Laidlaw Mason Partners

9 December 2013

Joint Regional Planning Panel
Panel Secretariat
23-33 Bridge Street
Sydney, NSW 2000

Attention: Ms Angela Kenna

Dear Ms Kenna,

RE: JRPP No 2013SYE061 – 144-154 Pacific Highway and 18 Berry Street, North Sydney

I have been requested by Strand Estates Pty Ltd to review and provide response, from a town planning perspective, to the matters raised by Council's Mr Mossemenear in his report to the JRPP concerning the above-mentioned development application, to be considered by the Panel on 17 December 2013. By way of background, I was also the town planner engaged by the applicant to provide evidence on the earlier development application being the subject of Court Proceedings *Strand Estates Pty Ltd v North Sydney Council [2013] NSWLEC 1004* and am very familiar with the earlier planning history of this site.

I would be obliged if this letter and its annexures could be made available to the Panel for review prior to its meeting.

The reasons forming the basis of Mr Mossemenear's recommendation for refusal can be summarised as:

- Height – excessive measured against existing and new LEP controls and non compliant with new LEP controls;
- Bulk and scale - not compatible with the nearby low scale residential area;
- Design of through site link;
- Floor space ratio requirements for non-residential floor area; and
- Amenity of apartments (also to be addressed by Steven King).

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By way of general comment:

a) Two of the above-mentioned design features – namely 'height relative to North Sydney Local Environmental Plan 2001 (NSLEP 2001)' and the 'through site link' are identical to those previously objected to by Council but approved by the Court after comprehensive if not exhaustive examination of all of the relevant circumstances.
b) The repeated claim by the DEP and Council that the proposal is 'non compliant' with the height controls of North Sydney Local Environmental Plan 2013 is incorrect, or at the very least fails to present a complete and balanced assessment against all of the relevant controls of the new LEP in relation to 'Height' and specifically Clause 6.3(3) which allows variation providing that overshadowing requirements are met – and in this case they are indeed met.
c) Bulk and scale; the new DA moves the higher element of the proposed built form approximately 12 metres closer to the lower density residential area to the north west, meaning a separation of 84 metres to Doohat Avenue (the area said to be of concern to Council's experts in respect of the earlier Court proceedings) and thus consistent with the benchmark of 83 metres as referred to in the same proceedings (in that case measured to the west, to Edward Street). These figures were established to allow comparison to the separation achieved in the Castle Constructions site in Walker Street – presenting a building of more or less the same height above ground level as the subject proposal but at a much closer separation of 29 metres (and unlike the current situation, with the 'affected' residential properties being at a much lower level compared to the Castle Constructions tower).
d) Commercial FSR: the applicant, notwithstanding concerns as to the viability of same, has offered to accept a condition to convert floorspace equivalent to that required under the NSLEP 2013 to commercial and Council's report acknowledges that the commercial FSR figure that results would be consistent with that which the new LEP would require and as such, an appropriate foundation for a well founded SEPP 1. This is a matter readily resolvable by condition (as offered by the applicant) supported by the amended plans, amended SEPP 65 assessment and amended yield assessment as now provided in Annexure 4.

Many of Council's objections, I note, mirror those of the DEP, and in this regard the panel (and for the most part, Council itself) has taken the view that the new DA should be assessed completely afresh and as if this site had no planning history. Whilst it is certainly appropriate and correct that this DA must be considered on its merits, that attitude effectively throws away the considerable resources expended by all parties in the earlier proceedings – including those associated with Council's own internal and external experts - in deliberating at great length, the appropriate outcome for this site. There are certain parameters arising from the Court's judgment that reasonably should be able to be relied on in establishing principles as to what is appropriate and those parameters are certainly applicable to the key issue of height, as well as the specific design features – such as the through site link and interface with 16 Berry Street – that are either the same or virtually identical to those of the earlier approved design.

Ironically, the one issue that Council's summary of the key issues completely fails to recognise or give any credit for is the obvious 'new' circumstance presented by this proposal, that being the considerable planning benefit associated with the amalgamation of 154 Pacific Highway into the site,

that being an initiative that was previously 'strongly supported' by Council and, as I recall, the DEP as well.

If the approved DA is accepted as a starting point – and this, realistically, will be the development constructed if the current application is unsuccessful – then even if one accepts there is an incremental 'worsening' of impacts (at least as Council perceives them to be) this must reasonably be balanced against the prospect of 154 Pacific Highway being left as an isolated and highly constrained site, in lieu of what could be achieved, which is a comprehensive urban design resolution of this prominent CBD intersection and a better planning outcome overall.

The issues raised by Council are discussed in greater depth below.

'The height is excessive when assessed under the current and new LEP controls'.

<u>The controls</u>

Whilst there are repeated references in Council's report to the proposed development 'breaching the height controls of NSLEP 2013' in fact the application is subject to the savings and transitional provisions of that new LEP – meaning that the DA must therefore be assessed under the provisions of NSLEP 2001 and there is in fact no 'breach'. Weight must be given to the NSLEP 2013's controls as (in effect) being 'certain and imminent' but it is wrong of Council to gloss over the weight that must also be given to the planning controls of NSLEP 2001 that actually apply to this development.

In any event, although LEP 2013 reduces the height standard for the site to RL 106/125 it is important to understand the rationale of Council's strategic planners in making this change. The report of Brad Stafford, senior strategic planner (extract at Annexure 1) prepared in relation to the North Sydney Strategic Review (23 September 2013) makes it clear that the numerical controls were introduced to support performance based overshadowing controls that had proved difficult to administer under NSLEP 2001: the report states: 'to rectify this, Council began in 2006 the process of translating those [overshadowing] controls into specific height controls for each site within the North Sydney Centre…<u>the height controls derived from this process are expressed as relative levels (RLs)… and form part of the recently gazetted North Sydney LEP 2013'</u> (emphasis by underline added).

The explanation provided by Mr Stafford is reinforced by the drafting of the height standard in the new LEP. Clause 6.3(3) provides that '<u>Development consent … may be granted for development that would exceed the maximum height of buildings</u> shown for the land on the Height of Buildings Map (ie RL 106/125 for the site) if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm is not likely to reduce the amenity of any dwelling located on land to which this Division does not apply' (emphasis added).

Mr Stafford's report and the particular drafting of the new height controls clearly show that the concern driving the reduction in height was that of overshadowing, secondly that Council accepted the difficulties in assessing overshadowing on a CBD-wide scale and thirdly that the response was to 'set the bar low' in terms of height limit, leaving the applicant with the prospect of 'raising the bar' back up again if it could be proven that the overshadowing performance criteria had been met. This approach simply changes the onus of proof on the applicant compared to the 2001 LEP where the bar was set high (RL195) with overshadowing to be addressed on a performance basis.

It is thus incorrect of Council's report to simply state the proposal 'does not comply with the LEP 2013 height controls' without considering the totality of the height controls and thus considering whether or not the in-built variation criterion of Clause 6.3(3) has been met. In fact the report makes no assessment of 'Height compliance' at all in the context of Clause 6.3(3) and this is a significant omission.

The variation criterion – has it been met?

There is one residential building caught by Clause 6.3(3), being one occupying land to which the relevant Division does not apply (ie outside of the CBD) and one that is affected by overshadowing from the proposed development, that property being 7-17 Berry Street.

As to what might constitute a material reduction in amenity for the purposes of applying Clause 6.3(3) the 'Nuts 'n' Berries'[1] threshold of 30 minutes (relating to the time a person might wait for solar access without undue annoyance) has been offered by Council as a reasonable guide – this judgment applying to a DA made under NSLEP 2001 in Berry Street. Additional shadowing to Level 3 of 7-17 Berry Street (comprising the living areas of three units) is limited to around 20 minutes in total. At this level the westernmost unit has a very generous wrap around balcony which includes a large area not affected even at 9am whilst the middle unit at that level receives sunshine to the western third of its balcony by 9.15am – ie the real impact is thus about 15 minutes to one unit at the worst time of the year. The owner/occupier of that unit is not an objector to this DA.

Council's report fairly acknowledges that this maintains a reasonable level of solar access and it is reasonable therefore to conclude the proposed development does not amount to a materially reduced amenity viz a viz Clause 6.3(3). Further, that the height standard contained in Clause 4.3 (ie RL 106/125) is thus able to be varied.

What Mr Mossemenear's report does not do, however, is place this solar access assessment in the context of Clause 6.3(3) to conclude as it should have done, that contrary to the repeated position expressed in the report – and even assuming the LEP 2013 standard currently prevailed over that of NSLEP 2001 which it does not - the RL 106/125 limit in this case would be able to be varied and without any need for reliance on meeting the criteria of Clause 4.6 (which effectively replaces SEPP 1).

For completeness it should be noted that:

- Clause 28D(2) NSLEP 2001 also provides other specific solar access controls relevant to building height and the current development proposal complies with these controls.
- NSLEP 2013 similarly provides additional solar access controls and the proposed development complies with these as well. Specifically in respect of the Don Bank Museum the impact is for 5 minutes before noon and of a tiny corner of what is already a very shady area. The impact that would be appreciated by any layman is, to all intents and purposes, non existent[2].

[1] Nuts 'n Berries v North Sydney Council [2006] NSWLEC 516

[2] It should be noted, by way of clarification, that Council's report includes, under its heritage assessment, comment that the proposal does not comply with the overshadowing standards relative to Don Bank. This was based on an incorrect notation of the submitted plans that has since been corrected by the applicant and advised to Council.

Building Height Plane

There is reference to Clause 30 – Building Height Plane in Mr Mossemenear's report. In accordance with earlier Court judgments this clause does not apply to the subject site and Council's comments as to non compliance should therefore be disregarded.

Height/massing – merit considerations

As to the other objectives relevant to height and massing (whether under NSLEP 2001 or 2013) there has been a long standing divergence of opinion between the applicant and Council as to what height would be appropriate at this corner site. Those differences of opinion were comprehensively, if not exhaustively, aired during the prior Court proceedings.

It was agreed by the Court that there were, in essence two purposes to the height controls. My evidence on these matters – which was accepted by the Court (paras 35, 38) - was addressed at paras 23 – 24 of the judgment (emphasis by underline added):

> 23 Ms Laidlaw maintains that there are two different types of building height objectives within LEP 2001 and the DCP. The first provides an absolute maximum height of RL195 and is supported by the "notional arcs" and by objectives relating to a stepping down of height to the edges of the CBD. This objective is concerned with urban form of the CBD and its skyline profile and a desire to have the two identified buildings Northpoint (100 Miller Street) and Shopping World (79-81 Berry Street)) in the middle, transitioning down to lower buildings at the edges of the CBD. Any skyline assessment is best based on a maximum level and the notional arcs. The second objective is concerned with how buildings, at the edges of the CBD, impact on special areas, heritage items/area, residential areas beyond the limit of the centre. The amenity objectives in LEP 2001 provide controls relating to overshadowing, privacy and general amenity impacts. Any assessment is best based on the height of a building measured in metres or number of storeys above ground level.
>
> 24 In this case, there is no dispute that the proposed building satisfies the skyline requirements of a maximum height of RL 195 AHD and the notional arcs. On this basis, Ms Laidlaw concludes that the key difference with Mr Mossemenear is the relatively small area of whether the scale and massing of the development, expressed as its height, is appropriate in terms of how the building would be perceived from surrounding residential areas. Ms Laidlaw notes that nowhere in LEP 2001 or the DCP is there any guidance in addressing this area of disagreement, and specifically what would be an appropriate height in metres or storeys at the edges of the CBD. While accepting that the suite of Court decisions on the Castle Construction site (136-140 Walker Street) has some relevance, it is necessary to take care in adopting the findings to the subject site because it is topographically at a significantly greater elevation than the Castle Construction site. To be of any relevance, it is necessary to firstly understand what was approved on the Castle Construction site (RL 132.5) in metres above ground level or number of storeys and secondly, the relative elevation and proximity of the residential buildings on the opposite side of Walker Street, being the nearest residential development outside the CBD. If this assessment is carried out (see p 20, Exhibit 3), it is obvious that the scale relationship between the mixed use building on the Castle Construction site and the adjoining residential development is more severe and overbearing than the proposed development and the adjoining residential development in Doohat Avenue because the separation distance is around 29 m for the Castle Construction site compared to around 83 m for the subject site, given that the two buildings have approximately the same height above ground level.
>
> 25 Overall, Ms Laidlaw states that the proposed building presents a reasonably compatible transition, compared to other buildings existing, proposed or under construction, at other locations around the periphery of the CBD. In her opinion, the scale relationship is appropriate between the

proposed buildings and the residential buildings in Doohat Avenue and consistent with what would be expected at the edges of a major commercial centre.'

The second part of the 'height objective' – the interface with lower scale residential - was then addressed thus:

38 'We agree with Ms Laidlaw that, in practical terms, there is always likely to be a difference in scale, form and massing at the interface between two different zones, particularly in this case, given the regionally significant status of the North Sydney CBD and the relatively low density of the adjoining residential development. We are satisfied that given the reasonable separation of the site from the nearby residential developments that the difference in scale, form and massing is acceptable. The argument by Ms Laidlaw that the relationship between the proposed development and the nearby residential properties is more acceptable and desirable in terms of scale, form and massing than the relationship between the residential properties opposite the approved Castle Construction development at 136-140 Walker Street because of the greater separation distance has some merit (see diagram p20 - Exhibit 3).

In terms of impact on residential amenity the net difference between the current proposal and that which the Court accepted as reasonable is the fact that the north-western edge of the proposed development's tower is moved a short distance of around 12 metres northwards – but importantly still maintaining – at around 84 metres - a greater separation to Doohat Avenue (this being the relevant assessment point adopted by Council's experts) compared to the benchmark of 29 metres provided in the Castle Constructions development referred to at para 38 in the Court's determination above. A copy of the Section Analysis provided to the Court is at Annexure 3. The 83 metres referred in the judgement was measured to Edward Street, whilst the separation to Doohat Avenue (the point requested by Council's experts) was, in that case, 96.2 metres.

I add, with reference to Mr Mossemenear's report's claim it was a factor, that there was no reliance by the applicant, nor indeed any reference in the judgment to any desirability of 154 Pacific Highway being used to provide a step down towards the residential area to the north west. Specifically the Court did not in fact place any reliance on the proposed RL 125 control of NSLEP 2013 as presenting a mitigating benefit as some kind of transitional step as claimed in the Council report.

In terms of merit considerations, under NSLEP 2013 the driving force of the lowered height controls, as noted, was apparently overshadowing. The remaining objectives of the new LEP with regard to height and massing are very similar to those of NSLEP 2001, being the objectives against which the earlier DA was assessed and found to be satisfactory. Importantly, and perhaps unusually for a multi storey residential building, there is no claim in Mr Mossemenear's report as to any direct impact by way of privacy, views or overshadowing in respect of current DA– these being the common concerns that give rise to objection as to height. That was also the case for the approved DA.

Finally on this central issue, I note that Mr Mossemenear's report includes the reasons for refusal given by the JRPP in rejecting that earlier development application. The JRPP was concerned over three particular aspects in relation to height. Two of these issues have been addressed above viz;

- Firstly as far as there was reliance on the 'Castle Constructions' suite of judgments the Court, in its more recent judgment relating to the subject site, explained the necessity of translating the RLs applicable to Walker Street into storeys or height in metres and agreed with the applicant's evidence that in actuality the two proposed buildings (ie the Castle

Constructions development and the development proposed for the subject site) were more or less the same height above ground yet the latter had greater separation and a lesser impact on the nearby residential area. That conclusion is only altered to the extent the new DA for the subject site brings the proposed development around 12 metres closer to Doohat Avenue; and

- As far as the then draft and 'not certain and imminent' LEP was concerned, that draft LEP does lower the height standards applicable to the site, but on the basis of Mr Stafford's report, that initiative was intended to allow for more effective management of shadow impact and the NSLEP 2013 allows variation to the height standard where – as in the case of the development application under assessment - overshadowing standards are achieved.

The third issue of concern to the Panel was the practicality of the tower's floor plate given the requirement for a podium to be introduced. In fact, the required podium was able to be introduced during the course of the earlier proceedings (and to the satisfaction of Council's planner) with the tower floor plate remaining practical and functional, hence addressing that concern as well. That remains the case for the current DA although of course there is now - with 154 Pacific Highway incorporated – a larger and more functional floor plate rising through the building in any event.

Counterbalancing what are perceived by Council as negative (but nevertheless, in a practical sense) incremental impacts – whether assessed under the NSLEP 2001 or 2013 - is the clear planning benefit associated with the amalgamation of 154 Pacific Highway into the development site – an initiative that was strongly supported by Council in the earlier DA including comment that 'amalgamation is the preferred option … such an amalgamation dependent on the merit of the design, may enable variation from Council's draft controls'[3]. In stark contrast, now that amalgamation has in fact been achieved it has been given no weight at all as a 'positive' in Council's current assessment. This is an unusual position to take, noting that if this DA fails then in all probability – noting its fragmented ownership and the difficulty experienced by the applicant in tailoring a commercially attractive proposition to the owners for amalgamation – if this DA does not succeed a small, isolated site is likely to remain a long term, if not effectively permanent, constraint on securing a co-ordinated high quality urban design outcome for this prominent corner.

Through site link

The DEP has justified its opposition to the design of the 'approved' though site link on the basis it did not have capacity to provide input during the earlier proceedings. Whilst that is so, it is also the case that the DEP likewise did not have the benefit of the extensive examination of this issue undertaken during those proceedings and therefore would not appreciate the various constraints that apply. The current design is identical to that which has been approved (see Annexure 2) and indeed somewhat improved in context, taking into account the relocation of the service area northwards (due to the incorporation of No.154).

That design was arrived at in the spirit of optimising the design of the link within the parameters set by the various site planning constraints, including the gradient of Berry Street and the design of the driveway under, and one considered adequate and appropriate to the role it is intended to serve – noting also that there is no specific DCP requirement on the applicant to provide any such link at all.

[3] Report of Geoff Mossemenear 7 March 2012

While the thoughts of architects, designers and planners may differ on questions of preferred detail, a design that has been comprehensively examined by all disciplines and previously found acceptable must surely be viewed as at least *an* acceptable design outcome for the purposes of the current DA.

DEP's objections - other

Aside from the through site link, the DEP's objections to the height and bulk of the development essentially mirror those of Council and my comments above therefore apply.

I add that the DEP fails to acknowledge the weight that should be given to the LEP against which this DA should be assessed and instead has placed overwhelming weight on the height standards of the 2013 LEP, at the same time failing to recognise the capacity offered by that LEP to vary those standards.

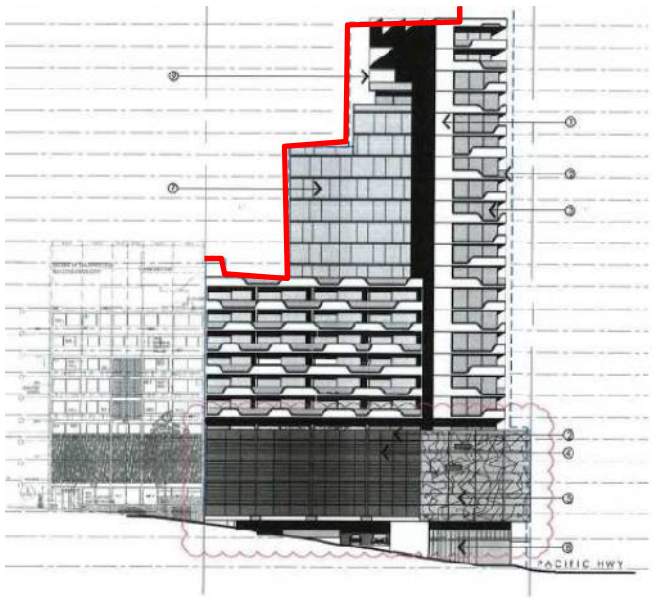
The DEP also ascribes an 'urban design' objective to the NSLEP 2013 height limits[4] that is at variance to the stated intention of Council in adopting those controls. Unless Mr Stafford's report has omitted this important piece of information the purpose of the height reduction was to achieve a more manageable approach to the control of solar access impacts. Indeed, if one has regard to the highly fragmented pattern of height controls under NSLEP 2013 for the North Sydney CBD (see extract below) it is difficult to interpret that there could be any consistent urban design philosophy or goal underpinning them – certainly not one beyond the overall goal of securing a gradation in height from Northpoint and Shopping World to the edges of the center, that being a philosophy the proposed building height has been already held to be consistent with.

NSLEP 2013 Height controls

With respect to the objection raised as to the transition of height to 12-16 Berry Street the transition is identical to that which has been approved (see extract of southern elevation below) and it is not

[4] 'variations to the controls could only be supported if there are sound reasons based on urban design and being in context with recent developments in the immediate vicinity….'

two storeys as referred to by the DEP, but one storey with a balustrade above. A one (or even two) storey transition in the context of a CBD environment is insignificant.



Interface with 16 Berry Street – approved development in red

Floor space ratio requirements for non residential floor area

Mr Mossemenear's report refers to the applicant's 'without prejudice' offer to accept a condition of consent to convert Level 3 of the proposed development to commercial. A plan is now submitted (DA017C – Annexure 4) which is capable of being substituted for the original residential floor plan and able to form the basis for an approval in those terms.

With Level 3 so converted the overall commercial FSR rises to 2.24:1, this being consistent with the average non residential FSR that would be required for the consolidated site under NSLEP 2013. It should be noted that this figure of 2.24:1 excludes the area occupied by the through site link, this being a public amenity included at the Council/DEP's request and occupying area that if not so used, would have been used for commercial (which in that eventuality, would have meant a non residential FSR slightly greater than that required by NSLEP 2013).

Mr Mossemenear's report notes 'A SEPP 1 objection could only be supported if the minimum FSR was at least equal to the FSR under the recently gazetted LEP'. Subject to imposition of the condition referred to above, and the substitution of DA017C that criterion has now been met. A revised SEPP 1 objection is annexed (Annexure 5).

Finally, Mr Mossemenear's report raises the concern that a condition to convert Level 3 to commercial would not be acceptable because the SEPP 65 assessment, yield assessment and S94 contribution would need to be altered and that a plan would need to be provided showing the new commercial area. All of these requirements are now supplied by the applicant and annexed to this letter (Annexure 4), viz:

- A plan showing Level 3 as commercial (DA017C);
- An updated yield analysis with Level 3 as commercial. This analysis shows performance against RFDC benchmark solar access and cross ventilation standards for the residential component improved to 73.5% and 75.7% respectively (compared to benchmarks of 70% and 60% respectively);
- A revised SEPP 65 assessment for the development with Level 3 as commercial.

With the above documents at hand the Section 94 re-calculation would be a simple matter for Council to prepare its calculation.

Amenity issues

Amenity issues are addressed by Steven King's assessment, submitted separately. That assessment is based on the amended plans provided to Council to address the concerns initially raised by the DEP. I clarify that Mr King's report was prepared on the basis of Level 3 being residential, however as the amended yield analysis at Annexure 4 shows, the performance against RFDC benchmarks is improved with Level 3 converted to commercial.

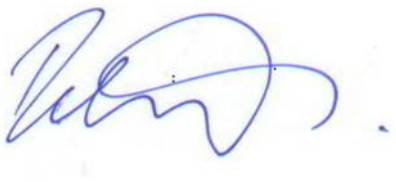
Whilst concluding that amenity needs to be 'significantly improved' Mr Mossemenear's report fails to acknowledge that the development in fact complies with the RFDC benchmark standards of 70% of units receiving adequate solar access and 60% receiving adequate cross ventilation. The report's analysis relies on extrapolating Mr King's original report on the unamended proposal taking into account the number of units removed under the amended proposal. In fact the amended proposal did not simply remove units but also improved solar access to the remaining units such that the yield analysis subsequently provided to Council showed full compliance with the RFDC benchmark standards of 60% (cross ventilation) and 70% (solar access) and that figure I understand, has been confirmed by Mr King.

As with the approved development the number of south facing units exceeds the RFDC standard but for a site constrained by a substantial southern aspect, and one which meets the relevant solar access and cross ventilation standards, this could not reasonably be held as determinative. For a development that complies with the benchmark standards Council's argument for a redesign to 'vastly improve' solar access is not compelling.

As for the concern about the amenity of the lower floor units the applicant's without prejudice offer to convert level 3 means that residential would now commence at Level 4. It will be noted that other mixed use buildings in the area have residential units at lower levels including the recently approved and constructed 156 Pacific Highway which is directly adjacent to the site and includes residential at Level 1. The same is true for the other Pacific Highway developments at 211-223, 239-247 Pacific Highway and the proposed development at 225-235 Pacific Highway. Also at 12-16 Berry Street, the first residential level is Level 1. Council's objection to the residential accommodation within the development is thus inconsistent with the approach apparently accepted for these nearby developments.

I would be obliged if the above matters were taken into account in the Panel's determination of this matter. In my opinion the amended application involves only minor, incremental impacts against the development approved on this site, those additional impacts being within reasonable bounds, and the specific design objections raised by the DEP/Council have been reasonably addressed by the applicant. At the same time this DA represents, in all probability, the last opportunity to secure a co-ordinated, high quality urban design outcome for this prominent Highway site through integration of No. 154 Pacific Highway – an outcome which offers a superior outcome overall and which has been viewed hitherto as highly desirable by Council, yet an initiative on the part of the applicant that has been afforded no credit at all in Council's assessment of the current DA.

Yours sincerely



Deborah Laidlaw

Annexure 1 - North Sydney Centre review – report (extract) to Legal and Planning Committee meeting dated 23 September 2013.

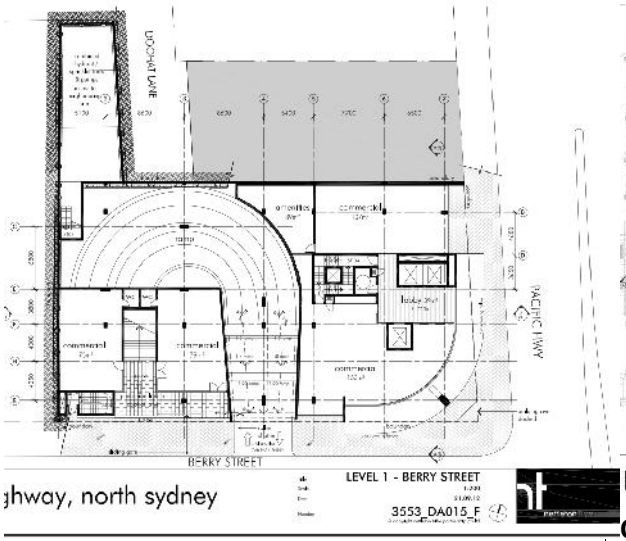
The shadow area control of LEP 2001 prohibited both any increase in overshadowing outside of the composite shadow area and any increase in overshadowing within the shadow area that would reduce the amenity of any dwelling within it. The policy was clear in its intention to protect the amenity of residential land surrounding the North Sydney Centre.

The policy however was often difficult to interpret and lacked the level of clarity and certainty that residents and land owners sought. To rectify this, Council began in 2006 the process of translating those controls into specific height controls for each site within the North Sydney Centre.

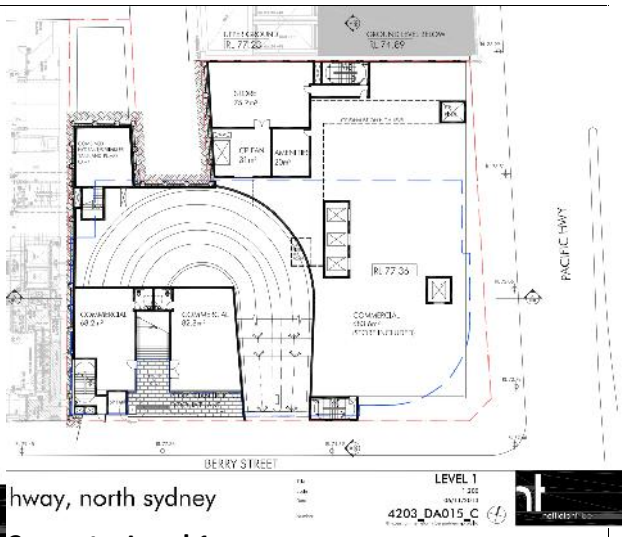
This process revealed that some measure of potential additional yield was present within the Centre, prevented from being realised due to the shadow control prohibition. This was particularly evident for sites that could potentially contribute to additional overshadowing of the Warringah Freeway if redeveloped.

The height controls derived from this process are expressed as relative levels (RLs) (i.e. metres above sea level) and form part of the recently gazetted North Sydney LEP 2013.

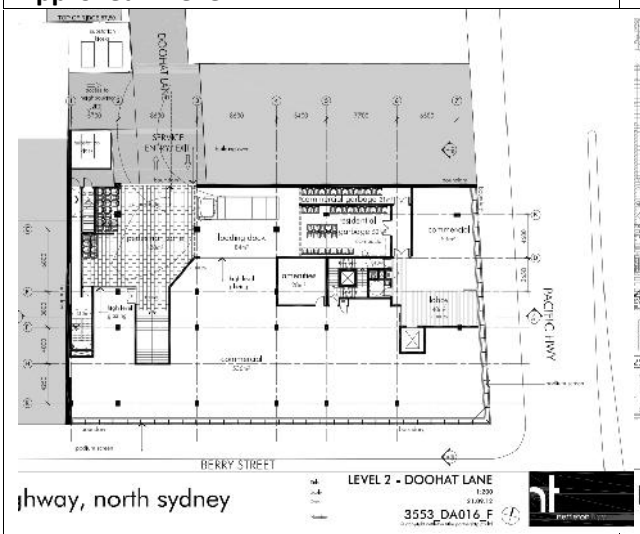
Annexure 2 – Through site link – comparison approved/current



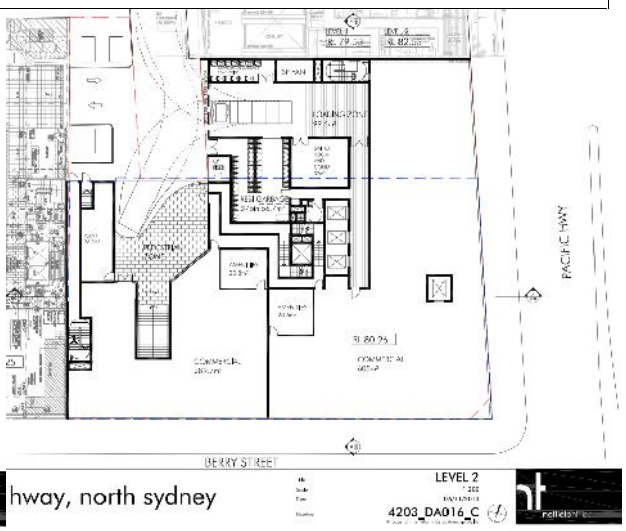
Approved – Level 1



Current – Level 1

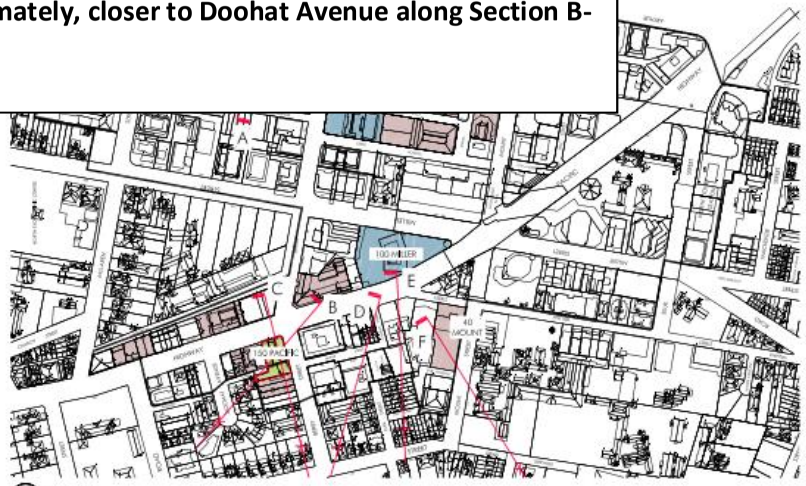


Approved – Level 2



Current – Level 2

Annexure 3 - Section Analysis relied on in earlier Court proceedings – figures are for approved development, not the currently proposed development which is 12 metres approximately, closer to Doohat Avenue along Section B-B



01 KEY PLAN
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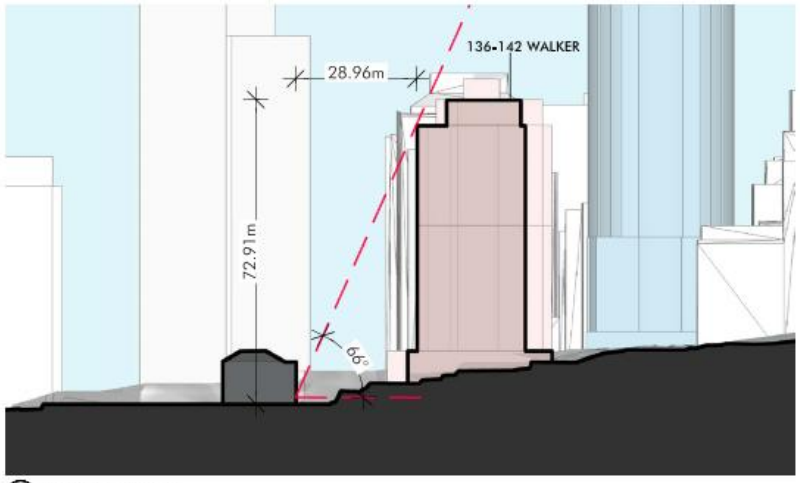

02 SECTION A - 175 WALKER ST
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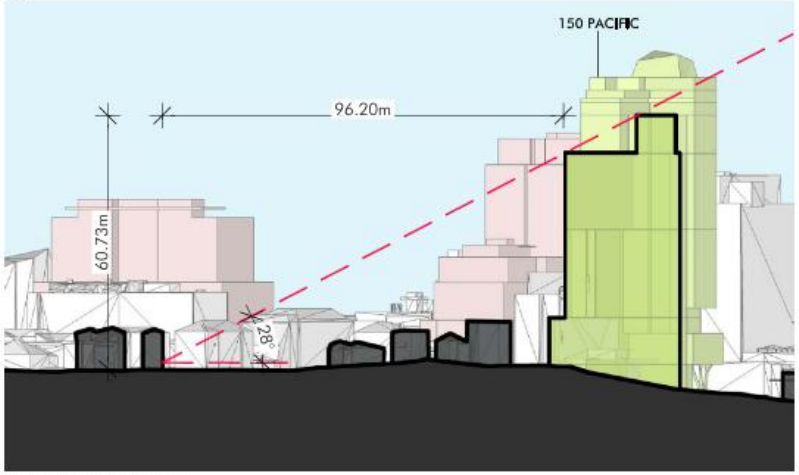
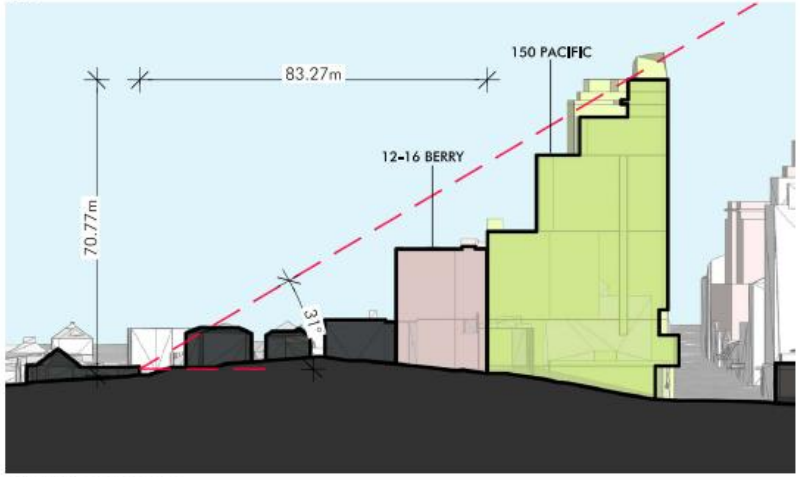


03 SECTION B - 15 DOOHAT AVE
SCALE 1:1000



04 SECTION C - 51 EDWARD ST
SCALE 1:1000

150 pacific highway, north sydney

Title: SECTION ANALYSIS
Scale: AS INDICATED
Date: 27.07.12
Number: 3553_SK_547

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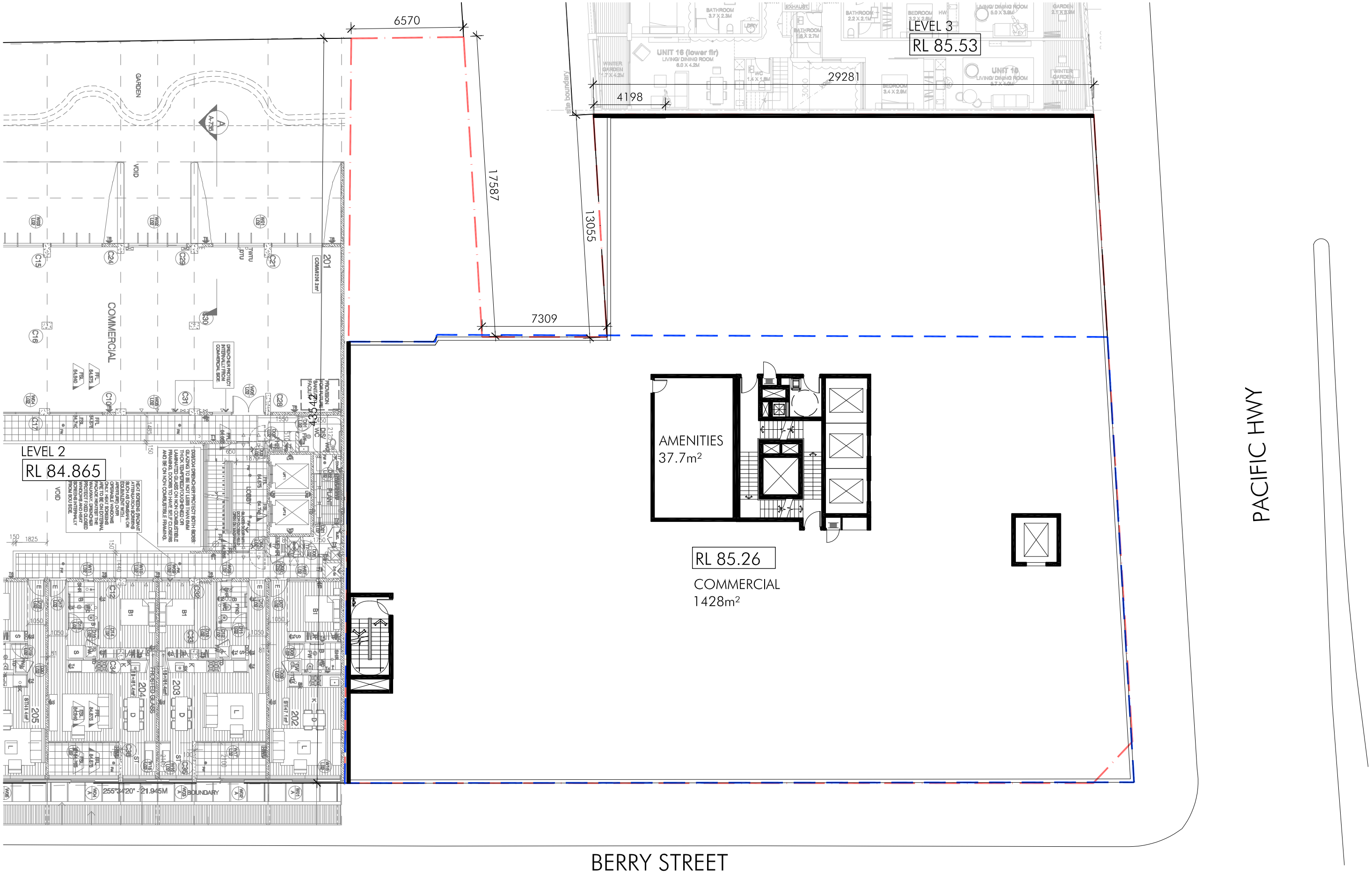
ANNEXURE 4 –

DA017C – Amended plan showing Level 3 converted to commercial floorspace, allowing compliance with the standards under NSLEP 2013

And associated with this plan:

- Updated yield analysis; and
- Updated SEPP 65 Assessment.



Nov 07, 2013 - 12:07pm P:\4203\4203_DA017_APPENDIX.dwg

154

pacific highway, north sydney

Title: APPENDIX_Level 3

Scale: 1:200

Date: 06/11/2013

Number: 4203_DA017_C

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154 Pacific Highway, North Sydney

RESIDENTIAL MIX SUMMARY

Commercial Level 3

Job: 4203
DATE: 08.11.2013

SITE AREA sqm	1681.8

SEPP 65 REQUIREMENTS

	% of total units	required %	No. of units
- Solar access (2hr direct)	**73.5%**	70%	133
- Cross-ventilation	**75.7%**	60%	137

UNIT MIX %

Total Studios	**15.5%**
Total 1 Beds (inclu. 1b+study)	**50.8%**
Total 2 Beds (inclu. 2b+study)	**32.6%**
Total 3 Beds	**1.1%**

RESIDENTIAL LEVELS	STUDIO	1 BED	1 BED + Study	2BED	2 BED +Study	3BED	TOTAL	SOLAR	CROSSVEN	SOUTH FACING
24	0	0	0	0	0	0	**0**	0	0	0
23	0	0	0	0	0	0	**0**	0	0	0
22	0	0	0	3	0	2	**5**	5	5	0
21	0	0	1	2	1	0	**4**	4	4	0
20	0	1	1	2	1	0	**5**	5	5	0
19	0	2	1	3	0	0	**6**	5	6	0
18	0	2	1	3	0	0	**6**	5	6	0
17	0	2	2	4	0	0	**8**	7	8	1
16	0	2	2	4	0	0	**8**	7	8	1
15	0	2	2	4	0	0	**8**	7	8	1
14	0	2	2	4	0	0	**8**	7	8	1
13	0	2	2	4	0	0	**8**	7	8	1
12	0	2	2	4	0	0	**8**	7	8	1
11	3	6	2	2	0	0	**13**	9	13	4
10	3	6	2	2	0	0	**13**	9	13	4
9	3	6	1	3	0	0	**13**	9	8	4
8	3	6	1	3	0	0	**13**	8	8	4
7	3	6	1	3	0	0	**13**	8	8	4
6	3	6	1	3	0	0	**13**	8	8	4
5	3	6	1	3	0	0	**13**	8	3	4
4	7	4	4	0	1	0	**16**	8	2	4
3	0	0	0	0	0	0	**0**	0	0	0
RESIDENTIAL SUBTOTAL	**28**	**63**	**29**	**56**	**3**	**2**	**181**	**133**	**137**	**38**
Unit Mix %	15.5%	34.8%	16.0%	30.9%	1.7%	1.1%	-	73.5%	75.7%	21.0%

max. carpark rate		amount	required	provided
serv. Apts	1/5 units	**0**	**0**	
COMMERCIAL	400	**3,765**	**9**	
STUDIO	0.5	**28**	**14**	
1 BED	0.5	**92**	**46**	
2 BED	1.0	**56**	**56**	
3 BED	1.0	**2**	**2**	
TOTAL			**127**	**146**
MOTOR BIKE	10.0		**13**	**14**
BICYCLE RESI.(LOCKOR)	3.0	60.3		
BICYCLE VISITOR(RAIL)	12.0	15.1		
BICYCLE COMM.(LOCKOR)	600.0	2.2		
BICYCLE COMM. VISITOR	2,500.0	0.5		

garbage bin (TBC)	rate	amount	required	provided
residential garbage	8	181	22.625	
residential recycle	14	181	12.9	
total			**35.6**	**TBC**
commercial office garbage	0.00001*5	1769	6	
commercial office recycle		1769	3	
commercial cafe garbage	0.00005*5	255	3	
commercial cafe recycle		255	4	
total			**10**	**TBC**

	RESIDENTIAL sqm	COMMERCIAL sqm
B5	36.8	0
B4	36.8	0
B3	36.8	0
B2	36.8	0
B1	36.8	0
GF	99	551.3
1	0	854.6
2	0	939.1
3	0	1420
4	1175	0
5	1002	0
6	1041	0
7	1041	0
8	1041	0
9	1041	0
10	1011	0
11	1011	0
12	737	0
13	734	0
14	734	0
15	734	0
16	734	0
17	734	0
18	565	0
19	565	0
20	517	0
21	468	0
22	381	0
23	374	0
GFA	15923	3765
FSR	9.47	2.24

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SEPP 65 DESIGN CHECKLIST

154 Pacific Highway, North Sydney
Project No. 4203 (Commercial Level 3)
DA– Modified Scheme 08.11.2013
Assessment against SEPP 65 "Residential Flat Design Code"

SEPP 65 Design Quality Principles	Design Proposal Principles	SEPP 65 Compliance description	compliance Yes	No	Comments
Principle 1: CONTEXT *Good design responds and contributes to its context. Context can be defined as the key natural and built features of an area. Responding to context involves identifying the desirable elements of a location's character or, in the case of precincts undergoing a transition, the desired future character as stated in planning and design policies. New buildings will thereby contribute to the quality and identity of the area.*	• Building type is mixed use podium and residential tower form • Relates to contextual built forms • Addresses dual street frontages of site • Clear building identity • Contributes to character of the precinct • Transitioning to the lower scale residential located further to the west	- Appropriate building form for corner site with use and building type similar to buildings in the context - General scale similar to the future character of the building envelopes in the area - Building responds to both site frontages at podium and tower levels - Architectural form and design establish building identity within its context - Corner site responds to planning and design policies	Y Y Y Y Y		
Principle 2: SCALE *Good design provides an appropriate scale in terms of the bulk and height that suits the scale of the street and the surrounding buildings. Establishing an appropriate scale requires a considered response to the scale of existing development. In precincts undergoing a transition, proposed bulk and height needs to achieve the scale identified for the desired future character of the area.*	• Similar bulk and height to surrounding buildings, but with transition to the west • Tower setbacks to reduce visual bulk and overshadowing to Don Bank • Scale in line with future character of planning controls	- Similar scale to the surrounding high rise buildings in the CBD - Acceptable impacts on the surrounding public domain (Don Bank) - Providing transition from higher buildings located in the CBD (south east off the site) to lower scale buildings located to the north and west	Y Y Y		24 storeys (includes plant room level)

Principle 3: BUILT FORM *Good design achieves and an appropriate built form for a site and the building's purpose, in terms of building alignments, proportions, building elements. Appropriate built form defines the public domain, contributes to the character of streetscapes and parks, including their views and vistas, and provided internal amenity and outlook.*	• Built form suitable for intended building use • Massing characterised by simple, linear form with alignments to the surrounding buildings and appropriate proportions • Building setback to provide articulated massing • Outlook and vistas from and to the building to be maximised • Appropriate building separation	- Massing and facades articulated to break down scale and create building identity, while improving internal amenity - Built form is characterised by simple forms with clearly indicated podium and tower form, which steps back from the western boundary to provide transition and minimise shadow impacts on the surroundings - Alignment of the podium height to the buildings next door on Berry Street and on Pacific Highway - Massing articulation improves natural lighting and ventilation - Building is located in dense, urbanised area with two buildings adjoining the property line to the north and to the west. Building has been designed to minimise any impact on those properties by additional setbacks and screening.	Y Y Y Y Y		
Principle 4: DENSITY *Good design has a density appropriate for a site and its context, in terms of floor space yields (or number of units or residents). Appropriate densities are sustainable and consistent with the existing density in an area or, in precincts undergoing a transition, are consistent with the stated desired future density. Sustainable densities respond to the regional context, availability of infrastructure, public transport, community facilities and environmental quality.*	• Appropriate high density for locality • Density responds to brief and market demand • Utilises existing infrastructure and transport	- Proposed building massing is consistent with the high density developments in the surrounding context - The proposal includes small apartments such as studios and one bedroom units, which are more affordable and suitable for the area - The location is centralised close to community facilities and employment - Proposed high density building type in central location, close to the transport hub utilises the existing public transport , providing integral, sustainable development	Y Y Y Y		
Principle 5: RESOURCE, ENERGY & WATER EFFICIENCY *Good design makes efficient use of natural resources, energy and water throughout its full life cycle, including construction. Sustainability is integral to the design process. Aspects include demolition of existing structures, recycling of materials, selection of appropriate and sustainable materials, adaptability and reuse of buildings, layouts and built form, passive solar design principles, efficient*	• Solar orientation • High density population • Water efficiency • Efficient / flexible planning • Energy efficient design	- High density within well services areas close to public transport and other facilities - The building will incorporate water efficient fittings and rainwater harvesting - Modular unit design allows future flexibility and potential future adaptive reuse to meet future demands - Energy use is reduced by maximising access to natural light and ventilation in units and common spaces	Y Y Y Y		

appliances and mechanical services, soil zones for vegetation and reuse of water.					
Principle 6: LANDSCAPE *Good Design recognises that together landscape and buildings operate as an integrated and sustainable system, resulting in greater aesthetic quality and amenity for both occupants and the adjoining public domain. Landscape design builds on the existing site's natural and cultural features in responsible and creative ways. It enhances the development's natural environmental performance by coordinating water and soil management, solar access, micro-climate, tree canopy and habitat values. It contributes to the positive image and contextual fit of development through respect for streetscape and neighbourhood character, or desired future character. Landscape design should optimise useability, privacy and social opportunity, equitable access and respect for neighbour' amenity, and provide for practical establishment and long term management.*	• Site is located in highly urbanised area , therefore no deep soil landscape is proposed • Communal open space with some landscape on the terraces of the building	- 25% of open space to be deep soil - The site is located within the North Sydney CBD area, and it provides commercial use on the lower levels, therefore no deep soil is provided		N	
Principle 7: AMENITY *Good design provides amenity through the physical, spatial and environmental quality of a development. Optimising amenity requires appropriate room dimensions and shapes, access to sunlight, natural ventilation, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and services areas, outlook and ease of access for all age groups and degrees of mobility.*	• Appropriate unit sizes and building dimensions • Natural ventilation • Building depth • Acoustic privacy • Accessibility • Solar access and good apartment amenity • Open space provisions	- Minimum unit sizes according to the SEPP 65 are achieved (1Bed- 50sqm, 2 Bed-70sqm, 3 Bed -110sqm) - Proposed building has a compact design with many corner units, or units with dual aspects on the upper levels - The building width varies from 18m to 25m. The depth of 25m is proposed in the areas where the dual aspect and corner units are situated; therefore it satisfies daylight and natural ventilation to those units. - Natural light and ventilation is provided to lift lobbies - 60% cross ventilated units - 25% kitchen naturally ventilated - Acoustic privacy is considered between units - Barrier free access to min 20% of dwellings - Max10% south facing apartments - Single aspect apartments are less than 8m deep - Kitchens are not further than 8m away from windows - 2.7m minimum ceiling height is provided to habitable areas - 70% of units receive 2 hrs of sun between 9am-3pm mid winter	Y Y Y Y Y Y Y Y Y Y Y	N	Range from studios, 1 bed, 2 bed, 3 bed and accessible units. 75.7% provided. Refer to Steven King's report 21% of units are south facing 73.5% provided. Refer to Steven King's report

		- Storage space is provided according to the SEPP 65 requirement: - $6m^3$ – Studio and 1bed unit - $8\ m^3$ – 2 bed unit - $10\ m^3$ – 3 bed unit - Proposed private open space provides area of minimum 2m deep balcony depth with areas of: - 25sqm on ground floor - Studio : 6sqm - 1 bed : 8-10sqm - 2 bed: 11-33 sqm - 3 bed: 24 sqm - 25% of site area to be communal open space. 17% of site area to be communal open space ($288m^2$) is provided on the roof terraces located on level 12 and 18. A further $272m^2$ of communal indoor space is located on levels 3-11. The proposed development is located close to community facilities and public open spaces and each unit is provided with appropriate private open space. Additionally the development provides a public link through the site that connects Berry Street with Doohat Lane.	Y Y Y Y Y Y Y	N	560sqm (33%) of communal space is provided.
Principle 8: SAFETY & SECURITY *Good design optimises safety and security, both internal to the development and for the public domain. This is achieved by maximising overlooking of public and communal spaces while maintaining internal privacy, avoiding dark and non-visible areas, maximising activity on streets, providing clear, safe access points, providing quality public spaces that cater for desired recreational uses, providing lighting appropriate to the location and desired activities, and clear definition between public and private spaces.*	• Activate street frontage, maximise activity on street level • Clear distinction between private and public spaces • Maximise casual surveillance	- Main entry from the street with retail and commercial activity on the street level overlooking the entry and the surrounding streets - Separate access for residential and commercial - The end of the common corridors are glazed to the north, south and west.	Y Y Y		

Principle 9: SOCIAL DIMENSION *Good design responds to the social context and needs of the local community in terms of lifestyles, affordability, and access to social facilities. New developments should optimise the provision of housing to suit the social mix and needs in the neighbourhood or, in the case of precincts undergoing transition, provide for the desired future community.*	• A majority of smaller apartments offers affordable accommodation • A range of smaller and larger units is provided to suit the social mix and needs of the local community • Accessible units to suit a range of demographic types	- Total 181units - 28 studios (15.5%) - 92 x 1 bed units (50.8%) - 59 x 2 bed units (32.6%) - 2 x 3 bed units (1.1%)	Y		
Principle 10: AESTHETICS *Quality aesthetics require the appropriate composition of building elements, textures, materials and colour and reflect the use, internal design and structure of the development. Aesthetics should respond to the environment and context, particularly to desirable elements of the existing streetscape or, in precincts undergoing transition, contribute to the desired future character of the area.*		- The design of the development responds to its context. - The dominant building elements are articulated by a playful, rhythmic façade of concrete and glass. The secondary building element is a series of glazed linear forms stepping back away from north and western boundaries in a proportional terracing sequence. - The building provides architectural emphasis to the highway and Berry Street and creates a strong tower form with clear podium base aligning with surrounding podium heights and responding to both street frontages.	Y		

Annexure 5 – SEPP 1 objection – FSR

Objection pursuant to SEPP 1- Development Standards. Clause 31(2) of NSLEP 2001 – non residential FSR for Mixed Use zones.

This objection pursuant to SEPP 1 represents an update of the objection originally prepared by Pikes Verekers Lawyers, and submitted to Council by letter dated 16 August 2013. The updated SEPP 1 reflects the without prejudice offer of the applicant to convert Level 3 of the proposed development to commercial as indicated on DA17C, thereby elevating the amount of commercial floor space to that which is equivalent to the requirements of North Sydney Local Environmental Plan 2013 ('NSLEP 2013') as averaged over the consolidated site.

Although the SEPP 1 objection has been generally updated, the principal additional arguments substantiating that the SEPP 1 is well founded in light of the applicant's offer to convert Level 3 to commercial are those set out in 1 (a) and (b) below.

EXECUTIVE SUMMARY

1 Compliance with the non-residential FSR control in the present matter is unreasonable and unnecessary for the following reasons:

a The non-residential area amounts to an FSR of 2.24:1 over the consolidated site. This is the same FSR as would be required by NSLEP 2013 for the same consolidated site and that LEP, being now gazetted, is 'certain and imminent' for the purposes of its assessment as 'technically' a draft planning instrument for the subject development application, having regard to the relevant applicable savings and transitional provisions. Given this circumstance and the fact that NSLEP represents Council's intentions for the future control of the North Sydney CBD it would be unreasonable and unnecessary to strictly enforce the non-residential FSR standard of NSLEP 2001 for the subject site.

b The non-residential FSR would in fact be higher were it not for the fact that the application includes a through site link, this being a public benefit which is not required by the applicable DCP but one which Council and the DEP has consistently supported and encouraged the applicant to provide. The through site link occupies space that could otherwise have been used for commercial purposes, and if that had in fact been realised, then the commercial FSR would have been greater than that required by NSLEP 2013.

c The objectives of the non-residential FSR control are met by the proposal despite the non-compliance. The objectives relate to appropriate residential/non-residential mix having regard to market demands, diversity of uses in mixed use zones, amenity and local character. The proposed development responds appropriately to the market and results in a diversity of uses in a high-quality urban setting.

d The objectives of the control, notably the need to respond flexibly to market demands, but also to achieve an appropriate mix of uses, having regard to that demand, will be thwarted. There is simply not the demand for the amount of non-residential floor space required by NSLEP 2001, and the control would result in an inappropriate mix in all of the circumstances.

e The Council has, by way of planning proposals, reduced the non-residential FSR on a number of sites in response to market demands and the need for more residential accommodation. This signals a shift in the planning intentions of Council in respect of the mix of uses on any given site to one that is more responsive to the market.

2 Compliance with the non-residential FSR control in the present matter would tend to hinder the attainment of objectives 5(a)(i) and (ii) of the Act in that a requirement of strict compliance would result in an unviable development unresponsive to market demands and economic feasibility.

3 If any one or more of paragraphs 1(a)-(e) or 2 above is supported then compliance with the standard should not be required.

THE TESTS

SEPP 1 Provisions

Clause 6 of SEPP 1 describes how this objection should be made:

> *Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefor) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstance of the case, and specifying the grounds of that objection.*

Clause 7 of SEPP 1 describes the matters on which the consent authority must be satisfied in determining whether to uphold an objection and provides:

> *Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent that development application notwithstanding the development standard the subject of the objection referred to in clause 6*.

Clause 3 sets out the aims of the policy referred to in clause 7 and provides:

> *This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.*

Thus the question when assessing a SEPP 1 objection is whether the objection is well founded and whether strict compliance with the standard is unreasonable or unnecessary in the particular circumstances or would tend to hinder the attainment of the objects in section 5(a)(i) and (ii) of the Act.

This is emphasised in the decision of His Honour Justice Lloyd in *Winten Property Group Pty Ltd v North Sydney Council* (2001) 130 LGERA 79 where His Honour describes the questions arising as follows:

> *First, is the planning control in question a development standard? Second, what is the underlying object or purpose of the standard? Third, is compliance with the development standard consistent with the aims of the policy, and in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the EP&A Act? Fourth, is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (In relation to the fourth question, it seems to me that one must also look to see whether a development which complies with the development standard is unreasonable or unnecessary, as noted by Cripps J in the Hooker Corporation case.) Fifth, is the objection well-founded?*

Is Clause 31 a development standard?

The provisions of SEPP 1 are applicable to development standards prescribed under an Environmental Planning Instrument pursuant to the Environmental Planning and Assessment Act, 1979.

The non-residential FSR control is set by clause 31(2) of NSLEP2001, which provides:

> ***Floor space controls***
> *A building must not be erected in the mixed use zone if the floor space ratio of the part of the building to be used for non-residential purposes is not within the range specified on the map.*

The range specified on the map is 3:1-4:1.

The control prescribed by clause 31(2) of NSLEP2001, being derived from a numerical dimension relating to the cubic content or floor space of a building, or alternatively the intensity or density of the use of any land, building or work, is a 'development standard' pursuant to the definition of same contained in Section 4 of the Environmental Planning & Assessment Act 1979.

The proposed variation

As submitted the proposal provided for a commercial ('non-residential') FSR of 1.47:1. The applicant has subsequently made a without prejudice offer to convert Level 3 to commercial supported by DA017C, a revised yield analysis and revised SEPP 65 Assessment. That offered amendment increases the non residential FSR to 2.24:1, that being the same non-residential FSR as is currently required for the subject site under the equivalent provisions of NSLEP 2013.

The non-residential FSR would be higher (and thus in fact greater than that required under the current planning regime of NSLEP 2013) were it not for the fact that the proposal also incorporates a through site link, that being a public benefit requested by the DEP and Council. The through site link incorporates space that could otherwise have been allocated for commercial purposes.

What is the underlying objective or purpose of the standard?

Clause 31(1) provides:

> *The specific objectives of the floor space ratio controls in the mixed use zone are to:*
>
> *(a) ensure a diverse mix of uses in each building in the mixed use zone, and*
>
> *(b) minimise traffic generation from commercial development.*

Given that clause 31 is specific to development in the mixed use zone, the mixed use zone objectives are also relevant in understanding the underlying purpose of the standard. These are set out in the Zoning and Permissible Use Table in NSLEP2001 as follows:

> *The particular objectives of this zone are to:*
>
> *(a) encourage a diverse range of living, employment, recreational and social opportunities, which do not adversely affect the amenity of residential areas, and*
>
> *(b) create interesting and vibrant neighbourhood centres with safe, high quality urban environments with residential amenity, and*
>
> *(c) maintain existing commercial space and allow for residential development in mixed use buildings with non-residential uses at the lower levels and residential above, and*
>
> *(d) promote affordable housing.*

Whilst ordinarily the objectives for a given standard would be expected to be best informed by the instrument containing that standard, NSLEP2013 is also a relevant instrument for the purposes of the DA, and hence this SEPP 1 objection. This is particularly so given that NSLEP2013 takes a similar approach to non-residential FSR in the mixed use zone (ie by prescribing a non-residential FSR range for given land) and prescribes the same non-residential FSR range for the subject site as NSLEP2001.

Clause 4.4A of NSLEP2013 sets the framework for considering non-residential FSRs on (inter alia) mixed use land. It is not possible to separate out the objectives of clause 4.4A, and they will be a relevant consideration for the DA pursuant to section 79C(1)(a)(ii) of the Act. As such they are, for the purposes of considering whether compliance with clause 31 is unreasonable or unnecessary, circumstances of the case that must be taken into account and thus also relevant considerations for this SEPP 1 objection, which forms part of the DA.

Given Council's consistent approach to non-residential FSRs across the two instruments, it is clear that the objectives in clause 4.4A are informative of the underlying purpose of the FSR controls in NSLEP2001. This is reinforced by Council's preparedness to amend NSLEP2001 to accord with the non-residential FSR controls proposed by NSLEP2013 when that instrument was still in draft, and in reliance on the matters called up by the objectives of clause 4.4A. These site specific planning proposals related to:

- 156-158 Pacific Highway;
- 12-16 Berry Street;
- 211-223 Pacific Highway;
- 239-247 Pacific Highway;
- 136-140 Walker Street;
- 144-148 Walker Street; and
- 225 Miller Street.

12-16 Berry Street and 156-158 Pacific Highway immediately adjoin the subject site. In each of the above examples, the reduction in non-residential FSR was accepted, in part, as a reflection of the lack of demand for commercial accommodation on the fringe of the North Sydney CBD. Further support for the reduction in non-residential FSR for these sites was found in that the reduction would:

- Maintain the mixed use character of the area.
- Increase the amount of permanent residential accommodation in the area.
- Provide added flexibility for the sites.
- Increase the vibrancy of the North Sydney CBD.

Although not strictly within the North Sydney Centre similar reasoning was adopted in respect of planning proposals for 8 and 10-18 Cliff St, Milsons Point, where non-residential FSR was reduced to 0:1.

The matters considered are all matters that, whilst not expressly referred to in clause 31 of NSLEP2001, are called up by the objectives of clause 4.4A of NSLEP2013. Council's approach is indicative of the fact that the underlying objective or purpose of the development standard in clause 31 of NSLEP2001 includes the same matters as are expressly set out as objectives of clause 4.4A. Those objectives are:

> *(a) to provide for development with continuous and active street frontages on certain land in Zone B1Neighbourhood Centre, Zone B4 Mixed Use and Zone SP2 Infrastructure,*
> *(b) to encourage an appropriate mix of residential and non-residential uses,*
> (c) *to provide a level of flexibility in the mix of land uses to cater for market demands,*
> (d) *to ensure that a suitable level of non-residential floor space is provided to reflect the hierarchy of commercial centres.*

Consideration of the objectives leads to a consideration of the third and fourth *Winten* questions, together with a consideration of the objectives of the Act. Various approaches to whether compliance with a standard is unreasonable or unnecessary in the circumstances of a case were considered by His Honour Justice Preston, Chief Judge of the Land and Environment Court in *Wehbe v Pittwater Council* (2007) 156 LGERA 446. These are discussed below. The relationship between the proposal and the objectives set out in section 5(a)(i) and (ii) is also discussed below.

Consideration of all of these matters and the particular facts and circumstances of this case leads to the conclusion that this SEPP 1 objection is well founded and should be supported.

Wehbe

In *Wehbe* Preston CJ set out five methods of determining whether compliance with a standard is unreasonable and unnecessary and whether an objection is well founded and consistent with the aims of clause 3 of the SEPP. The methods proposed by His Honour are not mutually exclusive, nor are they exhaustive. In *Liberty Investments Pty Ltd v Blacktown City Council* [2009] NSWLEC 7 Sheahan J observed:

> *On a close reading of… the Chief Judge's decision in Wehbe… it is clear that His Honour did not intend his analysis to be an exhaustive code to be strictly applied whenever SEPP 1 is relied upon… The learned Chief Judge, like Cripps J and Lloyd J in the earlier cases to which I have referred above, sought to provide up-to-date guidance and some examples to assist those who apply SEPP 1.*

It is also noted that the tests set by Preston CJ are in the alternative, although there may be some overlap between them. **Thus only one test needs to be met in order to ground a finding that a SEPP 1 objection should be supported**. The observations and submissions made in this SEPP 1 objection must be construed in this light.

Before setting out His Honour's tests we draw attention to the following passage which, in our view, is useful to bear in mind when considering any SEPP 1 objection:

> *development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives.*

This is the fundamental rationale behind His Honour's decision and the tests he sets flow from it. They are as follows (see paragraphs 42-48), and as noted apply in the alternative:

> *establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard…*
>
> *if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)…*
>
> *establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary…*

> *establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable…*
>
> *establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable…*
>
> *establish that "the zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary"…*

We do not question the zoning of the site and accordingly the fifth test does not arise here. Similarly it is not suggested that the objective or purpose is irrelevant to either the DA or this objection. The other three criteria are, however, all established.

A detailed analysis of the performance of the control as against the objectives of that control is annexed to and should be considered a part of this SEPP 1 objection and includes commentary on the North Sydney commercial market. This analysis is supported by a number of reports accompanying the DA, but notably:

- JBA Urban Planning Consultants, July 2013: Land Use and Apartment Mix: Commercial and Residential Market Report ("the July 2013 JBA report");
- URBIS, July 2011: Optimising Development Typology in North Sydney ("the July 2011 URBIS report"); and
- Boston Blyth Fleming, July 2013; Statement of Environmental Effects; and
- Property Council of Australia, 31 July 2013: North Shore Office Market Report ("the July 2013 PCA report").

It is clear from the annexed analysis and supporting reports that the DA is consistent with and supportive of the underlying objectives of the control. More significantly, however, strict adherence to the control is likely to seriously undermine the achievement of those objectives, notably the provision of an appropriate level of residential accommodation, especially affordable accommodation, and the requirement to be able to respond flexibly to market demand.

A brief consideration of these matters against each of the pertinent *Wehbe* tests is set out below. It is noted that the considerations below consider all of the objectives set out above, including those set out in clause 4.4A(1) of NSLEP2013. It is reiterated that these are relevant circumstances when considering whether compliance with the standard is unnecessary or unreasonable and cannot be ignored. They may fall under their own new head of consideration (consistent with Sheahan J's findings in *Liberty Investments*), however they fall equally comfortably within the *Wehbe* headings and have been addressed in that fashion here.

The objectives are otherwise achieved

Neither the DA nor this SEPP 1 objection seek to abolish all non-residential floor space on the site. The original proposal incorporated 7 commercial tenancies across three levels of sizes varying from 67.4m^2 to 672m^2. Commercial uses are located at lower levels and both frontages of the development will be activated by those commercial uses. There are sufficient and sufficiently varied commercial tenancies to ensure, in conjunction with the residential accommodation, a diversity of uses, which will give rise to interesting, vibrant and high quality urban environments. In accordance with DA 017C the applicant's without prejudice offer results in an additional level, Level 3, being allocated for commercial use.

A reduction in commercial FSR can only serve to reduce car parking demand form commercial uses.

The reduction in non-residential FSR is proposed chiefly in response to the absence of market demand for commercial floor space in North Sydney and the high demand for residential accommodation, in particular affordable residential accommodation. Reducing the non-residential FSR is a flexible approach that ensures that the development is responsive to market demand and provides the most appropriate mix of residential and non-residential uses having regard to that demand and the characteristics of the site.

The proposed development achieves the underlying objectives of the standard, and in those circumstances requiring strict compliance with the standard would be unnecessary (as the objectives are achieved) and unreasonable (as it places a burden on the Applicant for no real benefit).

The underlying purpose or objective would be thwarted or defeated

It is clear from even a brief consideration of the underlying objectives of the standard that it primarily seeks to ensure an appropriate and viable mix of residential and non-residential development on mixed use land. What is appropriate and viable is to be informed by market demand, and the expectation is that the non-residential FSR control will be flexible enough to respond to any given level of demand.

The annexed analysis, and the reports supporting the DA, inarguably demonstrate that demand for commercial floor space in North Sydney is low and is in decline. There is currently an oversupply of such floor space, with a 10.6% vacancy rate, and that vacancy rate is increasing (having increased by around 25,000m^2 in the 6 months to 31 July 2013). What demand is likely to arise in future is largely catered for by existing approvals and more efficient use of existing spaces.

A strict adherence to the development standard does not provide the flexibility necessary to respond to that market demand, and thus undermines and thwarts the objective.

A further consequence of enforcing the standard is to provide additional commercial floor space outside of the CBD core. This will not add to or act as an expansion of an already occupied CBD core, but rather will serve to draw commercial tenants away from that core, thereby undermining the commercial centres hierarchy.

Further, enforcing the development standard prevents that floor space within the building from being used for residential accommodation, at the expense of commercial tenancies that may well remain vacant. Most significantly, given that the commercial floor space would have to be at the lower levels of the building, it is the most affordable residential accommodation that is forgone (having regard to outlook, configuration and unit size). This is directly contrary to the underlying objective of the non-residential FSR control to provide additional residential accommodation, and in particular affordable accommodation. Such an approach runs contrary to initiatives, such as those incorporated in SEPP Affordable Rental Housing 2009, aimed at addressing the acute shortage of affordable residential accommodation.

Further, contrary to the objectives is the likelihood of a less vibrant, lower amenity development and locality that would result from the high levels of vacancy of the commercial tenancies if more commercial floor space is introduced into a saturated market. Vacant tenancies are unappealing and result in poor aesthetics and amenity, and potentially a reduced likelihood of street activation.

Compliance with the standard is unreasonable in circumstances where that compliance will undermine and thwart the objectives of that control.

<u>The Council has departed from the standard</u>

In *Legal and General Life of Australia Ltd & Anor v North Sydney Municipal Council & Anor* (1989) 68 LGRA 192 SEPP 1 objections to FSR and height controls had been lodged with the relevant development application for a mixed use development in Milsons Point. The Council had granted numerous approvals in Milsons Point for development which breached those controls. The Court found that the flexibility adopted by the Council was reflective of a desired change in the planning regime towards higher density development in the locality. The Court found that the Council had thus departed from the control in its planning instrument in favour of higher density and accordingly compliance with the control was unreasonable and unnecessary.

The circumstances here are slightly different in that Council has not approved development contrary to controls. Rather Council has consistently varied those controls on land with similar characteristics and zoning, and having regard to the same market demand concerns, as are of concern here. The planning proposals supported by Council are described earlier in this SEPP 1 objection.

The present matter is, however, analogous, to *Legal and General Life.* Council's preparedness to adopt those varied controls on the sites listed is reflective of a desired change in the planning regime to better respond to the market demands of the day and promote a more appropriate mix of land uses on any given site. Those same considerations should apply here, and compliance with the control would be both unreasonable and unnecessary (having regard to the change in the planning regime enacted by Council).

We note that such a departure is of itself not necessarily a bad planning outcome. In *Legal and General Life* the departures from the control aided a movement toward a better planning outcome for the locality which strict compliance would not have achieved. This is a similar situation to the present matter where significant social and public benefits have been achieved by Council's decision to vary the non-residential FSR control s.

EPA ACT OBJECTIVES

In addition to the objectives of the particular control, clause 3 and clause 7 of SEPP 1, read together, require consideration of the objectives set out in section 5(a)(i) and (ii) of the Act in determining whether compliance with the control should be required. Where the compliance with the control will tend to hinder the attainment of those objectives, that compliance ought not be required. The relevance of these objectives is made clear in the third *Winten* test and by Preston J in *Wehbe*, where His Honour states:

> *the Court must be of the opinion that "granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3"*

We also note the recent decision of Craig J in *Ku-ring-gai Council v De Stoop* [2011] NSWLEC 164. There His Honour identifies that assessment against the objectives of the Act is in the alternative to the above analysis of whether compliance with the control is unreasonable or unnecessary. He states (at paragraph 16):

> *it was necessary for the Commissioner to be of the opinion that strict compliance with the standards, in this particular case, would be unnecessary**, or alternatively,** that compliance would tend to hinder the objects specified in s 5(a)(i) and (ii) of the EPA Act* [our emphasis].

As relevant to the present matter, those objectives are

> *a to encourage:*
>
> > *i the proper management* [and] *development… of natural and artificial resources… cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
> >
> > *ii the promotion and co-ordination of the orderly and economic use and development of land*

As set out above, in the annexure to this objection and the reports supporting the development application, a requirement that there be a minimum non-residential FSR on this site of 3:1 fails to acknowledge the serious problems in the commercial market in North Sydney.

This additional commercial floor space is unviable, and comes at a high opportunity cost of more affordable residential accommodation, sorely needed in North Sydney. There is a strong likelihood of commercial vacancies or unviable rental yields.

Strict adherence with the NSLEP 2001 standard would be particularly unreasonable in circumstances where even the NSLEP 2013 has recognised the planning merit of reducing the non-residential FSR as it applies to this site and where the current, amended proposal is capable of complying with those reduced standards thereby being consistent with Council's contemporary objectives for the CBD.

It cannot be said that adherence to the control promotes the objectives of the Act and indeed would serve to undermine them.

Strict compliance with the FSR control is contrary to the objectives of clause 3 of SEPP 1 and should not be required.

CONCLUSION

Cripps J described the breadth of the discretion available to a consent authority when considering a SEPP 1 objection in the following terms:

> *The discretion vested in Councils under SEPP 1 is wide and, subject to limitations to be found in the instrument itself and in its relation the Environmental Planning and Assessment Act, is unconfined. The express limitation is that the council must be of the opinion that he objection is well founded and the grant of consent is consistent with the aims set out in cl 3 of the policy. The implied limitation is that the discretions must be exercised by reference to planning considerations the width and generality of which is to be found in s 5 and s 90 of the Environmental Planning and Assessment Act…* ***I can see no reason in principle why the discretion should not be wide. The purpose of SEPP No 1 is to provide flexibility in the decision making process.***

The submissions and observations made in this letter are intended to provide a path through the difficult process of exercising this broad discretion and one which allows Council and the JRPP some comfort that the decision reached would not be subjected to challenge in the Land and Environment Court.

Strict compliance with the non-residential FSR control is unreasonable and unnecessary in the circumstances of this matter, including the commercial market in which the development would operate and having regard to the fact that with Level 3 converted to commercial, the non residential FSR is the same as currently required under Council's NSLEP 2013. The non residential FSR would be higher still, - that is, in excess of that required by Council's current controls - were it not for the fact that at Council and the DEP's request the proposal incorporates a public benefit in the form of a through site link.

The proposed development, and the non-residential FSR envisaged therein, comfortably meets the underlying objectives of the control, however requiring strict compliance with that control would seriously undermine and ultimately thwart those objectives.

Additionally, requiring strict compliance with the control would tend to hinder and undermine the objectives of the Act and prevent the orderly and economic development not only of the site, but also of the Double Bay town centre and the wider Sydney East Sub-Region and Sydney Metropolitan Region. It would also prevent rather than promote the social and economic welfare of the community in those regions.

The SEPP 1 objection is well founded and should be upheld.

ANNEXURE A:

Zone Objectives

The zone objectives are set out in the body of this SEPP 1 objection.

Having regard to the reports accompanying this SEPP 1 objection it is readily apparent that the reduction in non-residential FSR sought is generally consistent with these objectives.

Certainly the proposed decrease in non-residential FSR, and commensurate increase in residential FSR, increases dwelling stock desperately needed in the North Sydney Centre. We note the conclusion of the July 2011 URBIS report:

> *Our analysis of the residential market demonstrates that there is an undersupply of residential apartments, particularly smaller apartments.*
>
> *Given that the current residential apartment supply line is dominated by prestige stock, this undersupply of smaller, more affordable apartments will continue for the foreseeable future."*

We also note the following comment in the July 2013 JBA report:

> *The buyer profile identified is likely to demand dwelling types which suit their needs and expectations of the area, namely:*
>
> > *smaller apartments suiting lone person and couple households;*
> > *affordable apartments which are within the relevant price constraints; and*
> > *well-designed apartments which offer convenience and functionality…*

Of particular note is that the floor space which would be given over to non-residential development if the 3:1 minimum required was enforced would be levels 3, 4 and possibly 5 of the development. It is expected that commercial space be at the lower levels of the building (correctly from a planning and residential amenity perspective), and the ground floor as well as levels 1 and 2 are already given over to commercial space. The difference in non-residential floor space between what is proposed by the DA and the requirements of the control is in the order of 2600m^2, which equates to between 2 and 3 floors of the development.

The most affordable units in the proposed development are those on levels 3 to 5, having regard not only to their configuration, but also their outlook. These levels comprise studio apartments (16 of which are on levels 3 and 4), 21 x 1BR apartments (14 of which are on levels 3 and 4) and 4 x 2 BR apartments.

Those affordable units cannot be reclaimed simply by pushing the development higher to accommodate the non-residential floor space. The proposed development is at the height acknowledged by the Court as within the contemplation of the current controls. Even within the current envelope, pushing these units higher up the building, with a commensurate increase in desirability from the improved outlook, will reduce their affordability.

Adherence to the current non-residential FSR controls, for this or any other development on the site, will, when regard is had to the inherent conflict between lower level (and hence more affordable) residential accommodation and lower level commercial space, seriously undermine the residential objectives of the planning instruments and mixed use zones.

At the same time, a move away from the current non-residential FSR controls for this site, will, when regard is had to the commercial market (discussed below), have little impact on the achievement of the commercial objectives of the planning instruments or mixed use zones. The market will determine whether those objectives are achieved, and whether further commercial floor space is provided on this site will not have any bearing on that outcome.

The proposed 1:1 non-residential FSR does, however, ensure that the objectives for a diversity of uses are achieved for the site, and provides by way of active street frontages and non-residential FSR commensurate with controls on adjoining sites, a safe and high quality urban environment, with high residential amenity appropriate to a mixed use site in a transitional location between the CBD core and residential zoned land.

This high quality urban environment is further supported by the proposal not adding to the extant oversupply of commercial space in the centre. In reference to an earlier iteration of development for the site URBIS in their July 2011 report state:

> *"the 1110sq.m of commercial office space proposed is considered high and may encounter problems with leasing and therefore vacancy. In turn this can impact on the aesthetics and overall appeal of the development…"*

Thus a reduction in non-residential FSR is likely to lead to a reduced risk of vacancy, and therefore an increase in the aesthetics and amenity of the development, with flow on effects on the streetscape and urban character of the locality.

FSR Control Objectives

The FSR control objectives relevant to the site under NSLEP2001 are set out in clause 31(1) and are to:

> *(a) ensure a diverse mix of uses in each building in the mixed use zone, and*
> *(b) minimise traffic generation from commercial development.*

Objective (b) is clearly associated with the maximum non-residential FSR control rather than the minimum (0:1 non-residential FSR would clearly achieve this objective) and need not be considered here.

Objective (a) is more closely associated with the minimum FSR control. The minimum non-residential FSR control ensures some non-residential uses on a given site, thus achieving a diverse mix of uses.

This diverse mix of uses remains achievable at a lower non-residential FSR, as is demonstrated by the number of commercial tenancies provided for in the development and the variance in their size and configuration (presently 7 tenancies ranging in area 67.4m^2 to 672m^2 not including plant and storage

areas). The objective is achieved at the lower FSR sought by the original DA and would be further enhanced by the proposal that Level 3 be converted to commercial use.

Further, having regard to the concerns about vacancy of commercial spaces and the associated reduction in the appeal of the development outlined above, a reduced non-residential FSR is likely to better achieve the objective, as it will better ensure the occupancy and hence the desirability and hence the continued occupancy of each of the commercial spaces.

The objectives for the non-residential FSR controls in NSLEP2013 are more detailed than those in NSLEP2001, and provide even greater support for the proposed reduction in non-residential FSR, particularly when regard is had to the commercial market. Clause 4.4A(1) of NSLEP2013 sets the following objectives for the control:

> *(a) to provide for development with continuous and active street frontages on certain land in Zone B1Neighbourhood Centre, Zone B4 Mixed Use and Zone SP2 Infrastructure,*
> *(b) to encourage an appropriate mix of residential and non-residential uses,*
> *(c) to provide a level of flexibility in the mix of land uses to cater for market demands,*
> *(d) to ensure that a suitable level of non-residential floor space is provided to reflect the hierarchy of commercial centres.*

Objective (a) will be met for any development that incorporates non-residential development to its street frontages, even at quite low non-residential FSRs. Certainly this can be achieved at a non-residential FSR of 1:1 as demonstrated even by the original DA.

Objectives (b), (c) and (d), however, are arguably undermined by the current controls when consideration is given to what is an "appropriate" mix of residential and non-residential uses; to the degree of flexibility necessary to cater to market demands, particularly when regard is had to level of supply and demand in the North Sydney Centre; and to what is a "suitable" level of non-residential floor space to reflect the hierarchy of the North Sydney Centre, and in particular the North Sydney Commercial Core.

The reports accompanying the DA clearly demonstrate an oversupply of commercial space and an undersupply of residential space, particularly the type of residential space required in the North Sydney Centre. Even a brief perusal of these reports reveals that the current FSR controls do not give adequate flexibility to cater for the current and future demand for non-commercial floor space. Rather the Applicant, if the current controls are maintained, is locked into providing commercial space for which there is simply no market.

Similarly, this enforced provision of commercial floor space that is not wanted by the market, at the expense of desperately needed residential space results in a clearly inappropriate mix of residential and non-residential floor space on the site. More particularly, a requirement for strict compliance undermines the site's capacity to supply affordable housing, given that the more affordable accommodation units would be at the lower levels of the new building, those being the levels that would need to be allocated back to commercial if strict compliance is sought (as indeed is the case under the recent proposal that Level 3 be converted to commercial use).

The reduction in non-residential FSR and removal of a maximum requirement sought by the Applicant better allows a proper response to market demands, and allows for the appropriate mix sought by the control.

It is important to note that the removal of a maximum non-residential FSR for the site further reinforces the flexibility sought by the objectives. Whilst an increase in commercial demand at some time in the future is not likely on the basis of the reports accompanying the DA, should market demand shift in the future the absence of a maximum non-residential FSR limit enables as much of the site to be utilised for commercial purposes as the market demands. The desired flexibility is introduced to truly allow the market to dictate the development mix on the site.

Further, the reduction in non-residential FSR on this site, in a mixed use zone on the fringe of the North Sydney CBD, better reinforces the role of the commercial core in the centre's hierarchy. Additional commercial floor space here can only hope to draw scarce tenants away from the centre, and undermine its role and function.

The Commercial Market

It is not proposed to here traverse in full the matters raised in the supporting documents accompanying the DA, however it is useful to make a few brief observations in support of the matters outlined above.

Firstly, the July 2013 JBA report was based on the January 2013 Property Council of Australia figures that reported a vacancy rate of 7.8% in North Sydney. It was prepared prior to the release of the Property Council of Australia's 31 July 2013 North Shore Office Market Report (a copy of which is attached to this letter), which shows that figure now at 10.6%. This is a significant deterioration in a limited six month period and is not attributable to an increase in supply through new development. The vacancy rate has increased by almost 36% compared to the January figure and equates to additional commercial vacancy in North Sydney in the order of 25,000m^2.

Further, increased technological mobility challenges the need for conventional office space. The rapid evolution and adoption of mobile technology in the form of notebook computers, tablets and smartphones has allowed workers to remain connected to information and other individuals and, in many cases, allowed them to perform their work activities remotely. Increased workforce mobility has spawned a rapid change in work practices that is having a significant impact on the way in which office accommodation is being used.

At the forefront of this revolution is the concept of Activity Based Working (ABW) pioneered by a Dutch company, Veldhoen & Co. The practice has many facets and initially sought to encourage companies to switch to more flexible workplaces, drastically reducing the number of workstations and offices. Savings in leasing and fit out costs were often invested in enhancing IT operations and improving the quality of the working environment. Increasingly, the introduction of ABW, is being linked to cultural change programs. Locally, companies such as Commonwealth Bank, Macquarie Bank, Bankwest, CB Richard Ellis, Freehills, Jones Lang LaSalle and DLA Piper have embraced the practice and have enjoyed a reduction in their footprint of up to 30%. The increasing acceptance of ABW and its derivatives is likely to have enormous ramifications for the demand for office

accommodation as many adherents have been able to reduce their occupancy rate to around 10m^2 per person.

JBA forecast approximately 160,000 – 190,000m^2 of additional floor space will be required in order to accommodate the forecast additional jobs of 14,800 between 2011 and 2036. This is predicated on 10 – 20% of the existing stock of office accommodation being refurbished within that timeframe to a standard sufficient to permit it to be occupied at a rate of 15m^2 per person. This analysis is arguably conservative on two fronts. Firstly, the additional jobs are predicted to occur over a 25 year timeframe. Based on most comprehensive refurbishments having a lifespan of 12 – 15 years, it is likely that at least 50% of the existing stock of buildings will be refurbished within the term of the study. Secondly, the occupancy rate of 15m^2 per person is 50% higher than is being achieved by proponents of ABW. If the occupancy rate of 15m^2 per person is accepted and 50% of the current stock refurbished during the term of the study, using JBA's methodology, the number of additional jobs able to be accommodated through the increased utilisation of the existing stock is 10,750. This leaves future supply having to accommodate 4,065 jobs which equates to an additional 60,975m^2 of office accommodation. It is clear from JBA's analysis the CBD is capable of meeting this requirement.

In July 2011 URBIS report it is demonstrated that real commercial rents in North Sydney have fallen over the 20 year period from 1991 – 2011. The actual rental performance of the building at 144-148 Pacific Highway demonstrates the lack of nominal and real rental growth over time. Urbis concluded that residential land use is substantially more productive and results in a far higher net community benefit than does commercial use.

The broader lack of commercial demand in the North Sydney Centre is exacerbated by the physical constraints of the subject site. Notably:

- the site slopes steeply with a fall of just over 8m from the north western corner off Doohat Lane to the south eastern corner at Pacific Highway. This limits the depth of accommodation with a frontage to Pacific Highway;
- Berry Street falls steeply from west to east which inhibits the depth of accommodation at the intersection with Pacific Highway. The fall of Berry Street also impacts on the accessibility of commercial accommodation on this elevation;
- the Berry Street frontage must incorporate access to the car park levels, which could not be provided off the Pacific Highway. It also must accommodate the through site link;
- it is necessary to provide loading and garbage facilities at Level 2 with access off the southern section of Doohat Lane, which also impacts on the design and efficiency of commercial space at this level;
- the irregular configuration of the site as a consequence of the intrusion of the southern section of Doohat Lane has a significant impact on the efficiency of the design of commercial space;
- Pacific Highway and Berry Street present physical barriers that define the fringe of the CBD and that has a great impact on limiting demand;
- the dimensions of the Pacific Highway and Berry Street frontages impose a significant design constraint in that it is not possible to provide large, efficient floorplates with access to an acceptable level of natural light and amenity; and
- the shape and dimensions of the residential tower dictate the extent of the commercial footprint. The structural grid to support the residential tower and the lift and services core penetrate the commercial floors and impact on the efficiency and layout of the

accommodation, at a time when contemporary tenants are demanding column free office space.

Thus the physical constraints of the site not only limit the amount of non-residential floor space able to be provided but also result in commercial accommodation that is sub-optimal. It is not the prestige office space identified as required to re-energise the CBD core.

Council has recognised the concerns with the commercial market and the inappropriateness of enforcing high non-residential FSRs on mixed use zoned land on the CBD fringe and reduced the non-residential FSR for a number of sites (initially by way of planning proposal and amendment to NSLEP2001, and ultimately by adoption in NSLEP2013). In March 2013, Council's strategic planners prepared a Briefing Paper for Councillors. In Section 3.2 of the Paper, under the heading of "Draft LEP 2012", and stated:

> *"In existing mixed use parts of the Centre, Council has actively sought to increase the potential for properties to redevelop by allowing developments to provide less commercial space in favour of more residential. This has already led to a number of site specific planning proposals being lodged to make previously unviable development opportunities more attractive to owners/developers."*

These site specific planning proposals related to:

- 156-158 Pacific Highway;
- 12-16 Berry Street;
- 211-223 Pacific Highway;
- 239-247 Pacific Highway;
- 136-140 Walker Street;
- 144-148 Walker Street; and
- 225 Miller Street.

12-16 Berry Street and 156-158 Pacific Highway immediately adjoin the subject site. In each of the above examples, the reduction in non-residential FSR was accepted, in part, as a reflection of the lack of demand for commercial accommodation on the fringe of the North Sydney CBD. Further support for the reduction in non-residential FSR for these sites was found in that the reduction would:

- Maintain the mixed use character of the area.
- Increase the amount of permanent residential accommodation in the area.
- Provide added flexibility for the sites.
- Increase the vibrancy of the North Sydney CBD.

Although not strictly within the North Sydney Centre similar reasoning was adopted in respect of planning proposals for 8 and 10-18 Cliff St, Milsons Point, where non-residential FSR was reduced to 0:1.

The proposed development and reduction in non-residential FSR the subject of the DA is consistent with all of the above.

It is also important to recognise the supply of 125, 849m^2 of commercial space in the CBD core expected to come on-line by way of approvals under the now repealed Part 3A of the Act, as referenced in the July 2013 JBA report. This additional space soon to become available achieves two thirds of the anticipated 2031 demand alone. This space has been down played to date on the basis that the developments have not commenced. Such proposals, however, require significant pre-construction commitments to secure construction funding.

It has recently been announced that Leighton Holdings have made a commitment to occupy the development at 177-199 Pacific Highway. A Section 96 Application was lodged at the beginning of August, seeking to tailor the approved building to Leighton's specific requirements. The building is to provide the opportunity for Leighton to consolidate its operations in a single location. It is understood that advanced negotiations are underway with a major tenant whose requirement will underpin the 100 Mount Street development. Even were those specific developments to not go ahead, the development potential of those sites remains, and remains within the commercial core.