

2 July 2021

2200636

Director Employment Zones
NSW Department of Planning, Industry and Environment
Locked Bad 5022, Parramatta NSW 2124

Dear Sir/Madam,

SUBMISSION TO EMPLOYMENT ZONES REFORM – SHOP TOP HOUSING

Thank you for the opportunity to make a submission to the NSW Department of Planning, Industry and Environment's 'Employment Zones Reforms'. This submission has been prepared on behalf of development clients that have property interests on the NSW South Coast. On their behalf, we support the State Government's intention to create a simpler and more flexible land use zoning framework. The primary purpose of this submission is to recommend:

- The DPIE further amend the shop top housing definition to make it clear that sites that slope to the rear may include residential uses behind, at the same level as and below (as well as above) the non-residential components.
- Including guidance in the Reforms 'Toolkit' clarifying how shop top housing is characterised.
- Expanding the list of permissible ground floor uses under the 'shop top housing' definition.

1.0 Background and Context

1.1 Legal characterisation of shop top housing

Our client has development sites in employment zones where shop top housing is permissible and represents the highest and best use of the land. However, sites can slope significantly from front to rear and across the site. In these circumstances, the NSW Land and Environment Court's interpretation of the definition of 'shop top housing' significantly and unfairly constrains shop top housing, as explained in more detail below. We think this was not intended in the original shop top housing definition.

A fundamental development hurdle for shop top housing development on sloping sites is the application of the NSW Land and Environment Court characterisation of the shop top housing definition established by the principles set out in:

- *Blackmore Design Group Pty Limited v Manly Council [2014] NSWLEC 164*; and
- *Hrsto v Canterbury City Council (No 2) [2014] NSWLEC 121*.

In particular, the following characterisation from Hrsto at para. 34 effectively restricts the type of sites that can accommodate shop top housing (emphasis added):

*"...a dwelling must be in the same building as the ground floor retail premises or business premises and **on a floor of that building that is at a level higher than the top most part of the ground floor retail premises or business premises to be characterised as "shop top housing" as defined.**"*

It is our experience that the characterisation outlined in Hrsto is relied upon by consent authorities to determine whether development meets or does not meet the definition of shop top housing regardless of site-specific circumstances (i.e., change in topography) and design responses.

Applying the Hrsto characterisation unnecessarily restricts the opportunity to develop a sloping site and achieve an appropriate outcome. This can lead to the pursuit of unnecessarily complex design solutions or complex legal arguments about street frontage (and where there are two or three street frontages it becomes more complex).

For example, **Figure 2** below illustrates a development concept that addresses a sloping site with the main street frontage at the top of the site and a secondary street frontage at the bottom of the site. The concept proposes compliant ground floor uses to both street frontages and theoretically complies with the site’s maximum FSR. However, the shop top housing above the secondary street retail premises is below the topmost part of the ground floor retail premises at the main street, and on one view may give rise to an argument, that it does not comply with the Hrsto decision..

This is just one example. Where a site sloping to the rear has no rear street, the development potential is severely limited by the application of Hrsto, notwithstanding that shop top housing is a permissible use. That significant constraint is at odds with general strategic planning intentions, and does not facilitate sound, consistent and economically viable development within an area.

The DPIE Reform process can remove the uncertainty and complexity around the legal characterisation of shop top housing generated by the LEC findings. This will enable sites to be developed with certainty and deliver an appropriate mix of town centre employment floor space and dwellings. We expect there are multiple sloping sites across NSW, where shop top housing is permissible, that are constrained by this issue.

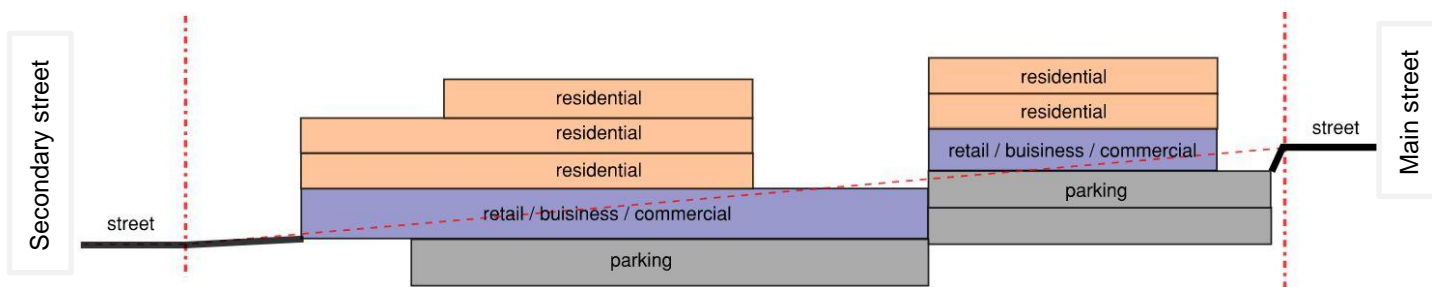


Figure 1 Indicative Concept Section

2.0 Recommendations

2.1 Guidance on the characterisation of shop top housing

The DPIE’s Position Paper notes that a ‘Toolkit’ will be prepared to support the implementation of the Reforms. We recommend that the DPIE include explanatory notes in the Toolkit that provide guidance to the community, consent authorities, councils, and the development industry outlining a flexible and common-sense approach to the characterisation of shop top housing that acknowledges site specific circumstances. For instance, for sloping sites:

“To account for changes in level across sloping sites with two (or more) street frontages, a development is characterised as shop top housing if the floor level of the dwellings is higher than the ceiling of the lowest ground floor premises.

To account for a change in level across a sloping site with one street frontage, a development is characterised as shop top housing if the floor level of the dwellings at the street frontage is higher than the ceiling of the lowest ground floor premises.

In addition, this should be supported by a specific change in shop top housing definition in the *Standard Instrument – Principal Local Environmental Plan*. In the absence of a specific change in wording, which clearly permits residential development at the rear/below the other uses where a site slopes to the rear, the Hrsto decision will continue to constrain development on such sites. Notes and further amendments to the shop top housing definition will provide clarity, improve certainty, and prevent avoidable legal delays and unnecessary costs.

2.2 Expand the permissible ground floor uses

The DPIE identify that a key purpose of the reforms is the need for flexibility to respond to circumstances. The reforms represent an opportunity to increase land use flexibility and employment floor space by expanding the non-residential uses that are permissible under the shop top housing definition. The DPIE propose to make shop top housing permissible with consent in Zone E1 Local Centre and Zone MU1 Mixed Use and amend the shop top housing definition to include 'commercial premises' and 'health services facilities'. The proposed amendment is supported; however, it is unnecessarily limiting. The following employment generating land uses are proposed to be mandated as permissible in both the E1 and MU1 zones, they are compatible with shop top housing and will contribute to diverse, dynamic, inclusive, and vibrant places:

- Amusement centres
- Centre-based child care facilities
- Community facilities
- Information and education facilities
- Educational establishments
- Tourist and visitor accommodation

Ground floor tenancies within approved and constructed shop top developments often remain vacant long after the dwellings have been occupied. This results in underutilised employment floor space and sterile and unappealing street frontages that detract from the sense of place. Expanding the permissible ground floor land uses beyond commercial and health services increases the potential for ground floor areas to be taken up by other suitable employment generating / town centre uses which will support the overall economic viability of the centre.

3.0 Conclusion

Thank you for the opportunity to respond to the Employment Zone Reforms. On behalf of our clients, we support the State Government's objective to create a simpler and more flexible land use zoning framework. In summary, we recommend that the DPIE:

- Include guidance in the Reforms 'Toolkit' clarifying how shop top housing is characterised, and specifically amend the definition of shop top housing to make it clear that sites that slope to the rear may include residential uses behind, at the same level as and below (as well as above) the non-residential components.
- Expand the list of permissible ground floor uses under the 'shop top housing' definition.

Please do not hesitate to contact the undersigned should you have any queries. We appreciate your consideration of this submission.

Yours sincerely,



Jim Murray
Associate Director

