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Mary Su
Senior Planning Officer
Department of Planning, Industry and Environment
320 Pitt Street, Sydney, NSW 2001

By email: mary.su@planning.nsw.gov.au

Dear Mary

30-62 Barcom Avenue, Darlinghurst – Planning Proposal to Amend Sydney Local Environmental Plan 2012 – Justification for Gateway Review Request

The City of Sydney wishes to formally lodge a request to review the Gateway Determination for 30-62 Barcom Avenue, Darlinghurst, dated 11 July 2019.

The City advised of our intention to lodge a review request on 22 July 2019. An extension to the deadline for submission of the request was granted by the Department of Planning, Infrastructure and Environment until 4 September 2019.

The City is seeking review of condition 1(c) of the Gateway Determination. We seek its deletion from the determination but have included a suggested alternative approach to address the Department's concerns whilst still achieving an appropriate sustainability outcome on the site. The City's justification for the gateway review request follows below.

Background

Proposal summary

The Planning Proposal seeks to increase the maximum floor space ratio (FSR) and building height controls that apply to 30-62 Barcom Avenue, Darlinghurst under Sydney Local Environmental Plan (LEP) 2012.

The amendment would allow for a building with an FSR of 3.75:1 (increased from 2:1) and a height of 18m (increased from 15m), subject to car parking and use restrictions and the delivery of sustainability outcomes, namely a 6 star NABERS Energy rating secured via Commitment Agreement.

An associated site-specific amendment to Sydney Development Control Plan (DCP) 2012 is also proposed. This establishes detailed controls around the building envelope and supports the sustainable development opportunity presented through redevelopment of the site via the encouragement of a green roof.

The amendments would facilitate a development concept consisting of a building with an additional two storeys of commercial floor space on top of the existing warehouse

building, which would remain as a self-storage facility. The additional floor space would accommodate a co-working office space, with kitchen and end-of-trip facilities, within a 5 storey building.

The proposed use is permissible on the site and the resultant built form is considered to respect the streetscape and the adjoining heritage conservation area.

In September 2018 Council and the Central Sydney Planning Committee resolved to approve the Planning Proposal for submission for a Gateway Determination on the grounds that strategic merit is demonstrated through sustainability improvements and the opportunity to support Sydney's start-up business community via the provision of flexible co-working office space.

Request for Gateway Determination

The City requested a Gateway Determination from the Greater Sydney Commission in early October 2018. Various requests for further information and clarification of the Planning Proposal's intentions and objectives were made by the Department of Planning, Industry and Environment (the Department) until May 2019. Copies of email correspondence can be found at **Attachment A**.

Gateway Determination

A Gateway Determination was issued on 11 July 2019. The determination requires the Planning Proposal to be amended prior to community consultation. The required changes are to amend the explanation of provisions (and related objectives and intended outcomes) to clarify more specifically the restrictions to land use types and car parking which are to apply to the additional floor space and height and to remove the provisions for a 6 star NABERS Energy Commitment Agreement.

A copy of the Gateway Determination, cover letter and gateway determination report can be found at **Attachment B**.

The City supports the changes required by the Gateway Determination to the objectives and explanation of provisions in the Planning Proposal which relate to the description of land use types that are to be accommodated in the resulting floor space. These changes were worked through collaboratively to better reflect the intended outcomes of the Planning Proposal and the City has agreed the changes with the Department prior to issue of the Gateway Determination.

However, the City does not support the required removal of the provision for a 6 star NABERS Energy Commitment Agreement from the Planning Proposal. This Gateway Review Request seeks a review of this element of the Gateway Determination (specifically Gateway Determination condition 1(c)).

As required by *A guide to preparing local environmental plans*, this is the City's justification for why an alteration to the Gateway Determination is warranted and provides responses to the issues raised by the original gateway decision maker.

Key issues raised in the Gateway Determination report

In justification of the required deletion of the NABERS clause, the Gateway Determination report highlights four key issues. In the gateway decision maker's view, inclusion of such a clause:

- 1) restricts the use of other verification methods to demonstrate energy efficiency in the National Construction Code (NCC) 2019;
- 2) requires detailed building design to be known at the planning proposal stage;
- 3) duplicates the requirements of the draft site-specific DCP amendment;
- 4) sets a prescriptive local standard which prevails over the NCC, inconsistent with the NSW Government's commitment to the Australian Building Code Board Intergovernmental Agreement.

The commentary in the Gateway Determination Report also raises that Council has not provided adequate justification for the inclusion of NABERS or demonstrated that the 6 star NABERS Energy rating can be achieved, particularly when the existing storage premises is proposed to be retained.

It is the Department's conclusion that appropriate ecologically sustainable development (ESD) standards can be achieved through the site-specific amendment to the DCP and the NCC.

The City's response to the key issues

The City wishes to respond to these issues as follows:

- 1) The proposed clause restricts the use of other verification methods

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.

The National Australian Built Environment Rating Scheme (NABERS) is a rating tool that has been in operation since 1999. It is a robust and clear energy rating process that has strong industry support and take up. NABERS ratings are well established in the Australian market, with two thirds of offices in NSW with a NABERS rating. An energy rating is the most popular type of NABERS rating.

The benefits of pursuing a good NABERS Energy rating have been quantified, with the Investment Property Database Australia Markets Results (2014) showing:

- a 10.6 per cent average return on buildings that achieve a 5 star NABERS Energy and higher, compared to 8.5 per cent return for 4 - 4.5 star and 7.6 per cent for 3.5 star or lower; and
- high performing NABERS Energy buildings have a vacancy rate of 0.4 percentage points lower than the average lower performing buildings, have 17 per cent higher net income (\$/sqm), have a 21 per cent higher capital value (\$/sqm), and a longer weighted average lease expiry by 45 per cent.

The inclusion of NABERS and Green Star as performance verification methods in the 2019 revision of the NCC was due to strong industry advocacy. It will also lead to better quality control outcomes, as both rating methods require independent review and verification of the performance simulation, unlike other verification methods.

Several Federal, State and industry programs and policies reference or require NABERS Energy ratings. These include:

- Commercial Building Disclosure Program (Federal);

- NSW Government Resource Efficiency Policy (State); and
- Property Council of Australia's *A Guide to Office Building Quality* (industry).

Under the Building Energy Efficiency Disclosure Act 2010 and regulatory Commercial Building Disclosure (CBD) Program, the NABERS Energy rating for commercial office space over 1,000 sqm is required to be disclosed whenever it is offered for sale or lease. Disclosure of the NABERS Energy rating before sale or lease assists prospective buyers and tenants to make informed decisions regarding energy efficiency and greenhouse gas emissions data. The subject development aligns with the CBD Program's mandatory disclosure threshold of 1,000 sqm. It would likely be a duplication of effort and resources for the proponent to choose an alternative verification method from the NCC 2019 via which to demonstrate the energy efficiency of their development.

The Property Council of Australia classifies office buildings according to criteria which influence a building's ability to attract occupants and sustain rental performance. Key criteria include building quality, size, floorplate, environmental rating, lifts, amenity and services, as outlined in *A Guide to Office Building Quality* (2019). It reflects industry aspirations and best practice by quality grade, defining four building categories – Premium, Grade A, Grade B and Grade C. The Guide requires all Grade buildings to achieve a NABERS Energy 5.5 star energy rating or higher, via a Commitment Agreement, or equivalent, to align with the NCC requirements.

A Commitment Agreement can be an excellent first step to establish a clear intent and pathway towards achieving a particular NABERS Energy rating.

A NABERS Energy Commitment Agreement is a commitment by a building owner to design, build and commission a building to a selected NABERS star rating. It is a contractual commitment and ensures a focus between the NABERS national administrator and a building owner to achieve actual operational performance. The communication amongst the design team and other relevant stakeholders during the design and construction stages, as part of the Commitment Agreement process, enables a focus on the achievement of a rating target.

NABERS Energy Commitment Agreements are applicable to new commercial office building projects or to upgrades and refurbishments of the base building, tenancy or combined tenancies and base building (known as a whole building rating). Commitment Agreements are also applicable to premises that are newly occupied, renovated or where operational changes are being made. The Commitment Agreement covers the design, construction, commissioning and tenancing phases of the project as well as a 12 month operational period to allow operational data to be collected to prove performance.

The benefits of NABERS Energy Commitment Agreements to proponents, building owners and tenants are:

- (a) reduced base building energy costs;
- (b) costs to design and construct a higher efficiency building can be minimised by including energy targets in the planning and design phase of a development;
- (c) a building rating system which allows for the achievement of corporate sustainability targets;
- (d) a building rating system which allows for developers, building owners and tenants to promote and market environmental performance whilst the building is being designed, constructed and leased;
- (e) NABERS Rating Estimate associated with a NABERS Energy Commitment Agreement can be used to show compliance with energy efficiency Performance Requirements JP1 and JP3 of National Construction Code Volume One Energy Efficiency Provisions 2016; and

- (f) NABERS Energy modelling associated with a NABERS Energy Commitment Agreement can be used to claim Energy points in Green Star - Design & As Built.

A Commitment Agreement is also a readily comprehensible document which can be verified by non-technical personnel. This is important when documentation to demonstrate energy efficiency is to be assessed by Development Assessment planners. Most planners would not have the skills to understand and verify NCC verification methods that require an engineering background. The site-specific DCP will be amended to clarify that when a proponent executes a Commitment Agreement a copy of the completed Commitment Agreement and independent energy assessment report must be provided with their development application to the planning authority.

A Commitment Agreement to achieving the NABERS rating, which is confirmed 12 months after occupation, also offers additional confidence to the developer, owner and tenant by bridging the gap between design and performance. This process encourages buildings to perform to the designed target, and is the only verification method listed in the NCC 2019 which offers this. A ratings scheme embedded with its own internal quality-control procedures is critical, given current building regulation issues, to rebuild community confidence in the NSW property market. It also provides greater confidence to the developer, owner and tenant that the building will perform as designed.

In summary, 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.

An explanation of how NABERS Energy Commitment Agreements for office developments operates and how this would apply to the subject development is included at **Attachment C**.

- 2) The proposed clause requires detailed building design to be known at the planning proposal stage

A NABERS Energy Commitment Agreement is a commitment by a building owner to design, build and commission a building to a selected NABERS star rating. It is a contractual commitment between the NABERS national administrator and a building owner to achieve actual operational performance. The communication amongst the design team and other relevant stakeholders during the design and construction stages, as part of the Commitment Agreement process, enables a focus on the achievement of a rating target.

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.

The Planning Proposal does not stipulate a timeframe for execution of the Commitment Agreement – this is expected after the detailed design stage. The LEP clause would act to ensure that the proponent requests ESD consultants and the rest of their design team

to meet a key sustainability target in their design work. Following that design, the ESD consultant will be able to simulate a NABERS rating estimate that the building is likely to achieve in operation. It is at this stage that the proponent would execute the Commitment Agreement, to accompany a detailed development application. This process could be clarified in the site-specific DCP amendment if necessary.

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.

Because a Commitment Agreement is a contractual commitment to achieve actual operational performance, it is usual for the ESD design work to aim to exceed the required energy rating. Independent verification via simulation further helps to ensure that key sustainability targets are achieved post-construction and in operation.

3) The proposed clause duplicates the requirements of the DCP amendment

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.

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.

4) Inconsistency with the Intergovernmental Agreement

The Intergovernmental Agreement “discourages the setting of prescriptive standards [by local governments] for *Building and Construction* that override the performance requirements in the NCC” (Recital 1.3 (h)).

The National Construction Code is a performance based code containing all of the performance requirements for the construction of buildings. It provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and

construction of new buildings, and new building work in existing buildings, throughout Australia.

To establish energy efficiency for an office building via the NABERS rating verification method, the performance requirement is for a minimum 5.5 star NABERS Energy Commitment Agreement. This NCC prescribes the *minimum* necessary standard, not a *maximum*. As a corollary, this allows for buildings seeking to achieve high levels of environmental performance to exceed this. 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 – it does not represent a “local government intervention” in relation to the Intergovernmental Agreement.

There are already many examples where NSW varies the NCC to ensure more stringent targets than other states, including BASIX, bushfire protection and health and safety requirements in entertainment venues.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 also makes allowance for local planning provisions which encourage or offer incentives for the adoption of measures beyond BASIX requirements. This is directly comparable with the case in question.

Given that the NCC presents the *minimum* necessary energy efficiency ratings required by for development, the City contends that seeking to achieve a rating in excess of this is still operating within the intensions of the code.

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.

As part of the process to amend the controls, a cost benefit analysis was undertaken to support the inclusion of a NABERS Energy Rating with a Commitment Agreement. In addition, consultation with tier one developers took place in February 2018, which demonstrated that at that time developers were comfortable with a 5.5 star NABERS Energy requirement.

Given that a 5.5 star rating is now required by the City as standard, the City views the requirement for a 6 star NABERS Energy Commitment Agreement in this Planning Proposal as an appropriate stretch-target to demonstrate ESD benefits over and above the standard requirements in the Sydney DCP 2012. This is particularly important given that the development site is to receive an uplift in height and floor space as a result of the planning proposal – thereby acting as an incentive to achieving energy efficiency outcomes beyond the standard requirements.

This stretch-target will also help to support the NSW Government's commitment to net-zero emissions by 2050. This “aspirational” objective is intended to provide a clear statement of the government’s intent, commitment, and level of ambition and to set expectations about future emissions pathways that will help the private sector and government agencies to plan and act” (*Fact Sheet: Achieving Net-Zero Emissions by 2050*, NSW Government Office of Environment and Heritage, 2016).

5) Inadequate justification for NABERS Energy 6 star

The Department asked the City on 29th October 2018 to provide more detail on the need to achieve a 6 star rating for the building, noting that previous planning proposals had

nominated 5 stars. On 31st October 2018, the City provided written commentary to follow up a telephone conversation on the same matter. The Department did not ask the City to justify our choice of NABERS out of the four possible energy efficiency verification methods available under the NCC.

The City advised the Department that the 6 star Energy rating was being nominated for two reasons. Firstly, if the revised NCC was to create a minimum standard of 5.5 star NABERS Energy Commitment Agreement for commercial office developments, the City felt that a 6 star requirement for additional floor space secured through a planning proposal was reasonable. Secondly, the commercial premises in question is low-rise and it is far easier for low rise buildings to achieve 6 stars than taller commercial buildings, which usually achieve 5.5 stars. Additionally the site and building in question lend themselves to a large array of solar panels, which would be a very cost effective and efficient way for the building to work towards achieving 6 stars. The City provided the Mirvac Bay Centre at Pyrmont as a recent example of a similar lower rise commercial building having achieved 6 star NABERS Energy.

The Department did not request of the City further evidence to support the 6 star NABERS Energy requirement. If this is needed, please see Table A at **Attachment D** that identifies 12 buildings, 5 in NSW that have achieved 6 star NABERS Energy (including many that retrofitted existing older buildings). This demonstrates achieving 6 stars NABERS Energy is not a challenging request.

It is worth noting that it is easier for a smaller building to achieve a higher NABERS Energy rating, especially for this proposal with only two office floors. For high rise office buildings, the energy required to actively pump fresh air around the building requires good design to manage the energy consumption. An office that takes up two levels (GFA of approximately 1,289m²) could be passively heated and cooled, or otherwise utilise a hybrid heating, ventilating and air conditioning system, which entails a mix of active and passive systems - such as openable windows to allow fresh air intake with an automated component. Neither option would result in a large draw on energy compared with a high rise building. For this proposed development, the absence of enclosed car parking, which would add lighting and mechanical ventilation demands, would further benefit the potential rating that can be achieved.

It is also worth noting that this is why the City-wide ESD provisions adopted in August 2018 in Sydney DCP 2012 were raised to 5.5 stars NABERS Energy and not 6 stars across the board. This is in recognition of all office developments in our local government area which include low, medium and high rise developments. Premium high-rise office buildings would find a 6 star rating more challenging to achieve.

The Gateway Determination Report also identifies that the proponent has raised concerns about achieving the 6 star rating when the existing storage premises is proposed to be retained.

The storage premises will not impact the NABERS Energy rating, as long as energy use associated with the storage space is separately metered. This was clarified in correspondence with the Department on 17 December 2018.

The 6 star NABERS Energy Commitment Agreement will only apply to the base building's central services and common areas such as heating and cooling systems, lifts and lobby lighting. For Base Building ratings, the net lettable area of all spaces that are leased or available for lease for office tenancies in the building are considered. Accordingly, the energy consumption related to the base building services for the storage facility area can be excluded, provided it is properly sub-metered and that a

NABERS accredited assessor ensures the configuration of the building and its uses reflects this when performing the rating assessment.

What the City seeks / what alteration is warranted

The City requests that the provision for a 6 star NABERS Energy Commitment Agreement be retained in the Planning Proposal, with the Gateway Determination amended accordingly such that no change to the objectives, intended outcomes and explanation of the provisions is required in this regard.

As an alternative, the City suggests that the Planning Proposal (and accompanying site-specific DCP) be amended to include the words “or equivalent” after the requirement for a 6 star NABERS Energy Commitment Agreement. This would allow for the same sustainability outcome to be achieved but would allow the proponent the option of demonstrating this via one of the other three verification methods identified in the NCC 2019.

It should be noted that the alternative to including such an ESD provision in the LEP is for the same energy efficiency outcome to be captured in a voluntary planning agreement, tied to the uplift in height and floor space ratio on the site. This is not the City’s preferred outcome, given that it would require the environmental benefits to be ‘costed’ in some way and that, going forward, capturing these sort of benefits would become an onerous and time-consuming process for all involved. It is anticipated that securing environmental benefits through energy rating stretch-targets will become increasingly common as the City moves to action the NSW commitment to net-zero emissions by 2050 via our Performance Standard Pathways project (further information provided in **Attachment E**).

Should you wish to speak with a Council officer about the above, please contact Samantha Bird, Specialist Planner, on 9265 9333 or at sbird@cityofsydney.nsw.gov.au.

Yours sincerely,



Ben Pechey
A/Executive Manager
Strategic Planning and Urban Design

Attachments

- Attachment A – Email correspondence between the City and Department clarifying aspects of the Planning Proposal prior to issue of Gateway Determination
- Attachment B – Gateway Determination, cover letter and gateway determination report
- Attachment C – Background information on Commitment Agreements and how

they would apply to the subject development

- Attachment D – Table A - 6 star NABERS Energy developments in New South Wales
- Attachment E – The City's Performance Standard Pathways project