

6 December 2019

General Manager
Northern Beaches Council
Customer Service Centre
725 Pittwater Road
DEE WHY NSW 2099

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Our Ref PEH

By email: council@northernbeaches.nsw.gov.au

Dear General Manger

DA 2019/81 - Demolition Works and construction of residential accommodation at 307 Sydney Road Balgowlah

1. We act for Ms Cathy Kell, the owner of an adjoining property at 2/305 Sydney Road, Balgowlah NSW 2093.
2. There are a number of problems with the assessment of the development application 2019/81 (**DA 2019/81**) that in our view mean that the determination of DA 2019/81 Northern Beaches Local Planning Panel (**Panel**) should be to **refuse the application or defer determination of the application** until those items below have been adequately addressed:
 - (a) that DA 2019/81 has been correctly notified;
 - (b) that Council has properly considered clause 6.9(3)(b) of the *Manly Local Environmental Plan 2013 (MLEP 2013)*;
 - (c) that owner's consent has been provided by the landowner of land for which the development is proposed to be constructed as required by clause 49(1) of the *Environmental Planning and Assessment Regulation 2000*, or that a clause 55 amendment is made to locate all of the development on the land for which landowner's consent has been provided; and
 - (d) that a written request for a variation of the development standard at clause 4.3 of the MLEP 2013 that satisfies the requirements of clause 4.6(4)(a)(i) of the MLEP 2013 has been provided.

Failure to properly notify

3. We **attach** a copy of the notification letter that was issued on our client on 10 September 2019. We note that the description of the proposed development is for "*Demolition Works and construction of residential accommodation*".

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4. We refer to the decision of *Tweed Business and Residents Focus Group Inc v Northern Region Joint Regional Planning Panel* [2012] NSWLEC 166 (**Tweed BRFG Inc**).
5. The description of the proposed development in the notification letter is plainly inadequate. The development is described as residential accommodation, that could include anything from a dwelling house to a residential flat building, a boarding house or some form of seniors housing.
6. The description of the development gives no indication about the number of dwellings or the particular built form of the development, which comprises apartments and townhouses. The site contain a heritage item. There is nothing that identifies that the development may impact the significance of a listed heritage item. Potentially most significantly the description of the development gives no indication that a significant amount of excavation is required to provide for basement carparking..
7. Anyone reading the notification letter could reasonably but erroneously believe this this was an application for a ‘knock-down-rebuild’ next door.
8. We note that section 2.23 of the *Environmental Planning and Assessment Act 1979 (Act)* requires that a community participation plan is to be prepared having regard to those matters at subclause (2), which included things such as “(c) *Planning information should be in plain language, easily accessible and in a form that facilitates community participation in planning.*”
9. The Northern Beaches Community Participation Plan (**NCPP**) repeats those considerations. In the NCPP at Table 2 on page 7 it says that Council, “*will tell you about plans/proposals and give you accurate and relevant information as they progress through the planning system*”. It says that it will do this via “*Online Application Tracker tool; newspaper notices, media releases, council website, Your Say website, information sessions, discussion papers and technical reports.*”
10. The words “*we will tell you about plans/proposals and give you accurate and relevant information as they progress through the planning system*” set the bar quite high regarding the expectations as to the information to be provided to the public as part of the community participation process.
11. The description of the proposed development is neither in plain-English “residential accommodation” nor does it provide an accurate assessment of what the development involves, no indication of the built form, the impact on the heritage item or the significant excavation required for the basement carparking.
12. Like the facts and circumstances in *Tweed BRFG Inc*, the description of the development does not satisfy the requirements of the NCPP and the mandatory community participation requirements at section 2.22 of the Act. As such, we consider that the development application must be renotified with a correct description of the development.

Failure to consider clause 6.9(3) of MLEP

13. Council’s assessment report identifies that the proposed development is within a foreshore scenic protection area and as such, that clause 6.9 of the MLEP 2013 applies. Clause 6.9(3) of the MLEP 2013 relevantly provides (**emphasis added**):

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority has considered the following matters—

(a) impacts that are of detriment to the visual amenity of harbour or coastal foreshore, including overshadowing of the foreshore and any loss of views from a public place to the foreshore,

*(b) measures to **protect and improve** scenic qualities of the coastline,*

(c) suitability of development given its type, location and design and its relationship with and impact on the foreshore,

(d) measures to reduce the potential for conflict between land-based and water-based coastal activities.

14. Council's assessing officer considers this clause at pages 58 and 59 of the Agenda for the 9 December 2019 meeting for the Panel (**Agenda**). The assessing officer fails to adequately consider this clause, in particular, in their assessment of clause 6.9(3)(b) of the MLEP 2013, the assessing officer says "the proposal is of an adequate design to protect the scenic qualities of the coastline". The assessing officer has not considered whether there are measures in the proposed development that will 'protect and improve' the scenic qualities of the coastline.
15. The clause operates as an essential pre-condition to the granting of consent. As such the Panel does not have the power to determine the application until it has considered those measures of the development that will protect and improve the scenic qualities of the coastline.

Lack of owner's consent

16. Council's assessing officer comments on the lack of owner's consent from adjoining property owners on page 40 of the Agenda. It says "*It is noted the development includes a fence on the boundary. A condition is recommended requiring all development be located entirely within the property boundaries*".
17. Clause 49(1) of the *Environmental Planning and Assessment Regulation 2000* (NSW) (**EPA Regulation**) reads as follows:

49 Persons who can make development applications

(1) A development application may be made:

(a) by the owner of the land to which the development application relates, or

(b) by any other person, with the consent in writing of the owner of that land.

18. We submit that Council cannot cure a jurisdictional problem by amending the application by Condition so that the application will be wholly contained on the land. The application must be amended prior to the grant of development consent per clause 55 of the EPA Regulation, if it is not, then potentially any grant of consent would be invalid.
19. We consider that there is an issue with this approach, particularly in light of the decision of *AI Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245, which would mean that the Panel does not have jurisdiction to determine the application until the application has been amended so that it is either wholly contained on the land for which landowners consent has been provided, or landowners consent for all land on which development is proposed to be carried out has been provided.

Inadequate clause 4.6 written request

20. The written request for a variation of the development standard at clause 4.3 of the MLEP 2013 does not satisfy the requirements of clause 4.6(4)(a)(i) of the MLEP 2013.
21. We consider that the Panel cannot satisfy itself that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause 4.6(3) of the MLEP 2013.
22. This is because the written request fails to justify the contravention of the development standard by demonstrating—
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
23. In particular, we draw the Panel's attention to the fact that while clause 4.6(3) of the MLEP is reproduced at page 104 of the Agenda, there is no justification contained in the written request demonstrating:
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
24. The clause 4.6 written request repeats relevant caselaw, but fails to discuss the relevant provisions of the clause as is required by clause 4.6(4)(a)(i). It only discusses the proposed development against the objectives of the standard and zone. There is no justification provided which says why compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and fails to provide any environmental planning grounds to justify why the development standard has been contravened the application must be refused.

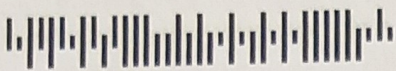
Conclusion

25. The Panel must either refuse DA 2019/81, or defer the determination of the application until:
 - (a) DA 2019/81 has been correctly notified;
 - (b) Council has properly considered clause 6.9(3)(b) of MLEP 2013;
 - (c) Owner's consent has been provided by the landowner of land for which the development is proposed to be constructed as required by clause 49(1) of the EPA Regulation or a clause 55 amendment is made to locate all of the development on the land for which landowner's consent has been provided; and
 - (d) A written request for a variation of the development standard at clause 4.3 of the MLEP 2013 that satisfies the requirements of clause 4.6(4)(a)(i) of the MLEP 2013 has been provided.
26. We trust that this submission to the Panel is of assistance.

Yours sincerely

A handwritten signature in blue ink that reads "Holding Redlich". The signature is written in a cursive, flowing style.

Holding Redlich



Proprietors of Strata Plan 5090
C/- Catherine Suzanne Kell
2/305 Sydney Road
BALGOWLAH NSW 2093

Dear Sir/Madam

NOTICE OF PROPOSED DEVELOPMENT – AMENDED PLANS

Application No: DA2019/0081
Address: Lot 1 DP 115705 and Lot D DP 335027 12 Boyle Street and 307 Sydney Road BALGOWLAH
Proposal: Demolition Works and construction of residential accommodation
Submissions Close: 28 September 2019 *add 1 week.*

Please be advised that Council has received amended plans and documents for the above Application. The applicant is Sun Property Group Australia Pty Ltd.

You may view the plans, the documents and follow the progress of a Development Application on Council's website: www.northernbeaches.nsw.gov.au > Planning and Development > Building and Renovations > Application Search.

If you would like to make a submission the best way to do so is online, via Application Search. Alternatively, you may email council@northernbeaches.nsw.gov.au or write a letter marked to the attention of Development Assessment and clearly identify the application number, the address of the property on which the development is proposed and the reasons for your concerns. They must be lodged by the Submissions Close date.

Council will acknowledge receipt of all submissions. Any objections received will be addressed in the report prepared by Council as part of the assessment process. All persons who make a submission will be advised of the outcome of this Application.

Please read the important information contained on the back of this letter. Enquiries regarding this Application may be made to Benjamin Price on 1300 434 434.

Yours faithfully

Benjamin Price
Planner