



16 October 2016

Ms Mary-Lynne Taylor
Regional Panel Chair
Sydney West Joint Regional Planning Panel
GPO Box 39
SYDNEY NSW 2001

Dear Ms Taylor,

**JRPP No. 2015SYW213
HECTOR COURT & AFFLECK CIRCUIT KELLYVILLE (DA913/2016/JP)**

- 1.1 This letter has been prepared on behalf of the applicant Toplace Pty Ltd in response to the report to the JRPP dated 20 October 2016 prepared by Ms Kristine McKenzie of The Hills Shire Council.
- 1.2 The report recommends refusal of the application. The purpose of this letter is to respond to the reasons for refusal and provide the JRPP with the opportunity to approve this application. This submission will respond to the key aspects why refusal has been recommended and is accompanied by Legal Advice from Barrister Philip Clay in relation to the density provisions contained within Council's DCP.
- 1.3 This submission responds to the following aspects of Council's report:
 - Height of Lift overruns and the requirement for a Clause 4.6 variation report
 - Density control
 - Number of storeys & context
 - Setbacks
 - Unit layout and design
 - Private open space
 - Storage
 - Waste Management
 - Stormwater Drainage

Height of Lift overruns

- 1.4 The application before the panel in my opinion is fully compliant with the Building Height Control of the LEP. As demonstrated in the Statement of Effects and duplicated in the JRPP report, the lift overruns have been designed as Architectural Roof Features and accordingly are permitted to

extend beyond the 16 metre height control. It is noted that the maximum height of the lift overruns is between 16.2 metres and 16.4 metres. The lift overruns are a continuation of the external facades and result in a linear vertical element that extends from the ground level to the top of the building. The lift overruns are consistent with the vertical element on the façade finished in rendered masonry.

- 1.5 It is my opinion that the submission of a Clause 4.6 variation report is not required as the design of the lift overruns is integrated with the facades as a consistent vertical architectural element.

Density Control

- 1.6 It is my opinion as outlined in the Statement of Effects and reproduced in the report to the JRPP that with the introduction of the amendments to SEPP 65 the density control in the DCP is no longer a valid control.
- 1.7 The density control relies on an occupancy rate based on number of persons per unit type. Accordingly the density in the DCP is directly linked to the configuration of units and their unit size. When the density control was introduced into the DCP, it was based on the following unit sizes:
- One bedroom – 75m²
 - Two bedroom – 110m²
 - Three bedroom – 135m²
- 1.8 The building as proposed is comparable to that which would result from a proposal with DCP compliant apartment sizes and population density. Therefore the link between the scale of the development and the character of the development that Council argues on page 25 of the JRPP report is without reasonable planning basis.
- 1.9 Council argues that the ADG unit sizes are a minimum and that Council has always advocated for larger unit sizes.
- 1.10 Due to the introduction of the mandated unit sizes in the ADG endorsed by SEPP 65, it is my opinion that the density control in Council's DCP is no longer a valid planning control. The provision of larger unit areas advocated by Council is contrary to the state planning regime that seeks to reduce unit sizes and provide more affordable housing options.
- 1.11 Accompanying this submission is a legal opinion prepared by Philip Clay which confirms in his expert opinion that *'it does not appear to be a sound planning basis to apply the density control as a reason for refusal of the development application'*.
- 1.12 It is therefore considered that the density control in the DCP is not a valid reason for refusal.

Number of storeys and Context

- 1.13 The DCP specifies a height of 4 storeys which is contrary to the permitted height under the LEP of 16 metres. As demonstrated by this DA, the 16 metre height is sufficient to achieve 5 storeys. Council's considers that the bulk and scale of the development is inappropriate. However there is

nothing in the controls that would restrict a 4 storey building achieving the same building height and scale.

- 1.14 Further, the report to the Panel states that the development is *'out of character with the existing surrounding development and does not adequately address the interface'*. I do not agree with this conclusion. Consideration must be given to the future character of this precinct which will be a mixed use precinct comprised of the various zones.
- 1.15 The subject site is zoned R4 High Density Residential. It adjoins land as follows:
- North – land zoned B2 Local Centre
 - East – land zoned SP2 Infrastructure
 - South – Road reserve of Affleck Circuit which is zoned R4 and land zoned R2 Low Density on the opposite site of Affleck Circuit
 - West - Road Reserve of Hector Ct zoned R3 Medium Density and RE1 Public Recreation beyond
- 1.16 The subject site provides a transition in building form and typology from the R2 Low Density zone which comprises substantial two storey dwellings to the B2 local Centre zoning. The B2 zoning is likely to contain a supermarket to cater for the growing needs of the area.
- 1.17 The form of development proposed on the subject site, as permitted by the planning controls will assist in providing noise attenuation to the R2 zone.
- 1.18 The R4 zoning provides a buffer between the visual and acoustic impact of a podium form as part of a retail/ supermarket development and the low density residential dwellings in the R2 Zone.
- 1.19 The configuration of the buildings in a series of three forms with compliant height will achieve this buffer and transition between the potentially conflicting uses. Furthermore, the proposed buildings are separated from the R2 zoned dwellings by more than 30 metres. This separation distance is well beyond what the Apartment Design Guide deems necessary to achieve *'reasonable levels of external and internal visual privacy'*. To achieve reasonable levels of privacy the ADG deems that a separation of 15 metres is sufficient (this includes 12 metre separation and additional 3 metres as adjacent to a different zone). The separation achieved is double that deemed appropriate under the ADG.
- 1.20 The R3 zone is a medium density zone that permits various forms of residential including multi dwelling housing. It offers a different form of housing than the R2 and R4 zones and further supports the mixed character of this precinct. This precinct is not primarily a low density precinct, it is characterised by the various zones and densities permitted which will all support the future development of the B2 land.
- 1.21 The form of development proposed is envisaged by the LEP and is consistent with the objectives of the R4 zone.

Setbacks

- 1.22 The report to the JRPP states that the proposal does not comply with the setback requirements of the DCP. The DCP requires the following setbacks:

- Primary frontage (Affleck Circuit) – 10 metres
- Secondary Frontage (Hector Court) – 6 metres
- Rear – 8 metres

- 1.23 The development before the panel is in my opinion compliant with the control and the intent of setback provisions. The building is fully compliant with all setback requirements with the exception of components of the ground level. The panel will note that with the exception of minor screening treatments above ground level, levels 1 to 4 are fully compliant with the high setback requirements of Council's DCP.
- 1.24 The variations at ground level relate to the entry landings and ground level courtyards. The entry landings to each of the buildings and awning above signal the primary access points. The landings step forward of the main building façade which appropriately gives the buildings a stronger sense of address. The minor variation has no impact on the generous landscaping provided within the 10 metre setback zone.
- 1.25 The other variation indicated in the Council report relates to the fencing to the ground level courtyards. I do not agree that the intent of the DCP is for courtyards to be setback beyond the building zone. Council's DCP and the ADG recommend a minimum courtyard area of 15m² for ground level apartments. The development fully complies.
- 1.26 Adopting Council's interpretation of the control, ground level courtyards would need to be provided behind the building zone which would result in private open space in an 'undercroft' area. This would result in poor amenity and is not a good design outcome. I do not agree with Council's interpretation that the setback to the building includes courtyard fencing and therefore I consider the position of the courtyards is appropriate and compliant with the DCP.
- 1.27 There are no enclosed spaces or balconies that project into the setbacks.
- 1.28 This is not a valid reason for refusal.

Unit Layout and Design

- 1.29 Clause 30(b) under SEPP 65 – Design Quality of Residential Apartment Development states that a consent authority may not refuse an application if the internal area for each apartment will be equal to or greater than the recommended minimum area for the relevant apartment type specified in Part 4D of the ADG.
- 1.30 All units comply with the recommended minimum area under the ADG. This is not a valid reason for refusal.

Private open space

- 1.31 The report states that not all units comply with private open space provisions. This is incorrect.
- 1.32 All units comply with the requirements of the ADG. Under Clause 6A of SEPP 65, the requirements for private open space and balconies in a DCP cannot be inconsistent with the ADG.

1.33 This is not a valid reason for refusal.

Storage

- 1.34 Council's DCP requires 10m³ of storage to be provided in the basement. The development complies with the ADG which requires a range of between 6m³ to 10m³ depending on unit type. The ADG also requires 50% to be provided in the apartment which is considered a superior option for the functionality of the units.
- 1.35 Under Clause 6A of SEPP 65, the requirements for storage in a DCP cannot be inconsistent with the ADG.
- 1.36 The development fully complies with the ADG and therefore is not a valid reason for refusal.

Waste Management

- 1.37 The updated Traffic report submitted to Council provided swept turning paths of Council's 7.6 metre long garbage truck. The diagrams confirmed that the Council garbage truck could enter and leave safely in a forward direction. Furthermore the location of the driveway entry was moved to Severn Vale Drive at the request of Council. Its location is appropriate considering the B2 zoning to the north. This is not a valid reason for refusal.

Stormwater Drainage

- 1.38 The Council report states that insufficient information has been submitted. Full stormwater details were submitted to Council and updated during the assessment process. No information has been provided as to what Council requires.
- 1.39 Stormwater is proposed to be connected to Strangers Creek and the associated SP2 area drainage system immediately to the east of the site. Connection is proposed by pipe under Severn Vale Drive. Any additional requirements could be included as conditions of consent.

CONCLUSION

- 1.40 On the basis of the above assessment, there are no valid planning reasons for the panel not to approve the Development Application and it is requested that the panel instructs Council to prepare draft conditions of consent for the panels' consideration.

Thank you for your consideration.

Yours sincerely



Larissa Brennan

Director

LJB Urban Planning Pty Ltd

14 October 2016

BY EMAIL

LJB Urban Planning

Email: LJB Urban Planning Pty Limited <larissa@ljbplanning.com.au>

Dear Colleagues,

TOPLACE PTY LTD

**HECTOR COURT AND AFFLECK CIRCUIT, KELLYVILLE
(DA 913/2016/JP)**

JRPP No. 2015SYW213

I have been asked to provide a short opinion relating to the density controls applicable to this development application (the DA).

The density control is in the Council's Development Control Plan ("the DCP") and provides in cl 3.10 that the density of a development is to be measured by the number of persons per hectare, and in this case the control in the DCP is 150-175 persons per hectare. The density of the proposal is 288.21 persons per hectare.

The purpose of a density control is principally twofold:

- to control the form of a development; and
- to control the intensity of a development, insofar as it is or can be a drain on public resources.

Those objectives are identified in the DCP in the following way:

- (i) To ensure residential flat building development does not over-tax existing services and facilities.
- (ii) To provide opportunities for a suitable density housing form that is compatible with the existing surrounding development.

The Council officer's report does not appear to suggest that the increased density by this proposal is going to in anyway over-tax

existing services and facilities. It appears the real question of concern is the form of the development consequent upon the density in excess of the control in the DCP.

It is a particularly crude approach to seek to control building form by a density control of persons per hectare. A floor space ratio control, albeit still crude but not as crude, is a more effective control when combined with other standard controls such as landscaped area, setbacks and the like.

The people per hectare control is based upon a pre-determined expectation of unit sizes and occupancy rates of those units. That is, such a density control can only control building form in conjunction with assumptions about minimum size of units and the occupancies assumed for those particular units.

I am informed that when the density control was created, the Council's DCP provided for large minimum sizes of units, much larger than the minimum sizes provided for in the Apartment Design Guide (ADG) made pursuant to State Environmental Planning Policy 65 (SEPP 65).

It follows, logically, that within the same building envelope smaller apartment will create a higher density measured as people per hectare, than will larger apartments. That is, the building form will be the same, but there will be more people per hectare if there are smaller units than the assumed larger size at the time the density control was made.

There are two important statutory controls which must be born in mind in considering the question of the application of the Council's density control. The first is s 79C(3A) EPA Act which relevantly provides:

“(3A) Development control plans

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

...

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards – is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development...”

This simply means that the Council must be flexible in applying the particular density standard, and also allow reasonable alternative solutions that achieve the objects of those standards.

It is worthy of note at this point that if there is no question of over-taxing the existing services and facilities, then that objective of a standard is met and would not be a basis for refusal.

The second important statutory control is cl 6A of SEPP 65 which relevantly provides:

"6A Development controls plans cannot be inconsistent with Apartment Design Guide

- (1) *This clause applies in respect of the objectives, design criteria and design guidance set out in parts 3 and 4 of the Apartment Design Guide for the following:*

...

(d) *apartment size and lay out*

...

- (2) *If a development control plan contains provisions that specify requirements, standards or controls in relation to a matter to which this clause applies, those provisions are of no effect.*
- (3) *This clause applies regardless of when the development control was made."*

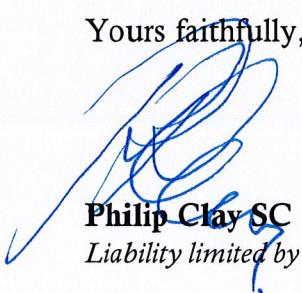
This clause does not specifically apply to a density control it must be said. However, it applies specifically to apartment size and layout. That is, Council cannot insist upon minimum apartment sizes greater than that provided for in the ADG in its own DCP.

It is because the Council's provision relating to minimum apartment size relate directly to the density control that this clause has some operation. It can be seen that the density control is based upon an assumption which under cl 6A of SEPP 65 is of no effect.

It does mean that the foundation for the density control is undermined by virtue of SEPP 65. It seems to me therefore that Council would have great difficulty in justifying a refusal based upon the density control itself.

In my opinion, whilst I would not use the language of Ms Brennan that "the DCP is no longer a valid control", for the reasons set out herein it does not appear to be a sound planning basis to apply the density control as a reason for refusal of the development application.

Yours faithfully,



Philip Clay SC

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