

2 May 2022

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Privileged and confidential

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Dear Stephen

Legal issues arising from the request for further information for DA162/2021, 13-19 Canberra Avenue St Leonards NSW

You have asked us for legal advice regarding 13-19 Canberra Avenue St Leonards NSW, lots 11-14 Section 3 DP 7259 (**the site**). Specifically, you require us to address legal matters arising from the following issues raised in the request for further information from Lane Cove Municipal Council (**the Council**) dated 21 March 2022:

- item 3: storeys; and
- item 4, part A: building setbacks — pedestrian link setbacks.

We are to address these matters in the context of the drawings that you have supplied us.

Summary advice

In our opinion:

- It is plain that:
 - 'terrace 1' and 'terrace 2' are part storeys that result from excavation of steep slopes or semi basement parking;
 - 'terrace 1' and 'terrace 2' do not count as a storey for the purpose of the 'Building Envelope' control 7 of section 7 of Part C;
 - the proposed building will be 12 storeys; and
 - the proposed building will comply with 'Building Envelope' control 7 of section 7 of Part C of the DCP.
- Even if the proposed building was non-compliant with the 'Building Envelope' control 7 of section 7 of Part C of the DCP:
 - the DCP provision attempts to cover the same field as the LEP height control;
 - the DCP provision applies a more onerous standard than the LEP height control;
 - the DCP provision is inconsistent with the LEP height control; and
 - the DCP provision would have no effect under section 3.43(5) of the EP&A Act.

- 'Building Envelope' control 1, 'Building Setbacks F', does not apply to 'Area 5' and the site. The 'pedestrian link' setbacks that the Council have raised in its request for further information do not apply to the site.

Background

We understand and assume the relevant facts to be as follows:

- You are the developer of 13-19 Canberra Avenue St Leonards NSW, lots 11-14 section 3 DP 7259 (**the site**).
- You lodged development application DA162/2021 on 10 November 2021 (**the development application**).
- The most recent architectural drawings for the development have been prepared by SJB, are marked revision 45 and are identified as follows:
 - DA-0000;
 - DA-0101;
 - DA-0102;
 - DA-0201;
 - DA-0202;
 - DA-0203;
 - DA-0204;
 - DA-0205;
 - DA-0206;
 - DA-0207;
 - DA-0208;
 - DA-0209;
 - DA-0210;
 - DA-0211;
 - DA-0212;
 - DA-0214;
 - DA-0218;
 - DA-0219;
 - DA-0220;
 - DA-0501;
 - DA-0502;
 - DA-0503;
 - DA-0504;
 - DA-0601;

- DA-0610;
 - DA-0611;
 - DA-0614;
 - DA-1101;
 - DA-1102;
 - DA-1103;
 - DA-1104;
 - DA-1105;
 - DA-2001;
 - DA-2101;
 - DA-2102;
 - DA-2201;
 - DA-2301;
 - DA-2302;
 - DA-2401;
 - DA-2402;
 - DA-2403;
 - DA-2404;
 - DA-2405;
 - DA-2501;
 - DA-3001;
 - DA-3002;
 - DA-4001;
 - DA-5010.
- The most recent architectural demolition plan drawing has been prepared by SJB, is marked revision 42 and is identified as 'DA-1003'.
 - The revision 45 drawings depict twelve levels plus two terrace levels.
 - You wish us to provide our advice on the basis of the revision 45 drawings.
 - The proposed building is located entirely within the brown area marked 'W' (corresponding with a maximum building height of 44 metres) on the 'Incentive Height of Buildings Map - Sheet IHOB_004' that is referenced in the *Lane Cove Local Environmental Plan 2009 (the LEP)*.
 - Your proposed development complies with the prerequisites for the application of the incentive height provisions under clause 7.1 of the LEP.

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. The height control for the site

- 1.1 The site is within the 'St Leonards South Area' under the *Lane Cove Local Environmental Plan 2009 (the LEP)* ('Area 5' on 'Key Sites Map - Sheet KYS 004').
- 1.2 This means that it is subject to:
- the **normal** maximum provisions for floor space ratio and height (which includes clauses 4.3 and 4.4); and
 - an **incentive** provision for additional floor space ratio and height linked to a prescriptive list of development requirements (clause 7.1).
- 1.3 The principal (normal) height provision is as follows:
- 4.3 Height of buildings**
- The objectives of this clause are as follows—
 - to ensure development allows for reasonable solar access to existing buildings and public areas,
 - to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,
 - to seek alternative design solutions in order to maximise the potential sunlight for the public domain,
 - to relate development to topography.
 - The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map. ...
- 1.4 Under the 'Height of Buildings Map', the (normal) maximum building height for the site is 9.5 metres.
- 1.5 Clause 7.1 of the LEP sets out height and floor space incentives when certain development requirements are met. Your proposed development meets those requirements.
- 1.6 Under clause 7.1 the applicable maximum height standard is 44 metres.

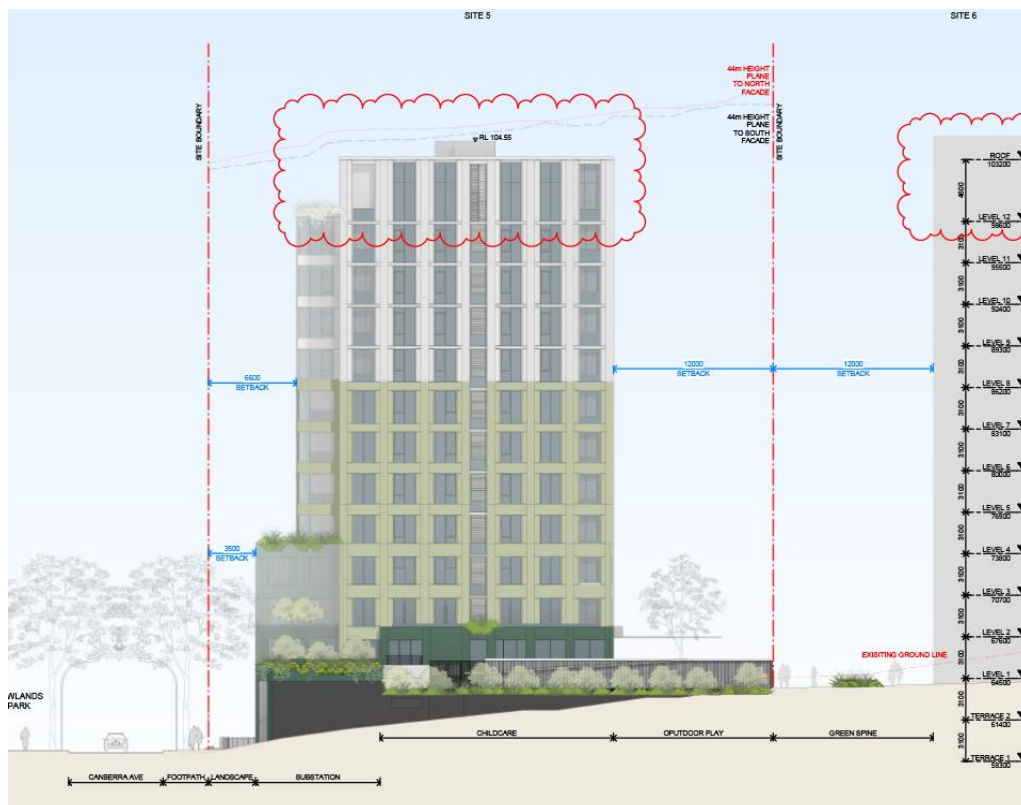
2. Item 3: storeys

- 2.1 The Council's Item 3 in its request for further information is as follows:
- The proposed development contains 13 storeys and 2 part storeys. LCDCP 2009 Part C Residential Localities – Locality 8 – St Leonards South Precinct allows for a maximum of 12 storeys in Area 5. You are requested to amend the proposal to comply. The resulting rooftop could be better utilised for a larger communal open space.
- 2.2 The Council appears to be referring to the 'Building Envelope' control 7 of section 7 of Part C of the *Lane Cove Development Control Plan 2009 (the DCP)*. The control is presented in the form of a table. An extract from the table appears below:

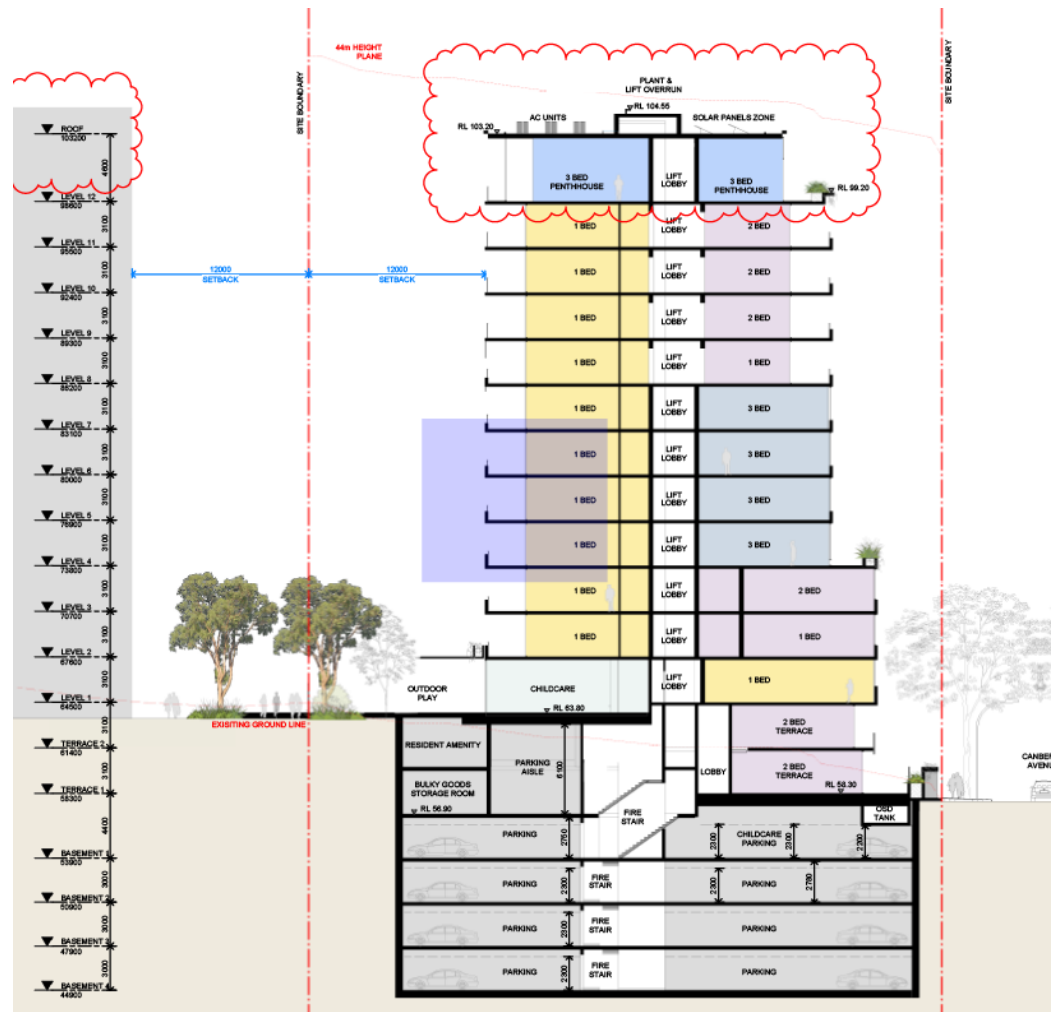
7	Height in Storeys	<ul style="list-style-type: none"> Height of development in number of Storeys shall be as per Figure 10. Part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey. 	Refer to Clause 4.6 (8)(cb) and Part 7 of Lane Cove LEP.
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- 2.3 The control says the 'height of development in number of Storeys shall be as per Figure 10'. Figure 10 specifies the number of Storeys for 'Area 5' to be 12.

- 2.4 Importantly, the control also says that 'Part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey'.
- 2.5 Drawing DA-0501 depicts the 'North Elevation' of the proposed building as follows:



- 2.6 It can be observed that 'terrace 1' and 'terrace 2' are only to be created a result of excavation below the existing ground level. This is also illustrated in the DA-0601 (section 1) as follows:



- 2.7 This section also shows the contribution that ‘terrace 1’ and ‘terrace 2’ make in terms of parking (via the provision of a ‘parking aisle’).
- 2.8 In our view, it is plain that:
- (a) ‘terrace 1’ and ‘terrace 2’ are part storeys that result from excavation of steep slopes or semi basement parking;
 - (b) ‘terrace 1’ and ‘terrace 2’ do not count as a storey for the purpose of the ‘Building Envelope’ control 7 of section 7 of Part C;
 - (c) the proposed building will be 12 storeys; and
 - (d) the proposed building will comply with ‘Building Envelope’ control 7 of section 7 of Part C of the DCP.
- 2.9 In any event, when the incentive maximum height provision applies, the maximum building height set by the LEP is 44 metres. The above two drawings illustrate compliance with that height control.
- 2.10 Section 1.5 of the DCP itself says:

This DCP should be read in conjunction with the provisions of the EP&A Act 1979 and the Lane Cove LEP 2009. The provisions within this DCP are in addition to the provisions of the LEP. If there is any inconsistency between this DCP and the LEP, **the LEP will prevail** (bold added).

- 2.11 However, there is a much broader provision that may also make some provisions of the DCP ineffective. Section 3.43(5) of the EP&A Act says:
- A provision of a development control plan (whenever made) has **no effect** to the extent that:
- (a) it is the same or **substantially the same** as a provision of an environmental planning instrument applying to the same land, or
 - (b) it is **inconsistent or incompatible** with a provision of any such instrument (bold added)
- ...
- 2.12 This provision was formerly known as section 74C(5). In *Elachi v Council of the City of Shoalhaven* [2016] NSWCA 15, Basten JA said (at [21]) that:
- Section 74C of the EP&A Act deals with the relationship between provisions in a DCP and an environmental planning instrument (such as an LEP), **not only** where there is inconsistency, but **also where there is overlap** (bold added).
- 2.13 In *Vision Land Glebe Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1488 at [44], it was accepted by the parties (ie the development applicant and the local council) that a:
- five **storey control** in s4.2.1.1 of the DCP would be inconsistent with the 27m **height standard** in the LEP as a greater number of residential storeys can be achieved within this height (bold added).
- 2.14 In *Onikul v Woollahra Municipal Council* [2015] NSWLEC 1345, the Land and Environment Court accepted that a provision in a development control plan that purported to prevent the demolition of contributory (heritage) items had no effect — as the local environmental plan permitted such demolition (at [66] and [84]).
- 2.15 In *Miller v Pittwater Council* [2014] NSWLEC 1087, the Court accepted (at [43]) that when faced with competing minimum lot sizes (in a local environmental plan and a development control plan), the development control plan provision had no effect because of the local environmental plan provision.
- 2.16 In *DeiCorp Construction Pty Limited v Council of the City of Sydney* [2013] NSWLEC 1269, the Court accepted that a development control plan cannot ‘read down’ provisions in an environmental planning instrument that related to advertising signage (at [35]).
- 2.17 In *Monahan v Warringah Council* [2014] NSWLEC 1027, the Court said (at [34]):
- Provided** the DCP provisions **do not set standards that are more onerous than required under the environmental planning instrument**, the provisions are matters to which the consent authority must have regard (bold added) ...
- 2.18 In *Ironlaw Pty Limited v Wollondilly Shire Council (No 3)* [2014] NSWLEC 1057, the Court considered whether an industrial-type development on rural land should be subject to a provision in a development control plan that would have prevented the permitted development from proceeding. The Court accepted that provisions of the development control plan were inconsistent with the permissibility authorised by an environmental planning instrument and had no effect (at [96]).
- 2.19 In *Level 1 Construction Pty Ltd v Canterbury-Bankstown Council* [2021] NSWLEC 1405, the Court found at [88] that a minimum site area provision in a DCP had no effect because it was ‘incongruent’ with the minimum lot area applicable under a state environmental planning policy.
- 2.20 In *Gorgees v Fairfield City Council* [2021] NSWLEC 1283, the Court found (at [64]) that lot width and depth control provisions in a DCP had no effect because they were effectively a lot size control. A lot size control was ‘not dissimilar’ to a site area control (such as the one in the applicable environmental planning instrument). The Court accepted (at [65]) that the DCP provision had no effect under section 3.43(5) of the EP&A Act.

- 2.21 In our opinion, even if the proposed building was non-compliant with the 'Building Envelope' control 7 of section 7 of Part C of the DCP:
- (a) the DCP provision attempts to cover the same field as the LEP height control;
 - (b) the DCP provision applies a more onerous standard than the LEP height control;
 - (c) the DCP provision is inconsistent with the LEP height control; and
 - (d) the DCP provision would have no effect under section 3.43(5) of the EP&A Act.

3. Item 4, part A: building setbacks — pedestrian link setbacks

- 3.1 The Council's Item 4, part A in its request for further information is as follows:

The proposal seeks to depart from the pedestrian link setbacks established in the DCP as detailed in **Table 1** below.

Table 1 – Pedestrian Link Setbacks		
Storey	Required Setback	Proposed Setback
1-4	6m	Predominantly 0m
5+	9m	Predominantly 3m

Recent determination DA99/2021 has reinforced the provision of compliant setbacks to the pedestrian link. For example, Building 8 (Area 8) provides a 10 storey building, similar in scale to the proposed development, with compliant pedestrian link setbacks. The proposed setbacks are considered to provide unsatisfactory bulk and scale impacts on the link and future public domain and are requested to be amended to comply.

- 3.2 The Council appears to be referring to the 'Building Envelope', control 1, 'Building Setbacks F' of section 7 of Part C of the DCP. The control is presented in the form of a table. An extract from the table appears below:

Building Envelope			
No.	CONTROL	PROVISION	NOTES/LOCATION
1	Building Setbacks F (Refer to Figure 9)	<ul style="list-style-type: none"> 6m at park level + 3m at and above Level 5 	To Local Park (eastern buildings of Areas 21 and 22).

- 3.3 The 'Location' of the building setbacks is specified as 'Areas 21 and 22'.

- 3.4 In our opinion, the reference to each 'Areas' is a reference to the identification of areas on the LEP's 'Key Sites Map – Sheet KYS_004'. An extract from this map appears below:



- 3.5 'Area 21' and 'Area 22' are located between Park Road and Berry Road. The site is located in 'Area 5' on Canberra Avenue.
- 3.6 The spatial location of the setbacks are said to be 'To [the] Local Park'.

- 3.7 We consider this to be a reference to the 'Large Park' shown on figure 6 of the DCP (sandwiched in between 'Area 21' and 'Area 22'). Figure 6 appears below:



Figure 6: Public Infrastructure

- 3.8 The site, on the other hand, includes 'Area 5' and stretch of public infrastructure identified as 'Stairs/ramps'.

- 3.9 We infer that the Council's officers have **assumed** that the setback control applies to 'Area 5' because the control is titled 'Building Setbacks F (Refer to Figure 9)'. Figure 9 of the DCP is as follows:



Figure 9: Building Setbacks / Building Depth

- 3.10 The above figure has a blue line which is marked with the letter 'F'. It is located next to the 'eastern buildings of Areas 21 and 22' as per the text of control 1, 'Building Setbacks F'. The blue line is also located, among other places, on the edge of 'Area 5' and adjacent to the envisaged 'Stairs/ramps'.
- 3.11 In our view, figure 9 (in itself) does not have any legal effect. Figure 9, by itself, does not set out any measurements of building setback or building depth. Figure 9 only has effect to the extent that it is applied by control 1, 'Building Setbacks F', of section 7 of Part C of the DCP.
- 3.12 We consider that control 1, 'Building Setbacks F' is very specific about which areas are to be subject to setbacks and building depth requirements with reference to figure 9. 'Area 5' is not nominated. We do not consider that control 1, 'Building Setbacks F' applies to 'Area 5' and the site.
- 3.13 While we consider that figure 9 cannot have any effect in its own right, even if it did, it would be in conflict with control 1, 'Building Setbacks F'. Control 1, 'Building Setbacks F' is the more specific (and less general) provision. If figure 9 had direct legal effect, it would be, in our view, an appropriate case, to apply the maxim of *generalia specialibus non derogant*. That is, that the general statutory provisions are not to be interpreted so as to override specific statutory provisions: *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 583-589 [44]-[59], 612 [149], 615-616 [162]-[165]; *Minister for Immigration and*

Citizenship v SZKTI [2009] HCA 30 at [39]-[44]; *Bruton Holdings Pty Ltd (in liq) v Commissioner of Taxation of the Commonwealth of Australia* 239 CLR 346 at [17].

3.14 In short, in our opinion:

- (a) 'Building Envelope' control 1, 'Building Setbacks F' does not apply to 'Area 5' and the site; and
- (b) the 'pedestrian link' setbacks that the Council has raised in its request for further information do not apply to the site.

Please do not hesitate to contact me on (02) 8035 7858 if you have any queries regarding this advice.

Yours sincerely



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Partner

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