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9 September 2024

Attn: Warren Duarte
East End Stage 3 Pty Ltd
East End Stage 4 Pty Ltd
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By Email: warren@iriscapital.com.au

cc: nryan@urbis.com.au

Dear Warren

Response to Request for Information (2)
Section 8.2(1) Review Application No. RE2024/00002 re Modification of Concept Development Consent No. MA2023/00175 at 121 Hunter Street, Newcastle

We refer to your request for our legal opinion in relation to your Section 8.2 Review Application No. RE2024/00002 ('**Review Application**'), which relates to your concept modification application no. MA2023/00175 ('**Concept Modification**') at 121 Hunter Street, Newcastle ('**Site**').

Specifically, we understand that the Hunter Central Coast Regional Planning Panel ('**HCCRPP**') has requested a legal response in relation to the following 2 questions to assist with its determination of the Review Application:

- In circumstances where the Chief Judge's decision in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437 ('***Realize Architecture***') did not make any findings in relation to "*the consent authorities reasons for the grant of the original consent*", which are required to be taken into consideration by the HCCRPP when assessing the Concept Modification pursuant to s.4.55(3) of the *Environmental Planning and Assessment Act 1979* ('***EPA Act***'):
  - where are the consent authorities reasons for the grant of the original consent to be ascertained from; and
  - once ascertained, what weight is to be placed on those reasons, if any, when considering the '*substantially the same*' test pursuant to s.4.55(2)(a) or when undertaking a merit assessment of the Concept Modification pursuant to s.4.55(3) (and s.4.15(1)).
- When undertaking a merit assessment of the Concept Modification pursuant to s.4.55(3) (and s.4.15(1)) of the *EPA Act*, what work do cls.4.6 'Exceptions to development standards' and 7.5 'Design excellence' in the *Newcastle Local Environmental Plan 2012* ('***NLEP 2012***') have to do, noting the HCCRPP has not been asked to assess or determine the related 'Stage 3 and 4' detailed development application no. DA2023/00419 ('**Stage 3 and 4 Detailed DA**') as part of the Review Application, which is the driver for the building envelope changes proposed by the Concept Modification.

Summary Advice

- In answer to the first question:
  - the consent authority's reasons for the grant of the relevant concept development consent no. DA2017/00701 ('**Original Concept Consent**') are to be ascertained from the 'Determination and Statement of Reasons' prepared by the ('**Statement of Reasons**') Joint Regional Planning Panel (as it then was) ('**JRPP**') on

21 December 2017, as they are considered to be *objectively identifiable reasons* that were specifically produced by the JRPP when granting the Original Consent;

- the jurisdictional obligation pursuant to s.4.55(3) of the *EPA Act* is simply for the HCCRPP to 'take into consideration' the Statement of Reasons when determining the Concept Modification as part of its merit assessment of the matters referred to in s.4.15(1) that are of relevance to the development the subject of the Concept Modification. Those reasons are **not** mandatory to be considered when applying the 'substantially the same' test in s.4.55(2)(a). In respect of what weight is to be given to those reasons, there is no jurisdictional obligation for the HCCRPP to form a state of satisfaction or opinion with respect to those reasons or for there to be any consistency with those reasons. Rather, the judicial obligation for the HCCRPP is simply to 'take into consideration' (i.e. to *have regard to*) those reasons in its determination of the Review Application. In that sense, the reasons are simply one factor but are not of themselves determinative for the Review Application.

- In answer to the second question:
  - cl.4.6 in the *NLEP 2012* does not have any work to do when undertaking a merit assessment of the Concept Modification pursuant to s.4.55(3) of the *EPA Act*, which requires the HCCRPP to take into consideration such of the matters referred to in section s.4.15(1) that are of relevance to the development the subject of the Concept Modification. Rather, the height proposed in the Concept Modification Application is to be assessed on its merits (e.g. by taking into consideration the objectives of the height of buildings development standard in cl.4.3 of the *NLEP 2012*). The Courts have confirmed that clause 4.6 **does not apply to modification applications at all**;
  - cl.7.5 in the *NLEP 2012* does have work to do in so far as provisions within that clause are in fact relevant to the Concept Modification (see our earlier Mills Oakley letter dated 27 August 2024, which was prepared in response to the RFI issued by Council in relation to the Review Application dated 20 August 2024). That said, there is an appreciation, including in recent case law by the Land and Environment Court of NSW, that the particulars of design excellence are more readily apparent in detailed development applications.

Background

- The relevant background facts are set out in the Division 8.2 Review Report, prepared by Urbis dated May 2024 and are not repeated verbatim in this advice.

Substantive Advice

We provide our legal response below.

1. Where are the consent authorities reasons for the grant of the original consent to be ascertained from and once ascertained, what weight is to be placed on those reasons when determining the Concept Modification, if any?

1.1 At the outset, we agree with the HCCRPP*'s* observation that the Chief Judge's decision in *Realize Architecture* did not make any findings in relation to "*the consent authorities reasons for the grant of the original consent*", which are required to be taken into consideration when assessing the Concept Modification pursuant to s.4.55(3) of the *EPA Act* (if any reasons in fact exist, discussed below).

1.2 The reason that s.4.55(3) of the *EPA Act* was not considered by the Chief Judge in *Realize Architecture* is because it was not a matter raised in the grounds of appeal for the proceedings. Those proceedings were an appeal on a question of law brought by the respondent council pursuant to s.56A of the *Land and Environment Court Act 1979* in relation to the primary decision of Espinosa C in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437. We acted for the applicant/landowner in both of

those appeals.

1.3 Helpfully, in *Realize Architecture* the Chief Judge did cite the decision in *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* [2022] NSWCA 227 ('***Feldkirchen***') at [26] and [27], which made findings in relation to s.4.55(3) of the *EPA Act* and which was a decision that the Chief Judge was also involved in, sitting in the NSW Court of Appeal.

1.4 The relevant findings of the Chief Judge in *Feldkirchen*, upon which Macfarlan JA and Meagher JA agreed, can be summarised as follows:

(a) at [43] and [63]-[64]: the primary Judge was correct to construe the phrase in s.4.55(3), "*the reasons given by the consent authority for the grant of the consent*", as referring to "*those **objectively identifiable reasons that are specifically produced** by the consent authority when granting the original consent*";

(b) at [63] and [76]: **the obligation** in s.4.55(3) of the *EPA Act* **is simply to take into consideration** such reasons as might be given by the consent authority for the grant of the consent that is sought to be modified. If no reasons were in fact given, there can be no reasons to be ascertained;

(c) at [65]-[75]: there is a distinction between the reasons *given for* the grant of a development consent and the circumstances behind the grant of a consent.

(d) at [73]-[75]: there is a distinction between the reasons *given for* the grant of a development consent and the reasons in a notice of determination for the imposition of conditions.

1.5 In relation to the Review Application, we note the following relevant facts:

(a) the Concept Modification seeks to modify the Original Concept Consent;

(b) the Original Concept Consent was determined by the JRPP on 21 December 2017;

(c) on the same date, the JRPP prepared its Statement of Reasons, which included a subheading titled 'Reasons For The Decision';

(d) a notice of determination was prepared by Newcastle City Council ('**Council**') in relation to the Original Concept Consent dated 2 January 2018 ('**Notice of Determination**'), which included a subheading titled 'Reasons for Conditions'.

1.6 Applying the above facts to the findings in *Feldkirchen*, we confirm the following in answer to the first part of the HCCRPP's first question:

(a) the text contained under the subheading 'Reasons For The Decision' in the Statement of Reasons is considered to contain the *objectively identifiable reasons* that were specifically produced by the JRPP when granting the Original Concept Consent and it is only those reasons, which are to be 'taken into consideration' by the HCCRPP when assessing the Concept Modification pursuant to s.4.55(3) of the *EPA Act*;

(b) equally, the text contained under the subheading 'Reasons for Conditions' in the Notice of Determination is **not** considered to be objectively identifiable reasons that were specifically produced by the JRPP for the granting of the Original Concept Consent and on that basis are not to be 'taken into consideration' by the HCCRPP when assessing the Concept Modification pursuant to s.4.55(3) of the *EPA Act*.

1.7 Relevantly, we observe that the Statement of Reasons provides:

> "*The Panel also had regard to the design excellence process that has been undertaken and the involvement and comments of the Council's Urban Design Consultative Committee in the design development and assessment.*".

1.8 Clearly the design excellence process was a key consideration (and reason) for the grant of the Original Concept Consent, which remains the key driver for the building envelope

changes proposed by the Concept Modification and in our view, that is a matter which the HCCRPP ought to have specific regard to.

1.9 In respect of the second part of the HCCRPP's first question regarding what weight is to be placed on those reasons when assessing the Concept Modification, we note the following:

(a) the Chief Judge held in *Arrage v Inner West Council* [2019] NSWLEC 85 at [29] and [42] that **s**.4.55(3) of the *EPA Act* is **not** a mandatory provision for the purposes of applying the 'substantially the same' test in s.4.55(2)(a). Rather, a consent authority is only bound to take into consideration "*the consent authority's reasons for the grant of the original consent*" when considering such of the matters referred to in s.4.15(1) as are of relevance to the development subject of a modification application;

(b) the obligation for a consent authority to 'take into consideration' is of a similar character to that which has been found to be imposed by a statutory obligation to **'have regard to'** identified matters (see: *Zhang v Canterbury City Council* [2001] NSWCA 167at [71]);

(c) whilst the reasons must be considered, **they are not determinative** (see: *TL & TL Tradings Pty Ltd v City of Parramatta Council* [2019] NSWLEC 160 at [35)].

1.10 In summary, the jurisdictional obligation pursuant to s.4.55(3) of the *EPA Act* is simply for the HCCRPP to 'take into consideration' the Statement of Reasons when determining the Concept Modification as part of its merit assessment of those matters referred to in s.4.15(1) as are of relevance to the development the subject of the Concept Modification. However, those reasons are not determinative in the sense of what weight is to be given to them because there is no jurisdictional obligation for the HCCRPP to form a state of satisfaction or opinion with respect to those reasons, nor even for there to be any consistency with those reasons. Rather, the judicial obligation for the HCCRPP is simply to *have regard to* those reasons in its determination of the Review Application.

2. What work do clauses 4.6 and 7.5 of the *NLEP 2012* have to do in the merit assessment of the Concept Modification?

2.1 Whilst it is apparent from the *EPA Act* that s.4.55 is available to "modify a development consent", the scheme set out in Division 4.4 concerning concept development applications, specifically acknowledges the ability to modify a consent granted on the determination of a concept development application at s.4.24(3).

2.2 The need to modify the Original Concept Approval in the present circumstances is motivated by the prescription contained in s.4.24(2), which provides as follows:

"*(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of* ***any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals*** *for the development of the site.*"

(our **emphasis**)

2.3 In a practical sense, to the extent that the related Stage 3 and 4 Detailed DA manifests built form that might be said to not be consistent with the Original Concept Consent, that manifestation is, as a sequencing and jurisdictional requirement, required to be addressed via the Concept Modification.

2.4 The proposed modifications to the Original Concept Consent are summarised on page 1 of the Statement of Modification, prepared by Urbis dated May 2023. As is also recorded on that page, the modifications proposed to the approved building envelopes emanate from:

(a) the design excellence process that has been undertaken as part of the Stage 3 and 4 Detailed DA, including the competitive design process held in accordance with cl.7.5(4) of the *NLEP 2012*; and

(b) redistribution of mass and height to incorporate the 10% design excellence height bonus pursuant to cl.7.5(5) of the *NLEP 2012*.

2.5 It is accepted that the HCCRPP has not been asked to assess or determine the related Stage 3 and 4 Detailed DA as part of the Review Application **however, that is not a jurisdictional impediment** to the (positive) determination of the Concept Modification.

2.6 As a matter of jurisdiction, the HCCRPP may modify the Original Concept Consent if it is satisfied as to each of the preconditions in s.4.55(2) of the *EPA Act*.

2.7 In our view, the Land and Environment Court's decision in *Maxida International Alexandria Property Australia Pty Ltd v City of Sydney Council* [2022] NSWLEC 1139 ('***Maxida***'), a case in which we acted for the applicant/landowner, is analogous to the facts of the subject Concept Modification and Review Application.

2.8 Relevantly, in *Maxida*, the Court was asked to determine an application to modify a concept development consent to integrate the close iterative work that had occurred as part of subsequent detailed development applications, which had been lodged but not yet determined. Specifically, the design of the subsequent detailed development applications:

(a) were premised on the winning design of a competitive design process, which had been undertaken in accordance with cl.6.21D(1) of the *Sydney Local Environmental Plan 2012* ('***SLEP 2012***'); and

(b) benefited from a 10% "design excellence uplift" in building height pursuant to Clause 6.21D(3) of the *SLEP 2012*.

2.9 In considering the application to modify the concept development consent in *Maxida*, the Court made the following observations:

(a) at [22]: "*In principle, the proposed modification to the concept approval seeks to move ahead to a higher level of detail in relation to many of the parameters identified in the current concept approval. I understand a key aspect to be that this higher level of resolution of various matters of detail, also brings to bear more certainty or a more complete answer in regard to future building envelope (and development outcome) particulars.*";

(b) at [23]: "A*n ambition on the part of the applicant, as I understand it, is to secure an appropriate level of alignment between the concept approval and detailed architectural and other plans associated with the future physical development of the site. That is, to be in a position where detailed development applications are consistent with the applicable concept approval*."

(c) at [24]: "*An ambition on the part of Council is that any amended concept approval also stands alone. That is to say, the Council is aware of the possibility that the detailed architectural and other plans (which have prepared in an iterative manner with the development of the modifications to the concept approval…) may not eventuate. That is to say, that any modified concept approval must be available for others to interpret and potentially activate.*"

(d) at [25]: "*In the thick of these ambitions are the design excellence requirements embodied in the existing concept approval. A competitive design process, … has been undertaken... The winning design was prepared by Silvester Fuller MHNDU and Sue Barnsley Design. Silvester Fuller MHNDU has prepared the architectural drawings for the modification application and Sue Barnsley Design has prepared the landscape scheme for the modification application. That is to say, the winning design architects and landscape architects have been a party to the finalisation of the modification application*."

2.10 The Court ultimately approved the application to modify the concept development consent in *Maxida* (in the absence of determining the subsequent detailed development applications, which were later determined by the Court as part of separate proceedings) and in doing so, addressed each of the preconditions in s.4.55(2) of the *EPA Act*, including:

(a) the 'substantially the same' test as required by s.4.55(2)(a) of the *EPA Act* at [34]-[37];

(b) notification of the application as required by s.4.55(2)(b) of the *EPA Act* at [38]-[40];

(c) consideration of submissions made in response to notification of the application as required by s.4.55(2)(c) of the *EPA Act* at [41]-[58];

(d) consideration of the relevant matters included in s 4.15(1) of the *EPA Act*, as required by s.4.55(3) of the *EPA Act* at [60]-[70];

(e) consideration of the reasons for the grant of consent sought to be modified as required by s.4.55(3) of the *EPA Act* at [71].

2.11 When undertaking its merit assessment of the Concept Modification as required by s.4.55(3) of the *EPA Act*, the HCCRPP ought to be mindful of the following principles, which were considered and applied by the Court in *Maxida*:

(a) the modification power is 'beneficial and facultative' (see: *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 at [173(2)]);

(b) unlike a development application, to the extent that there is additional height proposed by a modification application, as a jurisdictional matter, there is no requirement for a written request pursuant to cl.4.6 (see: *North Sydney Council v Michael Standley & Associates* (1998) 43 NSWLR 468; [1998] NSWSC 163 ('***Michael Standley***') at 481C);

(c) modifications can be 'evolutionary' in the sense that they can "c*omprise an evolution of the development conception as the various issues involved in relating concept to detailed development have been resolved*" (see: *Maxida* at [37]);

(d) a modified concept approval can exhibit design excellence in the terms outlined in a local design excellence provision, while it is appreciated that the particulars of this exhibition of design excellence are more readily apparent in detailed development applications (see: *Maxida* at [67]).

2.12 Against that background and in direct answer to the HCCRPP's second question, we confirm:

(a) cl.4.6 in the *NLEP 2012* does **not have any work to do** when undertaking a merit assessment of the Concept Modification pursuant to s.4.55(3) of the *EPA Act*, which requires the HCCRPP to take into consideration such of the matters referred to in section s.4.15(1) as are of relevance to the development the subject of the Concept Modification. Rather, the height proposed in the Concept Modification Application is to be assessed on its merits (e.g. by taking into consideration the objectives of the height of buildings development standard in cl.4.3 of the *NLEP 2012*). Clause 4.6 does not apply to modification applications at all (see *SDHA Pty Ltd v Waverley Council* [2015] NSWLEC 65 at [34] – [35] per Pepper J and *Michael Standley*

(b) cl.7.5 in the *NLEP 2012* does have work to do in so far as provisions within that clause are in fact relevant to the Concept Modification (see our earlier Mills Oakley letter dated 27 August 2024, which was prepared in response to the RFI issued by Council in relation to the Review Application dated 20 August 2024).

2.13 We note that the relevant merit assessment of the Concept Modification, as required by s.4.55(3) of the *EPA Act*, has been completed by the Applicant, which is apparent from the substantive material lodged with the Review Application.

2.14 To assist the HCCRPP further with respect to the matters squarely questioned and commented on in this letter, we understand that a Supplementary Planning Addendum – s4.55(2) Modification to DA2017/00701 has been prepared by Urbis dated 9 September 2024, which includes:

(a) Consideration of the JRPP's Statement of Reasons;

(b) Consideration of the Height of Buildings Objectives in cl.4.3 of the *NLEP 2012*;

and

(c) Consideration of the Design Excellence Provisions in cl.7.5 of the *NLEP 2012*.

2.15 Finally, it is important to note that in *Maxida*, the Court clearly and expressly had regard to the 'complex design resolution exercise' (i.e. competitive design process) that had been undertaken as part of subsequent detailed development applications, notwithstanding those detailed applications had been lodged but not yet determined. As stated above, those subsequent detailed development applications were determined as part of separate Court proceedings only once the application to modify the concept development consent had been determined. These circumstances are strikingly similar, if not identical, to the circumstances of the Concept Modification and Stage 3 and 4 Detailed DA.

Yours sincerely

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