

MEMORANDUM OF ADVICE

SUBJECT: 77-83 Moore Street Liverpool development proposal

TO: Cameron Laird Abacus Funds Management Limited

FROM: Michael Allen, Director, Allen Partners Pty Limited

DATE: 22 April 2015

1. Background

1.1. We are instructed that:

- (a) Abacus Funds Management Limited ("**Abacus**") owns 3 parcels of land on the corner of Moore and Macquarie Streets Liverpool.
- (b) The 3 parcels are 1/DP628824 ("**Site A**"), 2/547162 ("**Site B**"), (together "**Development Site**"), and 1/DP1189772 ("**Site C**") shown on the copy deposited plan sheet annexed.
- (c) Abacus proposes to develop Sites A and B as a mixed-use tower comprising 134 apartments (residential and serviced apartments) and commercial and retail uses. Site C is the Liverpool Plaza.
- (d) Some development is proposed on Site C comprising a lightweight car park structure.
- (e) The development proposal must comply with the *Liverpool Local Environmental Plan 2008* ("**LEP**").
- (f) Abacus wishes to seek a re-zoning of the Development Site from B3 to B4 (to accommodate the residential apartments) and then to use some of the unused existing floor space potential of Site C and apply it to the Development Site.

2. Advice requested

2.1. You have requested the following advice:

- (a) What restrictions does the LEP impose on the development proposal?
- (b) What options are available to overcome these restrictions?
- (c) The form of the restrictive covenant appropriate to prevent “double dipping” of unused floor space “transferred” from Site C to Sites A and B for the purposes of LEP compliance on floor space ratio restrictions.

3. Executive summary

- 3.1. LEP clauses 4.5(4)(a) – excluded development and 4.5(6) – substantial development, operate to prevent the development proposal if Site C remains zoned B3- Commercial and if the current development proposed for Site C remains of the existing type and scale.
- 3.2. Option 1 – satisfy both LEP clauses 4.5(4)(a) – excluded development and 4.5(6) – substantial development, by rezoning Site C with the Development Site and carry out “*substantial development*” on Site C (e.g., car parking for the serviced apartment and retail components of the Development Site).
- 3.3. Option 2 – rezone Site C with the Development Site and consolidate the 3 tiles for development purposes (to be re-subdivided on completion).
- 3.4. Option 3 – seek an exemption from clause 4.5 as part of the re-zoning application provided a restrictive covenant of the type envisaged in 4.5(9) is registered on the relevant titles.

4. Scope of this advice

- 4.1. This advice is limited to advice concerning the matters set out in paragraph 2. It assumes the instructions you have given us are accurate and complete. It is not advice as to any other matter including whether either the development site will be re-zoned or development consent will be issued for the development proposal.

5. What restrictions does the LEP impose?

- 5.1. A threshold issue for the development proposal is the necessary re-zoning of the Development Site. You propose to seek a B4 – Mixed Use.

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- 5.2. The LEP allows the calculation of a total floor space ratio across an aggregation of sites provided they are contiguous (see LEP clause 4.5(3)). Accordingly, the Development Site and Site C may be considered together for the purposes of calculating the floor space of the proposed building on the Development Site if:
- (a) the type development as proposed is not prohibited on any of the lots used for floor space calculations; and
 - (b) the proposed development must include “*significant development*” on each of the lots aggregated for the floor space calculation.
- 5.3. The re-zoning application does not include Site C. It is zoned B3 - Commercial Core. Both residential and serviced apartment use are prohibited under B3. Accordingly, Site C is excluded under the LEP from being included in the aggregated floor space calculation permitted under LEP clause 4.5(3) if it remains zoned as B3.
- 5.4. In addition, the proposed development on Site C must qualify as “*significant development*” to be included in the aggregation (see LEP clause 4.5(6)). There is no definition of “*significant development*” in the LEP. In addition, there has been little consideration of this term by the Courts. In *Antoniades Architects Pty Ltd v Canada Bay City Council [2014] NSWLEC 1019* (11 February 2014) the Court decided that construction of an access driveway and garbage bin storage was not significant development when compared to the ground floor retail tenancies, café, residential units and basement car park intended for the principal development proposed.

6. What options are available to overcome these restrictions?

- 6.1. The most significant issue is non-compliance with clause 4.5(4)(a) of the LEP i.e., that Site C must be excluded from the calculation because the development proposed on the Development Site is prohibited under the B3 – Commercial zone of Site C. Accordingly, Site C cannot be included in that calculation unless it is also rezoned to B4 - Mixed Use. The implications for this for that property and its current use should be examined prior to seeking a re-zoning (e.g., whether it is likely to affect value or has some implications for future use).
- 6.2. If Site C is not rezoned, whether the development proposal satisfies LEP clause 4.5(6) – substantial development, is of no consequence.

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- 6.3. If Site C is re-zoned, LEP clause 4.5(6) must then be satisfied. In Antoniades case, the Court took a comparative approach when considering whether development on the adjoining site was substantial i.e., it compared the nature and scale of the development on the principal site against the nature and scale of the development on the adjoining site. While the development proposed for Site C may be more substantial than that considered in the Antoniades case, it is doubtful when weighed against the scale of development on the Development Site, that it would be regarded as “substantial.”
- 6.4. Accordingly, to qualify as “substantial”, more significant development on Site C may be necessary. If it commercially feasible, the type of development discussed with Ian Cady was car parking for the new retail and services apartment components secured by covenant (not on title). Such development is arguably substantial as it is a use intrinsic to the development proposal and is arguably of sufficient scale.
- 6.5. If the development proposal then satisfies both LEP clauses 4.5(4)(a) – excluded land and 4.5(6) – significant development, a restrictive covenant could be registered over the titles used for aggregation to support the floor space ratio desired. This is the mechanism contemplated in LEP clause 4.5(9). An example of such a covenant is annexed to this advice.
- 6.6. LEP clause 1.9 preserves any such covenants in favour of Council against the operation of section 28 of the *Environmental Planning and Assessment Act, 1979* (NSW). This section and the LEP would otherwise operate to suspend such a covenant. As discussed in our meeting, while the example refers to the current Liverpool LEP it allows the floor space ratio to change, and hence the covenant to operate flexibly, if the LEP is changed in future.
- 6.7. A further option is consolidation of the existing 3 sites for the purposes of the application. LEP clause 4.5 does not then restrict the resulting floor space calculation. Once the development consent had been obtained and the development undertaken, the site could be re-subdivided on the same or similar boundaries (provided structural separation between the proposed strata scheme building on the Development Site and the plaza building on Site C is maintained). It would be prudent to obtain subdivision consent along with the principal consent on the basis that the subdivision can occur on completion of the development proposal. A restrictive covenant would be offered as part of the subdivision application to address the “double dipping” problem referred to in LEP clause

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4.5(9). Before the option is taken further, the implications of consolidation, albeit temporary, for both the Development Site and Site C should be examined.

- 6.8. The final option is standalone. It involves seeking either a change to clause 4.5 or to Part 7 of the LEP as part of the re-zoning application. The former would exclude the Development Site from operation of clause 4.5. The latter would allow a local exemption to the application of clause 4.5 and similar to the other local or "spot" exemptions found in Part 7.

Yours sincerely

(M. G. Allen) sgd

Michael Allen

Director

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- Annexures: 1. Form of example restrictive covenant
2. Site plan

Form of example restrictive covenant

1 Terms of Restriction on Use of Land numbered [##] in the Plan

1.1 Terms of restriction

The Grantor must not undertake any development works on the Lot Burdened resulting in a floor space ratio for all lots in the plan taken together is greater than 36,727.46 square metres (as calculated in accordance with the Liverpool LEP) without the consent of Council.

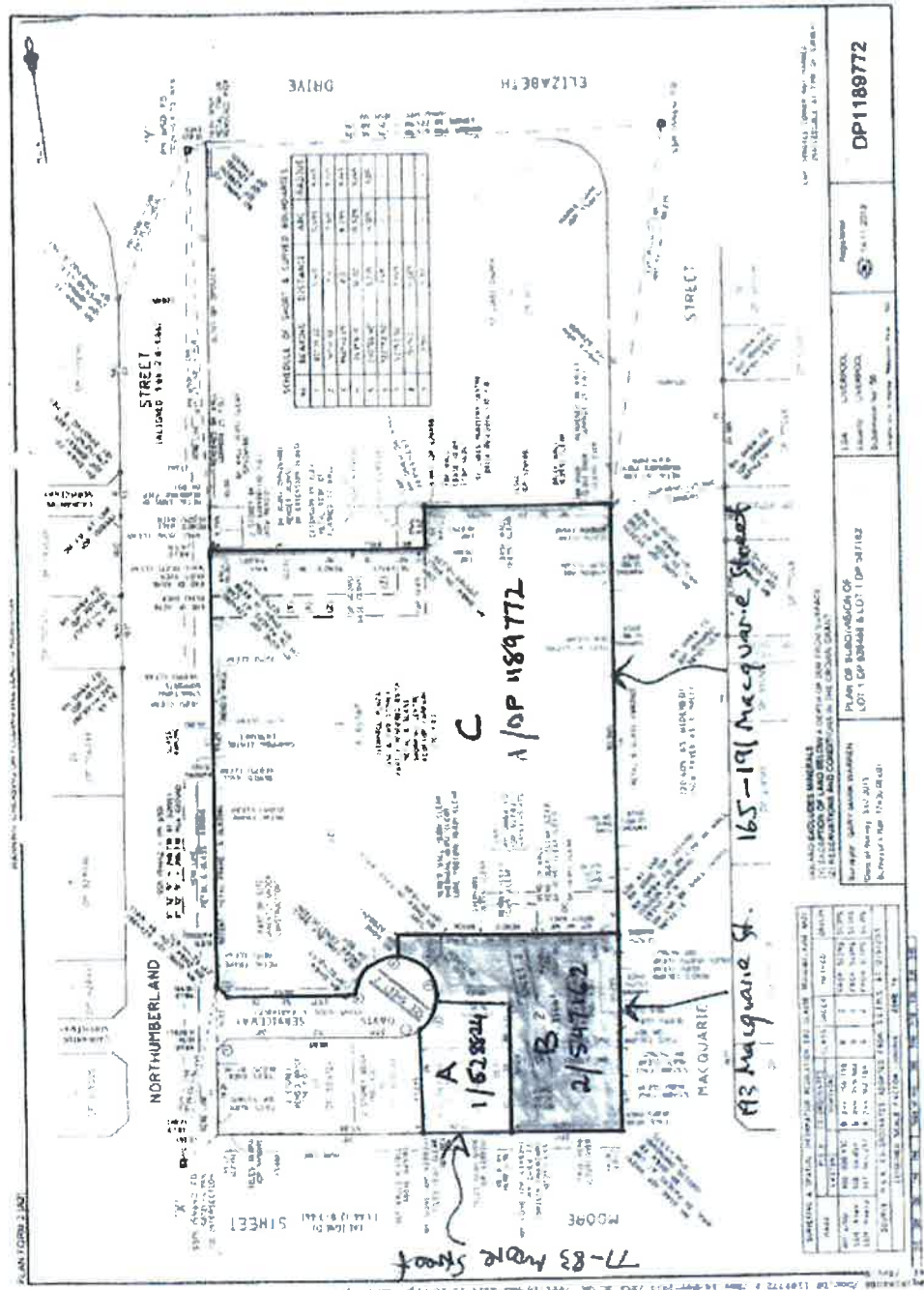
This is a restriction under sect 88E of the Conveyancing Act, 1919.

In this restriction, Liverpool LEP means the Liverpool Local Environmental Plan 2008 time to time or any variation or replacement of it.

Authority empowered to release, vary or modify this easement

Council is the party authorised to release, vary or modify this easement under section 88 of the Conveyancing Act, 1919.

Site plan



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