

Our Ref: 18418

6 October 2021

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Dear Ms White

Planning Proposal: 252-254 New South Head Road, Double Bay

We refer to your letter dated 24 September 2021 in relation to the above matter and to the Record of Decision of the Sydney Eastern City Planning Panel dated 22 July 2021 (**Panel's Decision**).

Your letter requests the proponent to prepare and submit to Council by 6 October 2021 (that is, within 12 days of the date of the letter) specified additional site testing information and a site specific DCP, to enable Council to finalise the planning proposal and submit it to the Department of Planning, Industry and Environment (**Department**) for a Gateway determination within the required 42 days of the Panel's Decision. The letter indicates that the request is made pursuant to the Panel's Decision.

Council appears to have misunderstood and/or misinterpreted the Panel's Decision which clearly states that it:

"recommends to the delegate that in granting any Gateway determination a site specific DCP be prepared to address the unique constraints of this site" (emphasis added)

and

"also recommends to the delegate that the proponent should undertake further testing to ensure the proposed FSR can be contained in the proposed height limit whilst satisfying the other built form and amenity outcomes, deep soil planting and tree canopy that would be required".

Accordingly, it is clear from the text of the Panel's Decision that it recommends that the site testing information and site-specific DCP be required to be prepared "in granting any Gateway determination", that is, as conditions of any Gateway determination as opposed to prior to the planning proposal being submitted to the Department for a Gateway determination.

Our interpretation of the Panel's Decision is also consistent with Part 6 of the document titled "A guide to preparing local environmental plans" published by the Department in December 2018 (**PP Guide**) which relevantly states that:

- at Part 6.1:

"The level of detail required in a planning proposal should be proportionate to the complexity of the proposed amendment. The planning proposal should contain enough information to identify relevant environmental, social, economic and other site specific considerations.

The scope of any key issues should be identified in the initial planning proposal that is submitted for a Gateway determination, while the actual information/investigation may be undertaken after a Gateway determination is issued and included in the planning proposal, where appropriate” (emphasis added); and

- at Part 6.3:

“The purpose of the Gateway determination is to ensure there is sufficient justification early in the process to proceed with a planning proposal. The Gateway determination is a checkpoint for planning proposals before resources are committed to carrying out investigative research, preparatory work and consultation with agencies and the community. It enables planning proposals that lack strategic planning merit to be stopped early in the process before time and resources are committed”

and

“The Gateway determination will indicate the following [EP&A Act s.3.34(2)]:

- *whether the planning proposal should proceed (with or without variation)*
- *whether any studies are required and if necessary the scope of these additional studies*
- *whether the planning proposal should be resubmitted for any reason (including for further studies or other information, or for the revision of the planning proposal)*

...”

It is readily apparent from the above that the additional site testing and site-specific DCP that were referenced in the Panel’s Decision, are matters to be considered by the Department in granting a Gateway determination in relation to the planning proposal and, if considered appropriate by the Department, made the subject of conditions of any Gateway determination. Any Gateway determination could also require that a site-specific DCP be included in the planning proposal as a proposed clause in the LEP pursuant to section 3.44 of the *Environmental Planning and Assessment Act 1979*.

The information that Council now requires before it will submit the planning proposal to the Department for a Gateway determination is over and above that envisaged and recommended by the Department in the PP Guide and is in fact contrary to what the PP Guide recommends, with consequential and unnecessary cost and delay impacts. The information already submitted to Council by the proponent readily satisfies all of the pre-Gateway requirements in the PP Guide and largely addresses the comments in the Panel’s Decision (see **attached** document prepared by us).

It follows, that it would be manifestly unreasonable for Council to delay or withhold submission of the planning proposal to the Department for a Gateway determination on the basis of any perceived non-compliance with its unwarranted request for further material. It may also lead a fair-minded lay observer to reasonably apprehend that Council has not brought an impartial mind in carrying out its statutory role with respect to the planning proposal, particularly given Council’s consistent opposition to the planning proposal over the last 19 months. In fact, it is surprising that Council now insists on being the planning authority for the planning proposal. It gives rise to a concern that Council may be seeking to use its power as the planning authority to frustrate the progression of the planning proposal.

In addition, on no reasonable view could the proponent be expected to prepare the additional site testing information as well as a site-specific DCP (in consultation with Council) and provide that material to Council within 12 days (and only 7 clear business days). It is noted that it took Council over 1 month to formulate its request for that material.

For all of the above reasons, we request Council to confirm that it no longer requires the preparation of the additional site testing and site-specific DCP and that it will submit the planning proposal to the Department for a gateway determination without further delay.

We look forward to your prompt response. If you require further information, do not hesitate to contact our office on 9362 3364.

Yours faithfully,



George Karavanas
MANAGING DIRECTOR

Attachment: Response to Council's letter [dated 24 September 2021]

Copy to: Peter Failes, Senior Strategic Planner / Urban Designer - peter.failes@woollahra.nsw.gov.au

Response to Council's letter [dated 24 September 2021]

Council points are quoted in **bold**.

Consistent with the rezoning review determination of the Sydney Eastern City Planning Panel the planning proposal should be accompanied by:

- **Further site testing to establish if the proposed Floor Space Ratio (FSR) is appropriate.**

Response: The Panel's comment was as follows:

The Panel also recommends to the delegate that the proponent should undertake further testing to ensure the proposed FSR can be contained in the proposed height limit whilst satisfying the other built form and amenity outcomes, deep soil planting and tree canopy that would be required.

The submitted plans demonstrated the proposed FSR can be contained within the proposed height limit, while satisfying the other outcomes and requirements.

The Indicative Scheme already demonstrated that required deep soil landscaping could be achieved, and that a proposal could comply with Apartment Design Guideline requirements for built form, and amenity outcomes. The Indicative Scheme included retention of landscaped area to maintain an existing Jacaranda sp. Tree near the front boundary where it would continue to contribute to the streetscape and local tree canopy. Other landscaping would be proposed on the site to provide a tree canopy, and separation to nearby residents.

- **A site specific development control plan (DCP) informed by the site testing.**

Accordingly, I am writing to request that you prepare and submit to Council a site specific DCP which is accompanied by additional site testing. This should be undertaken in consultation with Council's project officer, and address the matters identified below.

Please submit the required information by 6 October 2021. This will allow Council time to finalise the planning proposal and submit it to the Department of Planning, Industry and Environment for a Gateway determination within the required 42 days.

Response: In our opinion, a site specific development control plan is not required in this instance as the DCP already specifies controls and objectives in relation to the items outlined below. The Indicative Scheme demonstrated that development on the site was capable of achieving DCP compliance with controls and meet objectives. We outline our response to each element below.

Site specific development control plan

Preparation of the site specific DCP is to include provisions that address the following matters:

- **Desired future character. Include provisions which identify how the proposed building envelope will transition from higher density development in the Edgecliff Centre to the lower-density built form in the Double Bay residential precinct, with reference to the Edgecliff Centre and the Double Bay Residential Precinct of the Woollahra DCP 2015.**

Response: The Indicative Scheme and the proposed overall height and secondary height provision already provide the transition between the adjacent existing buildings, as has been demonstrated in the Planning Proposal Report. The Urban Design Report submitted with the Planning Proposal demonstrated the transition from higher to medium density built form near the site. This would be assessed at time of development application.

- **Streetscape. Include provisions which require the proposed built form to contribute to the Double Bay residential precinct including built form articulation and passive surveillance.**

Include provisions which seek to retain and enhance the established landscape character as a green gateway to the Double Bay residential precinct. Measures include retaining and protecting the Jacaranda tree and enhancing landscaping in the front setback area by introducing new tree and shrub planting.

Response: In our opinion, these requirements are already included in the existing development control plan.

The Indicative Scheme has demonstrated articulation and stepping of the built form, and the indicative apartment layouts provide windows overlooking New South Head Road for passive surveillance.

Deep soil planting for trees in front setbacks is already required in DCP 3.7.1 *Landscaped area and private open space*, as the site is within the Double Bay Precinct, and the following applies:

C2 At least 40% of the front setback comprises deep soil landscaped area, and:

*b) for a residential flat building, manor houses multi dwelling housing or multi dwelling housing (terraces) in the **Double Bay** or Point Piper precinct—at least one consolidated area of the deep soil area is at least 12m².*

Therefore, the landscaped character and soil area required for retention of the *Jacaranda* would be assessed as part of a development application. The Indicative Scheme provided landscaped areas and deep soil landscaping in the front setback to allow retention and protection of the existing *Jacaranda* tree. Side setbacks would also allow deep soil planting.

- ***Protection of the Jacaranda tree (tree 1). To protect the Jacaranda tree, include provisions that require the building envelope to be setback from the south-east corner of the site. This setback area should extend 8m from the front boundary (perpendicularly), and 12.5m from the most easterly corner at the front boundary. This tree protection area is to be marked on a site specific DCP diagram. Provisions should also be included to address the design of any pedestrian or vehicular access to ensure that no structures are located in the tree protection area that would impact on the root zone or canopy.***

Response: Tree protection requirements are included in the existing Woollahra Development Control Plan, and therefore would be assessed as part of a development application. The Indicative Scheme has demonstrated deep soil landscaping would be provided in the south-eastern corner to allow protection and retention of the *Jacaranda* tree, in accordance with qualified Arborist's recommendations.

- ***Apartment Design Guide (ADG). The development concept provided with the planning proposal has a depth of up to 27m. However, the ADG recommends a maximum depth of between 12-18m from glass line to glass line to ensure good levels of amenity.***

Accordingly, the proposed development concept is inconsistent with the recommendations of the ADG. The DCP provisions should incorporate a building envelope which is consistent with the recommendations of the ADG.

Response: The figures quoted for building depths or building separation are *recommendations* in the Apartment Design Guide and would be assessed as part of a development application. A simple building envelope is therefore an inaccurate response as it does not recognise the variations possible. This includes the variations possible under the ADG relating to habitable/non-habitable room use, blank facades etc, nor the appropriateness of applying all ADG recommendations to an in-fill site. Furthermore, the ADG is '*not intended to be and should not be applied as a set of strict development standards*' [reference Planning Circular PS 17-001].

The requirements and recommendations included in the ADG would be considered as part of a future development application's assessment.

- ***Rear setbacks. Under the Woollahra DCP 2015, control B3.2.4 establishes that the rear setback should be 60% of the site depth. For the subject site, this should be approximately 18m and at the northern boundary a rear setback of 12m is required.***

A rear setback of 60% will facilitate urban greening and is consistent with the desired future character of the residential precinct. It will also facilitate appropriate separation between a building on the subject site, and adjoining development at 260 New South Head Road.

Response: These controls and objectives are already included in the existing development control plan and would be assessed as part of a development application.

- ***View sharing. The information submitted with the planning proposal suggests that the development concept will impact on the northerly views (towards the Harbour) from 240 New South Head Road. Considering the principles of Tenacity Consulting v Warringah Council [2004] NSWLEC 140 the view sharing impact is assessed as being moderate for levels 3 and 4 of No. 240 New South Head Road. To facilitate view sharing, a further modulation of the envelope should be introduced to minimise these impacts, by lowering the height and/or providing greater setback of the envelope.***

Response: The Planning Proposal provided detailed view assessments from those buildings nearby and noted the existing available views. Council had required the view analysis to show the height controls applied to the full width of the site – that is, without side setbacks. To build to the boundaries would not meet Council or ADG requirements for setbacks and would be to the detriment of neighbours' views. View sharing requirements are already included in the existing Woollahra Development Control Plan and would be assessed as part of a development application, which would apply required minimum setbacks to minimise effects on views.

- ***Diverse unit mix. Include unit mix provisions. These provisions should be consistent with the recommendations from the Sydney Eastern City Planning Panel to facilitate housing choice.***

Response: The Panel had commented as follows:

The residential mix (noting that concept plans accompanying the Planning Proposal comprise 80% studio flat and one bedroom units) and provision of more affordable housing, which will meet a demand in the LGA and be appropriate given the convenience of a transport orientated location.

A development application will include the rationale behind a residential mix which responds to the demand for housing near a transport-orientated location and proposed affordable housing, at the time of lodgement.

- ***Car parking: The Sydney Eastern City Planning Panel recommended that due to the location of the subject site, car parking should be minimised or deleted. This must be addressed in the site specific DCP provisions.***

Response: The DCP provides for maximum parking rates only. Provision of any parking and servicing areas would form part of a future development application and would be assessed at that time.