

BEATTY LEGAL

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Dear Ms Sargeant

Re: Redevelopment of the Harbourside Shopping Centre: SSD 16_7874

We act for the owners of Strata Plan 49249 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.

It is our client's submission that the application for concept approval for the redevelopment of the Harbourside Shopping Centre (SSD 16_7874) ought not be approved and is in fact incapable of being approved.

The residents of One Darling Harbour have separately made their submissions and experts in town planning and visual impact have also made submissions on our client's behalf. This letter provides our client's legal submissions.

1. The Proposal cannot be assessed until proper planning controls are in place

The Darling Harbour area is of State and Regional significance and is a designated tourism and entertainment precinct.

Development in this location and of this scale needs to be assessed against clear planning controls (such as an LEP and/or a Master Plan) and these controls should be developed and implemented in consultation with the community.

Uniquely for an area of such significance to the State, the site is positioned within a development control vacuum. It has no prescriptive planning controls. Despite being within a strategic foreshore area, it is not required to have a Masterplan under the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (**SREP**) *unless the Minister so directs*.

We have copied this submission to the Minister with a request that he direct the preparation of a Masterplan by the Department of Planning and that such a Masterplan be put into place before this proposal is further assessed.

The Darling Harbour area is undergoing significant change as evidenced by the number of development applications made (and recently approved) in the area. It is a matter of great concern that this re-development is being undertaken in the absence any overarching strategic vision for the area.

It is entirely at odds with the objectives of the *Environmental Planning and Assessment Act* 1979 (**EP&A Act**) that development of this scale and in this significant (and strategically important) location by a private proponent, solely for its commercial gain, be proposed and considered by a consent authority without the benefit of detailed planning controls developed in consultation with the community.

As the Department is aware, section 5 of the EP&A Act provides:

The objects of this Act are:

...

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

Government cannot delegate responsibility for identifying and developing a strategic vision for this area to a private proponent. The idea that a private proponent, through a concept plan and subsequent site specific master plan (subordinate to that concept plan) can effectively assume authority to plan and develop a site of such strategic significance without any detailed specific planning criteria is an open invitation for excess.

The deficiencies in this kind of approach to planning and development are manifest in:

- the limited and biased analysis in the EIS of alternative design options for the site;
- the failure of the EIS to properly address matters such as cumulative impacts, the impact of the proposal on the scenic and heritage qualities of Sydney Harbour or the view loss impacts of the proposal;
- the inconsistent and potentially misleading descriptions in the EIS of the extent and impact of the building envelope proposed; and
- the disputed nature of the extremely limited public consultation undertaken by the proponent.

The SREP mandates that this strategic site (owned by the State) is to be developed for the benefit of the public¹. Unless and until a precinct Master planning process with legitimate opportunities for public consultation (and with the clear objective of ensuring that development is in the public interest) is undertaken, no consent authority acting reasonably could be satisfied that the aims of the SREP have been met.

2. The Proposal fails to comply with the planning principles for the area established by the SREP and other relevant policies

The SREP establishes planning principles and objectives to guide development in the Sydney Harbour Catchment (including Darling Harbour) generally (clause 13) and specifically in the Foreshore and Waterways Area (of which the site forms part) (clause 14).

In our opinion, and as detailed in our clients' expert town planning report and visual effects and visual impact assessment report, the proposal is inconsistent with:

- a) the aims of the SREP relevant to a building in this location (clause 2(1));
- b) the principles of the SREP specifically applicable to the Foreshore and Waterways Area (clause 2(2));
 - *“(a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good”;*
 - *“(b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores”; and*
 - *“(c) protection of the natural assets of Sydney Harbour has precedence over all other interests”;*
- c) all of its relevant planning principles:
 - clause 13(c): *“decisions with respect to the development of land are to take account of the cumulative environmental impact of development within the catchment”;*
 - clause 13(f): *“development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour”;*
 - clause 13(g): *“the number of publicly accessible vantage points for viewing Sydney Harbour should be increased”;*
 - clause 14(d): *“development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores”;*

¹ SREP clause 2(2):

(2) For the purpose of enabling these aims to be achieved in relation to the Foreshores and Waterways Area, this plan adopts the following principles:

(a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,

(b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,

(c) protection of the natural assets of Sydney Harbour has precedence over all other interests.

- clause 15(a): “*Sydney Harbour and its islands and foreshores should be recognised and protected as places of exceptional heritage significance*”;
- clause 15(b): “*the heritage significance of particular heritage items in and around Sydney Harbour should be recognised and conserved*”;
- clause 15(d): “*the natural, scenic, environmental and cultural qualities of the Foreshores and Waterways Area should be protected*”; and
- clause 15(e): “*significant fabric, settings, relics and views associated with the heritage significance of heritage items should be conserved*”; and

d) numerous other specific requirements of the SREP, such as, for example:

- foreshore and waterway scenic qualities (clause 25);
- maintenance, enhancement and protection of views (clause 26); and
- heritage Conservation (clauses 53 and 59).

In addition to the requirements of the SREP and other policies and guidelines referenced in the SEARs, other policy documents prepared by or on behalf of the Sydney Harbour Foreshore Authority (**SHFA**) ought to be taken into account in the assessment of this proposal.

We note that before it was “consolidated” with Property NSW on 1 July 2016, SHFA prepared and promulgated a ***Draft Darling Harbour Urban Form Strategy*** dated April 2016. This strategy document drew on prior urban design assessment specific to Darling Harbour undertaken for SHFA by Tony Caro Architects and City Plan Services (Building Height Study 2006) and Johnson Pilton Walker (Urban Design Report October 2010). The Proposal described in the EIS fails to comply with the guidelines outlined in these documents on almost all criteria including building height, bulk, scale and setback from the waterfront. A copy of relevant extracts from the draft Strategy is attached (**Attachment A**).

In circumstances where there are no detailed planning controls, where the responsible agency has prepared and provided for public consultation a document which seeks to establish detailed urban design criteria including height and setbacks, and the criteria established is consistent with generally accepted design principles and prior studies undertaken by the authority, these draft criteria ought to be given real weight in the assessment of the proposal. Such an approach is consistent with the principle established by the Chief Judge of the Land and Environment Court in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 (3 August 2004).

The Proposal is inconsistent with the requirements of the SREP and applicable planning policies and principles with respect to the bulk and scale of the retail podium, the height and location of the tower, the overshadowing impacts, the view loss impacts, the adverse impact on the scenic qualities of the Harbour and the heritage impacts of the proposal both on Pyrmont bridge and its harbour setting.

3. The consent authority has inadequate information upon which to make an assessment

In important respects, the information provided in the EIS is incomplete, superficial or inaccurate and fails to address the clear requirements of the Department's SEARs.

Even in the limited time available to it, our client and its experts have still identified numerous inadequacies in the EIS. These are detailed in its experts' submissions.

Our client has been unreasonably hampered in its ability to further assess and make submissions on critical inconsistencies in the EIS because the proponent has refused to provide base data on the building envelope to allow our visual experts to undertake his assessment efficiently. We are unaware whether this information has been furnished to the Department. If it has, we request access to it. If it has not, we submit that the Department is put in the same disadvantaged position as that faced by our client.

In our submission, once proper planning controls are in place, the proponent should be obliged to prepare and publicly display a scale model of the proposed building envelope as located within the Darling Harbour area to allow our client's experts and the wider community to properly assess the impacts of the proposal.

The EIS makes statements regarding the extent and effect of public consultation including that specifically with our client. Our client's response to these statements is set out in **Attachment B**.

Specifically, the EIS fails to address the following requirements of the SEARs:

- a. *provide a detailed visual and view impact analysis, which considers the impact of the proposal when viewed from the public domain and key vantage points surrounding the site, including Pyrmont, Darling Harbour, Pyrmont Bridge and adjacent buildings (item 2)*

Both Dr Richard Lamb and Mr Neil Ingham identify serious flaws in the analysis within the EIS in respect of the development's visual and view impacts in the public domain. The impact on public domain views and scenic qualities of the area are of critical importance in the SREP. As set out in section 6.1 of Dr Lamb's report the proponent's analysis is inadequate. It neither properly identifies and characterises these views nor does it properly assess the impact of the development on those views in any systematic manner let alone as required by the planning principles established by the Land and Environment Court in *Rose Bay Marina Pty Ltd and Woollahra Municipal Council and anor* (2013) NSW 1046.

- b. *provide a comprehensive options analysis for the built form, exploring a range of heights, tower locations and built forms, with justification of the selected option based on a thorough consideration of the benefits and potential impacts of each option (item 3);*

The options analysis of built form provided in the EIS is neither comprehensive nor does it provide a thoroughly considered justification for the selected option. This failure to address the SEARs is considered in the report of Ingham Planning, primarily at paragraphs 74 and following and in Appendix II of that report.

- c. *address and respond to comments and recommendations from SHFA's Design and Development Advisory Panel (item 3);*

As identified in paragraphs 19 - 21 of the Ingham Planning report the proposal neither addresses nor is appropriately responsive to the comments and recommendations of SHFA's Design and Development Advisory Panel (**SHFA Panel**). As the Department would be aware, the five members of the SHFA Panel at the time are extremely eminent and well credentialed experts in the fields of architecture, urban planning and property development². The views of these experts should be given real weight.

- d. *provide a detailed heritage impact statement (HIS) that identifies and addresses the impacts of the proposal:*

.... on the heritage significance of the site and adjacent area, including any built and landscape heritage items, conservation areas, views or settings, and in particular the impact on the State heritage listed Pyrmont Bridge (item 5);

Both Mr Ingham and Dr Lamb clearly articulate the failure of the EIS material to identify, let alone assess, the heritage significance of this part of Sydney Harbour and how it would be impacted by the proposal. The exceptional heritage significance of Sydney Harbour is a key basis for the heritage conservation principles in the SREP³.

As noted by Dr Lamb, the decision in *Anglican Church Property Trust v Sydney City Council* [2003] NSWLEC 352 provides a framework for assessing impacts on the aesthetic and landmark significance of a heritage item. The assessment in the HIS of the impact of the development on the heritage values of the State listed Pyrmont Bridge fails to have regard to the setting of the bridge. Furthermore, as noted by Mr Ingham, the HIS

² The five Panel members were:

Louise Cox AO is an Australian architect who was president of the International Union of Architects, based in Paris, from 2008 to 2011. She was awarded the Chevalier d'Ordre des Artes et des Lettres in 2011, one of France's highest honours, and has served on almost thirty boards and high level committees.

Nick Hollo is an Australian architect and urban planner who is the Deputy Executive Director of the Sydney Harbour Federation Trust – a government funded group, which aims to restore redundant defence sites around the harbour. He is also an artist.

Peter Watts AM is an Australian architect who was the founding member of the Historic Houses Trust NSW (1981-2008); he oversaw its success in accumulating 121 awards for architecture, conservation, design, publications, exhibitions etc. He was also a member of the Walsh Bay Arts Precinct Advisory Committee.

Dr Tim Williams has been a special advisory to a number of UK Cabinet Ministers in the Department of Communities and Local Government (CLG) and was regarded as one of the UK's leading planning policy makers. He also advised the Olympic Delivery Authority, the London Development Agency, and the Olympic Legacy Company and was the advisor to the CEO of Lend Lease for the construction of the Athletes Village during the London Olympics.

Brendan Crotty is currently Chairman of the Property Industry Foundation, a director of Brickworks Limited, Chairman of the Western Sydney Parklands Trust and is involved with the Barangaroo Delivery Authority. For 17 years he was also the Managing Director of Australand. Brendan is also a member of the City of Sydney Planning Committee

³ SREP Clause 15

Heritage conservation

The planning principles for heritage conservation are as follows:

- (a) *Sydney Harbour and its islands and foreshores should be recognised and protected as places of exceptional heritage significance,*
...
(d) *the natural, scenic, environmental and cultural qualities of the Foreshores and Waterways Area should be protected,*

appears to misconstrue the extent of the direct impact of the proposed building envelope on the bridge.

- e. *address ... visual privacy, view loss and view sharing, ... impacts to the surrounding area, including neighbouring properties and the public domain (item 7);*

The view loss and view sharing assessment contained in the EIS can in no way be considered to “address” these impacts:

- The impact is not quantified. No assessment is made of the impact on the central apartments of One Darling Harbour (that sit directly behind the tower). The assessment does not identify that over 92 apartments in One Darling Harbour alone will suffer significant view loss impacts.
- The view loss is not assessed in accordance with the established principles in *Tenacity Consulting v Warringah* [2004] NSWLEC 140. The planning principle on the assessment of view loss impacts in *Tenacity* is the framework by which an assessment must be made in circumstances where there are no detailed planning controls⁴.
- The specific deficiencies in the view loss assessment are discussed in both the submissions of Dr Lamb and Mr Ingham.

4. Conclusion

A proposal of this size and scale at such a strategically important site can only be assessed by reference to a clear planning framework developed and implemented in response to community expectations.

In the absence of that framework, as here, not only has the community been deprived of a basic right to be heard, the consent authority is itself hamstrung as a decision maker. The public interest cannot therefore be served conformably with the very objects of the planning legislation.

The approval of a “concept plan” like the present scheme will have long term adverse consequences for the precinct and will leave the State and its agencies open to claims of neglect or worse.

⁴ See for example: *Bastas Architects v Willoughby City Council* [2008] NSWLEC 1360 per Commissioner Hoffman at [11] “*The Court principles are only intended to be activated when a state or council statute and/or control are inadequate to deal with a particular dispute.*”

Even when assessed under the existing, limited planning frameworks established by the planning principles in the SREP, key policy documents and the Courts, the proposal is entirely without merit and could not be approved by any consent authority acting reasonably.

Yours faithfully



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Copy: NSW Minister for Planning