

# Waverley Council submission to the Independent Planning Commission – 50 Botany Street planning proposal – Gateway review.

## Introduction

Waverley Council welcomes the opportunity to provide a submission to the Independent Planning Commission in relation to the gateway review for a planning proposal at 50 Botany Street, Bondi Junction.

It is noted that the Commission will have received all relevant background relating to the planning proposal inclusive of relevant reports produced by Council to accompany the documents submitted by the Proponent. Therefore, provided in this submission is Council Officers' response to key objections raised by the Proponent their submissions to the DPHI as part of the request for a gateway review.

## Response to key points raised by the applicant as part of their Gateway review request

### 1. Proponent objection: lawfulness of the requested affordable housing contribution.

#### Waverley Council Affordable Housing Contribution Scheme

The *Waverley Affordable Housing Contributions Scheme (AHCS)* aims to ensure that lower income households continue to live and work locally within the Waverley LGA, to facilitate a socially diverse and inclusive community.

The scheme applies to the entire Waverley LGA and outlines two ways in which monetary contribution rates will be levied.

- A levy of 1% of the total gross floor area will be sought to apply to all new residential flat buildings, independent living units, multi-dwelling housing and mixed-use developments (shop top housing) only.
- A levy of the total gross floor area will apply to sites receiving uplift through planning proposals, with a target rate of 10% of total gross floor area. Sites that have previously received uplift through the planning proposal process and have also provided a contribution in line with Council's AHCS will not be subject to the prescribed levy of 1% of the total gross floor area at DA stage referred to above.

In relation to planning proposal sites, the levy is to be calculated as a percentage across the whole development in accordance with the market value of residential floorspace at the time of the planning proposal being assessed and before a Gateway Determination. These rates are outlined on [Council's website](#) and are updated on a regular basis in line with current market conditions.

## Waverley Council Affordable Housing Contribution Scheme Implementation Planning Proposal

Council's AHCS was accompanied by a planning proposal seeking to implement the scheme to facilitate contributions under 7.32 of the EP&A Act in relation to the 1% levy on development applications. In addition, the planning proposal proposed the inclusion of a new additional local provision and new schedule in the WLEP which would list the planning proposal sites which have received uplift and their relevant contribution payable. This is not a unique approach and is one that is consistent with other LEPs, such as in the City of Sydney LEP (7.13B and Schedule C6).

The planning proposal was first lodged with the DPHI in April 2021 and after receiving a gateway determination on 25 October 2023, was publicly exhibited 2 November 2023 – 18 December 2023. The planning proposal was finalised and gazetted in the WLEP on 16 August 2024.

The inclusion of the proposed clause and schedule for upzoned sites was supported by the DPHI throughout the planning proposal process but was deferred from being implemented under section 3.36 (3) of the EP&A Act 1979. The deferral was justified on the basis that Parliamentary Counsel did not include clauses which relate to blank schedules into an LEP as outlined in the below extract from DPHI plan finalisation report dated June 2024, as follows:

*“The Department recommends Council’s proposed ‘Affordable housing contributions on Planning Proposal sites’ provision (Clause 6.14) and supporting schedule (Schedule 7 Planning Proposal Land) be deferred from the making of this LEP, pursuant to section 3.36(3) of the EP&A Act 1979 until such time as there is planning proposal land available to list in the Schedule. Publishing a blank schedule is not consistent with the current drafting conventions for LEPs.*

*There may be opportunity for Council to seek the inclusion of the deferred provisions when a site-specific rezoning seeks to apply the provision to land and list it in the proposed Schedule. Legal drafting of any such provision would occur at that time.*

*Notwithstanding this, any future planning proposal will be subject to the requirements and plan-making process outlined in the Local Environmental Plan Making Guidelines (August 2023). Should such a planning proposal be submitted for Gateway it should include an explanation of how it seeks to apply the provision to the site and thereby give effect to the proposed provision.”*

In line with the above discussion from the DPHI plan finalisation report, the subject planning proposal is consistent with this approach.

### Planning proposal process

Part of the Proponent's argument against the gateway determination issued is based on the premise that Council has mis-represented or been misleading with regard to the planning proposal as submitted by the Proponent, by proposing to introduce a site-specific clause into the WLEP.

Council has not mis-characterised the planning proposal. It is standard practice for Council to take carriage of a planning proposal submitted by a private proponent and refine the proposal in a way it sees appropriate, this includes by way of site-specific provisions in the Local Environmental Plan relating to a raft of different matters. Precedent exists to this point in most LEPs within NSW and Council has precedent on a number of different sites around the LGA.

In addition, on page 28 of the *LEP Making Guidelines (August 2023)* in the 'Planning assessment by council' section (pre-gateway) it is noted:

*"A planning proposal can be changed prior to a council decision or during the council meeting. If this occurs, the planning proposal should be updated following the council decision and prior to referral of the planning proposal to the Department for a Gateway determination."*

Notwithstanding existing precedent on the matter, this statement alone speaks to the flexibility around developing and refining a planning proposal throughout the pre-gateway process.

In addition, throughout the reporting process to the Waverley Local Planning Panel and Council, Council Officers reports have clearly described that the Proponent submitted planning proposal sought to provide 'a contribution toward affordable housing'. Council has consistently proposed that the best approach is to be via inclusion in the WLEP, in line with the Waverley AHCS policy and consistent with the Waverley AHCS planning proposal implementation previously discussed in this submission. This is also in line with Council Officers assessment in relation to the strategic merit test as discussed throughout the Council planning proposal document itself.

#### DPHI support of the subject planning proposal

In addition to DPHI support for the introduction of this approach to levying affordable housing contributions on planning proposal sites as part of the implementation planning proposal, the DPHI has also supported the proposed mechanism and contribution throughout the subject planning proposal as follows:

- Support for the planning proposal to receive a gateway determination and granting Council Local Plan Making Authority (LPMA).
- Initial refusal of the gateway review request put forth by the Proponent.

#### Local Planning Panel and Council support

The planning proposal was considered by the Waverley Local Planning Panel (WLPP) on the 26 June 2024 and in providing their advice, unanimously supported the planning proposal and approach to apply the AHCS to the subject proposal.

The subject planning proposal has also been supported by way of resolution of Council on two separate occasions.

## **2. Proponent objection: quantum of the requested affordable housing contribution**

As discussed earlier in the submission, the AHCS sets a 10% target for sites receiving uplift via the planning proposal process. It is considered that the subject proposal would receive a value 'uplift' from rezoning to a residential use, despite no increases to development standards due to the change from a low-value SP2 zone to a high-value R3 medium density residential zone. The consideration of 'uplift' is consistent with the definition provided by the Greater Sydney Region Plan (the Region Plan) which speaks to 'the uplift in land value created as a result of a rezoning decision, which should be measured using a consistent viability test and core assumptions' as well as 'uplift' in the Department of Planning, Housing and Infrastructure Guidelines for the preparation of Affordable Housing Contribution Schemes which also refers to the objectives of the Region Plan.

*2.1 The quantum of the AHC proposed by Council is unreasonable as it will place an arbitrary (and overly onerous) financial burden on the future development of the Site.*

#### *2.1.1 Process to determine feasible contribution*

A detailed account of the process which has occurred to date in relation to the proposed AHCS contribution is summarised as follows:

##### Pre-planning proposal #1 – Previous landowner

Prior to the sale of the site from previous landowner Telstra, Council met with and provided pre-planning proposal advice for the potential rezoning. A summary of events is provided as follows:

- High level pre-planning proposal lodged on 13 April 2022.
- Meeting with Proponent and consultant team on 2 May 2022 to discuss.
- Written advice provided to Proponent on 28 June 2022 which included reference for any future planning proposal to review and consider the Waverley AHCS

##### Pre-planning proposal #2 – Current landowner

Following purchase of the site, the current landowner lodged a scoping proposal as part of a pre-planning proposal for Council feedback. A summary of events is provided as follows:

- Scoping report lodged as part of pre-planning proposal on 7 December 2023.
- Meeting with Proponent and consultant team on 18 December 2023.
- Written advice provided to Proponent on 21 December 2023 which included reference for any future planning proposal to review and consider the Waverley AHCS.

##### The subject planning proposal

Throughout the planning proposal, Council has undertaken a process that is transparent on the issue of the affordable housing contribution and its calculation.

A detailed summary of the process to date, in relation to determining a contribution toward affordable housing is provided as follows:

- 19 January 2024: the proposal, as lodged by the Proponent outlined a contribution for affordable housing to be provided with no specific monetary amount provided.
- 15 February 2024: in lieu of any nominated contribution amount being provided at lodgement, Council officers reiterated the application of any contribution to be provided in line with the Waverley AHCS.
- 25 March 2024: some 66 days after the lodgement of the proposal, the Proponent submitted a letter of offer to enter into a voluntary planning agreement, with a proposed contribution amount of \$100,000 with no supporting justification or feasibility provided.
- 28 March 2024: Council officers advised that this offer could not be accepted as it did not align with the calculation method envisaged in Council's AHCS.
- 17 April 2024: Council subsequently commissioned suitably qualified consultant Hill PDA, to undertake a feasibility study to determine a suitable amount. The feasibility study was based on the concept scheme provided and used industry benchmark rates to determine the relevant costs. Hill PDA have undertaken a number of other Affordable Housing Contributions Schemes for councils in New South Wales.
- 3 May 2024: an initial first draft report was provided to Council which found a contribution of \$2,455,735 viable.

- 6 May 2024: an initial draft report was provided to the Proponent for review who was asked to provide feedback into the key assumptions used if desired (costs, interest rates, developer margin etc.).
- 7 May 2024: Council and the Proponent met to discuss the draft report. In the meeting, the Proponent outlined the proposed feasible amount as being unviable, however subsequently provided an informal 'one-time only' offer of \$500,000. Council Officers advised that they could not accept the updated offer of \$500,000 due to the lack of adequate justification provided and that the appropriate contribution amount should be determined by the feasibility study.
- 14 May 2024: a builder's tender was provided by the Proponent, this was subsequently provided to Hill PDA for review.
- 22 May 2024: Council commissioned a Quantity Surveyor (QS) to undertake a peer review of the builder's costs due to significant disparity between the Hill PDA estimated costs and the builder's tender.
- 30 May 2024: the QS report was completed and provided to Hill PDA for review. It was also subsequently provided to the Proponent on 3 June 2024. The QS report resulted in an increase in construction costs from the initial Hill PDA draft report but still estimated lower than the builder's quote.
- The QS costs were adopted for the purposes of updating the feasibility study in which an updated report was provided on 20 June 2024, resulting in a reduced contribution amount of \$1,530,313. The updated report was provided to the Proponent on 21 June 2024.
- The Proponent subsequently commissioned its own peer review of the feasibility study and assessment. This study was provided to Council on 24 June 2024 and found no viable contribution amount, contradicting previous offers from the Proponent.
- 24 June 2024: the Proponent feasibility study was provided to Hill PDA who reviewed the documentation. No subsequent changes were recommended to the feasibility study.
- 16 July 2024: a more comprehensive feasibility study was provided by the Proponent to Council. This was subsequently provided to Hill PDA for review on 17 July 2024.
- Following multiple considerations of evidence and inputs provided by the Proponent, on 12 August 2024, Council's consultant finalised the feasibility study which proposed a contribution amount of \$1,652,738 equating to a 6.75% contribution in the context of the proposed concept scheme (at \$28,839/sqm) or 9.27% contribution when translated against Council's benchmark rates for Bondi Junction in the AHCS of (\$21,000/sqm).

#### Feasibility assumptions and inputs

It is noted that the Proponent has put forth a number of points contesting some of the key assumptions in the feasibility study within Hill PDA report, specifically relating to:

- (a) The gross realisation of the project in terms of total sales value (\$24,645,855).
- (b) Profit and risk margin (17%)
- (c) Escalation of gross realisation (3.5%)

As outlined in the feasibility study which forms part of the attachments for the planning proposal, all of the assumptions were adequately justified by Hill PDA based industry best practice and regular and extensive work that Hill PDA undertakes in the area of development feasibility and in particular, previous work completed on affordable housing contribution schemes.

Each issue raised by the Proponent was put forward to Hill PDA to undertake an objective review and incorporate any relevant changes into the study. Should the Commission seek further information to this regard, Council can provide records of responses by Hill PDA to these matters.

### 2.1.2 Translation of proposed contribution with Waverley AHCS benchmark rates.

It is noted that in their submission, the Proponent argues that “the percentage of the AHC proposed by Council is materially misrepresented as Council seek to impose a contribution rate which is almost 40% higher than the rate identified in Council’s own feasibility report”. This point of contention is a simple misunderstanding from the Proponent’s perspective which has been explained in simple terms in the planning proposal and also in Council reports. A basic explanation is provided as follows.

The proposed final contribution amount is \$1,652,738 or a 6.75% contribution rate based on the final sales rates (\$28,839/sqm) adopted by Hill PDA for the concept scheme. In other words, \$1,652,738 divided by \$28,839/sqm is 6.75%. The contribution percentage detailed in the WLEP must align with Waverley’s published AHCS rates. To equate the viable contribution (of \$1,652,738) to our published AHCS rates of \$21,000/sqm for Bondi Junction, the contribution translates to 9.27% of total gross floor area (\$1.65m/ \$21,000). This means that 9.27% of total gross floor area is to be dedicated to affordable housing as part of any future development application as in-kind floor space or as a monetary contribution. This is explained in Table 1.

Table 1 Explanation of translation of contribution amount

		<b>Concept scheme (sales rate of \$28,839sqm)</b>	<b>AHCS benchmark rates of \$21,000sqm for Bondi Junction</b>
A	Viable contribution (\$)	\$1,652,738	\$1,652,738
B	Adopted Sales rate (sqm)	\$28,839	\$21,000
C	Amount of affordable housing <b>(A divided by B)</b>	57.31	78.70
D	Total GFA	849	849
E	AH % of total development <b>(C divided by D)</b>	6.75%	9.27%

### 2.1.3 Contradictions in Proponent’s argument around feasible contribution amount

The Proponent’s financial offers have varied throughout the process, and includes;

- providing no monetary offer upfront, despite numerous previous advice regarding the need to provide a contribution, aligned with Council’s policies,
- providing an initial offer of \$100,000 with no justification or basis,
- providing a subsequent ‘one-time’ verbal offer of \$500,000, with no justification or basis which was later redacted, and
- the Proponent arguing that based on their commissioned study no contribution amount is feasible, contradicting previous offer amounts of \$100,000 and \$500,000.

In addition, the Proponent has not been transparent regarding demolition and construction related costs. This includes the position put forth by the Proponent that they were responsible for the costs borne for the removal of the large telecommunications tower that previously existed on site. Despite numerous requests from Council to the Proponent to provide evidence

to this effect, the Proponent was not forthcoming in providing such evidence, even though the provision of which would have resulted in a reduction in the feasible contribution amount payable.

## **Conclusion**

The planning proposal as presented, and process undertaken to date is one that is both typical and in line with best practice and the relevant guidelines. Specifically, as addressed throughout the submission, this includes:

- Council's proposed mechanism via inclusion of site-specific clause in the WLEP being both lawful and appropriate for the circumstances, having previously been supported by the DPHI on multiple occasions.
- Council having undertaken a robust, transparent and evidence-based process to determine an appropriate feasible contribution in close consultation with the Proponent and in line with the relevant guidelines.

The Commission should also be aware that due to the initial refusal of a Gateway review by the DPHI, Council has already exhibited and made a decision to finalise the planning proposal. Public exhibition occurred from 5 November 2024 – 5 December 2024 and Council resolved, at the Strategic Planning and Development Committee to finalise the planning proposal (as previously granted Local Plan Making Authority) on 4 March 2025.