

14 November 2013

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Our reference:
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Dear Richard

**Planning Advice re Development Application DA12/0549
1 King Street, Newcastle**

1 Introduction

You have asked us to respond to a submission made to the Joint Regional Planning Panel (**JRPP**) objecting to the above development application, by Herbert Geer solicitors dated 24 October 2013 on behalf of Mr P Anderson, owner of Unit 908, 67 Watt Street Newcastle located within the “Arvia” apartments (the **Anderson Objection**).

The Anderson Objection sets out a number of arguments as to why, in the writer’s opinion, the JRPP “cannot lawfully approve” DA12/0549 (**the DA**).

For the reasons set out below, we are firmly of the view that the JRPP may proceed to determine the DA, that the JRPP may confidently rely upon the comprehensive assessments of the DA which are before it, and that the assertions made in the Anderson Objection are, with respect, misconceived.

Given the length of the Anderson Objection, we summarise the main arguments identified in the Anderson Objection (underlined headings below) and respond to each.

2 Response to issues raised in the Anderson Objection

Conformity with the modified Concept Plan

2.1 The Anderson Objection asserts that:

“the DA fails to conform with the modified Concept Plan specifically clause 11(c) View Sharing in respect of the Planning Assessment Commission’s stipulations for objectives and design principles for view sharing”.

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- 2.2 At the outset it should be remembered that the relevant legal test is that the JRPP may not grant consent unless it is satisfied that the development which is the subject of the DA is “generally consistent with” the terms of the approval of the Concept Plan.¹
- 2.3 Consideration of view sharing has been, and continues to be, a central element of the DA, and was also an important matter considered by the PAC when it considered an application to modify the Concept Plan (MP05_0062 MOD 2) in April 2013 (**CP Modification**). As you are aware, a key purpose of the CP Modification was to request approval of the changed building envelopes within which the DA now seeks consent to carry out development.
- 2.4 Indeed, when determining the modification to the Concept Plan on 9 April 2013, the PAC specifically addressed the impact on views as follows:

“The Commission believes impact of views should be considered in the context of reasonable expectations having regard to the building envelopes and development potential already approved in the Concept Plan in 2007 for this site. The potential development of the subject site was also known before more recent residential development to the west of the subject site.

The Commission in accepting Department’s assessment has carefully considered the issue of view impact, and the submissions made by residents, **and agrees with the Department’s conclusion that the shifting of the building envelope southward and the relatively minor increase in building height over all would have negligible impact on views.** The Commission also accepts the Department’s assessment that having regard to relative floor levels that the 0.65m increase in height is acceptable and will have negligible impact on views.

At the same time the Commission adopts the recommendation of the Department to include a design principle for the consideration of sharing of view through building design and layout in future development applications, **however this is adopted in the context of an assessment of reasonable expectations.**”² (emphasis added)

- 2.5 The JRPP is entitled to take into account material which was prepared prior to the CP Modification, as well as the further detailed analysis which has been provided subsequently. The Applicant has, on several occasions, provided information addressing view sharing, all of which is now before the JRPP as follows:
- (1) The material comprising the original DA submission dated May 2012;
 - (2) in a letter provided to the Department of Planning dated 24 October 2012 (in support of the CP Modification) which is now before the JRPP;³ and
 - (3) in a further comprehensive view impact analysis, including 3D graphical view analysis taken from “The Royal” and “Arvia”, dated 26 July 2013.⁴
- 2.6 The 3D graphical view analysis is conservative in that it depicts built form which completely fills the modified Concept Plan envelope. As you are aware, the actual form of the proposed development does not completely fill that envelope, and it necessarily follows that the view impact of the proposed building form will be reduced from that depicted in the 3D graphical analysis.
- 2.7 In addition, the JRPP has the benefit of the detailed analysis of view sharing prepared by the Council officers in their assessment reports dated 3 June and 5 September 2013.

¹ Environmental Planning & Assessment Act 1979 Schedule 6A, clause 3B(2)(d)

² Planning Assessment Commission, Determination of Modification Application, Newcastle Hospital Site Concept Plan, 9 April 2013.

³ Annexure E to the Supplementary Assessment Report dated 5 September 2013

⁴ Appendix G to the Supplementary Assessment Report dated 5 September 2013

- 2.8 There can be no question that there is ample material before the JRPP to inform a comprehensive assessment of the impacts on views, and to satisfy the JRPP that the design, height and bulk of the proposed buildings incorporates the sharing of views (in accordance with the design principles set out in the modified Concept Plan).

The DA is contrary to the Land and Environment Court's planning principles on view sharing, assessing the impact on neighbouring properties, and FSR and building envelope.

- 2.9 First, it is important to understand the nature and status of planning principles. They are not legally binding, either on consent authorities or on the Court. Whilst the Court of Appeal has said that "consistency in the application of planning principles is, clearly, a desirable objective," the Court also cautions that each case must be decided on its own facts and circumstances.⁵
- 2.10 It is entirely appropriate for the Council in its assessment report, and for the JRPP in its consideration of the DA, to assess the acceptability of view loss, overshadowing and impacts on neighbouring properties in the context of the facts and circumstances of **this** case – namely:
- (1) the approved building envelopes established by the modified Concept Plan; and
 - (2) as the PAC stated in April 2013, in the context of "*an assessment of reasonable expectation*" formed as a result of the decision in 2007 as to the development potential of the site.
- 2.11 Notwithstanding these remarks, the principles in *Tenacity* have been carefully assessed in the documents before the JRPP.
- 2.12 Floor space controls are established by the modified Concept Plan, and are complied with. There is no void, or lack of clarity, in the applicable control established by the modified Concept Plan in this regard.
- 2.13 A review of the very extensive material now before the JRPP, and the several assessment reports prepared by the Council, leads comfortably to the conclusion that the JRPP is equipped to make a lawful determination.

The DA fails to resolve traffic problems related to the site

- 2.14 Again, there is ample evidence before the JRPP in relation to traffic matters.
- 2.15 As a consequence of the deferral of the application by the JRPP at its meeting on 5 September 2013, the Applicant was requested to provide yet further information on transport matters. That further information, including an updated traffic impact assessment, was provided to Council on 1 October 2013 and forms part of the material upon which the JRPP may base its decision.

The envelope assigned to the DA "enables an alternative design to be submitted".


- 2.16 Whilst there may be other designs which could be developed within the parameters set by the approved Concept Plan, that is, with respect, irrelevant to the JRPP's assessment of the current DA.
- 2.17 It is well settled that it is for an Applicant to decide the form of an application, and the duty of the consent authority is to consider the application presented to it, in accordance with law.

3 **Summary**

- 3.1 This is a DA which has been on foot for over 12 months and in respect of which there has been public notification, and ample opportunity for interested persons to make submissions, which they have done.
- 3.2 Specifically in relation to Mr Anderson, it is noted that he has availed himself of the opportunity to make submissions to Council, to the JRPP and, in respect of the modification to the Concept Plan

⁵ *Segal & Anor v Waverley Council* (2005) 64 NSWLR 177.

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which facilitated the subject development application, to the PAC itself. Those submissions have been the subject of detailed consideration and response both by the Applicant (and its expert consultants), and by Council.

- 3.3 As was identified by the PAC in its determination dated 9 April 2013, the objections of Mr Anderson and any others who reside in the Arvia Apartments should be tempered by an assessment of the reasonableness of those expectations, in the context (as pointed out by the PAC) that the building envelopes and development potential of the subject site was approved in 2007, and that the shifting of the building envelope southwards which was approved in April 2013 "would have a negligible impact" on their views.
- 3.4 Notwithstanding this circumstance, the Applicant has provided a detailed analysis of view impacts, overshadowing and impacts on neighbouring properties, as well as providing a further detailed response on traffic matters.
- 3.5 Accordingly, the JRPP has before it ample material upon which to make a determination in accordance with law, and to approve the subject DA should the JRPP be minded to do so.

Yours faithfully


Felicity Rourke
Partner
Norton Rose Fulbright Australia