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Jeff Curnow
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

By email: jeff.curnow@pdsgroup.com.au

Mills Oakley
ABN: 51 493 069 734

Your ref:
Our ref: AJWS/CYCS/3501492

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
Clare Collett
Email: ccollett@millsOakley.com.au

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

Dear Jeff

Legal advice on FSR controls for proposed development at Canberra Ave and Holdsworth Ave, St Leonards

We refer to previous correspondence and to your request for advice in relation to the proposed development at Canberra Ave and Holdsworth Ave, St Leonards. You have asked for advice on whether FSR can be redistributed between lots without the use of a clause 4.6 request.

Background

- The proposed development is at 27-41 Canberra Ave and 26-32 Holdsworth Ave, St Leonards (**the Site**).
- The Site sits within the Lane Cove Council (**Council**) LGA and the *Lane Cove Local Environmental Plan 2009* (**Lane Cove LEP**) applies.
- Under the *Lane Cove Development Control Plan 2009* (**DCP**), the Site falls within the 'St Leonards South Precinct', which is covered by Part C of the DCP.
- The DCP includes controls as to built form (Part 7 of Part C), including the requirement for lot amalgamations as shown in Figure 1 below. The Site is collectively marked as areas 7, 8, 9, 10 and 11 in the amalgamation map from the DCP below. We note that a pedestrian link separates areas 9 and 10 from area 11 at the south.



Figure 8: Required Amalgamations

- The DCP includes the following provisions regarding amalgamations:
 - Sites are to be amalgamated as per Figure 8 to comply with LEP minimum lot size; and
 - Alternative amalgamation patterns will only be considered if it can be demonstrated that all outcomes and objectives for this Locality can be delivered by the subject site and other Areas.
- The Lane Cove LEP and DCP contain FSR incentives if a development meets certain standards relating to minimum site size, design excellence, building setbacks, dwelling mix and amalgamation of lots. The DCP controls relate to the lot amalgamation as shown in the figure above.
- If the requirements in the DCP are met, the FSR for each individual area (being areas 7, 8, 9, 10 and 11 in the DCP map) will be 2.6:1, as shown in the figure below.

Summary of Advice

- In our view, the FSR can be redistributed between areas 7-11 within the Site so an exceedance of FSR of 2.6:1 in a small area of the Site is permissible, as long as the total FSR is compliant. The transfer of FSR within these areas does not require a clause 4.6 request.
- The fact that the LEP FSR incentives map shows the 'areas' does not mean that you are prevented from redistributing the FSR within the Site.

Substantive Advice: Is a clause 4.6 request required for an exceedance of FSR when the overall Site is fully compliant?

- 1.1 As outlined above, we understand that when viewed as an entire Site, the FSR for the whole Site is compliant with the 2.6:1 FSR control included in the LEP, when the incentives are taken into account. However, two of the 'areas' within the Site will not be compliant and will instead have an FSR above 2.6:1 (when viewed in isolation). We note that an 'area' is not a Lot but rather an area marked for amalgamation in the DCP (that is, area 7, area 8, area 9, area 10 or area 11).
- 1.2 You have asked for advice on whether a clause 4.6 request is required in this case. In order to advise on this, we must first consider the FSR requirements in the Lane Cove LEP.
- 1.3 Clause 4.4 contains the FSR control and provides that the FSR is that provided for in the FSR map. However, as the Site is located within the St Leonards South area, clause 7.1 of the Lane Cove LEP provides that the FSR is that identified in the Incentive FSR Map, which is at Figure 1 below. In this case, the applicable FSR is not in dispute but the issue is whether the FSR applies to the Site **in its entirety** so that a clause 4.6 request under the Lane Cove LEP is not required if the FSR for one area exceeds the control but the Site as a whole meets the FSR standard. The FSR Incentive Map below shows that the FSR for all areas of the Site is 2.6:1.



Figure 1: incentive Floor Space Ratio Map

- 1.4 Clause 4.5 of the Land Cove LEP, sets out how FSR and 'site area' are calculated. This is a standard clause which applies throughout NSW. Clause 4.5 reads as follows (relevantly):
 - (2) **Definition of 'floor space ratio'.** The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.
 - (3) **Site area.** In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be –

(a) if the proposed development is to be carried out on only one lot, the area of that lot, or
(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has a least one common boundary with another lot on which the development is being carried out.

(our emphasis)

- 1.5 Importantly, clause 4.5 provides that FSR relates to site area and site area is defined as the area of the proposed development, which may be multiple lots with common boundaries (as per clause 4.5(3)(b)).
- 1.6 As the proposed development is within the St Leonards South Area, clause 7.1 also applies. Clause 7.1(3) reads as follows:
- (3) Despite clauses 4.3 or 4.4, the consent authority may consent to development on land to which this clause applies that will result in a building with either or both of the following –
- (a) a building height that does not exceed the increased building height identified on the Incentive Height of Buildings Map, or
- (b) a floor space ratio that does not exceed the increased floor space ratio identified on the Incentive Floor Space Ratio Map.
- 1.7 Clause 7.1(3) is an incentive clause which allows a greater FSR for some areas. Clause 7.1(3) should be read in conjunction with clause 4.4 and indeed clause 4.5.
- 1.8 In this case the proposed development covers a number of lots, as well as a number of different 'areas' under Council's DCP amalgamation map.
- 1.9 Below is an excerpt from the DCP for area 8 relating to FSR which shows the outcomes required for the FSR incentive to apply.

Table 7.1 – Requirements to be entitled to Incentives				
LEP Key sites	Maximum LEP height of buildings	Maximum LEP FSR	Maximum Height of Building (storeys)	Outcome to be entitled to Incentives
Area 8	37 metres & 2.5 metres - As shown in LEP Incentive Height of Buildings map	2.6:1	10 As shown in Figure 10 (consider 'Building Envelope – Height in Storeys')	e) Amalgamation of lots as per Figure 8 to prevent the fragmentation or isolation of land. a) Minimum site area of 2,000m² b) Design Excellence is achieved in accordance with LEP Clause 7.6, including the Maximum Height of Buildings (in storeys); c) Provision of appropriate building setbacks to facilitate shared communal open space between buildings (Green Spines) embellished in accordance with the "Specifications for Private Open Space in the St Leonards South Precinct" with a positive covenant granting shared access in accordance with Section 88E of the Conveyancing Act 1919; d) A dwelling mix comprising a minimum 20% One Bedroom and Studio dwellings, 20% Two Bedroom dwellings and 20% 3 or more dwellings; and e) Amalgamation of lots as per Figure 8 to prevent the fragmentation or isolation of land.

- 1.10 As shown above, the FSR for the area is 2.6:1, subject to a number of pre-conditions. Importantly, one of these pre-conditions relates to a minimum site area. Therefore, it may appear that the 2.6:1 control must apply to each individual 'area' (or mini site, being areas 7, 8, 9, 10 or 11). However, in our view this is not the correct approach for determining FSR and the fact that the DCP requires a minimum 'site area' for each 'area' does not prevent the FSR of 2.6:1 being applied to the entire Site.
- 1.11 We note that the FSR controls in the DCP relate to lots which are to be amalgamated in the future so that each amalgamated area has an FSR of 2.6:1. However, the proposed development spans five amalgamated areas (each with an FSR of 2.6:1). The fact that the Council has identified four amalgamation areas which are part of the Site does not require that

the FSR be calculated for each amalgamation area. **The controls in the Lane Cove LEP relating to the calculation of FSR clearly outline how FSR should be calculated for the Site and should apply.** A DCP is a lower-order planning instrument than an LEP and the DCP provisions should not be interpreted in a way which is inconsistent with the Lane Cove LEP. The fact that the DCP itself provides for five areas of amalgamation does not require that FSR be calculated separately for each of these areas.

- 1.12 These 'areas' are also reflected in the FSR map in the Lane Cove LEP, as shown in Figure 1 above, as well as the Key Sites map under the Lane Cove LEP.
- 1.13 As the FSR for each of the five 'areas' is the same, in our view the entire Site area can be used for the purposes of FSR **so that an FSR of 2.6:1 across the entire site is permissible**, provided that the requirements in clause 4.5 are met (in particular that all lots have a common boundary).
- 1.14 The Courts have recently affirmed that this is the correct approach. In the recent case of *Mulpha Norwest Pty Ltd v The Hills Hire Council (No 2)* NSWLEC 74, Justice Pain considered the appropriate way to calculate FSR when there were multiple lots. In the Mulpha case, one lot had an FSR control and the other lot did not have any FSR control, and so a key issue was whether the lots could be considered as one Site so that the FSR control which applied to one lot could be spread across the two lots (essentially a blending of FSR). In Mulpha, the Court held that the FSR **could not be** spread across two lots (being the site) as one of the lots was not included in the FSR map. However, in considering FSR the Court also confirmed that where multiple lots are on the FSR map and are within one Site, the Site boundary can be used for the purposes of calculating the 'site area' for the proposed development.
- 1.15 At paragraph 50 Justice Pain stated: *'Obviously where a particular site is entirely contained within land having the FSR on the FSR map, no complications arise in the calculation of FSR. Ordinarily it might be expected that a site is coincident or less than the area of the FSR map. In those cases, clause 4.5 can be applied to the whole site without any difficulty.'*
- 1.16 In our view, **the fact that the FSR incentive map also shows 'areas' does not mean that the FSR for each individual area must be 2.6:1. That is, the fact that 'areas' are marked on the FSR incentive map does not prevent you from applying the applicable FSR to your entire Site.**
- 1.17 This is made clear in the wording of clause 7.1 which refers to 'development on land' and 'a floor space ratio that does not exceed the floor space ratio identified on the Incentive Floor Space Ratio Map'. Clause 7.1 does not state that the FSR must be applied to a particular 'area' and in our view there is no reason to interpret the clause this way. If there had been an intention that clause 7.1(3)(b) required that the incentive FSR be applied to each individual 'area', in our view this would have been explicitly stated in clause 7.1.
- 1.18 We note that clause 7.1 of Lane Cove LEP itself does not make reference to 'areas'. Part 7 applies to the entire St Leonards South Area precinct and the 'areas' are only included on the LEP maps for the purposes of FSR. In contrast, other clauses within Part 7 refer to specific 'areas' and individual controls for each 'area'. For example, under clause 7.3 there are separate affordable housing requirements for each area. However, there is no such delineation by area for FSR. **The fact that areas are dealt with individually in the Lane Cove LEP for other controls but are not detailed individually for FSR shows that the FSR controls are not limited to a specific 'area'. If this had been the intention, the Lane Cove LEP would have stated this (as it does for other controls).**
- 1.19 In our view, **the fact that the areas are noted on the FSR incentive map does not require that the FSR be applied to each individual area.** The reference to the 'areas' on the Lane Cove LEP maps only for FSR appears to have arisen as Part 7 of the LEP was inserted to provide for controls for the St Leonards South Precinct and the amalgamation map from the DCP, which refers to different areas, has been used as the basis for other forms of mapping in the Lane Cove LEP.
- 1.20 **The fact that the areas are noted on the FSR Incentive Map does not prevent you from applying the FSR controls across your entire Site. If this interpretation was adopted, the LEP would essentially prevent you having a Site larger than an 'area' on the LEP map and there is nothing to suggest that this was the intention.** Furthermore, there is extensive

case law regarding the application of an FSR control across an entire Site which states that this is permissible. In our opinion, the fact that the FSR incentive map shows 'areas', without any reference to these 'areas' within the text of the LEP, does not require you to calculate the FSR for each 'area' and cannot override the LEP provisions regarding FSR (which do not limit the calculation of FSR to a particular area).

- 1.21 Therefore, **the Site as a whole can be used for determining FSR, provided that 'the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out'.**
- 1.22 For the purposes of calculating FSR, the 'site area' is **the total site of the proposed development.** In your case, the proposed development will be carried out across all of parcels 7, 8, 9, 10, and 11. Those lands all presently adjoin each other, with contiguous boundaries, meaning that they fall within the definition of 'site area'. The fact that, **post development**, a strip of land will be dedicated to Council, does not deprive that strip of land from having formed part of the development. Absent the development, that pedestrian link would not exist. It is therefore an integral component of your proposed development, and does form part of your 'site area', **meaning that all of the allotments comprising areas 7 – 11 will form part of the 'site area', so that an FSR of 2.6:1 can be achieved across the total site. It is not necessary or legally correct to look at the FSR of the individual parcels in isolation.**
- 1.23 We note for completeness that a clause 4.6 request could not be relied upon for FSR if it had been required. This is because the Lane Cove LEP explicitly excludes Part 7 (aside from clauses 7.1(4) and 7.2) from being subject to clause 4.6.
- 1.24 **Also for completeness, we note that clause 4.5 of the Lane Cove LEP (which is a standard clause that applies throughout NSW) explicitly contemplates a situation such as this (where FSR is redistributed between lots within a Site) and provides for the inclusion of a covenant to prevent doubt dipping of FSR in the future.** Clause 4.5 reads as follows:

'When development consent is granted to development on a site comprised of 2 or more lots, a condition of the consent may require a covenant to be registered that prevents the creation of floor area on a lot (the restricted lot) if the consent authority is satisfied that an equivalent quantity of floor area will be created on another lot only because the site included the restricted lot'.

Conclusion

In our opinion, you can redistribute FSR across areas 7 to 11 within the Site and a clause 4.6 is not required (or in fact permissible).

If you have any questions or require further information in relation to this advice please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or Clare Collett on ccollett@millsoakley.com.au.

Yours sincerely



Anthony Whealy
Partner

Accredited Specialist — Local Government and Planning