

10 September 2019

Our ref:  
AJWS/JZOS/3401453

**Attention: Strategic Planning Department**

All correspondence to:  
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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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