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Dear Mr Wilson

**Planning Proposal (Pp_2018_Lanec_001_00) to Amend Lane Cove Local Environmental Plan 2009 to Permit Shop Top Housing as an Additional Permitted Use and Additional Building Height ["Planning Proposal"]
2 Greenwich Road, Greenwich (Lot 1 In DP 662215 And Lot 2 IN DP 56604) ["the Site"]**

We refer to the above matter, and specifically to your request for advice as to whether the Planning Proposal is consistent with "the draft findings of the St Leonards and Crows Nest Station Precinct strategic investigation", as required by the Gateway Determination.

Summary advice

In the writer's opinion, there could be little doubt that the Planning Proposal for the Site is 'consistent' in the required legal sense with the St Leonards and Crows Nest Station Precinct strategic investigation, such that the Planning Proposal can be progressed without amendment.

The Planning Proposal has both strategic and Site specific merit.

Strategically, the proposed 'shop top housing' use for the Site will act as an ideal transition between the commercial / retail (i.e. employment) and residential uses planned for Crows Nest and St Leonards respectively. Similarly, as the focus of the Precinct strategy is to create greater housing opportunities, the alternative proposal (which we are instructed was put to the Panel) to rezone the Site to R4 residential, squarely promotes that strategy. Certainly, there could be no suggestion that the Planning Proposal is inconsistent with either of those strategic planning outcomes, given that it incorporates a mixture of both.

The Site specific merits are that the Planning Proposal provides for residential development comprising a mix of 1, 2 and 3 bedroom units in keeping with the housing affordability and supply choices of the local community but importantly, not at the expense of jobs growth or retail / commercial activities. The proposed development of the Site will promote active walkability and accessibility to public transport and services.

In short, we see nothing controversial about progressing the Planning Proposal without change, and suggest that you approach the relevant Regional Panel to seek endorsement of same.

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Our more detailed advice follows.

Advice

- 1 You have provided us with a copy of the letter sent to Sydney North Planning Panel from Stephen Murray, Executive Director, Regional Planning Services (Department of Planning & Environment) (“DPE”), together with a copy of the Gateway Determination, each dated 6 September 2018, as well as the Gateway Determination Report dated 4 September 2018.
- 2 As noted in the Gateway Determination Report, the Site “*is on the cusp of two different character areas, being the Pacific Highway Corridor and Residential (St Leonards South)...* The Pacific Highway Corridor is proposed to be a high-density mixed-use corridor with a key focus on employment. St Leonards South is proposed to be a higher-density residential area with increased densities focused on areas closest to the station.” [Report p.6]. Further, as stated in the Summary of recommendation of that Report, “*The Planning Proposal is considered to have strategic merit as it will assist in delivering housing supply and choice in an area supported by existing and future public transport infrastructure, being the St Leonards station and the future Crows Nest Metro Station.*” [Report p.7].
- 3 The Gateway Determination is to the effect that “*an amendment to the Lane Cove Local Environmental Plan (LEP) 2009 to introduce shop-top housing as an additional permitted use, and amend the maximum permitted building height should proceed*”, subject to conditions, including:
 - Condition 1: *The Planning Proposal is to be updated to: (a) demonstrate consistency with the draft findings of the St Leonards and Crows Nest Station Precinct strategic investigation being undertaken by the Department in consultation with Lane cove, Willoughby City and North Sydney Councils), including the relevant proposed land use, height and floor space ratio; and*
 - Condition 5: *Prior to finalisation, the Planning Proposal is to be amended to demonstrate consistency with the final strategic planning framework for the St Leonards and Crows Nest Station Planned Precinct.*
- 4 Subsequent to the Gateway Determination, the *St Leonards and Crows Nest 2036 Draft Plan – October 2018* (“**the Draft Plan**”) was published online by the DPE. It does not make specific mention of the Site. Nevertheless the Site sits geographically between the areas that are specifically the subject of the Draft Plan. As such, in my opinion, **the Site should provide an ideal transition between the two areas for employment uses and residential uses**. That said, based on the case law detailed below, arguably the Site could be designated exclusively for one use or the other without being ‘inconsistent’ in the legal sense, **but a transition (as proposed) is the safer and entirely uncontroversial course**.
- 5 Importantly, the Planning Proposal was also previously assessed as being consistent with the *St Leonards and Crows Nest Station Precinct Interim Statement*.

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Legal principles

- 6 The Gateway Determination is made pursuant to the *Environmental Planning and Assessment Act 1979* and is therefore an instrument of delegated (or subordinate) legislation. This means that the general rules of statutory interpretation continue to apply. As such, the extensive body of case law relating to the meaning of 'consistent' or 'consistency', in environmental planning instruments, is applicable in this instance.
- 7 The guiding principle for determining whether a proposed development is consistent with the objectives of a zone is set out in the judgement of Pearlman CJ in *Schaffer Corporation Limited v Council of the City of Hawksbury* [1992] NSWLEC 77, wherein Her Honour states: "*The guiding principle, then, is that a development will be generally consistent with the objectives if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.*"
- 8 In *Dem Gillespies v Warringah Council* [2002]NSWLEC 224 Bignold J similarly considered the meaning of "consistent" in the context of planning instruments and [at paragraph 77] determined that it should not be confined to "*not antipathetic*" but "*be given its ordinary and natural meaning (eg. as in the Macquarie Dictionary: "1. Agreeing or accordant; compatible; ...")*".
- 9 Biscoe J in *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC190 [at paragraph 45] confirmed that "*consistent is not confined to the notion of the proposed development not being antipathetic and is synonymous with compatible.*"
- 10 As such, in my opinion the Planning Proposal, in its current form, is plainly 'consistent' (not antipathetic/compatible) with the Draft Plan, **such that the Planning Proposal needs nothing further in order to be "updated to demonstrate consistency"**. In other words, condition 1(a) of the Gateway Determination **is already met**.
- 11 In that regard, although it will require a merit assessment of sorts, it would seem to be an inescapable conclusion that the Planning Proposal is entirely consistent with the draft findings of the St Leonards and Crows Nest Station Precinct strategic investigation (as required by condition 1) given that the proposed 'shop top housing' use for the Site will act as an ideal transition between the commercial / retail (i.e. employment) and residential uses planned for Crows Nest and St Leonards respectively. Certainly, there could be no suggestion that the Planning Proposal is **inconsistent** with either of those strategic planning outcomes, given that it incorporates a mixture of both.
- 12 In the circumstances, given that:
 - a) the strategic merit of the Planning Proposal is consistent with the draft planning for the future development of St Leonards and Crows Nest; and
 - b) the Site specific merit of the Planning Proposal demonstrates a clear transition between the expectant redevelopment of the Pacific Highway Corridor and St Leonards South;

we are of the opinion that a request should be submitted to the Sydney North Planning Panel to progress the Planning Proposal, without change, at this point in time.

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If you have any questions or require further information, please do not hesitate to contact Anthony Whealy on (02) 8035 7848

Yours sincerely



Anthony Whealy
Partner
Accredited Specialist — Local Government and Planning

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