

Our Ref: ARB:TJA:817

18 April 2023

Ms Clarissa Qasabian
Managing Counsel
Goodman Property Services (Aust) Pty Ltd
GPO Box 4703
SYDNEY NSW 2001

By email: Clarissa.Qasabian@goodman.com

Dear Clarissa,

Re: Proposed development of land at 85-91 Waterloo Road, Macquarie Park ("Site")

You have asked us to advise Goodman Property Services (Aust) Pty Limited (**Goodman**) whether part of the Site could be developed for 'Build-to-Rent' (**BTR**) housing, which would be inconsistent with the concept development consent LDA2017/0096 that applies to the whole Site (**Concept Approval**).

In summary, it is our opinion that a development application for BTR housing can be made over part of the Site that seeks, as part of the application, the imposition of a condition of consent under s 4.17 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**) that modifies the Concept Approval so as to remove any inconsistency between the BTR housing development and the Concept Approval.

Background

We understand that:

- the Concept Approval benefits the entire Site;
- Stage 1 works were approved as part of the Concept Approval comprising (generally) the erection of a new building at the rear of the Site;
- the Stage 1 works have been completed and this part of the Site (now known as **2 Banfield Road**) has been sold to a third party;
- Goodman no longer wishes to develop the remainder of the Site in accordance with the Concept Approval, but would prefer to seek approval to carry out a multi-building BTR housing development; and
- the BTR housing development contemplated by Goodman would differ from the Concept Approval, including in terms of use, gross floor area, building height and building footprint.

Implications of s 4.24(2) of the EPA Act

Section 4.24(2) of the EPA Act provides:



“While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.”

As a result, if any development is proposed to be carried out at the Site that is inconsistent with the Concept Approval, then the Concept Approval must be either 1) surrendered; or 2) modified before development consent could be obtained for that development.

1. Surrender of the Concept Approval

There would be significant practical difficulties if Goodman were to seek to surrender the Concept Approval, including questions as to whether the built form and current use of 2 Banfield Road as approved under the Stage 1 consent forming part of the Concept Approval would continue to be permitted.

We understand that it is Goodman’s intention to preserve as much of the Concept Plan as is required to allow the built Stage 1 to continue to benefit from the Concept Approval. As a result, modification or amendment (as opposed to surrender) of the Concept Approval is the preferred option.

2) Modification or amendment of the Concept Approval

The EPA Act provides two mechanisms through which an existing development consent can be modified – one under s 4.55 and another under s 4.17.

At a high level, s 4.55 allows a proponent to apply to modify an existing development consent, provided that the development as modified would be “substantially the same” as the development as originally approved.

We understand from you that the BTR development proposed by Goodman is unlikely to be deemed to be substantially the same as the development originally approved in the Concept Approval. If that is the case, then Goodman would not be able to modify the Concept Approval under section 4.55 of the EPA Act.

Section 4.17(1) of the EPA Act prescribes the circumstances under which conditions of development consent may be imposed. Sub-section 4.17(1)(c) provides that a condition may be imposed if “it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11 in relation to the land to which the development application relates”.

In our opinion, s 4.17(1)(c) provides a mechanism under which a condition of a new development consent could “require” the modification of an existing consent such as the Concept Approval.

Mechanically, s 4.17(5) of the EPA Act provides that, if a consent authority imposes a condition requiring the modification of an existing consent granted under the EPA Act, then the consent may be modified subject to and in accordance with the regulations. Clause 67 of



the *Environment Planning and Assessment Regulation 2021 (EPA Regs)* then sets out a process whereby a beneficiary of a consent that includes a condition of the kind described in s 4.17(5) can effect the modification of the earlier development consent by the giving of a notice.

In other recent, publicly available examples, this mechanism has been used to bring staged/concept development consents and subsequent approvals for the same site into alignment with one another as required by s 4.24(2) of the EPA Act. One such example of this is the ongoing development of 1 Alfred Street in the Sydney CBD, the details of which are publicly available on the City of Sydney Council website.

Is the s 4.17 mechanism available to Goodman in this case?

In our opinion, the answer to this question is “yes”.

Any inconsistencies between the proposed BTR development and the Concept Approval could be addressed by a consent authority imposing a condition on the development consent for the BTR development that has the effect of modifying the Concept Approval.

The steps required to achieve this outcome would be as follows:

- a) Lodge a new concept development application that reflects the proposed BTR development. Because of the capital investment value (which we are instructed is in excess of \$50m) and proposed development type (i.e. BTR), the application would be for State Significant Development and would be made to the NSW Department of Planning Industry and the Environment (**Department**).
- b) As part of that concept development application, include a request that the consent authority impose a condition of consent under s 4.17 requiring the modification of the existing Concept Approval to make it consistent with the development proposed by the new concept development application.
- c) Once development consent is granted to the new concept development application, inclusive of the requested condition to modify the existing Concept Approval, prepare and lodge with Council (as the consent authority that determined the Concept Approval) a notice in accordance with cl 67 of the EPA Regs. That notice must include the following information:
 - i. the name and address of the person giving the notice;
 - ii. the address and folio identifier of the land to which the consent or right relates;
 - iii. a description of the consent or right to be modified or surrendered;
 - iv. whether the consent or right will be modified, including details of the modification, or surrendered; and
 - v. if the person giving the notice is not the owner of the land - a statement signed by the owner of the land that the owner consents to the modification or surrender of the consent or right.

- d) In accordance with cl 67(3), “(t)he notice takes effect when the consent authority gives written notice to the person giving the notice that the consent authority received the notice.”
- e) That confirmation of receipt from Council is the final step in the process. Thereafter, per cl 67(4), “(t)he notice operates, according to its terms, to modify or surrender the development consent or existing use right to which it relates.”

It would be available to Goodman to either:

- 1) lodge an amending concept development application (i.e. a new concept development application which seeks to modify the Concept Approval) with the Department first, allow it to be assessed via the process outlined above, and then lodge a further development application for actual works as part of the BTR development once the amending concept development application has been approved; or
- 2) lodge both applications at the same time and have the Department assess them in parallel. Mechanically, the amending concept development application would still need to be determined first so that the development application for works would be consistent with the concept development consents applying to the Site.

This approach has been accepted by the NSW Land & Environment Court in the following cases (*NB: this is not an exhaustive list*):

- This year, in *Castle Hill Panorama Pty Ltd v The Hills Shire Council* (2023) NSWLEC 24, in factually analogous circumstances to Goodman’s (including the presence of a concept development consent), Moore J stepped through and deemed acceptable the pathway outlined in this advice – see paras [33]-[38] as set out in **Annexure A** to this advice. In that case, one development application was a concept development application that was lodged primarily to amend an existing concept development consent, while a second development application was lodged and assessed in parallel for actual works that were consistent with the concept proposed by the new concept development application. The amending concept development consent from those proceedings, as granted by the Court, is provided at **Annexure B** to this advice.
- In *Waverley Council v C M Hairis Architects* (2002) NSWLEC 180, Talbot J outlined at [31]-[33] how such an approach could work and considered the development application in that case to be competent. Relevantly, this case involved an existing development consent that the proponent wanted to partially retain but amend in such a way that did not satisfy the “substantially the same” test in s 96 (as s 4.55 then was). The existing development consent was not a staged/concept consent, but the mechanism in s 80A (as s 4.17 then was) was considered to be available to the proponent by the Court. Paragraphs [31]-[33] of that decision are extracted at **Annexure C** to this advice.

We therefore consider this pathway to be available to Goodman in making an application to develop part of the Site for BTR housing.



**Beatty
Hughes**
& ASSOCIATES

Suite 2402, L. 24 Governor Macquarie Tower
1 Farrer Place Sydney NSW 2000

E admin@beattyhughes.com.au
T +61 2 8203 2381

www.beattyhughes.com.au

The Voluntary Planning Agreement currently applying to the Site would likely need to be amended as result of the above, which could be agreed in principle prior to lodgement of the new application.

Yours faithfully

Jennifer Hughes/Timothy Allen
Principal/Senior Associate

Beatty, Hughes & Associates
ABN 44 273 924 764

ANNEXURE A

Extract from *Castle Hill Panorama Pty Ltd v The Hills Shire Council* [2023] NSWLEC 24

The jurisdictional issue

33. The jurisdictional contention raised by the Council proposing that there was no proper basis upon which either the first or the second application could be approved was set out in the Statements of Facts and Contentions which had been filed for the Council in each matter. Those Statements of Facts and Contentions were tendered as part of the evidence in each of these proceedings. The jurisdictional contention was in slightly different terms, depending on the matter in which it was pleaded, but they were to the same effect in terms. The contentions and their supporting particularisations are set out below, with the contention and its particulars in Matter No 174486 of 2022 reproduced first:

INCONSISTENCY WITH CONCEPT DEVELOPMENT APPLICATION

The development application must be refused because there is no power to approve a development application that is inconsistent with a consent for the concept proposal for the development of the site.

Particulars

(a) Section 4.24 of the EPA Act states:

*“4.24 Status of concept development applications and consents
(cf previous s 83D)*

The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a concept development application and a development consent granted on the determination of any such application. While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site. Subsection (2) does not prevent the modification in accordance with this Act of a consent granted on the determination of a concept development application.”

(b) Concept Development Consent No. 1262/2019/JP as approved by the Sydney Central City Planning Panel on 20 February 2020 relevantly included:

- (i) A dwelling cap of 228 apartments, with a set unit mix;
- (ii) A maximum of 4 storeys for Building C;
- (iii) Heights of Buildings A, B, D and E as set out in paragraph 21 of the Facts;



- (iv) A total of 310 car parking spaces;
- (v) 4,469m² (36%) communal open space; and
- (vi) Did not include a neighbourhood shop.

(c) The development application proposed changes to the number of dwellings and the dwelling mix, the number of storeys of Building C, the building envelopes for

Buildings A, B, D and E, the number of car parking spaces, communal open space, and proposed provision of a neighbourhood shop, each of which is inconsistent with Concept Development Consent No.1262/2019/JP.

(d) The development application must be refused because the proposed development is inconsistent with Concept Development Consent No.1262/2019/JP, which is contrary to section 4.24(2) of the EPA Act.

with the contention and its particulars in Matter No 174536 of 2022 being:

B1 - CONTENTIONS THAT THE APPLICATION BE REFUSED **INCONSISTENCY WITH CONCEPT DEVELOPMENT APPLICATION**

1 The development application must be refused because the application is inconsistent with Concept Development Consent 1262/2019/JP.

Particulars

(a) Section 4.24 of the EPA Act, relevantly states:

“4.24 Status of concept development applications and consents (cf previous s 83D)

“(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.”

(b) The development application is based upon amendments proposed pursuant to Development Application No. 1110/2022/JP (the subject of Land and Environment Court Proceedings No. 2022/00174486).

(c) Until such time as Development Application No. 1110/2022/JP is approved, the development application is inconsistent with the existing stage 1 concept approval, which is contrary to section 4.2.4(2) of the EP&A Act, and cannot be approved.

34. I have earlier noted that Mr Hall had provided succinct and helpful written submissions. Those submissions set out the basis upon which it was advanced for the Company that the jurisdictional impediment raised by the Council was one which was capable of resolution. It is sufficient, for present purposes, to set out the relevant extract



from Mr Hall's written submissions addressing this point. The submissions said:

Jurisdiction

4. The Respondent had raised the following matters relevant to the permissibility of the development and therefore the jurisdiction of the Court.
 - 4.1 Inconsistency with the approved concept plan.
 - 4.2 Height exceedance.
 - 4.3 Floor Space Ratio
5. All other contentions raised by the Respondent went to merits issues. The consent authority and the Respondent now accept that the amended plan satisfying those contentions.

(A) Consistency with Concept Plan

6. A Concept Plan DA 1262/2019/JP for the subject site was approved by the Sydney Central City Planning Panel on 20 February 2020.
7. Section 4.24(2) of the EP&A Act, relevantly states that:

While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.
8. The Stage 2 development application 1112/2022/JP (in proceeding 536) is not consistent with the approved concept plan for this site.
9. The following procedure to amend the concept plan approval, so that the prohibition against that inconsistency is cured, allows the Court to approve the Stage 2 development application in the exercise of its discretion.
10. A subsequent development consent can modify an earlier development consent [*Waverley Council & Hairis Architects* (2002) 123 LGERA 100; and *Progress and Securities v North Sydney Council* (1988) 96 LGRA 236].
11. There is no jurisdictional bar to the Court approving DA 1110/2022/JP (in proceeding 486) subject to a condition that the existing concept approval 1262/2019/JP is either surrendered or modified. That is proposed condition 1 of that approval. The proposed modifications will make the amended concept plan consistent with DA 1112/2022/JP.
12. Section 4.17(5) of the EP&A Act provides that if a consent authority imposes a condition requiring the modification or surrender of a consent granted under that Act, the consent may be modified or surrendered subject to and in accordance with the Regulations.
13. Under the savings provisions set out in Schedule 6 of the *Environmental Planning and Assessment Regulation 2021*, the *Environmental Planning and Assessment Regulation 2000* continues to apply instead of the 2021 regulation to a development application made but not finally determined before 1 March 2022. The subject development application was lodged on 25



January 2022 and not determined before 1 March 2022. Therefore, the EP&A Regulation 2000 continues to apply to this application.

14. Clause 97 of the EP&A Regulation 2000 makes provision with respect to the modification or surrender of development consent and the content of the "Notice" under s4.17(5) of the EP&A Act that is required to be served on the consent authority. Clause 97(2) and provides that: "*A duly signed and delivered notice of modification ...of a development consent...*

*(a) takes effect when it is received by the consent authority,
and*

*(b) operates, according to its terms, to modify ...the
development consent to which it relates".*

15. There is therefore no response required from the consent authority and the notice duly served has the immediate effect of automatically amending the earlier concept plan consent.

16. The consent authority in this case is the Sydney Central City Planning Panel.

17. Therefore, once the notice is given, any inconsistency between the Stage 2 development application and the concept approval is removed and the Stage 2 development application can be approved.

35. It is to be noted that, during the course of the hearing on 22 February 2023, Mr Hall, in his oral submissions, took me through the matters outlined above.

36. It is also to be noted that Mr Seton indicated that the Council accepted that the path to resolution proposed on behalf of the Company was an appropriate and sufficient basis upon which the Council's concerns set out in the jurisdictional contention reproduced above were satisfactorily resolved.

37. Independently, I have considered Mr Hall's written submissions on this point. I am satisfied that they identify a proper basis by which the Council's jurisdictional concerns are able to be resolved.

38. I am satisfied that the jurisdictional contention originally pressed by the Council, with respect to both the first and second applications, no longer stands as an impediment to their approval.



**Beatty
Hughes**
& ASSOCIATES

Suite 2402, L. 24 Governor Macquarie Tower
1 Farrer Place Sydney NSW 2000

E admin@beattyhughes.com.au
T +61 2 8203 2381

www.beattyhughes.com.au

ANNEXURE B

Development consent 1110/2022/JP from *Castle Hill Panorama Pty Ltd v The Hills Shire Council* [2023] NSWLEC 24

Annexure A

DETERMINATION OF DEVELOPMENT APPLICATION BY GRANT OF CONSENT

Development Application No: 1110/2022/JP

Development: Amend Concept Development Consent No. 1262/2019/JP as granted by the Sydney Central City Planning Panel on 20 February 2020 for the construction of 5x residential flat buildings, by increasing the dwelling cap from 228 to 242, amending the unit mix to 54 x 1 bedroom, 128 x 2 bedroom and 60 x 3 bedroom units, increasing the height of Building C from 4 storeys to 5 storeys, increasing car parking from 310 spaces to 356 spaces, provision of a neighbourhood shop on the lower ground floor of Building D, and minor amendments to communal open space and building envelopes to allow for plant and lift overruns.

Site: 7, 9, 11, 13, 15, 17, 19, 21 and 23 Cadman Crescent and 18, 20, 1/22, 2/22 and 24 Hughes Avenue, Castle Hill.

Lot 502 DP258587;

Lot 504 DP258587;

Lot 327 DP 252593;

Lot 337 DP 252593;

Lot 328 DP252593;

Lot 329 DP 252593;

Lot 330 DP 252593;

Lot 331 DP 252593;

Lot 332 DP 252593;

Lot 333 DP 252593;

Lot 334 DP 252593;

Lot 3361 DP 865725;

Lot 3362 DP 865725; and

Lot 335 DP 252593.

The above development application has been determined by the granting of consent subject to the conditions specified in this consent.

Date of Determination: ***

Date from which consent takes effect: Date of determination

TERMINOLOGY

In this consent:

- (a) Any reference to a Construction, Compliance, Occupation or Subdivision Certificate is a reference to such a certificate as defined in the *Environmental Planning and Assessment Act 1979*.
- (b) Any reference to the "applicant" means a reference to the application for development consent or any person who may be carrying out development from time to time pursuant to this consent.
- (c) Any reference to the "site", means the land know as 8 Raymond Court and 7, 9, 11, 13, 15, 17, 19, 21 and 23 Cadman Crescent and 18, 20, 1/22, 2/22 and 24 Hughes Avenue, Castle Hill.
- (d) Any reference in this document to a "consent" means a "development consent" defined in the *Environmental Planning and Assessment Act 1979*.
- (e) Any reference to the "Council" means The Hills Shire Council.

GENERAL MATTERS

1. Modification of Concept Development Consent No. 1262/2019/JP

A 'notice of modification' as referred to in section 4.17(5) of the Environmental Planning and Assessment Act 1979 prepared in accordance clause 97 of the Environmental Planning and Assessment Act Regulations 2000 must be delivered to the consent authority (the Sydney Central City Planning Panel) modifying Concept Development Consent No. 1262/2019/JP by increasing the dwelling cap from 228 to 242, amending the unit mix to 54x 1 bedroom, 128x 2 bedroom and 60x 3 bedroom units, increasing the height of Building C from 4 storeys to 5 storeys, increasing car parking from 310 spaces to 356 spaces, provision of a neighbourhood shop on the lower ground floor of Building D, and minor amendments to communal open space and building envelopes to allow for plant and lift overruns.

The conditions imposed on Concept Development Consent No. 1262/2019/JP are to be replaced with the following:

1. Development in Accordance with Submitted Plans

The development being carried out in accordance with the approved plans and details submitted to Council, as amended in red, stamped and returned with this consent.

REFERENCED PLANS AND DOCUMENTS

| ARCHITECTURAL PLANS | | | | |
|----------------------------|---|------------|--------------------|-------------|
| DRAWING NO. | DESCRIPTION | REV | PREPARED BY | DATE |
| DA 0000 | Cover Page | H | MHN Design Union | 15.02.2023 |
| DA 1004 | Land Dedications and Setbacks | H | MHN Design Union | 10.02.2023 |
| DA 1005 | Building Height and Envelope Plan | H | MHN Design Union | 10.02.2023 |
| DA 3001 | Elevations East & South (Cadman Cresc. E & Hughes | H | MHN Design Union | 10.02.2023 |

| | | | | |
|---------|--|---|------------------|------------|
| | Ave) | | | |
| DA 3002 | Elevation North (Cadman Cres. N) | H | MHN Design Union | 10.02.2023 |
| DA 3101 | Elevation South & North (Building A+B & D+E) | H | MHN Design Union | 10.02.2023 |
| DA 3102 | Elevation West (Building C) | H | MHN Design Union | 10.02.2023 |
| DA 4001 | Building A | H | MHN Design Union | 10.02.2023 |
| DA 4002 | Building B | H | MHN Design Union | 10.02.2023 |
| DA 4003 | Building C | H | MHN Design Union | 10.02.2023 |
| DA 4004 | Building D | H | MHN Design Union | 10.02.2023 |
| DA 4005 | Building E | H | MHN Design Union | 10.02.2023 |
| DA 5001 | Sections A +B | H | MHN Design Union | 10.02.2023 |
| DA 5002 | Sections C +D | H | MHN Design Union | 10.02.2023 |
| DA 7201 | Landscape, Deep Soil & COS Area | H | MHN Design Union | 10.02.2023 |

No work (including excavation, land fill or earth reshaping) shall be undertaken prior to the issue of the Construction Certificate, where a Construction Certificate is required.

2. Determination of Future Development Applications

Approval is granted for the proposed Concept Development Application in accordance with the plans and details provided with the application to provide guidance for future development of the site. In accordance with section 4.22(1) of the Environmental Planning and Assessment Act all development under the concept development application shall be subject of future development application(s). The determination of future development application(s) are to be generally consistent with the terms of the subject development consent.

3. Dwelling Yield

The maximum dwelling yield for the site is not to exceed 242 units.

4. Land Dedication

2m land dedication is required for road widening purposes along Cadman Crescent east and north in accordance with Figure 10 with Council DCP Part D Section 19. No land dedication is required along Hughes Avenue. This is required to be conditioned in the first built form Development Application lodged for the site.

5. Subdivision Works

A subdivision works concept plan relating to the indented parking bays and associated public domain works must be prepared and submitted in support of any future built form Development Application.

6. Accessible Units

10% of all dwellings units are to be adaptable or accessible.

7. Vehicular Access and Car Parking

Vehicular Access for the entire development is to be provided via a single driveway on Hughes Avenue. The driveway is to be setback at least 6m from the tangent point at the intersection between Cadman Crescent/Hughes Avenue.

8. Section 7.11 Contributions

All future built form Development Applications must be levied in accordance with Contributions Plan No. 19 Showground Station Precinct and Section 7.11 of the Environmental Planning and Assessment Act 1979, to provide for the increased demand for public amenities and services resulting from the development.

ANNEXURE C

Extract from *Waverley Council v C M Hairis Architects* [2002] NSWLEC 180

31. If one has regard to s 96 (formerly s 102) as being facilitative in the sense that Bignold J categorised it in Progress and Securities, and as the Court now does, then the making of a separate development application pursuant to s 78A cannot be regarded as a circumvention of the regime established by s 96. The evaluation of a fresh development application involves a significantly more rigorous assessment than prescribed by the regime under s 96.
32. The Court is satisfied the process engaged by DA 138/02 could lead to a separate approval for the distinct part of the building subject to the proposed changes or it could result in a conditional determination which requires the subject of DA 133/98 to be modified so that any inconsistency between the two proposals is removed. The latter result foreseeably could foreclose the prospect of reinstating the club use through any process available to the developer under Div 2 or Div 7 in Pt 4 of the EP&A Act. It is not right to say, therefore, that the respondent is relying on an application that is dependant upon the exercise of the consent authority's power under s 80A(1)(b) and s 80A(5). Whether the Court, exercising the function of the consent authority, uses its discretion to do that remains to be determined.
33. Having regard to all of the above reasons, the Court is not satisfied, in the circumstances of this case as outlined, that the development application, DA 138/02, is incompetent.