

16th July 2020

Planning Secretariat
12 Darcy Street
Parramatta NSW 2150

Att: Brianna Cheeseman (Project Officer - Planning Panels Secretariat)

**RE: Response to the I Planning Panel Report (PPSSNH – 81)
Development Application No. 0047/2020**

We provide the following submission in response to the report prepared by Council under DA 0047/2020 to be considered by the Planning Panel on the 22nd July 2020.

This written submission deals with the State Environmental Planning Policy Affordable Rental Housing 2009 (SEPP ARH) and specifically the draft consent condition B2 dealing with a monetary contribution levied under Clause 51 of the SEPP ARH. This submission deals with two issues as follows:

1. Identify the Councils improper application of SEPP ARH with regard to Part 3
2. Failing the Planning Panels support of our preferred position at 1 above, we request that the Planning Panel modifies the affordable housing contribution condition and require payment prior to the issue of an Occupation Certificate as opposed to the issue of a Construction Certificate.

The following justification is provided in support of items 1 and 2 listed above:

1. Application of Part 3 of the SEPPARH

The relevant legal precursor to an assessment under the SEPP ARH and subsequent imposition of a monetary contribution under clause 50 of the SEPP ARH rests with application of clause 49(1) of the SEPP ARH. Clause 49(1) of the SEPP ARH relevantly provides:

“49 Buildings to which Part applies

*(1) This Part **applies only** to those buildings that were low-rental residential buildings **as at 28 January 2000**, and **does not apply** to any building that becomes a low-rental residential building after that date.” (our emphasis)*

The Council report at page 42 states as follows:

*“In light of the information submitted with the application it is **reasonable to assume** that the relevant buildings (2 and 4 Blue Street, 1 William Street) were low rental dwellings at the relevant date and therefore Part 3 of the SEPP ARH applies to the assessment of the application. In circumstances where the applicant has not provided information to the contrary Council must consider the potential loss of affordable housing.” (emphasis added)*



In our opinion and one which is shared by Pike Verekers Lawyers (see advice dated 29th June 2020 forming part of the Planning Panel documentation) is that the required legal test within clause 49(1) is not based on 'reasonable assumption' as reported by the Council.

We again emphasise the findings in the Pikes Verekers legal advice based on his Honors decision in *Hampstead Home Units Pty Ltd v Woollahra Municipal Council* [2016] NSWLEC 169. The Pikes Verekers legal advice confirms the following:

'There is no evidence as to the rental details of any unit within the subject buildings as at 28 January 2000, nor within several years of that date.

The ARH Assessment does not include rental information dating back that far. The ARH Assessment is only of relevance if some other document demonstrates that SEPPARH applies, so as to require an assessment.

The enquiries made of the current owners of the buildings disclose, in the email of Robert Barnes of 25 June 2020, that they do not hold rental records going back to January 2000.

Similarly the enquiries made by Ethos Urban in preparing the SEE, as set out in their letter of 25 June 2020 and the enclosures therewith, disclose that no relevant public authority, including Council, holds any record which would evidence the rent at the relevant date.

Absent any evidence, the consent authority cannot be satisfied that Part 3, and cl 51, of SEPPARH applies. As the SEPP cannot be applied, there is no instrument to trigger the application of s7.32 of the Act.'

Councils review of the historical files may have not indicated anything different to the assumption that the buildings were affordable as at 28 January 2000 but nor did it prove that they were low cost and that is the relevant test under the SEPP ARH.

Based on the Councils report it is clear that the mandatory triggers under Clause 49(1) have not been satisfied and therefore monetary contributions levied under clause 51 do not apply.

2. Amend draft Consent Condition regarding Payment

Notwithstanding the above position of the applicant. If the Planning Panel is of a mind to impose the affordable housing contribution, we request that the Planning Panel amend the draft condition B2 to require the contribution be paid prior to the issue of an Occupation Certificate. This suggested amendment to the condition is in the Spirit and intent of the Ministerial Direction enabling deferment of S7.11 contributions prior to the issue of the Occupation certificate.



Summary

We trust that the Planning Panel in dealing with this matter will give due consideration to the two items listed above which is supported by legal advice.

Should the Planning Panel require any additional information prior to the meeting please contact the undersigned on 0405 449 150 or Zach Constantinou from Thirdi Group on 0478 773 678.

Regards



Andrew Martin *MPIA*
Director
Andrew Martin Planning Pty Ltd

CC

Luke Donovan
North Sydney Council