



New South Wales Government
Independent Planning Commission

Gateway Determination Review for 30-62 Barcom Avenue, Darlinghurst

Gateway Determination Advice Report

Chris Wilson (Chair)

1 May 2020

1 INTRODUCTION

1. On 7 April 2020, the NSW Independent Planning Commission (**Commission**) received from the NSW Department of Planning, Industry and Environment (**Department**) a referral to give advice pursuant to section 2.9(1)(c) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)* in relation to a planning proposal and Gateway determination in respect of 30-62 Barcom Avenue, Darlinghurst (the **Site**) within the City of Sydney Local Government Area (**LGA**).
2. On 17 July 2018, Clarincade Investments Pty Ltd (the **Proponent**) lodged a request with City of Sydney Council (**Council**) seeking to amend the Sydney Local Environment Plan 2012 (**SLEP**) to increase the maximum floor space ratio (**FSR**) and maximum height of building (**HOB**) at the Site (the **Planning Proposal**).
3. On 11 July 2019, as delegate for the Minister for Planning and Public Spaces (**Minister**), the Department issued a Gateway determination that the Planning Proposal should proceed.
4. On 4 September 2019, Council lodged a request to review the Gateway determination, seeking removal of condition 1(c) which states that the Planning Proposal is to be amended prior to community consultation “*to remove the proposed provision for a 6-star NABERS [National Australian Built Environment Rating System] Energy Commitment Agreement*”. Council is seeking to retain the provision for a 6-star NABERS Energy Commitment Agreement in the Planning Proposal.
5. The matter was referred by the Minister’s delegate to the Commission for advice. The letter accompanying the referral requested that the Commission “*review the planning proposal and Gateway determination and prepare advice concerning the merits of the review request. The advice should include a clear and concise recommendation to the Minister’s delegate confirming whether, in its opinion, the Gateway determination should be altered*”.
6. Mr Peter Duncan AM, Acting Chair of the Commission, nominated Mr Chris Wilson (Chair) as the Commission Panel providing advice on the Planning Proposal and the Gateway determination.

1.1 Site and Locality

7. The Department’s Gateway Review Justification Assessment (**Department’s Assessment**) accompanying the Department’s referral states that:

“The subject site is on the eastern fringe of the Sydney CBD in Darlinghurst and is within 800m walking distance of Kings Cross Station, 250m walking distance of bus stops on New South Head Road and 600m from St Vincent’s Hospital”.

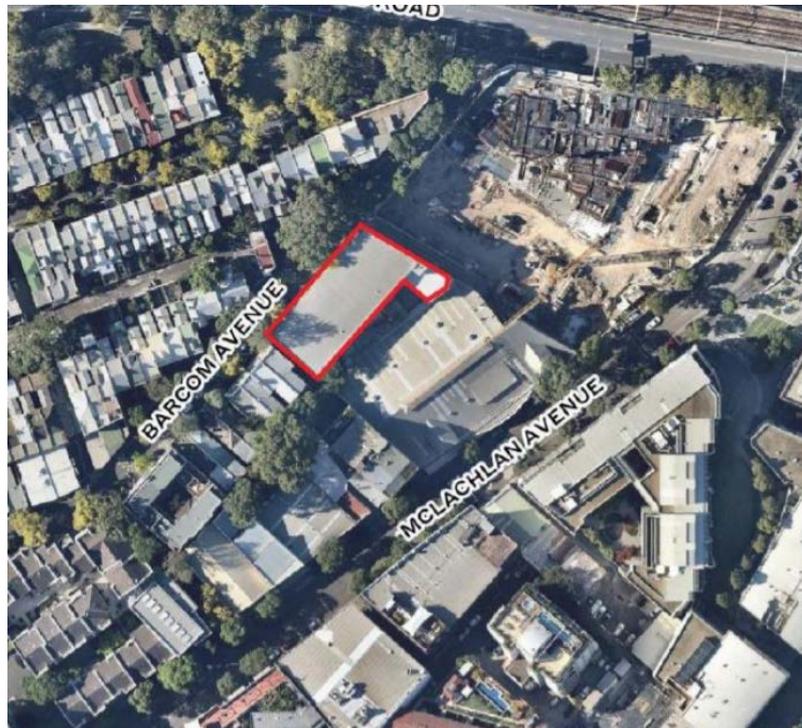
“The subject site is legally described as Lot B DP 111138 is irregular in shape with an area of 992.5m² with a direct frontage to Barcom Avenue of approximately 45m”.

“The site contains a part two-storey (fronting Barcom Avenue) part three-storey storage premises at the rear with a basement level... Currently, the building is used as a storage premises building and does not contain any on-site car parking”.

8. The location of the Site is illustrated in **Figure 1** below.
9. The Department’s Assessment states that under the SLEP, the Site is:
 - zoned B4 Mixed Use permitting residential accommodation and commercial

- premises;
 - has a maximum permitted FSR of 2:1; and
 - has a maximum building height of 15m.
10. The Department’s Assessment states that the Site’s current zoning is not proposed to be changed by the Planning Proposal.

Figure 1 – Site Location Map (Source: Department’s Assessment)



1.2 The Planning Proposal

11. The Department’s Assessment states that the Planning Proposal sought to amend the SLEP to provide a site-specific provision for the Site to permit the following development bonuses:
- *“increase the maximum building height from 15 metres (m) to 18m; and*
 - *increase the floor space ratio (FSR) from 2:1 to 3.75:1.”*
12. According to the Department’s Assessment, the bonus building height and floor space would only be afforded if:
- *“the entire building is used as a commercial premise (including the additional development);*
 - *there is no increase in car parking on the site; and*
 - *a 6-star National Australian Built Environment Rating System (NABERS) Energy Commitment Agreement is in place for new development.”*

1.3 History of the Planning Proposal and Gateway Determination

13. **Table 1** below provides a history of the Planning Proposal.

Table 1 – History of the Planning Proposal

10 October 2018	Council submitted the Planning Proposal to the Department for a Gateway determination
11 July 2019	Department issued a Gateway determination that the Planning Proposal should proceed, with conditions.
22 July 2019	Council notified the Department of its intention to lodge a request to review the Gateway determination
4 September 2019	Council lodged a request to review the Gateway determination
6 April 2020	Department's request to Commission to review Gateway determination
7 April 2020	The Commission received the request to review the Gateway determination

1.4 The Department's Decision

14. The Department's Assessment states:

"the Department issued a Gateway determination with conditions on the basis that the Planning Proposal:

- *is consistent with the Greater Sydney Region Plan, will give effect to the Eastern City District Plan and the relevant section 9.1 Ministerial Directions and state environmental planning policies;*
- *provides additional employment opportunities on the Sydney CBD fringe near a cluster of existing business premises;*
- *facilitates a development with a bulk and scale that is consistent with the surrounding area and desired future character of the locality;*
- *achieves a building envelope that is cognisant of the heritage items, conservation area and adjoining residential buildings; and*
- *would have minimal environmental, social and economic impacts."*

15. The Department's Assessment states: *"The Department considered the planning proposal had strategic and site specific merit subject to a number of modifications that were imposed through Condition 1 of the Gateway determination"*.

16. Condition 1 from the Department's Gateway Determination, dated 11 July 2020 is set out below:

"1. The Planning Proposal is to be amended prior to community consultation as follows:

- (a) update the objectives and intended outcomes section of the planning proposal to align with the explanation of provisions;*
- (b) amend the explanation of provisions to explain that to be afforded the bonus building height and floor space:

 - *the entire building cannot be used for residential accommodation or tourist and visitor accommodation;*
 - *the additional building height and floor space is restricted to commercial premises uses; and*
 - *car parking associated with the additional building height and floor space is prohibited;**
- (c) amend the planning proposal to remove the proposed provision for a 6-star NABERS Energy Commitment Agreement [Condition 1(c)]; and*
- (d) update the project timeline."*

17. The Department's Assessment concluded that:

“the inclusion of a NABERS rating provision in the LEP is not supported as it would:

- *restrict the ability to utilise other acceptable verification methods, to demonstrate compliance with the NCC [National Construction Code 2019];*
- *be inconsistent with commitments made by the NSW Government under the ABCB [Australian Building Codes Board] Intergovernmental Agreement to limit local governments from setting prescriptive standards that override the NCC;*
- *require the detailed building design to be known at the planning proposal phase; and*
- *duplicates the requirements for a 6-star NABERS energy rating in the site-specific DCP.”*

2 THE COMMISSION'S CONSIDERATION

2.1 Material considered by the Commission

18. In this determination, the Commission has carefully considered the following material (**material**):

- the Proponent's Planning Proposal Justification Report dated 17 July 2018, prepared by Ethos Urban Pty Ltd (**Ethos**) and its accompanying appendices;
- Council's Planning Proposal Report dated August 2018;
- the Department's Gateway Determination and accompanying Gateway Determination Report, dated 11 July 2019;
- Council's Justification for Gateway Review Request, dated 4 September 2019 and accompanying attachments;
- the Proponent's Response to Request for Gateway Review, prepared by Ethos, dated 23 October 2019; and
- the Department's Assessment dated 6 April 2020.

2.2 The Provision for a 6 Star NABERS Energy Commitment Agreement

Council Comments

19. The Department's Gateway Determination Report stated that the inclusion of a NABERS rating provision in the LEP is not supported as it would restrict the ability to utilise other acceptable verification methods, to demonstrate compliance with the National Construction Code 2019 (**NCC**). Council, in its Justification for Gateway Review Request dated 4 September 2019 stated:

“The NCC 2019 allows for energy efficiency to be demonstrated through four performance methods:

- (a) JV1 – NABERS Energy for Offices;*
- (b) JV2 – Green Star;*
- (c) JV3 – Verification using a reference building; and*
- (d) JV4 – Building envelope sealing.”*

20. Council, in its Justification for Gateway Review Request also stated:

“the City chose to include a NABERS-specific ESD mechanism in the Planning Proposal as an industry-supported ratings scheme and the least onerous verification method for the proponent, given that a NABERS rating would be required in any case under the mandatory CBD program. The City also considers NABERS to be the most transparent and straightforward verification method of those offered in the NCC 2019 with which to establish a building’s energy efficiency at both design and as-built stage. We also consider that the NABERS Commitment Agreement process, through independent review and verification, will deliver the expected building performance providing greater confidence to the developer, owner and tenant.”

21. The Department’s Gateway Determination Report stated that the inclusion of a NABERS rating provision in the LEP is not supported as it would be inconsistent with commitments made by the NSW Government under the Australian Building Codes Board (**ABCB**) Intergovernmental Agreement to limit local governments from setting prescriptive standards that override the NCC. In response, Council, in its Justification for Gateway Review Request stated:

“Given that the NCC presents the minimum necessary energy efficiency ratings required for development, Council considers that achieving a rating in excess of this is still operating within the intentions of the code.

In Council’s opinion, seeking to achieve a NABERS rating in excess of 5.5 stars for the subject development does not contradict the objectives or detail of the NCC, as it does not represent a “local government intervention” in relation to the Intergovernmental Agreement.”

22. The Department’s Gateway Determination Report stated that the inclusion of a NABERS rating provision in the LEP is not supported as it would require the detailed building design to be known at the planning proposal phase. In response, Council, in its Justification for Gateway Review Request stated:

“The NABERS Energy Commitment Agreement does not require detailed design to be known at the planning proposal stage. Stipulating this requirement in the Planning Proposal is a ‘flag’ to ensure that achieving a 6 star NABERS Energy rating becomes a parameter for the design, in much the same way that a designer would work towards key yield targets, numbers of parking spaces and so forth.”

Having this requirement in the LEP gives legislative weight to the sustainability target, ensuring that the building design work is revisited until it demonstrates, via the simulation software, that the correct NABERS rating can be achieved. A Commitment Agreement gives the certainty that buildings perform as expected, which is key.

23. The Department’s Gateway Determination Report also stated that the inclusion of a NABERS rating provision in the LEP is not supported as it would duplicate the requirements for a 6-star NABERS energy rating in the site specific DCP. Council, in its Justification for Gateway Review Request stated:

“The Sydney DCP 2012 currently contains sustainability targets in exceedance of the NCC (in transition phase). These provisions were amended in August 2018 and require all new office developments to achieve 5.5 star NABERS Energy with a Commitment Agreement.”

24. Council also stated in its Justification for Gateway Review Request:

“It is important that the required NABERS Energy Commitment Agreement be stated in the Planning Proposal (and consequently as an LEP clause) as the City considers the requirement to be a ‘development standard’ that must be adhered to in order to secure the additional height and floor space being proposed.

Whilst it is acknowledged that the requirement is repeated in the accompanying draft site-specific DCP, this is done so as a lead-in to the ways in which the NABERS rating may be achieved on the site contained in the draft DCP, for example through the inclusion of photovoltaics.

In essence, the LEP will provide the legislative framework and the DCP will provide the detail on how this can be achieved.”

25. Council also stated in its Justification for Gateway Review Request:

“The Department comments that the same sustainability outcome could be achieved using the site-specific DCP amendment and the NCC. In response, the City would point out that the Planning Proposal was submitted for Gateway six months prior to the update to the NCC ESD targets in May 2019 – such that the significantly lower 2016 standards (almost 40% lower) still applied. Furthermore, the higher NCC 2019 ESD targets have a transition period until 30 April 2020 during which the proponent can choose to select the 2016 or 2019 NCC requirements. The draft site-specific DCP ESD target is higher still.

Due to the discrepancy in targets between the NCC (2016 and 2019) and the draft site specific DCP, the City feels that the proponent may be able to argue for whichever target they preferred, particularly given that DCPs lack the legislative strength of an LEP. This leaves the City with no guarantee that the 6 star NABERS Energy target will be achieved. It could result in an ESD outcome approximately 40% lower.”

Proponent’s Consideration

26. In its letter to the Department dated 28 October 2019, the Proponent raised concerns that the imposition of NABERS in a LEP is a broader policy issue and is not appropriate for the Planning Proposal:

“given the relatively minor scale of the Planning Proposal, we contest that the imposition of NABERS in a planning instrument such as an LEP is a broader policy issue that should be resolved between Department of Planning, Industry and Environment (DPIE) and Council. Clanricarde Investments Pty Ltd should not be a test case nor be unduly hindered by this broader policy issue, which will have a detrimental impact on the delivery of the project potentially setting it back by up to 6 months.”

“we note that the Gateway Review to incorporate NABERS into the LEP is not appropriate and represents a misapplication of provisions/contents that can be included within an LEP pursuant to Clause 3.14 of the EP& A Act. The imposition of a NABERS commitment is a detailed design matter that is more appropriate for application in a DCP, as per the current application of this requirement by Council. Furthermore, the imposition of this commitment in the LEP is highly unnecessary as it replicates a control which is currently contained within the DCP and can be implemented with a VPA [Voluntary Planning Agreement].”

27. In the same letter, the Proponent stated that it was :

“prepared to enter into a Voluntary Planning Agreement (VPA) with Council (as a

condition of a revised Gateway) to enable the provision of a 6 STAR NABERS or equivalent, which would be applicable only to the additional floor area being sought under the Planning Proposal. The VPA would be prepared, adopted and executed with Council prior to the finalisation of the Planning Proposal and would be applicable at the Development Application stage.”

Department's Assessment

28. The Department's Assessment stated that inclusion of a 6-star NABERS Energy Commitment Agreement required detailed building design to be known at the Planning Proposal stage:

“The Department understands that NABERS ratings cannot be determined until 12 months after the development has been in operation. Therefore, there is no way to pre-emptively ensure that a development will achieve the required rating at the planning proposal phase when the detailed design is not yet known.”

29. The Department's Assessment stated that the inclusion of a NABERS rating provision in the LEP is inconsistent with the ABCB Intergovernmental Agreement:

“The inclusion of a minimum NABERS energy requirement would undermine commitments made by the NSW Government under the Australian Building Code Board Intergovernmental Agreement. Under the agreement the NSW Government has committed to limit local governments from setting prescriptive standards that prevail over the NCC.”

30. The Department's Assessment acknowledges that the Planning Proposal lodged by the Proponent did not include a proposed provision for a NABERS Energy Commitment Agreement and that Council has not provided adequate justification for the inclusion of such an agreement:

“The planning proposal lodged by the proponent did not include a proposed provision for a NABERS Energy Commitment Agreement, this was subsequently included by Council prior to reporting the proposal to the Central Sydney Planning Committee. Council did not provide adequate justification for the inclusion of a NABERS energy commitment agreement or demonstrate that the 6-star rating can be achieved.”

31. The Department's Assessment stated that the inclusion of a 6-star NABERS Energy Commitment Agreement as a provision in a LEP is not supported:

“The Department noted in its Gateway determination that whilst it supports ecological sustainable development, the planning proposal was conditioned to remove the provision for a 6-star NABERS Energy Commitment Agreement as the inclusion of the proposed provision in an LEP is not supported at this stage of the planning process when the detailed design is not yet known, a 5.5-star commitment is already required under Council's DCP and the National Construction Code requires achievement of a similar and mandatory requirement.”

32. The Department's Assessment stated that limiting the verification method to only one method is overly restrictive and unnecessary:

“NABERS is just one of four energy efficiency verification methods that can be used for office buildings to demonstrate compliance with the NCC. The other verification methods include Green Star, reference buildings and building envelope sealing. For office buildings, the NCC requires a minimum 5.5-star NABERS energy rating or equivalent.”

“Allowing the energy requirements to be verified by multiple methods provides flexibility, promotes innovation and accommodates existing rating tools. The Department considers that limiting the verification method to only one method is overly restrictive and unnecessary.”

33. The Department’s Assessment concluded that:

“The Department recommended under condition 1(c) of the Gateway determination that the proposed NABERS provision be removed from the planning proposal, noting that appropriate standards can be achieved through the site-specific amendment to the Sydney DCP 2012 and the National Construction Code”.

Commission’s Findings

34. The Commission acknowledges that the more stringent energy efficiency requirements of the NCC 2019 were subject to a 12 month transition period (from the NCC 2016) which ended on 30 April 2020. Consequently, development the subject of the Planning Proposal would now be subject to the higher energy efficiency targets of the NCC 2019 which require commercial buildings to achieve a minimum 5.5-star energy efficiency rating or above.
35. The Commission acknowledges that a 6-star energy efficiency commitment would be required by the draft site specific DCP which accompanies the Planning Proposal as stated by Council and the Department in paragraphs 23 and 31. Further, the Commission also notes that the Proponent has offered to enter into a Voluntary Planning Agreement (VPA) with Council to enable the provision of a 6-star NABERS or equivalent, applicable to the additional floor area being sought.
36. The Commission acknowledges that NABERS is just one of four energy efficiency verification methods that can be used to demonstrate compliance with the NCC as stated by the Department in paragraph 32 and set out by Council in paragraph 19.
37. The Commission agrees with the Department’s findings referred to in paragraph 32 that allowing the energy requirements to be verified by multiple methods provides flexibility, promotes innovation, and accommodates existing rating tools and that limiting the verification method to only one method is overly restrictive and unnecessary.
38. However, the Commission does not agree with the Department’s view referred to in paragraph 28 that the inclusion of a 6-star NABERS Energy Commitment Agreement in the LEP would require detailed building design to be known at the Planning Proposal stage. The Commission generally agrees with Council’s views referred to in paragraph 22 that a 6-star energy efficiency rating can be achieved over the life of the Project. The Commission further agrees that an early commitment to a 6-star energy efficiency rating would help facilitate the achievement of the target leading up to, during, and beyond the development assessment process.

39. The Commission notes that the ABCB Intergovernmental Agreement sets out objectives with the aim to “*limit local government interventions*” and “*discourages the setting of prescriptive standards for Building and Construction that override the performance requirements in the NCC*” (see objective 1.3). The Commission agrees with the Department’s findings referred to in paragraph 29 that the inclusion of a NABERS rating provision in the LEP is inconsistent with the ABCB Intergovernmental Agreement as set out above.
40. The Commission agrees with the Department that the inclusion of a 6-star NABERS Energy Commitment Agreement as a provision in a LEP generally duplicates the energy efficiency requirements of both the NCC and the draft site specific DCP as set out in paragraphs 34 and 35. This is specifically the case given the NCC now requires all commercial buildings to achieve equivalent to a 5.5-star NABERS rating or above.
41. The Commission finds that the inclusion of a requirement for a 6-star NABERS Energy Commitment Agreement in the Planning Proposal is not justified and consequently, the Gateway determination should not be altered to remove Condition 1(c). The reasons for the Commission’s position are as follows:
- There already exists adequate requirements for the achievement of a superior energy efficiency outcome for the proposed commercial building, noting:
 - the application of the NCC 2019 which requires a minimum 5.5-star energy efficiency target or above for commercial buildings;
 - the requirement for a 6-star NABERS Energy Commitment Agreement in the draft site specific DCP accompanying the Planning Proposal; and
 - the willingness of the Proponent to enter into a VPA with Council committing to a 6-star NABERS Energy Commitment Agreement for the development;
 - The proposal to require a 6-star NABERS Energy Commitment Agreement as a development standard in an LEP is inconsistent with the ABCB Intergovernmental Agreement which aims to discourage the setting of prescriptive standards for Building and Construction that override the performance requirements in the NCC;
 - The proposal to require a 6-star NABERS Energy Commitment Agreement as a development standard in a LEP may set a precedent with the potential to undermine the NCC 2019; and
 - While noting Council’s view that NABERS is the most transparent and straightforward energy efficiency verification method, allowing the energy requirements to be verified by multiple methods, provides flexibility and promotes innovation.

3 THE COMMISSION'S ADVICE

42. The Commission has undertaken a review of the Gateway determination as requested by the Department.
43. Based on its consideration of the Material, the Commission finds that the Gateway determination should not be altered for the reasons set out in paragraphs 34 to 41 dated 1 May 2020.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a horizontal line at the bottom.

Chris Wilson (Chair)
Member of the Commission