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## 6A & 8 BUCKINGHAM ROAD, KILLARA – SUPPLEMENTARY REPORT

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### EXECUTIVE SUMMARY

<b>PURPOSE FOR REPORT:</b>	To address the issues raised by the Chair of the Sydney West Joint Regional Planning Panel (JRPP) in a letter to Council dated 19 June 2012 and for the JRPP to determine DA0110/11 for the demolition of existing dwellings and construction of two residential flat buildings comprising 43 units, landscaping and associated works.
<b>BACKGROUND:</b>	Assessment reports were considered by the JRPP on 18 August 2011 and 1 December 2011. By letter dated 19 June 2012, the Chair of the JRPP requested a supplementary assessment report addressing three issues.
<b>COMMENTS:</b>	The three issues identified in the letter from the Chair of the JRPP are addressed in this report.
<b>RECOMMENDATION:</b>	Refusal

## PURPOSE FOR REPORT

To address the matters raised by the Chair of the Sydney West Joint Regional Planning Panel (JRPP) in her letter to Council, dated 19 June 2012, and for the JRPP to determine DA0110/11 which proposes demolition of existing dwellings and construction of two residential flat buildings comprising 43 units, landscaping and associated works.

## BACKGROUND

18 August 2011                      The JRPP considered a report prepared by Council staff which recommended refusal of the application. The JRPP resolved:

*That the matter be deferred and the staff be requested to provide a report that assesses the amended plans submitted by the applicant on the 2nd July 2011; for the following reason:*

*In light of the submissions made tonight and the request by the applicant to consider the amended plans, given the history of the matter and the claim by the applicant's representative that the amended plans address the concerns of the Council Staff, it is appropriate that the Panel have a report assessing those plans.*

2 September 2011                      An amended proposal is submitted. The information submitted with the amended DA included amended architectural, landscape and stormwater plans and supporting documents.

23 September 2011                      The amended proposal is notified

1 December 2011                      The JRPP considered a report prepared by Council staff which recommended refusal of the application as amended. The JRPP resolved:

*The Panel unanimously agree to defer the application, subject to determination of the S96AA and S82A applications and the applicant obtaining a registered easement for vehicular access over 2 – 6 Buckingham Road Killara or obtaining an approved legal access by some other means.*

*The Panel also invites the applicant to provide additional information to address the reasons for refusal contained in Council Officer's report to the Joint Regional Planning Panel meeting of 1 December 2011.*

## UPDATE

The S96AA application to modify the development consent for the construction of a residential flat building at 2-6 Buckingham Road Killara was approved by the Land and Environment Court on 7 June 2012.

The S82A Review of the development application for the construction of the basement link between the proposed development and the approved development at 2-6 Buckingham

Road Killara lapsed on 2 February 2012. A new development application (DA0099/12) which replaced the S82A Review was lodged on 3 April 2012. This development application has not been determined.

The applicant has not submitted any additional information to address the reasons for refusal contained in the Council Officer's report to the Joint Regional Planning Panel meeting of 1 December 2011.

## QUESTIONS OF THE CHAIR

***No further amended plans be requested from the applicant. [I understand, to date, the applicant has not provided additional information to Council].***

Council staff have not requested any further information from the applicant and no further information has been submitted.

***Assess road access issues to the site and provide the Regional Panel with a recommendation on access required over the adjoining site. For instance, comment on whether there are options for the applicant to obtain a registered easement for vehicular access over 2-6 Buckingham Road Killara or obtain approved legal access by some other means.***

The Statement of Environmental Effects submitted with the development application advises that the proposed development will rely upon the creation of an easement for the purposes of right of carriageway from the subject site through 2-6 Buckingham Road to provide vehicular access from Buckingham Road to the subject site. Council's records indicate that 2-6 Buckingham Road is owned by Urban Peninsula Pty Ltd. Urban Peninsula Pty Ltd is also the applicant for the subject development application which relates to 6A & 8 Buckingham Road.

By way of letter, dated 2 June 2011, the applicant's planning consultant provided the following advice regarding the mechanism for formalising vehicle access through 2-6 Buckingham Road:

*'Further to our recent meeting and telephone conversation, we understand that Council are seeking to clarify the best mechanism to ensure that should development consent be granted for the proposed residential flat building at 6A-8 Buckingham Road, Killara that the vehicular access through the basement level of 2-6 Buckingham Road, Killara, would actually be constructed. We understand that Council want to ensure that the basement connection was constructed and that Council would not be left in the position of a partially or near completed residential flat building on 6A-8 Buckingham Road where no legal easement had been created.*

*Don Fox Planning (DFP) understands Council's issue in this regard and is also of the opinion that it would not be in the interest of orderly and economic development if construction of the residential flat building on 6A-8 Buckingham Road commenced prior to the vehicular access through 2-6 Buckingham Road*

*being lawfully created and physically constructed. In our conversation it was indicated that Council may require that a deferred commencement condition be issued on a consent for 6A–8 Buckingham Road that the easement and basement connection through 2-6 Buckingham Road be physically constructed prior to satisfying the deferred commencement condition. DFP has discussed this option with Mr Tony Merhi of Globe Capital Pty Ltd and he has indicated that the construction programme would propose that 2-6 Buckingham Road will be constructed first and the basement connection would be constructed, prior to work commencing on 6a-8 Buckingham Road, however he has advised that his financial lending institution would not fund the purchase of 6A–8 Buckingham Road if a deferred commencement condition requiring the construction and registration of the easement prior to determination was imposed.*

*Therefore Globe Capital, would not be in a position to complete the purchase of 6A–8 Buckingham Road if such a deferred commencement condition was imposed.*

*It is therefore the suggestion of DFP that should Council be of a mind to approve 6A–8 Buckingham Road that a condition of development consent could be imposed requiring the construction and registration of the vehicular easement burdening 2–6 Buckingham Road in favour of 6A–8 Buckingham Road to allow vehicular access from 6A–8 Buckingham Road through 2–6 Buckingham Road onto Buckingham Road prior to the issuing of a Construction Certificate.*

*This condition would ensure that Globe Capital could complete the purchase of the land, but would also ensure that construction of the residential flat building on 6A–8 Buckingham Road could not commence until the vehicular connection was constructed and the easement registered.*

*This mechanism would ensure that the scenario of a partially constructed residential flat building on 6A–8 Buckingham Road could not occur as the basement connection at 2-6 Buckingham Road would need to be constructed prior to any physical commencement of work on 6a-8 Buckingham Road. This would ensure that the redevelopment of 2-6 and 6A–8 Buckingham Road was undertaken in an orderly and economic fashion.'*

By way of letter dated 31 August 2011, the applicant's planning consultant provided the following advice which contradicts the previous advice that, due to financing issues, the issue of vehicle access could not be resolved through a deferred commencement condition:

*'This letter is to confirm that it is the opinion of Don Fox Planning that the best way to resolve the basement connection from 6A-8 Buckingham Road to 2-6 Buckingham Road would be to impose a deferred commencement condition requiring the registration of an easement.*

*This would then provide the applicant with the opportunity to obtain development consent for the construction of the basement connection and to*

*have the easement registered. Once this had occurred a full development consent could be issued. This will provide Council with the confidence that construction on 6A-8 Buckingham Road could not occur until such time as the basement connection easement was registered with the Department of Lands. A further condition of consent could be imposed requiring the basement connection to be completed prior to the release of the occupation certificate.'*

The subject application is proposing vehicular access through Nos. 2-6 Buckingham Road. To provide vehicle access through Nos. 2-6 Buckingham Road, the basement of the building will need to be constructed and an easement for a right of carriageway benefitting No. 6A & 8 Buckingham Road will need to be registered on the certificate of title.

On 17 January 2008, a section 96 application (MOD0328/07) that included a proposal for a basement link between Nos. 2-6 Buckingham Road and the subject site was refused. A further development application (DA0226/11) for a similar basement link proposal was also refused. A new development application for the construction of a basement link was lodged with Council on 3 April 2012. This development application has not been determined.

In *Remath Investments No 6 Pty Ltd v Botany City Council* (Unreported) Talbot J expressed the view that deferred commencement provisions are, "not to be regarded as a panacea to overcome any unresolved issue at the time a development consent is granted". Certainty in obtaining vehicular access for a development is a fundamental issue that should not be resolved through the imposition of conditions. At the time of lodgement of a development application there should be a high degree of certainty that vehicular access to the development can and will be provided. The environmental impacts of the vehicular access must be known as all environmental impacts of a development which relate to the matters for consideration prescribed under s.79C must be considered as part of the development application assessment.

There is significant uncertainty as to whether and when vehicular access for the proposed development would be available. The form of vehicular access is also unclear as a development consent authorising construction of the vehicle access does not exist. A deferred commencement condition which requires the registration of an easement or other approved legal access does not stand on its own, because, to satisfy the condition and activate the consent, further development consent is required.

It is a requirement of the KPSO that car parking for the multi-dwelling developments be provided at the rates specified in cl.25J(2). Whilst the number of car spaces in the basement satisfies these requirements, there is no vehicle access to the basement. If the basement cannot be accessed by cars the areas of the basement intended for use by cars cannot be properly classified as 'car spaces'. Clause 25J(2) states that consent must not be granted unless the car parking requirements are satisfied. The granting of consent includes a deferred commencement consent. The granting of consent to proposal which does not satisfy the requirements of cl.25J may be unlawful in the absence of a SEPP 1 objection.

The proposal does not satisfy the aims and objects of the *Environmental Planning and Assessment Act 1979* as the proposal is inconsistent with the principles of orderly development.

***If the application merits approval, that any recommendation include relevant provisions (such as deferred commencement condition) requiring adequate and legal access over adjoining 2-6 Buckingham Road to be in place before the commencement of the consent.***

The JRPP considered a report recommending refusal of the development application on 1 December 2011. Despite the resolution of the JRPP inviting the application to submit additional information in response to the reasons for refusal, no additional information has been submitted. The application does not merit approval having regard to the reasons for refusal identified in the report considered by the Joint Regional Planning Panel on 1 December 2011.

## RECOMMENDATION

THAT the Sydney West Joint Regional Planning Panel, as the consent authority, refuse development consent to Development Application No. 0110/11 for the demolition of the two existing dwellings and construction of two residential flat buildings for 43 units with basement car parking (accessed via Nos. 2-6 Buckingham Road) and associated landscaping at 6A & 8 Buckingham Road, Killara as shown on plans DA00 – DA47 prepared by Aleksandar Design Group Pty Ltd and Landscape plans DA-LS01 to DA-LS07 prepared by Melissa Wilson landscape architect, for the following reasons:

1. The proposal is contrary to the principle of orderly development as expressed in section 5(a)(ii) of the *Environmental Planning and Assessment Act 1979*.

### Particulars

- i. The proposal seeks approval to construct a building with vehicular access provided solely through the basement of a building on a neighbouring property that has not yet been built. There is no certainty as to whether the building approved for the adjoining site will be built.
  - ii. Nos. 6A & 8 Buckingham Road Killara do not benefit from an easement for a right of carriageway through Nos. 2-6 Buckingham Road Killara. Nos. 6A & 8 Buckingham Road Killara do not have a legally binding entitlement for vehicular access through Nos. 2-6 Buckingham Road Killara.
  - iii. A development consent authorising building works which would facilitate the provision of vehicular access between Nos. 6A & 8 Buckingham Road Killara and Nos. 2-6 Buckingham Road Killara does not exist.
2. The development is inconsistent with the aims and objectives prescribed under clauses 25C(2) and 25D(2) of the Ku-ring-gai Planning Scheme Ordinance:

### Particulars

- i. The development has an unreasonable impact upon the adjoining heritage item at 10 Buckingham Road.
- 3. The development does not provide 'manageable housing' in accordance with the requirements of clause 25N of the Ku-ring-gai Planning Scheme Ordinance. A SEPP 1 Objection in respect of the variation to the development standard has not been submitted.

**Particulars**

- i. Two of 'manageable units' shown on the plans do not comply with the definition of 'manageable housing' contained in Part IIIA of the Ku-ring-gai Planning Scheme Ordinance.
- 4. The development does not provide car parking spaces in accordance with the requirements of clause 25J of the Ku-ring-gai Planning Scheme Ordinance. A SEPP 1 Objection in respect of the variation to the development standard has not been submitted.

**Particulars**

- i. The development application does not provide any means of vehicular access to the basement. As the basement is inaccessible to vehicles the car spaces in the basement cannot be properly classified as car spaces.
- 5. The proposal is contrary to the Design Quality Principles of State Environmental Planning Policy No. 65.

**Particulars**

The proposal fails to satisfy these principles for the following reason:

- i. The failure to provide manageable and visitable apartments that comply with the requirements of AS4299-1995 demonstrates that the proposal does not provide housing that suits the current and future needs of the neighbourhood and an ageing population.
- 6. The proposal is inconsistent with Part 3.5 'Development within the vicinity of a heritage item' of DCP 55.

**Particulars**

- i. The street setback does not comply with design control No. 1(iii) as the building is closer to the front boundary than the heritage item at No. 10 Buckingham Road.
- 7. The proposal is inconsistent with Part 4.7 'Social dimensions' of DCP 55.

**Particulars**

- i. In contravention of design control C-3, less than 70% of the dwellings in the development are 'visitable' by persons with a disability.
8. The proposal is unsatisfactory with respect of Section 79C(1)(a)(i)(iii) and (b), (c) and (e). The development is inconsistent with environmental planning instruments being SEPP 65, SEPP 1 and the KPSO. The proposal is contrary to the requirements of DCP 55. The proposal is an unacceptable development that is not suitable for the subject site. The development is contrary to the public interest.

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**Attachments:**

1. Letter from JRPP Chairperson dated 19 June 2012
2. Previous report considered by the JRPP on 1 December 2011
3. Minutes from JRPP meeting 1 December 2011
4. Previous report considered by the JRPP on 19 August 2011
5. Minutes from JRPP meeting on 19 August 2011