

21 February 2025

Mills Oakley
ABN: 51 493 069 734

Your ref: IRF25/37
Our ref: AJWS/JZOS/3745037

Attn: Claire Mirow
NSW Department of Planning, Housing and Infrastructure
4 Parramatta Square
12 Darcy Street
Parramatta NSW 2150

All correspondence to:
PO Box H31
Australia Square NSW 1215

By Email:

Contact

Partner

Dear Claire

Request for the Department of Planning, Housing and Infrastructure to reconsider its denial of the Gateway Review Request (FR-2024-13) concerning Planning Proposal No. PP-2024-104

We continue to act for Bondi Exchange Pty Ltd ('Proponent') in relation to the proponent led site-specific planning proposal no. PP-2024-104 ('PP') for land at 50 Botany Street, Bondi Junction ('Site').

We refer to the letter issued by the Department of Planning, Housing and Infrastructure ('Department') to the Proponent on 22 January 2025 ('January Letter'), which indicated that the Proponent's request for a review of the gateway determination issued by the Department in relation to the PP on 11 October 2024 ('Gateway Determination') had been denied on the basis that it was 'not eligible'. Specifically, the January Letter provided:

The Department has carefully considered your request for Gateway review and the supporting documentation provided, including the additional information. The Department has determined that the Gateway for the planning proposal for land at 50 Botany Street, Bondi Junction (PP-2024-104) be upheld without amendment as the Gateway review is not eligible for review and adequate justification has not been provided. Accordingly, the Gateway determination will not be altered.

In our view, the Department's decision in the January Letter to deny the Proponent's request for a review of the Gateway Determination is **untenable** for the following reasons:

- The Department's decision is one that purports to exercise a power that it does not have;
- In exercising this non-existent power, the Department has acted inconsistent with its own policies regarding these types of matters as set out in the *Local Environmental Plan Making Guideline – August 2023* ('Guideline'); and
- A departure from the Guideline without notice to the Proponent amounts to a breach of procedural fairness in the handling of the Proponent's request for a review of the Gateway Determination.

Each of the above reasons are set out in further detail below.

Against that background, and on behalf of the Proponent, we respectfully request that the Department re-consider the Proponent's request for a review of the Gateway Determination and confirm that the request is eligible and subsequently, as required by the Guidelines, prepare an assessment report and issue the review to the Independent Planning Commissioner ('IPC') for consideration.

We respectfully request that the Department provide a response to this letter no later than **COB, Friday, 28 February 2025**, as the Proponent has been recently informed that Waverley Council ('Council') will be considering the post-Gateway PP at the next Council meeting on 4 March 2025.

In circumstances where the Department does not agree with this request within the stated time, we anticipate that we will receive instructions from the Proponent to immediately commence proceedings in either the Land and Environment Court of NSW or the Supreme Court of NSW without further notice to the Department to seek an order in the nature of *mandamus* to compel the Department (i.e. a public authority) to discharge and perform its public duty to progress the Proponent's request for a review of the Gateway Determination to the IPC.

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1. **The Department has overreached its administrative function as part of the Proponent's request for review of the Gateway Determination**
 - 1.1 As the Department is aware, the Guideline sets out the policy framework in relation to applications by either proponents or local councils (as planning proposal authorities) to review of gateway determinations.
 - 1.2 There is nothing contained within the Guideline (or Division 3.4 of the *Environmental Planning and Assessment Act 1979* ('**EP&A Act**')) that provides the Department with a broad discretionary power to deny a request for review of a gateway determination based on the merits of the justification provided within that request.
 - 1.3 Instead, it is clear from pages 45 and 46 of the Guideline, that the Department's role in a request for review of a gateway determination **is purely one of administrative function** to:
 - (a) check that the request for review is 'eligible' having regard to the relevant time limitations regarding notification and lodgement of a review;
 - (b) check that the request for review is accompanied by all the required information;
 - (c) prepare an assessment report to be issued to the IPC;
 - (d) participate in any meeting to brief the IPC, if requested; and
 - (e) notify the proponent and council of any altered gateway determination.
 - 1.4 Furthermore, it is clear from page 46 of the Guideline, that it is the Minister (or delegate) who possesses a discretionary power as part of any review of a gateway determination to alter the relevant gateway determination and decide whether the planning proposal should or should not proceed, after consideration of the recommendations of the IPC.
 - 1.5 In that sense, the Department's view on the merits of the justification provided in a request for review of a gateway determination are **entirely irrelevant as it is not the Department who is empowered to carry out the review**.
 - 1.6 If the Department were to exercise a (non-existent) discretionary power beyond its administrative function as part of a request for review of a gateway determination, **this would clearly be inconsistent with the Guideline**.
 - 1.7 This is precisely what has occurred in relation to the Proponent's request for a review of the Gateway Determination. The effect of the Department's decision is that:
 - (a) the framework which permits the Proponent with a right to review the Gateway Determination has been breached;
 - (b) the Department has exercised a power that it does not have without notice to the Proponent, which has denied the Proponent procedural fairness to have the Gateway Determination independently reviewed by the IPC and Minister (or delegate).
 - 1.8 The position taken by the Department in the January Letter to deny the Proponent's request for a review of the Gateway Determination is clearly **untenable**.
 - 1.9 For completeness, we confirm that the Proponent's request for a review of the Gateway Determination satisfies the procedural requirements on page 45 of the Guideline as:
 - (a) the review application was submitted to the Department within the required time limitation (being 42 days after the Proponent notified the Department of their intent to request a review, which was within 14-days of the Gateway Determination); and
 - (b) was accompanied by the required information (i.e. an application form, a copy of the PP and supporting information, justification for the alteration of the Gateway Determination and disclosure of any reportable political donations).
2. **The reasons provided by the Department in the January Letter for denying the Proponent's request for review of the Gateway Determination are inconsistent with and not compatible with the Guideline**
 - 2.1 Notwithstanding it has been established that the Department does not benefit from a discretionary power to deny a request for review of a gateway determination based on the

merits of the justification provided within that request, we go onto consider and respond to the reasons provided by the Department in the January Letter below.

2.2 At the outset, we note that the Department provided 4 reasons for denying the Proponent's request for review of the Gateway Determination, which are reproduced below:

- *The Gateway review request is ineligible as it seeks to appeal an administrative condition (1(a) of the Gateway determination, on the grounds that the proponent objects to the proposed affordable housing contributions rate proposed for the site, which is a component of the planning proposal that does not form part of the Gateway determination conditions.*
- *The review request does not provide adequate justification as to why Condition 1 (a) of the Gateway is considered inappropriate and should be reconsidered.*
- *The proposal adequately demonstrates strategic and site-specific merit and any inconsistencies with the applicable section 9.1 Directions have been justified in accordance with the terms of the Directions.*
- *The proposal will support the delivery of housing on underutilised land, ongoing use of the telecommunications tower on the eastern part of the site, and supply of affordable housing in the Waverley LGA.*

Department's first and second reasons

2.3 In relation to the Department's first and second reasons, the Department will recall that:

- (a) on 13 December 2024, Willowtree Planning issued a letter in response to the Department's email correspondence dated 10 December 2024 and confirmed that the proposed alteration to the Gateway Determination that was sought as part of the Proponent's review request was as follows:

It is requested that Condition 1(a) of the Gateway Determination be deleted, as the Proponent's PP does not seek to amend the WLEP to include a site specific AHC provision.

For completeness, it is requested that Condition 1(a) to be replaced as follows:

1. *Prior to exhibition, the proposal is required to be updated to:*
 - a) *Require the removal of any requirement for the payment of an affordable housing contribution.*

- (b) on 17 December 2024, Willowtree Planning issued an email to the Department confirming that in the alternative to Condition 1(a) as proposed in the letter dated 13 December 2024, the Proponent considered the following alternative wording to also be appropriate:

1. *Prior to exhibition, the proposal is required to be updated to:*
 - a) ~~*Require the removal of any requirement for the payment of an affordable housing contribution*~~ *Exclude the affordable housing contribution additional local provision.*

2.4 To be clear, the Proponent requested that Condition 1(a) of the Gateway Determination ought to be deleted or amended (as proposed above), because the Proponent's PP does **not** seek to amend the *Waverley Local Environmental Plan 2012 ('WLEP')* by way of including a new site-specific provision for the payment of an affordable housing contribution ('AHC').

2.5 Council has mis-characterised the PP in the reports to the Panel and Department by making it appear that the AHC mechanism (which is sought to be inserted into the *WLEP*) was proposed by the Proponent. **The Proponent has never sought by its PP to include an additional local provision for an AHC scheme.** This primary complaint was articulated in the Legal Advice / Submission prepared by Counsel dated 28 November 2024, which was submitted with the Proponent's request for a review of the Gateway Determination.

2.6 In any event, there is nothing within the Guideline that supports the Department's position within its first and second reasons – which claim that that some conditions imposed as part of a gateway decision (e.g. 'administrative' conditions) are not able to be reviewed. That position is not supported by and is clearly incompatible with the Guideline.

2.7 In contrast, we note that page 45 of the Guideline expressly provides that **a proponent and/or council may request a review of any condition, without limitation, imposed as**

part of a gateway determination if those conditions are considered to be 'inappropriate'.

- 2.8 It is apparent that the Proponent considers Condition 1(a) of the Gateway Determination to be inappropriate on the basis that the condition relates to an item that the Proponent has never sought by its PP.
- 2.9 Against that background, the Department's first and second reasons for denying the Proponent's request for review of the Gateway Determination are inconsistent with and not compatible with the Guideline.

Department's third reason

- 2.10 In relation to the Department's third reason, there is nothing in the Guideline which supports the Department's position that a gateway decision is not able to be reviewed or that is not eligible for review because it is asserted that "*any inconsistencies with the applicable section 9.1 Direction have been justified in accordance with the terms of the Directions*".
- 2.11 Accordingly, the Department's third reason for denying the Proponent's request for review of the Gateway Determination is inconsistent with and not compatible with the Guideline.

Department's fourth reason

- 2.12 Similarly, in relation to the Department's fourth reason, there is nothing in the Guideline which supports the Department's position that a gateway decision is not able to be reviewed or that is not eligible for review because it is asserted that "*The proposal will support the delivery of housing on underutilised land, ongoing use of the telecommunications tower on the eastern part of the site, and supply of affordable housing in the Waverley LGA*".
- 2.13 Accordingly, the Department's fourth reason for denying the Proponent's request for review of the Gateway Determination is inconsistent with and not compatible with the Guideline.

Conclusion

As stated at the outset of this letter, we respectfully request that the Department re-consider the Proponent's request for a review of the Gateway Determination and confirm that the request is eligible and subsequently, as required by the Guidelines, prepare an assessment report and issue the review to the Independent Planning Commissioner ('IPC') for consideration **before COB on Friday, 28 February 2025.**

In circumstances where the Department does not agree with this request within the stated time, we anticipate that we will receive instructions from the Proponent to immediately commence proceedings in either the Land and Environment Court of NSW or the Supreme Court of NSW without further notice to the Department to seek an order in the nature of *mandamus* to compel the Department (i.e. a public authority) to discharge and perform its public duty to progress the Proponent's request for a review of the Gateway Determination to the IPC.

We confirm that the Proponent will rely on this letter on the question of costs, should it be required to commence the foreshadowed *mandamus* proceedings.

We, however, trust that the Department will reconsider its position and confirm that the Proponent's a review of the Gateway Determination is eligible so that it can be referred to the IPC without further delay.

Please do not hesitate to contact either Anthony Whealy on [REDACTED] or James Oldknow on [REDACTED] should you wish to discuss this matter further.

Yours sincerely



[REDACTED]
Anthony Whealy
Partner
Accredited Specialist Local Government & Planning