



**LATE ITEM MEMO
BUSINESS PAPER
(Item 6)
GENERAL MEETING**

**Wednesday, 21 August, 2013
at 6:30 PM**



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ITEM 6 **PL74/13** - Development Application - Subdivision of One Allotment into Three Lots and Construction of Two Attached Dwellings - 50 Hinemoa Avenue, Normanhurst

*Additional information with **CHANGE** to Recommendation*

On 20 August 2013 Solicitors Wiltshire Webb Staunton Beattie forwarded a letter to Councillors on behalf of their client alleging defects in the assessment of the application.

This late memo deals with the matters raised in the letter.

Response to item 1

Concerns were raised with regards to the requirements of condition Nos. 3 and 27 in Schedule 1 of the report.

Condition 3 requires the appointment of a Project Arborist to oversee any works on the site that are undertaken in the Tree Protection Zone (TPZ) of any trees to be retained to ensure that no tree roots are damaged and the tree viability is sustained during the course of the development.

Condition 27 relates to the requirement for an ongoing management plan for the restricted development area (see attached plan).

To clarify the intent of the conditions the following amendments to the wording of five of the proposed conditions is recommended:

3. Project Arborist

A Project Arborist is to be appointed prior to commencement of any works in accordance with AS 4970-2009 (Section 1.4.4) to provide monitoring and certification throughout the development process.

25. Restriction as to User – Protection of Land from Future Development

To inform current and future owners that the areas of native vegetation and habitat on the site is to be protected from future development, a Restriction as to User must be created under Section 88B of the *Conveyancing Act 1919* identifying that the 'Restricted Development Area' of the site marked in red on the approved plans is restricted from future development or disturbance of any kind.

Note: The wording of the Restriction as to User must be to Council's satisfaction and Council must be nominated as the authority to release, vary or modify the Restriction.

26. Vegetation Management

A positive covenant shall be created under Section 88E of *The Conveyancing Act 1919* for proposed Lot 2 where all landscaping/vegetation management shall be in accordance with the approved *Riparian Planting and Management Plan* within the Restricted Development Area (See Condition No. 27).

27. Riparian Planting and Management Plan within the Restricted Development Area

To ensure the regeneration of bushland and enhancement of the riparian corridor, the applicant must provide a plan prepared by a qualified bushland restoration company (Certificate 3 in Natural Area Restoration (TAFE) or similar) that ensures the following:

- a) The Plan must be prepared in accordance with Council's *Guidelines for the preparation of Vegetation Management and Restoration Plans 2008*;
- b) Provision of a Schedule of Works for all activities with the delivery dates for each action to complement the release of the Subdivision Certificate (Stage 2), Construction Certificate and Occupation Certificate for the dual occupancy buildings on proposed Lots 2 and 3 (Stage 2);
- c) Provision of a map of the works area that is consistent with the 'Restricted Development Area' of the site identified on the approved plans;
- d) The planting is to include a mixture of native trees/shrubs/ground covers. The plant species are to comprise of locally indigenous *Blackbutt Gully Forest*. The location of the plantings must take into account the required Tree Protection Zone of mature specimens of these trees and should be ideally placed in groups;
- e) Plant a minimum of 50% of the trees, 50% of the shrubs and 50% of the groundcovers of the vegetation community to be emulated;
- f) Planting density must not be less than 1 tree or 1 shrub per m², alternately planted in approximately equal numbers, and in addition, groundcover plants at 4 per square metre;
- g) All plants must be obtained from a local recognised native nursery and be of local provenance;
- h) The Plan must last for a minimum of 2 years from the issue of the Subdivision Certificate for Stage 2 works. Specify qualifications of persons undertaking/supervising the works (i.e. qualified and experienced bush regeneration personnel must undertake establishment works for the first 18 months of the Plan);
- i) Details of the positive covenant and restriction-as-to-user requirements to inform future owners of the lots of the obligations for tree protection of trees to be retained and planted trees on the site and constraints for future dwelling construction;
- j) The erection of a physical barrier (that extends a minimum 20mm below ground surface and 80mm above ground surface) along the edge of all turf areas to prevent the spread of exotic grasses or weeds into the 'Restricted Development Area';
- k) Maintenance activity requirements (e.g. watering/ mulching);
- l) All environmental and noxious weeds are to be removed and suppressed using recognised bush regeneration methods in accordance with *'Recovering bushland on*

the Cumberland Plain: Best practice guidelines for the management and restoration of bushland – Department of Conservation 2005;

- m) Certification by an ecologist or similarly qualified and experienced person (including Council's Natural Resources Unit) that the bushland has been adequately protected and regenerated in accordance with the requirements of this development consent;
- n) Specify that all weed removal, preparation and planting works are to be undertaken by a qualified and experienced bushland restoration company to best practice standards.

33. Project Arborist

A Project Arborist is to be appointed prior to commencement of any works in accordance with AS 4970-2009 (Section 1.4.4) and to provide monitoring and certification throughout the development process.

Response to item 2

Group Manager's Report PL74/13 provides a full and considered assessment of the relevant controls in the draft HLEP which pertain to the proposal. The report clearly indicates that the multi-unit housing component of the proposal is a prohibition pursuant to the draft HLEP. In particular the report identifies the following:

- At its meeting on 19 December 2012 Council resolved that the draft be forwarded to the Minister for Planning to be made
- The Draft Plan has been submitted to the Department for finalisation
- The development site is zoned R2 Low Density pursuant to the draft HLEP
- Subdivision is permissible pursuant to the draft HLEP
- The Multi-Unit Housing component of the proposal is a prohibition pursuant to the draft HLEP
- The minimum allotment size requirements and identifies that proposed lot 1 does not comply with the minimum allotment size
- The Savings and Transitional Provisions of the Draft HLEP
- That the draft HLEP is a matter for consideration under s79C(1)(a)(ii) of the EPA Act 1979

For completeness this memo identifies the following relevant aims and objectives pursuant to the draft HLEP:

DHLEP Aims and Objectives

- (1) *This Plan aims to make local environmental planning provisions for land in Hornsby Shire in accordance with the relevant standard environmental planning instrument under section 33A of the Act.*
- (2) *The particular aims of this Plan are as follows:*
 - (a) *to promote development that is safe; has progressive town centres, thriving rural areas and abundant recreation spaces; is connected by efficient infrastructure and transport systems; and is well planned with growth managed to provide for the needs*

- of future generations and people enriched by diversity of cultures, the beauty of the environment and the strong economy, and*
- (b) to guide the orderly and sustainable development of the Shire, balancing its economic, environmental and social needs, and*
 - (c) to promote a mix of housing types that provide for the future housing needs of the community near employment centres, transport nodes and services, and*
 - (d) to provide business and industrial lands that service the needs of the community near housing, transport, services, and are consistent with, and reinforces, the role of centres within the sub-regional commercial centres hierarchy, and*
 - (e) to maintain and protect rural activities, resource lands, rural landscapes and biodiversity values of rural areas, and*
 - (f) to provide a range of quality passive and active recreational areas and facilities that service the leisure needs of both the local and regional community, and*
 - (g) to provide for the equitable provision of community services and cultural opportunities to promote the wellbeing of the population of the Shire, and*
 - (h) to protect and enhance the scenic and biodiversity values of environmentally sensitive lands, including bushland, river settlements, river catchments, wetlands and waterways, and*
 - (i) to protect and enhance the heritage of the Shire, including places of historic, aesthetic, architectural, natural, cultural and Aboriginal significance, and*
 - (j) to minimise risk to the community in areas subject to environmental hazards, including flooding and bushfires.*

Draft HLEP R2 Zone Objectives

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

Having regard to the draft HLEP being forwarded to the Department for finalisation it is considered that it is certain and imminent. Council may therefore give the draft LEP significant weight in the determination process but such weight ought not be determinative. Further, it is considered that the proposed development will not undermine or frustrate the planning intent of the draft LEP in a significant or substantial way.

A copy of the WWSB letter and the restricted development plan is attached to this memo.

RECOMMENDATION

THAT Development Application No. DA/1365/2012 for the staged Torrens title subdivision of one allotment into three lots and construction of two attached dwellings at Lot B DP 347185, No. 50 Hinemoa Avenue, Normanhurst be approved subject to the conditions of consent detailed in Schedule 1 of Group Manager's Report No. PL74/13 as amended by LM8/13.

ROD PICKLES

Manager - Development Assessment

Planning Division

JAMES FARRINGTON

Group Manager

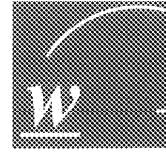
Planning Division

Attachments:

1. Wilshire Webb Staunton Beattie Lawyers
2. DA/1365/2012 - Restricted Development Area

File Reference: DA/1365/2012

Document Number: D02405062



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*Wilshire Webb Staunton Beattie
Lawyers*

Our Ref: JAR:UM:213399

20 August 2013

Cr Steve Russell (Mayor)
Cr Mick Gallagher
Cr Nathan Tilbury
Cr Antony Anisse
Cr Nick Berman
Cr Robert Browne (Deputy Mayor)
Cr Gurdeep Singh
Cr Michael Hutchence
Cr Jerome Cox
Cr Bernadette Azizi
Hornsby Shire Council

Attention: All Councillors Hornsby Council

Dear Councillors

DA/1365/2012

We act for Dr and Mrs Wilson in relation to the abovementioned matter. We prepared a submission to Council with respect to the amended plans (presently under consideration) dated 16 July 2013.

We have had the opportunity of perusing the Group Manager's Report PL74/13 to Council (General Meeting 21 August 2013, Business Item 6, page 46).

We have also examined the "Email to All Councillors" dated 20 August 2013 prepared by our clients which we commend to Council. You will note that our clients' submission highlights a number of defects in the assessment of the application.

We are concerned that if the Council resolves the development application it may be open to legal challenge for the following reasons:

1. The deferral of consideration of a report identifying the species of trees until after approval defers an essential matter for consideration (see *Mison v Randwick Municipal Council* (1991) 73 LGRA 349). Such a deferral of an essential consideration (see draft conditions page 17, paragraph 3 and page 23, paragraph 27) will leave the consent open to legal challenge. It is imperative that the species be identified prior to determination so that the appropriateness of removal can be assessed.

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ATTACHMENT 1 - ITEM 6

2. There is no doubt that the draft Hornsby Local Environmental Plan (DHLEP) is certain and imminent (see: *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195). The assessment report acknowledges the existence of the DHLEP but fails to give appropriate weight to the controls, as required by the principles set out in Terrace Tower, which dealt with a similar 'certain and imminent' draft instrument and similar savings provision. Such a failure of attribution of weight will leave any consent open to legal challenge.

Our clients have diligently set out their concerns in relation to the merits of the proposal, which we submit would lead Council to refuse the application.

If we can be of any assistance to Council, please do not hesitate to contact us.

Yours faithfully
WILSHIRE WEBB STAUNTON BEATTIE



JACINTA A REID
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Accredited Specialist
Local Government & Planning Law

