

Our Ref 82014006-01/Letter 004
Contact David Laing

27 November 2014

Southern Region Secretariat
Joint Regional Planning Panel
Regional Panels Secretariat
23-33 Bridge Street
Sydney NSW 2000 Via Email (jrppenquiry@jrpp.nsw.gov.au)

RE: DA-2013/1419 – REGENCY TOWER DEVELOPMENT
Response to Council Officer Report Prepared to inform the JRPP (Southern Region) Business Paper – 1 December 2014 – JRPP2013STH032

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Dear Panellist,

This letter has been prepared in response to the above item, which is being considered at the next JRPP (Southern Region) meeting on 1 December 2014.

The applicant has done all that is physically possible to ensure that the scheme complies with the LEP, DCP, RFDC including removal of one entire level of the development, further enhancement of street level activation and improved façade articulation on all elevations which have all been supported by State (concurrence from the DPE), Regional and Local authorities and external agencies.

Notwithstanding such a position, the Design Review Panel still holds the opinion that the scheme does not meet the qualitative 'design excellence provisions' of Clause 7.18 of the LEP. Council Officers have advised that they are unwilling/unable to contravene their own specialist advisors and have recommended refusal of the application citing four key matters, namely:

1. *"A failure to demonstrate design excellence as required by clause 7.18 Design Excellence in Wollongong City Centre and at key sites*
2. *<An inability> to achieve a high quality design and would adversely impact upon the existing and future desired streetscape*
3. *Unsuitability with respect to design quality (having regard for public submissions) and*
4. *Approval would set an undesirable precedent for similar inappropriate development and is therefore not in the public interest*

There were no submissions made in respect of the building's appearance (item 3) and the issue of precedent (item 4) stems from Council Officers not wanting to go against the recommendation of their DRP. Both items can therefore be dismissed.

Therefore the fundamental question for JRPP is what extent does the scheme meet the 'design excellence provisions' in the LEP, does the scheme adversely affect the streetscape, and in whose opinion?

Does the proposal now comply with the relevant planning controls?

During the October 21 JRPP meeting, the project architect raised the issue of subjectivity and that excessive weight was placed on the opinion of the DRP in meeting the design excellence provisions in the LEP. The Panel advised that if we were to gain

approval for the development, we must meet the requirements of the DRP, in particular the issue of height and floor space ratio. On this basis, further design modifications were made to the development, including:

- Removal of one entire floor from the development (consistent with advice from Council)
- Reduction in height of the building to RL 117.060 (building height of 83m)
- Redistribution of floor space throughout the building
- Rationalisation of the Regent and Rawson Street corner to reduce external steps
- Expansion of pedestrian movement areas and the introduction of a glass curved awning to improve amenity and emphasise the entrance to the building and
- Improvement of façade treatment including flaring of the glazed façade, raising the curved top of the glazing to improve upper level connectivity and a new window composition on the northern elevation.

The DRP (6 November 2014) commended these positive changes to the development but subsequent DRP comments (17 November 2014) stated that development had failed to meet the design excellence criteria. We would proffer that 'design excellence' is not an absolute state but one of gradation.

Planning controls in the Wollongong City Centre, (i.e. LEP and Chapter D13) are heavily codified and strictly enforced. With exception to a minor height and building separation non-compliance (which the DPE has granted concurrence to), the proposal complies with floor space ratio, setbacks, building depth and bulk, street frontage heights, open space and landscaping, car parking and SEPP 65 requirements. This is agreed to by all parties and a critical consideration in how much weight is given to the subjectivity surrounding consideration of 'design excellence'.

How much weight should be given to expert opinion?

The Land and Environment Court has considered the "weight to be given to expert opinion on architectural design" through a planning principle". The planning principle (located at paragraphs 38-42 in *Architects Marshall v Lake Macquarie City Council [2005] NSWLEC 78*) provides a way to approach this subjective and qualitative matter through a list of appropriate matters to consider when making a planning decision. Indeed, the court has stated that the very purpose of planning principles is to assist in the following situations:

- Where there is a void in policy
- Where policies expressed in qualitative terms allow for more than one interpretation
- Where policies lack clarity

The design excellence provisions at Clause 7.18 of the LEP are inherently qualitative (i.e. a high standard of architectural design, whether the form and external appearance of the development will improve the public domain, and the bulk, massing and modulation of buildings) and open to interpretation.

The Court's planning principle in *Architects Marshall v Lake Macquarie City Council [2005] NSWLEC 78* provides a more suitable approach to approach the determination of this application.

38 The weight given by the Court to expert opinion on architectural style, form or character should be tested against two main criteria, ie:

- whether the opinion is mandated by a design code, such as the Residential Flat Design Code or the Burra Charter, or alternatively reflects the subjective preferences of a local community expressed in a local policy, such as a development control plan, and/or
- **whether the opinion is a widely accepted professional view, or at least a view held by a sizable group of professionals, rather than one individual opinion.**

39 Most design codes and guidelines do not give advice on architectural style. Their content tends to be generalised. **For example, such codes may emphasise the need for compatibility with the context of a site, leaving the question open whether or not compatibility requires adopting the architectural style and materials of the surrounding buildings.**

40 In contrast, some development control plans are quite specific about the desired architectural character of the area to which they relate. **Since these plans have been subject to exhibition and community comment, they should be the starting point from which the proposal is considered.** The approach must be consistent with that prescribed by the Court of Appeal in *Zhang v Canterbury City Council [2001] 115 LGERA 373*.

41 The majority of development control plans, however, are silent on architectural style and character. In such cases the only evidence before the Court is that of one or more architects or urban designers. **It is not always easy to decide when an aesthetic opinion represents a widely accepted professional view rather than an individual opinion. However, generally held professional views tend to be expressed in articles, publications or policies of professional institutions. Experts criticising the architectural design of a building should, where possible, refer to these for validation, in order to demonstrate that the criticism amounts to more than a statement that the expert would have designed it differently?**

42 Applying the above principles, I find that Mr Vickas' criticism of the proposal's architectural style is an individual's opinion rather than a view shared by the design profession. It is not mandated by a development control plan expressing the subjective preferences of the Rathmines local community. Consequently, I do not give it major weight.

(emphasis added)

With reference to para 38, the development meets the requirements of SEPP 65 and the accompanying Residential Flat Design Code. The opinion of the DRP does not represent a "widely accepted professional view, or at least a view held by a sizable group of professionals". Would all architects share the same view, would another group of three hold a different view? Of course they would!

With reference to para 39, the DRP has mentioned that an improved contextual analysis would allow the development to better respond to surrounding developments, existing and proposed. The contextual analysis is suitable for the purpose but should be subservient to the higher order controls in the LEP and DCP. Both of which determine that development on Regent Hill will be significantly higher and denser than what is existing, with specific controls informing the built form of these developments to which we fully comply. The DRP implied that a detailed contextual and urban design analysis should inform the controls but this is contrary to the approach of Council and undermines their extensive urban design studies that they have used to inform their LEP and DCP.

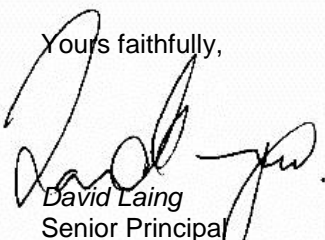
With reference to para 40, the LEP controls and DCP chapters defining the development of the Wollongong City Centre have been subject to extensive exhibition and community consultation, prior to the adoption of these two planning policies in 2009. Therefore, the design on whether the development meets the design excellence provisions should be grounded in the controls within the LEP and DCP.

With reference to para 41, the views expressed by the DRP are not grounded in "generally held professional view...expressed in articles, publications or policies of professional institutions." DRP has not referred to any articles, publications or policies of professional institutions, nor have they cited similar developments or other developments for the evidence base. Where is the evidence that underpins their viewpoint on these subjective issues of design excellence?

Recommendation

The JRPP is the relevant consent authority and must satisfy itself not only does the proposal meet the 'design excellence' provisions in the LEP, but a whole host of other matters prescribed by s.79C of the EPAA in particular the provisions of density, height, parking, economic, environmental and social impact. We stand firm behind this development and the contribution it makes to the City of Wollongong. All but the DRP believe this is case and we would respectfully ask the JRPP give this appropriate weight in their deliberations.

Yours faithfully,



David Laing
 Senior Principal
 For **Cardno (NSW/ACT) Pty Ltd**