

4 July 2016

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Your ref:
Our ref: AJWS/KXMS/3203512

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Dear Joe

Advice regarding permissibility of proposed development at 203 – 209 Northumberland Street and 64 Bathurst Street, Liverpool

You have asked us to provide independent legal advice as to the permissibility of the development proposed pursuant to clause 5.3 ('development near zone boundaries') of the *Liverpool Local Environmental Plan 2008 (LEP)*, including an assessment of the proposal against the requirements in clause 5.3 that the development be "not inconsistent with the objectives for development in both zones" and that "the carrying out of the development is desirable" when assessed against the specified planning considerations contained in clause 5.3.

Summary advice

In our opinion:

- The development proposed in the development application is permissible by virtue of the operation of clause 5.3 of the LEP. Clause 5.3 essentially enables the zone boundary of the adjoining B4 Mixed Use zone to be extended by 25 metres onto the land the subject of the development application.
- Having reviewed the comprehensive town planning documentation in support of the development application, we are of the opinion that it is readily open to the Council to be satisfied that the proposed development meets the objectives of both zones and is a desirable development in the context of and within the meaning of clause 5.3 of the LEP.

Background

We understand and assume the relevant facts to be as follows:

- Scenic NSW Pty Ltd (**Scenic**) previously lodged development application DA365/2015 in May 2015 to Liverpool City Council (**Council**) seeking approval for the construction of a mixed use development at 203 – 209 Northumberland Street and 64 Bathurst Street, Liverpool (**site**).
- The site is presently zoned B3 Commercial Core (soon to be zoned B4 Mixed Use) and is bordered by B4 Mixed Use Zoning to the east.
- On 22 January 2016, your consultant team met with Council staff to discuss draft LEP Amendment No 52. At that meeting, Council indicated that it did not agree to utilise Clause 5.3 of the LEP for DA 365/2015 and recommended that a new proposal be lodged under the draft LEP Amendment No 52. After that meeting with Council, in February 2016 DA365/2015 was subsequently withdrawn.

- In that regard, Council is in the process of preparing a new local environmental plan which would rezone the site to B4 mixed use and thereby permit 'shop top housing' upon the site. However at this point in time that draft LEP remains only in draft form and we understand is some way from being finalised and gazetted.
- On 22 May 2016, your consultant team met with Council staff including Toni Averay – Director of Planning and Growth, Brue Macnee, Manager of Strategic Planning and Lina Kakish, Manager of Development Assessments to discuss the lodgement of a new development application for the site.
- We understand that at that meeting Council representatives indicated support for a mixed use development site with a split of 70% residential and 30% non-residential uses (comprising ground floor retail, commercial tenancies and serviced apartments). Council's staff noted that they considered this design to be in more in line with the zone objectives of both the current zoning B3 Commercial Core of the site as well as the proposed future zoning of B4 Mixed Use Zone.
- Following this meeting Council's staff requested that consolidated legal and planning advice relating to the revised proposal be submitted prior to lodgement of the development application.
- In those circumstances, Scenic intends to lodge another development application similar to DA365/2015 which squarely and comprehensively addresses Council's concerns regarding permissibility, by relying on clause 5.3 of the LEP. The new development application will seek consent for:
 - three commercial/retail tenancies on the ground floor;
 - four storey podium with parking facilities and five commercial tenancies;
 - 22 storey tower above the podium comprising a mix of 20 serviced apartments and 96 residential units;
 - basement car parking for commercial and residential units; and
 - café and outdoor dining at the rear of the commercial building;
 - no part of the residential tower building will extend or protrude more than 25m from the B4 Mixed Use zone boundary

Please tell us if any of the above facts are not correct as it may change our advice.

Detailed advice

1. Permissibility of proposed development under the LEP

- 1.1 Under the LEP, the site is zoned B3 Commercial Core. The land immediately adjoining the site to the east is zoned B4 Mixed Use.
- 1.2 We have reviewed the DA drawings and are of the opinion that the proposed development is a mixed use development where the 22 storey tower closest to Bathurst Street and the B4 zone falls squarely within the definition of 'shop top housing' and 'tourist and visitor accommodation' (serviced apartments), which are uses that are ordinarily prohibited in the B3 zone.
- 1.3 Nevertheless 'shop top housing' and 'tourist and visitor accommodation' are expressly permitted with consent in the neighbouring B4 zone.
- 1.4 Clause 5.3 of the LEP applies to development near zone boundaries and aims to:

"...provide flexibility to development where the investigation of a site and its surroundings reveals that a use allowed on the other side of a zone boundary would enable a more logical and appropriate development of the site and be compatible with the planning objectives and land uses for the adjoining zone."
- 1.5 As the two adjoining zones in this circumstance are B3 and B4, under clause 5.3 of the LEP the boundary of the B4 zone can effectively be extended for a distance of 25 metres into the site from

the zone boundary.

- 1.6 Critically, clause 5.3 specifies that development consent can be granted for development that may be carried out in the adjoining zone, but only if the consent authority is satisfied that:
 - (a) the development is not inconsistent with the objectives for development in both zones; and
 - (b) the carrying out of the development is desirable due to compatible land use planning, infrastructure capacity and other planning principles relating to the efficient and timely development of land.
- 1.7 Essentially clause 5.3 operates to permit development of land for any purpose that may be carried out in the adjoining zone, under certain circumstances. Applying clause 5.3 to the proposed development in this instance, as 'shop top housing' and 'tourist and visitor accommodation' are permitted in the B4 zone which adjoins the site, the B4 zone boundary can be extended by 25 metres onto the site, **making these uses permissible within that western-most 25m portion of the site.**
- 1.8 As the residential component of the proposed development is located entirely within 25 metres of the B4 zone boundary and falls within the extension of the boundary onto the site, we confirm the proposed development is permissible by virtue of the operation of clause 5.3, and is therefore lawfully capable of being approved.
- 1.9 With respect to the second part of clause 5.3 that requires the development to be consistent with the objectives for development in both zones and to be desirable with compatible land use planning, infrastructure capacity and other planning principles, we have reviewed the comprehensive 'Preliminary Planning Assessment' by Elton Consulting dated 28 June 2016, and in particular section 4.3.1 of that document, which includes a detailed (4-page) assessment of the application against the criteria set out in clause 5.3 of the LEP. In our opinion section 4.3.1 clearly and reasonably identifies that the proposed development "is not inconsistent with" the objectives for development in both zones, and indeed **meets** the objectives in both zones, as required by clause 5.3(a). It also comprehensively identifies how the development will readily satisfy clause 5.3(b) by constituting a 'desirable' development in the requisite planning-sense.
- 1.10 In that regard, it is relevant to note that the Land and Environment Court has repeatedly held that a requirement for 'consistency' with zone objectives means something less than actual achievement. Generally, it is a requirement that the development be 'compatible' with them or 'capable of existing together in harmony' with the zone objectives. It means "something less onerous than 'achievement'". See for example the most recent decision on this issue in *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53. Nevertheless in this instance, in our opinion it is readily open to Council to be satisfied that the proposed development in fact meets and achieves the zone objectives of both zones, as required by clause 5.3(a) of the LEP
- 1.11 In addition, the Preliminary Planning Assessment' by Elton Consulting addresses clause 5.3(b) of the LEP and demonstrates that the proposed development is not only a compatible form of development with respect to the surrounding development, but is also timely given the proposed rezoning of the site under the *Draft Liverpool LEP Amendment 2008 (Amendment No 52)*. One of the proposed amendments under the *Draft Liverpool LEP 2008 (Amendment No 52)* is to rezone the site from B3 Commercial Core to B4 Mixed Use. Accordingly, the proposed development is reflective of the future permitted uses and types of development envisaged for the site under the new B4 zone. This reinforces the view that the proposed development is 'desirable' in a strategic planning context given that it reflects the desired future land-use planning for the site. This is plainly relevant to a consideration of whether the carrying out of the development "is desirable due to compatible land use planning".
- 1.12 Given that this assessment of the proposed development against the requirements in clause 5.3 is a matter for Council (because it is the Council who must be "satisfied" under clause 5.3, or the Land and Environment Court in any appeal), we are of the opinion that it is readily open to the Council to be sufficiently satisfied of the requisite matters so as to recommend approval of the development application pursuant to clause 5.3 of the LEP.

- 1.13 We note that reliance on these types of clauses and the extension of zone boundaries to create flexibility for permissible uses is not uncommon.
- 1.14 The Land and Environment Court has considered the application of this type of clause and the way in which it permits uses that would otherwise be prohibited. As a recent example, one such case considered by the Court is *Kirkham v City of Canada Bay 2013 (Kirkham)*, where the Court approved a development application that sought to apply clause 5.3 under the *Canada Bay Local Environmental Plan 2008* to enable the construction of a car park for patrons of the Canada Bay Club.
- 1.15 In *Kirkham*, development for the purpose of a car park was expressly prohibited on the land the subject of the development application. However the Court found that the applicant was able to apply clause 5.3 to the land and extend the boundary of permissible uses from the adjoining zone by 25 metres, making the proposed car parking permissible under the neighbouring zone. Importantly in the Court's interpretation of clause 5.3, the Court noted that "*the outset [of the clause is] that the objective is directed to **flexibility** when investigating the development of the site.*"
- 1.16 From a permissibility point of view, the decision essentially reinforces that clauses of this nature can and should be applied according to their terms with the objective in mind that the very purpose of the clause is to allow flexibility when assessing DAs adjacent to a zone boundary. In our opinion, the decision is entirely comparable to the approach being taken with respect to the DA in this instance.
- 1.17 Similarly in *Pitty v Bega Valley Shire Council [2012]* a Council approval of a McDonald's development (in reliance on a nearly- identical provision to clause 5.3) was challenged by local objectors. The Court confirmed that the development was indeed permissible based on the relevant clause in that LEP which allowed development to be carried out within 50m of a zone boundary provided that it was permissible in the adjacent zone. The objectors' challenge to the Council's approval was therefore rejected by the Court.
- 1.18 We therefore have no difficulty in concluding that the proposal in this instance is permissible in accordance with clause 5.3 of the LEP.

Summary

- 1.19 Given that the overriding operation of clause 5.3 is to give flexibility to the permissibility of development in neighbouring zones, which has been affirmed by the Courts, clause 5.3 operates in this circumstance to permit the development proposed in the development application, subject to the Council being 'satisfied' (subjectively) as to the matters that have been canvassed comprehensively in the Preliminary Planning Assessment by Elton Consulting dated 28 June 2016.
- 1.20 In our opinion, there is no legal impediment to the approval of the proposed development application pursuant to clause 5.3 of the LEP.

If you have any questions or require further information, please contact Anthony Whealy on (02) 8035 7848 (awhealy@millsoakley.com.au).

Yours sincerely




Anthony Whealy
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