

Our Ref: 1026



11 March 2025

Department of Planning, Housing and Infrastructure
Locked Bag 5022,
PARRAMATTA NSW 2124.

Dear Sir/Madam,

Subject: State Significant Development: Rhodes East Mixed Use Seniors Housing

Subject site: 15-17 Blaxland Road, 25-27 Blaxland Road & 440-442 Concord Road, Rhodes

Objection on Behalf of: Owner of Lot D, DP 432340, 31 Blaxland Road, Rhodes

We are instructed by Holding Redlich Lawyers and are engaged by the owners (Client) of 31 Blackland Road (**Subject Site**). The purpose of this letter is to object to the proposed development on the following grounds.

- 1 The Subject Site will become isolated in circumstances where a fair market offer has not been made by the Applicant to purchase our client's land.
- 2 Orderly and economic development of the Subject Site in isolation under the design proposed by the SSDA, if consolidation cannot occur

The basis of this objection is therefore founded on the site isolation principles set out in *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 (*Karavellas Principles*).

The *Karavellas Principles* are in fact 2 questions:

- Is amalgamation feasible?
- Can orderly and economic development of the separate sites occur?

However, the Environmental Impact Statement (EIS) accompanying the SSDA argues that site isolation is not a relevant consideration in the assessment of this application.

Accordingly, before dealing with the *Karavellas Principles* it is necessary to assist the Department in its assessment of this aspect of the Applicant's contention.

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1. IS SITE ISOLATION A RELEVANT CONSIDERATION IN THE ASSESSMENT OF THE SSDA?

The Applicant has opined that there is no minimum lot size control applicable to either the subject site or our client's site, nor is there any explicit requirement under the planning controls to amalgamate these sites¹.

This is incorrect. First, the NSW Land and Environment Court has consistently held that the Karavellas Principles apply even when there are no LEP provisions directing site isolation. See for example:

- ABC Planning Pty Ltd v Cumberland Council [2019] NSWLEC 1278.
- Ghazi Al Ali Architect Pty Ltd v Canterbury Bankstown Council [2020] NSWLEC 1487
- HGM Corp Pty Ltd v Sutherland Shire Council [2020] NSWLEC 1418
- Hamdan Co Group Pty Ltd v Canterbury-Bankstown Council [2018] NSWLEC 1255

Second, any fair reading of the Canada Bay Local Environmental Plan 2013 (CBLEP 2013) with Part K16 of Canada Bay DCP (the DCP) makes plain the planning controls anticipate amalgamation will occur. It is only through amalgamation that the gross floor area of individual master plan buildings can be reconciled against the LEP's floor space ratio (FSR) development standard.

We trust that the Department will reject the Applicant's suggestion that site isolation is not an applicable consideration in the assessment of this SSDA.

2. IS AMALGAMATION OF THE SITES FEASIBLE?

The principles to be applied in determining the answer to this first question of Karavellas are set out in *Melissa Grech v Auburn Council* [2004] NSWLEC 40 (Grech).

To summarise, for an applicant to demonstrate that amalgamation is not feasible, the following conditions should be true:

¹ Ethos Urban, *Environmental Impact Statement Rhodes East Mixed Use Development: 15-17, 25-27 Blaxland Road and 440-442 Concord Road, Rhodes*, 22 January 2025, p. 64.

1. Negotiations should be commenced at an early stage and ideally prior to lodgement of a development application.
2. Offers to purchase must be reasonable and be accompanied by at least one independent valuation.

The following outlines key issues concerning the offers to purchase, which have been made by the Applicant to our Client. This Practice is not bound by any "commercial in confidence"² restrictions which are reported to have limited the information which could be reported by the Applicant's town planning consultant.

2.1. History of Purchase Offers

- 28.10.2020 – Ecove offer [REDACTED] with the stated purpose of the offer to be "in an effort to avoid your property becoming isolated and undevelopable"³.
- 21.07.2023 – Ecove offered two amounts based on two scenarios (see Section 2.1.1 below).
- 12.03.2024 – HDC Town Planning Opinion Report
- 03.07.2024 – Ecove offered [REDACTED] via solicitors.

We are additionally instructed that a number of verbal offers have been made between 2020 and 2024. We do not have sufficient information about those offers to given them consideration in this letter.

Further analysis of the valuation and town planning report which accompanied each of the Ecove offers to purchase is set out below. Before consideration of that detail, the following summary observations are made about the three above listed offers.

- On 30 October 2021, the Rhodes Precinct was rezoned by the introduction of Part 7 of CBLEP 2013. This LEP amendment resulted in the floor space ratio of the Subject Site increasing from 0.5:1 to 6:1.
- Despite 12 times increase in statutory FSR, the second offer was less than the first.

² Ethos Urban, *Environmental Impact Statement Rhodes East Mixed Use Development: 15-17, 25-27 Blaxland Road and 440-442 Concord Road, Rhodes*, p. 64.

³ Ecove Developments Pty Ltd, '31 Blaxland Road Sale', 28 October 2020.

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- At the date of the final offer, Ecove were in possession of the HDC Town Planning Opinion Report dated 12 March 2024 (**HDC Report**) a copy of which is included as Annexure 1. The 2024 Ecove offer did not reference the HDC Report and did not enquire about the reasons for differing town planning advice which was before it.

2.1.1. July 2023 Two Scenario Valuation Offer

This offer was made in the form of a six-page letter plus attachments⁴. Because of its detail, it is necessary to discuss this offer in more than simply dollar amount offers. A copy of this offer is included as Annexure 2.

Observations Concerning Bonus FSR

FSR bonuses available under cl 7.16 of CBLEP 2013 were said to not be applicable to market value because attainment of these bonuses attracts additional expense by the developer⁵.

While it is correct to observe that attainment of any form of bonus is likely to require elevated construction costs or would be tailored to a specific end user profile, the offer does not provide any evidentiary basis for concluding that bonus FSR should be applied nil value. No attempt is made in the valuation to determine a lesser piecemeal rate per square metre for bonus FSR.

The offer does not contemplate bonus FSR available under s 87 of SEPP (Housing) 2021 which is relied on by the SSDA. These bonuses also likely require valuation on a separate, piecemeal rate per square metre. Construction standards are higher and the market for seniors living accommodation is smaller. However, like all forms of FSR bonus, there is no basis to presume they should be applied nil value.

We observe that all types of FSR bonus are included in the town planning framework to incentivise developers to deliver a particular development type or form. If the bonuses had no economic value, they would not achieve their policy intent.

Limitations on the Stand Alone Development Potential of 31 Blaxland Road

The offer observes that 6:1 FSR is not achievable on the subject site because of the height of buildings and setback controls which were said to apply.

⁴ Ecove Developments Pty Ltd and Bassam Aflak, '31 Blaxland Road Sale', 21 July 2023.

⁵ Ecove Developments Pty Ltd and Bassam Aflak, '31 Blaxland Road Sale', p. 2.

First, the analysis is factually wrong because the height of buildings development standard is 80m (say 26 storeys). GFA to 6:1 FSR could be accommodated with only 28% site coverage. Second, and far more significantly, the planning controls do not anticipate any land within the Station Gateway East Character Area being developed as a stand-alone site. Accordingly, isolated development potential is not representative of the highest and best use of the Subject Site.

The Two Scenario Valuations

Described on pages 5 and 6, appurtenant features of the two scenarios were:

- Scenario 1 – Presumed Maximum GFA of 1,246 m²
 - Binding sale in the amount of [REDACTED]
- Scenario 2 – Presumed Maximum GFA of 6:1
 - Ecove would seek changes to the planning controls at its expense.
 - 3-year call option of [REDACTED]

Observations

- By assessing the stand-alone development potential of the subject site, the July 2023 offer misapprehended the Subject Site's highest and best use.
- The Scenario 2 valuation falsely asserts the need to affect changes to the applicable planning controls in order to realise 6:1 FSR.
- Whether a call option is a “fair market value offer” relevant to the Karavellas principles is at least questionable. Of relevance to the consent authority is that an option agreement does not provide certainty that the land will come into amalgamated ownership.
- The call option fee offered by Ecove under Scenario 2 is suggestive of the dollar value of a fair market offer. However, to be reflective of present day development potential, the following adjustments to the call option value would need to be made:
 - Positive adjustment for time. Reason: the value of the call option must be discounted for the 3-year time period it will take to be realised.
 - Negative adjustment for risk. Reason: the call option would only be exercised if present day risks are satisfactorily resolved. In that sense, it is a value which assumes no risk. If Ecove was to purchase the site at the present day, it is acknowledged that an element of risk is

present. The quantum of that risk is a matter for valuation and is not discussed within this letter.

- Positive adjustment for bonus FSR. Reason: It is methodologically incorrect to ascribe nil value to bonus FSR. A lesser rate per square metre compared with baseline FSR is appropriate. Quantification of the delta is a matter for valuation and is not addressed in this letter.
- Positive adjustment for adjoining owner uplift. Reason: The planning controls require amalgamation. If amalgamation is not achieved, the risk exposure to Ecove in not gaining development consent is substantial. A prudent purchaser acting in the position of Ecove would seek to de-risk the attainment of development consent by offering more than a value derived merely by the contributory development potential of the Subject Site.

2.2. General Analysis of Ecove Valuation and Town Planning Reports

The 2024 offer was based on an Indicative Market Assessment Report, prepared by CBRE Valuation & Advisory Services dated 27 May 2024 (**CBRE Report**). That report was in turn, reliant on a Town Planning Report prepared by Ethos Urban dated 13 June 2024 (**Ethos Urban Report**). Putting aside the curiosity that the town planning report post-dates the valuation report on which it relied, it is clear that the CBRE Valuation was heavily reliant on the assessment of development potential contained within the Ethos Urban Report.

The Ethos Urban Report states⁶:

While the amalgamated redevelopment outcome allows for the component of the development that falls on the site to form part of an amalgamated shop top housing, seniors housing or commercial development on the site, this will not increase the development yield that can be achieved on the Ecove site. The Ecove site cannot achieve the maximum FSR that is permitted under the Canada Bay LEP 2013 and the seniors housing bonus provided under section 87 of the Housing SEPP, given the applicable planning controls, most notably including the overshadowing restrictions that apply to the site subject to clause 7.3 of the Canada Bay LEP 2015 .

⁶ Ethos Urban, *Environmental Impact Statement Rhodes East Mixed Use Development: 15-17, 25-27 Blaxland Road and 440-442 Concord Road, Rhodes*, p. 28.

It is noteworthy that this definitive statement was made in the absence of any solar diagrams to test the conclusion. It is also noteworthy that elsewhere in the Ethos Urban Report, the effect of overshadowing achievable GFA is made in far less certain terms⁷.

... adjacent public open spaces are subject to sun access protection controls under clause 7.3 of the Canada Bay LEP 2013. In our opinion there could be an inherent conflict between the bonus building height control pursuant to the Housing SEPP and sun access protection control under the Canada Bay LEP 2013. This is because should the additional height afforded under the Housing SEPP then bring a development into noncompliance with the sun access protection provision of Canada Bay LEP 2013, there is an inconsistency between the standards and therefore the Housing SEPP prevails.

Perhaps unsurprisingly, given the absence of any solar plane testing, that town planning opinion is counterfactual to the actual SSDA which has been lodged. The SSDA proposes the maximum FSR of 8.25:1 (p.31), which includes the 6:1 maximum mapped permissible FSR plus a 10% bonus under clause 7.16 of CBLEP and a 25% bonus under section 87 of the Housing SEPP (Appendix C – Statutory Compliance Table, p. 18). The shadow diagrams provided in the Architectural Drawings (DA09.000 & DA09.001) show no difficulties with this development achieving compliance with clause 7.3 of CBLEP 2013.

2.3. Valuation Consequence of the Incorrect Town Planning Opinion

Sections 10.3 and 10.4 of the CBRE Report calculate the value of our Client's land assuming two alternative development types and gross floor area yield. These are:

Development Option	Assumed GFA	Rate per sqm of GFA	Value
Commercial Development Site	977 sqm	██████	██████
"Shop Top" Development Site	1,178 sqm	██████	██████

Table 1: Summary of CBRE Development Options and GFA Rates

The most important metrics are the assumed GFA.

The FSR for each development option is:

- Commercial FSR: 2.2:1
- Shop Top GFA: 2.7:1

⁷ Ethos Urban, *Environmental Impact Statement Rhodes East Mixed Use Development: 15-17, 25-27 Blaxland Road and 440-442 Concord Road, Rhodes*, p. 22.

Adopting the GFA calculation on page 31 of the EIS, and assuming zero value for the fire station, then the SSDA proposes the following land use split:

Residential	70%
Independent Living Units (ILU)	7%
Aged Care	15%
Retail	8%
Fire Station	NA
Total	100%

Table 2: Derived Land Use Mix of SSDA

If the assumption is made that ILU and Aged Care is a form of Residential, then the residential to non-residential split is about 92% to 8%.

Applying that land-use mix to our client's land, adopting the GFA rate/sqm from the CBRE Report, and assuming zero value for the fire station land, the effect on value of the erroneous advice contained within the Ethos Urban Report is readily appreciable.

Development Option	Assumed GFA	Rate per sqm of GFA	Value
Commercial Development Site	291 sqm	\$ [REDACTED]	[REDACTED]
"Shop Top" Development Site	3,352 sqm	\$ [REDACTED]	[REDACTED]
Total	3,643 sqm (8.25:1 FSR)		[REDACTED]

Table 3: Application of CBRE GFA Rates to Subject Site Assuming the Same GFA and Land Use Mix as the SSDA

We do **not** say that the value of the Subject Site is [REDACTED]. Calculation of value is a matter for valuers. Rather, the purpose of the above analysis is to demonstrate that adopting the same rates as the CBRE Report, the development potential error in the Ethos Urban Report results in a valuation difference in the order of 285% to 303% depending on how the errors in the land use assumptions of each development option are resolved.

It is fair to say that the Applicant's offer to purchase was at a value of around 1/3rd of what would be calculated if the value is derived from the development potential reflected in the SSDA combined with the CBRE Report GFA rates.

2.4. Conclusions Regarding the First Karavellas Principle

The obvious contradictory findings from the same town planning consultancy, between reports prepared within seven months of each other, is perhaps explained by the fact that there is only one common signatory to the two reports. The kindest explanation would be to

assume that the common signatory had merely a supervisory role and was not across the word-for-word detail of either report.

In any event, the Applicant's fair market offers were based on planning advice which significantly underrepresented the development potential of the Ecove site. This means that the Applicant has not satisfied the first of the Karavellas Principles.

Tuor C observes at [22] of Karavellas that "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 purchase attempts which have occurred for the Ecove Development, the Department cannot be satisfied that a reasonable offer has been made.

This single assessment conclusion means that the SSDA must be refused regardless of any other merit assessment findings. This is because approval of an avoidable site isolation situation causes such egregious offense of Objective 1.3(c) of the Environmental Planning and Assessment Act 1979 (NSW) (EP&A Act 1979) that the issuance of development consent would be manifestly unreasonable in the Wedensbury sense.

3. CAN ORDERLY AND ECONOMIC USE AND DEVELOPMENT OF THE SEPARATE SITES BE ACHIEVED IF AMALGAMATION IS NOT FEASIBLE?

The principles to be applied in dealing with the second question of Karavellas are set out in *Cornerstone Property Group Pty Ltd v Warringah Council* [2004] NSWLEC 189 (**Cornerstone**).

To summarise, demonstration that orderly and economic development can occur for both sites require the following:

1. Both sites should be able to achieve an appropriate urban form with an acceptable level of amenity.
2. Building envelope plans ("including basement") demonstrating how the isolated site can be developed are useful.
3. The proposed development may need to be modified, including the potential for reduced GFA to ensure that the amenity of both sites is maintained.

The Applicant asserts that “the orderly and economic use and development of both the SSDA Site and the Subject Site can be achieved”⁸

This assertion is supported by the building envelope drawings contained within Figures 30 and 31 of the EIS.

It is the opinion of this Practice, that the Department must also reject the Applicant's conclusion that orderly and economic development of the isolated site can be achieved. The reasons why the Department must conclude this way are the following:

- The Applicant's concept development scheme ignores an east-west DCP road which is intended to separate the Meriton Site from the Ecove Site. This is important because the DCP Road is provided in direct service to the 'Design Principles of improving connectivity in cl. K16.2 of the DCP by creating additional street and pedestrian connections.
- The Applicant's concept development scheme does not demonstrate that reasonable development potential of the Subject Site can be achieved.
- No basement plans are provided.
- The SSDA proposed basement is separated from the western boundary of the Subject Site by approximately 9m. There is no opportunity for break-through panels and reciprocal rights of way to be created as is commonly proposed to vehicular access to an isolated site.
- There has been no development feasibility analysis of constructing the development suggested for the Subject Site where on off-street parking is provided. That the DCP sets maximum, not minimum parking requirements demonstrates that the compliance with the planning controls can be achieved by the provision of nil parking. However, that is not evidence of “economic development”.
- The concept design does not provide any details of building servicing, including garbage storage and collection.

⁸ Ethos Urban, *Environmental Impact Statement Rhodes East Mixed-Use Development: 15-17, 25-27 Blaxland Road and 440-442 Concord Road, Rhodes*, p. 65.

3.1. The EIS Concept for Isolated Development Thwarts Vehicle and Pedestrian Permeability Anticipated in the Station Gateway East Precinct

Figure K16-30 Station Gateway East Character Area Regulating Plan of the DCP shows concept site plan for the Station Gateway East Character Area. Figure 1 below provides an annotated extract.

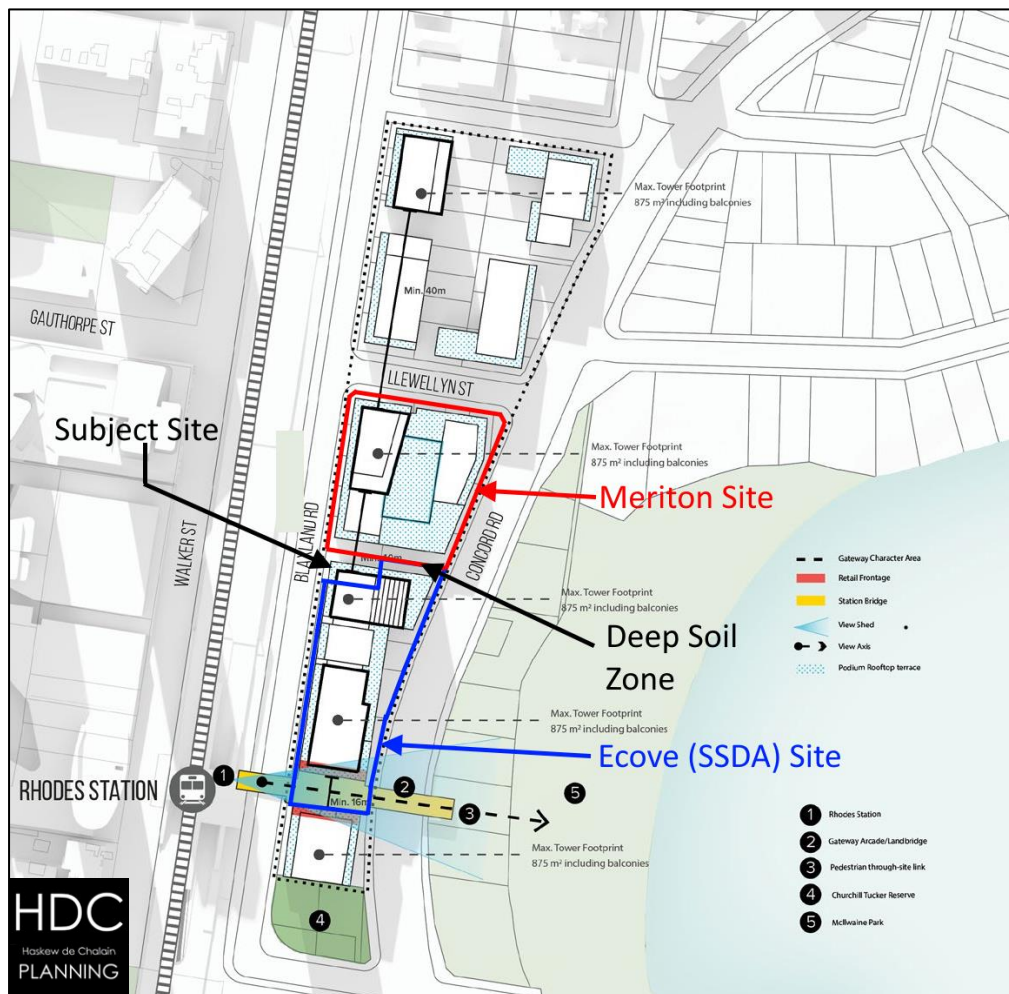


Figure 1: Annotated Extract of Station Gateway East Character Area Regulating Plan

Pursuant to Figure K16-40, Section 6-6 of the DCP, the Deep Soil Zone appears to accommodate a pedestrian connectivity function. The DCP Plan has been imported into a GIS model from which the location of the future road has been plotted. The overlaying the SSDA site plan is shown in Figure 2.



Figure 2: Future Permeable Pedestrian Movement Overlayed onto SSDA Site Plan

The Applicant's development proposal and its concept development for the Subject Site if developed in isolation has not responded to the amenity of the intended permeable pedestrian network.

3.2. Applicant's Concept Proposal for Isolated Development of the Subject Site Does Not Allow Reasonable Development Opportunity Consistent with the Planning Controls

The following table compares the Applicant's concept plan for the Subject Site with relevant planning controls.

Planning Control	Applicant's Development Concept	Is Consistency Achieved?
<u>Shop Top Housing Permissibility</u> Minimum site area under Clause 7.20 cannot be achieved.	No design response to enable shop top housing to be achieved such as through basements breakthrough panels.	No
<u>Floor Space Ratio</u> 6:1 base (cl4.4 of CBLEP 2013) Plus 10% (0.6:1) bonus FSR (cl 7.16 of CBLEP 2013). Subtotal - (Maximum permissible FSR for the purposes of Section 87(2)(b) of SEPP (Housing) 2021 = 6.6 Plus: 25% (1.65:1) bonus FSR under Section 87(2)(b)(iii) of SEPP (Housing) 2021 Total = 8.25:1	Building Envelope Area = 1282 m ² (See Figure 3) GFA = 1090 m ² assuming 85% GFA efficiency FSR = 2.5:1	No
<u>Building Height</u> Part ~58m, part 80m. While the maximum height of buildings development standard is 80m, the planning controls anticipate that the Subject Site will deliver a part 19 storey buildings, part road and part building separation between the Meriton Development and the Ecove Development (see Figure 4).	~12m	No
<u>Podium Separation</u> While this is the same spatial DCP non-compliance as the deletion of the DCP road, the road delivered a podium separation of 12m. 12m (see Figure 5)	9m	No
<u>Parking</u> Not more than 1 space per 150 m ² commercial GFA Not more than 1 space per 100 m ² for retail premises Assume 100 m ² retail floor space and 990m ² commercial floor space = 7 parking spaces	Nil parking	No

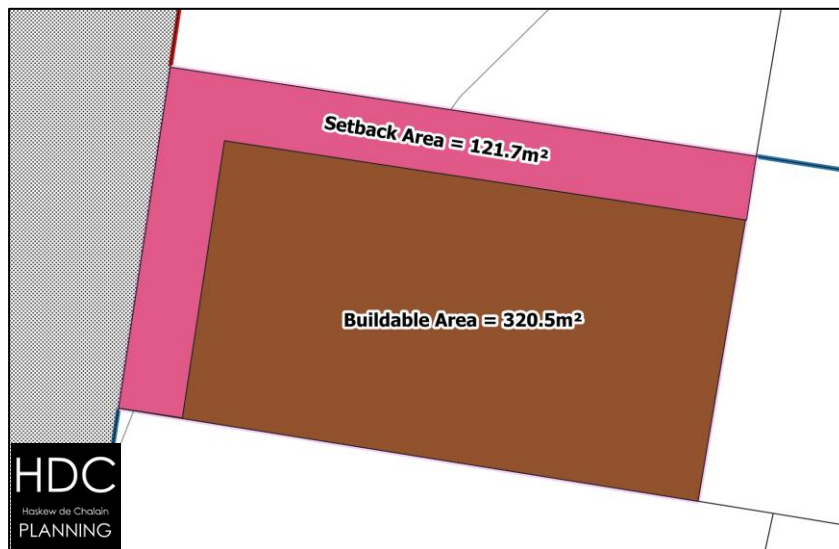


Figure 3: GIS Calculation of Buildable Site Area Depicted in Figure 30 of the EIS

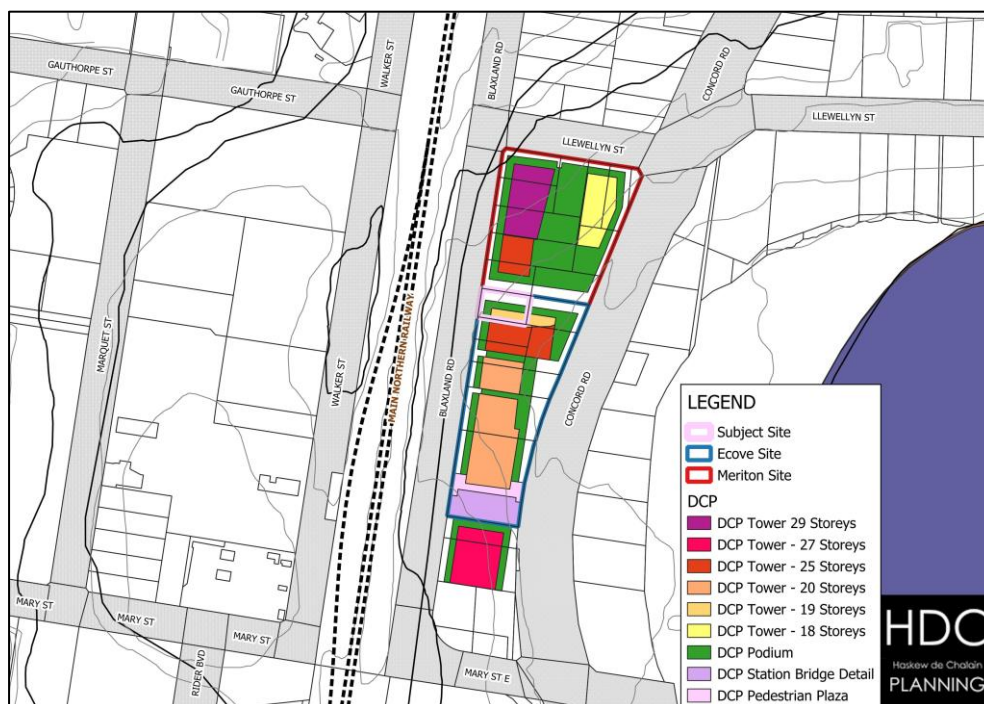


Figure 4: GIS Model of DCP Building Envelope Heights

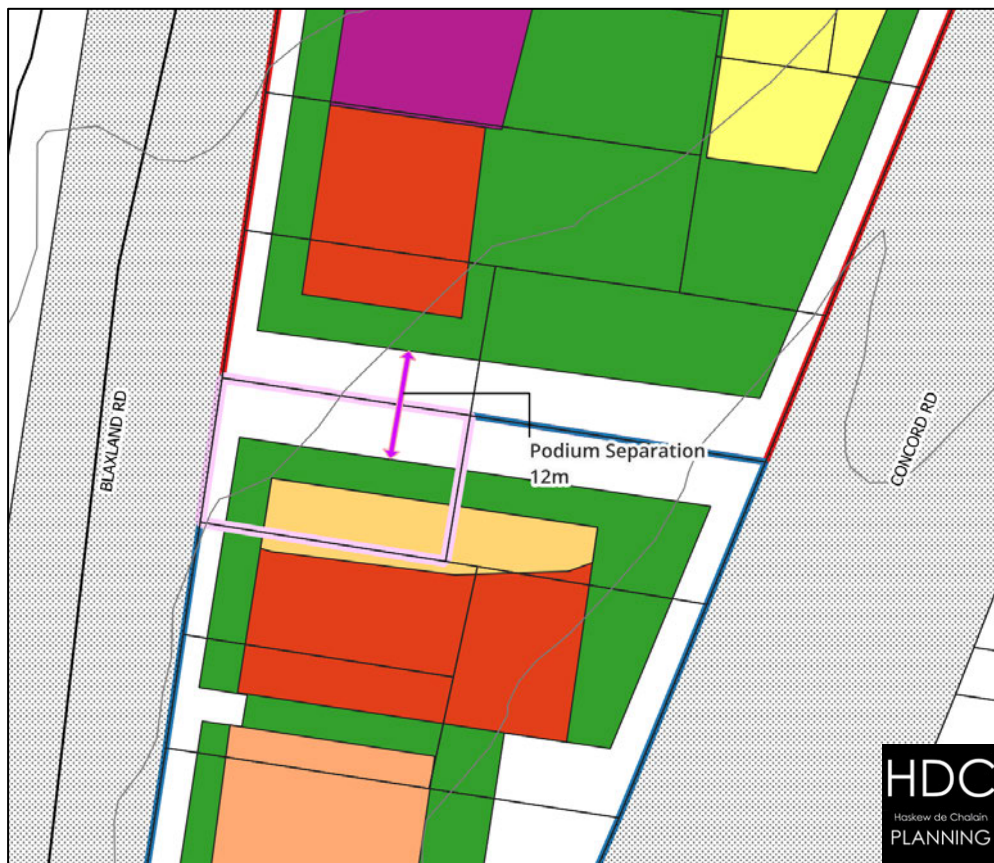


Figure 5: DCP Podium Separation

In summary, the Applicant's concept design for the Subject Site if developed in isolation:

- Does not enable any dwellings.
- Delivers only 30% of the FSR permitted under the planning controls.
- For that part of the Subject Site where the planning controls anticipate built form, delivers a building height which is 20% of the planning control. For the remainder of the subject site, provides a 4-storey building where planning controls anticipate nil building height
- Results in 33% less building separation at podium level.
- Provides no parking opportunity where the planning controls anticipate up to 7 parking spaces.

The above are significant departures from the planning controls. In terms of achievable GFA, it cannot be concluded that this is an orderly and economic development when the achievable FSR is less than half of the statutory base FSR.

4. CONCLUSION

The owner of 31 Blaxland Road is a willing vendor. The SSDA proposes 8.25:1 FSR. The EIS concludes that the environmental impacts of 8.25:1 FSR are satisfactory.

If amalgamated, the Subject Site would contribute its site area to maximum achievable GFA. If the same FSR as proposed was reflected in an amalgamated site development, the Subject Site would contribute 3,808.2 m² GFA.

That part of the Subject Site for which the DCP anticipates part of a 19-storey building is approximately 119 m². Over 19 storeys, that footprint would deliver approximately 1,920 m² GFA adopting an 85% floor space efficiency ratio. The remaining 1,886 m² would need to be distributed over what is presently the Ecove site. Such redistribution represents 4% of the GFA presently proposed.

If the Applicant is of the opinion that a development over the amalgamated parcels cannot achieve 8.25:1, then it is incumbent on the Applicant to demonstrate that with building envelope plans and rigorous analysis. If that was to be demonstrated by the Applicant, a market value commensurate with the lesser but achievable FSR over the amalgamated parcels would be appropriate.

The Applicant's current approach to the value of the Subject Site appears to be responsive to the fact that the planning controls anticipate that the majority of the site will not contain buildings. This is not a valid reason to value the Subject Site on its isolated development potential. In this regard, the planning controls clearly identify the highest and best use of the Subject Site as part of an amalgam of land which will accommodate a development as generally described with those planning controls.

Our client is a willing vendor subject to a fair market offer being made.

Yours faithfully,



David Haskew
Senior Partner
HDC Planning