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Subject: Letter of objection to Development Application DA2018/1708 for demolitions works and construction of a boarding house at 195-197 Sydney Road, Fairlight [HR-SYD.FID475798]

Attachments: Submission to Northern Beaches Council - 2018.11.15.pdf;

Dear Chief Executive Officer

Please see **attached** letter to you of today's date.

This letter concerns Development Application DA2018/1708 for demolition works and construction of a boarding house at 195-197 Sydney Road, Fairlight.

Please also confirm receipt of this email and the attached letter.

Kind regards

Georgia Appleby | Lawyer

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15 November 2018

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Dear Chief Executive Officer

Letter of objection to Development Application DA2018/1708 for demolition works and construction of a boarding house at 195-197 Sydney Road, Fairlight

1. We act for the Owners – Strata Plan No. 77843 at 201-207 Sydney Road, Fairlight.
2. We refer to Development Application reference DA2018/1708 (**DA**) which seeks consent for demolition works and the construction of a boarding house and basement car park at 195-197 Sydney Road, Fairlight (being Lot 87 DP 1729 and Lot 2 DP 589654) (**Land**).
3. The DA proposes the construction of two 3 and 4 storey buildings containing a total of 75 rooms capable of housing a maximum of 126 occupants. The DA also proposes the construction of a 2 storey basement carpark situated underneath both buildings (**Proposed Development**).
4. The Land is located in close proximity to 201-207 Sydney Road, Fairlight. The purpose of this letter is to outline our client's objection to the DA.

Summary of objection

5. By way of summary, our client objects to the DA on the basis that:
    a. the Proposed Development does not make provision for a sufficient number of car parking spaces;
    b. the Proposed Development does not meet the minimum accommodation size requirements;
    c. the design of the Proposed Development is not compatible with the character of the local area;
    d. the Proposed Development will have unacceptable traffic impacts; and
    e. the Proposed Development does not provide compliant communal living areas.
6. This letter also raises concerns regarding how the Proposed Development will be managed such that it does not impact on the amenity of the neighbouring properties.

Relevant planning controls

7. The DA is subject to the controls specified in the following:

    a. *Environmental Planning & Assessment Act 1979* (**EP&A Act**);

    b. *State Environmental Planning Policy (Affordable Rental Housing) 2009* (**ARH SEPP**);

    c. *Manly Local Environmental Plan 2013* (**MLEP**); and

    d. *Manly Development Control Plan 2013* (**MDCP**).

Grounds of objection

The Proposed Development does not provide for a sufficient number of car parking spaces

8. We note that the proponent seeks to rely on the ARH SEPP in seeking consent for the Proposed Development. Pursuant to clause 29(2)(e)(iia) of the ARH SEPP, a consent authority must not refuse to grant consent on the grounds of parking if at least 0.5 parking spaces are provided for each boarding room.

9. According to the documents exhibited with the DA, including the plans and the Statement of Environmental Effects dated 16 October 2018 (**SEE**), the basement car park allocates:

    a. 38 car parking spaces including 3 accessible parking spaces;

    b. 15 bicycle spaces; and

    c. 15 motorbike spaces.

10. On our calculations, clause 29(2)(e)(iia) requires a 75 room development to allocate 38 car parking spaces.

11. Whilst it may initially appear as though the DA is compliant with this clause, we are of the view that the DA has, in fact, only allocated 35 car parking spaces. This is because the DA has included, rather than excluded, the accessible parking spaces within their total car parking space calculations.

12. Pursuant to clause 3.6.3.2(c) of the MDCP, parking spaces for people with disabilities should be used only by those entitled to use the spaces. This has the effect that the three accessible car spaces (proposed under the DA) cannot be used by any able-bodied residents of the boarding house. Given this restriction, the accessible car parking spaces should be excluded from the calculation of car parking required under the ARH SEPP and any accessible car parking spaces should be provided in addition to the minimum number of unrestricted car parking spaces.

13. This reasoning is consistent with the Court's finding in *Pomering v Hawkesbury City Council* [2018] NSWLEC 1146. Here, Commissioner O'Neill held that the reservation of one of the spaces as accessible parking unnecessarily restricted the use of one of the two car parking spaces available and, thereby, further limited the availability of onsite parking associated with the proposal.

14. Practically speaking, the effect of this limitation in the context of the DA is amplified given that only 38 car parking spaces are required to be provided onsite, even where the development may house some 126 occupants.

15. Therefore, we are of the view that the DA fails to provide 38 car parking spaces as required by clause 29(2)(e)(iia) of the ARH SEPP. Consequently, Council is authorised to refuse the DA on the grounds that the proposal fails to meet the minimum mandatory parking requirements.

Unacceptable traffic impacts

16. Further and related to the above, we note that a Traffic Impact Assessment has been prepared in relation to the DA. This report concludes at page 20 that *"the increase in traffic volumes as a result of the development will have negligible impacts on the performance of the Sydney Road/Hill Street intersection."*

17. In the experience of residents, including our client, Sydney Road is renowned for being highly congested, especially during peak hours, and is already a significant safety risk to commuters. We query:

    a. the traffic consultant's reasoning that despite increasing the occupants from two detached dwellings accommodating approximately 10 people to a large multi-storey boarding house of approximately 126 people, the development will only have a "*negligible*" impact on traffic congestion in the immediate vicinity of the development; and

    b. whether the consultant has assumed that only 38 of the residents will have cars and that all others will rely on public transport. This would be an unacceptable assumption to make as it does not consider that occupants of the boarding house may choose to rely on offsite street parking where onsite parking is not made available.

18. Offsite street parking is already a serious issue in the experience of our client, with street parking seemingly at capacity. Also, given the discrepancy between the number of occupants and the amount of parking proposed under the DA, we anticipate that this issue will significantly worsen if the DA is approved.

19. On this basis, we contend that the Proposed Development poses significant and unacceptable traffic impacts.

The rooms do not meet the minimum size requirements

20. Clause 29(2)(f)(ii) of the ARH SEPP states that a consent authority cannot refuse to grant consent on the grounds of accommodation size if each room has a gross floor area (excluding any area used for private kitchen or bathroom facilities) of at least 16 square metres.

21. From reviewing the private space layouts at Part 9.1 of the Architectural Design Report, it is apparent that the kitchen areas have not been excluded from the calculation of the gross floor area.

22. While we were unable to scale the drawings for these rooms, in our view, the failure to exclude the kitchen areas would likely result in some of the rooms being undersized, contrary to clause 29(2)(f). In particular, given the current dimensions of room types 1.5, 2.0 and 2.0DDA, we are concerned that these rooms, when calculated correctly, would be below the threshold for minimum accommodation size.

23. Therefore, we contend that Council is authorised to refuse the DA on grounds that the proposal fails to meet the minimum accommodation size under clause 29(2)(f)(ii) of the ARH SEPP.

The design of the development is incompatible with the character of the local area

24. Clause 30A of the ARH SEPP states that a consent authority must not consent to development unless it has taken into consideration whether the design of the development is compatible with the character of the local area.

25. In this regard, we are of the view that the Proposed Development is both physically and visually incompatible with the character of the immediate surrounding neighbourhood.

26. Firstly, we acknowledge that the term compatibility when used in an urban planning context does not refer to sameness but rather, means "*capable of existing together in harmony*".[1] To this extent, two building can be compatible even where there are significant differences.

Physical incompatibility and inconsistency with MDCP

27. With regard to physical incompatibility, we are of the view that the Proposed Development exhibits various inconsistencies with the MDCP. These include in relation to front and rear setbacks and excavation depth.

28. While any of these inconsistencies when considered alone may not be determinative, when viewed from the perspective of the Proposed Development as a whole, they demonstrates a notable physical incompatibility with the character of the immediate locality.

29. In particular, the Proposed Development is not sufficiently setback from the front boundary to Sydney Road or the rear boundary which borders 10 Hilltop Crescent. As is acknowledged on pages 34 to 36 of the SEE, clauses 4.1.4.1 and 4.1.4.4 of the MDCP prescribe the following mandatory setback distances:

    a. front setback – where the street front building lines of neighbouring properties are variable and there is no prevailing building line, a minimum 6 metre front setback applies; and

    b. rear setback – the distance between any part of a building and the rear boundary must not be less than 8 metres.

30. With regard to the front setback proposed under the DA, we note that as currently designed:

    a. the garage façade is setback at a distance of between 4.2 to 5.5 metres; and

    b. the entry concierge/café is setback only 2 metres.

31. Both of these setbacks are non-compliant with the distances set under the MDCP and these contraventions are alleged to be justified on the basis that they are similar in alignment to the building at 199 Sydney Road.

32. In our view, it is inappropriate to use the existing setback at 199 Sydney Road to justify a non-compliant setback distance as this adjoining property does not reflect the character of the area. In fact, rather than being typical of the area, the front setback at 199 Sydney Road, which is approximately 2 metres, is an anomaly in that almost all other surrounding properties are setback much further from the street frontage.

33. In particular, we are of the opinion that it would be more reasonable for the Proposed Development to consider the front setbacks of the properties located between 181 to 167 Sydney Road which are located to the immediate west of the subject site. Generally speaking, the buildings located on each of these properties share a marked and consistent setback from Sydney Road.

34. On this basis, a variation to the front setback control is not justified as 199 Sydney Road should not set the setback benchmark for the area as it is an anomaly and the proposed non-compliant setback is markedly inconsistent with the character of the immediate local area.

35. Similarly, with regard to the rear setback, we note that the DA proposes a setback of 6 metres, rather than the required 8 metres. The SEE highlights that earlier versions of the design were

[1] *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 at [22].

consistent with the rear setback requirements and that this has since been amended in order to increase communal space areas.[2]

36. While we acknowledge the importance of communal areas, particularly for such a large boarding house, we are of the view that it is the role of the applicant to design the development in such a manner that it is both consistent with the planning controls and demonstrates good design practices. To this extent, a non-compliant setback is not necessarily mutually exclusive with effective design of open communal spaces. Rather, it is the applicant's role and duty to ensure that where possible both outcomes can be met. Therefore, in the absence of any other justification, we are of the view that the non-compliant rear setback is also unacceptable.

Visual incompatibility

37. With regards to visual incompatibility, the Proposed Development does not complement the streetscape and accordingly, is not consistent with the character of the local area.

38. In particular, we note that the DA proposes a large sandstone wall to be constructed along the street frontage of the building. This sandstone wall is very prominent, especially given that it is over 3 metres high and is setback only between 2 to 5.5 metres from the street frontage.

39. This design feature, in our view, directly contradicts objective 1 of clause 3.1 of the MDCP which aims to minimise any negative visual impacts of walls, fences and car parking on the street frontage.

40. The wall also does not comply with clause 4.1.10 of the MDCP, namely that freestanding walls between the front boundary and the building are to be no more than 1 metre high above ground level at any point.

41. This harsh and overbearing façade is not in keeping with the character of the local area which, as discussed earlier, largely incorporates generous setbacks with dense landscaping buffers.

42. We also consider that the bulk and scale of the building is not compatible with the surrounding development. While we acknowledge that Fairlight has a mixed residential character comprising detached dwelling housing, multi-dwelling housing and residential flat buildings, most of these are only one or two storey in scale. For example, the Palm Cove development at 201-207 Sydney Road (in which our client lives) incorporates basement car parking and is still approximately only two storeys.

43. In fact, clause 4.1.2.2 of the MDCP imposes a general 2 storey limit on buildings in the area (subject to some exceptions). While this limit does not apply to the DA as it is utilising bonus floor space under the ARH SEPP, it does demonstrate that the character of the area is largely low in bulk and scale. Therefore, in our view, a 3/4 storey development situated on an elevated site behind an imposing solid sandstone wall is not in keeping with the character of the local area.

44. At points, we note that the SEE seems to justify the bulk and scale of the development on the basis that it is in keeping with the 12 storey residential flat building located immediately behind the site at 10 Hilltop Crescent. On this issue, we contend that the issue of compatibility is not answered by merely pointing to other more imposing development in the area and forming the opinion that the development is less offensive than that existing building. Rather, as the Court held in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191, compatibility is about harmony and we are of the view that the 75 room development proposed under the DA is not harmonious with the bulk and scale of the largely low-level surrounding buildings.

[2] Statement of Environmental Effects, page 36.

45. Similarly, at times the SEE expressly points to development application reference DA 105/2013 in which Council granted consent to the construction of a boarding house at 122 Sydney Road, Fairlight. This consent permitted the construction of a 22 room boarding house to accommodate a maximum of 46 occupants. The boarding house approved under DA 105/2013 is significantly smaller in bulk and scale to that proposed under the DA. In our view, this comparison is of little value in justifying the Proposed Development and rather, provides further evidence that the Fairlight area is characterised by low bulk and scale residential development.

46. Further to this, the proposed façade incorporates a commercial use, being the concierge/cafe at the immediate street frontage of the building. This concierge/café is located within the residential zone yet visually presents as a commercial use within the streetscape. This is not in keeping with the character of the immediate locality which is largely residential and is situated away from the cluster of neighbourhood shops at 178 to 182 Sydney Road.

Excessive excavation required

47. Clause 4.4.5.2(a) of the MDCP states excavation is generally limited to 1m below natural ground level with the exception of basement parking areas (which will be contained within the footprint of the building) and swimming pools.

48. Whilst we acknowledge that the Proposed Development does involve basement car parking and as such, is authorised under the MDCP to excavate below 1m, the amount of excavation proposed is excessive.

49. According to Part 7.1 of the Architectural Design Report, a "*significant part*" of the design concept proposed under the DA is dependent upon creating cuts into the landscape. These "*cuts*" are, in places, very deep extending at least 3 storeys at the rear of the site.[3]

50. This is, in our view, incompatible with the objectives of clause 4.4.5 of the MDCP which expressly aims to limit changes to the topography and limit excavation.

51. The SEE also states that the degree of excavation required is as a result of the need to achieve sufficient onsite car parking. On this issue, we note that the amount of car parking is directly linked with the number of boarding rooms proposed and the size of the Proposed Development. This, in our view, is demonstrative of the fact that the current planning controls do not envisage a development of this scale being undertaken on the land and that the Proposed Development is otherwise incompatible with the local character of the area.

The Proposed Development does not provide compliant communal areas

52. Clause 4.4.9 of the MDCP establishes various controls relating to boarding houses. In particular, clause 4.4.9.1 states that development for boarding houses must meet the design standards outlined in Schedule 7. Relevantly, Part A2 of Schedule 7 states that the communal living areas in boarding houses must:

    a. have a minimum area of 12.5sqm or 1.2sqm for each resident, whichever is the greater; and

    b. communal living areas are to be located on each level of a multi-storey boarding house.

53. With regards to the first requirement, we note that the calculations recorded on page 32 of the SEE state that the development requires communal living areas of at least 155sqm. This is based on an estimate of 50 double lodger rooms and 24 single lodger rooms.

[3] Architectural Design Report, Section A-A plan, page 29.

54. However, as is acknowledged in the SEE, the design of the development fails to meet this requirement. Specifically, the Proposed Development only provides an aggregate of 135sqm rather than 155sqm.

55. Further to this, the Proposed Development fails to comply with the second requirement of having communal living areas located on each level of the multi-storey boarding house. Instead, the proposal has allocated communal spaces across the ground and first floor.

56. The failure to abide by these design requirements is, in our view, unacceptable particularly when you consider that the boarding house rooms may also be undersized (as discussed above).

Managing the impact of the Proposed Development on residential amenity

57. The boarding house as currently designed is capable of housing 126 occupants at any one time. The sheer scale of this Proposed Development also raises concerns regarding how the boarding house will be managed so that the development does not have a detrimental effect on the amenity of the adjoining properties.

58. To this end, we acknowledge that the proponent has developed a draft Plan of Management which outlines the operational management controls which will apply to the boarding house.

59. In particular, the Plan of Management proposes that the managerial functions will be carried out by a Site Manager who is to be contactable 24 hours a day, 7 days a week. It also proposes that the Site Manager will maintain a complaint register which will be made available for Council inspection.

60. While we are supportive of both these measures, we are concerned that the effectiveness of a Plan of Management is limited to the extent that it is enforceable by parties such as Council.

61. On this basis, we are of the view that if consent is granted to the DA, it should be a condition of this consent that the development is to be managed and maintained in accordance with the Plan of Management. This will ensure that the Plan of Management is enforceable, should the Site Manager fail to conduct their duties in accordance with the various requirements. Provision should also be made for an enforceable complaints handling procedure, with any issues raised by surrounding properties appropriately managed and addressed.

62. Furthermore, it is fundamental that a development of this nature be appropriately managed and any failure to do so strictly enforced to minimise amenity impacts on surrounding residents, including as a result of noise and parking.

Conclusion

63. On the basis of the above information, we request that Council determine to refuse the DA on the basis that:

    a. the DA does not comply with the standards regarding parking and accommodation size specified in clause 29(2)(e) and (f) of the ARH SEPP; and

    b. the design of the development is not compatible with the character of the local area as required by clause 30A of the ARH SEPP as is demonstrated through various non-compliances with the MDCP.

64. In the event that Council resolve to grant consent to the DA, we request that, at a minimum, Council request that the proponent amend the DA to address the concerns raised in this letter, particularly in relation to:

    a. parking;

b. setbacks;

c. excavation depth;

d. bulk and scale;

e. traffic; and

f. communal areas.

65. We would also request that Council ensure that the Plan of Management is made enforceable as an express condition of consent.

66. Should you have any questions regarding the content of this letter, please direct your correspondence to Breellen Warry at Breellen.warry@holdingredlich.com or (02) 8083 0420.

Yours sincerely

Holding Redlich

Holding Redlich