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5th December 2013

Sydney East Joint Regional Planning Panel
23-33 Bridge Street
Sydney, NSW 2000
For the attention of the Panel Secretariat

Dear Panel Members,

Re: DA.239/13: 144-154 Pacific Highway and 18 Berry Street North Sydney, Assessment Report and Recommendation for JRPP 2013SYE061

GMU has been engaged by Strand Estates to review the Report from North Sydney Council to the Joint Regional Planning Panel for DA 239/13 for the redevelopment of 144 – 154 Pacific Highway and 18 Berry St, North Sydney for a mixed use development.

The Development Application has also been accompanied by a Planning Proposal in relation to the commercial floor space requirement in Council's controls but that proposal will not be addressed in this letter.

North Sydney Council has prepared a Development Assessment Report and Recommendation on the above application. The recommendation is that the proposal should be refused. The justification for the refusal is:

1. The height and scale of the building is excessive and is not in context with surrounding development, particularly the residential development to the northwest.
2. The height of the building substantially breaches the height control under North Sydney Local Environmental Plan 2013 which is now certain and imminent.
3. The proposal does not comply with the minimum floor space ratio requirements for non residential floor space under North Sydney Local Environmental Plan 2001 and North Sydney Local Environmental Plan 2013 and the accompanying SEPP 1 objection is not considered to be well founded.
4. The proposed building design is non compliant with the minimum guidelines under the Residential Flat Design Code with regard to solar access, cross ventilation and south facing apartments.
5. The building contains an excessive number of single fronted south facing small apartments that have unsatisfactory amenity.
6. The proposed through site link from the lane to Berry Street is poorly aligned and narrow and is of limited public benefit.

We strongly disagree with the recommendation and the reasons given for refusal. We encourage the Panel to consider the proposal on its merits and to approve the development based on the information presented with the Development Application, the amendments that were made to the proposal at the specific behest of Council and the following discussion.

Discussion -

This letter will address the following points in relation to the reason for refusal –

- The Land and Environment Court Approval and Judgement
- Height and scale of the building
- South facing apartments and amenity
- Through site link

The Land and Environment Court Approval and Judgement –

On 11 January 2013 The Land and Environment Court upheld an appeal against the refusal of a development application on 144-50 Pacific Highway and 18 Berry Street. The proposal was for a mixed use development of 23 storeys with a maximum height of RL 149.5 excluding plant levels and RL 156 including plant levels.

It is important to note that the assessment of this application is under the same controls as the approval given by the Land and Environment Court. The only difference is that the draft LEP was considered to be more imminent than when the court heard the appeal.

The key findings of the court that are relevant to this application are as follows:

Height -

- Under Clause 29 of LEP 2001 there are no height limits applying to the site (this is still the case for the amalgamated sites).
- Cl 31 of the LEP requires a mix of floor space for non-residential purposes – 3.1-4.1. The same controls still apply for this application. The court and Council both agreed that strict compliance with the development standard was not necessary as it was unreasonable and unnecessary in the circumstances. The DA provided 2.65:1 of non- residential uses.
- NS DCP 2002 applies to the site including amenity standards and the Central Business District Character Statement for the North Sydney Centre Planning Area. This still applies. It requires buildings to step down in height from the tallest buildings being Northpoint (100 Miller Street) of existing RL 197 and allowed RL 200 and Shopping World (79-81 Berry Street) of existing RL 181 and allowed RL 185 to the core's boundary and surrounding residential areas. This intent is illustrated through the notional arcs. The DCP and notional arcs still apply to this application.
- Draft NS LEP had been advertised and was taken into consideration in the case on that basis but the LEP was not yet considered imminent or certain.
- The evidence in the case concluded that the scale and height of the proposal was acceptable other than the impact of the development around Doohat Avenue. This was the only contention on height.
- The Court in consideration of the height sought on this site concluded:

  "we do not accept ….that the notional arcs cannot be used to interpolate height on the subject site or that the notional arcs should only be considered after the proposal is found to be acceptable under the objectives and controls in LEP 2001 and SEPP 65 considerations. The notional arcs in Cl 1.1 h form are an important requirement for height and gain further importance where specific reference is made to achieving a transition of building heights from the taller buildings in the centre of the CBD to the boundaries in cl 28D (1)(c) of LEP 2001. This can only be reference to the more specific controls in Cl 1.1 h of the DCP. In our view, it is also unnecessary to have the ability to accurately scale from Figures 1.1 and 1.2 to understand the objective of a transition of building heights to the edge of the CBD. In any event there was no dispute that the proposed building was well below the notional arcs….."

The current proposal is equally still well below the notional arc in the DCP and is in fact slightly lower than the approved building.

In consideration of the issue of impacts to the residential area in Doohat Avenue the court concluded:

> *"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….".*

The court also concluded that the height and scale was acceptable given that *"there are no amenity issues, such as overlooking and overshadowing that warrant the refusal of the application."*

Podium –

In terms of the podium treatment the court accepted that the differences in the architectural design for the podium and tower when combined with a setback to the corner at level 5 was sufficient to create a 'waist' and an acceptable podium.

Internal amenity –

The court concluded that preference should be given to the DCP over the RFDC as it is specific to the site. The Court was satisfied that the design "minimise(d) the south facing units and use(s) lightwells to provide natural light where not available" and the court also accepted that there was sufficient justification to support a variation to the 10% requirement of the code to even 19% given the primary orientation of the building to the south.

The lightwell/courtyard –

The court concluded that it was an acceptable solution to sunlight and ventilation for some apartments given the size of the space and that it was well in excess of the DCP requirements.

Conclusion –

The approval by the court has established an allowable height for the majority of this site to RL 149.5 excluding plant levels and RL 156 including plant levels. It has also accepted that the orientation of the site will impact on the ability of the proposal to meet the RFDC requirements for the percentage of south facing apartments and has established that the podium with a 'waist' is an appropriate treatment for the base of the building.

Further the court has deemed that strict application of the FSR requirement for non residential uses is not necessary or reasonable.

The approved building includes a number of design elements that are now raised as reasons for refusal of the current application. The main one is the design of the through site link. However this design is unchanged from the court development and therefore is already approved in its current alignment and configuration.

We request that the Panel takes into account the conclusions and decisions of the Court Approval in its consideration of this DA.

Height and scale of the building –

A new development application has been made due to the amalgamation of the site of the court approval with 154 Pacific Highway. This site is located to the north of the previous Court's approval and was the subject of many discussions with Council during the formulation of the previous DA. Council had strongly encouraged Strand Estates to amalgamate the two sites which at that time was not possible. During the previous DA determination and Court process the amalgamation of the site with the site to the north was stated as a necessary element to avoid site's isolation

Strand Estates at considerable expense has now secured control of the adjoining site and seeks to develop both sites as a single development. This is an outcome that was sought by Council. By definition acquisition of another site incurs considerable cost and the applicant is bound to seek sufficient development to recoup and justify that expense. This is exacerbated at 154 Pacific Highway as the building is strata titled comprising thirteen lots with eleven different owners.

The additional site at 154 Pacific Highway is 13m wide. Therefore it does not add significant additional massing to the proposal to either the laneway or to the highway.

The Council report states that the height is excessive when assessed under the current and new LEP controls and that its scale is not compatible with the nearby low scale residential area (zoned "High Density Residential"). Yet the court in its ruling has established that the height sought by the previous and current proposal is acceptable and appropriate under the current controls. This DA also sits under the notional arc and still achieves the desired transition sought in the LEP and DCP. The new LEP, at the time that this proposal was lodged was still a draft. Although it was considered more imminent and certain it is a matter for consideration that must also be balanced with the court approval which allows a greater height on the corner site.

The comparison in massing and height to the north between the approved development and the current DA is:

- The main body of the development to Berry Street is in a similar location and has the same essential massing. These relationships are unchanged by the additional site.
- The court approvals inset lightwell/courtyard has been able to be deleted as the additional site now allows for full frontage to the laneway
- To Pacific Highway, the tower insets 3m at level 10 from the new northern boundary. This is two levels below the inset in the Court approved scheme. This maintains the same sort of relationship that was approved albeit it is 13m further north as it includes the new site.
- The depth of the tower to the north from Pacific Highway is similar in an east west direction and extends no further to the west than the approval.
- The new component of the tower that is on the new site is a lesser depth than this at only 23m including balconies at its widest in recognition of the laneway edge.
- The northern edge of the east west tail of the development (Berry St frontage) is in generally the same location as the court approval.
- The tower steps back from the west at level 18 on both the court approval and the new DA except the new DA steps back further in the centre to provide visual interest and manage building length. The setback is increased by 2.4m to the service core.
- The tower still sets back further to the south west at level 21 and at level 23.

The new northern portion of the tower is closer to the residential area of course but it is setback to the north and towards the east to minimise its visual impact. The diagonal measurement from the north west corner of the tower for instance to the boundary edge of the site to Doohat Lane on the western side is that the tower is 10m closer.

In terms of the perception of scale locating a development of this sort of height 10m closer does not create a major increase in impact particularly when the tower is:

- setback above a 3 level podium from the laneway
- viewed down a laneway; or
- viewed over other dwellings and development from the surrounding residential area.

The overall height of the tower is slightly less than the approved court development.

The Design Excellence Panel comments are included in the report and appear to ignore the Court approval and the height approved. They suggest major changes to elements that are approved. This is not appropriate. They suggest that the tower should be lowered despite the court finding that the height is appropriate and under the current controls. This is not helpful as the approval now sets a new height control for the corner.

The Panel recommends deletion of the upper levels well below the court approved height. This is unrealistic. Also if the upper levels were deleted, the eastern elevation fronting the Highway loses its vertical proportions and the result would be a bulky form when viewed from Pacific Highway and along Berry Street to the east. This would be a poor outcome and not in line with the court findings.

The court in its rulings has determined that the height sought is appropriate for the location and under the current controls. The DA as approved can be constructed and this will set the height relationship for this corner of Berry Street and Pacific Highway. The 'transition' of this DA to the CBD's boundary is the same as that of the previous DA. Its approval was not based on consideration of the height attainable on the site to the north (which is now part of the site) but rather on its relationship to the notional arc.

The new DA seeks to extend the tower slightly to the north by some 13m. This is not a significant distance in terms of city planning and the scale. The nature of Pacific Highway is such that it can easily absorb the extra tower width. The massing is located towards the highway on this basis and it does not detract from the amenity or character of the highway.

The proposal will also still enable a transition in scale to be achieved as it steps down to the height of the adjacent approval which is now constructed. The transition is gradual to the west along Berry Street and more abrupt along Pacific Highway. However the height and form sought sits below the notional arc so it is arguable that the adjacent development has perhaps been constructed at a height less than envisaged by the notional arc controls.

Based on the decision in the Castle Constructions Court case as well as the court case for this site, it is considered appropriate that large scale buildings are located in close proximity to the low scale residential buildings. The examples included in our report show that this occurs in many areas around the CBD.

Further the court has determined in relation to edge sites such as this that "*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….".*

The tower form is located away from the lower scale development in the west and north. The site is within the City Core boundaries, it relates to the CBD and its main frontage is to Pacific Highway and to Berry Street as a secondary frontage. The Part 3A approval is diagonally opposite the site at Norberry Terrace with a height of RL 195, which is equal to the maximum height in North Sydney LEP (Northpoint).

These approved heights will create a shift in the height distribution in the Centre. The proposed RL of 156 on the subject site located across the street from one of the highest buildings in North Sydney provides a very appropriate transition to the lower scale in the west and north.

The proposed height is below the height approved by the court and the new proposal locates the main tower away from the lower density areas in a similar way to the approved plans. On balance in our opinion it must be concluded that the extension of the tower form for a small distance to the north is reasonable, acceptable and capable of support and approval by the JRPP.

South facing apartments and amenity –

The Council's report finds issue with the amenity of the apartments. Issue is taken with the change from 9 dual aspect 2 storey units in some locations to single aspect apartments for the lower levels. This issue seems to be strongly linked to the fact that Council wish to achieve the FSR required in the controls for commercial uses for this site despite the fact that the court found that compliance with this standard was unreasonable and unnecessary and that Strand Estates has lodged a planning proposal on the basis that commercial space this far away from the CBD is not considered desirable or necessary by the market.

Mr King has addressed these comments in his letter, however it is appropriate to note that the Court in its approval recognised that the orientation of the site was going to result in a higher proportion of south facing apartments that advocated by the code and that this was acceptable.

The findings note that whether the percentage of units was 16% as calculated by the applicant's experts or 19% as calculated by the Council experts in either case this was acceptable due to the constraint of the orientation. The current proposal has 22% south facing units which are not at all far away from the 19% purported by Council in the previous application.

Quite apart from consideration of the findings of the court the Council report appears to ignore that whilst there is an increase in the number of single fronted apartments that face south these have been designed to achieve reasonable amenity. This has occurred by ensuring these apartments are wide fronted and shallow to maximise the penetration of light to the rear of the units and to ensure the habitable areas have excellent light and outlook. These units have full width balconies as well for both the living areas and bedrooms. The number of south facing units (it must be remembered) per floor on the lower levels of the building is 4. This is hardly unreasonable in a layout that has 16 units on each level in the podium.

The RFDC highlights that the developments which seek to vary from the minimum standards must demonstrate how energy efficiency is addressed. The report and comments by Mr King show that the amenity of the units is acceptable relative to this consideration.

The Council report also insists that the lower level units have poor amenity in comparison to the court approval. This is not the case. The court approval unavoidably relied on a lightwell/courtyard to supply light and air to the rear of the apartments in the centre of the building on level 5-7. In contrast the new DA by acquisition of the adjacent site now has a greater frontage available to the laneway and is able to offer an external façade and outlook into the laneway for the units. No units are now reliant on a lightwell or courtyard.

The court approval had 3 units per floor with northerly outlook along the lane and 2 units with outlook into the lightwell/courtyard as a secondary façade. The current DA has 4 units on the lower floors with northerly outlook along the laneway and 2 units with a westerly outlook again across the laneway where the laneway has a width of more than 17m. Above level 5 these units combine into one corner unit with excellent amenity.

So whilst the units extend lower in the building they have a reasonable standard of amenity and outlook. Therefore it must be considered that the proposed DA actually offers a better amenity for the lower units than the court approval.

It is also worth noting, that the developments recently approved and under construction on either side of the proposal to the north at 156-158 Pacific Highway and to the west at 12-16 Berry Street have residential use starting on the second level, which is lower than the proposal. The proposed DA includes 2 levels of commercial and residential floor on the third level, which activates the lower parts of the building and provides more commercial space in the podium than the recently Council approved buildings next door. Therefore the argument of poor amenity due to locating residential units closer to the street level is not reasonable if the residential levels have been allowed closer to the street on the sites next door.

Through site link -

The through site link was introduced to the subject site at the insistence of the original Design Excellence Panel in June and in December 2011 for the court approved application. The point was made at that time that this was in fact private land and not a public laneway. It was also emphasised that this laneway had a character that was created by service areas and vehicle entries and was not conducive to being a major public link.

However at the insistence of Council the link was included. The design of the link has not changed from the court approved scheme and therefore can be built as shown on the drawings irrespective of the comments of the new design review panel. The Council was previously satisfied with the design and form of the link.

It should also be remembered that the Character Statement of the DCP includes links which are required to be provided in the North Sydney CBD. This link is not required under the controls.

Conclusion

The Development Application has maintained many of the elements of the Court Approval and has followed the findings of the court in terms of its interpretation of the controls affecting the site. The imminent and certain nature of the draft LEP does not affect the fact that there is an existing approval on the site that achieves a similar if slightly greater height than is sought in this approval.

Council strongly encouraged the amalgamation of the court approval site with the site to the north. This has been achieved and naturally Strand Estates has designed a new building that seeks to include the new site within the tower form. The proposal is consistent with the outcomes of the previous approval and the expansion of the tower to 10m closer to the north is not considered to be a significant urban design issue in the context of a major CBD where the tower still sits beneath the notional arc and locates the form away from adjacent residential areas.

The amenity of the tower is reasonable given the highly urbanised location and the orientation of the lot and the design seeks to minimise any impacts through shallow wide fronted apartments. Overall the acquisition of the adjoining lot has allowed a rationalisation of the previous design and eradication of some elements that were not ideal such as the lightwell/courtyard.

Overall the proposal is appropriate for the site and we encourage the Panel to approve the Development Application.

Should you have any queries regarding this letter please do not hesitate to contact the author on 02 9460 6088.

Yours Sincerely,

Ms Gabrielle Morrish

Managing Director

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