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Dear Bob

Redevelopment of Eastwood Shopping Centre

Our Ref: PLM:4221764

We understand Yuhu Group (Australia) Pty Ltd (**Yuhu**) intends to lodge a development application for the redevelopment of Eastwood shopping centre (**DA**) which is subject to the provisions of *Ryde Local Environmental Plan 2014 (Ryde LEP)*. The DA proposes heights of buildings that exceed the maximum height of buildings prescribed in clause 4.3 of Ryde LEP. Yuhu will rely on a written request under clause 4.6 of Ryde LEP by Urbis dated June 2016 (**4.6 Request**) to allow the grant of consent to the DA despite the exceedance of the maximum building height.

You have asked whether the consent authority is empowered to grant consent to the DA despite the breach of the maximum building height standard in clause 4.3 of the Ryde LEP, relying on the 4.6 Request.

We consider that the consent authority can lawfully grant consent to the DA (assuming there is Secretarial concurrence or equivalent where delegated) despite the building height, by accepting the 4.6 Request because:

1. Clause 4.6 of Ryde LEP permits the grant of consent to development that contravenes a development standard;
2. The maximum building height control in clause 4.3 of the Ryde LEP is a development standard;
3. Clause 4.3 is not excluded by clause 4.6 (except as it relates to Ryde Town Centre);
4. The 4.6 Request deals with the matters required by clause 4.6(3)(a) and (b); and
5. The consent authority can reasonably be satisfied that the content of the 4.6 Request has merit and that it is in the public interest.

Our more detailed reasoning is set out below.

1. Clause 4.6 permits the grant of consent where a development standard is contravened

The objectives of clause 4.6 are:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development; and

- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

There can be no doubt that the purpose of clause 4.6 is to provide flexibility such that development consent can be granted to the DA despite the breach of the maximum building height standard, subject to the criteria in clause 4.6 being met.

The key criteria in clause 4.6 are:

1. clause 4.3 of Ryde LEP is a development standard and is not excluded from clause 4.6;
2. the consent authority is provided with, considered (clause 4.6(3)) and is satisfied with (clause 4.6(4)(a)(i)) a written request justifying the contravention by demonstrating:
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)); and
 - (b) there are sufficient environmental planning grounds to justify the contravention (clause 4.6(3)(b));
3. the consent authority is satisfied the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (clause 4.6(4)(a)(ii)); and
4. the concurrence of the Secretary of the Department of Planning and Environment has been obtained (clause 4.6(4)(b)).

There is no numerical limitation to the application of clause 4.6. That is, there is no maximum exceedance that is allowable under clause 4.6. We are not aware of any case law that dictates or requires a cap on the extent of the exceedance that can be allowed under clause 4.6. We are aware of consent authorities approving the following numerical contraventions:

- in *Micaul Holdings Pty Limited v Randwick City Council* [2015] NSWLEC 1386 a Commissioner of the Land and Environment Court approved a 55% exceedance of the height limit and a 20% exceedance of the floor space ratio control
- in *Moskovich v Waverley Council* [2016] NSWLEC 1015 a Commissioner of the Land and Environment Court approved a 65% exceedance of a floor space ratio control
- The Sydney East JRPP approved exceedances of FSR and height in the order of 12-36% for a mixed use development at 801 New Canterbury Road, Dulwich Hill
- The Sydney East JRPP approved an 18% exceedance of height at Little Street, Lane Cove in March, 2016 and a 15% variation for a mixed use development in Jannali in May 2016
- The Hunter and Central Coast JRPP approved a mixed use development with a 50% exceedance in height in Mann Street, Gosford in September 2015 and a 160% and 210% exceedance for a development in Georgina Terrace, Gosford.

2. The building height control is a development standard

A “development standard” is defined in the *Environmental Planning and Assessment Act 1979 (EP&A Act)* as provisions under an environmental planning instrument, such as Ryde LEP, where requirements are specified or standards are fixed in respect of any aspect of the development including such things as “the dimensions of any...buildings”.

There is no doubt that clause 4.3, which prescribes a maximum height in Ryde LEP, is a development standard. This is confirmed by clause 4.6 referring to clause 4.3 which is an admission that clause 4.3 is a development standard.

3. Clause 4.3 is not excluded from clause 4.6

Clause 4.3, so far as it applies to Eastwood, is not excluded from clause 4.6.

4. The 4.6 Request deals with the matters required by clause 4.6(3)(a) and (b)

The consent authority cannot grant consent relying on clause 4.6 unless the consent authority has considered the 4.6 Request and is satisfied that it adequately addresses the matters required by clause 4.6(3) and that the development will be in the public interest because it is consistent with the objectives of clause 4.3 and the objectives for development within the zone in which the development is proposed to be carried out.

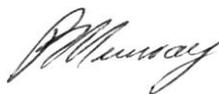
We have reviewed the 4.6 Request and consider that it adequately addresses the matters required by clause 4.6(3). We note that commencing in section 3.1 the 4.6 Request outlines the reasons why compliance with the standard is unreasonable or unnecessary in the circumstances of the case.

We note that the 4.6 Request also outlines the environmental planning grounds justifying the contravention of clause 4.3 and the consistency with the objectives of clause 4.3 and the zone to demonstrate that the proposed development will be in the public interest.

5. The consent authority can reasonably be satisfied that the content of the 4.6 Request has merit

We consider that a reasonable decision-maker should be able to be satisfied that the 4.6 Request adequately addresses the matters required in clause 4.6 and that the development is in the public interest - when consideration is given to the lack of inconsistency between the development and the impacts of the development and the objectives of clause 4.3 and the zone. The DA is seeking flexibility in the application of the development standards to allow for better urban design outcomes with a void and thru site link in the middle of the site and a redistribution of floor space to provide a better development form and reduce the impacts of the development.

Yours faithfully
DibbsBarker



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