



12 September 2019

Laura Locke
Acting Director Regions, Sydney Region East
Planning Services
NSW Department of Planning, Industry and Environment
320 Pitt Street
SYDNEY NSW 2000

Dear Laura,

**Rezoning Review Application for 160 Burwood Road, Concord –
Planning Proposal PP2018/0003, City of Canada Bay Council**

On behalf of New Concord Developments Pty Ltd (the Proponent), we seek the Department's independent review and determination of a request for a Planning Proposal for 160 Burwood Road, Concord (PP2018/0003). The Planning Proposal was submitted to City of Canada Bay Council (Council) on 7 February 2019 and amended on 11 September 2019.

The Planning Proposal seeks an amendment to the Canada Bay Local Environmental Plan 2013 to enable the rezoning of the 3.9ha site from its current IN1 General Industrial zoning to a range of residential, commercial and recreational zones. The proposal seeks to list the existing Central Roasting Hall (Former Bushells Factory building) as an item of local environmental heritage item, which is to be retained and adaptively reused. Amendments to permissible heights and floor space ratio are also sought.

Background

The Planning Proposal process for the site was initiated in 2014 and involved a substantial measure of initial consultation with Council and the community by the Proponent, prior to lodgement of the application in July 2018. This is reflected in the progressive design evolution of the associated Concept Plan for the site over time and the supporting amendments to the Planning Proposal. Refer to Table 1.

The Planning Proposal has been subject to Council review, independent peer review (July 2018 and February 2019), defacto community consultation via social media and Council's website, and independent assessment by the Canada Bay Local Planning Panel (February 2019 version).

An events / actions timeline between February 2018 and August 2019 is provided in Attachment A.



Table 1: Comparison of CBLEP 2013 provisions, original Planning Proposal (June 2017) and subsequent amendments to the Planning Proposal dated July 2018, February 2019 and September 2019.

	Canada Bay LEP 2013	Original Planning Proposal (June 2017)	Amended Planning Proposal (July 2018)	Amended Planning Proposal (Feb 2019)	Amended Planning Proposal (Sept 2019)
Land Use Zoning	General Industrial IN1	B4 Mixed Use	B4 Mixed Use	B1 Neighbourhood Centre R3 Medium Density Residential RE1 Public Recreation	B1 Neighbourhood Centre R3 Medium Density Residential RE1 Public Recreation
Height of Building	12m	121.5m	12m, 22m, 25m and 46m	12m, 16m, 21m, 24m and 30m. RL 46.6 to reflect existing roof height of Central Roasting Hall	12m, 15m, 17m, 18m, and 21m. RL 46.6 to reflect existing roof height of Central Roasting Hall
FSR	1.0:1	1.95:1	1.6:1	1.5:1	1.25:1
Schedule 1 Additional Permitted Uses	None	Boat sheds, jetties, moorings, water recreation structures	Multi-unit dwellings	Light Industries (in the R3 zone)	No change.
Schedule 5 Environmental Heritage	None	None	None	Local significance item, Former Bushells Factory Building	Local significance item, Former Bushells Factory Building

Reason for Rezoning Review

This rezoning review is requested pursuant to *Section 3.34(5)(a) of the Environment Planning and Assessment Act 1979* in response to the actions of Council. Council has failed to make a determination more than 90 days after the initial Planning Proposal was submitted and has consistently denied the Proponent procedural fairness in its merit assessment of the Planning Proposal to date. Since formal lodgement, Council has repeatedly denied the Proponent's requests to consult with Staff and Councillors, while at the same time consulting with selected members of the community who oppose the development, one of whom is an ex-Mayor.



These circumstances are detailed in a letter addressed to Council dated 10 September 2019 which is provided in Attachment B.

On that basis, we also request that the Department be the Determining Authority on the matter.

Supporting Information

In support of this rezoning review request and related attachments, the following relevant documentation is also submitted for the Department's review process:

- Completed application form
- A copy of the Amended Planning Proposal, dated 11 September 2019, inclusive of Appendices A to O)
- Relevant correspondence with Council
- Cheque for payment of the Rezoning Review Fee

Please do not hesitate to contact myself or Carla Mamaril on 9327 6822 should you have any further queries or require additional information.

Yours faithfully,

LFA (Pacific) Pty Ltd

Alf Lester
Director

Attachments:

- *Attachment A – Events / actions timeline between February 2018 and August 2019*
- *Attachment B – Letter to Council*



TIMELINE OF THE PROJECT 2018

Roberts Day Urban Designers met with Council:
Director Planning & Environment, Strategic Planning Coordinator

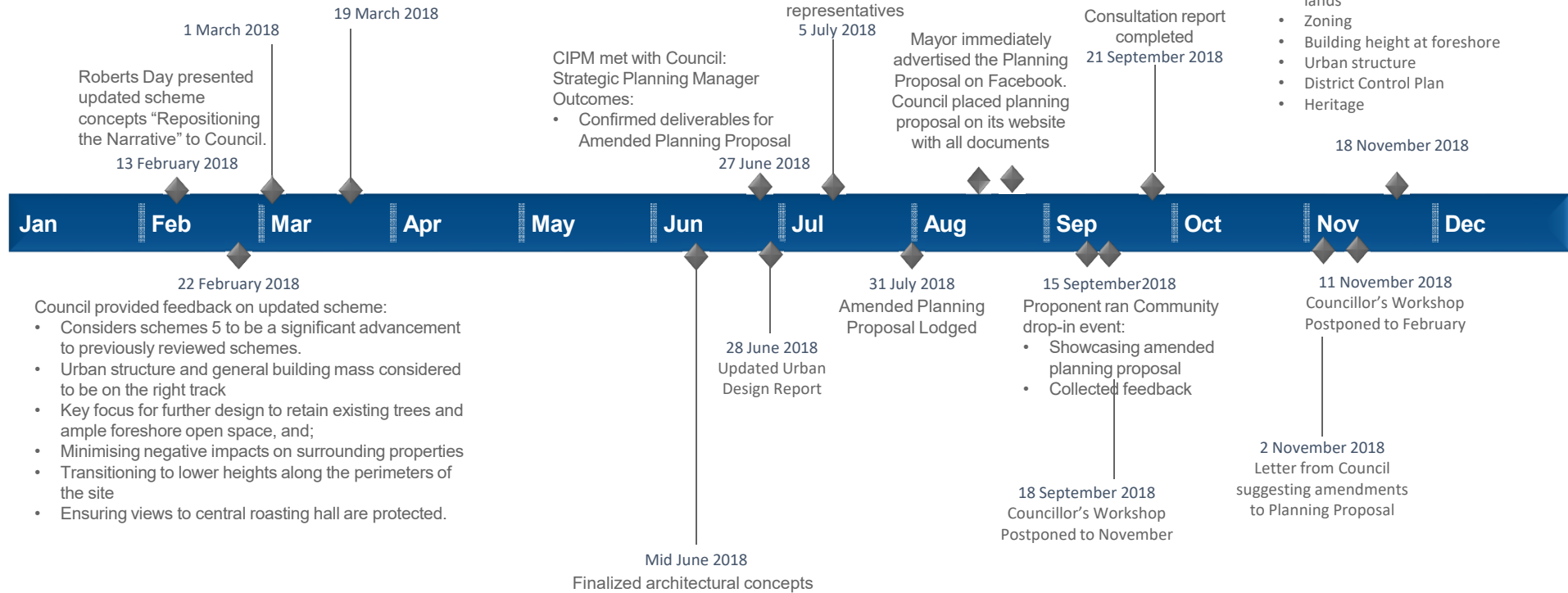
Outcomes:

- Council will favourably accept Planning Proposal with approx.1.5:1 FSR
- Suggest engagement strategy supplementing Council's own exhibition responsibilities
- Detailed matters for further review:
 - Size and shape of plaza
 - 8 storey building on eastern edge
 - Purpose and configuration of foreshore

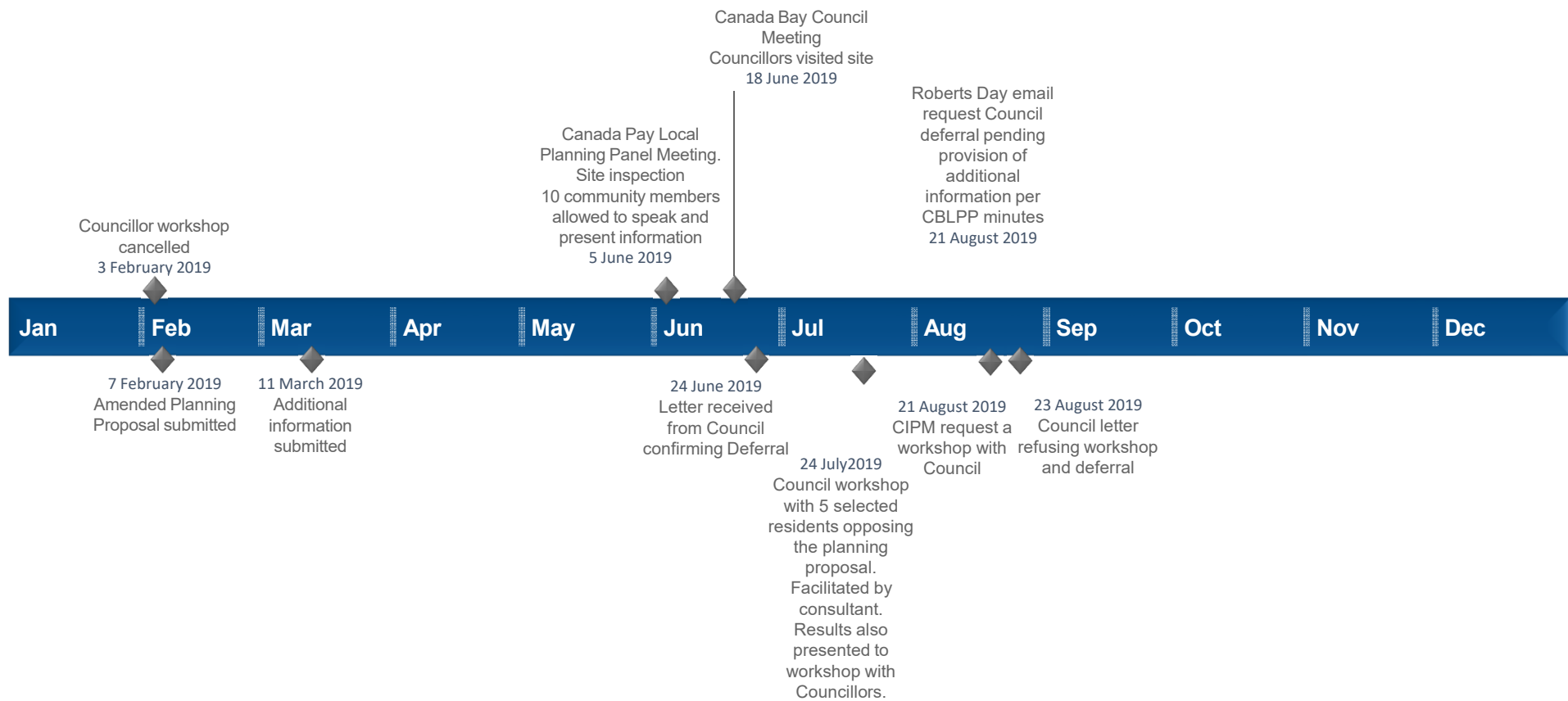
Meeting with Council Planning Manager

Discussed:

- Potential Loss of employment lands
- Zoning
- Building height at foreshore
- Urban structure
- District Control Plan
- Heritage



TIMELINE OF THE PROJECT 2019



Mills Oakley
ABN: 51 493 069 734

10 September 2019

Our ref:
AJWS/JZOS/3401453

Attention: Strategic Planning Department

All correspondence to:
PO Box H316
AUSTRALIA SQUARE NSW 1215

City of Canada Bay Council
1A Marlborough Street
DRUMMOYNE NSW 2047

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Hand Delivered

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IMMEDIATE ACTION REQUIRED

Dear Sir/Madam

**Request to Conduct Assessment of Amended Planning Proposal
Project: 160 Burwood Road, Concord (PP2018/0003) ('Planning Proposal')**

We act on behalf of the proponent, New Concord Developments Pty Ltd ('Client'), in respect of the above-mentioned Planning Proposal.

This letter has been prepared in support of a request to Canada Bay Council ('Council') to undertake an assessment of our Client's amended Planning Proposal, which accompanies this letter. In our opinion, it is necessary for that assessment to be undertaken to afford our client procedural fairness, which it has arguably been denied by the Council in their assessment of the (merits) of the Planning Proposal to date. The reasons in support of that assertion are set out as follows:

1. Council has not followed due process in its consideration of the Planning Proposal. Of particular concern is that our Client has never been provided with an opportunity to privately workshop the Planning Proposal with Council following the most recent Council meeting. In contrast, several closed meetings have occurred between Council officers and members of the community, and with local community action groups. This is a denial of procedural fairness in the legal sense, and creates a reasonable apprehension of bias, matters which we will canvass further later in this letter.
2. The Planning Proposal has been the subject of a 'de facto' social media public exhibition. Specifically, on receipt of the Planning Proposal, the mayor of Council posted a 'story' on his Facebook page effectively notifying the community and inviting merit based feedback. This unusual and additional level of public exhibition has undoubtedly contaminated the community's perception of the Planning Proposal and has influenced Council's own stringent merit assessment.
3. Our Client has requested an opportunity to present an amended concept plan as part of its Planning Proposal to respond to the advice and recommendations raised by the Local Planning Panel ('LPP') at the Meeting of Council on 5 June 2019; however, Council has denied our Client's request. This is apparent by a letter issued on behalf of Council dated 23 August 2019, which states:

"The deferral of the application [to consider the advice and recommendations of the LPP] is not an invitation to amend the Planning Proposal or submit a new development concept for the site."
4. The Planning Proposal has been the subject of an unprecedented additional level of community consultation. Put simply, Council has engaged in undue and ongoing discussions with a fractured segment of the local community by listening to a small community action group of

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approximately 5 persons, 1 of who is an ex-mayor of Council. This irregular consultation has subjected the Planning Proposal to a level of public inquiry comparable to a (post-gateway) development application, which has resulted in the Council undertaking a detailed merits assessment of the Planning Proposal, including extensive consideration of issues such as setbacks, overshadowing, landscaping and traffic congestion etc. (See: *See City of Canada Bay Council Meeting Agenda reports dated 5 and 18 June 2019*) in a manner that is strikingly inconsistent with the intent of paragraph 1.3 of the 'Guide to preparing planning proposals' prepared by the NSW Department of Planning and Environment ('Department') dated December 2018, which provides:

"A planning proposal relates only to a LEP amendment. It is not a development application nor does it consider specific detailed matters that should form part of a development application."

5. Council has scheduled a meeting to determine our Client's (unamended) Planning Proposal on **Tuesday, 17 September 2019**.

It is clear from the reasons outlined above that Council has unilaterally and without warning departed from the task at hand, i.e. the assessment of the Planning Proposal in the manner directed by the EPA Act and by the Department. Instead, the Council has proceeded down a different path – one comprising of a stringent assessment as to the detailed merits of the Planning Proposal and otherwise the appropriateness of a future development application on the land the subject of the Planning Proposal.

In summary, the Planning Proposal seeks to amend the *Canada Bay Local Environment Plan 2013* to rezone a 3.9 hectare parcel of land described as 160 Burwood Road, Concord ('Site') from its current IN1 industrial zoning to a range of residential, recreational and commercial zones in addition to increasing the maximum building height and Floor Space Ratio development controls. The Planning Proposal is notably consistent with the *Canada Bay Local Planning Strategy* adopted in 2010, which recommends consideration of alternative uses on the on the Site by 2020. Furthermore, and importantly, the LPP has endorsed the view that the Site's current context and location is not suitable for the continued or more intense use of industrial and urban services land and rather, that the Site should be rezoned to allow medium-density residential development, with a mix of local services and foreshore public open space.

As stated above, the LPP has recently recommended a number of Site specific items to be addressed prior to the Planning Proposal proceeding.

This letter accompanies our Client's amended Planning Proposal, which responds to the LPP's recommendations.

In the event that our Client's (unamended) Planning Proposal is determined by Council later this month, without an opportunity for a fair and impartial assessment of the accompanying amended Planning Proposal, it will undoubtedly be the last straw in a chain of events whereby **our client has consistently been denied procedural fairness**. Our Client clearly has a legitimate expectation that it will be given a chance to respond to the merit related issues raised by the community and more apparent, the recent recommendations of the LPP. This is particularly the case in circumstances where the Council has had a series of private meetings or briefings with community activists and indeed the Council's ex-mayor, who is objecting to the proposal. A denial of any such opportunity being given to our client will result in unfairness, consistent with New South Wales Supreme Court decision of Hoeben J in *Hemmes Trading Pty Ltd & Ors v State of New South Wales & Ors* [2009] NSWSC 1303 at [86], which provides:

"The minimum requirement is that the person be given an opportunity of answering the allegations or matters which have been raised."

Further, if Council were to make that determination, its reasons will be misdirected, as they will be founded upon considerations outside of the Planning Proposal process, and therefore will be considered legally irrelevant: *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* [1986] HCA 40.

Finally, any such determination will concern apprehended bias on the basis it will infer that Council did not undertake a neutral evaluation of the Planning Proposal: *Henroth Investments Pty Ltd v Sydney North Planning Panel* [2018] NSWLEC 112. In this sense, the test for apprehended bias will be satisfied, that is, whether a fair-minded lay observer might reasonably apprehend that the Council may not have brought an independent mind to its consideration of the Planning Proposal: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63 at [6].

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Against that background, our Client respectfully requests that the Council agree to defer the meeting later this month **until a full and fair assessment of the amended Planning Proposal package has been undertaken, which must include our client being given the same opportunity to meet with and brief Council staff and Councillors, as has been afforded to community groups and objectors.**

Yours sincerely



Anthony Whealy
Partner
Accredited Specialist Local Government & Planning

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