

ADDISONS

16 December 2016

Our ref: HSK:FRA007/4001

Mr Robert Cauchi
Fraser's Property Australia
Level 3
Building C
1 Homebush Bay Drive
RHODES NSW 2138

PRIVILEGED AND CONFIDENTIAL

BY EMAIL

Dear Robert

Stage 2 Phase 4H DA and MP 05-0001 MOD 2 Concept Plan for the Royal Rehabilitation Centre Site

We refer to Fraser's Property Australia's (**Fraser's**) request for advice in relation to whether the proposal for Stage 2 Phase 4H of the Royal Rehabilitation Centre development at Putney Hill is "generally consistent" with the MP 05-0001 MOD 4 Concept Plan for the Royal Rehabilitation Centre Site.

Executive Summary

1. By operation of Clause 3B of Schedule 6A of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, the consent authority for the development application for Phase 4H of the Royal Rehabilitation Centre development (**Phase 4H DA**), cannot grant development consent unless it is satisfied that the development is "generally consistent" with the terms of the approval of MP 05-0001, the Part 3A Concept Plan for the Royal Rehabilitation Centre Site (**Concept Plan**) as modified.
2. In our view, in order to be "generally consistent" it is not necessary for a proposal to be rigidly bound by the detail of a concept plan. Broad promises of a concept plan are required to be adhered to, however the detailed design of a development may be provided and assessed at the development application stage. Accordingly, a degree of latitude is available such that a proposal may differ from, but still be generally consistent with, the terms of the modified Concept Plan. We note that the general latitude afforded in Clause 3B(2)(d) of Schedule 6A to the EP&A Act is further employed in the modified Concept Plan in Condition A2 which requires that the development be only "generally consistent" with plans and documentation provided as part of the Concept Plan assessment.
3. In our view, assessing whether development proposed pursuant to a development application is generally consistent with a concept plan will require a consent authority to consider the concept plan holistically. This includes considering the aims and objectives across the whole concept plan site as well as the types of uses and overall density proposed, to assess whether the environmental impacts of the development would be altered or increased. JBA has carefully undertaken this exercise and have concluded that the consent authority can reach a state of satisfaction that, the development proposed in the Phase 4H DA is generally consistent with the terms of the approval of the concept plan.
4. In the Phase 4H DA, density, traffic generation and environmental impacts of the proposed development are all consistent with that proposed and assessed in the modified Concept

ABN 55 365 334 124

Level 12, 60 Carrington Street
Sydney NSW 2000

GPO Box 1433
Sydney NSW 2001

DX 262
Sydney

Telephone +61 2 8915 1000
Facsimile +61 2 8916 2000

mail@addisonslawyers.com.au
addisonslawyers.com.au

Liability limited by a scheme approved under Professional Standards Legislation

2012010_2

Plan. As a result, in our view, the proposal can be accepted by a consent authority as being "generally consistent" with the modified Concept Plan. Further reasons for this conclusion are set out in the body of this advice.

6. As we have concluded that the Phase 4H DA is "generally consistent" with the terms of the approval of the modified Concept Plan, in our view, a Section 75W modification to the modified Concept Plan is not required in order for consent to be granted to the Phase 4H DA.

Background

6. The Minister for Planning granted approval to the Concept Plan pursuant to Part 3A of the EP&A Act in relation to land at 600–640 Victoria Road, Ryde on 23 March 2006. Royal Rehabilitation Centre Sydney (RRCS) was the applicant for the original Concept Plan.
7. The Concept Plan approved a rehabilitation and disability facility in addition to a residential development, public and private open space, associated services and infrastructure.
8. RRCS has completed a number of modifications to the Concept Plan relating to the rehabilitation and disability facility component of the site. Those modifications did not alter the residential components of the site which are being developed by Fraser's and are referred to as Stage 1 and Stage 2.
9. However, the residential component of the Concept Plan has been modified twice pursuant to (repealed) section 75W of the EP&A Act by Fraser's. We understand that the residential component of the Concept Plan was not tested when RRCS prepared the original Concept Plan and before Fraser's became involved in the proposal. Accordingly, the two section 75W modifications modified the original Concept Plan as follows:
 - (a) MP05_0001 MOD 1 approval was granted by the Delegate of the Minister for Planning on 8 March 2013 to:
 - (i) amend the layout of Stage 1 including new building envelopes, built form controls, internal road layout, parking and public domain layout;
 - (ii) redistribute existing density controls with a new FSR control; and
 - (iii) introduce a staging plan and subdivision plan.
 - (b) MP05_0001 MOD 2 approval was granted by the Delegate of the Minister for Planning on 14 October 2014 to:
 - (i) amend the Stage 2 layout including new building envelopes and building layouts, changes to internal roads, basement car parking and public domain open space;
 - (ii) replace density controls across Stage 2 with new FSR; and
 - (iii) introduce a new staging plan for Stage 2.
10. We understand that Fraser's has lodged a development application for Stage 2 Phase 4H of the Royal Rehabilitation Centre development (**Phase 4H DA**) which relates to Stage 2 of the modified Concept Plan. The Phase 4H DA seeks approval for residential development that varies the building envelope contemplated for the northern portion of Phase 4H in the modified Concept Plan. If the building envelopes were to proceed as contemplated in the modified Concept Plan, this would result in a breach of Concept Plan Condition A1 which provides:

A1. Development Description

Concept approval is granted only to the carrying out of the development described in Volume 1: Urban Design Principles Site Analysis and Development Plan and Volume 2: The Preferred Project Revised Concept Plan, prepared by BSA Architects (December 2005), as amended by the Concept Plan Drawings by Cox Richardson (February 2013 and August 2014) including:

- (1) A new, purpose built specialised rehabilitation and disability facility.
- (2) **No more than 50 residential dwellings per hectare on land excluding the new, purpose built specialised rehabilitation and disability facility.**
- (3) Landscaped public and private open space.
- (4) Associated services and infrastructure.
- (5) Land use distribution, building heights, densities, dwelling mixes and types. [Our emphasis].

11. Due to the number of dwellings that have already been approved under previous development applications across the residential component of the site, Condition A1 of the modified Concept Plan limits the Phase 4H DA to a maximum of 22 dwellings. If approved, the Phase 4H DA will result in an overall reduction of built form to remove dwellings that would otherwise result in an inconsistency with Condition A1. Accordingly, the Phase 4H DA proposes to provide 22 housing dwellings to allow the maximum of 791 dwellings across the site to be achieved but not exceeded.
12. The reduction has been achieved by replacing an apartment block contemplated in the modified Concept Plan with lower density housing consistent with the building typologies otherwise proposed under the modified Concept Plan. The proposal in the Phase 4H DA remains generally consistent within the maximum FSR, height controls and with the setback requirements to Morrison Road. As the building massing is proposed to be reduced from that in the modified Concept Plan, we understand that all possible impacts of the proposal will be minimised.

ADVICE**Requirement for general consistency with the Concept Plan**

13. Clause 3B of Schedule 6A of the EP&A Act provides:

3B Provisions applying with respect to approval of concept plans

(1) This clause applies to development (other than an approved project) for which a concept plan has been approved under Part 3A, before or after the repeal of Part 3A, and so applies whether or not the project or any stage of the project is or was a transitional Part 3A project.

(2) After the repeal of Part 3A, the following provisions apply (despite anything to the contrary in section 75P (2)) if approval to carry out any development to which this clause applies is subject to Part 4 or 5 of the Act:

(d) a consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is generally consistent with the terms of the approval of the concept plan,

(our emphasis).

14. Accordingly, the Sydney East Joint Regional Planning Panel, which we understand will be the consent authority for the Phase 4H DA, cannot grant development consent unless it is satisfied that the development is generally consistent with the terms of the approval of the modified Concept Plan.

What does "generally consistent" mean?

15. The concept of "generally consistent" in relation to Part 3A of the EP&A Act has been applied by the Courts in merit review cases, however the Court has not provided a clear definition as to this concept nor any clear guidance as to when the requirement for development to be "generally consistent" with a concept plan will be met.
16. In our view, assessing whether development proposed is generally consistent with a concept plan will require a consent authority to consider the development proposed pursuant to the concept plan holistically in order to consider whether the environmental impacts of the development are altered or increased. In the current circumstances, density, traffic generation and the environmental impacts of the development are all consistent with that proposed and assessed in the modified Concept Plan. As a result, the proposal can be considered "generally consistent" with the modified Concept Plan.
17. "Generally consistent" does not require a proposal to be rigidly bound by the detail of a concept plan. Broad promises of a concept plan are required to be adhered to, however, detailed design of a development is provided and assessed at the development application stage. Accordingly, a concept plan is required to be applied with a degree of flexibility.
18. By way of comparison, we note that section 83D(2) of the EP&A Act, in relation to staged development applications, provides:

(2) While any consent granted on the determination of a staged development application for a site remains in force, the determination of any further development application in respect of that site cannot be inconsistent with that consent. [Our emphasis.]
19. Whereas, clause 3B(2)(d) of Schedule 6A of the EP&A Act in relation to transitional Part 3A projects employs wording that requires only general consistency rather than a higher standard of consistency or compliance with a concept plan. The legislature clearly intended development applications for transitional Part 3A projects to be subject to a lower threshold of consistency with a concept plan when compared to the requirement that a development application "cannot be inconsistent" with earlier consents for staged development applications (under section 83D(2)).

Is the proposed development application generally consistent with the terms of the approval of the Concept Plan (as modified)?

20. Condition A2 of the modified Concept Plan requires that the development shall be generally consistent with listed plans and documents including the Concept Plan Drawings by Cox Richardson Architects dated August 2014 submitted on 11 August (**CRA Drawings**), the S75W Modification to Concept Plan MP05_0001 Report by JBA (**JBA Report**) and the Putney Hill Architectural and Landscape Design Guidelines dated 21 May 2014 (**Architectural and Landscape Guidelines**).
21. Accordingly, the terms of the modified Concept Plan require a proposal under it to be only "generally consistent" with the CRA Drawings, JBA Report and the Architectural and Landscape Guidelines. Further, clause 3B of Schedule 6A of the EP&A Act requires that a consent authority must not grant consent under Part 4 for the development unless it is "satisfied that the development is generally consistent with the terms of the approval of the concept plan". Accordingly, there is a degree of latitude available that a proposal may differ from the CRA Drawings, JBA Report and Architectural and Landscape Guidelines and still be deemed to be generally consistent with the terms of the modified Concept Plan which only require the development to be "generally consistent" with the terms of its approval.
22. The JBA Report and the Response to Submissions and Amendments to Proposed Development Report dated May 2014 articulate that the indicative scheme included in the modified Concept Plan provides flexibility for further refinement. Those documents make

clear that the modified Concept Plan models and assesses an "upper limit" to mitigate the need to further modify the building envelopes. These documents also clarify that the Architectural and Landscape Guidelines provide further guidance on the assessment of future development applications and that the controls are not intended to be implemented as statutory controls. Rather, they are intended to provide high level direction on the future built form.

23. In the Statement of Environmental Effects prepared by JBA and lodged with the Phase 4H DA, JBA sets out the reasons why the proposal in the Phase 4H DA remains generally consistent with the modified Concept Plan. After considering the proposal and the modified Concept Plan, JBA has concluded that on balance, the consent authority can reach a state of satisfaction that, the development proposed in the Phase 4H DA is generally consistent with the terms of the approval of the concept plan.
24. In our view, in considering whether a development application is "generally consistent with the terms of the approval of the concept plan", a consent authority should consider:
- (a) the broad aims and objectives of the concept plan across the whole concept plan site;
 - (b) the types of uses proposed and general locations of those uses; and
 - (c) overall density and intensity of the development approved under the concept plan.
25. In considering the Concept Plan (as modified) and the Phase 4H DA, it is clear that the aims and objectives of the Concept Plan (as modified) are furthered and preserved in the proposal. The Phase 4H DA complies with Condition A1 in that it provides for no more than 50 residential dwellings per hectare on land excluding the new, purpose built specialised rehabilitation and disability facility. Additionally, the other requirements of Condition A1 of the Concept Plan are achieved through the Phase 4H DA in that it provides landscaped public and private open space, associated services and infrastructure and land use distribution, building heights, densities, dwelling mixes and types within the concept approved by the modified Concept Plan.
26. A concept plan in the context of Part 3A is intended to set out a framework for further approvals. In circumstances where residential uses in the Phase 4H DA are consistently proposed in densities that are entirely consistent with the requirements of the modified Concept Plan, we consider that it would be reasonable for a consent authority to be satisfied that the development is "generally consistent" with the terms of the approval modified Concept Plan.

Is a Section 75W modification to the Concept Plan required in order for consent to be granted to the Phase 4H DA?

27. As we have concluded that the Phase 4H DA is "generally consistent" with the terms of the approval of the modified Concept Plan, in our view, a Section 75W modification to the modified Concept Plan is not required in order for consent to be granted to the Phase 4H DA.
28. We note that Stage 1 Phase 1 of the residential development on the site was approved by the Department of Planning on 1 May 2012 pursuant to Project Application MP10_0189. MP10_0189 proposed a residential layout that was different to the terms of the original Concept Plan approval (but was consistent with the modifications later proposed in the MOD 1 Concept Plan amendment which applied to Stage 1 more broadly). The Department's assessment report for the MOD 1 Concept Plan section 75W application states "the Department considered that the proposed departures from the original Concept Plan approval were not so significant that they required a modification of the Concept Plan".

29. In considering whether previous development applications on the site are "generally consistent" with the terms of the modified Concept Plan, Council has taken a similar approach to the Department to construe and apply the modified Concept Plan broadly across the site and to allow incremental improvements to the Concept Plan framework without the need to amend the Concept Plan through further Section 75W modification applications.
30. Similarly, in our view, the development proposed in the Phase 4H DA and the modified Concept Plan are not so significant to require the Concept Plan to be subject to a section 75W modification application in order for the consent authority to grant approval to the Phase 4H DA.

If you have any questions, please do not hesitate to contact us.

Yours faithfully



Harshane Kahagalle
Partner

Direct Line: +61 2 8915 1096

Direct Fax: +61 2 8916 2096

Email:

harshane.kahagalle@addisonslawyers.com.au

Natalie Rodwell
Senior Associate

Direct Line: +61 2 8915 1069

Direct Fax: +61 2 8916 2000

Email: natalie.rodwell@addisonslawyers.com.au