

26 October 2021

Mills Oakley
ABN: 51 493 069 734

Your ref:
Our ref: CYCS/AJWS/3501492

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215
DX 13025 Sydney Market Street

Silver Pond Investments Pty Ltd ATF Silver Pond Unit Trust
C/- Property Development Solutions (Aust) Pty Ltd
Level 1, 63 York Street
SYDNEY NSW 2000

Contact
Clare Collett +61 2 9121 9027
Email: ccollett@millsOakley.com.au
Fax: +61 2 9247 1315

Email: jeff.curnow@pdsigroup.com.au

Partner
Anthony Whealy +61 2 8035 7848
Email: awhealy@millsOakley.com.au

Attention: Jeff Curnow

Dear Jeff

Request for Advice - St Leonards South, "Part-Storey" Control

We refer to your request for advice in your email of 6 October 2021 in relation to DA99/2021.

Summary of advice

It should firstly be stated that the "part storey" control is in the *Lane Cove Council Development Control Plan* ("DCP"), and as such it is not legally binding. Pursuant to Section 3.42 of the *Environmental Planning and Assessment Act 1979* ("EP&A Act"), DCP controls are 'not statutory requirements' and their purpose is to provide "guidance". Further, in this case, it is our view that the drafting of the DCP is ill-defined, making it difficult to give too much weight to the relevant provisions.

In any case, in our opinion, there is nothing in the DCP which states that each building is only limited to one part-storey and nothing which suggests that this should be inferred.

A correct interpretation of Part 7 of the DCP would be to exclude **any number of** "part storeys", assuming they fit in the criteria described and outlined in the control, that is, that they can reasonably be described as either:

1. "resulting from excavation of steep slopes"; or
2. "semi basement parking".

Of course, this does not avoid the need to comply with the *Lane Cove Local Environmental Plan 2009* (LEP) height controls (and we note in the present circumstances that the development application does so), therefore no issues should arise in terms of our interpretation of the storeys control, since the overall height of the development is limited by the LEP in any case.

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We also consider that there **would be an inconsistency** between the DCP controls and the LEP controls, if the height of buildings in storeys control substantively restricts that permitted under the LEP in the height of buildings incentives map, and /or the allowable gross floor area applicable under the LEP's FSR control. Where such an inconsistency arises, s3.43(5) of the Act provides that the DCP control shall be of "no effect".

We now provide the following more detailed advice.

Background

- Development Application DA99/2021 was lodged on 29 July 2021.
- Top Spring Property & Development Services Pty Ltd seeks the construction of five residential flat buildings with a total of 319 apartments, 10 terraces and basement parking for 372 vehicles on Areas 7-11 in St Leonards South.
- Lane Cove Council (**Council**) submitted a request for additional information on 30 September 2021. This has "stopped the clock" in terms of time legislatively required to lodge an appeal at the Land and Environment Court.
- For the purposes of this advice, limited specifically to Building 7, Building 9 and Building 11, we understand that:
 - (A) Building 7 has 2 part storeys
 - (B) Building 9 has 3 part storeys
 - (C) Building 11 has 3 part storeys
- The Incentive Height of Buildings Map -Sheet IHOB_004 depicts the land of the subject site with height limits of 25m and 31m respectively.

DCP Controls

- On page 35 of *Part C – Residential Localities* in the DCP, the Land can be identified in Locality 8.
- The subject passage containing the height in storeys control can be found on Page 45 of *Part C – Residential Localities, Locality 8*, in the DCP. (as amended 22 October 2020). It states:

"7 Height in Storeys

Height in Storeys - Height of development in number of Storeys shall be as per Figure 10.

"Part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey" [our emphasis].

That control also contains a 'note' which states "Refer to Clause 4.6 (8)(cb) and Part 7 of Lane Cove LEP."

- Figure 10 is replicated below



Figure 10: Height of Buildings (in storeys)

Lane Cove Development Control Plan

Locality 8 – St Leonards South Precinct

Adopted on 22 February 2010 Amendment – 22 October 2020

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- Despite the Council's assertions of a "maximum of 1 part storey" being available for Area 7 and 9, the DCP does not define 'part storeys', nor are 'part storeys' limited to any maximum number.
- We are instructed that The Final Exhibition Draft of the DCP Amendment for the Precinct stated (Part 1, Page 23, Section 6.4.6):

"Note that the definition of height should enable the nominated number of full storeys. (Part storeys resulting from excavation of steep slopes and as activating frontages for basement or semi basement parking will not count as storeys".

- This note was not included in the final DCP as published, and no other guidance was provided.

ADVICE

1. Lower Levels of Buildings are Part Storeys

- 1.1 In our view, the Lower Levels of Building 7, 9 & 11 are 'Part Storeys' Under Part C, Locality 8, Section 7 of the Lane Cove DCP, as they can reasonably be said to either be:
- "resulting from excavation of steep slopes"; or
 - "semi basement parking".

Meaning of Part Storey

- 1.2 Clause 1.3 of the DCP is headed 'Interpretation' and states:
- 1.3 "Definitions for the interpretation of the provisions of the DCP are contained in the Dictionary within the LEP. Where definitions are required within this DCP that are not contained in the LEP they are described in the Dictionary at the back of this DCP."
- 1.4 Notwithstanding that statement, and regrettably, the meaning of "part-storey" under the storey control **is not defined in the DCP, nor in the LEP.**
- 1.5 A "part storey" is also **not defined** in the EP&A act.
- 1.6 Under both the LEP and DCP, 'storey' means a space within a building that is situated between one floor level and the floor level next above, or if there is no floor above, the ceiling or roof above, but does not include—
 - (a) *a space that contains only a lift shaft, stairway or meter room, or*
 - (b) *a mezzanine, or*
 - (c) *an attic.*
- 1.7 As you will be aware, a 'basement' is separately defined and means 'the space of a building where the floor level of that space is predominantly below ground level (existing) and where the floor level of the storey immediately above is less than 1 metre above ground level (existing)'.
- 1.8 We have researched Land and Environment Court caselaw and note that few cases even mention the phrase "part storey", and all are limited to fleeting descriptions, with no solid definitions provided.
- 1.9 What is also clear is that **the Council has not defined the term 'part storey at all**, despite deciding to use that term in its DCP. In our view, if the Council wished to give that term any real meaning, it was incumbent upon the Council to define it.
- 1.10 Nevertheless, given that the terms 'storey' and 'basement' are each defined, **a part storey must be something that is different to those terms.**
- 1.11 The only guidance given by the DCP is the two exceptions provided for on page 7, being that "Part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey".
- 1.12 In our view, this means that storeys which are partially below ground and partially above ground, due to steeply sloping sites, will be considered a part storey, rather than a 'storey' as defined in the LEP and DCP. Otherwise, they would simply fit within the description of a 'storey' and **there would have been no need or purpose for the Council to include the 'part storey' provision in its DCP at all.**

What is "Excavation of Steep Slopes"

- 1.13 For the purposes this advice, we accept that the slope is plainly steep, although we note that the DCP provides no guidance as to what constitutes a 'steep' slope.
- 1.14 We note that Area 9 and Area 11 contain the steepest land within the St Leonards South Precinct, and indeed the steepest land to which the provision applies. We therefore take a common sense and literal approach, as required by law. Ultimately though, we flag that it may be necessary to demonstrate or to argue that the site is steeply sloping.
- 1.15 However, Council seems to accept that the site is steeply sloping, given that they will allow some part storeys. As such, we do not consider this to be a significant issue.

What is “semi basement parking”

- 1.16 Whether the part storeys are resulting from “semi basement parking” is a question of fact that may require expert evidence, having regard to definitions of “basement” and “ground floor (existing)” in the LEP.
- 1.17 The meaning of “Semi-basement parking” is undefined but would generally be understood to refer to a situation on a sloping site where basement level(s) partially emerge from and protrude above the existing ground level, such that the basement is partially visible above ground at the lower point of a site.
2. **There is nothing in the DCP which states that only one part-storey is required and nothing which suggests that this should be inferred.**
 - 2.1 Section 8(b) of the Interpretation Act 1987 states that:
“a reference to a word in the singular form includes a reference to the word in the plural form”.
 - 2.2 Accordingly, the word “part-storey” therefore means also “part-storeys” and vis-versa. However, this interpretation is, of course, subject to context.
 - 2.3 The Lane Cove DCP expressly refers to “part storeys” not “a part-storey”.
 - 2.4 We cannot see any contrary intention. Assuming that the development as proposed complies with the building height in the LEP, there is no logical purpose served by attempting to limit the number of ‘part storeys’ that may fit within the allowable LEP height limit, particularly on large, sloping sites.
 - 2.5 We note again that interpretation of the DCP in the Introduction expressly states that terms not defined in the LEP may be defined in the DCP’s own Dictionary. No such definition has been included, for example to limit the number of ‘part storeys’.
 - 2.6 In *Council of the City of Shoalhaven v Elachi* [2015] (discussed below) Justice Biscoe stated:
“The task of construction must begin with a consideration of the text itself. No particular theory or rule of statutory interpretation including that of purposive construction, can obviate the need for close attention to the text and structure of the relevant provisions”
 - 2.7 Our analysis accords with that discussed by Justice Biscoe in *Elachi*. It is our opinion that, in the context of the Lane Cove DCP “part storeys”, in Part 7, means (or at least allows) more than one part-storey.
 - 2.8 We also note for completeness that the Council’s Request for Information provides **no basis** for its assertion that only one part-storey is allowed by its DCP provisions. At best Council references vague notions of “intent” without any reference at all to the DCP’s text. If Council had such intent it could have explained it the DCP.
3. **The Test for Inconsistency**
 - 3.1 We have been asked to advise whether Council’s interpretation of the part storeys control be said to be inconsistent or incompatible with the LEP height standard and therefore have no effect pursuant to Clause 3.43(5) of the EP&A Act. We are asked this on the basis that the development fully complies with the applicable height controls under the LEP.
 - 3.2 It should be stated that the “part storey” control is in the DCP, as such it is not legally binding. Pursuant to Section 3.43 of the Act, its purpose is “to provide guidance”, and its controls are “not statutory requirements” (s3.42). Further, pursuant to s4.15(3A), where there are provisions of a DCP that are **not complied with, the consent authority “is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards”**.

- 3.3 Most importantly, as you have noted, where the provisions of a DCP are inconsistent or incompatible with the provisions of an LEP, then pursuant to s3.43(5) of the EP&A Act, those DCP provisions are of “no effect”. In other words, **they are not to be applied at all.**
- 3.4 The test for “inconsistency” when assessing a Council’s Local Environmental controls (versus the test for Development Control Plan) was confirmed in *Castle Constructions Pty Ltd v North Sydney Council* (2007) 155 LGERA 52 (see judgment of Tobias JA at [55](h)). In this case, the Court of Appeal considered the provisions of a Building Height Control in the LEP.
- 3.5 The facts in this case were that a development application was lodged to demolish the existing buildings on the property known as 136-140 Walker Street, North Sydney (the site) and to erect thereon a 31 storey commercial/residential building comprising basement parking, a podium of five commercial floors and a tower of 26 residential floors (the development). The new building had a proposed height of 97m above Walker Street.
- 3.6 If the building height provisions in the LEP were applied to the planned development on the Site it would permit a much taller building, than if the DCP provisions were applied. The Court found that the DCP provision regarding the building height plane was inconsistent with an LEP provision regarding building height.
- 3.7 In finding inconsistency, the Court applied the approach of President Kirby in *Coffs Harbour Environment Centre Inc v Minister for Planning & Anor* (1994) 84 LGERA 324, when he favoured an approach where the word inconsistency was given its natural meaning, as opposed to “any gloss around the meaning of the word in a constitutional setting”.
- “Upon that basis, there will be an inconsistency if, in the provisions of one environmental planning instrument, there is: ‘want of consistency or congruity’; ‘lack of accordance or harmony’ or ‘incompatibility, contrariety, or opposition’ with another environmental planning instrument.”*
- 3.8 At paragraph [55] of *Castle Constructions* His Honour considered whether there was an “inconsistency in substance as distinct from mere form” and looked to the objectives of the controls in question to assist in concluding there was an inconsistency.
- 3.9 Further, in *North Sydney Council v Ligon [No 2]* (1996) 93 LGERA 23 the Court of Appeal held at 31:
- “I see no reason why a development control plan, in providing **more detailed** planning considerations may not, by imposing criteria by way of restriction or specification of necessary requirements to be met before the development consent contemplated by a North Sydney Local Environmental Plan is granted, should not be regarded as conforming with the wider North Sydney Local Environmental Plan. **A detailed plan which contained a provision contrary to the wider plan would not be in conformity with it, but a provision which is restrictive or prohibitive unless certain conditions are met is not such a contrary provision.**” (our emphasis).
- 3.10 As such, a control in a DCP which is outright prohibitory in nature (for example by simply limiting the number of storeys, inconsistently with an LEP height control) would not be lawful or valid, whereas a DCP control expressed in terms of achieving objectives, would be lawful and valid.
- 3.11 In summary, the test to apply in order to support a conclusion of “inconsistency” is as follows:
- (a) Comparison of the objectives and close and thorough analysis of the words in provisions of the controls side by side;

- (b) Assess whether the part storey control has an “appearance of exhaustiveness” on the same subject matter as the height of buildings control, or does it simply fill in the gaps? If it fills in the gaps, then it complements the height of buildings control, rather than contradicts it. That is, it can be reconciled as they can “stand together”.
 - (c) Does the DCP control simply provide more detail and seek to achieve objectives, or does it instead seek to outright restrict or prohibit otherwise lawful development, under all circumstances?
- 3.12 This is now a well-established test, and there are numerous cases which have applied this case, and the test in *Castle Constructions* was applied in the case of Council of the *City of Shoalhaven v Elachi* [2015] NSWLEC 85, in relation to assessing whether a DCP provision was inconsistent with the LEP.
- 3.13 In our opinion, **if the DCP storey control limits, in any meaningful way, the ability to achieve the LEP height of buildings control, then it is likely to be found to be inconsistent.** It does more than “fill in the gaps” (as a DCP is allowed to do), but instead **curtails** the ability of a development to achieve the allowable LEP height. The Council cannot simply argue this away by claiming that the intention is protect the locality from overshadowing, or to point to some other broad planning objective that Council would like to achieve. A DCP storey control cannot be used as a backhand way to limit the allowable LEP heights, to achieve some other desirable planning objectives, because the controls in the DCP are required by law to remain ‘**consistent with**’ the LEP, failing which the DCP controls are simply switched off entirely by s3.43(5) of the EP&A Act, to overcome any such inconsistency
- 3.14 Although we have been cautious in coming to this conclusion, it is difficult to conclude that there is harmony between the LEP and DCP, in circumstances where the DCP drafting is simply unclear and unhelpful.
- 3.15 We also note the approach of Chief Judge McLennan in *Stanisic Associates v Sydney City Council* [2004] NSWLEC 770, when his Honour considered what was in his view, a poorly worded storey control in a DCP.
- 3.16 In summary, the document had little effect because it:
- (a) Was not worded in a helpful manner;
 - (b) had not been drafted with great care.
 - (c) lacked guidance as to how its objectives were to be achieved.
- 3.17 Similarly, we state that the guidance given in the DCP control in part 7 is uncertain and should therefore be given very little weight.
- 3.18 Also of importance, we note that section 5.3 Building Height of Mecone’s Statement of Environmental Effects states:
- “The LLEP establishes the maximum building heights for the site. Reduced heights are required for the edges of the precinct to “provide a transitional built form at the edges of the precinct.” To achieve this objective, due consideration has been given to ensure that the proposal complies with the applicable maximum height limits.”*
- This would suggest that Council’s stated objectives are achieved in any event, by way of compliance with the LEP height limits. We consider this to be a valid argument and approach.

Conclusion

In our opinion, the Council’s interpretation of the storeys control is overly restrictive and is not supportable either by reference to the DCP itself, or by the applicable legal principles that guide the interpretation of planning controls.

We appreciate that the issues canvassed in this advice are complex and we therefore welcome discussion with you on these matters.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy at awhealy@millsoakley.com.au.

Yours sincerely



Anthony Whealy

Partner

Accredited Specialist Local Government & Planning