

3 August 2022

Mills Oakley
ABN: 51 493 069 734

Your ref:
Our ref: AXGS/JZAS/3582255

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
Julide Ayas +61 2 8035 7918
Email: jayas@millsOakley.com.au

Partner
Aaron Gadiel +61 2 8035 7858
Email: agadiel@millsOakley.com.au

Marsdens Law Group
Level 1, 49 Dumaresq
Street
Campbelltown NSW
2560

Department of Planning
and Environment
Locked Bag 5022
Parramatta NSW 2124

By email: aseton@marsdens.net.au
jcorradini-bird@marsdens.net.au
nicholas.ridout@dpie.nsw.gov.au

Attention: Adam Seton
Nicholas Ridout

Dear Adam and Nicholas

**Karimbla Properties (No. 59) Pty Limited v City of Parramatta Council
Land and Environment Court proceedings number 2022/42290**

We refer to the above proceedings.

We confirm that we act for the Applicant in the proceedings. The Applicant is the owner of Lot 2 DP 1205413 (**the site**). The site is also known as 37 – 41 Oxford Street, Epping NSW 2121.

We note that Adam Seton is the solicitor for the Respondent (the City of Parramatta Council) and that Nicholas Ridout is the solicitor for the consent authority (the Sydney Central City Planning Panel).

The purpose of this letter is to:

- address the legal status of concept development consent DA/314/2017 granted by the Respondent on 12 March 2018 (**the concept development consent**); and
- explain why that legal status is significant in the context of the present proceedings.

Summary

- The additional height can be approved under the terms of the development consent as it stands, without the need for a modification of the concept development consent.
- The development application cannot be refused merely because the proposed development includes height outside of the building envelopes shown in the stamped plans.
- The development consent cannot be granted with a condition deleting the proposed height (merely because the height extends outside of the envelopes shown in the stamped plans).
- It is plain that the concept development consent conclusively approves and requires that any subsequent development provides for 299 car parking spaces (or at least a level of provision very close to that number).
- The development application cannot be refused merely because the proposed development includes 299 car parking spaces.

- Development consent cannot be granted with a condition requiring a reduction in car parking merely because of a desire to have less car parking.
- The fact that the development control plan may now specify another level of car parking provision is irrelevant. The terms of the concept development consent limits the discretion of the consent authority so, to the extent that the **development control plan** is considered, it cannot result in either:
 - the refusal of the development application; or
 - the imposition of a condition on the grant of development consent,
 if that decision is motivated by a rejection of an aspect of the development that was conclusively approved by the concept development consent. The provision of 299 car parking spaces **has been** conclusively approved.
- The grant of development consent for five levels of basement parking is permitted under the concept development consent (without any need for the modification of the consent).

Detail

1. The status of the concept development consent

- 1.1 A 'concept development application' is a special category of development application.
- 1.2 A consent granted on the determination of a concept development application for a site (**a concept development consent**) sets the parameters for the determination of any further development application in respect of a site (*The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* [2018] NSWLEC 158 at [43]).
- 1.3 A concept development application is made under division 4.4 of *Environmental Planning and Assessment Act 1979* (**the EP&A Act**). Within this division, section 4.22 of the EP&A Act relevantly says:
 - (1) For the purposes of this Act, a **concept development application** is a development application that sets out **concept proposals** for the development of a site, and for which detailed **proposals** for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.
 - (2) In the case of a staged development, the application may set out detailed proposals for the first stage of development. ...
 - (4) If consent is granted on the determination of a concept development application, the consent **does not authorise the carrying out of development** on any part of the site concerned unless—
 - (a) consent is subsequently granted to carry out development on that part of the site following a **further development application** in respect of that part of the site, or
 - (b) the concept development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.

The terms of a consent granted on the determination of a concept development application are to reflect the operation of this subsection (bold added). ...
- 1.4 The concept development consent has been granted under the above provision.
- 1.5 This is clear because of the terms of conditions 1 and 2 of the development consent.
- 1.6 Condition 1 begins with the words:

Any future detailed development application related to this **concept approval** (bold added) ...
- 1.7 Condition 2 of the development consent says:

No approval is given for any work on the site. A future 'Stage 2' detailed development

application must be submitted to and approved by Council prior to any works on the site. ...

1.8 Section 4.24(2) of the EP&A Act says:

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 (bold added).

1.9 Accordingly, any development application that is submitted must be **determined** in a way that is not inconsistent with the concept development consent (so long as that consent is in force).

1.10 Section 4.24(2) of the EP&A Act overrides other inconsistent provisions of the EP&A Act (as per section 4.21, section 4.24(1) and the note after section 4.16(5) of the EP&A Act).

1.11 The provision imposes a limit on the discretion that would normally be available to the consent authority under section 4.16 of the EP&A Act.

1.12 Section 4.16 of the EP&A Act is titled '**Determination**'. It relevantly says:

(1) **General** A consent authority is to determine a development application by—

(a) granting consent to the application, either unconditionally **or subject to conditions**,
or

(b) refusing consent to the application.

(2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.

(3) **"Deferred commencement" consent** A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.

(4) **Total or partial consent** A development consent may be granted—

(a) for the development for which the consent is sought, or

(b) for that development, except for a specified part or aspect of that development, or

(c) for a specified part or aspect of that development.

(5) The consent authority is not required to refuse consent to any specified part or aspect of development for which development consent is not initially granted under subsection (4), but development consent may subsequently be granted for that part or aspect of the development.

Note—

See also Division 4.4 **for special procedures concerning concept development applications** (some bold added) ...

1.13 Section 4.24(2) regulates the act of 'determination' by a consent authority. As section 4.16(1) makes clear, the act of 'determination' includes any of the following decisions:

(a) a decision to grant development consent;

(b) a decision to grant development consent, but with one or more conditions; and

(c) a decision to refuse to grant development consent.

1.14 This has three consequences.

- 1.15 **Firstly**, a development consent cannot be granted by the consent authority if the decision to do so would be inconsistent with the terms of the concept development consent.
- 1.16 **Secondly**, the consent authority cannot impose a condition on the grant of a development consent if the decision to impose such a condition would be inconsistent with the terms of the concept development consent. For example, the consent authority cannot impose a condition that would delete an aspect of the development that was conclusively approved (as a concept proposal) by the concept development consent.
- 1.17 **Thirdly**, the consent authority cannot refuse development consent if such a decision would be inconsistent with the terms of the concept development consent. For example, the consent authority cannot refuse development consent due to an aspect of the development that was conclusively approved by the concept development consent.
- 1.18 For completeness, section 4.24(2) of the EP&A Act also limits the discretion that would ordinarily be available to a consent authority under section 4.15(1) of the EP&A Act.
- 1.19 Section 4.15(1) is titled 'Evaluation'. It relevantly says:
- ... In **determining** a development application, a consent authority is to **take into consideration** such of the following matters as are of relevance to the development the subject of the development application:
- (a) the provisions of—
 - (i) any environmental planning instrument, and
 - (ii) any proposed ... , and
 - (iii) **any development control plan**, and
 - (iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4 ...

that apply to the land to which the development application relates,
 - (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
 - (c) the suitability of the site for the development,
 - (d) any submissions made in accordance with this Act or the regulations,
 - (e) the public interest (some bold added).
- 1.20 One consequence of this limitation in the discretion of the consent authority is that, to the extent that the **development control plan** is considered, it cannot result in either:
- (a) the refusal of the development application; or
 - (b) the imposition of a condition on the grant of development consent,
- if that decision would be motivated by a rejection of an aspect of the development that was conclusively approved (in concept) by the concept development consent.

2. What the concept development consent says

- 2.1 Condition 1 of the concept development consent relevantly says:

Any future detailed development application related to this concept approval is to be **generally in accordance with the following concept plans** endorsed with Council's Stamp **as well as the documentation listed below, except where amended by other conditions of this consent** and/or any plan annotations and subsequent separate development applications as part of future detailed Development Applications:

Reference No	Description	Prepared by	Date
...
0351r01v3	Traffic Impact Assessment Report	Ason Group	01/12/17
SA6311	Statement of Environmental Effects	Urbis	12/04/17
SA6311	Statement of Environmental Effects – Addendum Report	Urbis	19/02/18
...

(bold added)

The statement of environmental effects

- 2.2 The table in condition 1 of the concept development consent (as quoted in paragraph 2.1 above) refers to the 'Statement of Environmental Effects', prepared by Urbis and dated 12 April 2017 (**the SEE**). Condition 1 incorporates the SEE into the development consent, subject to other conditions of the development consent.
- 2.3 The 'Introduction' to the SEE says (on page 1):
- Development Consent for the key development parameters is sought prior to approval being sought for detailed design in a subsequent Stage 2 development application.
- 2.4 The 'Introduction' to the SEE goes on to say (on page 1):
- While consent is only sought for the building envelope drawings, with detailed design to be sought through a separate application, **the reference design** is provided to demonstrate that the proposed envelopes are capable of accommodating development in accordance with relevant planning controls (bold added).
- 2.5 The SEE says in section 3.4 'Indicative 'Reference' Design' (on page 23):
- An **indicative reference design** has been prepared by Candalapas Associates ... Consent is not sought for this reference design as part of the Stage 1 DA. **The detailed floor layout and design of the building will be determined through the Stage 2 DA process** (bold added).
- 2.6 The SEE goes on to say in the section 5 'Conclusion' (on page 46):
- The proposed Stage 1 building envelopes will establish a **clear framework** for further stages of the planning and design process, including a Stage 2 DA, enabling the creation of a detailed architectural vision for the site and more comprehensive assessment of potential environmental effects (bold added).

The statement of environmental effects – addendum report

- 2.7 The table in condition 1 of the concept development consent (on page 3) also refers to the 'Statement of Environmental Effects – Addendum Report', prepared by Urbis and dated 19 February 2018 (**the SEE Addendum Report**). Condition 1 incorporates the SEE Addendum Report into the development consent, subject to other conditions of the development consent.
- 2.8 The SEE Addendum Report was prepared following feedback and direction from the Council, the Council's Design Excellence Assessment Panel and the Sydney West Central Planning Panel.
- 2.9 The SEE Addendum Report states in section 4 'Proposed Development (as amended)', on page 14:

Architectural Plans of a 'reference design' prepared by Candalepas and Associates Architects are included at Appendix D. Key numeric aspects of the proposal are provided in Table 4 and the various components of the amended development and response to Council recommendations are described in the following sections.

- 2.10 The SEE Addendum Report says at section 4.2 'Building Height', on page 15:

The accompanying **reference design** includes elevations and sections that show the extent of built form above the 72m LEP height plane (bold added).

- 2.11 The SEE Addendum Report outlines in section 4.5 'Indicative 'Reference' Design', on page 17 and 18 that:

The reference design responds to Council advice and demonstrates how the amended design with increased height provides a positive design outcome ...

Consent is not sought for this reference design as part of the Stage 1 concept DA. The detailed floor layout and design of the building will be determined through the Stage 2 DA process (bold added).

The status of the approved building envelopes

- 2.12 Condition 3 of the concept development consent relevantly says:

The Concept Plan approved envelopes **do not guarantee that a future building form will be approved in that form.** Future detailed Development Applications must provide for a building form that addresses building separation, articulation standards, public accessibility, **amongst other matters**, and if not provide reasonable alternative planning solutions to compliance (bold added).

The traffic impact assessment report

- 2.13 The table in condition 1 of the concept development consent refers to reference the 'Traffic Impact Assessment Report', prepared by Ason Group and dated 1 December 2017 (**the traffic report**). Condition 1 incorporates the traffic report into the development consent, subject to other conditions of the development consent.

- 2.14 Condition 5 of the concept development consent relevantly says:

The recommendations outlined in the specialist reports listed in Condition 1 shall be incorporated into the plans and documentation accompanying the future detailed development application subject to the satisfaction of Council officers.

- 2.15 Section 2 titled 'Proposed Development' of the traffic report (on page 2) says:

In summary, the development for which approval is sought is a single residential tower above a lower level retail / commercial podium and basement car parking consisting of: ...

- Four levels of basement car parking, including:
- 299 x parking spaces (including 32 accessible spaces),
- 12 x motorcycle spaces.
- 148 bicycle parking spaces

- 2.16 The traffic report in section 4.1 titled 'Council Car Parking Requirements' (on page 10) states that:

Table 1 demonstrates that the development is required to provide between 286 and 296 parking spaces. **A total of 299 car parking spaces are provided**, therefore the development over supplies 3 parking spaces (bold added).

- 2.17 The traffic report in section 4.1 titled 'Council Car Parking Requirements' (on page 11) goes on to say that:

In addition to Council controls, the State Environmental Policy No. 65 – Design Quality of

Residential Apartment Development (SEPP 65) recommends minimum parking rates for developments within 800 metres of a railway station and the adoption of the RMS Guide parking rates. Application of these rates requires a minimum residential parking provision of 201 spaces (164 resident and 37 resident visitor spaces). **The development therefore complies with SEPP 65 residential parking with the provision of 299 spaces.**

Therefore, in terms of accommodating the forecast parking demands of the Proposal, it is clear that the proposed parking provision would adequately accommodate these demands on-site and avoid impacting the availability of on-street parking in the local area (bold added).

- 2.18 The traffic report, section 7 'Conclusions', bullet point two (on page 19) says the following:

Between 286-296 parking spaces are permissible under Council's DCP controls for the proposed development. In response, **a total of 299 parking spaces are proposed**, therefore the development provides an oversupply of 3 spaces (bold added). ...

3. Analysis of the concept plan approval — building height

- 3.1 We are instructed that the development application seeks a modest increment of additional height beyond the existing building envelope for the following reasons:
- (a) Extra floor-to-floor height is needed under each external communal open space to meet Building Code of Australia requirements for thermal insulation, waterproofing and landscaping.
 - (b) Extra floor-to-floor height must be provided where there is a change in the unit mix to accommodate the hydraulic stack roll over (whilst maintaining the minimum *Apartment Design Guide* floor-to-ceiling clearance).
 - (c) Extra floor-to-floor for the ground floor retail to 4500mm (as per the *Apartment Design Guide* minimum). (The reference scheme only had around 3200mm for some retail on the ground floor.)
 - (d) The business premises on level 1 in the reference scheme only allowed for 3100mm floor-to-floor height. The proposed development provides 3600mm, to provide for the 3.3 metre floor-to-ceiling height envisaged under the design guidance for objective 4C-3 (figure 4C.1) of the *Apartment Design Guide*.
 - (e) The height exceedance associated with the rooftop plant area is merely to accommodate the building essential services such as stair pressurisation plant, retail exhaust plant, solar panel, hot water plant and lift over-run.
- 3.2 While the additional height projects beyond the building envelope depicted in the concept development consent's stamped plans, this does not mean that the proposed design is inconsistent with the concept development consent.
- 3.3 While the stamped plans form part of the development consent, a development consent must be read as a whole. The effect of doing so may be to depart from the material and ordinary meaning of a provision where it is necessary to do so to avoid absurdity or inconsistency with the rest of the instrument (*Tempe Recreation (D.500215 and D.1000502) Reserve Trust v Sydney Water Corporation* [2014] NSWCA 437 at [53]–[54]; *Secretary, Department of Planning and Environment v Leda Manorstead Pty Ltd (No 4)* [2019] NSWLEC 58 at [92]).
- 3.4 In this case, conditions 1 and 3 (quoted in paragraphs 2.1 and 2.12 above) are relevant.
- 3.5 Condition 1 makes it clear that the approved stamped plans are subordinate to the other conditions.
- 3.6 Condition 3 expressly says that the '[t]he Concept Plan approved envelopes do not guarantee that a future building form will be approved in that form'. The condition anticipates the possibility that the building form may be constructed beyond the approved envelopes if it is necessary to address 'building separation, articulation standards, public

accessibility' and 'other matters'.

- 3.7 The matters listed in paragraph 3.1 above are plainly 'other matters' which may lead to the approval of a building form that is outside of the form shown in the approved building envelope plans. Accordingly:
- (a) the additional height can be approved under the terms of the development consent as it stands, without the need for a modification of the concept development consent;
 - (b) the development application cannot be refused merely because the proposed development includes height outside of the building envelopes shown in the stamped plans; and
 - (c) the development consent cannot be granted with a condition deleting the proposed height (merely because the height extends outside of the envelopes shown in the stamped plans).

4. Analysis of the concept plan approval — car parking provision

- 4.1 The **reference** plans that were used to inform the original merit decision to grant the concept development consent are plainly not approved concept proposals. This is made clear by the extracts from the SEE and the SEE Addendum Report cited in paragraphs 2.4-2.5 and 2.9-2.11 above.
- 4.2 However, the traffic report **does not** treat the proposed provision of car parking as a mere reference scheme.
- 4.3 In section 4.1 ('Council Car Parking Requirements') of the traffic report (as quoted in paragraph 2.16 above) the report says:
- A total of 299 car parking spaces **are provided** (bold added)
- 4.4 This number exceeded the number of car parking spaces that were needed to merely respond to the rates of car parking provisions in the development control plan at the time (by three spaces).
- 4.5 The fact that the car parking provision was a firm proposal was reinforced in section 4.1 ('Council Car Parking Requirements') of the traffic report (quoted in paragraph 2.17 above). The report said:
- The development therefore complies with SEPP 65 residential parking **with the provision of 299 spaces** it is clear that **the proposed parking provision** would adequately accommodate these demands on-site and avoid impacting the availability of on-street parking in the local area (bold added).
- 4.6 Finally, the point is again made in section 7 ('Conclusions') of the traffic report (quoted in paragraph 2.18 above). The report says:
- a total of 299 parking spaces **are proposed** (bold added).
- 4.7 The traffic report's proposed provision of parking spaces is adopted as part of the approved concept proposal in two ways.
- 4.8 **Firstly**, condition 1 of the concept development consent directly identifies the traffic report and requires that any 'future detailed development application ... is to be generally in accordance with' it (see paragraph 2.1 above).
- 4.9 **Secondly**, condition 5 of the concept development consent expressly requires that the 'recommendations outlined in the specialist reports listed in Condition 1' must be 'incorporated into the plans and documentation accompanying the future detailed development application' (see paragraph 2.14 above).

- 4.10 According to the *Macquarie Dictionary*, a 'recommendation' means, among other things, a:
representation in favour of a person or thing.
- 4.11 The traffic report plainly represented in favour of the proposal to provide 299 car parking spaces. Condition 1 requires that the car parking provision be generally in accordance with this number. Condition 5 is more specific and requires that the proposal for 299 car parking spaces 'be incorporated into the plans and documentation accompanying the future detailed development application'.
- 4.12 Accordingly, it is plain that the concept development consent conclusively approves and requires that any subsequent development provide for 299 car parking spaces (or at least a level of provision very close to that number).
- 4.13 The development application cannot be refused merely because the proposed development includes 299 car parking spaces.
- 4.14 Development consent cannot be granted with a condition requiring a reduction in car parking merely because of a desire to have less car parking.
- 4.15 The fact that the development control plan may now specify another level of car parking provision is irrelevant. As explained earlier, section 4.24(2) of the EP&A Act overrides other inconsistent provisions of the EP&A Act, including section 4.15(1) which would ordinarily require that the development control plan be taken into consideration.

5. Analysis of the concept plan approval — number of basement levels

- 5.1 The stamped building envelope plans depict four basement levels of car parking.
- 5.2 However, as we explained in relation to the height issue, condition 3 expressly says that '[t]he Concept Plan approved envelopes do not guarantee that a future building form will be approved in that form'. The condition clearly anticipates the possibility that the building form may be constructed beyond the approved envelopes if it is necessary to address 'building separation, articulation standards, public accessibility' and 'other matters'.
- 5.3 Condition 3 plainly allows for the approval of building form outside of the envelope if it is necessary to meet a technical design requirement. We are instructed that it will not be technically possible to provide the required 299 car parking spaces within a four-level basement configuration — and that five levels of basement will be needed.
- 5.4 As the 299 spaces have been approved — and as there is flexibility to deal with this situation in condition 3 — the grant of development consent for five levels of basement parking is permitted under the concept development consent (without any need for the modification of the consent).

Please do not hesitate to contact Julide Ayas on (02) 8035 7918 or myself if wish to discuss this matter.

Yours sincerely




Aaron Gadiel
Partner

Accredited Specialist—Planning and Environment Law