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12 December 2014

Privileged and confidential

Benjy Levy
Development Manager
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Dear Benjy

Advice regarding the clause 4.6 request for DA-578/2014

Overview

Questions 1 You have asked us to provide you with legal advice in answer to the following questions:

(a) Question 1: Is there any numerical maximum limiting the extent to which a clause 4.6 request can be approved?

(b) Question 2: Is there a requirement for the proposed variation to the floor space ratio be pursued as a planning proposal?

(c) Question 3: Is the clause 4.6 variation in relation to floor space ratio legally sound?

(d) Question 4: Will the approval of the clause 4.6 request set a precedent?

(e) Question 5: Is it the impact of the variation that needs to be justified or is it a matter of providing justification for why the breach of the controls is required?

Summary 2 In our opinion:

(a) There is nothing about the extent of the proposed variation to the floor space ratio that would lead to a finding that a development consent granted (in response to the development application) is invalid.

(b) A development proposal that is not consistent with either the objectives of the development standard, or the objectives of the zone, cannot be approved in reliance on clause 4.6. If such a proposal is to proceed, it must do so by way of planning proposal. The present proposal is consistent with the objectives of the development standard and the relevant zones. As a matter of law, it is able to be dealt with under clause 4.6.

(c) There is no doubt about the validity of the clause 4.6 request.

(d) A floor space ratio variation made on the basis of the clause 4.6 request would be legally sound.

(e) The approval of the clause 4.6 request will not set a precedent.

(f) The variation will need to be justified (in part), by the fact that the variation does not materially increase the kinds of impacts that the standard was intended to control. The clause 4.6 request addresses this.

(g) The consent authority must also be satisfied that there are sufficient environmental planning benefits to justify contravening the development standard. The clause 4.6 request does this by making the case that the failure to approve the clause 4.6 request will deny the community the particular environmental planning benefits.

Detailed advice

Facts

3 We understand and have assumed the facts in this matter to be as follows:

(a) You (or an associated entity) are the proponent for development application DA-578/2014, lodged with Liverpool City Council.

(b) The development application relates to a site at 420 Macquarie Street Liverpool, also known as Lot 100 DP 1074417 (**the site**).

(c) The land is subject to *Liverpool Local Environmental Plan 2008* (**the LEP**).

(d) The site is zoned B4 Mixed Use (**B4**) and R4 High Density Residential (**R4**). A very minor part of the site is zoned SP2 Infrastructure (for future road widening of the adjacent classified road).

(e) The development application is for the construction of a mixed use development comprising 438 apartments and 376m^2 of retail and communal facilities.

(f) The proposed built form comprises two 29 storey towers and one six storey residential flat building.

(g) The gross floor area of the proposed development will be 39,098m^2 which equates to a floor space ratio for the site (excluding a minor portion of the land identified for future road widening) of 6.40:1.

(h) Two maximum floor space ratios are set in relation to the site area:

(i) 6:1 in relation to the portion of the site zoned B4;

(ii) 3.5:1 in relation to the portion of the site zoned R4.

This equates to a maximum gross floor area of 34,428m^2 for the site area (excluding a minor portion of the land identified for future road widening). The blended maximum floor space ratio for the site is therefore 5.63:1 (in the absence of a clause 4.6 variation).

(i) The development application has been considered by the Sydney West Joint Regional Planning Panel (who has the function of determining the development application as consent authority) and as a consequence of that initial consideration you have sought this advice.

(j) A new clause 4.6 request has been prepared and lodged today (**the clause 4.6 request**).

4 If any of the above facts are not correct, please let us know as it may change our advice.

Question 1 ***Is there any numerical maximum limiting the extent to which a clause 4.6 request can be approved?***

5 Clause 4.6 of the LEP is similar to the long-standing *State Environmental Planning Policy No 1 - Development Standards* (**SEPP 1**).

6 From its earliest days it was established that SEPP 1 may be applied to vary development standards even when the variation could not be regarded as minor: *Michael Projects v Randwick Municipal Council* (1982) 46 LGRA 410, 415).

7 The Court of Appeal considered the issue in *Legal and General Life v North Sydney Municipal Council* (1990) 69 LGRA 201.

8 In that matter North Sydney Council had approved a SEPP 1 objection and the decision was subject to third party legal challenge.

9 The applicable floor space ratio control was 3.5:1, but - as a consequence of upholding the SEPP 1 objection - the approved floor space ratio was 15:1 (a variation to floor space of 329 per cent). The applicable height control was five storeys whereas the approved height was 17 storeys (an variation of 240 per cent).

10 The Court approved the following statement by the then Chief Judge of the Land and Environment Court (in *Legal and General Life v North Sydney Council* (1989) 68 LGRA 192, 203):

> The discretion vested in councils under SEPP No 1 is wide and, subject to limitations found in the instrument itself and its relation to the *Environmental Planning and Assessment Act 1979*, is unconfined.

11 Priestley JA (with whom Gleeson CJ and Samuels J agreed) said that:

> SEPP No 1, for better or for worse, seems to me to provide an escape clause for consent authorities from otherwise applicable and binding development standards…. [T]he substance of the argument was to the effect that to grant a consent permitting such a very large increase over the development standards for floor space ratio [329 per cent] and height [240 per cent], necessarily involved an abuse of power.

> I would not exclude the possibility that such a submission could succeed in some circumstances, If, for example, … **no plausible reason could be imagined for such consent, then the submission might succeed**…However, the facts of of the present case are almost the reverse of the example I have given… (bold added).

12 The Court upheld the validity of the Council's decision.

13 Clause 4.6 of the LEP is in similar terms to SEPP 1. Relevantly, like SEPP 1, there are no **explicit** provisions that make necessary for a consent authority to decide whether the variation is minor. Furthermore, in our view, the Court of Appeal's decision in *Legal and General Life* is equally applicable to clause 4.6. This means that there is no **implicit** constraint on the degree to which a consent authority may depart from a numerical standard.

14 In the present circumstances, the variation (to the floor space ratio) sought is 13.57 per cent. In our opinion, there is nothing about the extent of the variation in itself that could cause a legal problem, given the Court of Appeal's comfort with the 329 per cent variation in *Legal and General Life.*

15 The Court of Appeal noted that a variation for which there was 'no plausible reason' may be susceptible to legal challenge. This is true for a variation **of any amount**. As the Court of Appeal makes clear, the mere fact that the variation might be large does not mean that there is no plausible reason. In the present case, we consider that the clause 4.6 request outlines plausible reasons that are sufficient to justify the approval of the variation.

16 In short, in our view, nothing about the quantum of the variation sought would lead to a finding that a development consent granted (in response to the development application) is invalid.

17 Two good recent **examples** that illustrate the wide range of commonplace numerical variations to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

(a) On 30 October 2014, the Sydney East Joint Regional Planning Panel granted a development consent for a 14 storey mixed use development on land at 6-16 Parramatta Road Homebush (Reference 2014SYE053- Strathfield - 2014/066). In this decision, the panel, with the apparent benefit of advice from senior counsel, approved a floor space ratio variation of 24 per cent.

(b) On 14 January 2014, in *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.

Question 2 ***Is there a requirement for the proposed variation to the floor space ratio be pursued as a planning proposal?***

18 The Land and Environment Court has observed that the dispensing power under SEPP 1 is not a general planning power to be used as an alternative to the plan making power under Part 3 of the *Environmental Planning and Assessment Act 1979* (**the Act**): *Wehbe v Pittwater Council* [2007] NSWLEC 827 (at [51]). However, the

Court of Appeal has accepted that this is issue of planning discretion and **does not involve a question of law** (*Fast Buck$ v Byron Shire Council* 103 LGERA 94, 99-100, per Handley JA, Sheppard AJA agreeing).

19 As a matter of law, the fact that the same outcome may be achieved via a change to the planning controls under Part 3 of the Act does not preclude the exercise of the dispensing power under SEPP 1.

20 Of course, SEPP 1 does not apply the site in question. For this site, SEPP 1 has been replaced by clause 4.6 of the LEP.

21 Clause 4.6 contains a provision that had no equivalent in SEPP 1. Namely, clause 4.6(4)(a)(ii). This provision requires that:

> the proposed development … be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out …

22 In our view, this is a legislative response to the previous case law, and allows a clear distinction to be made between:

(a) variations to development standards that must be progressed by means of a planning proposal; and

(b) those that can be authorised under clause 4.6.

23 For example, under SEPP 1, it was possible for a variation to a development standard to be approved if the standard had been virtually abandoned or destroyed by the Council's own actions in granting consents: *Wehbe v Pittwater Council* [2007] NSWLEC 827. Under SEPP 1 this meant that a development standard could be departed from even if the objectives of the development standard were not met. **With clause 4.6 this is no longer possible.** Consistency with the objectives of the development standard must **always** be established.

24 In short, a development proposal that is not consistent with either the objectives of the development standard, or the objectives of the zone, cannot be approved in reliance on clause 4.6. If that proposal is to proceed, it must do so by way of planning proposal.

25 In the present case, in our view, the clause 4.6 requests demonstrates consistency with the relevant development standard and zone objectives. Accordingly, clause 4.6(4)(a)(ii) is satisfied, and nothing about the development proposal requires, as a matter of law, that it be progressed via a planning proposal.

Question 3 ***Is the clause 4.6 variation in relation to floor space ratio legally sound?***

26 In order for a clause 4.6 request to be legally sound it must (under clause 4.6(3)) seek to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In our opinion, the clause 4.6 request plainly does this. We do not consider that there is any doubt about the validity of request.

27 In order for the consent authority to actually approve the clause 4.6 request the consent authority must be **satisfied** that:

(a) the clause 4.6 request has adequately addressed the matters outlined in paragraph 26 above (clause 4.6(4)(a)(i); and

(b) the proposed development will be in the public interest because it is consistent with:

(i) the objectives of the particular standard; and

(ii) the objectives for development within the zone in which the development is proposed to be carried out

(clause 4.6(4)(a)(ii)).

28 This means that if the consent authority (that is the Sydney West Joint Regional Planning Panel) does not have the required satisfaction, a development consent cannot be lawfully granted on the strength of the clause 4.6 request.

29 If the consent authority has considered itself satisfied, **the courts will not step in and substitute their own opinion** for the opinion of the consent authority (*R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* [1944] HCA 42).

30 The exceptions to this rule are limited. The two main grounds for a court to step in and overturn a decision about a state of **satisfaction** can be summarised as follows:

(a) Firstly, the authority's satisfaction:

(i) is not reasonable because it was not an opinion capable of being reached by a person with an understanding of the nature of the statutory function being performed; or

(ii) is not based upon facts or inferences supported by logical grounds.

(*D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 [91], per Beazley P with Bathurst CJ agreeing.)

(b) Secondly, in deciding that it was satisfied, the authority:

(i) failed to take into account a mandatory relevant consideration; or

(ii) took into account an irrelevant consideration

(*Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40).

31 We have carefully reviewed the clause 4.6 request. In our opinion:

(a) the clause 4.6 request is sufficient to allow the Sydney West Joint Regional Planning Panel to be satisfied in the way that is required by clause 4.6(4)(a); and

(b) nothing in the clause 4.6 request will cause the panel to take into account an irrelevant consideration.

32 In short, we consider that a floor space ratio variation made on the basis of the clause 4.6 request would be legally sound.

Question 4 ***Will the approval of the clause 4.6 request set a precedent?***

33 For 'precedent' to be a relevant matter warranting refusal of a development application, **each** of the following criteria apply:

(a) The proposed development must itself be objectionable due to its own impacts.

(b) There must be a 'sufficient probability' that there will be further applications 'of a like kind' and 'in the same locality'. The mere chance or possibility of later similar development applications is not sufficient.

(c) The issue of precedent cannot arise in circumstances where the site is 'distinguishable' from other potential development sites.

(d) Precedent is only a negative factor where the precedent brings about an 'objectionable condition of affairs' and which 'produce in their totality some undesirable condition'. Precedents that might actually benefit community cannot justify the refusal of a development application.

(*Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177; *Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* [2002] NSWLEC 75)

34 In the present circumstances, the clause 4.6 request is at least partly justified by reference to the unique nature of the site, namely:

(a) the site's large size and multiple street frontages (which are able to accommodate additional height and density while mitigating surrounding impacts);

(b) the site's unique spatial setting allowing generous separation to future built form;

(c) the site's location as an iconic gateway to the southern entrance of Liverpool city centre.

(d) the site's prominent appearance;

(e) the creation of open space to the Carey street frontage providing separation between the Charles and Macquarie Street properties;

(f) the location of the site on a ridge, capturing 360 degree views; and

(g) the site's close proximity to shops, Liverpool train station, bus routes and state, arterial and sub-arterial roads/routes.

35 These factors strongly suggest there will not be 'sufficient probability' that there will be further applications 'of a like kind' and 'in the same locality'. We consider it unlikely that there will be many, if any, sites that satisfy these factors. This means that further development applications for other sites are likely to be 'distinguishable' from this development application. That is, no precedent would arise.

36 Additionally, the clause 4.6 request makes the case that the proposed development is not objectionable based on its own impacts. This is relevant, because if the application, on its own merits, is not objectionable, the possibility that it may set a precedent is an irrelevant consideration.

37 It should also be understood that situation under SEPP 1 - where a consent authority could virtually abandon or destroy a development standard by the consent authority's own actions in granting consents - **does not arise under clause 4.6**.

38 This is because, **in every instance** clause 4.6 is invoked, it is necessary for the consent authority to be satisfied that the proposed development is consistent with the objectives of the particular standard (clause 4.6(4)(a)(ii)).

39 This means that any decision the consent authority makes on this development application will not open the floodgates. It will not be possible for other applicants to credibly argue that the objective of the floor space ratio standard should be ignored.

40 In short, in our opinion, the approval of the clause 4.6 request will not set a precedent.

Question 5 ***Is it the impact of the variation that needs to be justified or is it a matter of providing justification for why the breach of the controls is required?***

41 To some extent it is both.

42 Clause 4.6(3)(a) (when read in conjunction with clause 4.6(4)(a)(i)) requires the consent authority to be satisfied that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

43 The clause 4.6 request seeks to do this by establishing that the objectives of the development standard will be met, despite the non-compliance with the numerical standard.

44 As the Chief Judge of the Land and Environment Court observed in *Wehbe v Pittwater Council* [2007] NSWLEC 827:

> The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, 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).

45 As the objectives of the floor space ratio are (in part) about

controlling the impacts of development, the variation will need to be justified (in part), by the fact that the variation does not materially increase the kinds of adverse impacts that the standard was intended to control.

46 However, clause 4.6(3)(b) (when read in conjunction with clause 4.6(4)(a)(i)) also requires the consent authority to be satisfied that there are sufficient environmental planning grounds to justify contravening the development standard.

47 This provision is about establishing that the variation itself brings about environmental planning benefits. If the consent authority is not satisfied that approving the contravention brings with it such benefits, it will be unable to approve the contravention. The clause 4.6 request addresses this.

48 The development applicant cannot insist the Sydney West Joint Regional Planning Panel approve the variation. However, it can make the case (as it has in the clause 4.6 request) that a failure to approve the clause 4.6 request will deny the community the particular environmental planning benefits.

49 It should be noted that the requirement to demonstrate environmental planning grounds that justify a variation to a development standard is really just a codification of a pre-existing principle implicit in SEPP 1. (This principle was famously highlighted in *Winten Property Group Ltd v North Sydney Council* [2001] NSWLEC 46.)

Please do not hesitate to contact me on (02) 9931 4929 if you require further information.

Yours sincerely

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