



Legal advice

To Wayne Williamson
Team Leader, Sydney Region East

From Kathleen McVay
Legal Officer, Policy and Legislation

Date 21 December 2017

Advice on rezoning review – 4-6 Bligh St, Sydney

1. Request for advice

- 1.1. You have requested advice on the legal risk that could arise in relation to a proposed rezoning review by the Planning Assessment Commission (PAC). You have also requested advice on the legal weight of planning circulars and guides issued by the Department.

2. Summary of advice

- 2.1. We have reviewed the advice dated 12 December 2017 from Herbert Smith Freehills (Freehills Advice) at **Attachment A** and broadly agree with its conclusions, that is:
- the rezoning review could be undertaken;
 - the request for the rezoning review was made by a person with the necessary delegation; and
 - there is no legal requirement to strictly adhere to Departmental policies, and a failure to do so will not (on its own) invalidate a decision.
- 2.2. For completeness, we note the following additional matters:
- there was proper delegation for the making of the request for rezoning review under section 56(5) of the *Environmental Planning and Assessment Act 1979* (EP&A Act);
 - although there has not been strict adherence to the timeframes set out in the relevant policies, for the reasons set out in the Freehills Advice, this should not affect the validity of the request;
 - the request for rezoning review was not a final decision that can be subject to judicial review.

3. Background

- 3.1. SC Capital Partners Group (proponent) is the owner of a property located at 4-6 Bligh Street Sydney. It engaged Architectus Group to prepare a planning proposal to increase the maximum floor space ratio applicable to the site under the *Sydney Local Environmental Plan 2012* (Sydney LEP).

- 3.2. On 4 August 2017, the proponent submitted documentation to the Council of the City of Sydney entitled 'pre-planning proposal information package'. The council advised the proponent in a letter dated 4 September 2017 that increases in floor space ratio or building height above the current maximum in the local environmental plan would not be considered until the Central Sydney Planning Strategy had been formally adopted by the council. The Central Sydney Planning Strategy is the basis for a review of the planning controls in the Sydney LEP.
- 3.3. The proponent sent a letter to the Department on 11 September 2017 requesting a rezoning review on the basis that the Council did not support its planning proposal. On 19 October 2017, the Deputy Secretary Planning Services sent a letter to the proponent and Council indicating that the proponent was eligible to request a rezoning review and inviting it to make an application.
- 3.4. A rezoning request was lodged by the proponent on 26 October 2017. On 30 October 2017, the Department requested the PAC to undertake a rezoning review and sent letters to the proponent and Council advising of the rezoning review. The letter to the council also invited it to comment on the proposal.
- 3.5. On 17 November 2017, the council sent a letter to the Department outlining its view that the rezoning review request was improperly made and should not be progressed for the following reasons:
 - no formal request to prepare a planning proposal was made to the council, and the required fee was not paid;
 - the review request was not made within 42 days;
 - the material before the PAC was distinct from the material before the council;
 - the council did not formally refuse the planning proposal and is still open to considering the proposal.
- 3.6. As part of conducting its review, the PAC invited the council and the proponent to provide legal advice in relation to these claims. The proponent provided the Freehills Advice on 12 December 2017. We understand that no legal advice has been received from the council beyond what was claimed in their submission.
- 3.7. This advice addresses the advice provided by the proponent and the broader question of compliance with the relevant Departmental policy and any legal risks that could arise from the process.

4. Advice

- 4.1. We have reviewed the Freehills Advice and broadly agree with its conclusions. In particular, that:
 - the PAC has power to conduct the rezoning review;
 - the request for rezoning review was made by a person with the necessary delegation; and
 - there is no legal requirement to strictly adhere to Departmental policies, and a failure to do so will not (on its own) invalidate a decision.

However, we make the following additional points, set out below.

Delegation

- 4.2. The request for a rezoning review was made by the Director of Sydney Region East in the Planning Services division of the Department. Rezoning reviews are requests for advice from a planning body about a planning proposal. These requests can be made by:

- 4.10. We note that the Department may make future administrative decisions based on the final advice of the PAC. In such circumstances, the Department will need to ensure that procedural fairness is adhered to and stakeholders (including the council) can give evidence and present arguments.

Signed:



Kathleen McVay
Legal Officer
Policy and Legislation

Endorsed:



Jonathon Schipp
Director
Policy and Legislation

Attachment A: Herbert Smith Freehills Advice dated 12 December 2017

- the Minister for Planning (Minister) or Secretary under section 23D(1)(b)(i) of the EP&A Act; or
 - the Greater Sydney Commission (GSC) under section 56(5) of the EP&A Act.
- 4.3. The Freehills Advice assumed that the relevant delegations were in place as they were unable to review the current delegations. We have reviewed existing delegations and note that we have been unable to find any delegation in relation to section 23D.
- 4.4. However, in relation to section 56(5), there is an instrument of delegation by the Minister dated 18 January 2016, allowing a Director (among others) to request a review of a planning proposal by the PAC. This is taken to be a delegation by the Greater Sydney Commission of its functions, as the Commission is responsible for creating plan-making functions in the Sydney Region (Clause 49, Schedule 7, *Environmental Planning and Assessment Regulation 2000*).
- 4.5. The Director of Sydney Region East could therefore request the rezoning review as the delegate of the Commission.

Compliance with Departmental policies

- 4.6. The process for review of plan making decisions is set out in planning circular *Independent review of plan making decisions* (PS16-004) and *A guide to preparing local environmental plans* (LEP Guide). These documents describe a non-legislative review process through which the planning bodies can be requested to advise on the strategic merit of a planning proposal. We note that the Freehills Advice references the Guide to Preparing Planning Proposals. This guide only references rezoning reviews in respect of assessment, and does not form the primary policy for the rezoning review procedure.
- 4.7. The council has claimed that the request for review was not made within 42 days of receipt of the refusal letter, dated 4 September 2017. Whilst we agree with the conclusions of the Freehills Advice at paragraph 2.3, we would like to expand on some of the points raised:
- First, although the proponent sent a letter to the Department on 11 September 2017, this letter only sought a rezoning review as an alternative to the proposal being determined as State Significant Development.
 - The LEP Guide provides that a rezoning review request should be made by a providing (among other things) a completed application form. As this was not done until 26 October 2017, the application was made outside the 42-day period which ended on 16 October 2017.
 - Nevertheless, as set out in the 2.1 of the Freehills Advice, Departmental policies do not fetter the discretion of a decision-maker (see *Green v Daniels* (1977) 13 ALR 1).
 - Consequently, we do not consider the failure to lodge the application within the policy timeframe to affect the validity of the rezoning request.

Decisions that could be subject to judicial review

- 4.8. We consider that the decision to request advice from the PAC it is not a final decision, rather it is an intermediate decision that forms part of a broader decision-making process (see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321). The decision therefore cannot be subject to judicial review.
- 4.9. Nevertheless, the power to request advice from the PAC is broad and does not have prescribed criteria by which it can be exercised. Therefore, we do not consider that a failure to abide by the terms of the planning circular in making the request could be the subject of a successful judicial review challenge.



HERBERT
SMITH
FREEHILLS

Legal Opinion in relation to the Rezoning Review for 4-6 Bligh Street, Sydney

12 December 2017



Legal Opinion in relation to the Rezoning Review for 4-6 Bligh Street, Sydney

Background

One Investment Management Pty Limited ATF Recap IV Management No. 4 Trust, being an affiliate of SC Capital Partners Group (**SC Group**) owns the property located at 4-6 Bligh Street, Sydney. SC Group has engaged Architectus Group Pty Ltd (**Architectus**) to prepare a planning proposal to seek an increase in the maximum floor space ratio applicable to the site under the *Sydney Local Environmental Plan 2012 (SLEP)*, and to prepare a State Significant development application to construct a mixed-use development comprising hotel, commercial and recreational uses (**Project**).

In relation to the planning proposal, pre-submission documentation was provided to the City of Sydney Council (**Council**) on 4 August 2017, with additional material being provided following a meeting with Council on 7 August 2017.

On 4 September 2017, the Council notified Architectus that it would not be considering SC Group's request (**Refusal Letter**). Architectus then sent a letter to the Department of Planning and Environment (**Department**) requesting a Rezoning Review on 11 September 2017.

The Department indicated that SC Group was eligible to request a Rezoning Review on 19 October 2017, and directed it to provide a completed application. This was done by 26 October 2017. On 30 October 2017, the Department requested the Planning Assessment Commission (**PAC**) undertake a Rezoning Review of the Project.

A detailed chronology outlining the consultation and correspondence between SC Group and Council is contained in **Appendix A**.

Key Issues

In relation to the Rezoning Review of the Project, the PAC has requested the parties provide it with legal advice in relation to whether it is open to the PAC to lawfully conduct the Rezoning Review (particularly having regard to the matters raised by Council in its letter to the PAC dated 17 November 2017).

Summary of Legal Opinion

For the reasons outlined below, it is lawfully open to the PAC to conduct the Rezoning Review.

Does the PAC have power to conduct a Rezoning Review?

Yes. While a Rezoning Review is an administrative process, rather than a statutory one, it is within the PAC's statutory functions to conduct a Rezoning Review if requested by:

- the Minister for Planning (**Minister**) or Secretary under section 23D(1)(b)(i) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*; or
-



- the Greater Sydney Commission (**GSC**) under section 56(5) of the EP&A Act.

Alternatively, such a request to the PAC may be made pursuant to a delegation made under section 23 of the EP&A Act or under section 11 of the *Greater Sydney Commission Act 2015* (**GSC Act**).

Did the person who requested the Rezoning Review have the necessary delegation?

The person who requested the Rezoning Review was Ms Van Laeren, Director, Planning Services, of the Department.

We have not been provided with (or reviewed) any delegation which would authorise Ms Van Laeren to make a request of the PAC. However *Planning Circular PS 16-005: Delegation of plan making decisions* dated 30 August 2016 (**Delegation Circular**) indicates that such a delegation is likely to be in place. We have no reason to believe that such delegation does not exist.

Was a proposal required to be formally lodged with Council before a Rezoning Review could be requested?

No. The process for requesting a Rezoning Review is contained in *Planning Proposals: A guide to preparing planning proposals* dated August 2016 (**Guide**). A guide or policy cannot fetter the discretion of a decision-maker to exercise a power. Provided the exercise of the discretion was lawful, it cannot be challenged. Consequently, the exercise of the discretion to request the PAC to conduct a Rezoning Review cannot be challenged on the basis that there was not strict adherence to the Guide, including in circumstances where no request was formally lodged with Council.

In any event, the Guide stipulates that a request for a Rezoning Review may be made if a council notifies a proponent that a request to prepare a planning proposal is not supported. It did not matter that the request was not formally lodged; the Refusal Letter from Council to Architectus unequivocally stated that Council would not consider SC Group's request. In our view, this constitutes notification that the request would not be supported.

Was the request for a Rezoning Review out of time?

No. There is no statutory basis for the 42 day time limit contained in the Guide. A guide or policy cannot fetter a decision-maker's discretion. Consequently, the exercise of the discretion to accept a request for a Rezoning Review, even if it is made out of time, cannot be challenged provided this discretion was exercised lawfully.

In any event, Architectus's letter to Mr Ray, made 7 days after the Refusal Letter, was within the timeframe stipulated by the Guide. A full application was lodged with the Department 7 days after the Department indicated that SC Group was eligible to request a Rezoning Review.

In any case, if, contrary to our opinion, the PAC were to accept the Council's proposition that SC Group was somehow time barred, that decision would deny SC Group procedural fairness, given that the Department's advice was sent to Architectus after the 42 days expired.



Did SC Group amend its request after it received the Refusal Letter?

No. The Guide only stipulates that a "planning proposal request which has been amended after the Council resolved to not support the matter is not eligible for a Rezoning Review". The additional documents do not "amend" or change the Project.

In any event, the Refusal Letter was unambiguous – Council was not going to consider SC Group's rezoning request. It would be unreasonable to require strict compliance with the Guide given that, in any event, the Council was not going to consider the application.

Has the Council been denied due process?

No. The Council has been given numerous opportunities to be heard and to be involved in the PAC's decision making process. Further, if the PAC determines that the Project has merit and should proceed to a Gateway Determination, the Guide stipulates that the Council will again be asked if it will accept the role of the relevant planning authority. The Council has been afforded procedural fairness and there is no basis for a claim that due process has not been followed.

Our detailed reasons are set out below.

Peter Briggs
Partner
Herbert Smith Freehills

+61 2 9225 5155
+61 409 030 299
peter.briggs@hsf.com

Darren Bick
Senior Associate
Herbert Smith Freehills

+61 2 9225 5082
+61 416 167 556
darren.bick@hsf.com

12 December 2017



Detailed advice

1 Can the Planning and Assessment Commission lawfully conduct the Rezoning Review?

1.1 The Legal Basis for a Rezoning Review

A Rezoning Review is an administrative process of the Department which is related to the power to make and, relevantly, amend a local environmental plan (**LEP**).

One circumstance in which a LEP may be required to be amended is where a proposed development does not conform with the applicable planning controls. In order for development consent to be granted to the proposed development, it is necessary for the LEP to be amended. The process for amending a LEP is set out in Division 4 of Part 3 of the EP&A Act.

This process is as follows:

- 1 the relevant planning authority (**RPA**) is required to prepare a document that explains the intended effect of the proposed instrument and sets out the justification for making the proposed instrument (the **Planning Proposal**): section 55(1) of the EP&A Act;
- 2 the RPA then forwards the Planning Proposal to either the GSC - for a Planning Proposal within the Greater Sydney Region: section 53A of the EP&A Act; or to the Minister - for a Planning Proposal outside the Greater Sydney Region: section 56(1) of the EP&A Act. The Project is within the Greater Sydney Region;
- 3 the GSC then determines the matters set out in section 56(2) of the EP&A Act (**Gateway Determination**). This includes:
 - a. whether the matter should proceed (with or without variation);
 - b. community consultation requirements;
 - c. whether a public hearing is to be held into the matter by the PAC or other specified person or body; and
 - d. any relevant timeframes;
- 4 any community consultation is to occur in accordance with section 57 of the EP&A Act; and
- 5 following the completion of the community consultation, the GSC may make (or amend) the LEP.

The RPA, being the authority who prepares the Planning Proposal and submits it to the GSC, is usually the council: section 54(1)(a) of the EP&A Act. However, the GSC (or the delegate of the GSC) "may direct that the Secretary (or any other person or body prescribed by the regulations) is the [RPA]" in circumstances where "the council for the local government area concerned has, in the opinion of the [GSC]... failed to comply with its obligations with respect to the making of the proposed instrument or has not carried out those obligations in a satisfactory manner": section 54(2)(d) of the EP&A Act.

A Rezoning Review occurs in circumstances where:

- a council is not supportive of a rezoning proposal within its local government area; or



- a council has delayed in progressing the rezoning proposal within its local government area.

The purpose of a Rezoning Review is to undertake a strategic and site-specific merit assessment of rezoning proposals, to determine whether the rezoning proposal should be taken up by a RPA. If the outcome of the Rezoning Review is in favour of the rezoning proposal, the Council will be given the opportunity again to be the RPA. If it declines, the GSC may exercise its power under either section 54(2)(d) or 56(5) of the EP&A Act to appoint an alternate RPA. These powers are discussed below in Section 1.3.

It is clear that there is no specific statutory basis in the EP&A Act for a Rezoning Review. Rather, a Rezoning Review is an administrative process designed by the Department to determine whether a rezoning proposal should be supported (see section 1.3 below for a discussion on the PAC's functions to conduct reviews).

1.2 When can a Proponent Seek a Rezoning Review?

The process of a Rezoning Review is described in:

- *Planning Proposals: A guide to preparing planning proposals* dated August 2016 (**Guide**); and
- *Planning Circular PS 16-004: Independent reviews of plan making decisions* dated 30 August 2016.

The Guide contains the Secretary's requirements with respect to the preparation of a planning proposal: section 55(3) of the EP&A Act. Relevantly, section 5.1 of the Guide addresses Rezoning Reviews.

The Guide provides that a proponent may seek a Rezoning Review when:

- the council has notified the proponent that the request to prepare a planning proposal is not supported;
- the council has failed to indicate its support 90 days after the proponent submitted a request, accompanied by the required information; or
- the council has failed to submit a Planning Proposal for a Gateway Determination within a reasonable time after it indicated its support.

The Guide notes at the bottom of page 9:

The Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) requires councils to notify a proponent when the council decides not to prepare a planning proposal. The proponent then has 42 days from notification to request a review of the council's decision.

On page 10 the Guide states, "A proponent may request a review by writing to the Department" and sets out how this request may be made. Relevantly, the Guide provides (on page 9) that Rezoning Reviews are determined by Planning Panels (being either a Joint Regional Planning Panel or a Sydney Planning Panel) or the PAC.

1.3 The Power to Appoint the PAC

The PAC is established under section 23B of the EP&A Act. Its functions are set out in section 23D of the EP&A Act. Relevantly, two of its functions include:

- any function delegated to the Commission under this or any other Act: section 23D(1)(a); and
- if requested to do so by the Minister or the Secretary, to advise the Minister or the Secretary as to planning or development matters, environmental planning



instruments or the administration or implementation of the provisions of this Act, or any related matter: section 23D(1)(b)(i).

Another function which has been delegated to the PAC under the EP&A Act is that contained in section 56(5) which provides:

The [GSC] ... may arrange for the review of a planning proposal (or part of a planning proposal) under this section to be conducted by, or with the assistance of, the Planning Assessment Commission or a joint regional planning panel:

- (a) if there has been any delay in the matter being finalised, or
- (b) if for any other reason the [GSC]... considers it appropriate to do so.

Further, any functions of the Minister or Secretary that are granted under the EP&A Act, may be delegated to any employee of the Department: section 23(1)(a) of the EP&A Act. Similarly, the GSC is authorised to delegate its functions to the Secretary or other person employed by the Department or the PAC: section 11(1), (3)(e) and (3)(g) of the GSC Act.

Consequently, it is clear that the PAC has the power to conduct the Rezoning Review:

- if requested by the Minister or the Secretary, or a delegate of the Minister or the Secretary under section 23D(1)(a) of the EP&A Act; or
- if requested by the GSC, or a delegate of the GSC under section 56(5) of the EP&A Act.

1.4 Was the PAC lawfully engaged to conduct the Rezoning Review?

On 30 October 2017, Ms Catherine Van Laeren, Director, Sydney Region East, Planning Services, wrote a letter to Ms Lynelle Briggs, the Chair of the PAC (**PAC Request Letter**). The subject line of the letter was, "Re: Request for a Rezoning Review – PGR_2017_SYDNE_001_00". A copy of the PAC Request Letter is contained at **Appendix B**.

The PAC Request Letter relevantly provided:

I am writing to you to advise that a Rezoning Review request, dated 27 October 2017 has been submitted to the Department of Planning and Environment and to request that the Planning Assessment Commission (the Commission) review the proposal.

...

The proponent is seeking a Rezoning Review because the Council has notified the proponent that the request to prepare a planning proposal has not been supported.

The Commission is now requested to review and determine its suitability for being referred to the Department for a Gateway determination under section 56 of the *Environmental Planning and Assessment Act 1979* (the Act).

The PAC Request Letter is identified on the PAC website as being the Department's request to the PAC to undertake the Rezoning Review: see <http://www.pac.nsw.gov.au/projects/2017/10/request-for-rezoning-review-for-land-at-4-6-bligh-street-sydney>.

However, it is unclear from the PAC Request Letter whether the request for a Rezoning Review by Ms Van Laeren was made under section 23D(1)(b)(i) or section 56(5) of the EP&A Act.

Further, we have not been provided with, and consequently have not reviewed, the delegations currently in place which would authorise Ms Van Laeren to request the PAC to undertake a Rezoning Review. However, the Delegation Circular indicates that there

are delegation in place for senior Department staff, which presumably would include Directors, Planning Services. The relevant sections of the Delegation Circular are extracted below:

Existing Delegations

The following plan making delegations have previously been issued.

...

Secretary and senior officers of the Department of Planning and Environment:

...

- Arranging for the review of a planning proposal by the Planning and Assessment Commission or a joint regional planning panel under section 56(5) of the EP&A Act;

...

Greater Sydney Commission

...

Savings and transitional provisions in Part 11 f Schedule 7 of the *Environmental Planning and Assessment Regulation 2000* (the Regulations) save existing Ministerial delegations to local councils, senior staff of the Department of Planning and Environment and the [Planning Assessment] Commission relating to the LEP making processes for the Greater Sydney Region...

...

Department of Planning and Environment

A broad range of decision and plan making functions have been delegated to the Department of Planning and Environment by the Minister for Planning and Greater Sydney Commission to ensure the timely delivery of LEPs...

Consequently, we would expect one of the following delegations to be in place:

- a delegation from the Minister or Secretary to a Director, Planning Services of the Department to exercise the power under section 23D(1)(a) of the EP&A Act; or
- a delegation from the Minister or GSC to a Director, Planning Services of the Department to exercise the power under section 56(5) of the EP&A Act.

Even if it transpires that such a delegation does not exist (we are not aware of any reason which would indicate this), nothing would prevent the Minister, GSC or Secretary from making a request to the PAC for it to conduct the Rezoning Review of the Project on the materials which it had before it.

2 Issues Raised by the City of Sydney

On 17 November 2017, the Council wrote to the PAC and raised the following issues in relation to the Rezoning Review of the Project:

- 1 SC Group never submitted a rezoning proposal and as such there could be no application to refuse. Consequently, the letter from Council to Architectus dated 4 September 2017 (**Refusal Letter**) did not constitute a refusal.



- 2 The Guide provides that a proponent has 42 days following notification by a council of its refusal to support a planning proposal to request a review. The Council asserts that the request is out of time.
- 3 The Guide provides on page 10, "A planning proposal request which has been amended after Council has resolved to not support the matter is not eligible for a Rezoning Review". Council asserts that the "documentation submitted for the rezoning review is not consistent with the documentation provided to the City".
- 4 the Council would be denied procedural fairness if the PAC was to undertake the Rezoning Review.

For the reasons outlined below, provided that the PAC has been lawfully requested to undertake the Rezoning Review (i.e. under an appropriate delegation), in our view, none of the issues raised by the Council constitute a basis on which to challenge any recommendation by the PAC arising from its Rezoning Review.

2.1 The legal status of the Guide

The Council's submission is based on a fundamental legal error, namely, that the Guide is required to be followed strictly, as though it had the status of legislation.

The Guide is a policy document, and although provision for such a document is made in the EP&A Act, this does not elevate its status.

As Hill J noted in *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 98:

... a decision-maker must take care to ensure that he does not slavishly follow a policy and disregard the particular circumstances of a case. As Gummow J said in *Khan v Minister for Immigration and Ethnic Affairs*:

"... what was required of the decision-maker, in respect of each of the applications, was that in considering all relevant material placed before him, he give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy".

Similar statements were made by Robson J in *Aubrey Robert Mills v Local Land Services* [2017] NSWLEC 25. His Honour noted at [51] to [52], in relation to the "Long Term Grazing Permit Policy and Procedures" (**LGP Policy**) that the Court was:

entitled to give consideration to the LGP Policy, however strict adherence to the LGP Policy is not a pre-requisite to the requisite determination.

... Adopting the reasoning of Kirby J in *Neat Domestic Trading Pty Limited v AWB Limited and Another* (2003) 216 CLR 277; [2003] HCA 35 at [138]:

The essence of lawful public administration in the exercise of discretion (as of good decision making generally) is to keep an open mind concerning the justice, reasonableness and lawfulness in the particular case, even if this sometimes involves a departure from a general policy.

It is clear from these decisions that the discretion of a decision-maker is not fettered by the existence of a policy or guideline. The policy or guideline operates as a relevant consideration, but allows a decision-maker to exercise his or her discretion in appropriate circumstances.

In relation to the Project, it is clear that the decision-maker exercised the discretion to seek a Rezoning Review in favour of SC Group. It is not open to a Court to review the merits of this decision. As outlined below, none of the issues raised by Council would



support a judicial review challenge to the decision to request the PAC to conduct a Rezoning Review, and we are not aware of any other ground which would support judicial review of the decision.

2.2 The Council refused to support the rezoning proposal

The circumstance where a proponent may seek a Rezoning Review are set out in Section 1.2 of this Legal Opinion. As noted, one basis is where “the council has notified the proponent that the request to prepare a planning proposal is not supported”.

It is clear from the PAC Request Letter that Ms Van Laeren had formed the view that “the Council has notified SC Group that the request to prepare a planning proposal has not been supported”. This was also reflected in the Briefing Report to the PAC prepared by a Planning Officer of the Department.

The issue raised by Council, properly formulated, is whether it was ‘Wednesbury unreasonable’ for Ms Van Laeren to form the view that the Council had notified SC Group that it did not support and would not prepare a planning proposal.

In our view, it was reasonably open to Ms Van Laeren to form the view that the Refusal Letter constituted the Council’s notification that it did not support the planning proposal. Indeed, we consider this to also be the correct view of the Refusal Letter.

The Refusal Letter states:

“While the City will consider planning proposals to vary the height and distribution of floor space to ‘unlock’ sites (such as Wanda, AMP, LendLease, Mirvac), we will not be considering increases in floor space above the LEP until the Strategy has been exhibited, received community feedback and potentially adopted by the Council and the Central Sydney Planning Committee.”

And concluded:

“We look forward to continuing our dialogue with you regarding this site. However, at this time we are not considering planning proposals based on the draft Strategy until it has the support of the NSW Government and is progressed through the steps outlined above.”

The phrases “we will not be considering” and “at this time we are not considering” clearly indicate that SC Group’s proposal was not going to be considered by Council, and was consequently refused. This is the plain intention and effect of Council’s letter.

It was not necessary, or indeed reasonable, for SC Group to submit a formal planning proposal request, or to pay the applicable fee in circumstances where the Council had emphatically stated that it would “not be considering increases in floor space above the LEP until the Strategy has been exhibited, received community feedback and potentially adopted by the Council and the Central Sydney Planning Committee.”

It was therefore open, in accordance with the Guide, for Ms Van Laeren to refer the planning proposal to the PAC.

2.3 Has the application for a Rezoning Review been validly made by SC Group?

The Council asserts that the application for the Rezoning Review has not been validly made because:

- the application was not properly made within the 42 day time frame; and
- the application contained documents not previously supplied to Council.



Neither of these issues raised by the Council has a basis in the EP&A Act or the EP&A Regulation. The only basis for the assertion that the application was not validly made is the Guide. As noted in Section 2.1 of this Legal Opinion, the Guide is only a policy and does not fetter the discretion of a decision-maker. Consequently, it was open to Ms Van Laeren to make the request of the PAC, even if the request was out of time or was amended.

To challenge this decision, the Council would need to establish that the decision was Wednesbury unreasonable. Given the emphatic language of the Refusal Letter, that Council "will not be considering" planning proposals, we do not consider that a Court would find Ms Van Laeren's decision to request the PAC to undertake a Rezoning Review as being Wednesbury unreasonable.

In any event, we do not consider either of the issues identified by Council to be made out.

The first issue raised by Council is that the application for a Rezoning Review was made out of time. The Refusal Letter was sent to Architectus on 4 September 2017. On 11 September 2017, Architectus sent to Mr Marcus Ray, the Deputy Secretary, Planning Services, of the Department a letter (**Application Letter**) in which it was stated:

...we seek a Rezoning Review of the Planning Proposal by the Planning Assessment Commission on the basis that "the council has notified Architectus that the request to prepare a planning proposal is not supported".

The Application Letter was made 7 days after the Refusal Letter. It was clearly within the timeframe stipulated by the Guide, and constituted a request for a Rezoning Review.

Further, given the existence of the Application Letter, any suggestion that it did not comply with the requirements of the Guide, and so was not made within time, would constitute a breach of the natural justice hearing rule as articulated in *Kioa v West* (1985) 159 CLR 550.

It is accepted that the date, 42 days after the Refusal Letter was sent to Architectus, was 16 October 2017. However, the Department only responded to the Application Letter on 19 October 2017, itself outside the timeframe stated in the Guide. In its response, the Department indicated that the Department had "formed the opinion that you [SC Group] are eligible for a Rezoning Review" and identified that SC Group should provide it with a completed application form and documents. Given that SC Group provided this within 7 days of receiving this letter, to suggest that the complete submission of the request for a Rezoning Review was out of time would breach the hearing rule, and would constitute a denial of procedural fairness.

The second issue raised by Council is that SC Group's request for a Rezoning Review contained documents "that were not made available to the City for its comment". The Guide only stipulates that a "planning proposal request which has been amended after the Council resolved to not support the matter is not eligible for a Rezoning Review". The additional documents do not "amend" the Project. There has been no change to the Project, so it is factually incorrect for the Council to allege that the Project has been amended. Further, as a matter of due process (discussed further in Section 2.4 below), these documents have now been provided to the Council for its comment.

In any event, the Refusal Letter was unambiguous – Council was not going to consider SC Group's rezoning request. The Project involved an increase in floor space above that permitted by the LEP and, in its Refusal Letter, the Council had indicated that it would "not be considering increases in floor space above the LEP until the Strategy has been exhibited, received community feedback and potentially adopted by the Council and the Central Sydney Planning Committee". It would be unreasonable to require strict compliance with the Guide given that, in any event, the Council was not going to consider the application.



It was therefore open and reasonable, and indeed entirely correct, for Ms Van Laeren to request the PAC to undertake a Rezoning Review. None of the issues raised by Council would, in our opinion, invalidate the exercise of this discretion.

2.4 The Council has been, and will continue to be, afforded procedural fairness

Finally, the Council asserts that "due process has not been followed". This amounts to a claim that it has not been afforded, and will not be afforded, procedural fairness. There is no basis for this claim.

SC Group was in discussions with the Council for over 10 months before the Council sent the Refusal Letter. Only following the Refusal Letter did SC Group request the Rezoning Review.

In accordance with the Guide, the Council was notified by Ms Van Laeren's request for a Rezoning Review, by letter dated 30 October 2017. Thereafter, Council was given 21 days to make submissions. On 17 November 2017, the Council made such submissions, which are currently before the PAC.

In the PAC Request Letter, Ms Van Laeren further stated:

The Commission is encouraged to meet with the Department, **Council**, Architectus, and any relevant agency previously involved in the matter to clarify any issues before making its determination. (Emphasis added).

From all this, it is clear that the Council has been given numerous opportunities to be heard and to be involved in the PAC's decision making process. Consequently, it is plainly wrong for the Council to submit that due process has not been followed and there has been a denial of procedural fairness.

Further, in any event, if the PAC determines that the Project has merit and should proceed to a Gateway Determination, the Guide stipulates that the Council will again be asked if it will accept the role of the RPA.

On the basis that the Council has been notified of the Rezoning Review to be undertaken by the PAC, has made submissions to the PAC, and, following a determination by the PAC that the proposal should proceed to a Gateway Determination, will be asked if it wishes to be the RPA, there is no basis for the assertion by Council that "as due process has not been followed... it may be vulnerable to legal challenge and will lack legitimacy".

To the contrary, provided that the PAC has been lawfully convened, the application for a Rezoning Review has been validly made.

Please do not hesitate to contact us should you wish to discuss.

Peter Briggs
Partner
Herbert Smith Freehills

+61 2 9225 5155
+61 409 030 299
peter.briggs@hsf.com

Darren Bick
Senior Associate
Herbert Smith Freehills

+61 2 9225 5082
+61 416 167 556
darren.bick@hsf.com

12 December 2017



Appendix A – Detailed Chronology

Consultation and correspondence with Council and the Department

| Date | Consultation or correspondence |
|------------------|---|
| 29 November 2016 | <p data-bbox="512 427 823 450">Meeting with the City of Sydney</p> <p data-bbox="512 456 1193 595">Architectus met with the City of Sydney to present the site and proposed development intent, including presentation of three preliminary design options which reflected the built form controls under the Draft Central Sydney Planning Strategy. Note this meeting occurred prior to knowing the hotel component was over \$100 million CIV and therefore constituted SSD.</p> <p data-bbox="512 604 762 627">Council attendees included:</p> <ul data-bbox="555 636 1129 734" style="list-style-type: none">• Tim Wise, Senior Specialist Planner;• Sally Peters, Manager Central Sydney Planning, Strategic Planning and Urban Design; and• Graham Jahn, Director City Planning. <p data-bbox="512 743 1193 860">Council generally supportive of proposed built form and proposed uses. Council raised concerns that insufficient "outlook" was proposed for the proposed hotel tower. Architectus consider that the inability for adjoining sites to develop due to heritage and other constraints need to be considered.</p> <p data-bbox="512 869 1193 965">Comments made by Council that the proposal was preemptive and that they were still awaiting a Gateway determination for their proposal and that they would wish to finalise their Central Sydney Planning Strategy before considering site-specific Planning Proposals.</p> |
| 27 March 2017 | <p data-bbox="512 981 1098 1025">Architectus issued Planning Proposal briefing letter to NSW Department of Planning and Environment (Attachment C)</p> <p data-bbox="512 1034 1193 1124">Architectus submitted a briefing letter to the Department of Planning and Environment to provide an overview of the proposed development and a request for the Department to be the Relevant Planning Authority (RPA) for the Planning Proposal.</p> <p data-bbox="512 1133 946 1155">This letter included an overview of the following:</p> <ul data-bbox="555 1164 1193 1429" style="list-style-type: none">• An overview of the site and context• An overview of the proposed development• Relationship of the proposal to the draft Central Sydney Planning Strategy;• The views of the City of Sydney Council towards the proposed development;• Request and justification for the Minister for Planning to make the EPI, including reasons as to why DPE should be the RPA (the development will be SSDA and the Planning Proposal may therefore be considered to be of "state or regional environmental planning significance" under section 54 of the EP&A Act 1979) <p data-bbox="512 1438 1193 1485">This letter also included a copy of the Urban Design Study and reference design for the proposed mixed-use hotel development.</p> |
| 30 March 2017 | <p data-bbox="512 1500 1098 1523">Meeting with NSW Department of Planning and Environment</p> <p data-bbox="512 1532 1193 1621">In response to the briefing letter above, a meeting was held with the Department to discuss the proposed development, Planning Proposal and request for the Minister to make the EPI, particularly in light of the subsequent State Significant Development Application (SSDA) processes.</p> <p data-bbox="512 1630 799 1653">Department attendees included:</p> <ul data-bbox="555 1662 1161 1792" style="list-style-type: none">• Stephen Murray, Executive Director - Regions;• Anthea Sargeant, Executive Director – Key Sites and Industry Assessments;• Sandy Chappel, Director, Sydney Region East; and• Ben Lusher, Director – Key Sites Assessments. |

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| 18 May 2017 | <p>Email from Marcus Ray, Deputy Secretary Planning Services, NSW Department of Planning and Environment (Attachment D)</p> <p>Following the preceding meeting above, email correspondence was received from the Department stating that the Department does not see any impediment to considering the Planning Proposal before the finalisation of the draft Central Sydney Planning Strategy and also that the Department would be likely to support any Planning Proposal advanced by the City of Sydney Council in conformity with proposed standards under the Draft Central Sydney Planning Strategy.</p> <p>This letter however provides that the circumstances which may trigger the Department as the RPA are not established at this time, and that the City of Sydney Council is to be RPA, whilst noting that the rezoning review process is available as an option should Council not support the proposal or fails to reach a decision within 90 days of receiving the Planning Proposal.</p> |
| 9 June 2017 | <p>Email to the City of Sydney (Attachment E)</p> <p>Due to there being an extended wait time for a meeting with the City of Sydney (originally approx. 6 weeks and later brought forward, so being 1 month after the request) Architectus requested some advice and feedback in advance of the meeting. The following queries were raised:</p> <ol style="list-style-type: none"> 1. Timing of Request for SEARs A concurrent PP and SSDA process is preferred by Architectus as this would allow for the more efficient assessment and consideration of the proposal, and also give greater certainty to the consent authority and RPA as to the future built form outcomes, given that the DCP would not apply the SSD. 2. Delegation of SSDA Assessment Function Architectus queried whether it would be the City's preference to have the assessment function of the SSDA delegated 3. Timing of consent for demolition and early works Queries in relation to Clause 7.19 of the Sydney LEP 2012 which have an implication on project timing, and specifically the applicant's desire to progress demolition and early works as early as possible in the process. <p>A response to these matters was provided by Benjamin Pechey by phone on 23 June 2017. In summary, the response was, the Council would not support submission of Request for SEARs until the Planning Proposal had been on exhibition and endorsed by Council and CSPC; Council would support the SSDA being delegated to them to determine; and that demolition could form part of a Stage 1 DA [note later discussions with Council specified their preference for a single DA – this meant that demolition could only occur later in the process].</p> |
| 29 June 2017 | <p>Meeting with the City of Sydney</p> <p>Following receipt of confirmation from the Department that the City of Sydney should be the RPA, a meeting was held with the City of Sydney to present the proposal and to detail Architectus' intent to lodge a site-specific Planning Proposal ahead of the finalisation of the Draft Central Sydney Planning Strategy – with emphasis placed on the need for prompt progression of a Planning Proposal if the project is to proceed, given the impending lapsing of the lease with NSW Property.</p> <p>Council attendees included:</p> <ul style="list-style-type: none"> • Graham Jahn; • Chris Coradi; • Benjamin Pechey; • Sarah Hotchin; and • Tim Wise. <p>Council was generally supportive of the proposal and noted that proposed setbacks, despite not being strictly consistent with the Draft DCP (Note: DCPs do not apply to State Significant Development), would likely be supportable subject to demonstrating that these would not result in any unsatisfactory impacts in terms of wind and daylight access to Bligh Street. Council suggested that the Planning Proposal could be prepared in such a way as to not require the preparation of a Stage 1 SSDA.</p> |
| 5 July 2017 | <p>Email to Benjamin Pechey, Acting Executive Manager Strategic Planning & Urban Design; and Chris Corradi, Area Planning Manager – City of Sydney (Attachment F)</p> |

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| | <p>Email sent as follow up to the above meeting proposing submission documentation and proposed planning pathway, given complexity around SSD and satisfaction of Clause 7.20 which requires the preparation of a site-specific DCP (which would then not apply to the development).</p> <p>No response formally provided but discussions with Tim Wise over the phone suggested an in-principle support for the proposed pathway, but Council hesitant to respond.</p> |
| 19 July 2017 | <p>Email to Tim Wise, Senior Specialist Planner, City of Sydney (Attachment G)</p> <p>Email sent to advise Council of intent to lodge a planning proposal on 28 July 2017 containing the material listed in the email of 5 July 2017, with the exception of pedestrian analysis and wind tunnel testing (which had at the time commenced, but not been completed).</p> <p>Queried applicable fee at lodgement.</p> |
| 21 July 2017 | <p>Email from Tim Wise, Senior Specialist Planner, City of Sydney (Attachment H)</p> <p>The email from Council to Architectus responds to matters discussed at the preceding meeting above and requests a Planning Proposal pre-submission be provided including documentation package.</p> <p>Key points raised by Council and items requested as part of this pre-submission included:</p> <p>Documentation requested</p> <ul style="list-style-type: none"> • Detailed covering letter outlining the proposed development, including an assessment against the Central Sydney Planning Strategy (Including associated Central Sydney Planning Proposal and Draft DCP); • Concept urban design study and built form drawings (including indicative site layout, building envelopes, proposed heights and floor space ratio); • Wind assessment; • Pedestrian assessment; • Daylight (sky view factor) analysis; and • Indicative public benefit offer. <p>Planning Proposal must demonstrate compliance with the Draft Central Sydney Planning Strategy</p> <ul style="list-style-type: none"> • Advice that any Planning Proposal (including pre-submission) must demonstrate compliance with the Draft Central Sydney Planning Strategy, and "<i>must not rely on existing controls for justification</i>". • For the purposes of this assessment, the Draft Central Sydney Planning Strategy is take to include: <ul style="list-style-type: none"> ◦ The Draft Central Strategy Planning Strategy 2016-2036 ◦ Central Sydney Planning Proposal; ◦ Draft Central Sydney Affordable Housing Program; and ◦ Sydney DCP 2012 (Central Sydney Planning Strategy Amendment). <p>Advice on request of SEARs</p> <ul style="list-style-type: none"> • Councils position was provided that SEARs should not be requested until after Council and CSPC have approved a post exhibition planning proposal. <p>Architectural design competition</p> <ul style="list-style-type: none"> • Council provided advice that the proposal is to be subject to a full architectural design competition <p>LEP 2012 – Clause 19 Demolition</p> <ul style="list-style-type: none"> • That the development must be staged or designed having regard to this clause. <p>Council specified they would provide the Planning Proposal form and confirm lodgement fees once all is provided to their satisfaction.</p> <p>The pre-submission Planning Proposal incorporates all matters raised by Council within this email.</p> |
| 4 August 2017 | <p>Architectus issued pre-submission Planning Proposal documentation to the City of Sydney (Attachment I)</p> <p>Planning Proposal pre-submission letter and documentation package provided to Council, including, however not limited to:</p> <ul style="list-style-type: none"> • Detailed covering letter, prepared by Architectus; • Architectural plans prepared by Architectus; |

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| | <ul style="list-style-type: none"> • Building envelope and urban design study prepared by Architectus; • Assessment of compliance against the Draft Central Sydney Planning Strategy; • Sky view analysis prepared by Architectus; • Preliminary Pedestrian Wind Environment Statement prepared by Windtech; • Draft Public Benefit Offer prepared by Architectus; and • Capital Investment Value Report, prepared by WT Partnership. <p>Note it was agreed beforehand with Council that the Wind Tunnel Testing, and the Pedestrian Assessment Study would be provided at a later date.</p> |
| 7 August 2017 | <p>Meeting with City of Sydney to discuss Pedestrian Analysis requirements.</p> <p>Council attendees included:</p> <ul style="list-style-type: none"> • Jesse McNicoll, Urban Design Coordinator; and • Tim Wise, Senior Specialist Planner <p>Brief discussion also held in relation to Daylight (Sky View Factor) Analysis. Council asked for an updated report which detailed what would be required to be done to the building envelope to achieve equivalent or improved outcome in sky visibility compared with a compliant building envelope.</p> |
| 23 August 2017 | <p>Submission of Updated Sky View Factor Analysis to Council</p> <p>Submission of updated Sky View Factor Analysis prepared by BIM Consulting (Architectus) to Council via email addressing requirements specified in above meeting.</p> |
| 25 August 2017 | <p>Submission of Detailed Pedestrian Wind Environment Study to Council</p> <p>Detailed Pedestrian Wind Environment Study (wind tunnel testing) prepared by WindTech and issued to Council via email.</p> |
| 1 September 2017 | <p>Submission of Draft Pedestrian Assessment Study to Council</p> <p>Draft Pedestrian Study submitted to Council via email. Study issued by Sarah Zhang (AECOM) to Council Officers Jesse McNicoll and Tim Wise.</p> |
| 4 September 2017 (received 7 September 2017) | <p>Letter from Graham Jahn, Director of City Planning, City of Sydney (Attachment J)</p> <p>The letter addressed to Michael Harrison of Architectus provides that the City of Sydney will not consider a planning proposal for 4-6 Bligh Street until the Draft Central Sydney Planning Strategy has the support of the NSW Government and has been publicly exhibited.</p> |
| 11 September 2017 | <p>Letter sent to Marcus Ray, Deputy Secretary Planning Services, NSW Department of Planning and Environment (Attachment K)</p> <p>A letter was sent the Marcus Ray and DPE officers advising of Council's position regarding lodgement of a Planning Proposal and requesting that either:</p> <ul style="list-style-type: none"> – The Department take on the role of the RPA and progress the Planning Proposal; or – Facilitate a Rezoning Review |
| 3 October 2017 | <p>Meeting with Department of Planning and Environment to discuss progressing the Planning Proposal</p> <p>Following on from the letter sent to Marcus Ray on 11 September, a meeting was held with DPE officers to discuss options for progressing the Planning Proposal. The history of the project and the potential for the DPE/PAC to be the RPA was discussed. DPE attendees included:</p> <ul style="list-style-type: none"> • Karen Armstrong – Director, Sydney Region East; and • Wayne Williamson – Team Leader, Sydney region East <p>The Department indicated that they considered the Proposal to have merit and that there the letter from Graham Jahn dated 4 September 2017 provided sufficient grounds to enable a Rezoning Review to occur.</p> <p>At this meeting Architectus provided the Department with a copy of the draft Planning Proposal and key supporting documents.</p> |
| 19 October 2017 (received 20 October) | <p>Response from Marcus Ray to Architectus' letter dated 11 September 2017 (Attachment L)</p> |

In a letter provided as a response to Architectus' letter dated 11 September 2017 requesting the Department to facilitate a Rezoning Review, Marcus Ray, Deputy Secretary Planning Services, DPE, advised:

- *"While acknowledging Council's draft Strategy is an important step in establishing a new planning framework for Central Sydney, I note that site-specific planning proposal requests can still be submitted and are to be assessed on their merits. The current status of the draft Strategy should not preclude Council giving due consideration to individual proposals"; and*
 - *"Given Council's decision to not consider the proposal request prior to the Strategy being close to finalisation, I have formed the opinion that you are eligible for a Rezoning Review."*
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Appendix B – PAC Request Letter



Planning &
Environment



Ms Lynelle Briggs
Chair
Planning Assessment Commission
Level 3, 201 Elizabeth Street
SYDNEY NSW 2000

Ref: 17/15054

Dear Ms Briggs

Re: Request for a Rezoning Review – PGR_2017_SYDNE_001_00

I am writing to you to advise that a Rezoning Review request, dated 27 October 2017 has been submitted to the Department of Planning and Environment and to request that the Planning Assessment Commission (the Commission) review the proposal.

The Rezoning Review request seeks to amend the Sydney Local Environmental Plan 2012 to introduce a site specific provision to increase the floor space ratio control at 4-6 Bligh Street, Sydney.

The proponent is seeking a Rezoning Review because the Council has notified the proponent that the request to prepare a planning proposal has not been supported.

The Commission is now requested to review and determine its suitability for being referred to the Department for a Gateway determination under section 56 of the *Environmental Planning and Assessment Act 1979* (the Act).

A copy of the proponent's request and all supporting information is provided on the Department's Tracking System, at <http://pgrtracking.planning.nsw.gov.au/>. Council has also been requested to provide comments detailing why the original request to Council was not progressed and to confirm that the current proposal is the same as what was considered by Council. Council's comments will be provided to you from the Department within 21 days from the date of this letter.

The Commission is encouraged to meet with the Department, Council, the proponent, and any relevant agency previously involved in the matter to clarify any issues before making its determination.

Should you have any further enquiries about this matter, I have arranged for Ms Mary Su of the Department of Planning and Environment to assist you. Ms Su can be contacted on 9373 2807.

Yours sincerely



Catherine Van Laeren
Director, Sydney Region East
Planning Services

30/10/17

