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City of West Torrens
165 Sir Donald Bradman Drive
HILTON SA 5033

Attention: Mr Tony Kelly

Dear Tony

DA 211/M013/17 – Demolish existing buildings on site, removal of one regulated tree and construction of an 8 storey mixed use building comprising 36 residential apartments, two levels of car parking and a cafe at ground level - 192 Anzac Highway, Glandore

I refer to our recent communications about the above development application (**Application**).

You have sought my advice about categorisation of the Application for the purposes of public consultation under the *Development Act, 1993 (Act)*.

For the reasons that follow, I am of the view that the Application involves a category 2 development.

Background

I record the following background facts upon which my advice is based:

1. The Application proposes a development described as "Demolish existing buildings on site, removal of one regulated tree and construction of an 8 storey mixed use building comprising 36 residential apartments, two levels of car parking and a cafe at ground floor."
(**Development**).
2. The proposed 8 storey building will be situated on an existing allotment with frontage to Anzac Highway, being Allotment 10 in DP 19964, as described in CT 5070/580 (**Land**).
3. The Land enjoys a free and unrestricted right of way (**Right of Way**) over a portion of the immediately adjoining land, being Allotment 11 in DP 19964 (**Adjoining Land**).
4. The Adjoining Land is a "battle axe" shaped allotment which immediately abuts, the eastern and southern boundaries of the Land.
5. The Right of Way is 9.25 metres in width, and extends along the full length of the handle of the "battle axe".
6. The Adjoining Land has been divided by Strata Plan 10370 to create 4 strata units, together with unit subsidiaries and common property.

7. The strata units are situated at the rear of the Adjoining Land and gain access from Anzac Highway via an existing driveway that traverses the Right of Way land.
8. The common property associated with SP 10370 includes the Right of Way land, but it also extends to the rear (southern) boundary of the Adjoining Land as indicated in the relevant strata plan of division (**Common Property**).
9. The Development proposes to utilise the Right of Way to provide vehicular access to the 8 storey building, whereupon the Right of Way land will provide the only means of vehicular access to both the Development and the strata units.
10. The Land and the Adjoining Land are situated in an Urban Corridor Zone according to the West Torrens Council Development Plan.
11. The rear (southern) boundary of the Adjoining Land forms the boundary between the Urban Corridor Zone and the adjoining Residential Zone.
12. The State Commission Assessment Panel (SCAP) is the relevant authority for the Application under the Act.

Development Act provisions

13. Under section 38 of the Act, development may be assigned to either category 1 or 2 by the Development Plan or the *Development Regulations, 2008* (**Regulations**).
14. Subject to several exceptions (including tree damaging activity), where a development is assigned to a category by the Development Plan and the Regulations, the Development Plan prevails to the extent of any inconsistency.
15. Where a development is not assigned to either category 1 or 2 by the Regulations or the Development Plan, it defaults to category 3.
16. For present purposes, it can be taken that the Development (apart from tree damaging activity) is not assigned to any category under the Regulations. As such, potential inconsistency between the Regulations and the Development Plan is avoided in this case.

Development Plan

17. The relevant Development Plan is the 30 May 2017 consolidation.
18. Within the Urban Corridor Zone, public notification is dealt with in the following way:

Public Notification

Categories of public notification are prescribed in Schedule 9 of the Development Regulations 2008.

In addition, the following forms of development, or any combination of (except where the development is classified as non-complying), are designated:

Category 1

Category 2

Advertisement
Aged persons accommodation
All forms of development that are ancillary and in association with residential development
Consulting room
Dwelling
Educational establishment
Light industry in Business Policy Area 37
Office
Pre-school
Primary school
Residential flat building
Retirement village
Supported accommodation
Shop or group of shops located in the High Street Policy Area 35
Shop or group of shops with a gross leasable area of 500 square metres or less located in the Business Policy Area 37
Shop or group of shops with a gross leasable area of 2000 square metres or less located in the Boulevard Policy Area 34
Tourist accommodation
Warehouse in Business Policy Area 37

All forms of development not listed as Category 1

Any development listed as Category 1 and located on adjacent land to a Residential Zone or Historic Conservation Area that:
(a) is 3 or more storeys, or 11.5 metres or more in height
(b) exceeds the 'Building Envelope – Interface Height Provisions'.

19. Putting aside demolition (which does not require development plan consent and therefore is not subject to the requirements of section 38 of the Act) and tree-damaging activity (which is assigned to category 1 under the Regulations, and which categorisation prevails over the Development Plan), the other elements of the Development, being a "residential flat building" and a "shop", together with other ancillary components (car-park, driveway, landscaping etc) fall within the list of Category 1 development. Therefore, but for the second item in the list of Category 2 development, the Development would be assigned to Category 1.
20. The issue is whether the Development is "located on adjacent land to a Residential Zone". If it is, the development, which involves an 8 storey building, will be assigned to Category 2 rather than Category 1.
21. In so far as the proposed driveway serving the 8 storey building is located on the Adjoining Land, the "site" of the Development includes the Adjoining Land.
22. Taken as a whole, the Adjoining Land is, of course, "adjacent land" to a Residential Zone. This assumes, as must be assumed, that the term "adjacent land" in the relevant part of the Development Plan has the same meaning as in section 4 of the Act: see section 5(1).
23. The issue, then, is whether it can be said that the Development is located on the Adjoining Land taken as a whole, or whether the Development is only located on a portion of the Adjoining Land comprising the Right of Way. If the latter is true, then the development will not be located on adjacent land to a Residential Zone. Rather, the adjacent land would be the "head" of the battle axe which is within the Urban Corridor Zone.
24. In my view, it cannot be said that the Development is only located on that portion of the Adjoining Land comprising the Right of Way.
25. This would involve reading the word "land" in the Category 2 list as meaning land as a physical entity, as opposed to land as a legal estate.

26. According to section 5(1) of the Act, where a term defined in Part 1 of the Act is used in a Development Plan, the term has, unless the contrary intention appears, its defined meaning.
27. "Land" is defined in Part 1, section 4 of the Act as follows:
- "land" means, according to context-*
- (a) land as a physical entity...including any building on, or fixture to, the land; or*
- (b) any legal estate or interest in, or right in respect of, land"*
28. Thus, there is a choice as to whether the word "land" in the Category 2 list means land as a physical entity or land as a legal estate.
29. The reason I prefer land as a "legal estate" in this context is that it is more consistent with the purpose of the public consultation provisions in the Act.
30. These provisions anticipate notification to "an owner or occupier of each piece of adjacent land". It is more conducive to the purpose of notifying adjacent owners and occupiers if land is defined according to legal estates and cadastral boundaries. Otherwise, developers may be encouraged to artificially structure their proposals so that the site of a development does not take up an entire parcel of land, and so as to make the balance of that land the relevant "adjacent land" for the purposes of notification. This would involve an artificial situation in which developers are only notifying themselves, which would defeat the purpose of public notification.
31. For these reasons, I consider that the terms "land" and "adjacent land" in the Development Plan provision are referring to "land" as a legal estate, which in this case includes the whole of the Common Property.
32. To recap, in this case:
- 32.1 the "site" of the Development includes portion of the Adjoining Land subject to the Right of Way;
- 32.2 the Right of Way land forms a portion of the Common Property in SP 10370;
- 32.3 having regard to SP 10370, the Common Property extends to the southern boundary of the Adjoining Land;
- 32.4 therefore, the Common Property abuts land within the Residential Zone;
- 32.5 therefore, the Development is located on adjacent land to a Residential Zone.
33. If, contrary to my view above, the SCAP or its delegate categorises the application as a Category 1 development, then the Council:
- 33.1 as the legal owner or occupier of the road reserve (forming portion of Anzac Highway) immediately adjoining the Land and the Adjoining Land; and
- 33.2 as a person with an interest in a matter which is relevant to the determination of the Application;
- may apply to the ERD Court under s86(1)(f) of the Act seeking review of the decision on categorisation.

34. The owners or occupiers of any other "adjacent land" to the site of the Development (including the owner or occupiers of the strata units) who can demonstrate an interest in the matter would also have a right of review under s86(1)(f).

I trust this advice assists. Please contact me if you would like to discuss further.

Yours faithfully
Norman Waterhouse



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