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Department of Planning and Environment
GPO Box 39
SYDNEY NSW 2001

Attention: Mr Peter McManus

By e-mail (original by post)

Dear Sir

OBJECTION TO SSD 6454 - SCECGS REDLANDS SCHOOL STAGED DEVELOPMENT FOR SENIOR CAMPUS

Introduction

1. I act for Mr Stephen Flood and Ms Teresita Cruz, the owners of 2/19 Waters Road, Cremorne ("my Clients' Property").

2. My Clients have instructed me to make this submission in objection to the staged development application ("the DA") lodged by SCECGS Redland in relation to the land known as 272 Military Road, Cremorne ("the SCECGS Land").

3. My Clients' Property is one of six townhouses in a strata complex directly adjoining the SCECGS Land in Waters Road (on the north western boundary).

4. This submission comprises two parts. Firstly, it deals with number of issues going to jurisdictional matters which, on my submission, must result in refusal of the DA. Secondly, there are a number of merit issues flowing from the proposed development, which when assessed objectively, should undoubtedly lead to a conclusion to refuse the DA because of the impacts that the proposed development would cause on my Client's Property.

Jurisdictional issues

5. The DA is accompanied by a document prepared by Environmental Investigation Services being a "Preliminary Stage 1 Environmental Site Assessment" ("the Stage 1 Report").

6. The Stage 1 Report concludes that the SCECGS Land contains a number of contaminants which need to be remediated. The Stage 1 Report does not conclude that the SCECGS Land is suitable in its contaminated state for the purpose which development is sought – that being an educational use. The Stage 1 Report clearly concludes that remediation work is required.

7. It is a mandatory requirement of State Environmental Planning Policy No. 55 ("SEPP 55") for a consent authority to be satisfied that, if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, the consent authority is satisfied that the land will be remediated before the land is used for that purpose. No such conclusion can be drawn on the basis of the matters in the Stage 1 Report. Accordingly, until such time as a stage 2 detailed investigation is carried out (as required by clause 7(3) of SEPP 55), the Minister (as consent authority) cannot reach the required level of satisfaction to conclude that the development can be safely carried out. It goes without saying that such a conclusion is fundamental in the circumstances where a sensitive land use such as an educational establishment is proposed. Further, the findings present serious concerns for my Clients having regard to the proximity of my Clients Property to the SCECGS Land.

8. In its present form, the DA must be refused for the lack of a stage 2 detailed investigation pursuant to clause 7(3) of SEPP 55.

9. The second fundamental matter restricting the Minister's determination of the DA is the proposed breach of the maximum height development standard in clause 4.3(2) of the North Sydney Local Environmental Plan 2013 ("the LEP"). The SCECGS Land is subject a 12 metre height limit. The DA proposes that the development in part have a height of 22 metres (which includes the building immediately closest to My Clients' Property).

10. The Environmental Impact Statement ("the EIS") accompanying the DA contains a written request for contravention of the development standard pursuant to clause 4.6 of the LEP ("the Clause 4.6 Request"). However, the Clause 4.6 Request is fundamentally flawed and cannot form the basis to conclude that development consent can be granted in light of the proposed contravention of the height development standards.

11. In order for the Minister to grant consent to a development in contravention of clause 4.3(2) of the LEP, he must be satisfied that:

    (a) the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3) being that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are

sufficient environmental planning grounds to justify contravening the development standard; and

(b) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

12. The EIS contains an assessment of the objectives of clause 4.3 of the LEP. Importantly, in relation to the objective in clause 4.3(1)(c) of the LEP, - which is "to maintain solar access to existing dwellings" the Clause 4.6 Request clearly acknowledges that My Clients' Property will suffer from additional overshadowing in mid-winter (pp 64 and 79 of the EIS). The comment in the EIS in relation to this impact is stated to be "unavoidable". Such a statement ignores the fact that the overshadowing is a direct result of the proposed exceedance of the height development standards in clause 4.3 of the LEP.

13. It is submitted that no reasonable consent authority can conclude that the objective of the height development standard can be achieved in circumstances where the exceedance of the height causes such a fundamental impact such as overshadowing on adjoining land. Further, the impacts are not minor – they are severe. This is dealt with further below. To compound the flawed reasoning of the Clause 4.6 Request are the reliance on incorrect statements in the EIS. The incorrect statements include that "these dwellings have private open space small balconies (sic) facing south and roof terraces that will not be impacted on by the proposal". My Clients' Property does not have a south facing balcony, not does it have a roof top terrace. The EIS also states that "… the existing boundary fence casts shadow on the ground floor living room and terraces." I am instructed that My Clients' Property gets full winter sun into at least 2 metres of the ground floor living room.

14. Simply put, the Minister cannot conclude that the Clause 4.6 Request justifies that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case; or that there are sufficient environmental planning grounds to justify contravening the development standard. In the absence of this justification, the Minister is estopped from granted development consent to the DA.

Merit reasons justifying refusal of the DA

15. There are a number of essential design elements proposed by the DA which are unacceptable when assessed against the relevant considerations in section 79C(1) of the Environmental Planning and Assessment Act 19789. Having regard to the matters listed below, the DA must be refused for those unacceptable design reasons.

Setback of the proposed Humphery building and use of the setback as a driveway

16. The proposed setback of the Humphery building from My Clients' Property is 6 metres. That setback is wholly inadequate when consideration is given to the use of the land between the Humphery building and My Clients' Property. The setback space is proposed to be a new driveway to service the SCECGS Land for its use by school buses and service vehicles including garbage trucks. The setback space does not include a landscape buffer which, it is submitted, would be an obvious design element to be included with any reasonable development proposal. Irrespective, the proposed new driveway will create an unreasonable level of impact on My Clients' Property by virtue of its extended period of use which will comprise at least 6 days a week by school buses and early morning times for waste collection vehicles. It is also noted that the acoustic impacts of such a use have not been assessed in the EIS. It would be evident to any reasonable observer that the building of a driveway in this location (which is the interface between the school and residential uses) is clearly inappropriate. It is submitted that this aspect of the development must be amended so as to locate the driveway in a more suitable place on the SCECGS Land.

17. The front setback of the Humphery building also does not comply with the requirements in the North Sydney Development Control Plan 2013 ("the DCP"). The failure to position the Humphrey building to accord with the setback of 19 Waters Road, compounds the perceived height of the building and will result in an even greater overshadowing impact on My Clients' Property than should otherwise occur.

The height of the Humphery building

18. The flawed Clause 4.6 Request has been addressed above. However, further submissions must be made in regard to the height of the proposed building having regard to the setbacks proposed. The EIS at p 70 asserts compliance with the setback requirements in the DCP. However, such compliance is on the basis that the building meets the height limit of 12 metres. As the proposed building does not, it is necessary to assess compliance in terms of the stricter standard of the building height plane. The proposed building also breaches this standard by a considerable amount. At the setback proposed, the maximum height of the building should – and needs to be – setback a far greater distance.

Rooftop pool

19. The impacts from the proposed rooftop pool on the Humphery building for My Clients' Property are immense. It is noted that it is proposed that the swimming pool use will commence as early as 6.00am and that the pool will be used on weekdays and weekends (see p 41 of the EIS).

The noise generated by an outdoor swimming pool at such close quarters is unreasonable. The EIS fails to consider whether a swimming pool can – or should be – an indoor facility. The EIS does not contain an acoustic assessment of the likely noise impact of the proposed rooftop pool. Such obvious matters cannot - and should not - be deferred for later consideration by some later development application.

Overshadowing

20. The shadow diagrams submitted with the DA show the gross nature of the shadow impacts from the Humphery building on My Clients' Property. The proposal will provide a situation whereby My Clients' Property goes from having mid-morning to afternoon solar access in mid-winter to having almost no solar access in mid-winter. As stated above, this is a direct result of the proposed breach of the height development standard of 12 metres. The Land and Environment Court's planning principle in respect to overshadowing (*The Benevolent Society v Waverley Council* [2010] NSWLEC 1082) provides that "*Overshadowing arising out of poor design is not acceptable, even if it satisfies numerical guidelines. The poor quality of a proposal's design may be demonstrated by a more sensitive design that achieves the same amenity without substantial additional cost, while reducing the impact on neighbours*." Again, the EIS fails to consider such fundamental matters in concluding that the overshadowing is "reasonable". Such a conclusion lacks an intelligible justification.

21. Further, the statement in the EIS that the recommended mitigation measure should be to "*ensure No. 19 Waters will receive good solar access at all other times of the year*" ignores the commonly accepted standard to measure the impact at mid-winter. Simply put, the overshadowing impacts are so vast as to form a single basis for refusal of the DA.

Conclusion

22. The matters detailed above must result in the Minister concluding that the DA is unable to be approved for want of jurisdiction and is generally unacceptable on its merits as they relate to My Clients' Property. The proposal is a gross overdevelopment of the SCECGS Land and has had very little regard for the Council's planning controls – the height development standard in particular. The DA fails to recognise in a built up urban area that there are limits on the development potential of land having regard to the likely impacts on adjoining properties. For the Minister to conclude otherwise would, in my opinion, leave any determination to approve the DA open to a challenge on the grounds of Wednesbury unreasonableness (see: *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223) and also on the grounds that such a decision lacks an evident and intelligible

justification (see: *Minister for Immigration and Citizenship v Li* [2013] HCA 18).

23. Should the Minister proceed to approve the DA and grant consent, my Clients will, without further notice, commence proceedings in the Land and Environment Court seeking a declaration that the consent is invalid and that it be set aside. My clients otherwise reserve their rights generally.

Yours faithfully

Grant Christmas
Solicitor / Principal

Law Society of NSW: Accredited Specialist (Local Government & Planning)