



11215  
13 August 2013

Panel Secretariat  
Joint Regional Planning Panel  
GPO Box 3415  
Sydney NSW 2001

Dear Sir/Madam

**WOOLOOWARE BAY TOWN CENTRE - STAGE 1 RESIDENTIAL (2013SYE033)  
461 CAPTAIN COOK DRIVE, WOOLLOOWARE**

We write on behalf of Bluestone Capital Venture No.1 Residential (the Applicant) in reference to the abovementioned Development Application (DA) and the upcoming Sydney East Joint Regional Planning Panel (JRPP) on 22 August 2013 where the DA will be considered. The recommendation from Sutherland Shire Council (Council) to defer a decision on the application is considered unnecessary and ill-founded, with the application satisfying all relevant requirements of the approved Concept Plan for the site.

The purpose of this correspondence is to provide Panel members with clarification on the interpretation of Condition 22 of the Concept Plan Approval in order to seek that the DA be determined at the JRPP meeting on 22 August 2013. It is considered that Council has incorrectly interpreted Condition 22 of the Concept Plan Approval, directly conflicting with the interpretation of the Department of Planning and Infrastructure (DP&I), who drafted the Concept Plan conditions and who have determined that the retail/club Project Application (PA) (MP10\_0230) is in accordance with those conditions.

**1.0 SUMMARY:**

- Council's recommendation for deferral of determination has no basis and was not been communicated to the Applicant prior to referral to the JRPP, notwithstanding repeated assurances by Council staff that all outstanding information had been received to complete the assessment;
- Council's interpretation of Condition 22 of the Concept Plan Approval is incorrect and inconsistent with the interpretation of the condition given by the Department of Planning and Infrastructure, which drafted the Condition. The Department has satisfied itself that the requirements of Condition 22 have been complied with for the Stage 1 Club/Retail Project Application and has recommended its approval to the Planning Assessment Commission (PAC);
- The Office of Environment and Heritage OEH has advised the Department that it does not have an approval or sign off role for Condition 22 – contradicting Council's reason for deferment.
- In commenting on issues relating to Condition 22 of the Concept Plan approval, OEH has consistently referred Council to the Department's assessment process for the Stage 1 Club/Retail PA, and has not specifically commented on the Stage 1 residential DA.

The Stage 1 Club/Retail PA process has resolved the OEH issues and approval has been recommended to PAC;

- There are two outstanding OEH issues which Council claims are the reason for recommending deferment both have been resolved:
  - Baseline surveys for threatened/migratory birds which OEH advised has not been undertaken, were undertaken as part of the earlier Concept Plan assessment and deemed adequate in the Director-General's assessment report.
  - OEH has acknowledged that, in the absence of baseline surveys for microbats, the assumption that they present on the site in drafting management plans is an acceptable practice.
- It should be emphasised that the Stage 1 Club/Retail PA involves development within and immediately adjacent to the Woollooware Bay foreshore, in contrast, the Stage 1 residential DA involves development 80-100m back from the foreshore.
- Council should be required to submit recommended conditions of consent prior to the meeting to ensure all parties have had adequate opportunity to comment and ensure procedural fairness.

## 2.0 INTERPRETATION OF CONDITION 22 OF THE CONCEPT PLAN AND ROLE OF OEH

Initially it is necessary to note that Council's interpretation of Condition 22 is inconsistent with the interpretation of the DP&I who originally drafted the Concept Plan condition. Council appear to have interpreted the condition as OEH needing to 'sign off' on each of the matters prescribed in the condition. As referenced in Council's Assessment Report for the subject DA, in its correspondence dated 6 June 2013 the OEH clarified that they do not "...agree to the inclusion of a consultative, approval or 'signoff' role...". With this policy in mind, it is reaffirmed that the final requirements of OEH were provided in their correspondence dated 6 June 2013 (see **Attachment A**).

This understanding is reflected in the DP&I's interpretation of the condition, exhibited in the recent Director-Generals Assessment Report for the retail/club PA, with a recommendation for approval. This recommendation illustrates that the retail/club PA is consistent with the Concept Plan, including the adequacy of the information submitted to satisfy Condition 22 and the requirements of the OEH. As the same information has been submitted for the subject DA, it is not understood how the proposal can be considered inconsistent with the Concept Plan. Furthermore, the retail/club PA relates to development in close proximity to the foreshore area, with even more need to consider the sensitive environment issues prescribed in Condition 22. The subject DA does not relate to land adjoining any sensitive environment, and is a significant distance from this area, as highlighted in the Council Assessment Report when discussed impacts on the natural environment:

*The stage that is the subject of this application does not seek approval for any works within, or directly adjacent to the riparian zone, and is 80-100m from the foreshore.*

The Director-General's Assessment Report for the Retail/Club PA notes that the Concept Plan approval contains a condition requiring the submission of management plans to ensure that the proposal's impact on adjoining fauna habitat is appropriately managed. These management plans have been prescribed to reflect the requirements of OEH that were raised during the Concept Plan assessment. It is however the role of the Department to satisfy itself, through its assessment process, that these requirements have been met, where relevant to the application. The Department acknowledges this and that Condition 22 has been satisfied through the submission of these plans.

*As a result of its assessment, the Department recommended Future Assessment Requirements within the Concept Plan approval requiring the submission of management plans (including plans relating to stormwater, noise, lighting and birds) to ensure that the impacts of the proposal upon the adjoining fauna habitat are appropriately managed. **The Proponent has submitted management plans in accordance with the Future Assessment Requirements in the EA.***

The Director-Generals Assessment Report then goes on to address the issues raised by OEH through the assessment process. The report notes that the final management plans can be submitted to the satisfaction of the Department prior to the commencement of construction. The report ultimately summarises that the requirements of OEH have been satisfactorily addressed.

*OEH's submission also raises concerns with these management plans and recommends that the suggested mechanical plant acoustic treatments proposed in the Noise Impact Assessment be included within the Noise Management Plan and that measures to reduce light spill be incorporated into a Lighting Management Plan.*

*The Proponent acknowledges the concerns raised in relation to the plans and has advised that the recommendations and mitigation measures as requested by OEH have been incorporated in the PPR and revised Statement of Commitments.*

*The Department notes that the Commitments acknowledge that the recommendations and mitigation measures provided in supporting reports are to be included in the final design of the proposal. The management plans are then to be provided to the Private Certifying Authority prior to the issue of a Construction Certificate.*

*Noting the comments from OEH and the Proponent's Commitments, **the Department is of the view that the amended management plans should be provided to the Department prior to the commencement of construction to ensure that the Plans accurately reflect the OEH's submission.***

*With the inclusion of the proposed Commitments and the Department's recommended Condition No. C23, the Department is of the opinion that **the issues raised by OEH have been satisfactorily addressed and this aspect of the application is acceptable.***

*(emphasis added)*

The recommendation for Approval is in direct conflict to Council's opinion that "... the terms of Condition 22 have not, or cannot, be met, the consent cannot be legitimately issued". It is clear from the DP&I's recommendation that the requirements of the OEH can be satisfied through a condition of consent requiring any outstanding issues to be incorporated into the final design of the development. As originally intended, this interpretation by the DP&I does not require the OEH to sign off on the matters prescribed in Condition 22.

### 3.0 UNRESOLVED MATTERS

Council's single reason for recommending the determination be deferred is a perceived non-compliance with Condition 22 of the Concept Plan Approval, relating to the satisfaction of Office of Environment and Heritage (OEH) requirements. In particular, Council state that two requirements of the OEH are still unresolved:

- *The absence of baseline surveys for threatened/migratory birds in accordance with the Director General's Requirements.*

- *The absence of trapping for microbats in accordance with DEC's 2004 draft Threatened Biodiversity Survey and Assessment Guidelines is acknowledged and the presence of *Myotis adversus* has been assumed based on a probable recording during limited field surveys.*

These two requirements have been extracted from correspondence prepared by OEH dated 6 June 2013 regarding the Preferred Project Report (PPR) for the Club/Retail PA, currently with the Planning Assessment Commission (PAC) for determination (see **Attachment A**). In a response to Council regarding the subject DA, OEH deferred all comments on the application to correspondence regarding the Club/Retail PA. As such, this latest correspondence from OEH on 6 June 2013 can be interpreted as the final requirements to be addressed to satisfy the OEH. It is highlighted that the items prescribed in Condition 22 have been similarly addressed in the Club/Retail PA and the subject DA, hence the response from OEH referring all issues to their correspondence on the Club/Retail PA.

It is necessary to dissect the two 'unresolved' matters identified by Council. On 7 June 2013, JBA sent correspondence to the DP&I (see **Attachment B**) clarifying the items discussed in the OEH correspondence on the PPR (**Attachment A**). In response to the OEH's claim that there was an "... *absence of baseline surveys for threatened/migratory birds in accordance with the Director General's Requirements...*" it was confirmed by Eco Logical Australia that:

*Baseline surveys for threatened/migratory birds have been conducted. ELA undertook a targeted survey of birds, frogs and micro-chiropteran bats during November 2011 to February 2012. This timeframe is considered optimal for migratory bird species. The results of the study were provided in a report to Bluestone dated 17 February 2012. A further letter was provided in response to agency comments on this report (dated 17 May 2012, attached). These letters were submitted to the NSW Department of Planning and Infrastructure (and OEH) during the assessment of the (now approved) Concept Plan.*

In the Director-Generals Assessment Report for the Club/Retail PA, it was confirmed that this baseline survey information had been deemed adequate at the Concept Plan stage.

*Concerns were raised by the Office of Environment and Heritage (OEH) that surveys supporting the proposal were inadequate and that construction and operational noise will impact the fauna habitat in the adjoining estuarine area.*

***During its assessment of the Concept Plan application, the Department noted this same concern raised by OEH, however has accepted that this level of survey information provided by the Proponent was adequate.***

*(emphasis added)*

In light of the recommendation for approval by the DP&I and the above comments, it is noted that the baseline survey information is adequate and no further information is required. As such, this matter is considered resolved.

It is unclear why Council has identified the second item in the OEH's correspondence on 6 June 2013 (**Attachment A**) as an 'unresolved' matter. This second item relates to an acknowledgment by OEH that no *Myotis adversus* have been trapped on the site, but that a precautionary approach instead has been taken, with the assumption that the *Myotis adversus* may be located on the site. This item is merely an acknowledgment by the OEH that Eco Logical have undertaken best practice in assuming that the *Myotis adversus* may be present on the site and assessed the proposal accordingly, regardless of tangible evidence of the species presence.

#### 4.0 RECOMMENDED CONDITIONS OF CONSENT

It is noted that Council's report clearly states that should the issues relating to the deferment of determination be resolved, the application would be recommended for approval subject to recommended conditions of consent. No such conditions have been prepared or forwarded to the JRPP, notwithstanding that the assessment report makes numerous references to proposed conditions. Should the JRPP be persuaded that the reasons for deferral are not valid or have been resolved; the panel will still not be in a position to determine the project at the meeting as recommended conditions have not been provided and commented on.

The Applicant is deeply concerned with these circumstances. If the conditions have been drafted they should be provided to the JRPP and made publicly available for comment to enable full transparency and ensure that the matter is able to be resolved at the JRPP meeting on the 22<sup>nd</sup> of August. If they have not been drafted, legitimate questions need to be asked of the Council. This application was lodged with Council on 4<sup>th</sup> April 2013 and is a subsequent stage to an approved Concept Plan. Councils own report states (page 44) that

*The proposed development is largely compliant with the Concept Plan approval.*

There are number of design and sustainability matters that Council has recommended could be addressed by way of deferred commencement or through conditions. Notwithstanding all this, Council has yet to provide recommended conditions, leaving the Applicant in a position of not being able to comment on the conditions in the public meeting despite there being numerous references to them in the report. The procedural fairness of this is questioned.

It should be noted that the Council assessment officer advised the Applicant in late June that the report to the JRPP would be deferred from July to August to enable the officer to write a "solid recommendation for approval" (her words). The Applicant accepted this outcome on the basis of Council's advice that all outstanding information had been received and that there were no further issues requiring clarification. The Council confirmed that this was the case on numerous occasions to the applicant. It is therefore disappointing that Council has not managed to finalise its responsibilities in regard to this matter in the two months that have elapsed.

#### 5.0 CONCLUSION

Based on the above, it is clear that there is no impediment to a determination of the subject DA at the JRPP meeting on 22 August 2013. The proposal is generally consistent with the Concept Plan, and all relevant conditions of the Concept Plan have been satisfied. Importantly, following an analysis of the DP&I's interpretation of Condition 22 of the Concept Plan Approval, it is clear that there is no inconsistency with this condition and that the requirements of the OEH have been satisfied.

It is disappointing that Council has not corresponded with the proponent on this matter prior to forwarding their recommendation for deferral to the JRPP. The Applicant has repeatedly sought confirmation from the Council Officers that all outstanding issues had been resolved and that no further information was required for the assessment to be completed. There are several other matters such as the allocation of visitor parking spaces and the provision of pedestrian access into Building F from Solander Playing fields, which could have easily been resolved prior to the application being forwarded to the JRPP. It is noted that the proponent may wish to make further representation to the JRPP regarding the draft conditions, which at this time are unavailable.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Gordon Kirkby', written in a cursive style.

Gordon Kirkby  
*Director*

*cc – Sutherland Shire Council (Attention: John Rayner - General Manager)*