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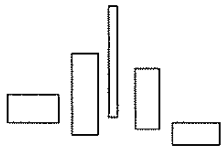

PIKES & VEREKERS
LAWYERS

9 December 2013

Joint Regional Planning Panels
Regional Panels Secretariat
GPO Box 39
Sydney NSW 2001

Dear Secretariat

DEVELOPMENT APPLICATION DA 239/2013 – 144 – 150 AND 154 PACIFIC HIGHWAY AND 18 BERRY STREET
Our ref JRP:GT:130232
Your ref Regional Panels Secretariat

As the Applicant's legal advisor I propose only to make comment on legal and planning principles insofar as they relate to the main issues before the JRPP (any other comments would be in passing).

Relevant to my role, the matters upon which I will speak would therefore be as follows:

1. The relevance of the existing approval to the subject DA.
2. The appropriate height.
3. Weighting to the old and new LEP provisions.
4. The commercial floor space ratio.
5. The site amalgamation.
6. The through link.

The real issue before the Joint Regional Planning Panel ("JRPP") as has been the issue on previous applications is height.

The Relevance of the Existing Approval to the Subject DA

There are many circumstances both before the JRPP and the Land and Environment Court where the Court has taken a relatively incidental view of any existing consents relating to a site and that is for good reason, as generally an applicant is entitled to or not, as they so wish, and develop the land in accordance with that development consent.

The circumstances are very different here. The applicant, the JRPP and the Land and Environment Court have consistently had reports before it by the same planning department and its strategic planning department coincidently saying that the appropriate height for any development on the corner of 144 – 150 Pacific Highway should be in the order of RL125. This view has been contained in every report prepared by the Council's planners going back three years in one form or another. It formed the basis of the draft LEP that was before the Court at the time and which subsequently became the new Local Environmental Plan.

That view has not been accepted by the Land and Environment Court and a very substantial building of RL156 has been approved on the corner site. There is currently an application to modify that consent lodged with the Land and Environment Court generally relating to the unit layout and the like. If this application is unsuccessful, that proposal will be proceeding.

I addressed the JRPP with respect to the last application, it was not my understanding that the JRPP necessarily formed a view that RL156 was an inappropriate height, but that there was a preference for a podium at the time. Resolving that podium form allowed extra height for the building to proceed to the height nominated in that application. It is fair to say that that matter was resolved by the time the matter went to Court.

It is also fair to say is that it had been the view of the strategic planning department and the JRPP that in terms of strategic planning it would be a better outcome for the three sites, 144 – 150 Pacific Highway, 18 Berry Street and 154 Pacific Highway, to be developed together as although 154 Pacific Highway was separately developable, it was largely constrained and the commercial realities of its redevelopment completely unlikely. This remains the case.

Indeed it has to be said in the circumstances before the JRPP here that if the current application is not approved, the adjoining building at 154 Pacific Highway will remain and will remain isolated for the indefinable future. This is a matter that hasn't weighed highly in the Council's concerns, but we think would be of considerable concern to the JRPP and to any objective observer.

The opportunity for site amalgamation with the options for purchase remains open until approximately February and the corner site will be developed independently after that and all opportunity for the site amalgamation lost. This would be an unfortunate planning outcome and something that we believe is appropriate to weigh in the minds of the JRPP when considering the current proposal. They were certainly conscious of it on the last occasion.

The Council's planners have always held the view that RL156 was too high and it is in an intractable position which detracts from the overall conclusions expressed in the Council planning report.

The reality of the circumstance is that despite the approval of 144 – 150 Pacific Highway and 18 Berry Street, the Council proceeded with an already outdated RL for that site in the new LEP in 2013 and as a result an already outdated RL for 154 Pacific Highway at the time it was gazetted. The relationship of RL125 to the approved RL156 was in error even before the new LEP was gazetted.

On behalf of my client, I wrote to the Department prior to the gazetting of the new LEP and advised them of this problem, to which we were advised that there was sufficient flexibility in the new controls, both relevant to the aims and objectives of the consent and the existing consent of the Court to allow for variations in the RL's based on merit and that we should not be concerned that the LEP would be proceeding in all the circumstances relating to the delay in gazettal of the LEP the department saw fit to 'gazette and ask questions later".

This is a circumstance that we think is of enormous weight when one considers that our application is actually being lodged under the old Local Environmental Plan, under which there is no height control and under which the Court granted approval to the development of 144 – 150 Pacific Highway and 18 Berry Street.

If ever there was a circumstance of a case where the prevailing approval and controls existing at the time of the lodgement of the application be given a high degree of weight, this would be it.

We are aware of decisions of the Court, most of which the writer has been involved in, relating to operation and weighting of transitional provisions (*Terrace Towers Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195). One of the most sensible decisions was a decision of the Senior Commissioner Roseth at the time in a case called *Basemount Pty Ltd v Baulkham Hills Shire Council* [2004] NSWLEC 13. It is our view that on a proper construction in a practical sense of the planning outcomes as advised in the evidence before the JRPP here, there is nothing in the proposal that would be deemed to be mutually unacceptable in the terms of the desired future outcome for North Sydney, the CBD and (we will deal with separately) the related residential precinct.

I will leave others to comment on the merit assessment of height, except to say this:

(a) Council officers have appended the eastern elevation in their description of the proposal, we believe to exaggerate the scale of the development in all its elevation. It is my understanding that it was decided to provide the additional scale on Pacific Highway in the eastern elevation because that was an area where an element of more robust scale and height was appropriate; and

(b) A proper analysis in 3D of the other elevations show a stepping down of the built form to the rear and toward Doohat Avenue and the residential precincts at the back. 154 Pacific Highway is only 13 metres wide.

By way of passing, I would also comment that much time and effort was spent analysing the interrelationship between the built form of a proposal generally of the height before the JRPP, the interrelationship to the residential development in Doohat Lane and Doohat Avenue.

There are many examples in cities around the world where the scale of adjoining sky line city living reduces substantially to a residential precinct adjoining, such as is the situation here. That scale and interrelationship was discussed at length by Ms Laidlaw in the proceedings before the Court and the idea of providing a relatively abrupt scale change adjacent to the skyline was deemed satisfactory, provided the actual amenity impacts such as privacy, overlooking, and overshadowing were not inappropriate to the residential neighbourhood. This view was accepted by the Court and the current proposal is not materially different.

We think that is the situation here. There is indeed a substantial separation to the residential properties beyond and those properties look back to the proposed building in the context of very substantial built form and approvals in the city skyline behind. The Council's argument on impact in residential precincts is flawed. If in doubt, one can just stand in Doohat Avenue and look back at the site to the city, taking into account all the existing approvals. This was the exercise undertaken both by the Land and Environment Court and the experts consulting and advising on the matter before it.

It is now the position that for a development with a total cost in the order of $125,000,000.00 there is actually no material impact on any objector of any substance. This must be a rare occurance in planning and is largely ignored by the Council.

Commercial FSR

The writer was very cognisant in advising the applicant that a SEPP 1 with respect to the commercial floor space of the size necessary and sought by the original plan would be hard to justify before the JRPP, who would be focused on achieving those objectives and so the planning proposal to vary the floor space provisions was lodged.

That planning proposal has an enormous degree of evidence and substantiation which was hardly dealt with by the strategic planning department of the Council when coming to the conclusion that the change was to be opposed.

This is in circumstances where the Council itself has varied that floor space provision for commercial space right through the city of North Sydney in any number of examples over the recent years.

We had tried to run the planning proposal and the DA together to give the JRPP sufficient flexibility to determine the matter, but met head on with the timing provisions relating to the two applications, we have therefore lodged an application for a review of Council's planning proposal decision with respect to the floor space

control, which ultimately we believe will be dealt with and determined on its merits by the JRPP going forward. We have had to face up to amending the commercial floor space requirement to a degree that is supportable under the current planning controls both in the existing LEP and proposed, those objectives in the new LEP relating to the commercial floor space as set out in the planning proposal application, and are easily supportable.

As a result of this and to enable the matter to move forward in an orderly and economic manner, we wrote to the Council when we amended the plans and offered a condition that converted level 3 of the proposed development condition in the following terms:

> *"Level 3 of the proposed development is to be converted to commercial space to better accord with the floor space ratio controls applicable at the date of determination of this development consent. An amended plan is to be provided to the satisfaction of Council prior to the issue of the construction certificate."*

We have architectural advice that this can be easily managed. The architects can be queried or questioned with respect to that matter during the course of this submission. In the circumstances of the site being outside the inner CBD, the lack of any economic support for the commercial components and the objectives otherwise being met, the commercial mix is supportable.

Site Amalgamation

The Council's planning department continually say (in their defence) that the proposal approved by the Court was substantially different to that which was recommended for refusal by the Council planning department on the last occasion.

We acknowledge it was much improved, but with respect, nothing changed in relation to the essential ingredient of height. The Council's principle concern there, as it is here, remains without merit. The Council still wishes to ignore the approvals granted under Part 3A by the Minister, despite them forming part of a visual precinct for the locality. They ignore the actual controls at the time of lodgement and the notional arc. Indeed, the relationship of the approved building with its neighbours almost reiterates the findings of the Court in *Castle Constructions* – a finding that the Council's experts promoted. The planning department draws reference to nearer sites in the eastern side being rezoned for RL's 135 and 145. View analysis of the very substantial existing building on the north-east corner of the intersection of Pacific Highway and Berry Street which is currently built to around RL130 can only lead to the conclusion that it will not be replaced by a building some 15m higher. The site immediately to the north forms part of the Crown development and is to be developed to RL142.

The applicant has lodged a small s96 on the existing approval with the Land and Environment Court. We have never been able to obtain support from Council for any development on that site. Options for the purchase of 154 Pacific Highway run out in February and the applicant will move on with the current approval if the JRPP can't resolve successfully the issues in dispute by either approving the application or determining an appropriate height form that allows the amalgamation to occur. No one could have tried harder to put the sites together, but that opportunity will be gone in February, both because of the expiry of the options and the redevelopment of the corner site.

Conclusion

The expression, "one shot in the locker" is commonly used in planning and couldn't be more relevant here. We believe the site amalgamated development of the proposed height and in the form designed is appropriate. If however, in the context the JRPP considers that minor amendments required by the plans and/or conditions would enable the site amalgamated development to take place, I would encourage that process and the applicant will fit in with the form deemed appropriate.

Yours faithfully

Gary Green
Partner

This office will be closed from 4pm on Monday 23 December 2013 until 8:30am on Tuesday 7 January 2014