

27 August 2024

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Your ref:
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Dear Warren

**Response to Request for Information
Section 8.2(1) Review Application No. RE2024/00002 re Modification of Concept Development
Consent No. MA2023/00175 at 121 Hunter Street, Newcastle**

We have been provided with a copy of the Request for Information ('RFI') issued by City of Newcastle ('Council') on behalf of the Hunter Central Coast Regional Planning Panel ('HCCRPP') dated 20 August 2024 in relation to your Section 8.2 Review Application No. RE2024/00002 ('Review Application').

You have asked us to consider the RFI and provide our legal response to the following points:

- **3. Design Excellence**
- **4. Former Council Car Park Site (92 King Street Newcastle)**

We provide our legal response below.

3. Design Excellence

3.1 The RFI queries the relevance of Clause 7.5 'Design Excellence' of the *Newcastle Local Environmental Plan 2012* ('**NLEP 2012**') in relation to the Review Application.

3.2 Specifically, the RFI queries whether Clause 7.5 of the *NLEP 2012* is a matter for consideration by the HCCRPP when undertaking its assessment of the Review Application, which relates to a "concept envelope only" on the basis that subclause (1) indicates the Clause only applies to the following development:

- (a) *the erection of a new building, or*
- (b) *additions or external alterations to an existing building that, in the opinion of the consent authority, are significant.*

3.3 In short, there is a well-developed body of case law that has expressly considered this query **and confirmed that local design excellence clauses are relevant matters for consideration by consent authorities when undertaking assessments of concept applications which seek consent for concept building envelopes.**

3.4 The leading case is *The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* [2018] NSWLEC 158 ('**Uniting Church**'). The findings of the Chief Judge of the Land and Environment Court in *Uniting Church* can be summarised as follows:

- (a) at [36]: it is important to recognise that a concept application is still a development application under the *Environmental Planning and Assessment Act 1979*;
- (b) at [52]: a concept application which seeks consent for concept building envelopes involves "the erection of a new building" within the meaning of that expression in a

local design excellence clause;

- (c) at [53]: the requirement that a consent authority “*must have regard to the following matters*” as prescribed by subclauses of a design excellence provision (e.g. subclause 7.5(3) of the *NLEP 2012*) is to be construed as a requirement to have regard to such of the matters in the subclause as are of relevance to the development the subject of the application (including a concept development application). It follows that if a matter within a subclause of a design excellence provision is not of relevance to a particular development application, the consent authority is not able to have regard to it;
- (d) at [57]-[58]: there are certain types of development that require competitive design processes as prescribed by subclauses of a design excellence provision (e.g. subclause 7.5(4) of the *NLEP 2012*). If a proposed development is not a development that requires a competitive design process to be held, then that matter is not relevant to consider as part of a concept application. **In contrast, if the proposed development is a development that requires a competitive design process to be held, then that matter is relevant to consider as part of a concept application.**
- 3.5 The Chief Judge’s decision in *Uniting Church* was subsequently applied by the NSW Court of Appeal in *Local Democracy Matters Incorporated v Infrastructure NSW* [2019] NSWCA 65 at [73] to [75].
- 4. Former Council Car Park Site (92 King Street Newcastle)**
- 4.1 The RFI queries the assumptions made by the applicant in the Review Application in relation to the arrangement of future development within the former Council Car Park site.
- 4.2 We are instructed that the former Council Car Park site is presently cleared.
- 4.3 Pursuant to the Chief Judge of the Land and Environment Court’s decision in *Tuite v Wingecarribee Shire Council (No 2)* [2008] NSWLEC 321 (*‘Tuite’*) at [55], the obligation on the HCCRPP is to “*determine the particular development application before*” it and that task involves “*assessing the impacts of the development proposed on the environment existing at the time of determination of the application*” (our **emphasis**).
- 4.4 Accordingly, based on the above principle in *Tuite*, the HCCRPP must assess the impacts of the Review Application on the environment existing at the time of determination.
- 4.5 It follows that:
- (a) the HCCRPP does not need to focus on the arrangement of future development within the former Council Car Park site;
- (b) it would be consistent with the above principle in *Tuite* for the applicant to simply model the former Council Car Park site in the Review Application as it presently exists, that is, a cleared site.
- 4.6 Notwithstanding, as requested the applicant and will clarify the assumptions which have been adopted for the purpose of the Review Application.

Yours sincerely



Anthony Whealy
Partner
Accredited Specialist Local Government & Planning

