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The General Manager
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Attention: Susanna Cheng

Development Application for Proposed Construction and Use of a Health Facility with Basement Car Parking
25 Shirley Road, Wollstonecraft
DA 326/17

Dear Susanna,

This letter provides additional information to inform the assessment of Development Application (DA) 326/17 relating to the proposed construction and use of a health facility with basement car parking, at 25 Shirley Road, Wollstonecraft. Specifically, this letter responds to the matters raised within the email dated 13 September 2018.

The subsequent paragraphs outline our response to each of the matters raised by Council.

Supporting this response are the following Appendices:

- **Appendix 1** Council Email Correspondence, dated 13 September 2018
- **Appendix 2** Legal Advice
- **Appendix 3** Shadow Diagrams

We trust that the additional information enclosed addresses all matters raised by Council. If you have any further questions, please do not hesitate to contact the undersigned.

Yours faithfully,

Chris Wilson
Managing Director
Willowtree Planning

Additional Information Response

DA 326/17 – Proposed Construction and Use of a Health Facility with Basement Car Parking
25 Shirley Road, Wollstonecraft

1. BUILDING HEIGHT

It is understood that Council has received a submission suggesting that an 8.5m height limit is applicable to the site. The submission acknowledges that pursuant to *North Sydney Local Environmental Plan 2013* (NSLEP2013) the site is *not* subject to a height standard. The submission however seeks to apply the NSLEP2013 8.5m height limit applicable to the adjoining sites, to the subject site. This is on the basis that Section 3.1.2 of *North Sydney Development Control Plan 2013* (NSDCP2013) provides that SP2-zoned land is subject to the controls of the most restrictive zone adjoining the site (including the E4 and R3 zones). Section 3.3.7 (P1) of NSDCP2013 proceeds to provide that *the height of buildings is not to exceed that stipulated within cl.4.3 to NSLEP2013*.

Whilst a Development Control Plan (DCP) may *refer* to a Local Environmental Plan (LEP), a DCP control *cannot* elevate its status to an LEP standard. This means that where the LEP nominates a particular height standard (or chooses not to impose a numeric height limit over any particular site), the DCP cannot supersede the LEP standard. Neither can a DCP introduce additional controls that would hold the same weight as an LEP standard. Where a DCP provides controls in relation to any particular matter, those controls remain consistent with the weight of a DCP (noting that a DCP is a policy, not statutory, document).

By application, the NSLEP2013 height standard continues to apply to the site. Given that NSLEP2013 does not impose a numeric height limit over the site, the site is *not* subject to any numeric LEP height standard.

Therefore, the proposed development does *not* contravene the NSLEP2013 height standard.

Accordingly, it is not necessary or statutorily valid to provide a Clause 4.6 request to vary a development standard.

This is confirmed within the Legal Advice provided in relation to the matter in **Appendix 2**.

2. SHADOW DIAGRAMS

As requested by Council, additional Shadow Diagrams have been prepared for the equinox. The Shadow Diagrams are included at **Appendix 3**.

CONCLUSION

This letter and the supporting appendices have responded to the matters raised by Council and demonstrated the suitability of the subject site and proposed development.

It is therefore considered that the information contained in this letter and its appendices provide suitable information to inform the favourable determination of the subject DA (DA 326/17).

Yours faithfully,



Chris Wilson
Managing Director
Willowtree Planning

Additional Information Response

DA 326/17 – Proposed Construction and Use of a Health Facility with Basement Car Parking
25 Shirley Road, Wollstonecraft

Appendix 1 Council Email Correspondence, dated 13 September 2018

Additional Information Response

DA 326/17 – Proposed Construction and Use of a Health Facility with Basement Car Parking
25 Shirley Road, Wollstonecraft

Appendix 2 Legal Advice

Additional Information Response

DA 326/17 – Proposed Construction and Use of a Health Facility with Basement Car Parking
25 Shirley Road, Wollstonecraft

Appendix 3 Shadow Diagrams

25 September 2018

Our ref: MDSS/KXMS/3342997

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By email: James.Hoang@dcwc.com.au

Dear James

**Advice on LEP height control
Development Application No. DA
Property: 25 Shirley Road, Wollstonecraft NSW**

We refer to your request to provide advice in relation to the assessment of the above development application and the applicable height control pursuant to the *North Sydney Local Environmental Plan 2013 (the LEP)*. Specifically, you have asked us to advise on whether the North Sydney Development Control Plan (DCP) provisions may lawfully operate as a development standard to implement an LEP height control on the site, and respond to the issues raised by an objection on the issue of the applicable height.

Summary

In our view, based on our review of the objection raised in relation to height, the relevant planning controls and legislation governing the operation and interpretation of those controls, we advise as follows:

- The LEP does not mandate a height control for the site.
- The provisions of the DCP in relation to height cannot lawfully operate as a development standard, or in place of the height control contained within the LEP.
- All DCP provisions must be interpreted in accordance with s4.15(3A) of the *Environmental Planning and Assessment Act 1979 (the Act)*.

Background

We understand the relevant facts to be as follows, based on the documentation provided and correspondence received:

- Development Application DA 326/2017 proposes the construction of a health care facility with basement car parking at 25 Shirley Road, Wollstonecraft.
- The application went before the Sydney North Planning Panel and was deferred to allow amendment to be made to the proposal. That amended application was renotified.
- Council has received an objection which contends, amongst other things, that the DCP operates to apply a development standard under the LEP to the site in the form of a height control.
- You have asked us (Mills Oakley) to provide a response to the objection and clarify from a

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legal perspective the applicable planning controls which apply to the site and the way in which they are required to be interpreted.

Detailed advice

1. The issue raised in relation to the height of the proposed development is whether a height control applies to the site pursuant to the LEP and can be interpreted as being a development standard. The issue agitated is that in order to vary a “development standard” a clause 4.6 objection is required and is claimed by an objector to be necessary in this instance.

Legal overview

2. The term *development standard* is defined by s1.4 of the Act as follows:

“development standards means provisions of an *environmental planning instrument* or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,”

3. Importantly, the definition contained in the Act expressly requires that the provisions of a development standard be contained within an *Environmental Planning Instrument*.

4. The term *environmental planning instrument* is defined by the Act as follows::

“environmental planning instrument means an environmental planning instrument (including a SEPP or LEP but not including a DCP) made, or taken to have been made, under Part 3 and in force.”

5. Relevantly, the definition of an environmental planning instrument expressly excludes a DCP, which confirms that, in order to qualify as a development standard, a provision may not lawfully arise under or be contained within, a DCP, being a document expressly excluded as an EPI.
6. Part 4 of the LEP is titled “*Principal Development Standards*” and contains a number of development standards, including “height” which apply to land within the North Sydney Local Government Area.
7. The operative provisions of the height development standard require at subclause (2):

“(2) The height of a building on any land is not to exceed the maximum height shown for the land on the [Height of Buildings Map](#).”
8. When the relevant height of Buildings Map is interrogated, there is no maximum height identified for the subject site.
9. By its own terms, the development standard for height requires that any building is not to “exceed” the height shown on the relevant map. In circumstances where no height is nominated for the site the proposed development complies with the development standard requirement and is not in breach of it.
10. It is true that clause 4.6 of the LEP provides a mechanism by which development standards may be varied, subject to satisfaction of a range of tests contained within the clause itself. In the present circumstances this is unnecessary and not engaged, because the proposed development

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complies with the height development standard set out in the LEP and relevant Map.

11. To be clear, there is no legal requirement for a clause 4.6 to be submitted or upheld in order to approve the proposed development as the proposal is compliant with the development standards, as that term is defined by the Act, contained within the LEP.

The nominated height issue

12. The objection received also contends that an implied height control exists for the site by virtue of the “*Maximum Building Height RL m*” table contained on the relevant map.
13. The maximum building height table provides for different colour shades to be applied to sites and provided the ability for specific height to be nominated to those sites, identified as an RL.
14. For example, on Sheet HOB_001 a site is nominated as light grey with three references across the site outlined in black that nominate the heights (as RLs in metres) as 93.4, 101.1 and 104.2.
15. The nominations on the heights on HOB_001 represent the maximum heights for those areas identified on the map.
16. It is true that areas shown the colour white on the map may have heights nominated between 0m and 20m, the subject site does not have any nomination on the height of buildings map.
17. Relevantly, the height of the site on which the building is proposed to be located is already, at ground level) above an RL of 20m anyway and accordingly, could not practically be capped by a height control nomination of 20m, being a height which is below ground level for the site.

Interpretation of the DCP

18. Clause 4.15(3A) of the Act deals expressly with the interpretation of DCP provisions and provides:

“(3A) Development control plans If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.”

19. The Act is clear and unequivocal in that it requires DCP controls to be applied flexibly, in accordance with the terms identified above.
20. The DCP contains provisions in relation to the way in which a proposal is to be assessed, specifically in relation to height however, each of those provisions is subject to assessment in the manner mandated by s4.15(3A) of the Act.
21. There is no legal mechanism which allows the DCP controls to be interpreted or applied in a manner that replicates that of a development standard or to require that any variation is to be

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dealt with otherwise than in accordance with the requirements of 24.15(3A) of the Act.

22. The provisions of the DCP are mandatory consideration pursuant to s4.15(3A) and must be considered as part of any assessment of the proposal however, they are legally required to be interpreted as DCP controls and do not take on the role or status of an LEP provision.

Conclusion

23. In our view, there is no LEP mandated height control for the site and the proposed development complies with the height limit identified by the LEP.
24. Accordingly, no clause 4.6 is necessary as a development standard, as that term is defined by the Act, is sought to be breached.
25. The DCP controls regarding height are relevant to the assessment of the proposal but are to be applied and interpreted in accordance with s4.15(3A) of the Act and cannot lawfully be elevated to the status of a development standard.
26. We encourage you to bring these matters to Council's attention as part of their assessment of the application.

If you have any questions or require further information please do not hesitate to contact Matt Sonter on +61 2 8035 7850 or msonter@millsoakley.com.au

Yours sincerely



Matt Sonter
Partner

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7th August 2018

**Revised Heritage Impact Statement Addressing Amended Plans
Tresillian 25 Shirley Road, Wollstonecraft
DA 326/17**

Background

This Revised Heritage Impact Statement (HIS) has been prepared to accompany revised plans submitted as part of a Development Application for new works at Tresillian Family Care Centre, No. 25 Shirley Road, Wollstonecraft, New South Wales (DA 326/17). The proposed changes have been made at the request of the Joint Regional Planning Panel (JRPP).

This statement is designed to be read in conjunction with the HIS prepared by Weir Phillips Heritage, dated September 2017, that accompanied the original statement. A Conservation Management Plan (CMP) was also prepared by Weir Phillips Heritage (September 2017) and submitted with the DA.

This statement is designed to be read in conjunction with the revised plans prepared by Team 2 Architects and numbered DA 100-106; 200-203; 300-303; 900; SS008, SS020 and SS032.

Amendments

The proposal submitted under DA 326/17 is for the demolition of ancillary buildings on the site to permit a vehicular driveway; earthworks; construction of a five storey health facility with lower ground level parking; and associated landscaping.

Following a meeting with the Sydney North Planning Panel on 11 July, 2018, the Panel deferred their decision so that amended plans could be prepared to address the following issues:

1. The reduction of the overall height of the proposed building by sinking the building down one level so that the parapet height is no greater than RL61.3 and the top of the upper most level is no greater than RL64.3. This amendment must retain the existing, recessed design of the upper level.
2. Increased southern side setback to the building at parapet level (Level 2/3) to provide for a minimum setback of 6m from the southern side boundary where it adjoins No. 24 Tryon Avenue.

Consequently, the plans have been amended in the following ways:

- The proposed building has been sunk further into the site so that the overall height of the building is below RL64.3. The upper-most level retains its setbacks from the levels below and the pitch of the roof has been flattened.
- The footprint of the proposed building has been altered. The southern setback of Level 2 has been increased from the original proposal so that the eastern end of this level is well setback from the boundary. The southern setback of Level 3 has been substantially increased. The northern setbacks are similar to the original DA, with the exception of the new lift which has been added to the north western corner to accommodate the lowering of the building. The setback of the proposed building from *Carpenter House* and the childcare centre to the west is changed. To accommodate these changes, the footprint has been extended to the east.

Weir Phillips Heritage

- The above changes have resulted in amendments being made to the elevations and floor plans. The material palette and overall character of the building as submitted in the original DA plans, however, is retained.

Impact on the Site

Prior to assessing the proposed amendments it is noted, following a question raised at meeting on the 11 July 2018, that the proposed new building is located in the best location on the site for a building of this type as provided for by the *CMP 2017*. Moving the proposed building west onto that part of the site currently occupied by the Guthrie Childcare Centre would place it in too close a proximity to *Carpenter House*. The proposed location provides a good separation between the original (and significant) part of *Carpenter House* and the proposed building, managing its visual impact not only on *Carpenter House*, but also on the Wollstonecraft Conservation Area and nearby heritage items.

The following aspects of the proposed amendments will have a positive impact on the significance of the site:

- Reducing the height of the proposed building so that it lies below RL64.3. Reducing the height of the building means that it now lies below the ridgeline of *Carpenter House*. Reducing the height of the building makes it a more recessive element to *Carpenter House* than the original proposal when standing within the site and when viewed from Shirley Road.

The following aspects of the proposed amendments will have no additional impact on the significance of the site:

- The additional excavation involved in lowering the height of the building will not result in the loss of any additional garden stone work than that provided for in the original DA.
- Changing the footprint of the building in the proposed manner will have no additional heritage impact. If anything, increasing the setback from the southern boundary brings the proposed building further back behind the southern side setback of *Carpenter House*. Decreasing the setback on the eastern side (effectively increasing the length of the northern and southern elevations) will have no additional impact on the significance of the site because the increase in footprint is located away from *Carpenter House* and outside of significant view corridors.
- The proposed lift on the northern side will have no additional impact. It will not increase the perception of the massing and scale of the proposed building when it is viewed in conjunction with *Carpenter House*. From the western part of the site, it will read as a modest structure, part of the new building, that is well removed from *Carpenter House*. There will be no additional impact on significant view corridors.
- The proposed changes to the elevations will not change the overall character of the building as originally proposed. The materials and finishes are the same as for the original plans.
- Internal changes to the proposed building will have no impact.

Impact on Heritage Items in the Vicinity

Three heritage items were identified in the original HIS as lying in the vicinity of the site:

- House, No. 46 Shirley Road. Item No. I1111.
- House, No. 42 Shirley Road. Item No. I1110.
- House, No. 36 Shirley Road. Item No. I1109.

The impact of the proposed building on these items was, and remains, mitigated by the deep setback of the proposed building from Shirley Road, behind *Carpenter House*. The proposed amendments will have a positive

Weir Phillips Heritage

impact on the general setting of these items because the height of the proposed building is reduced, which will further reduce its visibility from the public domain.

Impact on the Wollstonecraft Conservation Area

The proposed amendments will have a positive impact on the Wollstonecraft Conservation Area for the reasons given above.

Summary

The proposed amendments will have a positive impact on the site, nearby heritage items and the Wollstonecraft Conservation Area because the height of the proposed new building is reduced whilst maintaining the originally proposed setback from *Carpenter House* and the setback of the upper most level. Lowering the building further into the ground will not result in any additional impact on garden elements above the impacts of the original DA.

Please do not hesitate to contact me on 02 8076 5317 if you have any questions,

Yours faithfully,



James Phillips | Director