THORNTON NORTH PENRITH PTY LIMITED

41, 184 AND 192 LORD SHEFFIELD CIRCUIT, PENRITH

MEMORANDUM OF OPINION

1. My instructing solicitors act on behalf of Thornton North Penrith Pty Ltd atf Thornton North Penrith Unit Trust. Thornton proposes to undertake development at a site known as 41, 184 and 192 Lord Sheffield Circuit, Penrith.

2. 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 residential towers over a five storey commercial podium and car parking basement, with a maximum height of the proposed residential towers of approximately 107m.

3. 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. The consent authority for the Development Applications lodged with the Penrith City Council is the Sydney Western City Planning Panel. On 29 March 2023, that Panel met to consider the Development Applications and, as I am instructed:

   (a) indicated that it considered the existing Concept Approval remained a transitional Part 3A project; and

   (b) queried whether the proposed development was generally consistent with the terms of that approval, in light of the requirement in clause 3B(2)(d) of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017.

5. Following that meeting, and on 27 June 2023, my instructing solicitors provided advice concerning whether the Concept Approval may be partially surrendered so as to address the query that I have recorded at [4] above. That advice was shared with the Council and the Department of Planning and Environment, the latter of which responded on 15 August 2023 to the effect that it did not accept that the Concept Approval could be partially surrendered.

6. I have not been Briefed to consider the question of a partial surrender of the Concept Approval. However, I do note that the issue arises because a significant portion of the development the subject of the Concept Approval in fact has been the subject of a series of subsequent approvals, and has been constructed and in many cases sold to subsequent owners, including residential owners.

7. (Whilst I have not been Briefed to consider the question of a partial surrender, I note that the position of the Department of Planning is that in the absence of a specific power for partial surrender, one cannot assume the ability for a partial surrender; to which it may be said that, in the absence of a proscription against a partial surrender, it might be said to be equally unreliable to assume that a partial surrender may not be effected.)

8. I have been Briefed to provide my opinion as to whether the Development Applications may be determined. In my opinion, and for the reasons set out below, in the particular circumstances of the Development Applications there is no barrier to the grant of consent for the development described in those Applications by reference to, or dependence upon, the Concept Approval.

The Concept Approval

9. As referenced above, the Concept Approval (MP 10-0075) was granted on 9 November 2011 pursuant to the former Part 3A of the *Environmental Planning and Assessment Act 1979* (which Part I address below). That Concept Approval related to a site known as the North Penrith Whole precinct. That which was the subject of the approval was described in the instrument of approval as being for a "*concept plan for a development on approximately 40.7*

hectares for approximately 1,000 dwellings, 4,500m^2 of retail floor space, 10,625m^2 of commercial floor space, 7,000m^2 of light industrial floor space, 7.2 hectares of open space and drainage and associated infrastructure".

10. The site the subject of the Development Applications was included in the land the subject of that Concept Approval. Insofar as the subject site is concerned, the Approval Plans to which the Concept Approval relates included a Concept Plan Map and other mapping that refers to the site as being within the "Village Centre", that the uses on the site as being for "retail" and "public car park" (some other built form designations also included no use allocation and an at grade car park), and indication that maximum height of buildings is to be six storeys with a maximum building height of 30m. The subject site is not identified as a proposed apartment site.

The Development Applications

11. The Development Applications the subject of this Memorandum of Opinion propose high density residential apartments in buildings up to an overall height of 107m located above retail/commercial podium with car parking ancillary to proposed retail and commercial uses, but not public car parking. The Development Applications seek consent for a total of 553 dwellings at a floor space ratio of 5:1.

12. Thus, both in terms of form and land use, the Applications bear no relationship to the form or use authorised by the Concept Approval; and the only shared integer is that of the cadastral boundary.

Permissibility of the development the subject of the Development Applications

13. The Development Applications are lodged on the basis that consent may be granted for the proposals' compliance with the terms of the Penrith Local Environmental Plan 2010.

14. Pursuant to clause 4.3 of the LEP, the maximum height applying to the subject land for development is 32m. There is no maximum floor space ratio pursuant to clause 4.4 of the LEP.

15. On 23 June 2017 the LEP was amended to insert clause 8.7 which applies to the site, as being within the Penrith City Centre and identified as "Key Site 11". That clause allows development consent to be granted for a new building that exceeds the height control under clause 4.3 where the proposed development includes community infrastructure. In those circumstances there is no maximum height control imposed with respect to the land, but there is imposed a maximum floor space ratio control of 5:1. Preconditions to the grant of consent include a consideration of design excellence and the nature and the value of community infrastructure to the Penrith City Centre.

16. In pursuit of the community infrastructure requirement of clause 8.7, the proponent has offered to enter into a voluntary planning agreement; a matter which I have not been asked to consider.

17. That notwithstanding, on the assumption that the consent authority is otherwise satisfied about preconditions to the application of clause 8.7 (design excellence and community infrastructure), as I understand it, the proposal would be permissible pursuant to the LEP.

18. Statements of Environmental Effects have been lodged with the Development Applications. Other than what might be described as a passing historical reference to the concept approval in [3.1] of both Statements of Environmental Effects (essentially by way of background), it is apparent that the Development Applications do not purport to be related to or lodged with respect to, or depend upon, the Concept Approval.

The Determination *Impasse*

19. As referred above, the consideration of the Development Applications has stalled at the point of consideration by the Planning Panel (supported by a position equally adopted by the Department of Planning) that because the

Development Applications may not be said to be generally consistent with the terms of the Concept Approval, they may not be determined.

20. In my opinion, the observation that the Development Applications are not generally consistent with the terms of the Concept Approval (in fact, the Development Applications, for the broad reasons that I have set out above, are materially different to the terms of the Concept Approval) is no foundation for, or reason for, the non-consideration of the Development Applications.

21. This is because, as is demonstrated below, the legislative scheme within the EP&A Act is such that, provided there is authority for the grant of consent for the development the subject of a development application, where it factually may be said to be different development to that which is the subject of the Concept Approval, any legislative requirement for consistency with the Concept Approval is, as a matter of nexus, disengaged. This is because any such constraints are directed to the development which is the subject of the Concept Approval, as distinct from operating more globally in relation to land the subject of the Concept Approval.

Part 3A

22. Part 3A was inserted into the EP&A Act on 1 August 2005. It was then repealed on 1 October 2011; but with savings and transitional provisions that maintain the validity of instruments granted during its life (a matter to which I will address, below).

23. Its heading was “Major Infrastructure and Other Projects” and, by reference to s.75B(2), it was, generally, concerned with development that in the opinion of the Minister was of State or regional environmental planning significance.

24. In its general operation, and leaving aside for the moment the specific component sections of the Part, it was concerned with broader State and regional policy approval of major projects which, even if partially prohibited, could be undertaken pursuant to an approval issued by the Minister. Provisions within the Part then ensured that a project so approved was not prejudiced or

curtailed by the operation of controls derived from other Parts of the EP&A Act, or other approvals legislation required for the carrying out of the project.

25. Of relevance to the current issue are certain of its provisions.

26. Firstly, s.75B deemed the application of the Part "to the carrying out of development that is declared under the section to be a project to which the Part applies". That application is either via a specific order by the Minister, or, as was conventionally the case, via enabling provisions in a *State environmental planning policy* (usually, and as was the case in this instance, together with the forming of an opinion by the Minister in relation to that development). Once that declaration is made, all parts of the project were encapsulated into the application of Part 3A.

27. Upon declaration that the carrying out of development is a project to which the Part applies, s.75D proscribed the carrying out of development without the approval of the Minister. It also prescribed compliance with conditions of that approval. The balance of Division 2 then dealt with the manner in which, and the form of, the Minister's Approval for such a project. This Division 2 was subject to the operation of Division 3, which was concerned with concept plans.

28. Section 75M (the first section within Division 3) permitted the Minister to authorise a proponent to apply for approval of a concept plan. As s.75M(2) specifically provided, a concept plan was required (simply) to outline the scope of the project; and a detailed description of the project was not required.

29. Section 75O authorised the approval of a concept plan, and the subsequent determination of the authority to undertake the development that was the subject of the concept plan was dealt with in s.75P. In essence, that contemplated either a subsequent approval under Part 3A (via Division 2), or the determination of that subsequent phase being pursuant to Part 4 of the EP&A Act.

30. As I have referred at the outset, the policy behind Part 3A was to provide authority for major projects without any barriers contained elsewhere within the Act. Within Part 4, Division 1 provided for what was described as "the threefold classification", namely development that was permissible without consent, development permissible only with consent, and development that was prohibited. That threefold classification was, in terms, subject to the other provisions of the EP&A Act: s.76C. [I note at this point that, thus far, references are to section numbers of the EP&A Act as they were in place at the time of the currency of Part 3A.]

31. Thus, where a major project was the subject of a concept plan approval, which then was subject to a project approval under Part 3A, there was no inconsistency because of the exemption contained in s.76C. Equally, where approval for a Part 3A project subsequent to a concept plan approval occurred by the pathway of Part 4 (for example, via s.75P(2)), Division 4 ensured the non-applicability of provisions of the Act that might otherwise impact upon consideration of that subsequent stage within Part 4. Expressed another way, the Part 3A approval maintained precedence.

32. The genesis of the concept of "generally consistent" finds its place in s.75P(2)(a). In terms, that paragraph provided that:

> "If the Minister determines that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act, the following provisions apply:
>
> (a) the determination of a development application for the project or that stage of the project under Part 4 is to be generally consistent with the terms of the approval of the concept plan…"

33. What is to be noted is that any limitation to general consistency relates to the determination of a development application which is "for" "the project". That is, both the concept plan approval and the consistency requirement for the subsequent Part 4 approval is directed to a specific project, namely the project the subject of the concept plan approval.

34. In the circumstances of the present case, that requirement also continued through to the Concept Approval itself. In terms, the Concept Approval applied to "the plans, drawings and documents cited by the proponent in their environmental assessment"; and the "development description" in [A1] of Part A to Schedule 2 of the Concept Plan described a particular development. Pursuant then to [A2](1), "the development shall generally be in accordance with the following plans and documentation…"; and [3] in fact substantively repeated the terms of s.75P(2)(a).

The savings and transitional provisions

35. As referred above, Part 3A was repealed on 1 October 2011. Its continued existence, however, was initially provided via clause 3(1) of Schedule 6A of the EP&A Act.

36. That continuation, however, was not absolute. As part of the savings and transitional provisions, which are now manifest in the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation, 2017*, the continued survival of things done under the former Part 3A revolved around a period of two years before or after the repeal date of Part 3A, and/or in some circumstances the date of 30 November 2012. None of that is particularly relevant here because it is accepted that the Concept Approval is, for the purposes of the transitional regulation, a transitional Part 3A project (the matter which I have recorded at [4](a) above).

37. The operative provision of the transitional regulation is Schedule 2. In the circumstances of the present case, pursuant to clause 3B(3), Part 4 is taken to apply to the carrying out of the development in relation to the Concept Approval. This is because in determining the Concept Approval the Minister did not make a determination pursuant to s.75P(1)(b), nor is there an environmental planning instrument that provides that the development the subject of the Concept Approval may be carried out without development consent or is exempt development.

38. Upon that foundation, pursuant to clause 3B(2)(a), the development (the subject of the Concept Approval) is "taken to be" development that may be carried out with development consent under Part 4; and this is despite anything to the contrary in an environmental planning instrument. In the circumstances of the present case, clause 3B(2)(a) actually has no work to do except insofar as retail and/or public car parking is not permissible in the LEP.

39. The provision upon which the consent authority is presently concerned ([4](b) above) is clause 3B(2)(d). In terms, it provides as follows:

> "A consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is generally consistent with the terms of the approval of the concept plan."

40. In the circumstances of the present case, that provision, which is the contemporary version of s.75P(2)(a), is no barrier to the determination of the Development Applications.

The Concept Plan Approval is no barrier

41. As is apparent from the terms of clause 3B, the proscription against the grant of consent under Part 4 is not global. The proscription contained in clause 3B(2)(d), instead, is with respect to a grant of consent under Part 4 for "the development". That term is repeated, and it is in that repetition that the requirement for general consistency is required, again not globally, but instead "with the terms of the approval of the concept plan".

42. The *chapeau* to clause 3B(2) also refers to "development" which, as a matter of construction, must be the same development as referenced in clause 3B(2)(d). In all aspects of the reference in clause 3B which give rise to the constraint for general consistency, the object of the proscription is the development the subject of the concept plan approval.

43. What is important to note is that the whole structure of a Part 3A approval, and a concept plan granted under Part 3A, and the proscription in clause 3B of the transitional regulation, is directed to particular development. It does not operate in a zoning sense to land generally. That is, in its operation, the application of Part 3A, even from the moment of the declaration of application of Part 3A is to a "project"; and then to the "development" envisaged in that "project".

44. Simply because land may be the subject of a Part 3A approval does not sterilise that land to the carrying out of any development other than development envisaged by the Concept approval. This is because neither in its operation, nor in its particular application to this case, does Part 3A operate as a cadastral land-based control, or in a zoning way.

45. Expressed another way, there is quite simply no warrant for assuming, or concluding, that a concept approval under Part 3A sterilises or constrains land only to the development the subject of the Concept Approval.

46. Provided then that what is sought is otherwise permissible via an alternate pathway in the EP&A Act, there is no barrier to a grant of consent for that different development. That is, if it is the case that the election is made to pursue the development the subject of the Concept Approval (that is, the "project" to which the declaration of application of Part 3A related, and then the Concept Plan Approval with respect to particular "development"), then that is an available election. But if an election is made for a proposal to carry out different development, or even for that matter a different "project", then if that different development is otherwise permissible within the statutory scheme, then there is no reason why that cannot be undertaken.

47. The natural extension of that concept is that there may be, in relation to the one parcel of land, more than one authorisation for the carrying out of development. That is not remarkable: *Waverley Council v Hairis Architects* [2002] 123 LGERA 100, cited with approval in *Baron Corporation v Council of the City of Sydney* [2019] NSWLEC 61.

48. Whilst the legislative scheme in (former) s.75P (and current clause 3B(3)) provide for the dominance of the Part 3A approval via the Part 4 pathway, again, that is only with respect to the "development" the subject of the Part 3A pathway.

49. I have earlier in this Memorandum of Opinion set out in a broad sense aspects of the Concept Approval on the one hand, and aspects of the Development Applications on the other. It is safe to observe that they are materially different; so much so that it is impossible for the two developments to be considered synonymous. There are fundamental reasons why. Firstly, in terms of land use, they are fundamentally different; secondly, in terms of heights and density, they are, again, significantly different.

50. Thus, almost ironically, it is this extent of the difference that is demonstrating that the nature of the "development", whether for the project to which the declaration of Part 3A occurred, or the development to which the Concept Plan applies, is not the same development as is the subject of the Development Applications. All that is similar is the land; but as identified above, the Concept Approval is "development" related and specific; it does not operate solely with respect to any development in relation to the land.

51. Moreover, in the absence of any legislative constraint to the lodgment of an application for consent for development that is otherwise permitted, there is no warrant in my opinion for reading into the legislative scheme a prohibition upon that course simply because there is, in existence, a concept plan approval. What may result is the obtaining of a development consent that does relate to (and is generally consistent with) the terms of the Concept Approval; but there may also be a development consent for development that is entirely unrelated to that approval, which is nonetheless permissible via other pathways within the legislative scheme. As referred above, that consequence is not remarkable, and in fact is envisaged in the legislative scheme: *ibid*.

52. Of course, if the alternate scheme is otherwise not permissible within the regime of the Act, then a consent cannot be granted, except via the pathway of the Part 3A approval. The *quid pro quo* for that pathway is consistency with the concept

plan approval; and to the extent that anything else within the Act might stand in the way of such an approval then, as identified above, that constraint is necessarily removed, provided the approval is generally consistent with the Concept Plan approval.

53. This analysis focuses upon the words within the scheme of the Act that utilise the definite article in relation to the concept of "development". In my opinion, that is more than sufficient to establish the disconnection of the Development Applications from any notional tether to the Concept Approval. But that disconnection is even more so the case when one recognises that within the scheme of the Act, even similar types of development, relating to the same land, can be regarded as mutually exclusive.

54. This is best demonstrated by reference to a case involving a prosecution for breach of a Part 3A approval. In *Secretary, Department of Planning and Environment v Leda Manorsted* [2019] NSWLEC 58, Pepper J determined a prosecution for breach of conditions of a project approval in relation to earthworks concerned with a residential subdivision. The subdivision had been the subject of, first, a concept plan approval and then a project approval in relation to which conditions were imposed seeking to control the nature and extent of earthworks. The defendant argued that prior to the grant of the concept and project approvals, there existed development consents for earthworks in relation to the same land, and in the same place, and that those consents were saved in the grant of the project approval, and that those consents authorised the works said to be in breach of the project approval.

55. However, as relevant to this Memorandum of Opinion, at [261] and [264], Pepper J found that the coexistence of another consent did not obviate the need to comply with the conditions of the project approval if it was the case – and Pepper J found that it was – that the earthworks were being done (factually) in furtherance of the project approval. This finding was corroborated by the Court of Criminal Appeal: *Leda Manorsted v Secretary, Department of Planning and Environment* (2022) 253 LGERA 184 at [87]-[92].

56. Thus, even where there are two similar approvals, for essentially the same type of development, on the same land, the Courts have distinguished the carrying out of development of one from the other where, factually, one, but not the other, was the basis upon which the purported development was undertaken.

57. In the circumstances of the present case, *a fortiori*, the subject of the two Approvals (potentially, if approved) is in fact quite different development. One does not even need to consider in depth the definition of "development" in s.1.5 (currently) of the EP&A Act to see that that is the case. Where development includes the use of land, and the erection of a building, in the circumstances of the present case the use of the same land is proposed to be fundamentally different as between that which is encapsulated in the Concept Plan Approval, and that which is in the Development Applications; and the erection of buildings is materially different, also, one to the other.

58. Thus, returning to the provisions of clause 3M of the transitional regulation, in the circumstances of the present case there is simply no foundation for the supposition that the Development Applications in genesis have anything to do with the development the subject of the Concept Plan Approval. Accordingly, in my opinion, and for the reasons set out above, clause 3B has no application to the determination of the Development Applications.

59. There is one residual potential constraint to the Part 3A regime aside from that identified in [4](b) above, as related to the potential exercise of power under Part 4 of the EP&A Act in relation to the development applications currently being considered. This is as contained in former s.75R. Firstly, pursuant to subsection (1), Part 4 is said to not apply in respect of an approved project. This provision is not applicable because "approved project" is defined in s.75A as a project approval, but not where only a concept plan approval has been granted. Secondly, s.75R(3) provides that environmental planning instruments do not apply to or in respect of an approved project, and, again, the definitional exclusion in s.75A equally applies. Again, the definite article as apposite the "project" is used in effecting that constraint.

60. For the reasons set out above the development applications may proceed to be determined without constraint to or by reference to the Concept Plan approval.

Chambers,
22 September 2023

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