

Our Ref: ARB:BES:277
Your Ref: SSD7874

10 November 2020

BY EMAIL

Anthea Sargeant
Executive Director Compliance, Industry and Key Sites
Department of Planning, Industry and Environment

David Glasgow
Principal Planning Officer

David.Glasgow@planning.nsw.gov.au

Dear Ms Sargeant and Mr Glasgow

**Re: Submission on behalf of One Darling Harbour _Harbourside Shopping Centre
RTS_ SSD7874 (the RTS)**

This submission is made on behalf of the owners of Strata Plan 49259 which comprises the major residential development known as One Darling Harbour. One Darling Harbour is located at 50 Murray Street, Sydney and is home to approximately 750 residents.

This submission is made in response to the amended design and documents submitted by the proponent in its Response to Submissions dated October 2020 (**RTS**) and exhibited by DPIE (**Amended Design**).

Our client acknowledges that the RTS has in its Amended Design provided a response to the public interest and private view impacts raised in our client's previous submission and that, as a consequence of the Amended Design, some One Darling Harbour apartments will be less adversely impacted by the proposal. However, our clients note that:

- a) The Amended Proposal will have moderate to severe impacts on 49 One Darling Harbour apartments, home to approximately 150 residents. Additional apartments will suffer moderate impacts. The severity of these view impacts are significantly underestimated in the Applicant's visual impact assessment documentation which assesses moderate to severe impacts on 24 apartments. Please see attached report by Dr Richard Lamb.
- b) The northern podium, which is the cause of the primary view impacts for our clients, does not represent a reasonable development proposal. Further modification of the design could be achieved without loss of development potential (GFA) so as to provide a better public domain outcome whilst also minimising the severity of the view impacts for our client.

Private View Impacts

Our client appreciates that the Applicant has at last provided detailed CGI images to represent the likely future impact of the proposal on views from residential apartments at One Darling Harbour. Our client notes that these CGI images confirm that:

- 104 apartments and the east facing common areas of One Darling Harbour will have views adversely impacted by the proposal (in that South and South East cityscape views will be blocked)

- 48 of these will lose all, or substantial key elements of, the valuable iconic water views they currently enjoy.

Our client and its expert (Dr Richard Lamb) disagree with the characterisation of the severity of this view impact provided by the proponent. Dr Lamb's report is attached. In Dr Lamb's expert opinion the Amended Design benefit a total of four apartments in One Darling Harbour, 2 at each of Levels 2 and 3, as a result of lowering of part of the northern section of the podium. The overall view impacts to an extent that is moderate to severe would remain for a further 49 apartments.

We note that these significantly affected apartments are home to approximately 150 residents. We also note that in Dr Lamb's opinion the view impact images provided tend to underestimate the actual impact of the proposal as:

- the impacts have been assessed using CGIs representing views from the extremity of balconies, other than for one view from communal space on the roof of One Darling Harbour. This should result in extra weight being given to impacts on the whole apartments. The result however is under-estimating the likely impacts on internal view; and
- the building envelope is significantly larger than the exemplar building depicted in the images.

Our client appreciates that the creation of the proposed "Guardian Square" provides a corridor for improvement of the adverse view impacts for some One Darling Harbour apartments, as well as its primary function of providing additional public space.

Our client notes that this improvement of the design was achieved at no loss of GFA for the proposal.

Principles for the assessment of view impacts

The general principles for the assessment of the impacts of a proposed development on private views are well known and well established. They are set out in the decision of Senior Commissioner Roseth in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140 (***Tenacity***).

The four step process set out in paragraphs 25-29 of *Tenacity* is one of the "planning principles" promulgated by the Land and Environment Court. A planning principle "*is a statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision*". Planning principles are specifically identified by the Court to provide assistance when making a planning decision where, as in this case, **there is a void in policy, where policies expressed in qualitative terms allow for more than one interpretation; and where policies lack clarity**.¹

¹ http://www.lec.justice.nsw.gov.au/Pages/practice_procedure/principles/planning_principles.aspx

Tenacity establishes a 4 step process to help decision makers assess whether the taking by a proposed development of views enjoyed by an existing development is reasonable. Given that the proponent has inferred that *Tenacity* is of less relevance, or has a different application, in this case because there are no specific building controls regulating height, bulk or scale under the relevant environmental planning instruments, we have extracted the planning principle in full so that its application can be properly understood.

26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (e.g. 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, e.g. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

The spatial characteristics of the views across Darling Harbour and the composition of the whole view extending from the Barangaroo shore to the south end of Cockle Bay, including Pyrmont Bridge, the land-water interface, the continuous public foreshore and active retail frontage and the open prospect of the view east and south-east is highly valued from One Darling Harbour. Loss of those elements should be given the greatest weight. Retaining the view of part of the background horizon of high-rise buildings in the CBD and Centrepont Tower is of lesser significance, should be given less weight and in any event it is achieved in most views

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.

One Darling Harbour residents enjoy direct panoramic views across Darling Harbour, Pyrmont Bridge and the City from a sitting and standing position from their living spaces, across what can be considered the front boundary in relation to this step of *Tenacity*. It would be reasonable to expect these views to be protected. The further amended proposal has provided a modest improvement in protection of views from One Darling Harbour that is appreciated. However, a significant number of apartments is affected by view loss in excess of the existing situation. 49 apartments are affected to an extent of impact moderate-severe or severe assessed by Dr Lamb and Ethos Urban concede the same level of impact on at least 26 apartments. On either estimation, the reasonable expectation for protection of views across the front boundaries has not been achieved

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.

Dr Lamb has assessed the severity of the view impacts as follows:

The extents of view impact assessed in the VVIA are generally too low, as they appear to have given too much weight to part of the view that is unaffected, insufficient weight to loss of whole views, land-water interfaces, impacts on the spatial characteristics of the views impacted by the podium and the effects of the combined podium and tower in views toward the south-east. The table attached to Dr Lamb's report compares his assessment of overall view impacts with the Applicant's and includes a column assessing impact on the south-east view that includes the higher section of the podium and the tower, the effects of which on view impact extent appears to have been either ignored or minimised

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 application of this fourth step is discussed below]

We note that the Court has also promulgated a planning principle for the assessment of impact on neighbouring properties in *Davies v Penrith City Council* [2013] NSWLEC 1141 at [116] to [121] (**Davies**). It proposes the following criteria [at 121] for assessing impact on neighbouring properties:

- *How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?*
- *How reasonable is the proposal causing the impact?*
- *How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?*
- *Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?*
- *Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?*

The “reasonableness” of the Proposal

Together, *Tenacity* and *Davies* make it clear that what is required in assessing the reasonableness of the proposal that is causing the adverse view impact, is consideration of:

- the proposal's acceptability in its planning context;

- 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; and
- the vulnerability of the affected neighbouring property.

In this regard we note that:

- a) Professor Peter Webber, in the independent Urban Design Review, has suggested a benchmark for the assessment of the reasonableness of the proposal causing the view impact. He has suggested that *no additional impact* on the views from One Darling Harbour in excess of what is caused by the existing Harbourside building is a standard which the podium north of the proposed tower in the proposal should achieve.
- b) The planning controls require that the public good take precedence in the assessment of development proposals in the foreshore area. We note that Guardian Square provides 1,500sqm public space (at an RL of 13.75m AHD, being above the level of bridge walkway). In contrast, for example, the Cockle Bay development was required to provide 5,500sqm of open space adjoining Pyrmont Bridge (at an RL of 12m AHD);
- c) The development will increase the GFA of the property by 67,000 sqm (to 87,000sqm from 20,000sqm). The public open space suggested to be provided by the development appears less than that required for the Cockle Bay redevelopment on the Eastern side of Pyrmont Bridge (which has a similar GFA). The open space component of the Harbourside development which is on the leased site is limited to the two stairways and the new proposed Guardian Square. We note that the development appropriates a section of public (non-leased land) for the development.
- d) The scale of commercial use proposed is inconsistent with the planning objectives for the site. We note that it is a commercial use that is causing the view impact for our residential clients.
- e) The improvement to the urban realm and public domain that is asserted to justify the development can be achieved without creating a substantial east/north east view impact for One Darling Harbour residents. The residents will already experience an adverse view impact to the S and SE due to the tower and its podium.
- f) Adjustment of the Northern podium by a more skilful design could minimise view impacts for residents without adversely impacting the GFA. The applicant has already taken a step in this direction. This has been achieved by transferring commercial GFA on the northern podium to additional residential GFA in the tower (i.e. at no loss of GFA to the development). We note that a greater residential GFA component may be a preferred outcome for the proponent given the significant increase in new commercial space in the area due to the Cockle Bay and Ribbon developments and the potential declining demand for commercial office space in the CBD due to COVID.

The applicant has suggested that the assessment of the view impacts for One Darling Harbour would achieve a similar outcome to the DPIE/PAC assessment of view impacts for the three other identified recent Darling Harbour area developments. However, these view impacts and their assessment differ from the current situation faced by One Darling Harbour residents as follows:

- IMAX – the impacted private views were identified as distant skyline/harbour views from a CBD location.
- Cockle Bay – the development is located within the CBD (city fringe), a lesser number of units were impacted, the impacted water views were more distant and some oblique, an alternative design (such as a lower tower) would still have had a substantial impact and movement of the tower north would have significant impacts on heritage and the public domain.
- SICEEP- mid/distant views impacted, improvement of view impact would require relocation of tower element which would create adverse public domain impacts.

In contrast to the view impacts assessed for all of these developments, our clients currently enjoy immediate harbour views, from outside the City fringe, and further relatively minor modification of the northern podium to achieve a better view outcome could easily be achieved and would achieve better public domain/urban realm outcomes, by for example expanding the public space adjacent to Pyrmont Bridge.

In short, the severity of the view impacts on around 150 One Darling Harbour residents is underestimated by the Applicant and the impact of the northern podium on views is unreasonable. A reasonable proposal would provide for a lesser impact (i.e. no impact on East and North East views greater than that caused by the existing Harbourside building).

General Submissions

Our client notes that what is being sought is approval for Stage 1 demolition and a building envelope. As identified above (and in our client's previous submissions) the use of an exemplar building in the view impact assessment and public domain assessment has the potential to create a misleading impression as to the actual impact of a development that fits within the building envelope. Specifically, the exemplar building depicted is thinner and shorter than the building envelope the subject of this application. This is particularly evident in the depiction of the NE edge of the residential tower and in the depiction of the pedestrian walkway connecting One Darling Harbour with the Harbourside development (**Walkway**). Care must be taken in the drafting of the design requirements for any future DA to ensure that private view impacts and public domain amenity are consistent with the exemplar building.

Our client also requests that in the scheduling of any demolition works consideration be given to preserving the connection of the Walkway to Pyrmont Bridge for as long as possible to minimise the disruption to residents associated with the redevelopment works.

Yours faithfully
Beatty Legal



Andrew Beatty/Ballanda Sack
Director/Special Counsel
Beatty Legal Pty Limited
ABN 44 273 924 764

Attachment:
Report of Dr Richard Lamb dated 7 November 2020