

ALLSOP GLOVER
LAWYERS

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Our Ref: RJA:VC:160710

24 January 2017

Ms Mary-Lynne Taylor,
Sydney West Central Planning Panel,
23-33 Bridge Street,
Sydney 2000

Dear Ms Taylor,

**RE: Development Application DA-24/2014 for Mixed Use Residential Flat Building,
13-21 John Street, Lidcombe (Panel Ref. 2014SYW024)**

We have been instructed to act for Sydney Project Group Pty Ltd, the Applicant in Development Application DA-24/2014 (“the Applicant”).

On 23 June, 2016, the Sydney West Joint Regional Planning Panel (“SWJRPP”) deferred the development application for the reasons set out in the Determination and Statement of Reasons, a copy of which is attached.

Prior to the meeting of the SWJRPP on 23 June, 2016 Cumberland Council had provided a Director’s Report to SWJRPP recommending that DA-24/2014 be approved subject to deferred commencement.

Subsequently, Cumberland Council raised the issue of landowner’s consent. Initially, our client understood that the Council contended that it had withdrawn its consent which it had previously given.

On 8 August, 2016 a letter was sent to Mr Salim Mehajer of Sydney Construction and Developments stating that the SWJRPP had received legal advice on whether valid landowner’s consent is in place.

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Please note that Sydney Constructions and Developments Pty Ltd is not the Applicant in DA-24/2014 and that Mr Mehajer is not the director of that company, nor the Applicant.

This letter did not state the facts which were provided to the party providing the said legal advice.

The said letter requested evidence of consent be provided within 21 days.

Mr Mehajer responded by email on 9 August, 2016. Mr Mehajer contended that all landowner's consents had been lodged with Auburn City Council.

We are instructed that this has been our client's understanding. This is supported by the fact that Auburn City Council and then Cumberland Council dealt with DA-24/2014 up to the Director's Report recommending approval, without raising any objection about a lack of landowners' consent

On 23 December, notice was given of a Public Meeting scheduled on 25 January, 2017 at which the Sydney West Central Planning Panel ("SWCPP") will further consider Development Application DA-24/2014.

This was the last working day before the Christmas vacation.

On 17 January, 2017 documents were uploaded onto the Planning Panels website.

Our client became aware when it downloaded the documents that Cumberland Council contends that it has never given consent to DA-24/2014, as set out in the letter from Storey and Gough to you dated 18 November, 2016.

The owners of 15, 19 and 21 John Street Lidcombe are associated with the Applicant. There has never been any doubt that these owners have consented and continue to consent to the development application.

Documents forwarded by Mr Mehajer support this contention.

If there has been an error, or evidence of the consent of any of these landowners has been misplaced, this can be rectified by written consent being provided prior to the determination of the development application.

Our client remains of the view that Auburn City Council, as it then was, gave its consent to the development application. It is still looking for any record it may have, and this process has been expedited now that a copy of Storey & Gough's letter of 18 November 2016 has come to its attention.

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Council's conduct until recently has been consistent with it having given consent to the application. As set out above, it permitted the development application to be considered by SWJRPP and until recently made no submission to the effect that the application should be rejected on because of the absence of consent.

Quite apart from this, Council's obligations to give its consent were regulated by the terms of the contract for the purchase of 13 John Street. We understand that the panel has a copy of the contract, but for completeness we attach a copy of special condition 14. We draw your attention, in particular, to sub-clause F thereof, which states relevantly:

'The Vendor must sign any Applications, Consents...or documents required by the Purchaser for the Application.'

The obligation of council to give its consent would, in addition, be affected by its implied duties to co-operate in bringing about the outcome contemplated by the contract.

Therefore, at the time the development application was lodged the Council was required to give its consent.

Our client contends that the Council owed it an obligation to notify it if it contended that the development application was defective because its formal written consent had not been obtained.

If it had done so, the Council was required to give its consent.

Our client contends that the Council is required to give its consent now, if it has not previously done so.

The status of that contract is the subject of proceedings in the Supreme Court of New South Wales, being proceeding 2016/00297667. In those proceedings, our client alleges that the contract has not been rescinded by Council, and it seeks specific performance thereof. The defendant contends otherwise.

We have, contemporaneously with this letter, written to Storey & Gough requiring its client's consent, pursuant to clause 14F, for the development application. We anticipate that the council will contend that it is not obliged to give its consent because the contract has been rescinded. A copy of that letter is attached.

Our client contends that the development application should be approved. Alternatively, SWCPP should defer final consideration of the development application until after the Supreme Court proceedings have been resolved.

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There are two reasons why final determination should be deferred, if the development application is not approved.

Firstly, it would be unfortunate for the panel to determine the application on the basis of an absence of consent, if council was required to give its consent and had not given it in breach of contract.

Secondly, our client would suffer obvious prejudice in that event. Not only would its expenditure on the application be wasted but, if the contract remained on foot, its ability to comply with special condition 14 would be severely prejudiced.

Yours faithfully,



RICHARD ALLSOP

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Email: richard.allsop@allsopglover.com.au

SYDNEY WEST JOINT REGIONAL PLANNING PANEL

Meeting held at **Cumberland Council** (Former Auburn City Council Chambers) on
Thursday 23 June 2016 at 4.00 pm

Panel Members: Mary-Lynne Taylor (Chair), Paul Mitchell, Bruce McDonald, Paul Stein and Julie Walsh

Apologies: Nil

Declarations of Interest: Nil

Determination and Statement of Reasons

2014SYW024 – Cumberland Council - DA-24/2014, Demolition of existing structures and construction of 2 buildings, one 11 storeys and the other 10 storeys including a 2,300 m² supermarket located at the ground floor 103 residential apartments and basement car parking for 240 cars, including replacement public car parking, Lot 1 DP 233926, Lots 1, 2 & 3 DP 608751, 13-21 John Street, Lidcombe.

Date of determination: 23 June 2016

Decision:

The panel unanimously deferred the development application as described in Schedule 1 pursuant to section 80 of the *Environmental Planning and Assessment Act 1979*.

Panel consideration:



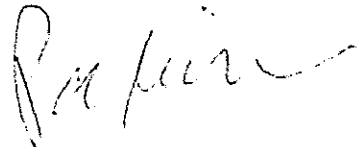
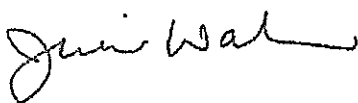

The panel considered: the matters listed at item 6 as addressed in the Council Assessment Report, the material listed at item 7 the matters presented at meetings and the matters observed at site inspections listed at item 8 in Schedule 1. The Panel adjourned during the meeting to deliberate on the matter and formulate a resolution.

Reasons for the panel decision:

The Panel considers the following matters need to be addressed satisfactorily prior to a final decision being taken by the Panel.

1. The Panel is uncertain about whether the land owner's consent is in place and seek legal advice from the Department of Planning and Environment whether the Panel has the power to determine this development application as the owner's consent appears to have been withdrawn.
2. The Panel requires all matters proposed as deferred commencement conditions and the operational conditions 19 and 94 to be addressed in revised plans and council is to provide a report on the amended plans prior to a further meeting of the Panel.
3. A detailed assessment of the Clause 4.6 variation relating to the breach of the LEP height standard is to be provided by Council.
4. A plan is to be submitted demonstrating effective arrangements for the management of the retail, residential, public car parking on site.

Panel members:

		
Mary-Lynne Taylor	Bruce McDonald	Paul Mitchell
		
Julie Walsh	Paul Stein	

SYDNEY WEST JOINT REGIONAL PLANNING PANEL

SYDNEY WEST JOINT REGIONAL PLANNING PANEL – SCHEDULE 1	
1	JRPP Reference – 2014SYW024, LGA – Cumberland Council, DA-24/2014
2	Proposed development: Demolition of existing structures and construction of 2 buildings, one 11 storeys and the other 10 storeys including a 2,300 m ² supermarket located at the ground floor 103 residential apartments and basement car parking for 240 cars, including replacement public car parking.
3	Street address: Lot 1 DP 233926, Lots 1, 2 & 3 DP 608751, 13-21 John Street, Lidcombe.
4	Applicant and Owner: Sydney Project Group Pty Ltd.
5	Type of Regional development: Capital Investment Value > \$5M Council Interest
6	Relevant mandatory considerations <ul style="list-style-type: none"> • Environmental planning instruments: <ul style="list-style-type: none"> ◦ State Environmental Planning Policy 55 – Remediation of Land ◦ SEPP 65 – Design Quality of Residential Apartment Development ◦ SEPP (Infrastructure) 2007 ◦ Auburn Local Environmental Plan 2010 • Draft environmental planning instruments: Nil • Development control plans: <ul style="list-style-type: none"> ◦ Auburn Development Control Plan 2010 • Planning agreements: Nil • Regulations: <ul style="list-style-type: none"> ◦ Environmental Planning and Assessment Regulation 2000 • The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality. • The suitability of the site for the development. • Any submissions made in accordance with the EPA Act or EPA Regulation. • The public interest, including the principles of ecologically sustainable development.
7	Material considered by the panel: Council assessment report with draft recommended conditions and written submissions. Verbal submissions at the public meeting: <ul style="list-style-type: none"> • Cathy McDowell • Wenging Cai • Pavlo Doroch, Mohamed Eldardiry on behalf of the applicant
8	Meetings and site inspections by the panel: 23 June 2016 – Site Inspection and Final briefing meeting.
9	Council recommendation: Approval
10	Conditions: Attached to council assessment report



Figure 1 Aerial view of site
(Source: NSW Land and Property Information, 2016)

Description of Proposed Development

Council has received a development application for the demolition of existing structures and construction of 2 buildings, one 11 storeys and the other 10 storeys including a supermarket located at the ground floor, 103 residential apartments and basement car parking for 240 cars, including replacement public car parking.

The supermarket comprises a ground floor retail and back of house component - 2,251 m²; basement supermarket storage - 71 m²; basement supermarket waste room - 34 m²; and supermarket loading dock - 266 m² resulting in a total 2,622 m².

Conclusion

Council has not given its owner's consent to the development application in accordance with the provisions of Clause 49 of the Environmental Planning and Assessment Regulation 2000. It does not intend to give its owner's consent.

Further the owners of the land at 15 John Street, Lidcombe (Lot 3 DP 608751) are Ahmad Salim Mouhajar and Ghazwas Mouhajar, and that these persons have also not provided owners' consent to the development application.

In those circumstances, there is no power to approve the development application, and it should be determined in accordance with the law.

(5) In this Clause:

"required rating" means:

- (a) a short term unsecured debt rating of at least A1 from S & P or at least P1 from Moody's; or
- (b) a claims paying ability rating of at least A - from S & P;

"S & P" means Standard and Poor's (Australia) Pty Limited, a company incorporated in Victoria; and

"Moody's" means Moody's Investor Services, Inc., a corporation organised and existing under the laws of the State of Delaware in the United States of America.

(6) On completion of this contract, the Purchaser shall pay to the Vendor, in addition to all other moneys payable under this contract, the amount stipulated in the Guarantee, either by way of cash or unendorsed bank cheque.

11. Clause deleted.

12. The definition of "Depositholder" will be amended to read "Vendor's Solicitors"

13. Correction of error in adjustment at completion

Clause 14 of the Contract requires that on completion the parties adjust, as at the adjustment date, all rates and other outgoings (including strata levies and land tax, if applicable). If any adjustments of an outgoing or rate at settlement is incorrect or by error a rate or outgoing is not adjusted, the parties agree to correct such error and for the party to be reimbursed to be paid the amount to be reimbursed within 7 working days of receipt of written notification from the party entitled to reimbursement. This clause shall not merge on completion.

14

A The Vendor agrees to allow the Purchaser and its authorised agents access to the property for the purposes of carrying out inspections, surveys, reports, viewing and any other reasonable purpose connected with this Contract, on prior reasonable notice to the Vendor.

B The Purchaser agrees that any access to the property pursuant to this clause will be carried out at the risk of the Purchaser. The Purchaser indemnifies the Vendor for any loss, damage or expense caused to the Vendor because of the Purchaser exercising its rights under this clause.

C The Purchaser shall, within six (6) months of the date hereof, at its expense lodge a Development Application and obtain consent, such consent to include a supermarket with a minimum area of 2000 square metres with all ground floor areas to be dedicated to commercial uses.

D The Vendor will provide within 7 days from the date of request by the Purchaser, a letter to the Purchaser which will be addressed to any necessary authority authorising the Purchaser and the Purchaser's:

- (i) agents;
- (ii) architects; or

- (iii) any other relevant body the Purchaser requests,
- to liaise and lodge the Development Application with Council or any necessary authority.
- E The Purchaser must, at its expense, obtain the consent of the Council or the necessary authority(ies) for any Application.
- F The Vendor must sign any Applications, Consents or plans, instruments or documents required by the Purchaser for the Application.
- G The Vendor consents to the Purchaser erecting on the property, for the period required by any relevant law, any sign or notice required in respect of any Application.
- H If any Application is refused by any Authority or is granted subject to conditions which are unacceptable to the Purchaser (in its absolute discretion), then the Purchaser may, at its own cost, elect to appeal to the relevant court or tribunal or, in the case of an objection to or an appeal against the determination by an outside party, appear at the relevant court or tribunal on the hearing of that objection or appeal (as the case may be). The Purchaser and the Purchaser's Solicitors will have the carriage and conduct of the appeal or objection in the name of the Vendor, and the Vendor appoints the Purchaser its attorney to do all such acts, matters and things and to sign all documents necessary for the purposes of the appeal or objection. The Vendor warrants and agrees that it will not lodge any objection to the appeal.
- I In the event that the Purchaser does not obtain Development Consent for the subject property within eighteen (18) months from the date of lodgement of the Development Application on terms acceptable to the Purchaser pursuant to clause 14(H) in the contract then either party may be at liberty to rescind this contract whereupon the provisions of Clause 19 shall apply.
- J This clause 14 shall not merge on completion of this contract.

15 In the event that the Development Consent is obtained, settlement shall be effected within twelve (12) months of the date of the Development Consent.

16 It is a term and condition of this Contract that the existing carpark on 13 John Street, Auburn is to remain open to the public for carparking free of charge until development pursuant to a Development Consent is commenced. A licence agreement shall be entered into between the parties to that effect on terms acceptable to the Vendor. This clause shall not merge on completion.

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Our Ref: RJA:VC:160710

24 January 2017

Ms Belinda Gough
Storey and Gough Lawyers
182 George St
PARRAMATTA NSW 2150

BY EMAIL: belinda@sglaw.com.au

Dear Ms Gough,

RE: SCD V CUMBERLAND COUNCIL

We write to you concerning the forthcoming meeting of the JRRP concerning the above development application.

Our client recently received a copy of your letter to the Chair, Sydney West Joint Regional Planning Panel ("the panel") dated 18 November 2016.

Our client remains of the view that your client has already given its consent to the application. Council's conduct until recently has been consistent with it having given consent to the application. It permitted the development application to be considered by the panel, and until recently made no submission to the effect that the application was premature or should be rejected on any basis, including the absence of consent.

Without prejudice to such rights as our client has arising from any previous consent, our client hereby requests that Council provide its written consent to the application, and does so before the meeting scheduled for 10 am, Wednesday 25 January, 2017.

Council is required to give its consent pursuant to special condition 14F of the contract between our respective clients and the implied terms pleaded by it; including

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To: Ms Belinda Gough
Storey and Gough Lawyers

that it must act in good faith and that it agreed to do what was necessary to be done on its part to process the plaintiff's development application.

Yours faithfully,



RICHARD ALLSOP

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