

6 December 2024

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Department of Planning, Housing and Infrastructure

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Dear Thomas

SSD-71457960 | Yorktown Parade and Fitzgerald Avenue, Maroubra - Affordable Housing Redevelopment

1. We act for The Owners - Strata Plan 90056 at 189 Fitzgerald Avenue Maroubra, NSW 2035 (our **client**) and refer to the State Significant Development Application, SSD-71457960 (the **SSD**) at 195-213 Fitzgerald Avenue and 40-64 Yorktown Parade, Maroubra (the **Site**).
2. Our client's principal concerns relate to:
 - (a) The clause 4.6 variation request has not been properly made and the consent authority does not have the power to approve the SSD.
 - (b) Insufficient detail to confirm the contamination status of the development site that affects the consent authority's level of satisfaction about the suitability of the site.
 - (c) The removal of public trees and lack of clarity on the location of trees that are proposed to be removed with some trees proposed to be removed that are outside the site boundary.
 - (d) The impact on the locality as a result of the intensification of street parking and the reconfiguration of driveway arrangements causing unacceptable traffic impacts.
3. The individual and cumulative impact of the above issues mean that the DA should be refused, or at the very least further consultation conducted with our clients to ensure its concerns are better addressed in what is a very significant redevelopment proposal.
4. Our client fully appreciates the need for good quality, new, and additional affordable housing within Maroubra and acknowledges the nature of the existing development proposed to be replaced. However, our client respectfully submits that renewal of existing estates by the NSW Government should better balance the surrounding existing amenity. It is our client's submission that this development proposal goes too far.

Jurisdictional issue

Clause 4.6 variation request not made

5. The request made under clause 4.6 of the *Randwick Local Environmental Plan 2012 (RLEP)* seeks to vary the height standard as the fourth storey on building 1B and 1C exceed the height limit by 3.65 metres and 2.65 metres respectively. The lift core of buildings 2C and 2D exceed the height limit by 1.25 metres-1.45 metres.

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6. A clause 4.6 variation request must be justified by demonstrating:
 - (a) *"that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case"* (clause 4.6(3)(a)); and
 - (b) *"that there are sufficient environmental planning grounds to justify contravening the development standard"*: (clause 4.6(3)(b)).
7. Our client submits that the clause 4.6 request submitted in support of the proposed SSD does not satisfy the requirements of clause 4.6(3)(a) and (b) and addresses each requirement below.
8. Underlying the technical legal arguments as to why the jurisdictional gateway enlivening the power to grant consent does not exist based on the drafting of the clause 4.6 request, our client is concerned of the continued elasticising of the height limit.
9. The applicant, a NSW Government authority, already benefits from the facultative height limit contained in the *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*, and not satisfied with that increased height limit then seeks a further dispensation to that limit through this clause 4.6 request.

Clause 4.6(3)(a) Unreasonable or unnecessary element

10. The decision in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**) found that merely showing that a development achieves the objectives of the development standard will be insufficient to justify that a development's compliance with the development standards is unreasonable or unnecessary.
11. The clause 4.6 variation request seeks the additional height for the following reason:

"The additional height sought by this request is to ensure that the provision of affordable housing is maximised. Without the additional height, fewer affordable housing unit could be delivered which would reduce the Project's achievement of this objective".
12. Whilst the provision of affordable housing is a laudable objective, there will always be a limit to what is reasonable, and that is reflected generally by compliance with the controls. The controls should not be capable of being dispensed with simply because the type of development proposed constitutes affordable housing and more is considered better. Just because the proposed development would provide a commendable social good does not render the development standard unreasonable or unnecessary. Most if not all applications provide a social good.
13. In *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [46] the Court stated that compliance with the development would be unnecessary or unreasonable if *"the underlying objective or purpose would be defeated or thwarted if compliance was required"*. That is not the case here as plainly there will be compliance and a substantial increase in affordable housing will continue to be provided compared to the status quo, and no underlying objective or purpose would be thwarted if the liberal height limit in the Housing SEPP is complied with.
14. The objective of the proposed SSD is still provided for. Compliance with the height control is not unreasonable or unnecessary as a good development can still be provided for by not including a fourth storey, which is anomalous in the area.
15. Finally, the objectives of the zone will not be thwarted by compliance with the already generous height limit in the Housing SEPP.

Clause 4.6(3)(b) - Sufficient Environmental Planning grounds

16. In analogous circumstances to the proposed SSD, in Four2Five the Commissioner found at [60].

"The environmental planning grounds identified in the written request are the public benefits arising from the additional housing and employment opportunities that would be delivered by the development..."

*"These grounds are not particular to the circumstances of this proposed development on this site. To accept a departure from the development standard in that context would not promote the proper and orderly development of land as contemplated by the controls applicable to the B4 zoned land, which is an objective of the Act (s 5(a)(ii)) and which it can be assumed is within the scope of the "environmental planning grounds" referred to in cl 4.6(4)(a)(i) of the LEP".
(Emphasis added)*

17. Similarly, the grounds in the clause 4.6 for this application are not particular to the circumstances of this proposed development on this site but apply more generally. As mentioned already, the proposed development relies on the beneficial affordable housing provisions under the Housing SEPP which already provides for a 30% bonus of the height of the building. If consent is granted, the effect would have the effect of granting a bonus on a bonus. Exceeding a height limit that has already been increased as result of the Housing SEPP should not be considered an entitlement simply because the development involves affordable housing, and must still provide adequate environmental planning grounds.

18. The repeated references throughout to the delivery of affordable housing as the "*Premiers Priority*" does not permit the applicant to circumvent the jurisdictional pre-requisites contained in clause 4.6 to a development proposing an exceedance of the height limit. These continual references to those priorities do not constitute a planning ground and the importance of a proper justification being made was affirmed by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 with the following at paragraphs [23]-[24].

(a) The environmental planning grounds must be sufficient "*to justify contravening the development standard*" in relation to clause 4.6(3)(b), not simply promote the benefits of carrying out the development as a whole. *The "focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds"* (at [24]).

(b) The clause 4.6 request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard to satisfy the consent authority under clause 4.6(4)(a)(i) that the written request has adequately addressed this matter.

19. Commissioner Pearson in Four2Five found that the development proposed did not "*promote the proper and orderly development of land as contemplated by the (relevant) controls*". In similar circumstances, the proposed SSD should not be allowed to depart from the development standards without site specific reasoning.

20. The Clause 4.6 variation request also refers to the "*15-20m wide verge that includes established canopy trees*". The references made to 'screening' and 'extensive verge' cannot be relied upon to ameliorate the physical non-compliant works. In *Rebel MH Neutral Bay Pty Ltd* [2018] NSWLEC 191 at [97] the Court found:

"Second, I have considerable doubt as to whether it is appropriate to rely on vegetation on a neighbouring property (this being relevant because much of

*the vegetation on the site will be removed if the proposed development is approved) should be relied upon for screening purposes. The question of borrowing vegetation values for such purposes has not been dealt with in any of the Court's planning principles (the second element of the planning principle in *Super Studio v Waverley Council* (2004) 133 LGERA 363; [2004] NSWLEC 91 not being relevant). There has been no general proposition adopted (and I do not advance this concern as a general proposition, in these proceedings) on such an issue." (Emphasis added)*

21. The landscaping on the road reserve should not be relied upon as a reason in support of the height exceedance.

Contamination

22. Requirement 16 of the Planning Secretary's Environmental Assessment Requirements (**SEARS**) required the following.

"In accordance with Chapter 4 of SEPP (Resilience and Hazards) 2021, assess and quantify any soil and groundwater contamination and demonstrate that the site is suitable (or will be suitable, after remediation) for the development".

23. The jurisdictional requirements outlined in section 4.6 of the *State Environmental Planning Policy (Resilience and Hazards) 2021* (**Hazards SEPP**) are provided below.

(1) A consent authority must not consent to the carrying out of any development on land unless—

(a) it has considered whether the land is contaminated, and

(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and

(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

24. Based on the material lodged with the SSD, there appears to be gaps in the confirmation of the contamination status of the site. Section 2.3.5 of the Environmental Impact Statement prepared by TBA Urban (**EIS**) says the following.

*Due to occupation of the Site by social housing residents, borehole testing was carried out in lieu of test pits recommended in NSW Environmental Protection Agency (EPA) made or endorsed guidance. Soil samples were collected via hand auger at 19 locations. **It was noted that further testing in accordance with a supplementary contamination assessment (SCA) would be required to address identified data gaps due to the access constraint.***

25. The interim advice of the site auditor made the following comment.

"While most of the data is likely to be accurate, there is some doubt regarding possible loss of volatiles from sampling of hand augers. However, the site history and walkover inspections have not identified point sources of contamination which have associated volatile contaminants".

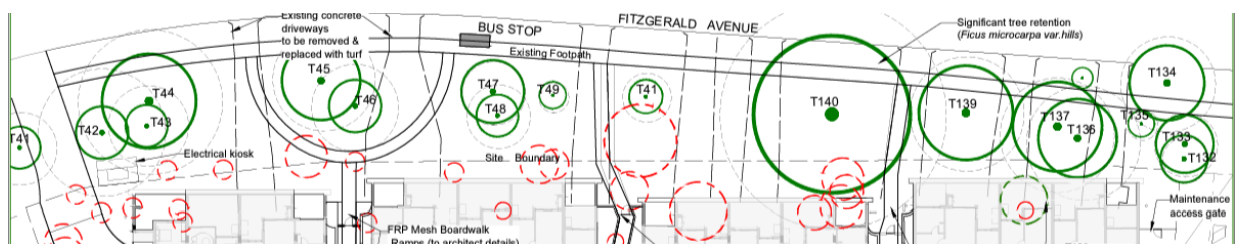
26. The EIS concludes that a Supplementary Contamination Assessment is to be "undertaken following controlled demolition and removal of the structures and hardstand areas". There is understandable concern that the prevailing contamination issues on the site will not be known until demolition of the existing dwellings occur and earthworks begin.

27. Our client is concerned that previous contamination investigations conducted by Alliance Geotechnical and Environmental solutions found (referred to in the RAP), that *"there is a potential for unacceptable land contamination to be present at the site as a result of current and previous land use activities"*.
28. The Detailed Site Investigation report also identified several areas of environmental concern (**AEC**) on the site and any contaminants of potential concern (**COPC**). There is a large number of AECs and COPC with potential contaminants including but not limited to PFAS and asbestos.
29. Our client has reservations about the ability of the consent authority to be satisfied that the site is suitable for the development due to the acknowledged 'data gaps' about any contamination that may be present. The site auditor's interim advice state that *"in the Auditor's opinion, the RAP provides an adequate framework that **should be able to ensure that the site is suitable for the proposed land uses if adequately implemented**. Successful validation will be required to confirm this"*.
30. The consent authority cannot be satisfied that the land will be suitable for the purpose for which the development is proposed and cannot be sure without a determination of the contamination that is present on the site. Our client's submission is that the SSD should be refused on the basis that jurisdictional requirements under the Hazards SEPP are not satisfied.

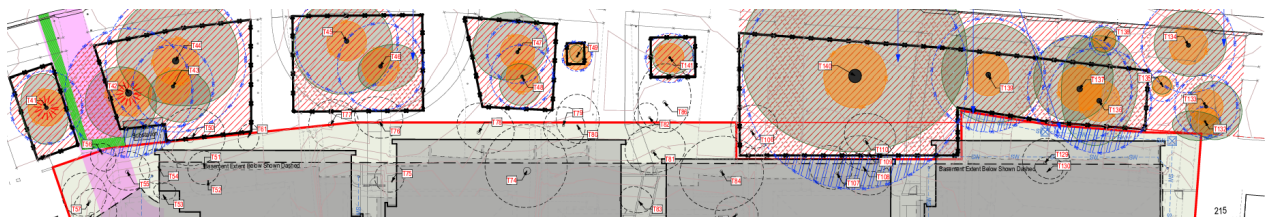
Merit Issues

Removal of trees

31. We appreciate that a BDAR waiver was granted by DPHI on 21 October 2024 however we refer to the numerous references to the EIS at section 7.9 which incorrectly states that the *"proposal includes the retention and protection of all trees within Fitzgerald Avenue and Yorktown Parade, and the removal of 122 trees on the Site"*. This is again reinforced throughout the EIS at section 7.5.1.
32. This appears to be an incorrect statement as evidenced by the Landscape and arboricultural plans which show that Trees 82, 86 are located outside the site boundary and are proposed to be removed.



Appendix J - Landscape Plans prepared by mclean design - General Arrangement Plan



Appendix Q - Arboricultural Plan prepared by Arterra Design Pty Ltd - Tree Protection & Removal Plan

33. There is a discrepancy between the landscape and arboricultural plans which identify that several trees are in fact not within the site boundary. Specifically tree T76 and T77 are

located on the site boundary on the arboricultural report but are located outside the site boundary in the landscape report.

34. The impact upon the locality cannot be properly assessed without accurate identification of the location of the trees. If street trees are not maintained the characteristics of the street will be altered. Further, we have not been made aware of Council's agreement to any of the trees being removed in circumstances where there is conjecture as to what trees will be retained.
35. Clarification on the exact location of trees should be undertaken to ensure that during construction trees are not incorrectly removed.

Parking

Construction Parking

36. The Transport and Accessibility Impact Assessment prepared by ttp at Section 9.8 only considers the number of trucks that will use the site. There has been no consideration as to the number of construction vehicles that will attend the site.
37. We appreciate that the Assessment considers that tradespeople should somewhat optimistically use public transport and suggests 'carpooling'. However, this is an unlikely scenario. A more likely scenario is that tradespeople will attend the site in their private vehicles with their tools. This needs to be assessed, with measures proposed to ameliorate the impact caused.
38. We query the Assessment of the impact of construction vehicles and consider that ttp has not attempted to quantify the traffic impact of vehicles other than 'trucks' to the site.

Car parking and unacceptable traffic impacts

39. The residents of units with the Owners Corporation are aware of and regularly experience the impacts of limited on-street parking availability in the area. Our client is concerned that the Proposed Development will have an adverse traffic impact and intensify these issues. The concerns in this regard are directed towards the scale of the SSD. Our clients are justifiably concerned due to the following.
 - (a) The SDD will increase the number of dwellings on the site from 33 to 144 units.
 - (b) The SDD will include 144 units but only provide 70 parking spots for residents and 7 parking spots for visitors.
 - (c) The flow of traffic into the proposed SSD will be intensified by one point of entry on Fitzgerald Avenue.
40. Section 7.8.1 of the EIS says the following.

Parking requirements for the Project have been assessed based on the non-discretionary applicable rates set out in the Housing SEPP as outlined in Table 27.
41. Section 2(e) of the Housing SEPP provides the parking rates required for development:
 - (2) *The following are non-discretionary development standards in relation to the residential development to which this division applies—*
 - (e) *the following number of parking spaces for dwellings used for affordable housing—*

(i) for each dwelling containing 1 bedroom—at least 0.4 parking spaces,

(ii) for each dwelling containing 2 bedrooms—at least 0.5 parking spaces,

(iii) for each dwelling containing at least 3 bedrooms— at least 1 parking space,

42. In *Parker Logan Property Pty Ltd v Bayside Council* [2017] NSWLEC 1709 (**Parker Logan**) considered similar provisions for boarding house parking rates under the previous *State Environmental Planning Policy (Affordable Rental Housing)* 2009 at [27].

"The proposal is for 18 car parking spaces. As the minimum requirement of 16 car parking spaces is met, one extra car parking space in excess of the minimum under subcl 29(2)(e)(i) is, in all the circumstances of this proposal, not a cause for concern in my view. The provision at (e) does not specify exact requirements that must be met and not exceeded and this is clear from the language, "at least", in (e)(i). Instead, subcl 29(2)(e)(i) specifies the minimum requirement for car parking spaces that, once met, cannot be used as a reason for refusal".

43. Based on the above decision, the applicant has the ability to provide more parking to its residents but has elected not to do so and instead place pressure on already limited street parking.
44. Our clients are concerned that 70 parking spots for 144 units will contribute to further congestion of cars parked on the surrounding streets, in circumstances where the parking is already limited.
45. The proposed driveway and basement design concentrates access to the development at one point on Fitzgerald Avenue. The SSD site is bounded by ANZAC Parade (a major arterial road) and Malabar Road. There are driveways to the adjoining properties directly next to the proposed driveway, intensifying the traffic flows along Fitzgerald avenue.
46. Currently the site has several driveways spaced along Yorktown Road and Fitzgerald Avenue. This arrangement allows for an evenly distributed flow of traffic.
47. Our clients believe that the proposal would be improved by considering options to distribute traffic more evenly such as providing another driveway along Yorktown Parade. Given the intensification of the site, suitable alternatives should be considered to avoid unnecessary traffic impacts as a result of a design that is supported by limited traffic assessment.
48. Further our clients are also concerned that the traffic impact assessment has also failed to consider the impact of traffic travelling east on Fitzgerald avenue turning right into the proposed development and the impact on traffic flows. The interaction of the existing driveway with our client has the potential to create traffic conflicts due to the design and proximity of the driveways side by side as well as the number of vehicles entering and exiting each site. Our client wishes to avoid additional traffic conflict risks created by this development.
49. Separately, given the significant increase in the local population there needs to be consideration of public transport and other infrastructure that are needed to support the increase in people. Whilst our client appreciate that is somewhat separate to the application, given the substantial population increase this application proposes, there should be more thorough assessment of the impact on the capacity of current transport options.

Conditions to be imposed

Dilapidation report

50. The geotechnical report has concluded that the excavation of the basement will not result in vibrations that could pose a risk to neighbouring properties. Our clients request that the following conditions be imposed.
- (a) A detailed dilapidation report to be prepared by a suitably qualified engineer prior to the issue of a Construction Certificate on units within our client's block to protect adjoining properties from the impact of the extensive excavation for the basement car park.
 - (b) A second detailed dilapidation report should be prepared prior to the issue of an Occupational Certificate.

Construction hours

51. Given the intensity of the proposed redevelopment it is requested that clear conditions are imposed to ensure that construction only occurs during certain hours. We appreciate that this is standard, but our clients are anxious to ensure construction noise and other impacts are limited. Our clients request that there is clear communication with neighbouring residents to limit the impact to residents working from home when noisy work is taking place on site.

Waste Management

52. Our clients are concerned that despite the Operational Waste Management Plan being prepared, that bins from the proposed SSD will be placed on the road for collection instead of on the kerbside further reducing available street parking.
53. A proposed condition to address this is as follows.
- "The placement of bins for collection is to be in accordance with kerbside collection in the approved Operational Waste Management Plan prepared by Waste Audit & Consultancy Services (Aust) Pty Ltd. **No bins are to be placed on Yorktown Parade or Fitzgerald Avenue**". (Emphasis added)*
54. It is requested that a positive covenant be made in accordance with section 88E of the Conveyancing Act 1919 with Randwick Council appointed as the authority to enforce, release or vary the covenant as the authority responsible for waste collection for the local government area.
55. A positive covenant has become standard practice adopted by Councils throughout Sydney dealing with waste practices. The purpose of this covenant is to ensure that the limited parking space on Fitzgerald Avenue or Yorktown parade is not further reduced by bins being placed on the street rather than the allocated kerbside collection points.

Notification issues

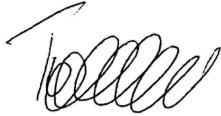
56. We have reviewed the Engagement Report lodged with the SSD which refers to notification letters that were sent to local residents. Our client is one of the sites that was identified on the 'scope of notification map'. We are instructed that letters were not received by the residents of the apartment complex and were not aware of the consultation sessions. They have only become aware of this project at the commencement of the exhibition period.
57. Our clients are obviously quite concerned that proper consultation with the community has not taken place. Aside from the legal issues with notification, consultation with the

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community is a cornerstone of the planning system in New South Wales and we strongly encourage the applicant to ensure that local residents are engaged with going forward.

58. For the reasons discussed above, the current proposal in our clients' submission raises problems that warrant the application being refused.

Yours faithfully



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