Mills Oakley
ABN: 51 493 069 734

Our ref: AJWS/JZOS/3681442

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

Contact
James Oldknow +61 2 8035 7875
Email: joldknow@millsoakley.com.au

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

16 May 2023

Landmark Group Australia Pty Ltd
PO Box R351
Royal Sydney Exchange
SYDNEY NSW 1225

By email: adam@landmarkgr.com.au

cc: joseph@landmarkgroup.com;
aaron@sutherlandplanning.com.au

Dear Adam

Legal Advice regarding clause 6.7 of the *Warringah Local Environmental Plan 2011*
Property: 4 Delmar Parade & 812 Pittwater Road, Dee Why
Development Application No. 2022/0145

We refer to your request for legal advice in relation to Development Application No. DA2022/0145 (**DA**) for demolition works and construction of a mixed-use development comprising a residential flat building and shop top housing, basement parking, lot consolidation and Torrens Title Subdivision (**Proposed Development**) at 4 Delmar Parade & 812 Pittwater Road, Dee Why (**Site**).

Specifically, you have asked us to provide advice on whether cl 6.7 of the *Warringah Local Environmental Plan 2011* (**LEP**) is a development standard which can be varied via a cl.4.6 written request in light of the Land and Environment Court's recent decision in *Canterbury Bankstown Council v Dib* [2022] NSWLEC 79 (***Dib***). Assuming that it is a development standard, you have also asked us to advise on whether cl.6.7 of the LEP can still be relied on (and varied), noting that it is now repealed following an amendment to the LEP on 26 April 2023.

Summary advice

At the time of lodging the DA, the Site was zoned B4: Mixed Use and 'residential flat buildings' (**RFB**) and 'shop top housing' developments were permissible with consent in this zone. As a consequence, cl 6.7 of the LEP was an applicable provision for the purpose of the relevant assessment of the DA.

Consistent with the *Standard Instrument—Principal Local Environmental Plan* (***Standard Instrument***), cl.4.6(2) of the LEP provides "*this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*" As at the date the DA was lodged, cl.6.7 was one such clause expressly excluded from the operation of cl.4.6 pursuant to cl.4.6(8)(d) "*to the extent that it applies to land identified on the Key Sites Map as Site F or Site G*". It follows, **as a matter of the LEPs construction, that cl.6.7 is expressly a development standard, and is one which can be varied via a cl.4.6 written request** because the Site is **not** identified on the Key Sites Map as Site F or Site G.

For this reason, we are of the firm view that an assessment of whether cl.6.7 of the LEP is a development standard in light of the Land and Environment Court's recent decision in *Dib* is **not** required. Nevertheless, we have undertaken that exercise as part of this advice, given it was requested by the Sydney North Local Planning Panel ('**Panel**'), and we have reached the same conclusion.

We also conclude that cl.6.7 of the LEP can still be relied on (and varied), notwithstanding its repeal following an amendment to the LEP on 26 April 2023. This is because the relevant amending instrument, known as the *Standard Instrument (Local Environmental Plans) Order 2006* (**LEP Order**), contains a savings provision at cl.5 of Schedule 1, Part 2, which saves and continues to permit until 26 April 2025 "***Development that is permitted with development consent on land in a former zone*** *under a local environmental plan, as in force immediately before 26 April 2023*".

There is no doubt that the Proposed Development is "*development that is permitted with development consent*" in the B4 Mixed Use prior to 26 April 2023, albeit in reliance upon a well-founded cl.4.6 written request in relation to cl.6.7. As a result, the Proposed Development will continue to be permitted via that pathway until 26 April 2025.

Background

- On 15 March 2022, the DA was lodged with Northern Beaches Council (**Council**).
- The Site is heavily constrained by the natural typography of the area and given its close proximity to both land zoned R2: Low Density Residential and the Stony Range Botanical Reserve, which is a locally listed Heritage Conservation Area (**HCA**).
- The Site is zoned B4: Mixed Use under the LEP (as at the date the DA was lodged) and both residential flat buildings (**RFB**) and shop top housing developments are permissible with consent in this zone. The objectives of the B4 zone are as follows:
    - *To provide a mixture of compatible land uses.*
    - *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
    - *To reinforce the role of Dee Why as the major centre in the sub-region by the treatment of public spaces, the scale and intensity of development, the focus of civic activity and the arrangement of land uses.*
    - ***To promote building design that creates active building fronts, contributes to the life of streets and public spaces and creates environments that are appropriate to human scale as well as being comfortable, interesting and safe.***
    - ***To promote a land use pattern that is characterised by shops, restaurants and business premises on the ground floor and housing and offices on the upper floors of buildings.***
    - *To encourage site amalgamations to facilitate new development and to facilitate the provision of car parking below ground.*

  (our **emphasis**)
- As at the date of lodgement, cl 6.7 of the LEP was an applicable provision for the purpose of the relevant assessment of the DA. That provision provides:

  6.7 Residential flat buildings in Zone B4 Mixed Use

  Development consent must not be granted to a residential flat building in Zone B4 Mixed Use with a dwelling at the ground floor level.
- As the DA seeks consent for residences on the ground floor of a RFB in the B4 zone, a cl 4.6 written request has been prepared by Sutherland & Associates, justifying the proposed variation to cl 6.7 of the LEP (**cl 4.6 Request**).
- Pursuant to Schedule 6(2) of the *State Environmental Planning Policy (Planning Systems) 2021,* the DA was referred to the Panel for assessment as the Proposed Development has a Capital Investment Value of $60,195,000 (in excess of the $30m threshold).
- On 16 December 2022, the *State Environmental Planning Policy Amendment (Land Use Zones) (No 5) 2022* (**Amending Instrument**) was published, which came into effect on 26 April 2023.
- As a result of the Amending Instrument, land zoned B4: Mixed Use in the LEP was converted to 'MU1: Mixed Use'. In addition, the permissible uses in the MU1 Land Use Table were also amended and *"residential accommodation"* (of which RFBs and shop top housing are a species and the types of development for which consent is sought in the DA) is now prohibited in the MU1 zone.
- Between 23 March 2023 and 20 April 2023, the DA was publicly exhibited by Council and three (3) submissions were received.
- On 27 April 2023, Council issued its Assessment Report to the Panel and recommended that the DA be approved subject to conditions (**Assessment Report**).
- As detailed in the Assessment Report, Council staff supported the DA in its current form, which includes reliance upon a cl 4.6 Request justifying ground floor residences in contravention of cl 6.7 of the LEP. It follows that Council staff are of the view that cl 6.7 of the LEP is a 'development standard' which can be varied, rather than a prohibition.

- Council provide the following reasons in the Assessment Report in support of the variation to the requirements set out in cl 6.7 of the LEP:
    - "*Because of these constraints* (being the typography and proximity to both R2 zoned land and a HCA)*, the form of the building and the arrangement of land uses differs from what is typically envisaged by the planning controls."*
    - *"[B]ecause of the spatial and geographical disconnect the site has from the core of the Town Centre, and its peripheral location at the edge of the Town Centre, that the site is not suitable for such intensive commercial floorspace."*
    - The Council and Applicant have considered alternative options to ground floor residences and "*This assessment report finds that the applicant's rational behind the variation* (to cl 6.7 of the LEP) *is well-founded, reasoned and logical in its basis, and that whilst the proposal may not be providing the desired quantum of commercial floorspace, it does provide an appropriate level of commercial activation of the street frontages in this area of the Town Centre, and provides much needed additional apartment type housing in the Town Centre."*
- On 5 May 2023, Council issued an addendum to the Assessment Report (**Supplementary Memo**) which amended one of the proposed conditions of consent relating to development contributions.
- On 10 May 2023, the Panel met to consider the DA and ultimately deferred the matter until 7 June 2023, to allow the Applicant time to provide further information. For the purposes of this advice, the Panel's request for further information is limited to whether cl 6.7 of the LEP is a 'development standard' or prohibition pursuant to the principles set out in *Dib,* and *assuming* that it is a development standard*,* whether cl.6.7 of the LEP still applies to the DA by way of a savings provision contained in the Amending Instrument*,*.
- Cl.5 of Schedule 1 in Part 2 of the **LEP Order**, contains a savings provision, which provides as follows:

    Continuation of permitted development

    Development that is permitted with development consent on land in a former zone under a local environmental plan, as in force immediately before 26 April 2023, continues to be permitted with development consent on the land until 26 April 2025.

Substantive Advice

1. Is clause 6.7 of the LEP a 'development standard' or an outright 'prohibition'?

1.1. The term 'development standards' is defined by s 1.4(1) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), which reads as follows:

*"… **provisions** of an environmental planning instrument or the regulations **in relation to the carrying out of development,** being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of—…"*

(our **emphasis**)

1.2. However, whether a relevant provision contains a development standard or not, is often a vexed question. Notwithstanding the statutory definition set out in s 1.4(1) of the EP&A Act there have been many NSW Court decisions over several decades which discuss and state the key principles and approaches to resolve the question.

1.3. For the purpose of this advice, it is **not** necessary to consider those NSW Court decisions at length (although we have undertaken this task, as requested by the Panel) because the answer is straightforward – that is, **cl.6.7 is expressly listed as a development standard that can be varied via a cl.4.6 written request**.

1.4. This is because the LEP provides at cl.4.6(2), consistent with the *Standard Instrument*:

"*this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*"

1.5. Cl.6.7 was one such clause (prior to the recent LEP amendments), which was expressly excluded from the operation of cl.4.6 pursuant to cl.4.6(8)(d) "*to the extent that it applies to land identified on the Key Sites Map as Site F or Site G*". It follows, **as a matter of the LEPs construction, that cl.6.7 is expressly a 'development standard' that can be varied via a cl.4.6 written request** because the Site is **not** identified on the Key Sites Map as Site F or Site G.

1.6. Notwithstanding our above (firm) conclusion, we go on to consider the relevant NSW Court decisions as part of this advice, noting this was requested by the Panel.

1.7. As correctly identified by the Panel, the Chief Judge of the Land and Environment Court recently considered this historical body of case law in *Dib* and clarified at [50]:

> *"**The starting point** in determining whether a provision is a development standard within the **definition is to identify the development that may be carried out with consent**."*
>
> (our **emphasis**)

1.8. The Chief Judge's recent guidance in respect of the correct starting point is consistent with the 'two-step test' approach that was earlier adopted by the NSW Court of Appeal in *Strathfield Municipal Council v Poynting [2001] NSWCA 270* (***Poynting***), which requires:

a) Firstly, consideration of whether the relevant provision prohibits the carrying out of development.[1]

b) Secondly, if the provision **does not** prohibit the carrying out of development, consideration of whether the relevant provision specifies a requirement — or fixes a standard — in relation to an aspect of the proposed development.[2]

1.9. We address each step of the *Poynting* test relation to the Proposed Development and Site below.

2. First Step: Does cl 6.7 of the LEP prohibit the carrying out of development on the Site?

2.1. With respect to the first step, the Chief Judge in *Dib* at [55] relevantly states that:

> "*A provision of an environmental planning instrument **can only be a development standard** within the definition of "development standards" **if the provision is "in relation to the carrying out of development"**. Under the EPA Act, **the only development that may be carried out is development that an environmental planning instrument permits to be carried out either without consent or only with consent***."
>
> (our **emphasis**)

2.2. It is clear that in the present case, cl 6.7 of the LEP is a provision that *"is in relation to the carrying out of development"* as it establishes a criteria or control that relates to a permissible use in a certain zone.

2.3. Accordingly, in respect of the permissibility pathway for the Proposed Development on the Site, we note the following:

a) Pursuant to cl 2.2 of the LEP, the Site is located within the B4: Mixed Use zone.

b) Pursuant to the relevant Land Use Table referred to in cl 2.2(1) of the LEP, both RFBs and shop top housing are uses that are **expressly permitted** with consent in the B4 zone (i.e. there is no outright prohibition of the Proposed Development).

c) However, cl 2.3(4) of the LEP provides that uses permitted by the relevant Land Use Table are *"subject to other provisions*" of the LEP.

d) Cl 6.7 of the LEP is one such 'other' provision which must be satisfied for the DA to be capable of approval.

2.4. Having regard to 'other' relevant provisions in the LEP, it is clear to us that the Proposed Development **is permissible** with consent on the Site and that the criteria in cl 6.7 **does not** need to be satisfied in order for the Proposed Development to be otherwise permissible.

[1] *Agostino v Penrith City Council* (2010) 172 LGERA 380; [2010] NSWCA 20.

[2] *Canterbury Bankstown Council v Dib* [2022] NSWLEC 79 at [54] and [62].

2.5. Cl 6.7 of the LEP serves to limit ground floor residences in RFBs within the B4 Zone. The operational effect of the same aligns with objectives of the B4: Mixed Use zone by promoting *"active building frontages*" and *"contributing to the life of streets and public spaces"* by ensuring that *"shops, restaurants and business premises are on the ground floor and housing and offices on the upper floors of buildings"*.

2.6. As set out in the cl 4.6 Request which accompanies the DA, the objectives of the B4 zone are satisfied notwithstanding the provision of ground floor residences.

2.7. Further commentary on the first limb of *Poynting* is also provided in the case of *Agostino v Penrith City Council* [2010] NSWCA 20 (***Agostino***) where the NSW Court of Appeal was asked to consider whether a provision in the *Penrith Local Environmental Plan No 201* was a development standard or prohibition. The relevant provision in *Agostino* permitted a use that was otherwise prohibited in the applicable zone (being a fruit and vegetable store), **only** in circumstances where the fruit and vegetable store (the otherwise prohibited use) did not exceed 150m2 in size.

2.8. The Proposed Development can be distinguished from the facts in *Agostino,* as RFBs in this case **are permissible** in the B4 zone and cl 6.7 of the LEP serves to establish a criteria in relation to the carrying out of that otherwise permissible use. Whereas in Agostino, the starting point was that fruit and vegetable stores were outright prohibited, other than in the limited exception provided for where they were no more than 150m2 in size.

2.9. The Court of Appeal in *Agostino* ultimately held at [57] that the provision was an outright prohibition because it fell outside the purview of the relevant enabling provision:

> *"It follows that* ***no part of clause 41(3) is a separate and independent provision intended to control an aspect of that which is otherwise made permissible.*** *It is, in substance, a form of zoning provision. Taken as a whole****, it describes or defines that which is permissible as an exception to the general prohibition*** *in the Table to the subject zone of a fruit and vegetable store on land within that zone."*
>
> (our **emphasis**)

2.10. Against that background, it is our view cl 6.7 of the LEP is clearly "*intended to control an aspect of* [development] *that*… *is otherwise*… *permissible* " and **not** a zoning provision that provides an exception to a general prohibited use.

2.11. Accordingly, it is our view that cl 6.7 of the LEP satisfies the first step of *Poynting.*

3. Second Step: Does clause 6.7 specify a requirement or fix a standard in relation to an aspect of proposed development?

3.1. With respect to the second step, the Chief Judge in *Dib* at [60] relevantly states that:

> *"There is a distinction between a provision in the form of: "On land of characteristic X no development may be carried out" and a provision in the form of "****On such land development may be carried out in a particular way or to a particular extent."***
>
> (our **emphasis**)

3.2. As cl 6.7 is **not** a provision that prohibits RFBs or shop top housing entirely (given our conclusion above in relation to the first step), the provision falls within the Chief Judge's latter distinction in [60]; in that it seeks to regulate how development is to be *"carried out in a particular way or to a particular extent"*. Accordingly, it follows that that cl 6.7 **cannot** be considered an outright prohibition and the second step in *Poynting* is also satisfied.

3.3. For completeness, His Honour goes on in *Dib* to provide the following relevant commentary in respect of the step second of *Poynting:*

> [62] "*If the provision "does not operate to define the development that is permitted to be carried out with consent"* ***it instead must "serve[s] the different function of specifying the circumstances in which a consent authority can and cannot grant development consent…[t]his aspect of development is not an essential element of the development… but rather conditions the exercise of the power to grant consent to that development****."*
>
> [66] *"...The test of whether provisions of an environmental planning instrument are development standards or not is simply* ***whether they are "provisions in relation to the carrying out of development" and "provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development****". If the provisions answer those descriptions, they will be development standards regardless of whether or not the provisions do so by including a jurisdictional fact."*

[78] *"In the case of cl 30AA, I find that the clause does specify a requirement or fix a standard in respect of an aspect of development for the purposes of boarding houses and thus meets the description in the definition of development standards.* ***The fact that the heading to the clause and the clause itself do not use the words "standards" or "development standards" does not matter****. Similarly, the text of cl 30 does not refer to the words "development standards" or "standards", yet the clause is a provision specifying requirements or fixing standards in respect of various aspects of development for the purposes of boarding houses such that the clause does meet the description in the definition of development standards."*

(our **emphasis**)

3.4. As we have stated above, cl 6.7 was expressly listed and labelled (in terms) in the LEP as a 'development standard' when regard is had to a proper construction of cl.4.6(2) and (8)(d) and it is clear that the intended effect of this provision is to specify the circumstances in which a consent authority **can and cannot** grant consent to an otherwise permissible use.

4. Whether cl.6.7 of the LEP can still be relied on (and varied), noting its recent repeal

4.1. Following lodgement of the DA, the Amending Instrument came into effect on 26 April 2023 and as a result, clauses 4.6(8)(d) and 6.7 of the LEP were repealed and the Site was rezoned MU1: Mixed Use.

4.2. However, as set out in the background facts of this advice, Cl.5 of Schedule 1 in Part 2 of the LEP Order contains a savings provision, which provides as follows:

Continuation of permitted development

Development that is permitted with development consent on land in a former zone under a local environmental plan, as in force immediately before 26 April 2023, continues to be permitted with development consent on the land until 26 April 2025.

4.3. It follows that:

a) there is no doubt the DA is one that is able to be characterised as "*development that is permitted with development consent*" in the former B4 Mixed Use prior to 26 April 2023; and

b) that conclusion is not effected in anyway because the DA relies on a well-founded cl.4.6 written request to seek to vary cl.6.7.

4.4. As result, the DA will continue to be permitted via the proposed pathway until 26 April 2025.

Conclusion

Based on the above, it is our view that cl 6.7 of the LEP is a development standard and not an outright prohibition, which remains an applicable approach to the current DA.

In light of this, and for the justifications provided in the cl 4.6 Request (that are supported by Council), it is our opinion that the cl 6.7 of the LEP is a provision that can be relaxed or varied. Accordingly, the Proposed Development in its current form is permissible with consent in the current MU1 zone.

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 James Oldknow on +61 2 8035 7875 or joldknow@millsoakley.com.au.

Yours sincerely

Anthony Whealy
Partner
Accredited Specialist — Local Government and Planning