



Our Ref: CHS:AK:200037

25 June 2021

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

**Attention:** Ben Boyd, Executive Strategic Planner and Joseph Hill, Director City Strategy

Dear Mr Gouldthorp,

**Re: Owner's consent for planning proposal – 153-157 Walker Street, North Sydney (DPIE REF- PP-2021-2695)**

1. By way of introduction, we act for the Owners Corporation of SP 50411 (the **Owners**). We have received instructions to write to North Sydney Council (**Council**) regarding owner's consent requirements for planning proposals. We understand that the Owners intend to lodge a planning proposal with respect to 153-157 Walker Street, North Sydney (the **Site**).

### **Summary of Advice**

2. In summary, planning proposals can be accepted and considered by Council without owner's consent. Owners consent is not required at any stage of a planning proposal application.
3. We note that the approach to owners consent requirements are different for development applications. Councils have the power to refuse development applications if they are not accompanied by owners consent. However, this power does not apply to planning proposals.
4. We set out our advice in more detail below. We note that in the event that Council is of a different view, we request that Council advise us of the legislative provisions or cases which are relied on in support of that position.

### **Owner's consent and development applications**

5. The requirements in relation to the lodgment of development applications are prescribed pursuant to the *Environmental Planning and Assessment Act 1979* (**EPA Act**) and the *Environmental Planning and Assessment Regulation 2000* (the **EPA Regulation**).
6. Relevantly, section 4.12(1) of the EPA Act states:

#### **4.12 Application**

*(1) A person may, subject to the regulations, apply to a consent authority for consent to carry out development.*

...

7. Clause 49 of the EPA Regulation specifies who can make development applications:

**49 Persons who can make development applications**

(1) A development application may be made—

(a) the owner of the land to which the development application relates, or

(b) by any other person, with the consent of the owner of the land.

...

(4A) The consent of an owner or other person under this clause is not required to be in writing.

...

8. Relevantly, we note that these owner's consent requirements are only in relation to development applications and that such consent is not required to be in writing.

9. In this regard, the NSW Court of Appeal considered the policy objectives of owner's consent requirements in *Sydney City Council v Ipoh Pty Ltd* [2006] NSWCA 300 and stated (with emphasis added):

*...the requirement of consent of the owner to a development application under the Act and Regulation is to be considered as a means of supporting the objects and the functioning of that legislative scheme; for example by ensuring that consent authorities are not troubled by applications that are pointless because title requirements for carrying them out will not be satisfied, and by ensuring that owners are not prejudiced by having development consents associated with their land which cause unwelcome increases in the value of land and thus in rates and taxes payable on it.*

10. In this regard we note that the utility of obtaining any such consent is related to providing consent authorities with a degree of surety that the applications before them will be progressed following the determination of those applications. The provision of owner's consent to a development application does not provide an enduring consent to carry out the actual works. In the event that development consent is granted and the owner of the land changes, the eventual carrying out of the proposed works will only succeed with the further permission of any new owner.

**Owners Consent with respect to planning proposals**

11. The making of planning proposals is contemplated by section 3.32 of the EPA Act, with the only reference to land owners being at subsection (3):

**3.32 Planning proposal authority**

(1) For the purposes of this Division, the **planning proposal authority** in respect of a proposed instrument is as follows—

(a) the council for the local government area to which the proposed instrument is to apply, subject to paragraph (b),

(b) if so directed under subsection (2)—the Planning Secretary, a Sydney district or regional planning panel or any other person or body prescribed by the regulations.

...

(3) A planning proposal authority that is requested by the owner of any land to exercise its functions under this Division in relation to the land may, as a condition of doing so, require the owner to carry out studies or provide other information concerning the proposal or to pay the costs of the authority in accordance with the regulations.

...

12. Section 3.33 of the EPA Act provides a list of items that must be included as part of a planning proposal. Owner's consent is not listed as a requirement:

**3.33 Planning proposal authority to prepare explanation of and justification for proposed instrument—the planning proposal**

...

(2) The planning proposal is to include the following—

- (a) a statement of the objectives or intended outcomes of the proposed instrument,
- (b) an explanation of the provisions that are to be included in the proposed instrument,
- (c) the justification for those objectives, outcomes and provisions and the process for their implementation (including whether the proposed instrument will give effect to the local strategic planning statement of the council of the area and will comply with relevant directions under section 9.1),
- (d) if maps are to be adopted by the proposed instrument, such as maps for proposed land use zones; heritage areas; flood prone land—a version of the maps containing sufficient detail to indicate the substantive effect of the proposed instrument,
- (e) details of the community consultation that is to be undertaken before consideration is given to the making of the proposed instrument.

(3) The Planning Secretary may issue requirements with respect to the preparation of a planning proposal.

13. Pursuant to section 3.33(3), the Planning Secretary has issued a guideline titled "*Planning Proposals – a guide to preparing planning proposals*" and published in December 2018 (the **Guide**). The Guide provides general guidance and information on the making of planning proposals.

14. Part 1.2 of the Guide relevantly states:

*The Act does not say who must prepare the information needed for a planning proposal. In practice, the planning proposal document can be prepared by a council, a landowner or developer seeking to change the planning controls relating to a particular site, area, locality or local government area, or by a third party on behalf of a landowner or council.*

15. This excerpt demonstrates the breadth of the planning proposal powers. In our view it would be impractical to require owner's consent in circumstances where changes of planning controls are being sought, and in particular in circumstances where those changes will impact one or more specific sites in circumstances where there is demonstrated strategic merit in relation to the change.

16. Furthermore, a requirement for owner's consent with every planning proposal would also provide a significant impediment to all local councils in relation to their planmaking powers

where owner's consent is not forthcoming, such as with respect to strategic upzonings, downzonings, or heritage listings. It is our view that it would be impractical for councils to obtain owner's consent prior to the submission of planning proposals for gateway determination for each proposed LEP amendment. Under the legislative scheme, the treatment of planning proposals prepared by third parties is the same as those of councils.

17. In addition, with respect to the information to accompany a planning proposal, the Guide states at part 1.3 (with *emphasis* added):

*A planning proposal relates only to a LEP amendment. It is not a development application nor does it consider specific detailed matters that should form part of a development application.*

18. It is our view that this comment includes the specific detailed matters that should form part of a development application as prescribed in the EPA Act and EPA Regulation, including the owner's consent requirements at clause 49 of the EPA Regulation.
19. The EPA Act and the EPA Regulation do not require owner's consent for the purposes of the preparation of a planning proposal under Part 3 of the EPA Act. Furthermore, there is no power to reject a planning proposal application based on the absence or refusal of owner's consent. In circumstances where equivalent provisions have been explicitly provided for with respect to the making of development applications, the absence of such provisions in relation to the making of planning proposals reflects a deliberate legislative intent and as a result, there are no owner's consent requirements in this respect.
20. We note that the Guide recognises that planning proposals may be prepared by a variety of parties, and that the planning proposal is distinct from a development application in that it is merely adjusting the controls of the site. The approval of a planning proposal over land does not affect the owner's rights to provide consent (or otherwise) at the later development application stage.

### **Next steps**

21. As explained above, owner's consent is not required for the lodgement of a planning proposal.
22. In the event that Council is of a different view, we request that Council advise us of the legislative provisions or cases which are relied on in support of that position.
23. Please contact the writer if you have any questions about this letter, or require further information.

Yours faithfully,



*per* Christopher Shaw  
Principal  
for **SHAW REYNOLDS LAWYERS**

Alyce Kliese  
Senior Solicitor

Mobile: 0414 353 818  
Email: [chris.shaw@shawreynolds.com.au](mailto:chris.shaw@shawreynolds.com.au)

Mobile: 0400 438 072  
Email: [alyce.kliese@shawreynolds.com.au](mailto:alyce.kliese@shawreynolds.com.au)

**The Owners – Strata Plan 50411**

24 March 2021

North Sydney Council  
200 Miller Street  
North Sydney NSW 2060

Dear Sir / Madam

**Planning Proposal – 153-157 Walker Street, North Sydney  
Owners Consent Letter**

On behalf of the owners of Strata Plan 50411 comprising the subject land we hereby provide owners consent to lodge a Planning Proposal on our behalf for the property 153 Walker Street, North Sydney.

Yours Sincerely,



Rick Miller

**On behalf of The Owners – Strata Plan 50411**