

Our Ref: JSL:13/0091

6 August 2013

Department of Planning & Infrastructure  
GPO Box 39  
SYDNEY NSW 2001

### By On-line Electronic Submission

Dear Sir/Madam,

### Submission to Draft Oxford Falls Valley & Belrose North Strategic Review

- 1 I act for Numeve Pty Limited, the registered proprietor of land identified as Lot 100 in DP 1023183 (**Land**), being situated in the Oxford Falls Valley of the Warringah Council local government area (**Warringah LGA**).
- 2 I am instructed to make the following submission on behalf of my client in direct response to an invitation to my client to comment on the Oxford Falls Valley and Belrose North Strategic Review (**Strategic Review**) jointly released by the Department of Planning and Infrastructure (**Department**) and the Warringah Council (**Council**) on 21 June 2013.
- 3 The purpose of this submission is to object to:
  - 3.1 specific aspects of the methodology and process adopted by the Project Control Group (**PCG**) in preparing and delivering the Strategic Review; and
  - 3.2 the outcome of the Strategic Review as detailed in the application of the E3 Environmental Management Zone to the Land.

### Background

- 4 My client is on the record as having expressed its objection to the making of the draft Warringah LEP 2011 (**Draft Plan**) as exhibited from 12 October to 30 of December 2009.
- 5 As a consequence of numerous submissions made to the Minister for Planning and Infrastructure (**Minister**), the Department and the Council, objecting to the proposed E3 Environmental Management zoning for land within the Oxford Falls Valley and Belrose North localities of the Warringah LGA, the Minister announced that he intended to defer the areas of Oxford Falls Valley and Belrose North localities from the Warringah LEP 2011. On

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9 December 2011, when the Warringah LEP 2011 was made, both the Oxford Falls Valley and Belrose North localities were deferred, meaning that planning controls under the Warringah LEP 2000 continued to apply to the aforementioned localities which included the Land.

6 In objecting to the making of the Draft Plan where this intended to zone the Land as E3 Environmental Management, my client relied, inter alia, on the following grounds:

- 6.1 my client's previous reliance, in good faith, on the representation of the previous Minister in his communications with the Warringah Council expressing the view that the *'most appropriate option is to defer Oxford Falls Valley from the draft LEP until Council has undertaken the studies recommended by the Commission. Upon completion of the studies, Council will be in a better position to determine the appropriate areas to be zoned for conservation and if appropriate, any areas suitable for urban development'*.
- 6.2 the failure of the Warringah Council's planning staff to properly translate the provisions of the WLEP 2000 to the Draft Plan resulting in the imposition of new planning controls over land proposed to be zoned E3 Environmental Management;
- 6.3 the failure of the Warringah Council's planning staff to correctly interpret and apply the E3 Management Zone to a substantial number of 'cleared' properties within the Warringah Council local government area;
- 6.4 the Warringah Council's failure to comply with important procedural aspects relating to the preparation and notification of the Draft Plan;
- 6.5 the Warringah Council's refusal to give adequate consideration to community opposition to the Draft Plan;
- 6.6 the Warringah Council's resolution not to undertake a public hearing in response to matters raised in submissions to the Draft Plan; and
- 6.7 the failure of the Warringah Council to take appropriate steps to address admitted deficiencies in the Draft Plan prior to its submission to the Minister, thereby imposing an unnecessary and inequitable financial burden on affected ratepayers who will be required to seek an amendment of the Draft Plan once made (if made) should they wish to have the procedural and substantive errors in the Draft Plan corrected.
- 6.8 legal advice given to my client by me that my client:
  - (a). had standing before the Land & Environment Court to object to the making of the Draft Plan pursuant to s20(1)(b) of the *Land & Environment Court Act 1979* for the purpose of seeking orders to have the Draft Plan, or parts thereof, declared invalid if it were to have been made by the Minister in its then present form; and

- (b). had reasonable prospects of successfully arguing that the Draft Plan, or parts of it, be declared invalid if it were to have been made by the Minister in its then present form,

on the basis that the Council has failed to adequately discharge its statutory obligations in the process of preparing the Draft Plan.

- 7 Regrettably, some of the critical reasons for my client's original objections to the Draft Plan remain relevant to my client's present objections to:
- 7.1 the outcome of the Strategic Review in recommending that the Land be zoned E3 Environmental Management; and
- 7.2 the process that has been followed by the PCG in reaching the conclusions identified in the Strategic Review.
- 8 I now turn to highlighting the basis of my client's present objections and respectfully invite both the Department and Council to consider this submission and to reconsider the conclusion reached with respect to the proposed E3 Environmental Management zoning of the Land.

## Key issues for consideration

### Has the E3 Environmental Management zone been correctly applied to the Land?

- 9 It is my client's contention that the E3 Environmental Management zone has again been incorrectly applied to the Land as a result of a flawed translation process that has sought to translate the B2 Oxford Falls Valley zone under the WLEP 2000 to a new LEP applying the standard instrument format for LEP's

## Flaws in the Process

### Incorrect interpretation of zoning definition

- 10 The purpose of the Strategic Review is stated on page 26 of the Strategic Review "*to apply planning controls that most closely reflect existing planning controls*", the authors of the strategic review comment that "*whilst value of land is not a planning consideration, the strategic review did examine a best fit zone having regard to the **character statements** [my emphasis] of the two localities under LEP 2000*".
- 11 It is respectfully suggested that such a basis of translation is fundamentally flawed as it fails to take into consideration the categorisation of permissible land uses (and importantly almost entirely discounts the category 3 land uses) that were identified in the zoning under the LEP 2000 for locality B2 Oxford Falls Valley.
- 12 Such an approach serves only to reinforce the original error of the Councils Planning Staff when arguing that the Draft Plan was intended to represent '*as close as possible to a translation of the provisions under WLEP 2000*' and that the '*draft LEP provisions for the*

*Oxford Falls valley are a translation of the existing provisions within the Warringah LEP* [my emphasis]', having regard for the outcome of Strategic Review so far as it relates to the Land.

- 13 It is submitted that just as the Council staff made a substantive error in the manner in which the E3 Environmental Management zone was applied to a significant number of properties when attempting to translate the provisions under WLEP 2000 the approach adopted by the PCG serves only to replicate this fundamental error.
- 14 It is simply not possible to seek to extract one aspect of the original definition of the B2 Oxford Falls Valley zone and seeks to apply this in isolation of the remaining components of the definition of that zone when looking for a similar zoning match under the standard instrument format for LEP's.
- 15 Simply put, the attempt of translating a place-based plan such as the Warringah LEP 2000 to the standard instrument format, is ill served by an approach that seeks to pay more attention to one aspect of the definition of the relevant zone (the desired future character statement) at the expense of an equally important aspect of the definition detailed in the categorisation of permissible land uses.

#### Inconsistent and flawed analysis of land

- 16 The fundamental flaw in the translation process is further reinforced in the current Strategic Review by the staged approach taken in analysing land as to its suitability for the E3 Environmental Management zone with a highly predictable outcome given the framework for analysis.
- 17 This is exemplified by considering the process adopted by the PCG when analysing the Land as documented in the Strategic Review.
- 18 **Stage 1:** Involves an analysis of the use of the Land which (with the benefit of site visits) is originally identified as "*commercial*" (Map 003 Land Uses). So much is agreed.
- 19 **Stage 2:** Applies a cumulative level of environmental constraint filter which identifies the Land as being subject to "*moderate environmental constraints to development*" (Map 004 - Cumulative level of environmental constraints). So much is agreed.
- 20 **Stage 3:** Applies a further filter in the analysis of the appropriate zoning for the Land which involves a zoning recommendation based on the consideration of primary environmental constraints which defines the Land as having "*no environmental constraints to development*" (Map 005 - Outcome Of The Primary Environmental Constraints Analysis) subject to further assessment being required to determine the zoning. Again so much is agreed.
- 21 **Stage 4** (the catch all stage): Despite having identified the Land as having "*no environmental constraints to development*" "the fourth stage of the land analysis involves a further 4 stage analysis identified on pages 32 and 33 of the Strategic Review which can only be interpreted to serve one purpose and that is to overwhelmingly force a conclusion that the majority of land be zoned as E3 Environmental Management on grounds that

completely ignore the first three stages of land analysis including importantly its present use and the pre-existing definition applied to the zoning of the Land under the B2 Oxford Falls Valley zone.

- 22 Simply put it is not rational to adopt a process of land analysis that through its application ultimately ignores one of the most important and fundamental stages involving the analysis of the use of the land.

#### Existing uses

- 23 To suggest that the “*small number of nonconforming land uses* [that arise] *as result of the recommended zoning*” be dealt with through reliance on existing use rights under the *Environmental Planning and Assessment Act 1979* and the *Environmental Planning and Assessment Regulation 2000* is simply not an adequate response to what clearly amounts to an effective down zoning of the permissible use of the Land and a flawed process having regard for the current categories of available land uses noted in the B2 Oxford Falls Valley zone and the availability of alternative zoning outcomes.

#### Integrity of the process – a comparison with Kimbriki

- 24 It is inevitable that one should question why the process of translating the WLEP 2000 should result in a particular zoning outcome (SP2) for land owned and controlled by the Council in relation to the operations of the Kimbriki Waste operations, which notably involves a land use not dissimilar to the current use of the Land by my client as a concrete recycling facility, but interestingly enough has resulted in an entirely different zoning outcome for the Land in question both in the regional Draft Plan and as an outcome to the Strategic Review.
- 25 Indeed such an outcome and the inferences that may be drawn from it invites further criticism of the process and begs a response to the question “Why is it that the development potential of the land owned by a competitor of Kimbriki, namely the Land owned by my client should be so compromised by the application of a process that should surely be neutral in its application?”

#### Continued resistance to accountable decision making

- 26 Regrettably, despite assurances about transparency and accountability and the desire for appropriate community consultation and engagement, the actions to delay access to certain information again invites criticism. The lack of availability of information to enable the formulation of appropriate submissions and comment on the Strategic Review has again undermined the process of public engagement. Indeed it is noted with considerable reservation that information underpinning the process and methodology used to analyse land within the Oxford Falls Valley and Belrose North localities was only made available following a GIPA application made by the Warringah Urban Fringe Association Incorporated.

### **Concluding remark**

- 27 The Department, the Council and the PCG are urged to take this submission into account when proceeding to finalise recommendations with respect to the zoning of my clients Land and are specifically invited to reconsider zoning my clients land in a manner that more appropriately reflects and takes into account the approved uses of the Land which are otherwise prohibited under the E3 Environmental Management zone. A potential and appropriate solution may be to recognise the approved uses of the Land by their inclusion in Schedule 1 to the WLEP 2011 when amended to incorporate the deferred areas.

Yours sincerely,



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