

17 August 2022

**Mills Oakley**  
ABN: 51 493 069 734

Your ref:  
Our ref: AJWS/JZOS/3557238

Mr Viv May PSM  
Administrator  
Wingecarribee Shire Council  
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### URGENT ACTION REQUIRED

Dear Mr May

**Submission for consideration at Ordinary Meeting of Council on  
Wednesday, 17 August 2022 re Planning Proposal No. P-2022-1345 Myrtle Street Bowral &  
Elizabeth Street, Moss Vale**

We continue to act for Beaches Capital Ventures Pty Ltd ('**Client**'), who is the landowner of Lot 110 in DP 877316 ('**Lot 110**') and Lot 1 in DP 986025 ('**Lot 1**'), otherwise known as 24 and 26 Elizabeth Street, Moss Vale ('**Site**'), respectively.

We refer to the abovementioned Planning Proposal No. P-2022-1345 ('**Planning Proposal**'), which seeks to include the Site as a heritage item in Schedule 5 of the *Wingecarribee Local Environmental Plan 2010* ('**WLEP 2010**').

We understand that the Planning Proposal is scheduled to be considered at the ordinary meeting of Wingecarribee Shire Council ('**Council**') today - **Wednesday, 17 August 2022 at 3:30pm** ('**Ordinary Meeting**').

We note that the Ordinary Meeting will be held at Council's Chambers and that we have been informed Council may only be addressed 'in person' through the Public Forum. Regrettably, neither our Client, or its consultant team (including legal and heritage representatives), are available to attend the Ordinary Meeting 'in person'. Accordingly, we ask that a copy of this correspondence, including its enclosures, are forwarded to the relevant Councilors for consideration at the Ordinary Meeting.

In summary, we are instructed to request that **the Council resolve at the Ordinary Meeting to defer any endorsement of the Planning Proposal** in so far as it relates to the Site until:

- The current Land and Environment Court of NSW ('**Court**') appeal proceedings no. 2021/358017 ('**Proceedings**') brought by our Client against Council's making of Interim Heritage Order No. 13 ('**IHO**'), which currently applies to the Site, **have been finally determined**;
- The Wingecarribee Local Planning Panel ('**WLPP**') has considered the Court's final determination in relation to the Proceedings and attended a physical inspection of the Site proposed to be heritage listed upon reasonable notice being provided to our Client to arrange that inspection;
- A further meeting of the WLPP is held upon reasonable notice being provided to our Client so that it, and its relevant consultants, can address the WLPP;
- A further ordinary meeting of Council is held upon reasonable notice being provided to our Client so that it, and its consultants, can address Council.

The reasons for our request are primarily twofold and summarised as follows:

- The Court's final determination in relation to the Proceedings, including its public findings in relation to whether part of the Site (i.e. Lot 110) has heritage significance, is a matter that our Client should be permitted to raise in its submission against the Planning Proposal;
- There has been a serious failure of the WLPP and Council to carry out their obligations in relation to the Planning Proposal in a satisfactory manner.

We set out those reasons in detail below.

## 1. Court's determination in relation to the IHO Proceedings must be considered

- 1.1 As Council is aware, in November 2021, Council made the IHO in relation to the Site.
- 1.2 Subsequently, our Client commenced the Proceedings against the making of the IHO and presently seeks an order for the IHO to be revoked insofar as it identifies and relates to Lot 110.
- 1.3 The Proceedings were listed for a conciliation conference (mediation) on 11 May 2022, which was unsuccessful and terminated on the same date. As a result, the Proceedings are now listed for hearing on **Wednesday, 31 August 2022** (i.e. 14 days after the Ordinary Meeting).
- 1.4 In our written submission dated 8 July 2022 in response to the post-gateway public exhibition of the Planning Proposal (copy **enclosed at TAB A**), we:
  - (a) specifically requested that the post-gateway public exhibition of the Planning Proposal be extended from 8 July 2022 until 14-days after the Proceedings have been finally determined; and
  - (b) submitted that the Court's final determination, including its public findings in relation to whether Lot 110 has heritage significance, is squarely a matter that our Client should be permitted to raise in its submission against the Planning Proposal. This is because *"the role of the Court extends to considering whether the [proposed] item is of local heritage significance, just as it would for the Council"* per Gray C in *Forte Construction Group Pty Ltd v Inner West Council* [2018] NSWLEC 1400 at [23].
- 1.5 The Court's final determination is equally a matter that the WLPP and Council should consider prior to any endorsement of the Planning Proposal.
- 1.6 We note from page 24 of the Agenda for the Ordinary Meeting that the relevant Council assessment officer considered the request within our submission to extend the post-gateway public exhibition of the Planning Proposal from 8 July 2022 until 14-days after the Proceedings have been finally determined. However, the relevant assessment officer ultimately reported to the WLPP that our requested extension should not be supported for the following reasons:
 

*"In addition, the submissions call for the extension of the public exhibition period to 14 days after a decision is made by the Court on the matter, which is set down for a hearing in late August. It is the owner's solicitor's contention that this extension would not put the property at further risk of harm. However, a delay as set out in this submission would result in the matter being reported back to the Local Planning Panel and Council in November (at the earliest due to Business Paper preparation deadlines), meaning that both Interim Heritage Orders would lapse before the LEP amendment was finalised and jeopardising the NSW Department of Planning and Environment's (NSWDPE) LEP finalisation deadline. The NSWDPE issued the Gateway Determination allowing the Planning Proposal to be placed on public exhibition and specified the minimum public exhibition period. The exhibition period specified in the Gateway Determination was adhered to and is considered reasonable. Since Council does not have delegation to finalise the Planning Proposal and the plan making authority is instead the NSWDPE, should the property owner wish to make a submission to the Department following the release of the Court judgment, they could do so at that time.*

*However, should the Court find in the favour of Council and the public exhibition had been extended, it would open up the opportunity for a development application (DA) to be lodged after the expiry of the Interim Heritage Order(s) and any such DA would be protected by the proposed savings provision in clause 1.8A, detailed earlier in this report, which could be a potential threat to the heritage significance of these properties."*
- 1.7 With respect, the above commentary is premised on:
  - (a) exaggerated timing regarding the preparation of the Court's final determination following the hearing scheduled on 31 August 2022; and

- (b) a desire, above all else, to ensure that the proposed LEP amendment is finalised prior to the IHO lapsing date on 19 November 2022 to ensure that our Client does not lodge a Development Application that would be protected by the proposed savings provision.
- 1.8 In respect of the observation in paragraph 1.7(a) above, we note that the most recent proceedings determined by the Court which concerned an appeal in relation to an interim heritage order were *Helm No. 18 Pty Ltd v North Sydney Council* [2022] NSWLEC 1406, a case in which we acted for the applicant. Those proceedings were heard on 6-7 June 2022 and the Court's final determination was handed down on 29 July 2022, which equates to approximately **52-days between hearing and final determination**. Adopting that timing, it would be reasonable to expect that the Court's final determination in relation to the Proceedings would be handed down by 22 October 2022, that is, 52-days after the hearing on 31 August 2022. **That timing would leave 28-days (i.e. 4-weeks) for Council and the WLPP to action the 4 items that we have requested to occur above on page 1 – which is reasonable**, particularly having regard to the Council's and WLPP's recent ability to hold the WLPP meeting on 3 August 2022 and subsequently, the Ordinary Meeting that is scheduled on 17 August 2022, some 14-days later.
- 1.9 Further, the reasoning from the observation in paragraph 1.7(b) is misguided. For example, our Client could equally lodge a development application as at the date of this letter (or any time prior to the actual making of the proposed amendment to the *WLEP 2010*) that would be protected by the proposed savings provision. However, that has **not** occurred and is not intended to occur. Rather, our Client's desire is simple; for Council to act in accordance with due process and to be afforded procedural fairness in respect of the Planning Proposal, which includes, first and foremost, an opportunity to receive the Court's final determination in relation to the Planning Proposal and for that determination to be considered by Council and the WLPP prior to any endorsement of the Planning Proposal. Otherwise the Proceedings will have been pointless and otiose, irrespective of their outcome.
- 1.10 Finally, we note that the WLPP has attempted to dissolve the significance of the Proceedings by way of its merit finding on page 26 of the Agenda for the Ordinary Meeting, which provides:
- "...in relation to the argument that Lot 110 DP 877316 should not be included in a heritage listing together with Lot 1 DP 986025, the Panel notes that 'Karingal' comprises of a house and garden setting which has been integrated across both lots to provide for a dwelling house, tennis court/parterre garden and garage for a period of more than eighty years."*
- 1.11 Again, respectfully, the WLPP's finding is **fundamentally flawed**. This is supported by Urbis' written submission dated 8 July 2022 (copy **enclosed at TAB B**) in response to the post-gateway public exhibition of the Planning Proposal, which provided:
- "Lots 1 and 110 are not a formally consolidated allotment and to our knowledge have always been treated as two separate parcels of land despite having been purchased by the same owner as separate transactions. It is our recommendation that the two lots continue to remain separate, as this is the historical situation..."*
- "There is no justification on heritage grounds for [Lot 11] to be included in the Wingecaribee LEP on heritage grounds."*
- 1.12 In circumstances where the Court is specifically being asked to make public findings on this issue in dispute it would be reasonable for **the Council to defer any endorsement of the Planning Proposal until those findings have been considered**.
- 2. Serious failure to carry out obligations in a satisfactory manner**
- 2.1 In our view, Council and the WLPP have **not** carried out their obligations in relation to the IHO and Planning Proposal in a satisfactory manner. Specifically, Council and the WLPP have **not** followed due process evidenced by their lack of transparency with our Client, who is the sole effected landowner in respect of the Planning Proposal.
- 2.2 The reasons in support of this assertion are as follows:
- (a) Council did **not** make its 'preliminary heritage assessment' available at the time it made the IHO in relation to the Site. As you will be aware, it is a mandatory legal requirement for a council to consider a preliminary heritage assessment **prior to** making any interim heritage order pursuant to clause (1)(b) of Schedule 2 '*Conditions for Local Councils to make Interim Heritage Orders*' in the relevant Ministerial Order

dated 22 April 2013. However, it was not until 17 May 2022, some 6-months after the making of the IHO, that Council produced, during the course of the Proceedings, a memorandum dated 17 November 2021 said to be the relevant 'preliminary heritage assessment'. This is in direct contrast with the late agenda report and minutes for the ordinary meeting of Council held on 8 December 2021, which provided "*The heritage assessment for 26 Elizabeth Street, Moss Vale, **has largely been completed as part of the heritage review***";

- (b) Council did **not** notify our Client of its intention to refer and consider the draft Planning Proposal at the initial WLPP meeting on 2 March 2022, where it was ultimately supported;
- (c) Council did **not** provide our Client with a copy of any of the documents which informed the initial WLPP meeting on 2 March 2022 except for the IHO itself, many months prior;
- (d) Council did **not** invite our Client to participate/make representations at the initial WLPP meeting on 2 March 2022 in relation to the draft Planning Proposal;
- (e) Council did **not** notify our Client on the outcome of the initial WLPP meeting on 2 March 2022, notwithstanding that the WLPP expressly resolved that "*the affected property owners...be advised of this decision*";
- (f) Council issued a letter to our Client dated 10 March 2022, which was the first time that Council sought to notify our Client of the proposed ordinary meeting of council on 16 March 2022 to consider the draft Planning Proposal – that is, **5 clear days' notice** with 2 of those days over a weekend. For unknown reasons, our Client did not locate a copy of Council's letter until well after the date of the ordinary meeting. Nevertheless, the period of notice sought to be provided was **never** reasonable for our Client to properly consider the volume of documents that informed the ordinary meeting and to prepare any necessary submissions in relation to the Planning Proposal;
- (g) Council did **not** issue our Client with a copy of the NSW Department of Planning and Environment's gateway determination in relation to the Planning Proposal dated 23 May 2022;
- (h) Council did **not** notify our Client of its post-gateway exhibition of the Planning Proposal;
- (i) Council issued an email to our office dated 28 July 2022, which was the first time that Council:
  - (i) sought to notify our Client of the proposed WLPP meeting on 3 August 2022 to consider the post-gateway exhibition of the Planning Proposal – that is, again, **5 clear days' notice** with 2 of those days over a weekend. As stated above, this period of notice was **never** reasonable for our Client to properly consider the volume of documents that informed the WLPP meeting and to prepare any necessary submissions in relation to the Planning Proposal;
  - (ii) requested that our Client arrange a site inspection on the morning of the proposed WLPP meeting on 3 August 2022 – that is, again, **5 clear days' notice** with 2 of those days over a weekend. Similarly, this period of notice was **never** reasonable for our Client to arrange a view of the site, noting that the Site is currently tenanted and that the request for access is to be made via a third-party agent. A minimum period of 7-days' notice for our Client to arrange a Site inspection was brought to the Council's attention by our office as earlier as 1 June 2022 (copy **enclosed at TAB C**) and repeated in a series of emails from our office between 28 July and 3 August 2022 (copy **enclosed at TAB D**). To our surprise, there is an assertion in that email chain that we declined Council's/the WLPP's request for a site inspection, which is simply not correct;
- (j) Further, Council also issued notification of the proposed WLPP meeting on 3 August 2022 direct to our Client via regular post. However, that notification was **not** received by our Client until 4 August 2022, being the day after the WLPP meeting was



actually held. We **enclose** (at **TAB E**) a copy of the postal letter provided by our Client with the received date marked up;

- (k) As mentioned above, between 28 July and 3 August 2022, we corresponded with Council's assessment officer via email and submitted that:
  - (i) proceeding with a WLPP meeting relating to a Planning Proposal to list a heritage item in circumstances where the WLPP has **not** inspected the Site is unreasonable and a failure of process;
  - (ii) proceeding with a WLPP meeting on 5 days' notice (including 2 days over the weekend) to the landowner and its legal representatives is unreasonable and a failure of process;
  - (iii) nevertheless, denying the landowner and its legal representatives an opportunity to attend the WLPP meeting remotely is unreasonable and a failure of process.
- (l) Notwithstanding the above, the WLPP meeting was held on 3 August 2022 where the Planning Proposal was supported.

2.3 We remind Council and the WLPP of the following mandatory obligations, which in our view, have **not** been complied with in a satisfactory manner:

Local Planning Panels Direction – Operational Procedures dated 30 June 2022  
('LPP Minister Direction') (copy enclosed at TAB F)

2.4 Clause 3.3, subsection 6, in Part 3 of the LPP Minister Direction provides:

*"The panel **must give reasonable notice** to the public of the times and places of its meetings. This must be through the website used by the panel and may include other mechanisms as appropriate."*

(our **emphasis**)

2.5 It cannot be said that providing **nil** notice, or **5 clear days'** notice with 2 of those days over a weekend, to our Client in respect of the prior WLPP and council meetings was "*reasonable notice*" for purposes of the above clause.

2.6 Similarly, it cannot be said that providing **5 clear days'** notice with 2 of those days over a weekend, to our Client to arrange a physical site inspection of the Site was "*reasonable notice*" for purposes of the above clause.

Update - changes to Local Planning Panels, published on the NSW Department of Planning and Environment website ('LPP Website Direction') (copy enclosed at TAB G)

2.7 We note that page 2 of the LPP Website Directions provides:

*"With face-to-face public panel meetings no longer an option, holding meetings by virtual means, such as by teleconference, will be a necessity until further notice."*

***There is no requirement for panel members or members of the public to attend panel meetings in-person."***

(our **emphasis**)

2.8 Having regard to the above publication, we simply do not understand why our Client was denied an opportunity to attend the WLPP meeting on 3 August 2022 via remote means.

Ultimately, we are of the view that Council's actions are suspect of a nefarious or at least very deliberate intention and have arguably denied our Client procedural fairness in the legal sense. Our Client and our office should not be required to regularly visit Council's website and trawl through Council meeting agendas to ascertain whether any planning proposals are being or have been prepared by Council in respect of land that it owns. Rather, principles of due process and fairness would support that if Council were seeking to follow that course our Client should be properly and reasonably notified so that it can arrange its consultants to attend in a timely matter. This has **not** occurred.

As stated above, we ask that a copy of this correspondence, including its enclosures, are forwarded to the relevant Councilors for consideration at the Ordinary Meeting.



We otherwise respectfully request that the **Council resolve at the Ordinary Meeting to defer any endorsement of the Planning Proposal** in so far as it relates to the Site so that Council and the WLPP can action the 4 items that we have requested to occur on page 1.

If you have any questions in relation to this matter or require any additional information please do not hesitate to contact James Oldknow at (02) 8035 7875 or via email at [joldknow@millsOakley.com.au](mailto:joldknow@millsOakley.com.au).

Yours sincerely



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