

7 July 2011

Allan Campling  
Department of Planning & Infrastructure  
GPO Box 39  
SYDNEY NSW 2001

Dear Allan,

**Modification request to amend condition 11 to allow for the demolition of the  
Power House Building (Breakfast Point Concept Plan 2005)**

Please find attached Council's submission in relation to this matter. Council objects to the amendment of condition 11 which proposes demolition of the Power House, remediation, subdivision of the land into 6 Torrens lots and the construction of 6 x 2 storey buildings (subject to consent) without a community benefit as stated in the concept plan.

For further enquiries please contact Paul Dewar, Senior Strategic Planner on 9911 6402.

Yours sincerely,



Tony McNamara  
Director, Planning & Environment

**Submission from City of Canada Bay re modification request from Breakfast Point Pty Ltd to amend condition 11 to allow for the demolition of the Power House Building (Breakfast Point Concept Plan 2005 MOD 2)**

Council does not support the proposal to remove/amend condition 11 of the Breakfast Point Concept Plan 2005 and to permit the demolition of the Power House building, the remediation of the land and the subdivision of the land into 6 Torrens title lots and construction of 6 new 2 storey homes without a community benefit provided to Council.

The intent of condition 11 was for the applicant (Rose Group/Breakfast Point Pty Ltd) to seek dedication of approx 240m<sup>2</sup> of the Power House's gross floor area and curtilage as a community benefit.

Council has entered all discussions in good faith with Breakfast Point Pty Ltd in relation to this matter since 2006 following the approval of the Concept Plan. The fact that Breakfast Point Pty Ltd has continued in these discussions during this time indicates they believed that they were still under obligation to dedicate part of the Power House and to satisfy Council's requirements in relation to the dedication. There has been some contention as to the 12 month time frame stated in paragraph 2 of condition 11 for the dedication to have occurred. Council was recommended by the Department of Planning in October of last year (appendix 1) to seek legal advice as to whether condition 11 could still be acted upon by Council. Legal advice has been obtained which states that the obligation to dedicate continues despite the expiration of the 12 month period (appendix 2).

Initially, Breakfast Point Pty Ltd sought to dedicate part of the building and curtilage as per condition 11. Following further building assessment the Power House building was found to have fallen into significant disrepair with the developer determining that the cost to restore was prohibitive. Additionally, Council estimated that the cost to maintain the area of building dedicated would be in the order of \$80,000 per annum. In light of this, Council was willing to discuss the alternative proposal which involved demolishing the Power House and constructing residential dwellings. In support of this proposal the developer offered a monetary contribution to Council of one half of the residual land value based on figures provided by Breakfast Point Pty Ltd.

Council sought its own advice in September 2009 on the valuation offer of \$1,093,085.00 by Breakfast Point Pty Ltd. In November 2009 Council wrote to the developer stating that the monetary contribution offered did not provide a true value of the loss of community amenity. Indeed, Council viewed the cost savings to Breakfast Point Pty Ltd in relation to the works required under the existing consent, when compared with the proposal to construct residential dwellings on the site and the associated revenue, to be far in excess of the offer made. Council presented the developer with a counter offer. Negotiations continued in early 2010 with Council ultimately pursuing the developer in September 2010 to finalise the matter. On 14 December 2010, Council resolved:

1. *THAT Council advise Rose that the offer made in lieu of implementing condition 11 of the Minister's Consent associated with the Breakfast Point*

*Concept Plan dated 7 April 2006, and proposing the demolition of the Powerhouse building, the rezoning of the land for residential use and construction of 6 free standing homes on the waterfront at Breakfast Point is not acceptable due to the offer being well below current market value.*

2. *THAT further, if a Part 3A application is lodged by Rose that Council makes a submission to the Minister for a community benefit that is greater than the \$1.2m from Rose, based on the professional advice of Council's valuers and legal representatives.*

It is unfortunate that at this point no agreement has been reached between Council and Breakfast Point Pty Ltd, however Council does not accept that it has declined the dedication of the said land (refer to legal advice appendix 1) or an appropriate monetary contribution. The proposed monetary benefit that has been offered in lieu of the public benefit if the Power House building is demolished is not considered fair and reasonable by Council and would not outweigh the community benefit that would be gained by the restoration and adaptive reuse of the building for community purposes as was originally intended by condition 11.

If the condition 11 of the Concept Plan is amended as proposed then no community benefit will be received by Council monetary or otherwise and the developer will have the opportunity to apply for the demolition of the Power House and potentially make a substantial profit from the 6 additional residential dwellings on the foreshore.

It should also be noted that the application for the demolition of the Power House and the construction of 6 x 2 storey houses which had been lodged with the Department of Planning as a Part 3A application has been revoked and the City of Canada Bay will become the consent authority. Council considers it unreasonable that there is an application to amend the Concept Plan which clearly disadvantages Council (and the wider community) prior to Council resuming consent powers.

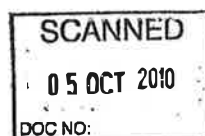


## Planning

APPENDIX 1

Mr Gary Sawyer  
General Manager  
City of Canada Bay Council  
Locked Bag 1470  
DRUMMOYNE NSW 1470

File: 9039939-10



Dear Mr Sawyer,

### Breakfast Point Concept Plan – Power House Precinct

Thank you for your letter concerning the Breakfast Point Concept Plan and a number of conditions of approval. I apologise for the delay in responding to you. I have addressed each of your queries below.

#### Conditions 7 & 9: Additional GFA and Monetary Contributions

The Director General approved the additional 200 dwellings permitted pursuant to Condition 7 of the Concept Plan approval on 4 August 2006. That approval increased the number of dwellings permitted to be constructed at Breakfast Point from 1865 to a total of 2065. The provisions requiring payment of additional monetary contributions pursuant to Condition 9 are not triggered until the Proponent proceeds with the additional 200 dwellings.

At this time, the total number of dwellings approved for construction at Breakfast Point is 1734, and the requirements of Condition 9 have not therefore been triggered.

#### Condition 11: Dedication of Power House GFA and Curtilage

I note that pursuant to the terms of Condition 11, the Council now seeks to activate the provisions of the condition by accepting the dedication of the nominated area of 240sqm of the Power House building. I understand that Council wishes to pursue this course as the separate negotiations between Rosecorp and the Council for an alternative outcome have not been successful.

The first issue to resolve is whether the time period within which Council can accept the dedication has now expired. I note that Condition 11 requires that within 12 months of the determination date of the Concept Plan, the Applicant is to use its best endeavours to dedicate the 240sqm of the Power House building to Council. The 12 month period fell due on 7 April 2007 and obviously has not been met. Accordingly, pursuant to the terms of the condition, the Power House building and its curtilage remains in the care, control and maintenance of the owner at the time, which I understand is Breakfast Point Pty Ltd.

It is recommended that you should seek your own legal advice as to whether Condition 11 is a matter that can be acted upon by the Council.

The Department is happy to meet with Council to further discuss the above issues if required. Should you have any further enquiries or wish to meet regarding these matters, please contact me directly on telephone number (02) 9228 6162 or email [richard.pearson@planning.nsw.gov.au](mailto:richard.pearson@planning.nsw.gov.au)

Yours sincerely

 30/9/10  
Richard Pearson  
Deputy Director General  
Development Assessment and Systems Performance

NSW Department of Planning – Development Assessment & Systems Performance  
23-33 Bridge Street, Sydney NSW 2000 - GPO Box 39, Sydney NSW 2001  
Telephone: (02) 9228 6111 Fax: (02) 9228 6455 [www.planning.nsw.gov.au](http://www.planning.nsw.gov.au)

## APPENDIX 2

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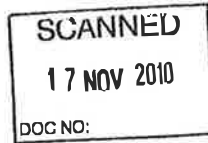
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PIKES LAWYERS

16 November 2010

The General Manager  
Canada Bay City Council  
DX 21021  
DRUMMOYNE, NSW



EMAIL [kent.walton@canadabay.nsw.gov.au](mailto:kent.walton@canadabay.nsw.gov.au)

Dear Sir

**ADVICE RE POWERHOUSE BUILDING – BREAKFAST POINT**  
Our ref DB:LS:CB0114/90463  
Your ref Kent Walton

We refer to Council's instructions of 11 November 2010.

We are of the opinion that for the purposes of section 10B of the Local Government Act 1993 the advice in this letter concerns legal matters that:

- a are substantial issues relating to the subject matter of this advice in which the Council, or any relevant committee, is involved;
- b are clearly identified in this advice; and
- c are fully discussed in this advice.

### INSTRUCTION

Council seeks advice in relation to the interpretation of condition 11 of the approval to the Breakfast Point Concept Plan issued by the Minister for Planning on 7 April 2006.

We have been provided with a copy of Council's letter to the Department of Planning and a copy of the Department's reply dated 30 September 2010.

### THE CONDITIONS

Condition 11 of the approval of 7 April 2006 provides:

*"Dedication of Power House and Curtilage*

*Within twelve months of the determination date in Part A of Schedule 1 of the Breakfast Point Concept Plan, the Applicant shall use their best endeavours to seek the dedication of approximately 240m<sup>2</sup> of the*

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*Power House's gross floor area and the curtilage (as identified in Schedule 3) into the care, control and maintenance of Council. Should an agreed outcome not be reached within that timeframe (and the Director General has not specified an alternative timeframe), the Power House and the curtilage shall remain in the care, control and maintenance of the owner at that time.*

*The Applicant shall liaise with Council and the NSW Heritage Office regarding the appropriate construction standards so that the Power House and curtilage may be dedicated to the Council in the future, if the Council chooses to accept the dedication. The final design detail of the Power House and curtilage is to be approved by the Department prior to the issue of the construction certificate for these works.*

*In the event that Council accepts the dedication, a public positive covenant and right of carriageway is to be created over the Powerhouse and curtilage to allow full public access to the development to the dedicated area. In addition, the owner is to be burdened with the requirement to maintain the Power House and curtilage to the construction standard. These mechanisms are to be created pursuant to section 88B of (sic) Section 88BA of the Conveyancing Act 1919 and are to be shown on the title of the land. Details of these mechanisms are to be approved by the Director prior to the release of the relevant subdivision certificate or the strata subdivision certificate."*

In his letter of 30 September 2010 the Deputy Director General of the Department of Planning states:

*"The first issue to resolve is whether the time period within which Council can accept the dedication has now expired. I note that condition 11 requires that within twelve months of a determination date of the concept plan, the Applicant is to use its best endeavours to dedicate that the 240m<sup>2</sup> of the Powerhouse building to Council. The twelve month period fell due on 7 April 2007 and obviously has not been met. Accordingly, pursuant to the terms of the condition, the Powerhouse Building and its Curtilage remains in the care, control and maintenance of the owner at the time, which I understand is Breakfast Point Pty Ltd."*

The Deputy Director General recommends that Council seek its own legal advice as to "whether condition 11 is a matter that can be acted upon by the Council".

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#### ADVICE

We believe condition 11 should be interpreted as follows:

##### Paragraph 1

There is a mandatory obligation on the Applicant to use its best endeavours to seek to dedicate approximately 240m<sup>2</sup> of the Powerhouses gross floor area and the curtilage identified in Schedule 3 into the care, control and maintenance of Council. Council is not obliged to accept that dedication. The paragraph contemplates discussion between the Applicant and the Council as to "an agreed outcome". If an agreed outcome is not reached within the twelve month period (and the Director General has not specified an alternative time frame), the Powerhouse and its curtilage are to remain in the care, control and maintenance of the owner ("at that time").

We believe the intent of the last sentence is that Council is not obliged to accept the dedication of part of the Powerhouse and its curtilage until it is satisfied with what it will be receiving. The Applicant is not entitled to simply dedicate or convey the land to the Council. If the agreed outcome has not been reached in the twelve month period, the Powerhouse and its curtilage remain in the care, control and maintenance of the owner for the time being.

##### Paragraph 2

There is a mandatory obligation on the Applicant to liaise with Council and the NSW Heritage Office regarding the appropriate construction standards so that the Powerhouse and curtilage may be dedicated "to the Council in the future", if the Council chooses to accept the dedication. We believe the words "in the future" are intended to convey the fact that the obligation to dedicate part of the Powerhouse and its curtilage to the Council remains with the Applicant even though the twelve month period referred to in the first paragraph has expired. There is no obligation upon Council to accept the dedication, the clear intent being that Council is entitled to be satisfied with what is being dedicated to it and, if it is not satisfied, it is not obliged to accept a dedication or conveyance of part of the Powerhouse and its curtilage.

The words "in the future" are not qualified by any time limit. We believe that the intent is that Paragraph 2 imposes an obligation beyond the expiry date of the obligations imposed by the first paragraph. The words "may be dedicated to the Council in the future" would have no role to play in that paragraph if the obligation to dedicate was limited to the period contained in the first paragraph. If it had been intended that the obligation to dedicate should expire after a period of twelve months from the date the concept lapsed, the appropriate words to be used in Paragraph 2 would be "within the period referred to in Paragraph 1" rather than "in the future". The latter words convey a sense of an open ended obligation.

Paragraph 3

The contents of the third paragraph are not relevant to the question of whether the obligation to dedicate imposed on the Applicant is limited to the period of twelve months from the determination date.

We are reinforced in our view of the construction of the second paragraph by the fact that the Applicant continued to negotiate with Council in respect of an alternate means of satisfying its obligations after the twelve month period had expired. Throughout 2007 and 2008 Council's officers had been negotiating with officers of the Applicant regarding the restoration of the Powerhouse and its curtilage with a view to having the building dedicated for public use upon the completion of all works. Clearly the Applicant believed it was still under an obligation to attempt to dedicate part of the Powerhouse and its curtilage to the Council and to attempt to satisfy Council's requirement in relation to the dedications. Council's letter to the Director General indicates discussions with the Applicant and have continued up until this year.

**SUMMARY**

We believe that Paragraph 2 of condition 11 of the approval of 7 April 2006 operates to ensure that the obligation to dedicate part of the Powerhouse and its curtilage imposed on the Applicant continue despite the expiration of the twelve month period referred to in the first paragraph.