
Sent: 7/02/2020 5:24:15 PM
Subject: Letter of Objection to Northern Beaches Council regarding DA2019-1419 [HR-SYD.FID518218]
Attachments: Letter of Objection to Northern Beaches Council regarding DA2019-1419 (0....pdf;

Dear Sir or Madam

Please see attached submission in response to DA2019-1419.

Kindly acknowledge receipt.

Kind regards

Breellen Warry | Partner



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7 February 2020

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

Dear Sir/Madam

Letter of objection to Development Application DA2019/1419 for proposed cancer treatment centre at 49 Frenchs Forest Road East, Frenchs Forest

1. We act for Northern Beaches Cancer Care Centre Pty Limited.
2. Our client currently occupies Building 4 in the business park located at 49 Frenchs Forest Road, Frenchs Forest (**Business Park**) and operates a radiation oncology facility at these premises.
3. We refer to Development Application reference DA2019/1419 (**DA**) which seeks consent for the construction of a cancer treatment centre and basement carpark on Lot 7 in DP 1020015 (**Site**) which is also located in the Business Park.
4. Specifically, the DA proposes the construction of a 4 storey building containing consulting rooms, a radiation oncology unit with Linear Particle Accelerator, medical oncology unit and medical imaging. The DA also proposes the construction of a 4 storey subterranean basement carpark situated underneath the building (**Proposed Development**).
5. We note that this DA follows withdrawal by the applicant of an earlier Development Application DA2019/0988. However, it would appear that the DA again fails to address some key issues, proposes an even more extensive excavation to provide an additional subterranean basement floor and conflicts with surrounding lot owners' rights of way, easements and the terms of the Umbrella Deed governing the Business Park.
6. The purpose of this letter is to outline our client's objections to the DA on the basis that:
 - (a) the DA has not been correctly exhibited, advertised or notified;
 - (b) the Proposed Development does not make provision for a sufficient number of car parking spaces;
 - (c) incomplete information has been provided regarding the use of Level 3;

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- (d) the Proposed Development involves excessive earthworks and requires a sump and pump system to be installed to manage seepage water;
 - (e) the Proposed Development results in unacceptable construction impacts;
 - (f) the Proposed Development will interfere with the surrounding lot owners' access to right of way numbered 6 in DP1020015; and
 - (g) the Proposed Development will create unacceptable impacts on vehicle and pedestrian traffic.
7. This will result in significant unacceptable impacts to our client's existing facility, other businesses and other developments within the Business Park. In addition, this will lead to unsatisfactory planning outcomes as a result of a poorly formulated DA which fails to adequately address numerous matters and is non-compliant with various relevant controls.
8. We submit that the significant and material problems with the DA again prevent Council officers from being able to properly assess the DA and hence require the DA to be withdrawn, proper consultation undertaken with lot owners and a new DA prepared and submitted.

Relevant planning controls

9. The DA is subject to the controls specified in the following:
- (a) *Environmental Planning & Assessment Act 1979 (EP&A Act)*;
 - (b) *Environmental Planning & Assessment Regulation 2000 (EP&A Regulation)*;
 - (c) *Warringah Local Environmental Plan 2011 (WLEP)*;
 - (d) *Warringah Development Control Plan 2011 (WDCP)*; and
 - (e) *Northern Beaches Community Participation Plan (NBCPP)*.

Grounds of objection

Ground 1: the DA has not been correctly exhibited, advertised or notified

10. Firstly, we are concerned that Council has failed to correctly exhibit, advertise and notify the DA in accordance with the requirements of Council's notification policy in the NBCPP.
11. Relevantly, the NBCPP provides that the minimum mandatory exhibition, advertisement and notification requirements are:
- (a) the application is to be made available online via Council's website;
 - (b) notification letters must be sent to adjoining property owners and occupiers; and
 - (c) a notification sign is to be placed in a prominent position on the Site for the duration of the notification period.
12. In our view, Council has also failed to satisfy the requisite advertising and notification requirements in the following respects:

- (a) the Notice of Proposed Development letter is deficient and fails to meet the minimum mandatory requirements under the NBCPP. In particular:
- (i) we are instructed that not all occupiers/tenants of the Business Park were informed of the DA;
 - (ii) it provides a wholly inadequate description of the proposed development, being “*Construction of a Cancer Treatment Centre*”. This fails to provide key information regarding the scale of the development (ie. that it is 4 storeys) and that it also proposes the construction of a 4 storey subterranean basement car park; and
 - (iii) the sign has not been placed in a “*prominent position*” on the proposed development site, in order to visually bring the DA to the attention of the public. In this regard, we are instructed that the sign erected on the Property is set back on the gates and 3m from the footpath.
13. In our view, these breaches of the NBCPP are contrary to the purpose of community participation which is to assist in bringing the application to the attention of the community so as to enable people to be informed and make submissions.¹
14. By failing to comply with the relevant exhibition requirements, Council has undermined a legitimate expectation held by the people of its local government area that it would apply the notification policy indiscriminately to all developments. The critical nature of a breach of this kind has been described by Cripps J as follows:
- ...when a public authority has promised it will follow a certain procedure, it ought, in the interests of good administration, be held to that promise...*²
15. We are also instructed a number of lot owners in the Business Park were not aware of the DA being lodged.
16. It is therefore fundamental that the DA be notified strictly in accordance with Council’s notification policy and that proper consultation be undertaken with other businesses within the Business Park.

Ground 2: Insufficient car parking and traffic impact

17. The SEE states that the Proposed Development incorporates a total of 75 parking spaces, with 44 spaces reserved for use by patients and the remaining 31 spaces for use by staff.
18. In order to demonstrate alleged compliance with minimum car parking requirements, the Traffic Report has characterised the proposed oncology centre as a “fit for purpose medical centre” on the basis the proposed oncology centre treats patients by appointment only. The Traffic Report submits Council’s DCP rate for medical centres is an inappropriate assessment for the proposed development.
19. Instead, the Traffic Report submits the parking requirement is to be assessed with reference to the 18 rooms in the proposed development used to treat patients. With 18 rooms, the Traffic

¹ *Scurr v Brisbane City Council [No 5] (1973) 28 LGERA 50* per Stephen J at p 57.

² *Hardi v Woollahra Municipal Council* (Land and Environment Court of New South Wales, 17 December 1987, unreported) Cripps J.

Report projects the centre will only have capacity to treat 24 patients at any one time with a maximum 37 staff present.

20. The Traffic Report's forecast for 75 parking spaces is an estimate based on the proposed development's capacity for 24 patients and 37 staff members and is calculated with reference to:
 - (a) required parking spaces for drivers after dropping off and picking up patients; and
 - (b) the Australian Bureau of Statistics 2016 Census of Population and Housing – Place of Work by Method of Travel (NSW) data for the Frenchs Forest-Belrose localities. These ABS statistics indicate 83% of residents partake in high vehicle usage.
21. The Traffic Report's breakdown for parking spaces is as follows:
 - (a) 83% of 24 patients: resulting in 20 car spaces for patient use;
 - (b) 83% of 37 staff: resulting in 31 car spaces for staff; and
 - (c) an overprovision of 24 car spaces to avoid any potential use of on street parking.
22. Firstly, we note the Traffic Report concedes the proposed 75 parking spaces does not comply with the WDCP 2011's requirements. However, the Traffic Report does not provide satisfactory grounds as to why the parking requirements of the WDCP2011 are not applicable, nor a sufficient basis for different controls to be applied. The Proposed Development clearly falls within the definition of a "medical centre" for the purposes of the LEP and the WDCP2011 and should be assessed on this basis. It is not considered that the fact that patients can make appointments is a sufficient justification for departing from the minimum requirements in the WDCP2011.
23. Notwithstanding this, our client is concerned that the Proposed Development's car park requirements have been incorrectly calculated and based on unsubstantiated assumptions. For example:
 - (a) the reliance on the Australian Bureau Statistics' (ABS) recorded data for the wider Frenchs Forest – Belrose localities is an insufficient basis to form the view that 75 parking spaces is a sufficient amount;
 - (b) the calculation for parking spaces is also formed on the assumption "some parking spaces are required for the drivers after dropping off the patients and prior to picking them up". We submit that in order to rely on this assumption, Council should require additional details from the Applicant to support this assumption. We are instructed that as patients will be receiving treatment for cancer it is likely that many patients will be accompanied by family, carers and/or other support persons and that these persons will stay with the patient for all or part of the treatment episode;
 - (c) the Traffic Report notes that it is likely that many staff will use public transport services and/or cycle for their daily commute. However it is the experience of our client within the Business Park that in fact none of their staff members take public transport and all drive; and
 - (d) minimal impact on parking requirements will be generated by the medical imaging services on Level 3 (with inadequate detail provided on the medical imaging services, the likely staffing required and patient numbers).
24. It is also important to acknowledge that the developments in and around the Business Park will continue to grow in the coming years, including as a result of the development on land adjoining

the Site for the purpose of modifications to the hotel and the construction of a new Dan Murphy's. We are also instructed that GenesisCare is intending to relocate cancer services from another building in the Business Park to the proposed facility, leading to other additional uses in the vacated space in that building.

25. Given this, we consider that if the Proposed Development proceeds based on the current design and proposed services mix, the traffic impacts discussed above will become increasingly problematic as the Proposed Development will be burdening an already densely developed area. It is therefore critical that the consent authority can be satisfied that the DA will not result in unacceptable traffic impacts. Based on the current information submitted with the DA, we consider that the consent authority simply cannot form this view.

Ground 3: Incomplete information regarding the use of Level 3

26. The DA states that Level 3 of the Proposed Development will be used exclusively for medical imaging services and that the medical imaging services will be provided by an outsourced separate provider. However, the DA provides no operational plan or detailed information on the scope, operating hours, staff and/or referrals, numbers and types of patients that will be using Level 3.
27. We are instructed that medical imaging services comprise a very wide scope of possible imaging services, including general radiology, ultrasound, CT, MRI, PET, interventional radiology and increasingly other use of biomedical substances and techniques (nuclear medicine and theranostics being examples).
28. The DA mentions CT planning for patients referred for radiation oncology, PET and MRI. However, these are inconsistently referenced across the documentation in references to medical imaging. While a figure of 3 patients per day for CT planning for patients referred for radiation oncology therapy is stated, no details of patient volumes for PET or MRI are provided. The staffing numbers for Level 3 do not align with the usual numbers in modern high quality medical imaging services. The DA does not make clear how many days per week the medical imaging services will be provided. It appears that they may be operating for 6 days a week.
29. The DA also does not state how the scope and levels of patient activity will be controlled as no details of the proposed outsourcing contract are provided. Will general radiology and ultrasound be explicitly excluded? Will medical imaging referrals for non-oncology reasons also be explicitly excluded? Commercial realities for privately owned medical imaging services require a service offering including general radiology and ultrasound. It is also highly likely that the medical imaging service will receive patient referrals from other health services in the Business Park and the wider Frenchs Forest health precinct.
30. A high quality MRI medical imaging service by itself will see at least 2 patients per hour and generate a patient activity of at least 15-20 patients per day. A service providing only CT, PET and MRI will need 5-6 radiographers on site.
31. Accordingly, the inclusion of medical imaging in the building and its occupancy of the whole of Level 3 will generate significant additional patient activity and require additional staffing. Unless the DA consent conditions specifically exclude provision of general radiology and ultrasound, as a minimum we are instructed that may be at least 20-25 patients per working day. Commercial realities suggest that the patient activity is more likely to be reach 50+ patients per working day.
32. The parking requirements generated by patients and staff therefore cannot be assessed without a detailed operational plan for medical imaging services on Level 3 that specifically sets out the

scope of medical imaging services to be provided by the outsourced operator, the patient referral sources, the hours and days of operation, projected patient volumes and staffing. The operational plan needs to also provide sufficient reassurance that these projected numbers will be controlled and not exceeded.

33. As medical imaging services comprise a core component of the services proposed for the Proposed Development and a material generator of parking demand, it is not possible for traffic impact and parking requirements for the DA overall to be properly assessed at the present time. At the very least, the applicant should be required to prepare and submit an operational plan for the medical imaging services to enable the assessment of the DA overall to proceed.

Ground 4: Excessive earthworks

34. The Proposed Development outlined in the DA now involves the construction of a deeper 4 storey basement car park. This equates to an anticipated excavation depth of between 12m and 14m below existing surface levels.
35. Accordingly, the DA is required to be assessed against the requirements of cl 6.2 of the WLEP which aims to ensure that earthworks do not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.³
36. It must also be assessed against Part C7 of the WDCP which establishes various objectives and controls relating to excavation and landfill, including that excavation and landfill works must not result in any adverse impact on adjoining land.⁴
37. The Geotechnical Investigation Report prepared by JK Geotechnics dated 10 December 2019 (**Geotech Report**) identifies that the primary geotechnical issue concerning the Proposed Development is maintaining the stability of the excavation sides and nearby structures during excavation works.
38. As set out in the Geotech Report, the risks here are exacerbated by the fact that the land is mostly comprised of sandstone of a very low to low strength. Accordingly, it is not strong enough to be cut vertically and requires the installation of a full depth shoring system.⁵ Of note, the implementation of this shoring system will likely require approval from neighbouring landowners as anchors may need to be installed below their property.⁶
39. Further, the Geotech Report identifies that given the close proximity of the site to adjoining structures, the use of hydraulic rock hammers throughout the excavation process may also lead to additional risks associated with the transmission of vibrations.⁷ Given this risk, it recommends the installation of vibration monitors on adjoining structures with real time warning systems to alert construction workers as to vibration impacts on neighbouring properties.
40. Given these findings and recommendations, our client remains concerned that the earthworks will have a detrimental impact on neighbouring uses, contrary to the requirements of cl 6.2 of the

³ Warringah Local Environmental Plan 2011, cl 6.2(1)(a).

⁴ Warringah Development Control Plan 2011, part C7, Requirement 2.

⁵ Geotech Report, page 11.

⁶ Geotech Report, page 11.

⁷ Geotech Report, page 15.

WLEP and Part C7 of the WDCP. Rather, it highlights the potentially severe risks posed to neighbouring properties as a direct result of the excavation works for the Proposed Development.

41. These risks are exacerbated by the fact that the degree of excavation proposed is very significant, especially when compared with the adjoining buildings.
42. These risks and potential impacts also need to be considered in the context of the surrounding land uses. In particular, many of the existing tenants of the Business Park, including our client, operate medical and health services with sensitive diagnostic and treatment equipment with practices which are open to members of the public. This increases the severity of any potential geotechnical impacts and disturbance experienced as a direct result of the excavation works proposed.
43. Given these risks, we consider that the applicant has not sufficiently demonstrated how the Proposed Development is consistent with cl 6.2 of the WLEP and Part C7 of the WDCP, particularly given the need for a full depth shoring system and the potential detrimental impact on neighbouring properties.
44. In particular, in addressing these requirements, the Geotech Report notes that, for example:⁸
 - (a) ***Provided the comments in our report are followed, and good practices, such as dust suppression during excavation and or filling, are followed there should be no adverse impact on adjoining land.***
 - (b) ***Provided the comments in our report are followed and retention systems are properly engineer designed and constructed the site will remain geologically stable.***
45. Our client remains concerned that the management of the significant risks noted in the Geotech Report is wholly dependent on further designs and mitigation measures being in place in relation to which no detail has been provided. It is therefore unclear how Council can assess whether these risks have been adequately addressed. Furthermore, the Geotech Report does not appear to consider the sensitive medical uses within the Business Park who are even more susceptible to vibration impacts. We again note that the DA provides no evidence of consultation with adjoining lot owners, including to discuss the potential impacts of the Proposed Development, how impacts on adjoining owners can be best mitigated and their willingness to consent to measures requiring use of their lots and buildings.
46. Similarly, the Geotech Report notes that at p12:

*Groundwater monitoring to date indicates the water level to be at a depth of about 7m (RL152.3m), within the sandstone bedrock, and about 5.4m above the lowest basement level. Permeability testing at one borehole location indicates a relatively low permeability for which we expect seepage through the defects in the sandstone bedrock will be readily managed using a pump and sump system. **Further hydrogeological assessment will be required to confirm these assumptions.***
47. Once again, we query how the DA can be assessed without this information being provided and to confirm that these assumptions are correct, that the sump and pump system proposed to manage seepage water is workable and that any impacts can be appropriately mitigated. Further assessments should be provided.

⁸ Geotech Report, p14.

48. Furthermore, we note that in the event that of this Proposed Development proceeds, any consent must be subject to strict conditions requiring all risk mitigation measures to be in place and monitored throughout the excavation phase. For example:
- (a) vibration monitoring should be in place with requirements to cease if any specified limits are exceeded; and
 - (b) the Geotech Report recommends engaging excavation contractors with experience in such work and with a competent supervisor who is aware of vibration damage risks. With this in mind, the applicant should be required to identify who will be engaged as excavation contractors along with the supporting plans and statements to confirm these contractors are capable of completing the excavation works safely.

Ground 5: Unacceptable construction impacts

49. Related also to the extent of excavation and earthworks proposed is the impact of these works during the construction of the Proposed Development.
50. Whilst a Construction Management Plan has been provided with the DA, this plan provides very little detail as to how the impacts from construction will be managed and impacts on the Business Park mitigated. For example:
- (a) whilst it is noted that waste production will be minimised, there is very little discussion or analysis of the volumes of soil and other materials expected to be removed during the construction phase and the consequent truck movements which will result from this;
 - (b) similarly, no information has been provided on how these movements will be managed to reduce impacts to the Business Park and ensure the safety of pedestrians and other people visiting the Business Park;
 - (c) it is unclear whether the internal road within the Business Park will be accessed by trucks during the construction phase. This is of concern as the road will not be able to withstand frequent movements by large trucks. The DA provides no evidence that this has been assessed. Measures must be in place to protect the internal road and for any damage to be repaired.
 - (d) based on the size and depth of the excavation required, it is likely that thousands of truck movements will be required during the excavation and construction. The DA gives no calculations of truck movements, projections on the loaded weight of each truck or details of the access road construction and load bearing capacity. The DA has also not examined the impact of the truck movements required for excavation and construction and/or the capability of the access road construction to meet this weight and volume. No bond or surety is offered to manage this risk, upgrade the road's weight bearing capability and or repair damaged caused.

Ground 6: Unacceptable interference with the Proposed Development lot owners' access to Right of Way numbered 6 in DP1020015

51. Part 2, Section 7 of the Section 88B instrument accompanying DP1020015 (**S88B**) sets out the terms of right of way for the "Right of Way 4.6 Wide & Variable", marked as (E) in DP 1020015 (**Right of Way**). In practice, the Right of Way acts as a service road connecting the business park to Frenchs Forest Road East.

52. Our client objects to the Proposed Development with reference to the Section 88B instrument accompanying DP1020015 (**S88B**).
53. The Right of Way grants the right for the owner of the lot benefited (in practice, being all lot owners within the Business Park) and authorised users, to enter, pass and repass over the lot burdened for the purpose of entering or leaving the benefited lot and delivering and removing goods and items for the lot benefited.
54. Part 2, 7.2 (a) of the S88B prohibits an owner of the benefiting lot from parking or standing a motor vehicle or trailer on or obstructing the use of the lot burdened.
55. The construction to be completed as per the DA, specifically the works required to build a roundabout and access ramp appear to be in breach of Part 2, 7.2 (a) of the S88B. The proposed construction will prohibit the remaining lot owners from benefiting from the Right of Way.
56. Furthermore, the construction staff, vehicles and equipment required to execute the Proposed Plans will likely be in breach of Part 2, 7.2 (a) of the S88B. The DA and the relevant supporting documents indicate the Proposed Development will result in motor vehicles obstructing the use of neighbouring lots, specifically lots 5 and 6.
57. The vehicles, plant and work force required to complete the excavation work in the Proposed Development will inhibit the functionality and accessibility of the service road for other lot owners.
58. Moreover, construction works in conflict with the Right of Way will also be detrimental to the Forest Central business park's trade, especially as the resident businesses are extremely dependent on access points and provided parking. The businesses of neighbouring lot owners will suffer from customers being deterred and challenged by the obstructed and limited Right of Way.
59. On this basis, the Proposed Development in its current form prevents lot owners from enjoying their benefits under the Right of Way.
60. The applicant should be required to demonstrate in the DA that the Proposed Development will not be in conflict with this Right of Way and can be constructed as proposed.

Ground 7: Unacceptable impacts on vehicle and pedestrian traffic

61. The traffic report prepared by Transport and Traffic Planning Associates does not adequately analyse the impact the increased number of vehicles and pedestrians will have on the operational performance of the Business Park.
62. The Traffic Report provides a 'conservative' estimate for the projected traffic generation of staff and patients arriving and departing from the Proposed Development during the peak periods as:
 - (a) 37 staff; and
 - (b) 24 patients.
63. As noted earlier in this submission this projection of staff and patient numbers requires significant review. In addition, the Traffic Report does not adequately consider the impact that the estimated traffic will have on the Business Park's current traffic system. We note the Traffic Report states the service road "has operated satisfactorily for more than 10 years". However, we are instructed that this is not the experience of our client and others within the Business Park. Our client has serious reservations over the current pedestrian and vehicle traffic management of the service

road and understands the Proposed Development will add to the existing dangers. As inspections of the Business Park will show, the internal access road is narrow and congested.

64. The Applicant will not be entitled to the Right of Way discussed above due to the influx in vehicle and pedestrian traffic. As decided by the High Court in *Westfield Management Ltd v Perpetual Trustee Company Ltd* (2007) 233 CLR 528, the benefit of an easement will not be extended beyond the scope of the grant to impose a burden greater than which the burdened parties agreed to accept. The increase in intensity caused by the Proposed Development will increase the traffic of the service road to the detriment of the neighbouring lots, ultimately at the expense of their clients and business.
65. Our client is also concerned with the parking system described in the Traffic Report, whereby patients are required to pre-book their parking spots. We are instructed that the service road and surrounding roads provide inadequate parking opportunities for patients who do not comply with the Proposed Development's parking regime.
66. Additionally, our client disagrees with the Traffic Report's claim that the access roads have traditionally operated without any pedestrian hazards or risks. The pictures included in the Traffic Report to demonstrate pedestrian activity do not depict the varied volume of pedestrian traffic. As we understand, pedestrians crossing the service road are at risk of being hit by vehicles driving on the service road due to limited visibility caused by parked cars. The risk of vehicle collision is amplified by the service road's current 4.6 metre width as it creates a tight and restricted space for vehicles.
67. Consequently, the proposed traffic management plan for pedestrian safety contained in Appendix D of the Traffic Report is unsafe. The proposed pedestrian footpath is dangerously close to the service road and porte-cochere area. The dangers associated with the pedestrian footpath's close proximity are heightened by the vulnerable state of patients likely to attend the Proposed Development. We expect these patients will have low mobility and will be endangered to the level of traffic on the service road. The introduction of trucks and other heavy vehicles on the current service road design will contribute to an even more dangerous Right of Way particularly for pedestrians.
68. We also note the DA is accompanied by the Forest Central Business Park Pty Ltd's proposal for pedestrian protective railings (**Bollard Proposal**). Our client acknowledges that there is a need to create a safer environment and protect pedestrians seeking to cross the Right of Way. However, our client does not accept that the Bollard Proposal can be used in the DA as supporting evidence of the DA creating a safer environment for the Business Park.
69. This is because our client understands the Bollard Proposal is in conflict with the Right of Way, with the structural design plans going beyond the permitted 4.6 metre width, and therefore cannot be used as grounds to support the DA and to demonstrate measures to ensure pedestrian safety.

Conclusion

70. On the basis of the above information, we consider that the DA should be refused.
71. However, in the event that the Council is minded to further consider the DA, we request that, at a minimum, Council invite the proponent to withdraw their application and resubmit it after the application has been reformulated to address the matters raised in this letter or that the proponent otherwise amend the DA to address the concerns raised in this letter.

72. Furthermore, Council must re-exhibit, advertise and notify the DA (including any amendments made to it) in accordance with the provisions of NBCPP and the relevant provisions of the EP&A Act, particularly having regard to the issues raised in this submission.
73. Should you have any questions regarding this content of this letter, please do not hesitate to contact us.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Holding Redlich', written in a cursive style.

Holding Redlich