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Mr Kevin Kim  
Department of Planning, Housing and Infrastructure  
Locked Bag 5022  
PARRAMATTA NSW 2124

Dear Sir,

**STATE SIGNIFICANT DEVELOPMENT APPLICATION (SSDA) - 67175465**  
**173 – 179 WALKER STREET AND 11 – 17 HAMPDEN STREET, NORTH SYDNEY**

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**Introduction**

I refer to the abovementioned matter which comprises a State Significant Development Application (SSDA) for a *"Residential Development with Affordable Housing"* at No's 173 – 179 Walker Street and No's 11 – 17 Hampden Street, North Sydney ("the subject site").

The subject site is located on the eastern side of Walker Street, at the intersection with Hampden Street. The site comprises seven (7) adjoining allotments with a combined area of approximately 3,952.1m<sup>2</sup>. The consolidated site is L-shaped with frontages of approximately 72.14 metres to Walker Street and 54.255 metres to Hampden Street.

I confirm that I act on behalf of HPDG Pty Ltd. My client is the registered owner of Apartment 2205, 168 Walker Street, North Sydney. My client's apartment occupies the south-eastern corner of Level 22 of the residential flat building known as *Aura*.

I confirm that I have inspected the subject site and surrounding locality. I have also inspected my client's apartment to gain an understanding of the layout of the apartment and the nature and extent of existing views.

I have reviewed the documentation submitted in support of the SSDA including the Amended (and original) Architectural Plans, *Environmental Impact Statement*, *View and Visual Impact Assessment*, *Addendum View and Visual Impact Assessment* and *Submissions and Amendment Report*.

I hold a Bachelor of Town Planning (Honours), and a Master of Environmental and Local Government Law. I have 28 years experience in the New South Wales (NSW) planning system, and have particular expertise in preparing and assessing DA's, and providing expert town planning evidence on behalf of both Applicant's and Council's in the NSW Land and Environment Court. I have also been appointed by the Court on multiple occasions as a Court Appointed town planner.

The proposed development (as recently amended) comprises the demolition of the existing structures on the site and the construction of a residential complex providing a total of 239 residential apartments, including 78 "*affordable housing dwellings*". Off-street car parking is proposed for 218 vehicles, 22 motorcycle/scooter spaces and 263 bicycle spaces.

My client objects to the proposed development on the basis of the devastating impacts on my client's existing views. In that regard, the existing views include parts of *Sydney Harbour* and the land/water interface with the *Royal Botanic Gardens*, the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

The proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

In my opinion, the impact can properly be characterised as severe to devastating. The view loss relates to highly iconic features and the proposed development does not satisfy the applicable objectives of the building height and FSR controls which include "*the retention of existing views*".

Further, I note that the recent amendments to the proposed development have (regrettably) increased the building height of the buildings, including *Building B1* which contributes to the view loss from my client's apartment.

## **Planning Controls**

The site has a lengthy planning history over the last decade that includes several Planning Proposals, none of which were approved. On 30 July 2021, a Planning Proposal was approved by the Minister and amendments were made to the planning controls for the site.

The site is zoned R4 – High Density Residential pursuant to the North Sydney Local Environmental Plan (LEP) 2013 and "*residential flat buildings*" are permissible in the zone with consent.

The "*estimated development cost*" is greater than \$75 million, circumstances in which the proposed development is deemed to be "*State significant development*" pursuant to State Environmental Planning Policy (SEPP) (Planning Systems) 2021.

Clause 2.3 of the LEP requires the consent authority to have regard to the objectives for development in the zone and the relevant objectives are expressed as follows:

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To encourage the development of sites for high density housing **if such development does not compromise the amenity of the surrounding area** or the natural or cultural heritage of the area **[emphasis added]**.*
- *To ensure that a reasonably high level of residential amenity is achieved and maintained.*

Clause 4.3 of the LEP specifies a maximum building height of RL133 for the north-western portion of the site (No. 11 Hampden Street and No. 179 Walker Street), RL84 for the north-eastern portion of the site (No's 15 and 17 Hampden Street) and RL89 for the south-western portion of the site (No's 173 – 177 Walker Street).

Irrespective, Clause 6.19C specifies that development consent may be granted to development involving the erection of a building on the subject site with a height not greater than RL148 if certain criteria is satisfied.

The relevant objectives of the building height control are expressed 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, **[emphasis added]**.*

Clause 4.4 specifies a maximum floor space ratio (FSR) of 6.1:1. The relevant objectives of the FSR control are expressed as follows:

- (a) *to ensure the intensity of development is compatible with the desired future character and zone objectives for the land,*
- (b) *to limit the bulk and scale of development.*

The North Sydney Development Control Plan (DCP) 2013 is generally intended to supplement the provisions of the LEP and provide more detailed objectives and controls to guide future development.

On 30 July 2021, the Council adopted a site-specific amendment to the DCP. The site-specific amendment was intended to facilitate the orderly implementation of the amendments made to the LEP.

The provisions of a DCP do not specifically apply to a SSDA. Irrespective, the DCP remains a relevant matter for consideration in terms of informing an understanding of the LEP and providing objectives and controls relating to, *inter alia*, building height, FSR and impacts on existing views.

Part 1.3.6 of the DCP includes objectives and controls relating to Views. The objectives include *"To encourage view sharing as a means of ensuring equitable access to views from dwellings, whilst recognising development may take place in accordance with the other provisions of this DCP and the LEP"*. Further, Part 1.3.6 specifies that Council will give consideration to the *Planning Principles* in *Tenacity Consulting v Warringah Council [2004] NSWLEC 140*.

Chapter 2 of Part 2 of State Environmental Planning Policy (SEPP) 2021 aims *"to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households"*.

Clause 16(1) specifies a maximum additional floor space ratio of the maximum floor space ratio permissible for the site *"plus an additional floor space ratio of up to 30%"*.

Clause 16(3) specifies a maximum building height of *"the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1)"*.

The provisions of Clause 16 are *"maximum"* standards and are clearly differentiated from the *"non-discretionary"* standards in Clause 19.

## Assessment

### Zone Objectives

The most relevant objective of the R4 – High Density Residential zone is *"To encourage the development of sites for high density housing **if such development does not compromise the amenity of the surrounding area** or the natural or cultural heritage of the area [emphasis added]"*.

The *Submissions and Amendment Report* prepared to accompany the SSDA includes the following comments in relation to the objectives of the zone:

- *It does not compromise the amenity of the surrounding area as it provides high quality landscaping, contextually appropriate interface to heritage items, provides*

*amenities for residents, won't result in unacceptable overshadowing, view loss or visual impact and will have acceptable traffic impacts.*

My client's concern primarily relates to "view loss". In that regard, the proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

In my opinion, the impact can properly be characterised as severe to devastating. The view loss relates to highly iconic features and the proposed development does not satisfy the applicable objectives of the building height control which include *"the retention of existing views"*.

Further, I note that the recent amendments to the proposed development have (regrettably) increased the building height of the buildings, including *Building B1* which contributes to the view loss from my client's apartment.

I understand that other submissions have been made raising concerns in relation to overshadowing, visual impact and traffic impacts. In that regard, the proposed development has been designed to include the *"additional"* FSR and building height pursuant to the provisions of SEPP (Housing) 2021.

The *"additional"* FSR and building height increase the gross floor area and building height by 30% over and above what would otherwise be permitted on the site. Obviously, the *"additional"* FSR and building height generate additional impacts on surrounding properties in terms of overshadowing, visual impact and traffic.

In the circumstances, I do not agree with the Applicant that the proposed development *"remains consistent with the objectives of the R4 zone"*.

### Building Height

The proposed development extends to a maximum building height of RL156.2 (Building B1).

Clause 4.3 of the LEP specifies a maximum building height of RL133. The extent of variation to Clause 4.3 of the LEP is 23.2 metres, representing a non-compliance of approximately 30%.

Clause 6.19C of the LEP specifies a maximum building height of *"not greater than"* RL148. The extent of variation to Clause 6.19C of the LEP is 8.2 metres, representing a non-compliance of approximately 9%.

The most relevant objective of the building height control is ***"to promote the retention and, if appropriate, sharing of existing views [emphasis added]"***. The objective can be paraphrased (if sharing of views is not appropriate) to mean *"the retention of existing views"*.

The objectives of the building height control must be informed, underpinned and understood by the related numerical standard (refer to *Wenli Wang v North Sydney Council* [2018] NSWLEC 122). In the absence of a related numerical standard, the objective is highly subjective, if not meaningless.

Clause 16(3) of the SEPP specifies a maximum building height of *"the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1)"*.

The proposed development has been designed to comply with the *"additional"* building height control specified in the SEPP.

The SEPP does not include any alternate objectives for the building height control. In the circumstances, the objectives of the building height control in the LEP remain relevant and applicable to the *"additional"* building height control.

The *Addendum View & Visual Impact Assessment* prepared to accompany the SSDA includes the following comments in relation to the application of the objectives of the building height control:

*As an objective, 'to promote the retention and, if appropriate, sharing of existing views' is inherently qualitative. In the absence of quantification of views, which occurs in some other planning instruments such as the Sydney Local Environmental Plan 2012, 'retention of existing views' satisfies the test for both 'where policies expressed in qualitative terms allow for more than one interpretation'. As such, interpretation of this objective is assisted by the application of Tenacity.*

*Providing further support for this interpretation is the judgement of Robson J in Wenli Wang v North Sydney Council [2018] NSWLEC 122 that considered this part of NSLEP 2012. Relevant parts are as follows (emphasis added in bold):*

- 'In his assessment of the impact, Mr Youhanna placed reliance upon the objectives of the building height development standard contained in cl 4.3(1) of the LEP, extracted above at [13]. Objective (b) in that clause is "to promote the retention and, if appropriate, sharing of existing views", an objective which Mr Youhanna contended that the proposed development does not meet, especially with regard to the word "retention"*
- The difficulty with the approach of Mr Youhanna as a matter of statutory construction is that the objectives relate to the setting of a development standard (the 8.5 metre height limit) with which it is agreed that the proposed development complies. The applicant, through Mr Staunton of counsel with whom Ms Nurpuri appears, submits that the objectives are taken to have been achieved where the proposed development complies with the standard. Mr Larkin indicated that on considered reflection Council concurs with this view and consequently submits that the objectives are of limited assistance*

- *I agree with the position of the parties' representatives in relation to the application of the objectives. Although the maximum set by a development standard is not a right, a development is taken to comply with the objectives of a standard where compliance with the standard is achieved. This is made clear by the chapeau of cl 4.3(1) which provides that what follows are the "objectives of this clause" as opposed to the objectives of the development. The clause is the development standard set by cl 4.3(2)*

The Applicant appears to rely upon the compliance with the "additional" building height control specified in the SEPP to conclude that the objectives of the building height control in LEP are "taken to have been achieved".

I do not agree with that conclusion. The objectives in the LEP relate to the development standard in the LEP and do not, and cannot, relate to an alternate development standard incorporated in a different environmental planning instrument.

Further, in the absence of any alternate objectives in the SEPP, the objectives in the LEP remain relevant and applicable. In the circumstances, the portion of the building that extends above the building height control in the LEP does not necessarily satisfy the objectives of the building height control.

My interpretation does not preclude the proper application of the "additional" building height control in the SEPP in any circumstances but does preclude the "additional" building height in circumstances where that "additional" building height does not provide for the "retention of existing views". That is, there may be circumstances where the "additional" building height still provides for "the retention of existing views".

Irrespective, the building height control in both the LEP and SEPP are both expressed as a maximum control, and "the maximum set by a development standard is not a right" (refer to *Wenli Wang v North Sydney Council* [2018] NSWLEC 122).

In my opinion, the proposed development does not achieve the objectives of the building height control to the extent that the proposed development does not provide for "the retention of existing views".

#### Floor Space Ratio

The proposed development provides a gross floor area of 31,340m<sup>2</sup>, representing an FSR of 7.93:1.

Clause 4.4 of the LEP specifies a maximum FSR of 6.1:1. The extent of variation to Clause 4.3 of the LEP is approximately 7,232.2m<sup>2</sup>, representing a non-compliance of approximately 30%.

The objectives of the FSR control are "to ensure the intensity of development is compatible with the desired future character and zone objectives for the land" and "to limit the bulk and scale of development".



Again, the objectives of the FSR control must be informed, underpinned and understood by the related numerical standard (refer to *Wenli Wang v North Sydney Council [2018] NSWLEC 122*). In the absence of a related numerical standard, the objective is highly subjective, if not meaningless.

Clause 16(1) of the SEPP specifies a maximum additional floor space ratio of the maximum floor space ratio permissible for the site *"plus an additional floor space ratio of up to 30%"*.

The proposed development has been designed to comply with the *"additional"* FSR control specified in the SEPP.

The SEPP does not include any alternate objectives of the FSR control. In the circumstances, the objectives of the FSR control in the LEP remain relevant and applicable to the *"additional"* FSR control.

The documentation submitted with the SSDA does not include any specific commentary in relation to the objectives of the FSR control. Irrespective, the *Environmental Impact Statement* includes the following comments in relation to the *"desired future character of the area"*:

*The proposed development is consistent with the desired future character of the area, as reflected in its compliance with the site-specific LEP height and FSR controls (and Housing SEPP bonus).*

The desired future character of the area and the objective to *"limit the bulk and scale of development"* must be informed by the related development standard. In my opinion, it cannot be concluded that a development that exceeds the FSR control in the LEP by 7,232.2m<sup>2</sup> (representing a non-compliance of approximately 30%) promotes the desired future character of the area or *"limit the bulk and scale of development"*.

Further, I infer the Applicant appears to rely upon the compliance with the *"additional"* FSR control specified in the SEPP to conclude that the objectives of the FSR control in LEP are *"taken to have been achieved"*.

Again, I do not agree with that conclusion. The objectives in the LEP relate to the development standard in the LEP and do not, and cannot, relate to an alternate development standard incorporated in a different environmental planning instrument.

The additional gross floor area (7,232.2m<sup>2</sup>) incorporated in the proposed development has a very significant impact on the overall bulk and scale of the building. Further, it is reasonable to conclude that the additional gross floor area has a significant impact on my client's existing views.

In my opinion, the proposed development does not achieve the objectives of the FSR control to the extent that the proposed development does not promote the desired future character of the area or *"limit the bulk and scale of development"*.



### View Loss

My client's apartment occupies the south-eastern corner of Level 22 of the residential flat building known as *Aura*. The apartment comprises an open plan living/dining/kitchen area, three (3) bedrooms and amenities.

The apartment was specifically designed and orientated to capture the available views of part of *Sydney Harbour* and the land/water interface with the *Royal Botanic Gardens*, the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

The existing views are available from a sitting and standing position, and from the main living areas and all three (3) bedrooms.



**Photograph 1 – Existing View from Main Living Area**

The documentation prepared to accompany the SSDA does not include a view loss analysis from my client's apartment. Irrespective, the *Addendum View & Visual Impact Assessment* includes an analysis from Apartment 2105, 168 Walker Street, North Sydney. The apartment is located immediately (one level) below my client's apartment and the impact on the views from my client's apartment will be virtually the same.

The *Addendum View & Visual Impact Assessment* includes a photograph depicting the existing view, and a photomontage purporting to depict the proposed development. I note the Assessment states that *"Photography, survey and photomontages for public domain viewpoints prepared for this report have been prepared in accordance with the Photomontage Policy"*.

I infer from that comment that the photographs taken from individual private apartments did not have the position or point from where the photographs were taken surveyed. Further, I note that the photograph taken from Apartment 2105 is clearly distorted. In the circumstances, the photomontages prepared for individual apartments should be treated with considerable caution in terms of their accuracy.

Irrespective, the photomontage clearly shows that the proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

I note the *View & Visual Impact Assessment* characterised the impact on Apartment 2105 as "severe" and noted that *"The proposal blocks views to the Sydney Opera and high value elements within an expansive view"*. The Assessment does not acknowledge or comment on the loss of views of the land/water interface with the *Royal Botanic Gardens* and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

The *Addendum View & Visual Impact Assessment* characterised the impact on Apartment 2105 as "moderate – severe" and notes that *"The proposal will block part of Sydney Harbour"*. I do not know why the extent of the impact has been "downgraded" or why the *Addendum View & Visual Impact Assessment* refers only to *"part of Sydney Harbour"*. Further, no reference is made to the loss of views of the land/water interface with the *Royal Botanic Gardens*, the *Sydney Opera House* and the northern pylons and the parts of the arches of the *Sydney Harbour Bridge*.

Irrespective, the *Planning Principles* in *Tenacity Consulting v Warringah Council [2004] NSWLEC 140* are considered as follows:

*26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

The proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*. The loss of views relates to unarguably, the most iconic features in Australia.

*27 The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

The loss of views will occur across a front boundary, from both a sitting and standing position and from the whole of the apartment including the open plan living/dining/kitchen area and three (3) bedrooms.

*28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

The proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*. The apartment will retain some views of *Sydney Harbour*, however the most iconic elements of the view will be entirely lost.

In my opinion, the impact can properly be characterised as severe to devastating and includes the complete loss of views of unarguably, the most iconic features in Australia.

*29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

The proposed development substantially exceeds both the maximum building height and FSR controls incorporated in the North Sydney LEP 2013 and has been designed to comply with the “additional” building height and FSR controls incorporated in SEPP (Housing) 2021. The “additional” provisions in the SEPP are not “non-discretionary” development standards.

Further, the objectives of the building height and FSR controls remain relevant to consideration of the *"additional"* building height and FSR controls incorporated in the SEPP. That is, the objectives of the building height and FSR controls are not *"taken to have been achieved"* by compliance with the SEPP.

## Conclusion

My client objects to the proposed development on the basis of the devastating impacts on my client's existing views. In that regard, the existing views include part of *Sydney Harbour* and the land/water interface with the *Royal Botanic Gardens*, the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

The proposed development will eliminate a portion of the existing views of the land/water interface with the *Royal Botanic Gardens*, and the entirety of the existing views of the *Sydney Opera House*, and the northern pylons and part of the arches of the *Sydney Harbour Bridge*.

In my opinion, the impact can properly be characterised as severe to devastating. The view loss relates to highly iconic features and the proposed development does not satisfy the applicable objectives of the building height control which include *"the retention of existing views"*.

In my opinion, the proposed development does not achieve the objectives of the building height control to the extent that the proposed development does not provide for *"the retention of existing views"*.

Further, in my opinion, the proposed development does not achieve the objectives of the FSR control to the extent that the proposed development does not promote the desired future character of the area or *"limit the bulk and scale of development"*.

I trust this submission is of assistance and ask that I be kept informed prior to any determination being made, and/or in relation to any further information submitted by the Applicant.

In the meantime, should you require any further information or clarification please do not hesitate to contact the writer.

Yours Sincerely,



James Lovell  
Director  
James Lovell and Associates Pty Ltd