From:	Pierre Le Bas
Sent:	3/11/2020 11:14:52 AM
To:	Thomas Prosser; Council Mailbox
Cc:	Kim Hildebrand; Steve Lydiate; Maureen Wannell; Maureen Wannell; Eskil Julliard
Subject:	DA2020/0431 - Proposed Collaroy boarding house and commercial Dev -lyd.pit112c

Hi Thomas

I refer to the above matter, our earlier written submission and your conversation with Nic Najar from this office.

See under from Lindsay Taylor Lawyers, in an article dated 17/10/2017:

Intensification of Use, Owners Consent and Staged DAs

Development proposals often involve the intensification of the use of an existing easement. A recent decision of the Land and Environment Court is a reminder that development consent will be required for the intensification of the use of an easement. However, it does not necessarily follow that owners consent to the development application ('**DA**') is required from the owner of the land burdened by the easement.

In *Opera Properties v Northern Beaches Council & anor* [2017] NSWLEC 1507 the Applicant had sought development consent for a 62 lot residential subdivision and construction of dwellings. The DA was a staged development application (now known as a concept development application) within the meaning of s83B of the *Environmental Planning & Assessment Act 1979* (**'Act'**).

The only vehicular access between the development site and the public road network was over an existing right of carriageway ('**ROW**') across land owned by the Uniting Church.

The Uniting Church argued that its consent to the making of the DA was required under clause 49 of the *Environmental Planning Assessment Regulation 2000* because the development proposed involved the intensification of use of the ROW.

The Applicant argued that the DA did not seek consent for an intensification of the ROW, as the intensification of the use would occur in a later stage of the development and would be the subject of a further DA.

The Court found, consistently with previous authority, that the intensification of use of the ROW was '*development*' under the Act as it constitutes the use of land.

However the works proposed in the DA would not generate the intensification, given the proposed staging.

The DA which had been made would only, if granted consent, authorise the subdivision of the development site and some subdivision works only. It would not authorise the construction of dwellings and therefore the use of the ROW would not be intensified.

The Court found that the DA did not seek consent for the use of the ROW, and the consent of the Uniting Church to the making of the DA was not required.

Consent of the Uniting Church would of course be required to the subsequent DA which would need to be made to authorise the intensified use of the ROW.

Despite the fact that the DA before the Court did not propose the intensification, the impacts of the intensification needed to be considered and assessed before consent to the DA could be granted.

Read the full judgment here: *Opera Properties v Northern Beaches Council & anor* [2017] NSWLEC 1507

In the subject case there can be no doubt that there is an intensification of use as regards the development proposal. The specific circumstances in the decision in *Opera Properties* are different from the current matter in that the development proposed will of itself give rise to an intensification of the use of the ROW. In other words the proposal is not a mere subdivision that gives rise to the 'potential' for intensification.
It would be most unfortunate if a consent was granted here that was open to challenge by way or jurisdictional error.
We have run an argument along these lines in our own submission to Council dated 29 May 2020. We have also discussed the issue relating to deferred commencement conditions.
I hope this assists.
Kind regards

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