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23 April 2021

Your ref:
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Attention: The Panel Secretariat

Sydney Eastern City Planning Panel

Dear Panel Members

Modification to development application (PPSEC – 83)
Section 4.55 modification application to construct two additional residential levels, including 5 additional apartments, internal alterations and changes to bicycle parking spaces, roof design and facade
Property: 57-75 Grafton Street Bondi Junction NSW 2022

We refer to the above modification application (**the Modification Application**) and confirm that we act for Clygen Pty Ltd, the Applicant, in relation to that application.

We are instructed to write to the Panel in relation to a number of critical legal issues that are central to the Panel's assessment and determination of that Modification Application. These issues have arisen, somewhat urgently, as a result of various comments made in the planning assessment report recently prepared and released on 14 April 2021 by Waverley Council's planning staff (**the Council Report**).

Subject Application

The Modification Application is proposing to modify DA-482/2017 for the demolition of an existing commercial building and construction of a 19 storey mixed use building, comprising ground floor retail with residential apartments above at 57-75 Grafton Street Bondi Junction (**Site** and **Approved Development,** respectively), approved by the Sydney Eastern City Planning Panel (**Panel**) on 2 May 2019.

The Modification Application broadly proposes to amend the Approved Development to include two additional levels of residential apartments (to provide for 5 additional residential apartments), increasing the building from 19 to 21 storeys (**Modification Application**).

Summary of this legal submission

In summary it is our submission that despite the position put forward by the assessing officer in the Council Report, the Panel can readily approve the Modification Application due to the following:

1. A clause 4.6 variation request is not required, at law, for a s4.55 modification application. This should be uncontroversial;

2. Notwithstanding the above, and even if the Modification Application had (hypothetically) required a clause 4.6 variation request, the Modification Application has been made pursuant to and in conformity with the Council's *Planning Agreement Policy 2014* (**VPA Policy**). We wish to ensure that the Panel recognises that the creation (and subsequent consistent application) of an endorsed Policy establishes that the Council has, in effect, **abandoned** the strict application of the height and floor space ratio development standards, at least insofar as those standards intersect with and are **subject to departures envisaged and authorised by VPA Policy**. It would therefore be legally unreasonable to require compliance with the controls in the present circumstances: fourth test in *Wehbe v Pittwater Council* [2007] NSWLEC 827; and

3. The Panel cannot ignore, and **must** take into account, the VPA Policy as part of its consideration of the Modification Application. This is clear from the long-standing Land and Environment Court decision of the former Chief Justice of the Court (and now an endorsed Land and Environment Court 'Planning Principle') in the matter of *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472. That decision established that endorsed Council policies do have statutory weight and **must** be considered in the assessment process.

We address each of these points below.

Submission

Clause 4.6 Variation

The Council Report indicates that whilst a clause 4.6 variation request is not required for the Modification Application, the matters required to be considered under clause 4.6 are relevant to the merit assessment of the Modification Application. With all due respect, this is plainly incorrect. While the provisions of the LEP relating for example to height and floor space are obviously relevant, the much more onerous and legalistic requirements of clause 4.6 are **entirely irrelevant**, as the Courts have made clear on countless occasions.

Clause 4.6(3) of the *Waverley Local Environmental Plan 2012* (**LEP**) provides that '**development consent** must not be granted to development that contravenes a development standard …". As a modification application is considered a stand-alone provision (i.e.. It results in a modification approval, not a 'development consent') **clause, 4.6 does simply not apply to a modification application**. This has been confirmed by the Land and Environment Court ad nauseum, which we would expect the Council staff to be quite aware of.

The seminal decision of *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 provides that a consent authority is not precluded from granting approval to a modification application in circumstances where the modified development would result in an exceedance of a development standard. More recently, Pepper J in n *SDHA Pty Ltd v Waverley Council* [2015] NSWLEC 65 at [31] to [36], found:

> *31. The first is, as the council correctly submitted in my opinion, that the application before the Commissioner was a modification application pursuant to s 96 of the EPAA, and that, as a matter of law, s 96 constituted a complete source of power to modify a consent, and* ***therefore, cl 4.6 did not apply and was not relevant*** *for the purposes of s 96(3) of that Act.* [our emphasis]
>
> *……*
>
> *33. Accordingly, there was nothing in the LEP that obliged, in mandatory terms, the taking into account of the objectives of the height or FSR controls because the cl 4.6 objection was otiose.*

34. Just as, by analogy, an objection under the State Environmental Planning Policy No 1 does not apply to s 96 applications, neither did cl 4.6 of the LEP and the objection based upon it before the Commissioner (Lido Real Estate Pty Ltd v Woollahra Council (1997) 98 LGERA 1 at 4 per Talbot J, North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 480–481 per Mason P - cited in 1643 Pittwater Road at [52] and Gann v Sutherland Shire Council [2008] NSWLEC 157 at [8]–[18] per Lloyd J).

35. Although both Lido Real Estate and Michael Standley concerned an earlier version of the power to modify development applications as contained in s 102 of the EPAA (the precursor to s 96), given the almost identical language contained in s 102(3A) and (4) to the present text of s 96(3) and (4), the same result must follow. No error, therefore, was committed by the Commissioner in not considering cl 4.6 or the objection based upon it as asserted by SDHA.

Based on the above we consider that the Panel would fall into **legal error** if it were to consider the requirements of clause 4.6 of the LEP as part of its assessment of the Modification Application. Unfortunately, this is precisely the approach that the Council Report has taken (it goes so far as to reject the application **largely based upon** this unlawful assessment under clause 4.6 of the LEP) and which it appears intent on inviting the Panel to do, erroneously.

Abandonment of the Height and FSR Controls

Although a clause 4.6 assessment is not required to be undertaken, the relevant LEP planning controls (in particular the height and FSR controls) still form part of the merit assessment of the Modification Application, in their own right (and divorced from clause 4.6 as detailed above). This is mandated by s4.55(3) of the *Environmental Planning and Assessment Act 1979* (**Act**). However, even if a clause 4.6 variation request were required, the panel will be aware of the concept of 'abandonment' of controls, which a consent authority may lawfully have regard to and rely upon in approving development which does not comply with the applicable controls. We discuss the legal principle of 'abandonment' in greater detail below. In this instance, It is our submission that the Council has effectively abandoned the requirement for strict adherence to these controls following the introduction and consistent application of the Council's VPA Policy – which **expressly envisages and authorises** departures from those controls of up to 15% in FSR.

In that regard, in 2014 the Council introduced its VPA Policy for all forms of development within the Council's local government area. The VPA Policy at Part 2.1(a) expressly says that Council may consider and approve applications for development "up to an additional area of 15% of maximum gross floor area" otherwise permitted under clause 4.4 of the LEP. Appendix 1 of the VPA Policy sets out the residential benchmark rates for the respective areas of the Council's LGA"

Bondi Junction retail fringe[2]	$2,600
Bondi Junction office	$2,600

Figure 1: Extracted from Appendix 1 of the VPA Policy

The Site in this instance is expressly assigned has a benchmark rate of $2600 per square metre (see above), along with a residential benchmark rate of $3700 per square metre, albeit these amounts are subject of course to negotiation. In any case, it is clear that the site has been identified as one in which the FSR control that is stated in clause 4.4 of the LEP can be departed from, by up to a maximum 15%, pursuant to Council's VPA Policy.

In *Wehbe v Pittwater Council* [2007] NSWLEC 827 the Chief Judge (Preston J) established a five-part test to determine whether compliance with a development standard is unreasonable or unnecessary. Of relevance is the fourth test which arises where a development standard "has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard [by others] is unnecessary and unreasonable" (at [47] and [81]).

We note that we have acted for applicants in several Land and Environment Court matters where the Court has agreed that development standards had been abandoned, at least in a localised area, by other approvals which departed from those development standards. See for example the Court's recent approval in the Double Bay town centre in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112. In that matter, the Court held at [95] that:

> "The Council deliberately and knowingly decided that larger buildings were appropriate in the block of which the Site forms part. That, in my view, amounts to an abandonment of the controls for this part of Double Bay."

Similarly, we also acted for the applicant in *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 where the Court held at [4]:

> "I consider that the Council has abandoned the 18m height development standard in the immediate locality and that it is appropriate to grant the variation to the development standard for height on the proposal. Considered in that context, the merit issues concerning separation, side setbacks, solar access and deep soil landscaping do not warrant refusal of the application."

In light of these examples, the Panel should therefore not resile from its obligation to recognise an obvious instance of legal abandonment where that has plainly occurred.

In this instance, it is our submission that the adoption of the VPA Policy, which expressly applies to a certain and defined geographical area, **and the continued consistent application of the VPA Policy over approximately half a decade**, is a clear indication that the Council does not seek to strictly apply the gross floor area controls and has in fact, with respect, abandoned the controls (at least subject to the VPA Policy – we do not suggest that the controls are abandoned in the absence of the VPA Policy).

In support of this submission we attach the following:

a. table setting out the Council's planning agreement register, including and identifying the extent of variation to the FSR control permitted as part of a voluntary planning agreement; and

b. table prepared by Urbis setting out planning agreements entered into by Council for sites (which are comparable to the Site) and therefore evidencing that Council has applied and adhered to its VPA Policy.

The attached information, in addition to confirming that the Council has effectively abandoned strict application of the controls, also refutes the Council's argument that the approval of the Modification would set a precedent for the two existing commercial buildings to the west. Rather, the approval of the subject application would simply reflect the implementation of Council's own adopted and well established VPA Policy, whereas any other applications for other development sites would of course be subject to their own assessments, and they too would need to be measured against the VPA Policy, in their own rights.

Panel must take into consideration Council's Voluntary Planning Agreement Policy 2014

The Applicant has invested considerable time and money (approximately one year) into negotiating the planning agreement in conjunction with preparing the Modification Application. Shortly after lodgement of the Modification Application, the Applicant commenced negotiations with Council, in accordance with the VPA Policy. A formal letter of offer for a voluntary planning agreement was submitted to Council on 21 October 2020. Up until two weeks ago, the Council was supportive of the Modification Application and the supporting voluntary planning agreement. Indeed, the quantum of monetary contributions under the proposed Planning Agreement had already been negotiated and agreed upon with Council. We understand that the applicant and its consultants will address the Panel separately on those historical and factual matters.

Despite the Council's most recent, and surprising, reversal on its position on the draft planning agreement, the Panel is legally obliged to take into consideration the Council's VPA Policy as part of its assessment of the Modification Application. It is now a well-established planning principle (first set out in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472) that the matters which are relevant to determining the weight to be given to policies adopted by Council includes (as relevant):

a. the time during which the policy has been in force; and
b. the extent to which the policy has been departed from in prior decisions.

The VPA Policy has been in existence since 2014 and the attached information attests to the Council's consistent, frequent and long-term application of the VPA Policy to development within its local government area. Based on this, the Panel cannot ignore the existence of the VPA Policy and should appropriately give significant weight to the VPA Policy as part of its assessment of the Modification Application.

The amenity impacts arising from the Modification Application (dealt with by Robinson Planning Pty Ltd) are minimal and on balance we consider that the Panel should conclude that they are reasonable impacts, and in line with what the VPA Policy contemplates (i.e. an additional 15% of GFA in a high density location will of course be visible, but its impacts are on balance very modest and acceptable).

Based on the above matters and in conjunction with the planning advice prepared on behalf of the Applicant, it is submitted that the Panel may comfortably approve the Modification Application.

Yours sincerely

Anthony Whealy
Partner
Accredited Specialist — Local Government and Planning

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