



Our Ref:CM:KL:238435

28th September 2011

The General Manager
Newcastle City Council
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**121 – 123 UNION STREET COOKS HILL
RESIDENTIAL FLAT BUILDING & BOARDING HOUSE**

Further to our letter (and attachments) of 18 August 2011 responding to the JRPP requested points of clarification the project team have now had the opportunity to review submissions received during the exhibition period and provide this further submission addressing the key points raised. In particular we have considered the Cooks Hill Community Group submission which encompasses the majority of concerns raised in all submissions.

CASES OUTLINED IN THE SUBMISSION:

The Cooks Hill Community Group (CHCG) in their submission refer to a number of Land and Environment Court Cases to support the various points of view they present. We have analyzed these after seeking legal advice and provide the following response.

It is important at the outset to make some critical observations about the use of "Planning Principals" in the NSW planning system. In *Alphatex Australia vs The Hills Shire Council*, the Senior Commissioner says:

"Planning Principals are not binding. They are not the stone inscribed commandments that Moses described in Exodus Chapter 20, as bringing down from Mount Sinai.

Planning principals published and adopted by the court are intended to provide guidance to those who bring similar cases to the court for determination and are also intended to provide assistance and guidance to consent authorities. They do not and cannot have the same force as some form of statutory prescription.

Planning principals are not statutory instruments and are not intended or expected to be the subject of the same statutory interpretation and construction of the words and phrases contained within them as if they had the force of law and were subject to the requirements for statutory interpretation of their intention."

The above overarching commentary regarding planning principals should be kept front of mind in consideration of them.

Pages 10, 11 and 16 of the CHCG submission make reference to the case *McKenzie Architects vs Willoughby Council*. In doing so the CHCG submission suggests that the proposed development will have impacts by way of overshadowing and from other non compliant building elements and therefore the application should not be approved.

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The relevant principal in this case is that a DCP and an LEP are focal points for decision making but are not determinative. Accordingly the application should be considered on its merits having regard to the planning controls contained within these documents.

The separate report prepared by Geoff Baker, Urban Designer (HBO+EMTB), along with other supporting documentation including comments by Councils Urban Design Consultative Group have considered the merits of the proposal with regard to the LEP and DCP and deem the proposal acceptable within its context.

The Council's Urban Design Consultative Group comprises highly experienced Architects and Urban Designers. There would be in the order of a combined 100 years of experience between the Group members. The Group is a committee constituted under SEPP 65 and that they are satisfied on merit with the proposal is of significant weight.

In particular regard to overshadowing, we note that the proposed development is acceptable in terms of its shadowing impact as evidenced in the shadow diagrams submitted as part of the DA and the HBO+EMTB height report which indicate the overlaying of complying 10m height and the proposed development.

Pages 11, 23, 24, 25 and 26 of the CHCG submission make reference to a number of concerns relating to overlooking, amenity and character. Reference is made to the case *Peninsula Development PTY LTD vs Pittwater Council*. This case relies on the planning principal contained in *Project Venture Developments vs Pittwater Council* where the character test relevant to SEPP 65 was established.

The relevant principals are:

- 1) Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites.
- 2) Is the proposals appearance in harmony with the buildings around it and the character of the street?

We note that SEPP 65 does not apply to the proposed Boarding House. Notwithstanding this we have asked Geoff Baker, Urban Designer with HBO+EMTB, to prepare commentary relevant to the principals in this case for the entirety of the development including the residential flat building and the boarding house. This is attached and this document can be read as an addendum to submissions that the project team has already made.

On pages 13, 16 and 17 the CHCG refer to a number of cases including *Jawad Pty Ltd vs Ku-ring-gai Council*, *Krslovic Homes Pty Ltd vs Ku-ring-gai Council* and *Super Studio vs Waverley Council*.

The relevant principle from the cases is that the use of landscaping should not be the primary means to safeguard against overlooking or the primary means to mitigate bulk and scale.

The proposal does not rely upon landscaping as the main safeguard to protect privacy and minimize impacts of bulk and scale. Increased setbacks, appropriate unit orientation, designed screening as well as a highly articulated and site specific building rhythm/ massing strategy are the primary measures to ensure that this proposed development is appropriate. Further to this the

colour and material selections have been made in close consultation with Councils Heritage Adviser, Sarah Cameron and the heritage architect retained for the project.

The building design allows the opportunity for landscaping to compliment the overall site composition. This is evident in the central park between the two residential flat building strips and the main landscaped entry off Union Street. On Corlette Street large breaks between the building have been provided to allow deep soil landscaping.

We note that Council's Urban Design Consultative Group commended the overall planning approach to the development. Geoff Baker, Urban Designer with HBO+EMTB, has provided further commentary on this point.

Additional commentary relative to the 8 points of clarification sought by the JRPP is provided hereunder.

1. Certification from a competent person of the building heights of all proposed buildings on the site, clearly stating the proposed building heights in relation to existing ground level and distinguishing complying and non-complying elements with shading and/or colouring;

As outlined in our previous correspondence, all heights have been certified by deWitt Consulting and complying and non complying elements have been shaded.

Enclosed is a planning report prepared by Geoff Baker, Urban Designer with HBO+EMTB, addressing the building height and in particular whether the control for building height is unnecessary or unreasonable.

Further to this report, it must be noted that on two separate occasions the building height was assessed and critiqued by the Urban Design Consultative Group. On both occasions, the height was seen as appropriate when considering the positive outcomes associated with increasing the height including increased boundary setbacks, increased landscaping and building separation and reduced building mass.

Mr Baker in his report illustrates that this methodology of increasing height in the centre of the site provides a better outcome than by simply filling the available envelope formed by the control height and applicable setbacks.

The DCP allows for a 6m high wall on the boundary before setting back 4m to a height of 10m. A 6m high wall hard on the northern boundary without any setback or buffering would have a significant impact on those neighbours. Indeed a 10m high wall 4m off the boundary without the ability to provide adequate landscaping and proportioned set backs was not seen as entirely appropriate.

In seeking a departure on height, the following items should be considered:

- the provision of setbacks are well in excess of the minimum required;
- the additional height does not create more overshadowing (see height report);
- more open space and landscaping opportunities are created including a landscaped entry from Union Street. This entry provides a thematic link to National Park through to an

internal park and breaks down the building forms at the northern end of the Union Street Frontage;

- Flood planning only allows for a basement car park to 20% of the site. This has been located under the Union Street Buildings. All other parking to meet the DCP must be 'at grade' (RL of 2.5);
- The additional height at the central building has been designed as a recessive element to compliment the overall building composition- see 3D renders submitted. This element is effectively self shadowing as indicated in the shadow diagrams;
- The additional height does not constitute an overdevelopment. It is well considered in terms of design, approach, urban consideration, texture, form and sustainability; and
- The alternative of spreading the buildings over the site to reduce height would create more bulk, scale and privacy issues.

The proposed height at the centre of the site is similar to (actually less than) a development that was previously approved for the site, a development that was also subject to assessment by Council's Urban Design Consultative Group.

With regard to the objectors comment that the architects have misrepresented height and that shaded areas contradict one another we note that it was the intention of the resubmitted drawings to show the impact of the height of the development relative to the surrounding lots as well as internally.

To address these two aspects we have shown the following:

- All four boundary elevations with the elevation cut line **at the boundary**. A height line is shown 10m above the existing ground line at that relevant boundary. This is clearly indicated on the elevations: for example the Northern Elevation has a 10m height plane that clearly notes "10m HEIGHT PLANE AT NORTHERN BOUNDARY".
The intention of this is to show what the impact of height is relative to neighbouring properties.
- We have provided 6 sections through the site that clearly show the height of the buildings **at the section cut line**.

The heights at the sections will differ from the elevations due to the varying points at which the elevation or section cut planes are taken. All these heights have been checked and qualified by a registered surveyor (deWitt Consulting Height Report). The current submitted plans and appropriate revisions are referenced in deWitt's Height Report.

The plans clearly show the areas over the 10m height guide as shaded portions. We clearly state and define the two guiding height principals: Council's DCP and SEPP 65. Again, all heights and dimensions have been checked and qualified by a registered surveyor (deWitt Consulting August 11 Height Report).

The DCP allows for a variation when it can be demonstrated that the height control is unnecessary or unreasonable. The project Architect has designed the buildings in a responsible manner that considers all the necessary factors: site constraints, design, approach, urban consideration, texture, form and sustainability. This approach has been supported on two occasions by the UDCG. In particular the central height has provided the opportunity to step the building away from the boundaries.

2 Investigation and advice on the feasibility of vehicular access to the site from Union Street

A vehicular access has been provided to Union Street, which we note is welcomed by the CHCG. In response to the comments made concerning other traffic aspects TPK & Associates provide the following response:

The author of the submission is confused, below is what has happened:

- TPK September-October report adopted 0.29 trips per unit for Boarding House (see page 5 of that report); Council in their assessment wanted 0.4 trips per unit.
- TPK April 2011 report adopted 0.4 trips per unit (see page 4 of that report); Council has not objected since.

Better Transport Futures (BTF) has prepared reports on this project primarily for the Grammar School; at the JRPP in July 2011 a paper from BTF was handed to the Chair by the School Principal and TPK was requested to respond.

In response TPK prepared a statement for the JRPP (dated 9th August) and this was post Council agreeing to allow access to Union Street. In TPK's August response there were some revised traffic distributions and as the Union St access was now included naturally some change in distribution numbers occurred however it was the total trips from the April 2011 report that were redistributed and that report used the 0.4 trips per unit.

It is further reiterated that TPK in all reports has not dismissed the level of service concern for the right turn flow from Tooke Street at the Union Street intersection; TPK has:

- Acknowledged the LoS E & F in TPK Sept-Oct 2010 report indicating a Union Street Route Strategy should be considered by Council.
- TPK report in April 2011 again acknowledged the poor LoS and provided modelling for alternate geometric layouts that corrected the LoS concern however maintained the poor LoS to the right turn from Tooke Street in the peak exists now and was not solely brought about by this development. Hence the Union Street Route Strategy recommended in the TPK Sept-Oct 2010 report is a matter that Council needs to strategically consider rather than considering this intersection in isolation.
- Council has accepted this view.

TPK therefore confirm that they have addressed the Tooke Street issue.

3) Clarification of boundary offset

As stated in the covering letter submitted with the redesign, the boundary setback provisions under the DCP should only apply to the perimeter of the development site. The re-submitted scheme has all boundary setbacks dimensioned at all corners of the building.

The key objective of a boundary setback is to ensure adequate light and ventilation, protection of privacy and the minimization of shadow impacts. In this instance the proposed development is

for either side of an internal boundary and therefore the impacts between both 'sites' are able to be readily determined and addressed. These impacts have been addressed in the following ways:

- substantial building separation;
- appropriate use of screening; and
- appropriate location of windows.

The southern boarding house is set back between 8.1m and 8.2m from the southernmost boundary abutting the school. In real terms, this is in excess of over 4m from the minimum boundary setback that could be applied to this boundary.

Therefore having regard to the merits strict compliance of the referenced internal boundaries is unnecessary.

4) Advice on the opportunity to re examine alternative design of the proposed dwellings in the North Western corner of the development to improve the privacy and amenity of the existing adjoining dwellings.

The north west building has been redesigned and reduced in area. The northern wall has been set back 7.2m to 8.5m from the north boundary. Two ground floor apartments would look across the site and into the proposed acoustic screened fence. The units on the upper levels look over the roof of the neighbouring dwelling to the north on Union Street. No privacy issues are anticipated in any of these units.

The building separation as required by SEPP 65 would be achieved if the site to the north is developed. However in the interim the current setback is appropriate when considering the location of windows and existing fencing along this boundary.

As stated above in regard to court cases. The proposal does not rely solely on the landscaping for privacy.

5) A review advice responding to Mark Waugh's traffic comments dated 22nd July 2011 in relation to the proposed development.

See point 2 above.

6) Further consideration of the opportunity to provide a wider range of dwelling types including more 2 and 3 bedroom dwellings, noting that the current proposal is overwhelmingly single bedroom dwellings.

We note in the submission that currently in the area exists:

- department of housing units;
- aged and disabled residents (Housing NSW);
- some boarding house accommodation (private); and
- some private residential units.

This confirms our position that there is not significant numbers of privately owned 1 bedroom dwellings in the area. As indicated in the previous covering letter and subsequent market

commentary by Street Real Estate, the market demand is for this style of accommodation. This is also supported by falling dwelling occupancy rates.

The presence of boarding houses in the locality is of course completely expected and consistent with the zoning of the site and surrounds as 2(b) Urban Core zone, which permits boarding houses, whereas in Council's 2(a) Residential zone boarding houses are prohibited.

The proposed residential flat building will include high quality, modern residential apartments that meet the current market trend and demand. The fact that the units are small does not mean they are of a low standard.

We note that Housing NSW in a letter to Council commend the project and particularly support the proposed boarding house.

The subject site is an appropriate location for the apartments and boarding house having good access to shops and services and transport and in particular noting the topography being conducive to walking and bike riding.

7) Certification from a competent person of the proposed gross floor areas of the proposed development.

This has been addressed in Council's report.

With regard to the provision of balconies where the side walls are enclosed we note the following as explanation by way of a design outcome:

- the enclosed balconies focus views across the parkland and away from the school to the south and residents to the north,
- The side walls are essential to the aesthetics and architectural expression for the development. They modulate and articulate the building mass. The building mass is articulated as a series of smaller box elements that step in and out undulating along the streetscape to break down the mass and provide a smaller grain of articulation to the building,
- the enclosed side walls assist in mitigating any privacy issues associated with the provision of balconies on a busy road,
- The side walls mitigate privacy issues between balconies so that the outdoor spaces can be better utilized. The balconies are a primary outdoor space for the upper units and privacy and usability must be maximised. Using the blinker walls visual and acoustic privacy is maintained from oblique angles along the street as well as between adjacent units and balconies.
- the side walls allow for weather protection to the balconies including limiting western sunlight,
- The side walls assist in identifying the perimeter extent of each unit assisting in identification of each unit in the external expression of the building.

8) Provision of a local character statement for the boarding house component of the proposed development, given that such consideration applies under Clause 54A(3) of the current SEPP.

A character statement has been prepared & lodged with Council. An addendum to this has been prepared by Geoff Baker, Urban Designer with HBO+EMTB and is attached to this letter.

CONCLUDING COMMENTS

There is significant evidence arising that NSW requires additional housing, more affordable housing and more affordable rental options. This is being reported regularly. Housing NSW commend the Union Street project and support it, for this very reason.

Government policy reflected through the range of planning documents including the Lower Hunter Regional Strategy, the relevant SEPP Affordable Rental Accommodation, Council's LEP, DCP and Newcastle Urban Strategy tell us that we must provide for increased density to house increasing population and that this is best to occur in compact settlements close to shops transport and services. The planning controls tell us that this site is one of those sites where this should happen. The proposed development responds to this and delivers a development to the envisaged density for the area, consistent with the desired future character but designed in consideration of the existing character.

There can be no doubt that achieving the envisaged density will necessitate a built form that is different to single storey detached dwellings or even two storey homes and townhouse and villa design. However, the form of development has not ignored the character of the area and has provided a high level of modulation and articulation, the appropriate cues from the locality have been adopted but in a modern interpretation that purposefully does not mimic nearby design, particularly that of the adjoining conservation area. The development is appropriate when considering the relevant factors of design, approach, urban consideration, sustainability, texture and form.

From a land use perspective the proposed boarding house does not rely on the SEPP for permissibility, the 2(b) Urban Core zone says we want boarding houses in this area. The proposed boarding house land use is consistent with this desired outcome.

The only area of non compliance is with the height of buildings. The Urban Design Consultative Group, a SEPP 65 constituted committee of highly experienced professionals accept the methodology of proving for some increased height in order to allow increased boundary setbacks and agrees it is consistent with the desired context for the area. This increased height does not unreasonably overshadow and does not create unreasonable privacy impacts. This increased height allows for increased setbacks to reduce apparent bulk at the boundaries and does not constitute an 'overdevelopment' of the site.

Council's DCP makes it clear that the controls within can be varied subject to appropriate merit consideration. This is also established planning law. In relation to height that merit consideration has been undertaken by the very experienced Urban Design Consultative Group and has been further addressed in the report prepared by Geoff Baker Urban Designer.

Regards

A handwritten signature in black ink, appearing to read 'Craig Marler'.

Craig Marler
Senior Development Planner
ADW Johnson Pty Ltd
Hunter Office

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