that the current zoning substantially limits the potential of the childcare centre to expand to other parts of the site and notably such limitations would not have applied under the previous RLEP 1998 Special Uses zoning. It is further agreed that any proposal to expand the childcare centre would thus be contingent on an appropriate planning framework that would allow for the continued development of the site.

### ***Concept Plan***

The aforementioned concept plan indicates an increase in gross floor area by 84m<sup>2</sup> accounting for the expansion into the disused church building.

While noting that the subject Planning Proposal is not seeking consent for the proposed expansion, the concept plan has been broadly considered in line with the DCP requirements for childcare centres to assist with the assessment of the strategic merit and potential impact of an amendment to the RLEP.

It is considered that the concept plan is generally consistent with the DCP controls for childcare centres in terms of maintaining a single storey scale in a low density residential environment. It is noted that a more detailed assessment can only be undertaken at a future DA stage when sufficient information is available on centre design and other amenity considerations such as visual and acoustic privacy, safety and security.

### ***Traffic Impact Statement***

The Traffic Impact Statement (TIS) submitted as part of the proposal states that there is no fundamental impediment to the rezoning of the site on parking and traffic grounds. It notes that the concept plan having regard to the net increase of 37 children and 6 staff makes provisions for 5 additional car parking spaces and 3 staff spaces, and is thus capable of meeting Council's DCP requirements (i.e. one parking space per 8 children and one space per 2 staff). These issues will be subject to a



detailed DA process should the Planning Proposal result in an amendment to Schedule 1 of the RLEP 2012.

It is important to note that the TIS comprises a preliminary analysis of traffic and parking impacts based on the concept plan and may not be a reflection of the actual proposal submitted at the DA stage. Any future DA would need to be supplemented by a comprehensive Parking and Access Report addressing the likely impact of the proposal on traffic, pedestrian safety and parking in the locality.

Preliminary feedback from Council's Integrated Transport Department regarding both the concept plan and TIS indicate that the proposal for expansion will need to suitably address safety and visibility issues. Additionally, once a mix of children is ascertained, there will be a need to review staff car parking provision, as the ratio of staff to children is based on age groupings (with a greater ratio of staff to younger aged children). There may also be a need to review on-site car parking provision as the concept plan relies on the use of on-street parking in part. Such matters will need to be resolved at the DA stage where Council's Integrated Transport Department will have greater input.

### ***Merits of the Proposal***

When considering the merits of the Planning Proposal it is noted that the subject site's RLEP SP2 Infrastructure zoning (with nominated use as 'place of public worship') had the unintended effect of prohibiting childcare centre development. As a result the existing childcare centre, while operating lawfully, is now a non-conforming use in the SP2 Infrastructure (Place of Public Worship) zone. The SP2 Infrastructure (Place of Public Worship) zoning is now regarded as an anomaly, particularly as the church has vacated the property and is no longer the primary use of the land.

As a result of its zoning under the RLEP 2012, the potential to expand the existing childcare centre into other parts of the site is limited under existing use rights legislation. Notably under the previous RLEP 1998, the proposal to upgrade and expand the childcare centre would have been dealt with under a straight forward DA (given the permissibility of childcare centres in the Special Uses zone) and not required an LEP amendment to facilitate this process. It is also acknowledged that a residential zoning (in line with State Government direction) would have recognised the existing childcare centre on the site, given this use is permissible (with development consent) in all residential zones.

It can be argued that an expansion of the childcare centre could potentially be accommodated within the existing building subject to the original development consent (e.g. such as through adding an additional storey to the childcare centre). Notwithstanding, the DCP controls generally discourage childcare centres above ground level for safety and access reasons.

When considering the site context and the fact that the church building has been disused for a number of years, it is reasonable to assert that the existing SP2 Infrastructure (Place of Public Worship) zoning is redundant as it no longer reflects the use of the land. Furthermore in its present state, the site with its disused church building is underutilised and does not represent an orderly and efficient use of the land.

Council's general stance is to not support standalone Planning Proposals relating to individual parcels of land given that Randwick City was subject to a relatively recent comprehensive planning review in preparing the RLEP 2012. Notwithstanding, given the circumstances of the case as articulated in this report, the Planning Proposal is considered to have merit as it is simply reinstating a use that was formally permissible and unintentionally prohibited under the current LEP. This is supported by legal advice recently received by Council which notes that the approach of amending

Schedule 1 of the RLEP 2012 to provide for childcare centre as an additional use in respect of the entire site would be consistent with the fact that the predecessor RLEP 1998 permitted this use under its previous special uses zoning.

On this basis, it is recommended that the Planning Proposal be referred to the Minister for Planning for a gateway determination, noting that any subsequent DA for expansion of the childcare centre would be subject to a separate assessment process where detailed design and amenity issues can be thoroughly considered.

### **Future Review of SP2 Infrastructure Zoned Land**

The subject Planning Proposal has highlighted the fact that there are other childcare centres operating lawfully across Randwick City that are zoned SP2 Infrastructure (Place of Public Worship) under the RLEP 2012. Similarly to the subject site, the RLEP 2012 SP2 Infrastructure (Place of Public Worship) zoning has effectively made these childcare centres subject to the existing use rights provisions of the Act and Regulations.

Given the issues raised in this report, it is considered timely that a detailed review of all SP2 Infrastructure zoned land be undertaken to investigate the zoning and development standards suitable for these sites. It is recommended that the subject review be included in the Strategic Planning Department's Operational Plan for the 2016-2017 financial year period.

### **Relationship to City Plan**

The relationship with the City Plan is as follows:

|                   |          |  |
|-------------------|----------|--|
| <b>Outcome</b>    | <b>4</b> | Excellence in urban design and development.                    |
| <i>Directions</i> | 4a       | Improved design and sustainability across all development.     |
|                   | 4b       | New and existing development is managed by a robust framework. |

### **Financial impact statement**

The applicable fee for the preliminary assessment of the proposal was paid by the applicant as per Council's Fees and Charges Policy (\$7,960) and further fees will be required should the rezoning progress to the next stage (to cover public consultation and further assessment).

### **Conclusion**

The RLEP 2012 SP2 Infrastructure (Place of Public Worship) zoning for 270 Malabar Road, Maroubra (Cnr Lot 3821, DP 752015) is now regarded as an anomaly as the church has vacated and the childcare centre is the primary use on the site. While the childcare centre continues to operate lawfully its potential to expand is limited under existing use rights legislation.

The subject Planning Proposal seeks to amend Schedule 1 of the RLEP 2012 to include 'childcare centre' as an additional permitted use on the site. The proposal is supported on the basis that it will reinstate a use that was formerly permitted on the land under the previous RLEP 1998. Any future development proposal to expand the childcare centre would be subject a separate DA process where design issues and amenity impacts can be suitably assessed. It is accordingly recommended that the Planning Proposal be referred to the Minister for Planning for gateway determination. It is also recommended that a city wide review of SP2 Infrastructure zoned land be undertaken in the near future, to determine the appropriate zoning and development standards for such sites.



**Recommendation**

That:

- a) Council endorse the Planning Proposal (attachment 1) which proposes to amend the *Randwick Local Environmental Plan 2012* to include 'childcare centre' as an additional permitted use for 270 Malabar Road, Maroubra (Cnr Lot 3821, DP 752015).
- b) the Planning Proposal (attachment 1) be forwarded to the Minister for Planning requesting Gateway Determination and endorsement for exhibition in accordance with s.56 of the *Environmental Planning and Assessment Act 1979*.
- c) Council seek to exercise the delegation of the Minister for Planning's functions under s59 of the *Environmental Planning and Assessment Act 1979* to make the Local Environmental Plan.
- d) Council endorse a review of SP2 Infrastructure zoned land to address anomalies and any relevant issues and that the subject review be included in the Strategic Planning Operational Plan for the 2016-2017 period.

**Attachment/s:**

1. Planning Proposal 270 Malabar Road Maroubra Included under separate cover