



WILLOUGHBY
CITY COUNCIL

MEMO

To: JRPP (Sydney East)
From: Annie Leung
Date: 20 July 2015
Address: 150 Mowbray Road & 670-680 Willoughby Road, WILLOUGHBY NSW 2068
Ref/File No.: DA-2014/510 (2014SYE143)
Subject: Site isolation and the definition of shop top housing

I refer to the enquiry from the Panel regarding the following aspect of the proposed development (email 20 July 2015):

1. *Shop top housing definition – a large number of the proposed units within the central spine of the site sit at and above ground level, with no retail or business uses below them. The panel believes there might be a legal precedent that this does not meet the definition of ‘shop top housing’, perhaps regarding a DA in the Canterbury LGA.*

Comments: During preliminary assessment of the application, the assessing officer has raised concerns that the residential component of the proposed development in its original form will not meet the definition of shop top housing for two reasons:

- a) Large parts of the residential component of the proposed Building A were not “above” any retail/business premise
- b) The commercial premise proposed in Building B was identified as an office premise.

The applicant was also requested to address the recent court judgements concerning the definition of shop top housing.

In response, the applicant has submitted legal advice to explain how the amended proposal meet the definition of shop top housing including references to *Hrsto v Canterbury City Council (No 2) [2014] NSW LEC 121* and *Blackmore Design Group Pty Ltd V Manly Council [2014] NSWLEC 164*. Quoted below:



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- (i) To qualify as "shop top housing" all residential parts of the building must be above the relevant retail or commercial parts, **see Hrsfo paras 56 and 33 and also Blackmore paras 11 and 13.**
- (ii) It is not necessary for the dwellings to be directly or immediately above the retail/commercial premises in order to be characterised as "shop top housing" **see Hrsfo paras 56 and 34(35).**
- (iii) The dwellings must be in the same building as the ground floor retail/commercial and on a floor of the building that is at a level higher than the top most part of the retail/commercial use. **See Hrsfo paras 56 and 34(33).**
- (iv) If any part of the residential component of the use is at a floor level lower than the top most part of the ground floor retail/commercial then it will not be shop top housing. **See Hrsfo paras 56 and 34(33).**
- (v) The dwellings must be in the same building as the ground floor retail/commercial premises for the purposes of the term "shop top housing". However, the dwellings need only be at a floor level that is higher than the top of the ground floor retail/commercial premises and do not need to be contained in an envelope on the higher floor level that would be intersected by a line drawn vertically from within the envelope of the ground floor retail or business premises. **See Hrsfo para 34(36).**

In order to meet the above elements of the definition of shop top housing as interpreted in the court judgements, the amended proposal incorporates a retail premise fronting Penshurst Street to ensure that the residential component of proposed Building A is all located at a level higher than the top most part of the retail/business premise. The proposed commercial premise proposed in Building B is identified as a business premise in the amended proposal.

A copy of the applicant's legal advice is attached.

2. *Isolated properties – there is no detail as to the actual valuations and formal offers made in attempts by the applicant to purchase those properties. Email and phone conversations do not meet the Court principle, with the outcome being that those sites become isolated. Council needs to see that the formal process has been followed, and advise the panel accordingly.*

Comments: It is in the opinion the assessing officer that the isolation of the properties at the corner of Mowbray Road and Willoughby Road (immediately north of the proposed Building B), including No 132, 130A Mowbray Road, and No 684 Willoughby Road is not an outcome of the proposed development. This is due to the existing large commercial buildings at the properties, including No 150 Mowbray Road and No 680 Willoughby Road forming the development site have already isolated the properties at No 132, 130A Mowbray Road, and No 684 Willoughby Road depriving them of vehicular access and potential redevelopment due to lack of consideration of potential for future amalgamation. In this regard, the site isolation of No 132, 130A Mowbray Road, and No 684 Willoughby Road is an existing situation.



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It should also be noted that:

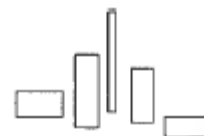
- The proposed development is not in breach of any development standard with respect to minimum allotment size or minimum frontage requirement for such development.
- The development application has provided a satisfactory response to the planning implications of future potential for amalgamation and redevelopment of the site with the adjoining isolated allotments. A conceptual design has been submitted with the application illustrating the potential of future amalgamation of the sites, with the redevelopment of the isolated sites and how it can achieve an appropriate urban form and with acceptable level of amenity (including residential amenity for shop top housing)
- The proposed development involves consolidation of three existing allotments, including the small/narrow allotment at No 670 Willoughby Road.
- The isolation of at No 132, 130A Mowbray Road, and No 684 Willoughby Road in its existing situation is primarily due to their lack of vehicular access. In this regard, the proposed development is a considered response to the site's circumstances including the provision of a future basement extension to these properties for which vehicular access can be provided. The applicant is also accepting the imposing of a right of way to be imposed on the development site to facilitate such future vehicular access.
- Due to No 132, 130A Mowbray Road, and No 684 Willoughby Road being very small allotments and that No 684 Willoughby Road is a strata property, for any consolidation to be practical and feasible, owners of all of the abovementioned isolated properties need to be agreeing to the consolidation. The applicant has documented that communication to these owners is not achieving any reasonable result at this point in time, and cannot progress to further negotiate offer or valuation of properties.

Based on the above, the strict application of planning principles of the NSW LEC with respect to Isolation of site by redevelopment (Melissa Grech v Auburn Council [2004] NSWLEC 40 at 51 & Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189 at 31-34), including the requirement for details of the negotiations between the owners of the properties is not considered warranted.



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PIKES & VEREKERS
LAWYERS

4 February 2015

Mr D McNamara
Ceerose Pty Ltd
Box 3231
DURAL NSW 2158

BY EMAIL daniel.mcnamara@ceerose.com.au

Dear Sir

PROPOSED DEVELOPMENT OF LAND AT 150 MOWBRAY ROAD AND 670 – 680 WILLOUGHBY ROAD, WILLOUGHBY
DA No. 2014/510
Our ref PMJ:KEG:150008

We refer to previous correspondence concerning the proposed development of land at Willoughby by Ceerose Pty Ltd ("Ceerose") which is the subject of DA No 2014/510 ("the DA") submitted to Willoughby City Council ("the Council") last year.

Ceerose seeks advice whether the proposed development is permissible pursuant to the relevant planning instrument which is Willoughby Local Environmental Plan 2012 ("the LEP"). In this respect we advise as follows:

1. THE DEVELOPMENT SITE

- 1.1. The land the subject of the DA is Lots 10 and 11 in DP880509 and Lot Y in DP405823 which allotments are known respectively as 150 Mowbray Road and 670 – 680 Willoughby Road, Willoughby ("the land"). The land is irregular in shape with a site area of 4,661.9m².
- 1.2. The improvements on the land include:
 - A three – four (3-4) storey development comprising two separate buildings on that part of the site known as 150 Mowbray Road and 680 Willoughby Road, and
 - A two (2) storey commercial building on that part of the site known as 670 Willoughby Road.

2. THE PROPOSED DEVELOPMENT

- 2.1. The DA seeks consent for the demolition of the existing improvements and the construction of a building to be used for shop-top housing comprising a podium of commercial use with 110 apartments above in two (2) separate apartment blocks with associated basement car parking.

Liability limited by a scheme approved under Professional Standards Legislation



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3. THE ZONING OF THE LAND

- 3.1. The land is within the B5 Business Development Zone pursuant to the LEP with shop-top housing being a permissible form of development within the B5 Zone with consent.
- 3.2. If however, as properly categorised the proposal is not "shop-top housing" then it is a prohibited form of development within the B5 Zone. The relevant definition in the LEP is as follows:

"Shop top housing means one or more dwellings located above ground floor retail premises or business premises."

4. WHETHER THE PROPOSED DEVELOPMENT IS FOR "SHOP-TOP HOUSING" AS DEFINED IN THE LEP

- 4.1. The first critical step is to understand the purpose of the use in order to establish whether it is permissible. In this respect, Preston CJ in the decision of **Chamwell v Strathfield Council [2007] NSW LEC 114** states as follows at p 406

"Proper categorisation

- 27 *In planning law, use must be for a purpose: Shire of Perth v O'Keefe (1964) 110 CLR 529 at 534-535; 10 LGRA 147 at 150 and Minister Administering Crown Lands Act v New South Wales Aboriginal Land Council (N02) (1993) 31 NSWLR 106 at 121; 80 LGRA 173 at 188. The purpose is the end to which land is seen to serve. It describes the character which is imparted to the land at which the use is pursued: Shire of Perth v O'Keefe at 534; 150.*
- 28 *In determining whether land is used for a particular purpose, an enquiry into how that purpose can be achieved is necessary: Newcastle City Council v Royal Newcastle Hospital (1957) 96 CLR 493 at 499-500; 4 LGRA 69 at 74. The use of land involves no more than the "physical acts by which the land is made to serve some purpose": at 508;81.*

- 4.2. Preston CJ also states at p 408 as follows:

"The characterisation of the purpose of development must also be done in a common sense and practical way"



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- 4.3. Preston CJ's approach to the characterisation of the use was followed by Justice Jagot of the Land and Environment Court in ***T & K Berry v Wollongong Council* [2008] NSW LEC 210** and also by the Court of Appeal in ***Abret Pty Ltd v Wingecarribee Shire Council* [2011] NSW CA 107**.
- 4.4. Thus, the task to be undertaken in this matter is to determine whether the proposal as articulated in the suite of architectural drawings which have been provided to us, as properly categorised, is "shop-top housing" within the meaning of the LEP. The drawings which we have considered include the drawings identified "Option 2B for Lower Ground 1:200 03/02/15"; "Option 2B for Ground Floor 1:200 03/02/15" and "Section GG Option 2B 1:200 03/02/15" ("the concept drawings").
- 4.5. In our opinion it is reasonably open to the decision maker to come to the view, on a proper characterisation of the use that the proposal identified in the architectural drawings as submitted is for "shop top housing". However, based upon recent decisions of the Land and Environment Court, a view might be taken that the proposal as submitted is not for "shop top housing". Ceerose is considering amending the DA to remove any doubt concerning permissibility.
- 4.6. The recent decisions of The Land and Environment Court of NSW referred to above are ***Hrsto v Canterbury City Council (No.2)* [2014] NSWLEC 121** and ***Blackmore Design Group Pty Limited v Manly Council* [2014] NSWLEC 164**). In our opinion the key issues arising in *Hrsto* and *Blackmore* are as follows:
- (i) To qualify as "shop top housing" all residential parts of the building must be above the relevant retail or commercial parts, **see *Hrsto* paras 56 and 33 and also *Blackmore* paras 11 and 13**.
 - (ii) It is not necessary for the dwellings to be directly or immediately above the retail/commercial premises in order to be characterised as "shop top housing" **see *Hrsto* paras 56 and 34(35)**.
 - (iii) The dwellings must be in the same building as the ground floor retail/commercial and on a floor of the building that is at a level higher than the top most part of the retail/commercial use. **See *Hrsto* paras 56 and 34(33)**.
 - (iv) If any part of the residential component of the use is at a floor level lower than the top most part of the ground floor retail/commercial then it will not be shop top housing. **See *Hrsto* paras 56 and 34(33)**.
 - (v) The dwellings must be in the same building as the ground floor retail/commercial premises for the purposes of the term "shop top housing". However, the dwellings need only be at a floor level that is higher than the top of the ground floor retail/commercial premises and do not need to be contained in an envelope on the higher floor level that would be intersected



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by a line drawn vertically from within the envelope of the ground floor retail or business premises. **See Hrsto para 34(36).**

- 4.7. We are instructed and note that the concept drawings address each of the critical elements referred to in (i) – (v) above.
- 4.8. We understand that the concepts will be “worked up” to a full set of architectural drawings which will form part of an amended application to Council, clearly depicting development for “shop top housing” within the meaning of the LEP.
- 4.9. In our opinion, the amended drawings which will specifically address the permissibility issue does not change the fundamental nature of the proposal and therefore does not constitute a fresh application which would require the lodgement of a new DA, **see Blackmore.**
- 4.10. It is therefore open to Ceerose to make formal application to Council pursuant to clause 55 of the EPA Regulation to amend the current DA to address the permissibility issue raised by Council, **see Blackmore.**
- 4.11. Our advice is qualified to the extent that we have not yet considered a full set of amended architectural drawings reflecting the concepts.

Please do not hesitate to contact Peter Jackson of our office if you wish to discuss any aspect of our advice.

Yours faithfully

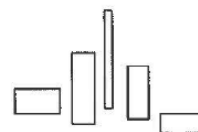
A handwritten signature in blue ink, appearing to read 'Peter Jackson', written over a horizontal line.

Peter Jackson
Partner



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LAWYERS

27 March 2015

Mr D McNamara
Ceerose Pty Ltd
No. 2 Argyle Place
WEST PENNANT HILLS NSW 2125

BY EMAIL dmps@me.com

Dear Sir

150 MOWBRAY ROAD, WILLOUGHBY
ADVICE RE PROPOSED DEVELOPMENT
Our ref PMJ:KEG:150008

We refer to previous correspondence concerning the subject matter and in particular to our letter to Ceerose of 4 February 2015, a further copy of which is **enclosed**.

In our February letter to Ceerose we state in part as follows:

- "4.4 Thus, the task to be undertaken in this matter is to determine whether the proposal as articulated in the suite of architectural drawings which have been provided to us, as properly categorised, is "shop-top housing" within the meaning of the LEP. The drawings which we have considered include the drawings identified "Option 2B for Lower Ground 1:200 03/02/15"; "Option 2B for Ground Floor 1:200 03/02/15" and "Section GG Option 2B 1:200 03/02/15" ("the concept drawings").
- 4.5 In our opinion it is reasonably open to the decision maker to come to the view, on a proper characterisation of the use that the proposal identified in the architectural drawings as submitted is for "shop top housing". However, based upon recent decisions of the Land and Environment Court, a view might be taken that the proposal as submitted is not for "shop top housing". Ceerose is considering amending the DA to remove any doubt concerning permissibility.
- 4.11 Our advice is qualified to the extent that we have not yet considered a full set of amended architectural drawings reflecting the concepts."

We have now had the benefit of examining extracts from the final architectural drawings, namely DrwA.102D – A.104D, A.150C, and A.161C.





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We are of the opinion that as properly characterised the proposed development as reflected in the above final architectural drawings, as properly categorised, is for "shop top housing" and, thus, is permissible with Council's consent. Please do not hesitate to contact Peter Jackson of our office if you wish to discuss any aspect of our advice.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Peter Jackson', written over a horizontal line.

Peter Jackson
Partner

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