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20 September 2011

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Dear Robyn,

Development Application DA 0951/10 – SEPP 1 Objection
1-21 Woniora Avenue, Wahroonga

1 Background

This SEPP 1 objection has been prepared on behalf of Becton Woniora Pty Ltd (Becton) and in support of a development application that is currently lodged with Ku-ring-gai Council (Council) for the demolition of existing buildings and construction of two residential flat buildings, basement car parking, swimming pool, landscaping and associated works at 1-21 Woniora Avenue, Wahroonga.

Council undertook a preliminary assessment of the development proposal and issued correspondence dated 16 February 2011 which stated the following:

> *The residential flat buildings exceed the permitted height limits pursuant to clauses 25I(5) and 25I(8) in the Ku-ring-gai Planning Scheme Ordinance (KPSO). The basement level with the swimming pool has to be counted as a storey [as defined clause 25I(9)] causing a further non-compliance in this respect*

Becton engaged Minter Ellison Lawyers to review Council's advice and reply correspondence dated 18 March 2011 was submitted which stated the following:

> *Block D is not a six storey building. Applying clause 6(a) of State Environmental Planning Policy No 6 – Number of Storeys in a Building (SEPP 6), it is a part two and part five storey building and therefore complies with the maximum five storey height requirement in KPSO. As such, a SEPP 1 objection is not required to be lodged in order for the Development Application to be approved.*

Council remained of the view that the proposal did not comply with the KPSO and a SEPP 1 objection was required. Becton remained of the view that the proposed development complied with the provisions of the KPSO and a SEPP 1 objection was not required. Regardless, it was verbally agreed by both parties that the swimming pool could be supported based on the merits of the proposal and a SEPP 1 objection was submitted on a 'without prejudice' basis.

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Council undertook a final assessment of the development proposal to enable its referral to the Joint Regional Planning Panel for determination. Further issues were raised regarding the compliance of the proposed development with the 'number of storeys' having regard to the height of the basement above ground level. Council issued correspondence by email on 13 September 2011 which stated:

> *I've checked both buildings for compliance with clause 25.I(9)- height of basement above NGL. I have found that both buildings are, in part, non-compliant (units 504, 501, 503, 404, 403). Our engineers have also questioned whether a slab of 300mm is necessary in that location.*
>
> *The overall height [compliance with 13.4m/25I(8)], however, appears to comply.*
>
> *Council has been consistent in requiring compliance with the above development standard unless a well founded SEPP 1 has been submitted to Council.*

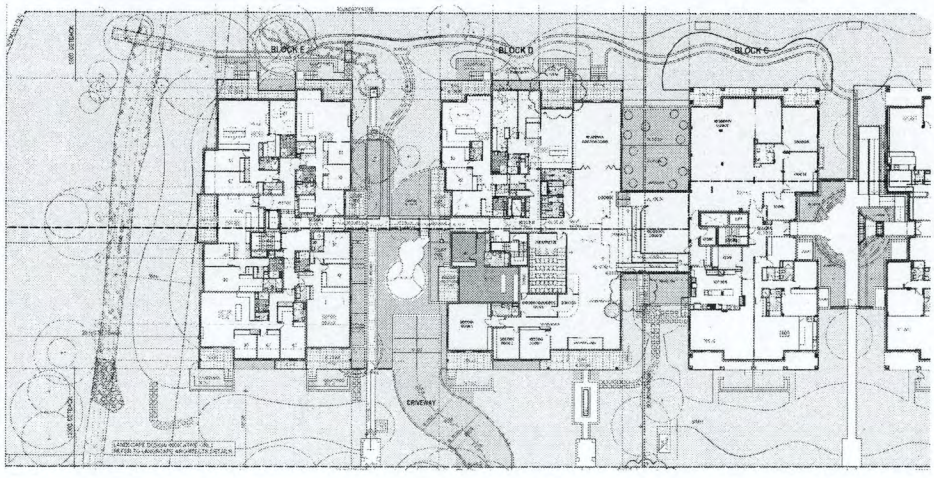
Becton has reviewed the relevant elevations having regard to the above comments and remains of the view that the proposal complies with the KPSO provisions. Council remains of the view that the proposal does not comply and a SEPP 1 objection was required. It was verbally agreed that this matter could be supported based on the merits of the proposal and a SEPP 1 objection (which replaces the April 2011 version) has been prepared and is submitted on a 'without prejudice' basis.

2 Proposal

2.1 PROPOSED DEVELOPMENT

The proposed development comprises an extension of the existing residential development at 1–9 Woniora Avenue (referred to as 'Stage 1'). The Stage 1 development includes three residential flat buildings (Blocks A, B and C) and ancillary communal facilities and basement car parking located within a landscaped setting. The current proposal (referred to as 'Stage 2') comprises the following key features:

- Staged construction of two residential flat buildings (Blocks D and E) accommodating 50 dwellings.
- Ancillary communal facilities, including a swimming pool, lounge area, library and bridge room.
- Two levels of basement car parking with 95 car parking spaces accessed from a single driveway.
- Stormwater/riparian works and landscaping to mitigate the potential impacts and enhance the amenity of the site.



2.2 DEVELOPMENT STANDARD

This SEPP 1 objection has been prepared to seek an exemption from the strict application of the building height standards provided in Clauses 25I(5) and 25I(8) of the Ku-ring-gai Planning Scheme Ordinance (KPSO). Each of these clauses is listed below.

25I(5) Maximum number of storeys

Buildings on land to which this Part applies are not to have more storeys than allowed by the Table to this subclause.

Table

Maximum number of storeys

Site area	***Maximum number of storeys***
Less than 1,800m^2	*3*
1,800m^2 or more but less than 2,400m^2	*4*
2,400m^2 or more	*5*

25I(8) Maximum number of storeys and ceiling height

Subject to subclause (5) and clause 25K, buildings on land to which this Part applies are not to have:

(a) more storeys than the maximum number of storeys specified in Column 2 of the Table to this subclause, or

(b) given the number of storeys in the building, a perimeter ceiling height greater than that specified in Column 3 of that Table.

Table

Maximum number of storeys and ceiling height

Column 1	***Column 2***	***Column 3***	
Zone	*Maximum number of storeys*	*Calculation of maximum perimeter ceiling height*	
	Number of storeys in a building (not including top storey with floor area reduced because of subclause (7) or attics, where applicable)	*Number of storeys in building (not including top storey with floor area reduced because of subclause (7) or attics, where applicable)*	*Maximum perimeter ceiling height of building (not including top storey with floor area reduced because of subclause (7) or attics, where applicable)*
2(c1) and	*2*	*1*	*4.5 metres*
2(c2)		*2*	*7.2 metres*
2(d3)	*4*	*1*	*4.5 metres*
		2	*7.2 metres*
		3	*10.3 metres*
		4	*13.4 metres*

2.3 PROPOSED VARIATION

The maximum perimeter ceiling height of the building (not including the top storey) is 13.4 metres, complying with the provisions of the KPSO. However, it is Council's view that the proposed development comprises six storeys (or five storeys excluding the top storey) for the following reasons:

- The proposed swimming pool is considered to be a 'storey', and
- The basement is considered to be more than 1.2 above ground level in some locations.

Each of the above matters is discussed in greater detail in the following sections.

2.3.1 SWIMMING POOL

Becton and Council agree that the swimming pool is a 'storey' in accordance with the provisions of the KPSO. Clause 25I(9) states:

> *(9) Any storey which is used exclusively for car parking, storage or plant, or a combination of them, in accordance with the requirements of this Ordinance and no part of which (including any wall or ceiling which encloses or defines the storey) is more than 1.2 metres above ground level, is not to be counted as a storey for the purposes of the Table to subclause (8).*

The proposed swimming pool does not fit within the exclusion criteria and accordingly, must be considered as a storey in accordance with the provisions of Clause 25I(8). However, Becton and Council differ with regard to the calculation of the maximum number of storeys within the building. Becton has obtained legal advice which asserts that Block D is a part two storey and part five storey building. The reasons for this assertion are explained in the following extract of the Minter Ellison correspondence dated 18 March 2011:

- *SEPP 6 specifies that the number of storeys of a building is the maximum number of storeys which may be intersected by the same vertical line.*
- *The cumulative effect of the application of clause 6(1) of SEPP 6 and clause 25I(9) of KPSO is that Block D is 5 storeys. This is because the same vertical line intersecting Block D from its highest point to its lowest point and the exclusion of Basement Levels 1 and 2 (because they are to be used exclusively for car parking, storage and plant) and no part of those levels is more than 1.2 metres above ground level) means that it is 5 storeys.*
- *That same vertical line does not intersect the basement swimming pool area in Basement Level 1 nor the residents' lounge on the Ground Floor (**the Amenities**) (except perhaps a wall which is excluded) notwithstanding that the Amenities are not in a separate building to Block D.*
- *The same vertical line intersecting the Amenities from its highest point to its lowest point results in the Amenities being a two storey building.*

Council has advised that the legal advice provided by Minter Ellison is not correct. Emailed correspondence from Council dated 28 March 2011 stated:

> *I put forward your legal advice with regards to the no. of storeys. It was agreed by the senior attendees at the meeting that our legal is correct and we would be looking for a SEPP 1 to address clause 25I(9) in the KPSO.*
>
> *Council has also received submissions in relation to the swimming pool so it would be prudent for you to provide a SEPP 1 (without prejudice if you wish) so that we can determine the application having regards to the merits of the application.*

Becton has not been provided with a copy of Council's legal advice for review, however, we understand that Council's position is that the inclusion of the swimming pool as a 'storey' means that the entire Basement Level 1 must be considered as a 'storey' within the context of Clause 25I(8). On this basis, Council considers the proposed development to comprise six storeys and a SEPP 1 objection is required to justify the proposed variation to the KPSO.

This SEPP 1 objection has been prepared to address the proposed variation to the maximum number of storeys as identified by Council. It is submitted on a 'without prejudice' basis to facilitate the determination of the development application by the Joint Regional Planning Panel.

2.3.2 HEIGHT OF BASEMENT ABOVE GROUND LEVEL

The building elevations submitted with the development application include the ground level (marked as a solid black line) and a measurement 1.5 metres above ground level (marked as a red dashed line) which comprises the maximum 'exclusion' of 1.2 metres provided in Clause 25I(9) plus 300mm for the concrete slab above.

No part of the basement is shown to be located above the red dashed line, however, Council advised that their assessment indicated non-compliances for parts of the building, including Units 403, 404, 501, 503 and 504. Council's engineers also questioned whether a slab of 300mm is necessary. On this basis, Council considers that the basement should be counted as a storey and accordingly a SEPP 1 objection is required to justify the proposed variation to the KPSO.

This SEPP 1 objection has been prepared to address the proposed variation to the maximum number of storeys as identified by Council. It is submitted on a 'without prejudice' basis to facilitate the determination of the development application by the Joint Regional Planning Panel.

3 SEPP 1 Objection

The sole objective of State Environmental Planning Policy No 1 – Development Standards is as follows:

> *This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act.*

The compliance of the proposal with this objective and each of the requirements listed within SEPP 1 is demonstrated in each of the following sub-sections.

3.1 COMPLIANCE IS UNREASONABLE AND UNNECESSARY

Compliance with the development standards relating to the maximum number of storeys is considered to be unreasonable or unnecessary having regard to the following reasons:

- **Compliance with objectives of development standard** – the proposed variation will not undermine the compliance of the proposal with the underlying objectives for the maximum number of storeys within a building as outlined below:
  - Compliance with maximum perimeter ceiling height – despite the perceived variation to the maximum number of storeys within the building, the proposal complies with the maximum perimeter ceiling height control of 13.4 metres (excluding the top storey).
  - No visual impact on the streetscape - the swimming pool is not visible from Woniora Avenue and will have no impact on the streetscape. It only protrudes above the ground level on the

northern elevation, facing the rear communal open space. This part of the site is screened from public view and as such, it is considered that the proposed swimming pool will not result in any visual impacts. Similarly, the perceived areas of non-compliance with regard to the basement (being more than 1.2 metres above ground level) are located on the western and northern parts of the building, away from public view. Again, it is considered that the perceived variations will not result in any visual impacts on the streetscape.

- Minimal impact on the overall height of the residential buildings – the proposed swimming pool is wholly located between the residents lounge which comprises only a single storey. The swimming pool contributes to the height of this single storey component, however, it does not directly contribute to the overall height of the residential flat buildings. The perceived variations to the height of the basement above ground level are minor and do not result in any significant impact on the overall height of the building.

- **No purpose would be served by strict compliance** – each of the proposed variations is considered to be minor and it can be demonstrated that no purpose would be served by the amendment of the development plans to enable strict compliance:

  - Swimming pool - the perceived variation with respect of the swimming pool is considered to be a technical non-compliance arising from a strict interpretation of the provisions of Clause 25I(8). If the swimming pool was deleted from the proposal, the development would comply with the provisions of the KPSO, as the car park below Blocks D and E would be excluded from the number of storeys. This would not result in any change to the overall height of the buildings and no discernible difference to the proposed development, noting that the swimming pool is visible only from the rear communal open space.

  - Basement - the minimum habitable floor levels have been derived from the Flood Study Assessment which provided for 176.20 (north) and 176.70 (south) for Block E. No purpose would be served by lowering the basement of Block E, taking into account the need to achieve these levels.

- **Merits of the proposal** – while the swimming pool could be deleted from the plans or relocated an alternate location to enable strict compliance with the KPSO, it is considered that the current proposal provides for the most appropriate location. The location of the swimming pool in the basement offers a number of benefits, including:

  - Minimising potential amenity impacts – the internal location of the proposed swimming pool within the basement means that it is less likely to impact on adjoining residents with regard to noise or the like. It is noted that one of the resident submissions received during the public notification of the development application requested that the swimming pool should be an indoor pool.

  - No loss in deep soil landscaping - the swimming pool is located below the residents lounge area, meaning that there is no loss in deep soil landscaping or tree planting as a result of the inclusion of the pool within the ancillary communal facilities.

Overall, it is considered that the proposed variation is considered acceptable and compliance with the development standard is unreasonable or unnecessary having regard to the circumstances of the case.

3.2 CONSISTENCY WITH OBJECTS OF ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

The proposed development complies with the objects listed in Section 5(a)(i) and 5(a)(ii) of the Environmental Planning and Assessment Act 1979, which state:

> *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment*
>
> *the promotion and coordination of the orderly and economic use of developed land*

Compliance of the proposal with the above objects is demonstrated as follows:

- The swimming pool will provide for internal recreation opportunities, including swimming and aqua aerobic classes, promoting the health and social welfare of residents.
- The proposed location of the swimming pool in the basement level between Blocks C and D, rather than an outdoor location, maximises the area available for deep soil landscaping and tree planting.
- The proposed buildings will comply with the minimum habitable floor levels having regard to the potential flood impact from the riparian corridor.
- The overall height of the building is considered to be acceptable and will not result in any detrimental impacts with regard to the site or the adjoining land.

3.3 OBJECTION IS WELL FOUNDED

Clause 8 of SEPP 1 requires the consent authority to be satisfied that the objection is well founded and that the granting of consent is consistent with the aims of SEPP 1. It is considered that the objection is well founded, having regard to the following matters:

- The SEPP 1 objection has been prepared in response to a request by Council, having regard to their interpretation of the maximum number of storeys within the development.
- The objection has been submitted in writing.
- It has been demonstrated that the strict compliance with the development would be unreasonable or unnecessary having regard to the circumstances of the case (refer to **Section 3.1**).
- It has been demonstrated that the proposal complies with the objects listed in Section 5(a)(i) and 5(a)(ii) of the Environmental Planning and Assessment Act 1979 (refer to **Section 3.2**).

3.4 CLAUSE 8 CONSIDERATION

Clause 8 of SEPP 1 requires certain matters to be considered when determining whether to grant concurrence to the proposed variation. Clause 8 states:

> *The matters which shall be taken into consideration in deciding whether concurrence should be granted are:*
>
> *(a) whether non-compliance with the development standard raises any matter of significance for State or regional environmental planning, and*

(b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

The proposed non-compliance with the development standard is considered to be minor and will not raise any matters of significance with regard to State or regional environmental planning. The proposed variation is appropriate having regard to the specific circumstances and will not result in an undesirable precedent or an undermining of the current planning controls. Accordingly, it is considered that concurrence may be granted for the proposed variation.

4 Summary and Recommendation

This SEPP 1 Objection has been prepared in support of a proposed variation to the maximum height limits prescribed by Clauses 25I(5) and 25I(8) in the Ku-ring-gai Planning Scheme Ordinance (KPSO). It has demonstrated that:

- Strict compliance with the relevant development standards is unreasonable or unnecessary
- The proposal complies with the objects of the Environmental Planning and Assessment Act
- The SEPP 1 objection is well founded
- The proposal will not raise any matters of significance with regard to State or regional environmental planning.
- The proposed variation is appropriate having regard to the specific circumstances and will not result in an undesirable precedent or an undermining of the current planning controls.

Overall, it has been clearly demonstrated that the proposed variation is satisfactory and can be supported by Council to facilitate approval of the development application by the Joint Regional Planning Panel.

Please do not hesitate to contact me should you wish to discuss.

Yours sincerely,

Jennifer Cooper
Associate Director