

4 August 2020

To Mr Stephen Barry
Director
Independent Planning Commission
Level 3, 201 Elizabeth Street Sydney NSW 2000

By email: stephen.barry@ipcn.nsw.gov.au

Dear Sir

Re: Gateway Review Justification Assessment

We act for Northern Beaches Council (**Council**) in connection with 2 and 4 Nooal Street and 66 Bardo Road, Newport (**Site**). We refer to the Gateway Review Justification Assessment (Department Reference No GR_2020_NBEAC_001_00) (**Assessment**) made by the Department of Planning, Industry and Environment (**Department**). The Assessment demonstrates that the Department has conducted the review using a narrow approach, being one which is not substantiated by the policies or guidelines of the Department. In following this narrow approach, the Department has failed to independently consider the matters raised by the Council. Instead, the recommendation was reached on the basis of existing assessments.

1 Background

On 28 November 2017, the Council resolved not to support a planning proposal which sought to rezone the Site from E4 Environmental Living to R2 Low Density Residential to enable 'seniors housing' on the land (**Planning Proposal**). On 30 January 2018, a rezoning request was submitted to the Department and referred to the Sydney North Planning Panel (**Panel**). The Panel recommended that the planning proposal had merit and additionally recommended that all land along Nooal Street up to Irrubel Road ought to be zoned R2 Low Density Residential. The Council is of the view that this decision was an overreach of the Panel's discretion, and this view is borne out by the assurances made by the Department that the proposal is only to refer to and include the Site.

The Council was obliged as the Principal Planning Authority to submit the Planning Proposal for Gateway determination. The Department issued a Gateway determination in October 2019, with a range of conditions.

The Council notified the Department on 24 October 2019 of its intention to seek a Gateway review and proceeded to do so by a letter dated 12 December 2019. The basis of the request was, in summary, that the Planning Proposal has not demonstrated strategic or site specific merit and that the Gateway determination appears to be based on inaccurate information in relation to the flood and estuarine

hazards that affect the site. The Assessment was then prepared in response to the request from the Council.

2 Gateway Review Justification Assessment

2.1 Narrow approach

The Assessment concluded that the Planning Proposal should proceed without change to the Gateway conditions. That conclusion was reached on the basis that a Gateway review process should only be undertaken where new information or circumstances exist, or where consideration needs to be given to the alteration of conditions of the Gateway determination.

For evidence of this narrow approach, we refer to paragraphs 3 – 6 on page 11 of the Assessment, replicated below:

The considerations raised by Council's review request are not consistent with the intention of the Gateway review process. The Gateway review process gives Council or a proponent the opportunity to request that the determination is reviewed considering new information or circumstances. The Gateway review process may also be used to consider alterations to the conditions of the Gateway Determination.

A Gateway review is not an opportunity for Council to challenge the Department's assessment or determination decision, without any additional information, change in circumstances, or justification which had not been previously considered by the Panel or the Department.

The Gateway review documentation submitted by Council for 2 and 4 Nooal Street and 66 Bardo Road states "The Gateway Review challenges the Gateway Determination issued by the DPIE..." and calls the Department's Gateway determination report "deficient and flawed." Council does not raise new considerations, but revisits the considerations already assessed by the Gateway determination report, arguing that these haven't been adequately addressed and should preclude the proposal from progressing.

The Department's position is that the issues raised by this Gateway review have been previously considered and where necessary will be mitigated by further investigation, provision of information, or by other measures.

In our view, this narrow approach to the Gateway review process is infected with error. There is no basis for this approach in the guidelines or policies under which the Department operates and further comments are made regarding this at 2.2 below. The above extracts demonstrate that in fact there has been no review because the Department has not turned its mind afresh to the issues at hand; there has been no independent consideration of the issues and the recommendation was instead reached by relying on existing assessments.

2.2 Lack of basis for narrow approach

The Assessment proceeds on the basis that a Gateway review process deals primarily with new information or circumstances and, consequently, the matters raised by Council are not properly to be raised in this review process. This is a narrow approach to the review process, which is not substantiated in departmental policies or guidelines. We refer in particular to the *Planning Circular PS18-012: Independent reviews of plan making decisions (Planning Circular)* and the Department's guide, *Local Environmental Plans: A guide to preparing local environmental plans (LEP Guide)*.

The Planning Circular provides two paragraphs regarding the review process after a Gateway determination has been made. Included in those paragraphs is an explicit statement that advice on alteration of the Gateway determination should give consideration to the Council's submission. No part of the Planning Circular provides support for the narrow approach taken by the Department.

The LEP Guide includes more substantial commentary on the review process. At page 4, the LEP Guide lists some grounds on which the Council can, (in its role as Principle Planning Authority), base its request for a review. These grounds are:

- the conditions imposed by the Gateway;
- the decision (i.e. whether or not to proceed); or
- the requirement to resubmit the planning proposal to the Gateway for further consideration.

Section 6.4 of the LEP Guide sets out further details about the review process, including a section dedicated to the preparation of a preliminary report by the Department. Further, Attachment 3 to the guide includes a diagram on the Gateway determination review process. In our view it is significant that there is no mention of the approach that the Gateway review process should be constrained to the review of new information or circumstances.

In our view, the approach taken by the Department is not mandated by its policies and guidelines and is in fact in direct conflict with those policies and guidelines. Further, given that local environmental plans "are the main planning tool to... ensure local development is done appropriately",¹ a full and independent consideration of the relevant issues is called for.

2.3 Lack of independent consideration of the issues

Firstly, we refer to paragraphs 3 – 6 on page 11 of the Assessment extracted in section 2.1 above. Secondly, throughout the Assessment, the Department relies on the assessment by the Panel and the assessment forming the Gateway determination to respond to the matters raised by Council in the review request. The reliance on these prior assessments is so significant that the complete answer to matter number 8 is that it has "been previously addressed as part of the Gateway determination report".

Further, it appears to have been considered relevant to the decision maker's recommendation on page 15 that the Council's review request "reiterates Council's original objection". The recommendation section goes so far as to state that the review was motivated by the "Council's refusal to accept the assessment by the Sydney North Planning Panel and subsequently the conclusions and justification by the Department's Gateway determination".

The above evidence forces the conclusion that in the review process the Department has not independently considered the matters raised by the Council. Instead, the recommendation set out in the Assessment was undertaken with a closed mind and was reached solely on the basis of existing assessments. In our view, this is a serious error.

Given the context of the concerns raised above, the Council asks that the Independent Planning Commission (**Commission**) undertakes a full and independent Gateway review. We would be grateful if you

¹ *Local Planning and Zoning*, Department of Planning, Industry and Environment, accessed 4 August 2020 <<https://www.planning.nsw.gov.au/Plans-for-your-area/Local-Planning-and-Zoning>>.

would confirm the Commission's agreement to ensuring that the review is now properly and independently undertaken having regard to all of the matters raised by the Council in its review request.

Yours sincerely



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