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10 July 2015

Sydney East Panel Secretariat
Joint Regional Planning Panels
GPO Box 39
Sydney NSW 2001

Dear Panel

**COUNCIL ASSESSMENT REPORT FOR 208/2013 (JRRP REF: 2013SYE094)
52-52 PEMBERTON STREET, BOTANY**

This letter has been prepared on behalf of Australand in response to the recommendation for refusal put forward by the City of Botany Bay Council in relation to the subject application. This letter provides a specific response to each of the reasons listed for refusal with additional information appended for the Panel's reference.

1.0 RESPONSE TO REASONS FOR REFUSAL

1.1 Inconsistency with the Maximum Height of Building Development Standard

Council's Assessment Report notes that the January resolution of the Panel supported the height variations now reflected in the current scheme to generally adhere to the panel's design modification requirements. However, the assessment report indicates that contrary to the resolution of Panel to the Council (and Council's previous assessment report which supported the Clause 4.6 variation for building height), the Council's current policy is that all applications should comply with the maximum building height standard and therefore the height variations are not supported. We understand this new policy direction relates to the submission of Planning Proposal 1/2015 to the Department of Planning and Environment in February 2015 which seeks to reduce the maximum height control for land zoned R3 from 22m to 10m and to allow land owners to lodge Clause 4.6 variations to vary the 10m height control. Such a planning proposal would have a deleterious effect on the development capability of land zoned R3 within Botany LGA. At this stage, Council's planning proposal 1/2015 has not received gateway determination and accordingly it has not been publicly exhibited nor is there any certainty that this planning policy will receive a gateway determination.

We note that the proposed building heights are generally consistent with the January Panel resolution and is supported by a well-founded Clause 4.6. The height variations are also supported by Council's internal urban designer (see **Attachment A**). The only variation to the maximum heights set out in the Panel resolution relate to Building B along Pemberton Street.

The amended design now incorporates terrace style apartments in Building B fronting Pemberton Street with a street frontage height of 10.3m stepping up to 12.4m at the rear of the building. This variation is a consequence of the need for freeboard to satisfy the required flood design level and was supported verbally by Council officers when tabled prior to resubmission on the basis that:

- the terrace typology was more desirable than an apartment building;
- the variation was driven by the flood design levels; and
- the building will generally present a 10m form to the street frontage.

The amended design also retains a 4 storey form at the southern end of Building B (south wing residential apartment building) as this building forms part of the proposed residential apartment building which runs east west across the southern end of the site. Building B south wing steps down to 4 storeys at its frontage with Pemberton Street from 8 storeys where it fronts the N-S pedestrian link. Building B's frontage with Pemberton Street comprises a ground floor commercial tenancy with loading dock behind and 3 levels of residential apartments above. While the proposed 4 storey apartment building at the frontage with Pemberton Street is a storey higher than the approved adjoining building at the northern end of 42 to 44 Pemberton Street (but 2 storeys lower than the maximum approved height of the adjoining development at its frontage with Pemberton Street), the additional storey presents a coordinated and cohesive built form given it forms part of a larger residential flat building which will not detract from the adjoining development. The proposed 11m side setback between the 3 levels of residential apartments and the shared boundary with 42 to 44 Pemberton Street will mitigate any impacts associated with the additional storey.

Group GSA has also provided the following view from an architectural perspective:

The design for the Pemberton Street massing and architectural response considers the complete design along the length of the site and most importantly how it integrates into the adjacent built form. The site plays an important role in transitioning from residential flat buildings to the south of up to six storeys down to single storey light industrial and residential to the north. To assist in a more fulsome transition, the DA design responds to the JRPP and Council concerns regarding appropriate scale and typology, and there are two areas of refinement that depart from the JRPP recommendation, but which we believe produce a more developed transition.

To the southern end of the Pemberton Street design for the site, the typology transitions from row terrace houses to an L shaped residential flat building, referred to as Building B South Wing. This residential flat building is physically separated from the terrace housing of Building A and B, and marks the shift both in our site and also the overall Pemberton Street neighbourhood, where there are residential flat buildings directly adjacent to the south. The change in typology is articulated in both form and expression (the terraces having a higher degree of finer grain detail) with a commercial / retail tenancy at ground floor and three levels of residential apartments above. The change from three to four storeys at this one point at the south of the site assists in transition to the adjacent scale and provides an expressed punctuation to the transition of typology. The four storey height is limited in its frontage to Pemberton Street (approximately 20m) and does not dominate the massing of the street, but rather provides diversity of form, expression and typology.

We believe that this change provides on the whole, a better and more appropriate overall scheme.

The building heights proposed for Building B that vary slightly from the JRPP Resolution therefore still respect the lower density adjoining parts of the site while being largely comparable with the scale of existing and proposed industrial development to the west opposite the site. The corresponding FSR for the B4 zoned part of the site has been reduced and now complies with the maximum FSR requirement. The stepping up in height from 3 storey terraces to a 4 storey mixed use building, setback 11m from the boundary with the neighbouring 3 to 6 storey mixed use development, will provide visual interest through the change in dwelling form and building height. Further support for the proposed design is provided in Council's internal Urban Design referral included at **Attachment A**.

In light of the Panel's previous support for the proposed height variations, support of Council's urban designer, and merit of the minor variations being proposed for part of Building B, we do not agree with Council's position that that the development should be refused on the basis of the proposed variations to the Height of Buildings development standard.

1.2 Inconsistency with the January 2015 LEP Planning Proposal to remove c14.6

This reason for refusal relates to Planning Proposal 2/2013 containing an exclusion from the use of Clause 4.6 to seek a variation to height standards without a savings provision, however it is our

understanding that the Department of Planning and Environment has written to Council advising that a savings provision will be included in the LEP amendment (Planning Proposal 2/2013) to allow the application of clause 4.6 to continue to be permitted for DAs currently lodged but not determined.

On the basis that the Department has taken action to enable sites that have been in the assessment process for a long time to continue to be assessed and determined on the basis upon which they were submitted with designs modified throughout the assessment at the request of Council and the JRPP, we feel that the exclusion of Clause 4.6 should not be given determinative weight as the application will be captured by a savings provision. Further this application has been considered on two occasions by the Panel in the context of Council's draft Planning Proposal, and the Panel subsequently resolved to support with some further design modifications, the proposed height variations.

In light of the Panel's previous resolution, having regard to the draft Planning Proposal, and indication from the Department that the amendment will not apply to the subject DA, it should not be considered as grounds for refusal.

1.3 Fails to satisfy the recommended internal areas for apartments in the RFDC

Council has stated that the proposed application fails to satisfy the recommended internal areas for apartments under Part 3 of the RFDC and therefore consent can be refused in accordance with Clause 30A(1)(b) of SEPP 65.

58% of the apartments comply with the RFDC table, with the remainder complying with the RFDC rule of thumb sizes. A Housing Diversity Report was submitted with the DA to support the proposed apartment sizes (see **Attachment B**) and uses empirical demographic evidence to demonstrate that the proposed apartment sizes are appropriate. Council's assessment report acknowledges the Housing Diversity Assessment is detailed but states that its own evidence, which is not provided, suggest that there is no requirement to vary the unit size and mix.

Clause 30A of SEPP 65 states that a consent authority must not refuse consent to a development if the proposed area for an apartment is equal to, or greater than, the recommended area for the relevant apartment type in Part 3 of the RFDC. Until recently, it has been accepted practice that this requirement relates to the apartment areas specified in the 'Rules of Thumb'. However, a recent ruling of the Land and Environment Court, *Botany Bay City Council v Botany Development Pty Ltd (No 2)*, stated that Clause 30A is not linked to the 'Rules of Thumb' for Apartment Layout, but rather to the more onerous standards of the accompanying table. Nevertheless, the decision does not mean that the consent authority cannot approve unit sizes smaller than those outlined in the RFDC.

Following that Judgement, on 19 June 2015, the proposed Amendments to SEPP 65 were gazetted, including adoption of the Apartment Design Guide (ADG). The amendments remove the apartment sizes table and effectively adopt the 'rules of thumb' in the RFDC, which the proposed development complies with. The amended SEPP retains the 'must not refuse' clause (clause 30) but now refers to the lower ADG apartment sizes, and includes a new clause (clause 6A) which states that 'Development Control Plans cannot be inconsistent with the Apartment Design Guide' in relation to apartment size. Therefore if the subject DA was re-lodged then Council's DCP controls relating to apartment size would no longer apply and the consent authority would not be able to refuse the proposed development on the basis of apartment size.

Whilst the Savings and Transitional Provisions mean that the RFDC continues to apply to the development, as the SEPP 65 amendments have been gazetted they are both certain and imminent and should be given substantial weight. The amendments also clearly indicate the NSW State government's position that apartment sizes consistent with the ADG are entirely appropriate.

Finally it is noted that in Council's Assessment Report it states that the larger apartment sizes are necessary in order to provide additional amenity in the Botany area because the apartments are

affected by road and aircraft noise. The subject site is not adversely affected by either of these external impacts, further substantiating that the application of larger apartment sizes is inappropriate on the subject site.

In light of the above, the non-compliance with the larger apartment sizes in the RFDC table should not be grounds for refusal and is inconsistent with State policy.

1.4 Non-compliance with the DCP in relation to building height, unit mix and unit size

Council states that the proposal should be refused as it fails to satisfy the requirements of the DCP in relation to building height, unit mix and unit sizes.

The building height control in the DCP defers to the LEP. As detailed in Section 1.1 the proposed heights are generally consistent with the JRPP resolution which previously supported the variations to the LEP height controls.

The proposed variation to the DCP unit mix was supported by a Housing Diversity Assessment (see **Attachment B**) that uses in-depth demographic analysis to demonstrate that the mix is appropriate for the area. This methodology is consistent with Objective 4K-1 and associated design guidance in the ADG for unit mix. Council's assessment report notes the justification, stating that compliance with the unit mix is "of less concern", has been varied in the past, and "could be supported, if compliant unit sizes were provided". Further under its assessment of SEPP 65 the Assessment Report states that "the development provides a balanced mix of apartments". However, because the proposal does not comply with unit size it is Council's policy that it must comply with unit mix. There is no correlation between apartment size and mix. If this mix is supportable on its merits, as the Council's report indicates, then it should not be listed as a reason for refusal because of a variation to a different control.

Finally, as detailed in Section 1.3, the proposed variation to the DCP unit sizes must be considered in the context of the evidence provided in the Housing Diversity Assessment and direction provided at a State policy level in the form of the amendments to SEPP 65, which demonstrate that the proposed apartment sizes are entirely appropriate.

In light of the above, the proposed variations to the DCP controls are strongly supportable on their merits and are not valid reasons for refusal.

1.5 Non-compliance with the DCP requirement for visitor spaces

The proposed visitor parking was provided in accordance with the visitor car parking rate that formed part of the draft parking conditions prepared by Council as part of its previous assessment as a Stage 1 DA. Notwithstanding this change in position from Council, their concern regarding the provision of an additional 37 visitor spaces could be addressed by expanding the basement under Building E. Therefore should the JRPP support the need for additional visitor parking, a condition could be imposed without having any impact on the landscape or deep soil provision on the site. In light of the above, Reason 5 is not grounds for refusal.

1.6 The non-compliant unit sizes and shortfall in visitor parking is not in the public interest

Council has indicated that the non-compliant unit sizes and shortfall in visitor parking is not in the public interest as it will create adverse social and economic impacts in the locality by unreasonably contributing to the oversupply of undersized units in the Botany LGA.

As noted in Section 1.5 above, the proposal could be amended to comply with the shortfall in visitor parking. As considered in Sections 1.3 and 1.4 and supported by empirical evidence in the Housing Diversity Assessment at **Attachment B**, the proposed unit sizes will not create any adverse social or economic impacts.

It is noted that, if Council's assertion that the non-compliant unit sizes will create adverse social and economic impacts in the locality by unreasonably contributing to the oversupply of under-sized units in Botany then the recently gazetted State policy would also not be in the public interest.

1.7 The proposal is not in the Public Interest

No additional reasons are given as to why the proposal is not in the public interest in addition to those listed in Reason 6. The public interest section of the assessment report states that the proposal is "generally consistent with the strategic vision of the site". However, the report also states that Council's policy direction is to remove Clause 4.3(2A) and 4.4B(3) altogether and therefore the development does not serve in the public interest. Council's desire to remove the height and FSR clauses that apply to the site is the subject of a Planning Proposal (1/2015) that has not proceeded through Gateway and has not been placed on public exhibition. Therefore this change in policy direction is not a relevant consideration under Section 79C and is internally contradictory to the conclusions in Council's own assessment, and in particular the internal referral from Council's Strategic Planner (see **Attachment A**) for the application. Therefore Reason 7 is not a valid reason for refusal of the DA.

We trust that the above information will assist the JRRP in preparing for the meeting scheduled for the application on 15 July 2015. Should you have any queries about this matter, please do not hesitate to contact me on 9956 6962 or mrowe@jbaurban.com.au.

Yours faithfully



Michael Rowe
Associate