THORNTON NORTH PENRITH PTY LIMITED

41, 184 AND 192 LORD SHEFFIELD CIRCUIT, PENRITH

MEMORANDUM OF OPINION[1] - *Addendum*

1. My instructing solicitors act on behalf of Thornton North Penrith Pty Ltd atf Thornton North Penrith Unit Trust.

2. Thornton proposes to undertake development at a site known as 41, 184 and 192 Lord Sheffield Circuit, Penrith. On 11 March 2022, Thornton lodged two Development Applications with Penrith City Council. The Development Applications seek consent for construction and operation of a mixed use development in the form of two sets of two residential towers over a five-storey commercial podium and car parking basement with respect to each of the components of land the subject of the development applications.

3. On 22 September 2023, I provided my Memorandum of Opinion concerning the ability to grant consent to the Development Applications having regard to the fact that the land the subject of the Development Applications also forms part of a broader parcel of land the subject of a Concept Approval granted by the Minister for Planning and Infrastructure on 9 November 2011.

4. On 19 February 2024 I provided my further Memorandum of Opinion with respect to certain aspects of two requests for review made by the client pursuant to s.8.2 of the *Environmental Planning and Assessment Act* following the refusal of both Development Applications by the consent authority, the Sydney Western City Planning Panel, on 7 November 2023.

[1] 2024b

5. One of those aspects was concerned with (and was labelled):

> **"(2) In relation to clause 8.2 of Penrith LEP, whether a clause 4.6 request is required in the light of the additional solar studies"**

6. For the reasons set out in my Opinion dated 19 February 2024 I was of the view that the clause was a development standard to which cl.4.6 of the Penrith LEP could be applied.

7. I am instructed that an issue has arisen as to the proper datum point for assessment of the issue of the extent of breach of that clause.

8. In terms, and as I had set out at [22] of my earlier Opinion, clause 8.2 of the Penrith LEP, as applying to the subject land, provides that:

> "…development consent may not be granted to development on land to which this Part applies if the development would result in overshadowing of public open space to a greater degree than would result from adherence to **the controls indicated for the land on the height of buildings map**." (my emphasis)

9. As previously noted, I have been instructed that in the circumstances of the present application(s), there would be a resulting overshadowing of public open space, albeit marginally, and notwithstanding that there would be less overshadowing at various times of the year. I express the view that this later aspect was available to be utilised as an environmental planning ground in any request pursuant to cl.4.6 of the Penrith LEP.

10. The relevant present question though is what is the appropriate datum for establishing the base case for assessment of the fact of, or the quantum of, that additional overshadowing (and also, for the purposes of the assertion of an improvement, any additional solar access).

11. In my opinion the appropriate base datum is to be derived from the terms of the clause itself. That is, by reference to "…the controls indicated for the land on the height of building map…" That would involve, simply, the attribution of a height limit onto the subject site from which the base case is to be derived, and against which the overshadowing of the proposed development is to be compared.

12. This is for a number of reasons:

    a. The terms of the clause are specific, and are specifically directed to the height of buildings map, alone. Those terms do not involve any other metric.
    b. If it were the case that reference to alternate sources for establishment of the base datum was intended then the draftsperson could have done so, but has not.
    c. There is no foundation for adoption of controls in, for example a Development Control Plan, unless there exists specific reference or adoption to that control: *Woollahra Municipal Council -v- SJD DB2* [2020] NSWLEC 115 at [46] (per Preston CJ in LEC).
    d. The opening words of the operative part of cl.8.2(3) provide "Despite clause 4.3, 5.6 and 8.4…". Clause 4.3 is concerned with the height of buildings map itself, so it is somewhat circular and surplusage. Clause 5.6 is concerned with architectural roof features, and operates so as to provide for greater height than the limits in the map for roof features. In that instance cl.8.2 would limit the roof feature exception, but as a function of the height of buildings map. And cl.8.4 is concerned with design excellence, but more relevantly (in my opinion) the bonus in height for a building that exhibits design excellence. As with cl.5.4, cl.8.2 would constrain that bonus back to the height of buildings map. Accordingly, as a matter of construction all of the clause are concerned solely with a "ceiling" established by a height of buildings map, and not otherwise.

13. Accordingly, in my opinion the base datum for establishing compliance or otherwise with cl.8.2 is the mere application of the height of buildings map's control to the site. Once that upper limit is applied (irrespective of any other control that might be applicable to the site), the comparison task as against the proposed development can be undertaken. In my opinion the clause does not require, let alone permit, recourse to any metric other than (to use the words of the clause) "…the controls indicated for the land on the height of building map…" for the purposes of determining whether the proposal satisfies that clause, or would result in additional overshadowing.

Chambers,
15 March 2024

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