



Our Ref: CHS:AK:200037

29 March 2021

Ken Gouldthorp
General Manager
North Sydney Council
PO Box 12
North Sydney NSW 2059

By email: council@northsydney.nsw.gov.au

Dear Mr Miller,

Re: Isolation issues for 153 Walker Street, North Sydney

1. We have been asked to write to North Sydney Council (**Council**) regarding isolation issues at 153 Walker Street, North Sydney.

Summary of Advice

2. In our opinion, 153 Walker Street is subject to site isolation issues.
3. If 157 Walker Street was redeveloped on its own, or with another adjoining site (such as 161 and 165 Walker Street), this may cause 153 Walker Street to become an isolated site. In our view such an outcome would be in contravention of a number of legislative and strategic objectives and controls.
4. Our opinion is that there are significant challenges in relation to isolation issues for the owners of 153 and 157 Walker Street, given that there are legislative instruments and policies which are directly pertinent to the determination of any future development application on these properties. In light of these controls, it is our view that the singular development of one or both of these properties could not promote the orderly and economic use and development of the land.
5. We strongly recommend that the strategic future of 153 and 157 Walker Street be carefully considered given the implications that this advice may have on the future uses and development of 153 and 157 Walker Street. In this regard, we suggest that opportunities be considered which encourage the amalgamated development of these two sites and promote the desired future character of the North Sydney Centre.

Legislation and Policy

6. The ability for 153 Walker Street to be developed as a stand-alone site is constrained by a number of relevant statutory instruments and matters for consideration under section 4.15 of the *Environmental and Planning Assessment Act 1979* (**EPA Act**).
7. In particular, 153 Walker Street is subject to the planning controls set out in the *North Sydney Local Environment Plan 2013* (**NSLEP**) and the *North Sydney Development Control Plan 2013* (**NSDCP**). As

this property is less than the required 1000 square metres in area, the maximum height of 215m cannot be achieved without amalgamation with an adjacent site. The height of future development on the site is limited to 45 metres unless it is amalgamated with an adjoining site.

8. These provisions are directly pertinent to the determination of future development applications and will affect the prospects of the orderly and economic use and development of 153 Walker Street and adjoining properties. In our opinion, allowing 153 Walker Street to be isolated is inconsistent with the objectives of the planning controls.
9. We set out key provisions below.
10. Section 4.15(1) of the *Environmental and Planning Assessment Act 1979 (EPA Act)* contains requirements that a consent authority must consider when determining a development application. Relevantly (with *emphasis* added):

4.15 Evaluation

*(1) **Matters for consideration—general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—*

(a) the provisions of—

(i) any environmental planning instrument, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

11. 153 Walker Street is zoned B3 Commercial Core under the NSLEP. It is located in the “North Sydney Centre” and additional local provisions within Division 1 to Part 6 of NSLEP apply. One of the aims of the controls is to encourage the consolidation of sites for the provision of high-grade commercial space, as discussed below.

12. The Land Use Table from the *North Sydney Local Environment Plan 2013 (NSLEP)* relevantly states:

Zone B3 Commercial Core

1 Objectives of zone

- *To provide a wide range of retail, business, office, entertainment, community and other suitable land uses that serve the needs of the local and wider community.*
- *To encourage appropriate employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To prohibit further residential development in the core of the North Sydney Centre.*
- *To minimise the adverse effects of development on residents and occupiers of existing and new development.*

13. Clause 4.3 of the NSLEP relevantly states (emphases added):

4.3 Height of buildings

(1) The objectives of this clause are as follows—

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- (b) to promote the retention and, if appropriate, sharing of existing views,*
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- (e) to ensure compatibility between development, particularly at zone boundaries,*
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.*

(2) 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.

...

14. Pursuant to Clause 4.3, the maximum height of a building is a reduced level of 215 metres. If a site is less than 1000 square metres (as is the case here), then the maximum height of a building is restricted to 45 metres, as set out below.

15. Clause 6.1 NSLEP relevantly states (emphases added):

6.1 Objectives of Division

The objectives of this Division are as follows—

- (a) to maintain the status of the North Sydney Centre as a major commercial centre,*
- (b) to maximise commercial floor space capacity and employment growth within the constraints of the environmental context of the North Sydney Centre,*
- (c), (d) (Repealed)*
- (e) to encourage the provision of high-grade commercial space with a floor plate, where appropriate, of at least 1,000 square metres,*
- (f) (Repealed)*
- (g) to prevent any net increase in overshadowing during winter months of any land in Zone RE1 Public Recreation (other than Brett Whiteley Plaza) or any land identified as "Special Area" on the North Sydney Centre Map,*
- (h) to ensure that any land within a residential zone is afforded a reasonable amount of solar access,*
- (i) to maintain areas of open space on private land and promote the preservation of existing setbacks and landscaped areas, and to protect the amenity of those areas.*

16. Clause 6.3(2)(c) NSLEP relevantly states (with emphasis added):

6.3 Building heights and massing

(1) The objectives of this clause are as follows—

- (a) (Repealed)*
- (b) to promote a height and massing that has no adverse impact on land in Zone RE1 Public Recreation in the North Sydney Centre or land identified as "Special Area" on the North Sydney Centre Map or on the land known as the Don Bank Museum at 6 Napier Street, North Sydney,*
- (c) to minimise overshadowing of, and loss of solar access to, land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone RE1 Public Recreation or land that is located outside the North Sydney Centre,*
- (d) to promote scale and massing that provides for pedestrian comfort in relation to protection from the weather, solar access, human scale and visual dominance,*
- (e) to encourage the consolidation of sites for the provision of high grade commercial space....*

(2) Development consent must not be granted for the erection of a building on land to which this Division applies if—

- (a) the development would result in a net increase in overshadowing between 12 pm and 2 pm from the March equinox to the September equinox (inclusive) on land to which this Division applies that is within Zone RE1 Public Recreation or that is identified as "Special Area" on the North Sydney Centre Map, or*
- (b) the development would result in a net increase in overshadowing between 10 am and 2 pm from the March equinox to the September equinox (inclusive) of the Don Bank Museum, or*

(c) the site area of the development is less than 1,000 square metres and any building resulting from the development would have a building height greater than 45 metres.

17. Several parts of the North Sydney Development Control Plan 2013 (**NSDCP**) apply to the North Sydney Centre and land zoned as B3 Commercial Core. The NSDCP relevantly states (with emphasis added):

1.6 AIMS OF THIS DEVELOPMENT CONTROL PLAN

The aims of this DCP are to:

- (a) Ensure that development positively contributes to the quality of the natural and built environments;
- (b) Encourage development that contributes to the quality of the public domain;
- (c) Ensure that development is economically, socially and environmentally sustainable;
- (d) Ensure future development has consideration for the needs of all members of the community;
- (e) Ensure development positively responds to the qualities of the site and its context;
- (f) Ensure development positively responds to the character of the surrounding area; and
- (g) Ensure that the actions of the North Sydney Local Strategic Planning Statement (as amended) and the North Sydney Local Housing Strategy (as amended) are achieved.
- (h) Ensure that the Directions Outcomes and Strategies of the North Sydney Community Strategic Plan are achieved.

...

Part C Section 2.1.2 Desired Future Character

Diversity of activities, facilities, opportunities and services

P1 High rise and medium density, commercial and mixed use developments.

P2 Provision of a variety of different sized office, retail, community and entertainment spaces.

P3 Provision of a variety of outdoor and indoor community spaces (e.g. urban plazas, gymnasium; gardens; outdoor and indoor dining areas and food courts).

P4 The commercial focus of the CBD is to be enhanced by preventing any further residential development from occurring in its core (i.e. the B3- Commercial Core zone).

...

Part C Section 2.1.3 Desired Built Form

Subdivision

P1 Development sites should be of a size which enables the creation of large high quality floor plates which helps to reinforce the Centre's role as a Global City as identified within the Metropolitan Strategy.

P2 Development on small sites should not detrimentally impact on the long term ability of the amalgamation of sites for significant commercial development.

18. Part B of the NSDCP contains provisions relating to development on land zoned B3 Commercial Core. One of the objectives is to encourage quality built form. In particular, one of the stated objectives is:

to ensure that the site layout and building design responds to the existing characteristics, opportunities and constraints of the site and within its wider context (adjoining land and the locality).

19. Any future development application at 153 Walker Street will need to be accompanied by a Site Analysis. As set out in Section 5 of Part A of the NSDCP, the development application will need to illustrate how the proposed development responds to site conditions and its relationship to the surrounding context:

By describing the physical elements of a locality and the conditions impacting on a site, opportunities and constraints for future development can be understood and addressed in the design.

...

Design the development to minimise negative impacts on the amenity of any adjoining development, so that it fits within its context.

20. In our opinion, a future amalgamated development of 153 and 157 Walker Street is one of the major "opportunities and constraints for future development".

21. Part B of the NSDCP includes the following relevant provision (with emphasis added):

Part B Section 2.4.2 Site Consolidation

Objectives

O1 To enable the creation of a human scale that also reflects a consistent subdivision pattern.

O2 To enable the creation of suitably sized commercial floor plates that can be tenanted easily.

Provisions

P1 Amalgamate lots to achieve lot frontage identified in the relevant area character statement (refer to Part C of the DCP).

P2 Break down the apparent length of buildings by incorporating articulation, design and detailing and or a change in materials, finishes and colours.

22. In our opinion the NSDCP and the abovementioned provisions will be an important consideration in any development assessment and approval process in relation to 153 and 157 Walker Street.
23. We also note the North District Plan dated March 2018 prepared by the Greater Sydney Commission. This policy document is a guide for implementing the Greater Sydney Region Plan "A Metropolis of Three Cities". Action 24 relevantly states:

Actions	Responsibility
<p>24. Grow economic development in the North Sydney CBD to:</p> <ul style="list-style-type: none"> a. maximise the land use opportunities provided by the new station b. grow jobs in the centre and maintain a commercial core c. strengthen North Sydney's reputation as an education centre, to grow jobs and add diversity d. expand after hours' activities e. encourage growth in business tourism as a conference location that takes advantage of North Sydney's identity as a business hub, its location, access and views f. provide a variety of high quality civic and public spaces befitting a globally-oriented CBD, which can be utilised for a range of cultural and entertainment activities g. improve amenity by reducing the impact of vehicle movements on pedestrians h. create capacity to achieve job targets by reviewing the current planning controls 	North Sydney Council, other planning authorities, and State agencies

Case Law

24. The Court has determined the planning principle which applies to the isolation of a site by redevelopment of adjacent sites as set out in the following judgments:

- a. *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 (**Karavellas**) was in respect to a proposal to demolish four existing dwellings and to construct two residential flat buildings and basement carpark at 498-502 President Avenue and 139 Arcadia Road, Sutherland. The Court relevantly stated (with *emphasis* added):

17 The general questions to be answered when dealing with amalgamation of sites or when a site is to be isolated through redevelopment are:

- *Firstly, is amalgamation of the sites feasible?*
- *Secondly, can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible?*

*18 The principles to be applied in determining the answer to the first question are set out by Brown C in *Melissa Grech v Auburn Council* [2004] NSWLEC 40. The Commissioner said:*

Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application.

Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners

of the properties. These details should include offers to the owner of the isolated property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, is to be based on at least one recent independent valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.

Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s 79C of the Environmental Planning and Assessment Act 1979.

19 In the decision *Cornerstone Property Group Pty Ltd v Warringah Council* [2004] NSWLEC 189, I extended the principles of *Brown C* to deal with the second question and stated that:

The key principle is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls would be required, such as non compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity.

To assist in this assessment, an envelope for the isolated site may be prepared which indicates height, setbacks, resultant site coverage (both building and basement). This should be schematic but of sufficient detail to understand the relationship between the subject application and the isolated site and the likely impacts the developments will have on each other, particularly solar access and privacy impacts for residential development and the traffic impacts of separate driveways if the development is on a main road.

The subject application may need to be amended, such as by a further setback than the minimum in the planning controls, or the development potential of both sites reduced to enable reasonable development of the isolated site to occur while maintaining the amenity of both developments.

20 In applying these principles to the application before me, I find that in answering the first question the amalgamation of the sites is not reasonably feasible. I do not accept council's submission that as the parties are only \$50,000 apart, amalgamation is feasible. Inherent in the concept of whether amalgamation is feasible is whether it is also reasonable. While it appears feasible to amalgamate the sites, it is on the basis that Mr Khoury's counter offer is accepted. I do not see it as the role of the Court to enter into negotiations on a final purchase price but rather to be satisfied that a reasonable offer has been made. Given the history of negotiations between the parties and the evidence before the Court I am satisfied that a reasonable offer has been made and that Mr Khoury is fully aware that access through his site is not required and the implications for re-development of his site in the event that it is not amalgamated with the adjoining sites.

- b. In *45 Cornelia Street Pty Ltd v Canterbury - Bankstown Council* [2017] NSWLEC 1617 (**45 Cornelia Street**) Dickson C found that a reasonable offer had been made during negotiations in circumstances where two independent valuations were provided which were at least 14% above the market value of the property and included the costs of the legal and transfer fees.

- c. In *Ghazi Al Ali Architect Pty Ltd v Canterbury Bankstown Council* [2020] NSWLEC 1487 (**Ghazi**) Espinosa C found that a reasonable offer has been made “*in the context of the independent valuation being increased by 8% as the value of the offer made by the Applicant*”.

Application to 153 Walker Street

25. 153 Walker Street and 157 Walker Street are both zoned as B3 (Commercial Core). Both sites are part of the North Sydney Centre which is part of the North Sydney Central Business District.
26. Isolation of a site occurs when a site cannot be developed in accordance with the relevant planning controls in that area (in this instance, the NSDCP and the NSLEP). In considering whether the site isolation is acceptable, the Court is required to consider the two questions outlined in *Karavellas*, being:
- a. is amalgamation of the sites feasible?
 - b. can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible?
27. In considering whether an amalgamation of the sites is feasible, the Court takes into consideration the negotiation process and whether a reasonable offer has been made. The Court has previously accepted offers that were higher than an independent valuation as reasonable. We note that the reasonableness of the offer may also go to the methodology adopted in formulating the offer.
28. Once the first question has been answered, the Court then turns on the second question. The key principle as stated by Tuor C in *Cornerstone Property Group Pty Ltd v Warringah Council* [2004] NSWLEC 189 is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls are required, the principle that applies is whether both sites will be able to achieve “*a development of appropriate urban form and with acceptable level of amenity*”.
29. If 157 Walker Street was developed on its own, or with another adjoining site (such as 161 and 165 Walker Street), the issue of isolation of 153 Walker Street remains for the reasons below:
- a. the site area of 153 Walker Street is approximately 641 square metres and is below the site area requirement provided in clause 6.3 of the NSLEP. This limits the height of future development on 153 Walker Street to 45 metres unless it is amalgamated with an adjoining site.
 - b. we are instructed that the adjoining property to the south at 141 Walker Street does not intend on doing any developments due to deed restrictions. This prevents 153 Walker Street from being able to amalgamate with 141 Walker Street and further adds to the isolation of the 153 Walker Street.
 - c. any development on 157 Walker Street would need to consider isolation issues which must be considered as part of the development assessment process.
30. Furthermore, we note that:
- a. the height restriction in clause 6.3 of the NSLEP is to facilitate the objective provided in clause 6.1(e) of the NSLEP which states that the objectives of the division is “*to encourage the provision of high-grade commercial space with a floor plate, where appropriate, of at least 1,000 square metres*”. Allowing 153 Walker Street to remain isolated is inconsistent with this objective.

- b. Section 2.1.2 of Part C of the NSDCP lists *"high-rise and medium density, commercial and mixed used developments"* as part of the desired future character for the North Sydney planning area. Section 2.1.3 of Part C of the NSDCP provides that a development site *"should be of a size which enables the creation of large high quality floor plates which helps to reinforce the Centre's role as a Global City as identified within the Metropolitan Strategy"*. Due to the height restriction in clause 6.3(2)(c) of the NSLEP, 153 Walker Street as a stand-alone development site will not meet these objectives.
- c. As it stands, any development plans for 153 Walker Street could result in a building that is smaller than the current size. This is also inconsistent with the North District Plan and does not maximise the land use opportunity given that the maximum height permitted on the site is 215 metres.

Conclusion

- 31. In our view the relevant planning controls require that sites such as 153 Walker Street be amalgamated with adjoining properties to achieve orderly and economic use and development of the land.
- 32. We strongly recommend that the strategic future of 153 and 157 Walker Street be carefully considered given the implications that this advice may have on the future uses and development of 153 and 157 Walker Street in light of the current statutory context.
- 33. We respectfully suggest that opportunities be considered which encourage the amalgamated development of these two sites and promote the desired future character of the North Sydney Centre.
- 34. Please contact the writer if you have any questions about this letter, or require further information.

Yours faithfully,



per Christopher Shaw
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for **SHAW REYNOLDS LAWYERS**

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