



28 November 2024

REF: WTJ23-075

Department of Planning, Housing and Infrastructure
Sent via the NSW Planning Portal

Dear Sir/Madam,

GATEWAY REVIEW - PLANNING PROPOSAL AT 50 BOTANY STREET, BONDI JUNCTION

Willowtree Planning Pty Ltd acts on behalf of Bondi Exchange Pty Ltd (the Proponent) in relation to the Planning Proposal (PP) submitted to Waverley Council (the Council) in support of a site-specific PP at 50 Botany Street, Bondi Junction (the subject site) (NSW Planning Portal Reference Number PP-2024-104) (Council Reference Number PP-2/2024).

This is the cover letter accompanying the Gateway Review request lodged via the NSW Planning Portal.

The subject site is approximately 1,132m² (residual lot post subdivision) with a 20m frontage to Botany Street and is zoned SP2 Infrastructure (Telecommunications), pursuant to the WLEP2012.

The Planning Proposal seeks to amend the following controls in the *Waverley Local Environmental Plan 2012* (WLEP2012) as it applies to the subject site:

- rezone the subject site from SP2 Infrastructure (Telecommunications) to R3 Medium Density Housing;
- introduce a minimum lot size of 232m² consistent with the adjoining properties; and
- remove the heritage listing on the western part of the subject site.

The key dates and actions associated with the PP are provided in **TABLE 1** as follows:

TABLE 1. KEY DATES AND ACTIONS	
Date	Action
20 December 2012	Council Scoping Meeting
1 February 2024	PP accepted by Waverley Council
26 June 2024	PP reported to Waverley Council Local Planning Panel
20 August 2024	PP reported to Waverley Council Meeting
22 August 2024	PP lodged with the Department of Planning, Housing and Infrastructure (DPHI)
14 October 2024	Gateway Determination issued by DPHI
18 October 2024	Intention to submit Gateway Review lodged via the Planning Portal

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In line with the Local Environmental Plan Making Guideline (the Guideline), this application contains the following information:

Copy of the Planning Proposal and Supporting Information as Submitted to the Gateway

- Planning Proposal Application Form
- Proponent Planning Proposal Report
- Appendix 1 - Urban Design Report
- Appendix 2 - Social and Community Needs Assessment
- Appendix 3 - Statement of Heritage Impact
- Appendix 4 - Arboricultural Impact Assessment
- Appendix 5 - Parking and Traffic Impact Assessment
- Appendix 6 - Preliminary Site Investigation
- Council Planning Proposal
- Affordability Housing Feasibility Analysis (Hill PDA)
- Consultancy Report (John Virtue Valuers)

Justification for the Strategic and Site Specific Merit

The strategic and site specific merit justification in support of the PP is provided below.

Strategic Merit

Greater Sydney Region Plan

The Greater Sydney Region Plan, A Metropolis of Three Cities (the Plan) sets a 40-year vision (to 2056) where the people of Greater Sydney live within 30 minutes of their jobs, education and health facilities. The Plan has been prepared concurrently with *Future Transport 2056* and *State Infrastructure Strategy 2018-2038* to align land use, transport and infrastructure outcomes for Greater Sydney. The Plan envisages Sydney as a metropolis of three (3) cities, including:

- The Western Sydney Parkland City;
- The Central River City; and
- The Eastern Harbour City.

The subject site is located within the Eastern Harbour City and in proximity to the Strategic Centre of Bondi Junction.

The proposal meets the following relevant objectives of the Greater Sydney Plan:

- **A City for People** – The proposal seeks to deliver housing that is sympathetic with the adjoining and nearby development and retains the landscape features of the subject site. The revitalisation works will provide opportunity for uses that establish a housing typology that will provide for the needs of local community.
- **Housing the City** – This Planning Proposal will facilitate increased residential accommodation in a highly accessible location, which supports the objective to provide a greater housing supply. The proposal seeks to provide 7 dwellings which will contribute to the housing targets mandated by the GCC.
- **A City of Great Places** – The size of the site only affords limited opportunity to create a medium density development in a natural setting, with unique points of difference that create a sense of community including, access to public transport and public recreation areas and surrounding area as well as contributing to the character of the existing heritage precinct.
- **A City in its Landscape** – The proposal provides the opportunity to retain and enhance the quality of landscaping on the subject site allowing the community to experience an improved environmental outcome. The proposal would reserve areas of the site for communal and private open spaces incorporating high quality landscaping.



Eastern City District Plan

The Eastern City District Plan (the District Plan) identifies planning priorities and actions for improving the quality of life for residents of the Eastern District as the area grows and changes. The District Plan establishes a number of priorities and actions to guide growth, development and change, relating to infrastructure and collaboration, liveability, productivity and sustainability.

Pursuant to **Planning Priority E5**, the District Plan seeks to provide housing supply, choice and affordability, with access to jobs, services and public transport. The objective promotes local infill development and a range of housing types in the right locations to create more liveable neighbourhoods and support Greater Sydney's growing population.

In accordance with the District Plan's locational criteria for new housing, the site is accessible to jobs, services and public transport, and is connected to the established road network. The site affords the opportunity to create a medium density development in a natural setting and integrate a wider variety of housing within an established neighbourhood that benefits from walking, cycling and public transport links.

In addition to the above, **Planning Priority E6** identifies the need to create and renew great places and local centres, and respect the District's heritage. The proposal will engender a neutral heritage impact to the heritage significance of the Botany Street HCA and would ensure that a future development would be sympathetic to the existing and desired future character of the Botany Street HCA.

Waverley Local Strategic Planning Statement 2020-2036

The Waverley Local Strategic Planning Statement 2020-2036 (Waverley LSPS) plans for Waverley's economic, social and environmental needs to 2036. The Waverley LSPS identifies planning priorities to protect and support infrastructure, the environment and economy via short, medium and long term actions that Waverley Council can take to achieve the vision of a sustainable and well connected community, living in a stunning natural environment.

The Waverley LSPS includes 'principles for change' that recognises that *'Planning Proposals may have merit and contribute to targets by increasing capacity through a change in building height or permissible floor space on the site, particularly where the proposal is for a strategically valuable use and there is a desirable public and urban design outcome. Any changes to the planning controls should enable an acceptable built form that responds to its surrounding context and achieves a strategic aim.'*

The 'principles for change' provide a local merits test to guide the Council and Local Planning Panel in the consideration of, and consistent decision-making about, planning proposals in the local area. Consideration of the proposal against the local strategic principles for change is provided in **TABLE 2** below:

TABLE 2. LOCAL STRATEGIC PRINCIPLES FOR CHANGE	
Principle	Comments
Proposals should be consistent with the Greater Sydney Region Plan and Eastern City District Plan.	See discussion above.
Proposals for sites in Bondi Junction Strategic Centre should be consistent with the objectives for the centre in the Eastern City District Plan and in this Local Strategic Planning Statement.	The site is not within the Bondi Junction Strategic Centre.
Proposals should be consistent with the relevant directions, objectives and actions of the Waverley Community Strategic Plan.	See discussion above.



TABLE 2. LOCAL STRATEGIC PRINCIPLES FOR CHANGE

Principle	Comments
Aims of the Waverley Local Environmental Plan.	<p>The Proposal will be consistent with the aims of the WLEP with particular reference to the aims listed below.</p> <p><i>(c) to provide for a range of residential densities and range of housing types to meet the changing housing needs of the community,</i></p> <p><i>(ca) to encourage the development of a variety of housing on land close to public transport, essential goods and services and open space,</i></p> <p><i>(f) to enhance and preserve the natural environment through appropriate planning, protecting the integrity of natural systems and by protecting existing trees,</i></p>
Proposals should be consistent with the relevant liveability, productivity, infrastructure and sustainability priorities, objectives and actions in this Local Strategic Planning Statement.	See discussion regarding the proposal's consistency with Waverley LSPS priorities below.
Proposals should be consistent with the relevant priorities, objectives and actions of any relevant strategies. A list of strategies is available at the end of this document.	The Proposal is consistent with relevant strategies with particular reference to the WLEP2012, Waverley Housing Issues Paper, Waverley Local Housing Strategy.
Proposals should support the strategic objectives in Council's adopted strategies and action plans.	See discussion below.
Proposals should not compromise non-residential development to meet employment targets for Bondi Junction Strategic Centre.	Not Applicable.
Proposals which seek to respond to a significant investment in infrastructure should be considered in a wider strategic context with other sites. This may include, but is not limited to, consideration of other infrastructure demand and provision, appropriate distribution of development potential across an area, value capture for public benefit and infrastructure delivery, and the orderly sequencing of development.	Not Applicable.
Proposals should give consideration to strategically valuable land uses that are under-provided by the market, such as but not limited to hotels, cultural space (including performance and production space), medical and health-related uses, education uses and childcare centres, and urban services such as mechanics and bulky goods retailers, and have regard to the appropriateness of the use for the context.	The subject site is in a relatively quiet suburban street with a strong residential character. The close proximity of adjoining residential dwellings, existing heritage conservation area affectation and limited size of the subject site does not lend itself to successful conversion to the 'strategically valuable land uses' suggested.



Consideration of the proposal against the site-specific principles for change is provided in **TABLE 3** below:

TABLE 3. LOCAL SITE-SPECIFIC PRINCIPLES FOR CHANGE	
Principle	Comments
Proposals should locate development within reasonable walking distance of public transport that has capacity (assuming development capacity will be delivered) and is frequent and reliable.	As outlined above, the subject site is located in an area that is well served by public transport (Public Transport Accessibility Level 6). Provision will be made in the future Development Application for cycling facilities.
Proposals should meet high sustainability standards, improve urban resilience, and mitigate negative externalities. Proposals can satisfy these high standards by committing all development on the subject site to achieve a 5+ Green Star rating with the Green Building Council of Australia, or a Core Green Building Certification or Zero Carbon Certification with the Living Futures Institute of Australia, or equivalent.	It is intended that a future development application for the residential development proposed on the subject site will demonstrate the achievement of high sustainability standards, improvements to urban resilience and mitigation of negative externalities.
Proposals should include an amount and type of non-residential floor space appropriate to the site's strategic location and proximity to, or location within, a centre or activity street.	As discussed above, the subject site is in a relatively quiet suburban street with a strong residential character. The close proximity of adjoining residential dwellings, existing heritage conservation affectation and limited size of the subject site does not lend itself to non-residential floor space. Conversion to a residential zone, consistent with the adjoining and surrounding properties, is the most appropriate future land use.
Proposals should create demonstrable public benefit.	The proposal anticipates the making of a financial contribution to the provision of affordable housing.
Proposals should be supported by an infrastructure assessment and demonstrate any demand for infrastructure generated can be satisfied, assuming existing development capacity in the area will be delivered.	The Planning Proposal is supported by a Social and Community Needs Assessment that provides a detailed consideration of demand for infrastructure generated by the proposal. It is identified that the subject site is generally well serviced with regard to community facilities however, there is likely to be a shortfall of open space which is best met through further enhancement of existing open space with funds available through development contributions from future development applications.
Proposals should make a positive contribution to the built environment and result in an overall better urban design outcome than existing planning controls.	The Statement of Heritage Impact notes that the concept drawings for a potential future development at the site would adopt a form, scale and materiality that would be in keeping with the generality of terrace style and semi-detached housing evident in the nearby heritage items, and Botany Street HCA. It is considered that the proposed change of zone will provide the opportunity for a sympathetic infill development to reflect the current R3 zoning of the



TABLE 3. LOCAL SITE-SPECIFIC PRINCIPLES FOR CHANGE	
Principle	Comments
	Botany Heritage Conservation Area and the established character of the surrounding area.
Proposals should result in high amenity for occupants or users.	Future dwellings on the subject site will provide a high level of amenity for residents.
Proposals should optimise the provision and improvement of public space and public connections.	Having regard for the small scale of the proposal, the limitations of the subject site and sensitivities of adjoining residential development there are limited opportunities to provide public space and public connections at the subject site.

In accordance with the direction for planning proposals, the residential rezoning of the site would exhibit strategic and site-specific merit. The Proposal would facilitate increased housing choice to contribute to meeting the targets established by the Waverley LSPS as well as the housing targets of the WLHS and the District Plan. The site is accessible and there is adequate infrastructure to support future development. Public benefit, high quality planning, and urban design excellence could all be achieved through sensitively designed residential development that responds to the unique heritage and ecological attributes of the site.

The LSPS includes 17 Planning Priorities. The Planning Priorities of key relevance are considered in **TABLE 4** below:

TABLE 4. CONSISTENCY WITH LSPS PRIORITIES	
Planning Priority	Comments
Planning Priority 4 - Ensure the community is well serviced by crucial social and cultural infrastructure.	This Priority relates to social and cultural infrastructure such as schools, libraries, churches, community centres and halls, hospitals and cultural facilities. Whereas the subject site contains physical infrastructure (telecommunications tower) that has come to the end of its functional life. The subject site has provided for the telecommunications needs of the community. Due to advancements in technology, the telecommunications needs of the community can now be serviced from a smaller portion of the site. The Telstra building has been decommissioned. Accordingly, there is no longer a need to retain the existing SP2 Telecommunications zoning on the portion of the site that has been subdivided and the most logical future use of this land is R3 Medium Density Residential zone consistent with the adjoining properties.
Planning Priority 5 - Increase the sense of wellbeing in our urban environment.	This Priority recognises that 'wellbeing is greatly influenced by the amenity of our urban areas, including air quality and noise. Air quality can be improved through tree planting and reduction of traffic.' The proposed development will enable the retention of existing trees as well as planting of new trees and vegetation on the subject site to facilitate improvements to the urban area. The proposed development will make provision for active travel and reduced reliance on private vehicles.
Planning Priority 6 - Facilitate a range of housing opportunities in	Under Planning Priority 6 of the WLSP provides as follows:



TABLE 4. CONSISTENCY WITH LSPS PRIORITIES

Planning Priority	Comments
<p>the right places to support and retain a diverse community.</p>	<p><i>Facilitate a range of housing opportunities in the right places to support and retain a diverse community</i></p> <p>The Planning Priority includes specific Housing Priorities as follows:</p> <p>Housing Priority H1 Encourage a range of housing options to support and retain a diverse community.</p> <p>The proposal will facilitate greater diversity and choice of housing that is fit-for purpose and provide a missing middle housing typology.</p> <p>Housing Priority H2 Manage housing growth sustainably and in the right location.</p> <p>As outlined above, the subject site is well located in relation to access to public transport as well as open space and services and facilities.</p> <p>Housing Priority H3 Increase the amount of affordable rental housing and social housing.</p> <p>The proposal will enable the introduction of a missing middle housing typology that provides a different price point to stand alone dwellings. Furthermore, the proposal will include a financial contribution to the provision of affordable housing.</p> <p>Housing Priority H4 Improve liveability, sustainability and accessibility through high quality residential design.</p> <p>In accordance with this Housing Priority, future housing will go above and beyond the minimum design and sustainability standards to ensure buildings are resilient and can be adapted for a range of needs.</p> <p>Housing Priority H5 Ensure new development is consistent with desired future character.</p> <p>Future development on the site will be consistent with the scale and form of development on adjoining and nearby sites.</p>
<p>Planning Priority 13 - Protect and grow our areas of biodiversity and connect people to nature.</p>	<p>The subject site is identified as being within a Biodiversity Habitat Corridor. Having regard for the expanse of the existing infrastructure and buildings occupying on the subject site, the Proposal will allow for a significant improvement in the ability of the subject site to provide deep soil planting, retain existing native canopy trees and associated landscaping to deliver improvements on outcomes associated with the existing habitat corridor.</p> <p>The WLSPS recognises that 'Council's strategy is to continue to grow the urban tree canopy on public and private land, as well as requiring deep soil areas and a range of climate hardy plants on private property to both reduce the urban heat island effect, and improve conditions for wildlife'. The Planning Proposal will make provision for increased opportunities for deep soil planting</p>



TABLE 4. CONSISTENCY WITH LSPS PRIORITIES	
Planning Priority	Comments
	including space for native canopy trees and vegetation to reduce the urban heat island effect and create habitat for wildlife.
Planning Priority 14 - Achieve net zero carbon emissions in the built environment.	Future development at the subject site will be subject to the provisions of the State Environmental Planning Policy (Sustainable Buildings) 2022 and will comply with all requirements of this legislation.
Planning Priority 16 - Plan for and manage our assets and urban environment, and support our community to adapt and be resilient to a changing climate.	<p>The WLSPS recognises that to 'reduce the urban heat island effect in our area, Council intends to grow the urban tree canopy which includes canopy on both private and public property'.</p> <p>As identified above, the proposed development will be designed to retain existing trees and provide for the introduction of additional deep soil planting space to allow for the planting of additional canopy trees and shrubs.</p>

Waverley Local Housing Strategy

The Waverley Local Housing Strategy (WLHS) has introduced the following housing priorities to guide the future of housing in Waverley. Consideration of how the Proposal assists with the delivery of the Waverley housing priorities is outlined below:

Priority H1 - Manage housing growth sustainably and in the right locations.

Priority H1 recognises that 'there may be circumstances where changing the planning controls can facilitate the realisation of housing capacity and achieve better planning outcomes. In other cases, changes to the planning controls could enable a built form that responds better to surrounding context and creates a better urban environment.' It is considered that the circumstances of the subject site i.e. telecommunications infrastructure that has come to the end of its functional life, is a circumstance whereby a better planning outcome can be achieved though the delivery of much needed housing consistent with adjoining and nearby properties. Furthermore, it has been demonstrated that the Proposal can satisfy the 'Principles for Change' outlined in the LSPS and therefore warrants support.

Priority H2 - Encourage a range of housing options to support and retain a diverse community.

The WLHS recognises that there will be future unmet demand for larger apartments that cater to families with children and a strong need for increasing housing diversity and choice. The Proposal will result in the delivery of 2 x 4 bedroom terrace and 5 x 3 bedroom terrace development. The proposed housing typology will provide for a housing product that is in short supply and high demand in the Waverley Local Government Area catering for local families who have outgrown their apartments but cannot afford a stand alone house as well as an older demographic who want to downsize out of their large family home but do not wish to live in an apartment. This type of product creates greater housing choice and diversity in the local housing market.

Priority H3 - Increase the amount of affordable rental housing and social housing.

The proposal will provide a financial contribution towards the provision of affordable housing.



The proposal will also result in a housing typology that differs from the dominant housing type in the Bondi Junction area, being residential flat buildings. The introduction of additional multi-dwelling housing/terrace style development will provide for additional housing options in the market.

Priority H4 - Improve liveability, sustainability and accessibility through high quality residential design.

Future development will achieve high quality design and sustainability standards to ensure it is resilient and can be adapted for a range of needs in accordance with the requirements of SEPP Sustainability and the requirements of Waverley Council's LEP and DCP.

Priority H5 - Ensure new development is consistent with the desired future character.

The WLHS identifies that where the character of an area is highly valued, there are opportunities to maintain or enhance that character for the enjoyment of existing and future residents, workers and visitors.

As outlined in the Statement of Heritage Impact:

- The planning proposal would engender a neutral heritage impact to the heritage significance of the Botany Street HCA and would ensure that a future development would be sympathetic to the existing and desired future character of the Botany Street HCA.
- The concept drawings for a potential future development at the subject site would adopt a form, scale and materiality that would be in keeping with the generality of the terrace style and semi-detached housing evident in the nearby heritage items, and Botany Street HCA.
- The proposed changing of the zoning to R3 would provide the opportunity for sympathetic, infill development at the site to reflect the current R3 zoning of the Botany Street HCA and nearby heritage items.
- Materials and colours that link the future development with the existing heritage fabric the site would, in Heritage 21's opinion, ensure that the future development would be sympathetic to the HCA while acknowledging the heritage item.



Site Specific Merit

The existing telecommunications facility has come to the end of its functional life. As a result of changes in technology, the telecommunications infrastructure is now only needed to occupy a small portion of the eastern part of the subject site. The former Telstra building on the subject site has been decommissioned.

Waverley Council have recently approved a Development Application (DA-63/2023) for Torrens Title subdivision of 1 Lot into 2 Lots at the subject site. This subdivision has not yet been registered. The subdivision has the effect of allowing the site to be divided to reflect the intended uses going forward i.e., the eastern portion of the subject site will maintain the SP2 Telecommunications Facility zone, and the western portion of the subject site will be zoned R3 Medium Density Residential, consistent with the surrounding area.

The PP seeks to explore the rezoning of the portion of the subject site that will not contain any telecommunications infrastructure (proposed Lot 1) from the existing SP2 Infrastructure (Telecommunications) zone to R3 Medium Density Residential, consistent with the zoning of adjoining and surrounding land.

In addition to the proposal to change the zone and having regard for the intended future use for residential purposes, the following map in the WLEP2012 will also need to be amended to be consistent with the adjoining residential land:

- Minimum Lot Size (232m²)

The subject site contains a telecommunications tower (at the eastern end of the subject site) which is a locally listed heritage item known as 'Telecommunication Tower' (No. 1166) under Schedule 5 of WLEP2012.

The heritage item was constructed in 1970 and is described by the NSW State Heritage Inventory as:

Telecom Australia radio telephone terminal, said to be located on the highest point of the municipality, and a major landmark. Significant technology and a symbol of Waverley's place in the communications network. The tower is 82m high and supports radio systems for telephone, television and data services.

The telecommunications tower has been approved for replacement under DA 79/2020 and the subsequent modification DA 79/2020/A. The telecommunications tower was approved for removal following consideration of the structure's integrity and relative safety concerns and was removed in April 2024. The replacement monopole structure has already been erected on site.

An amendment to the heritage listing is requested to remove the listing from the part of the site proposed to be rezoned for residential use.

The subject site is also identified within a heritage conservation area, Botany Street Conservation Area (C3). Detailed consideration of the heritage matters associated with the PP is provided within a Statement of Heritage Impact.

The subject site is adjacent to numerous medium density residential terrace style developments. To the east of the site is a former Anglican Church, Waverley Park, and Waverley College. To the south of the site is Elizabeth Hunter Lodge and Uniting War Memorial Hospital.

Several bus stops are located within 100m of the subject site. The zoning of surrounding area is predominately R3 Medium Density Residential, and SP2 Infrastructure. The subject site is located



approximately 6km south east of Sydney CBD, 9km north east of Sydney airport and 2km west of Bondi Beach.

In relation to the suitability of the site for the proposal:

- The site is extremely well located within an existing town centre, adjacent to Lindfield Railway Station, multiple bus services and the arterial road system. There is sufficient infrastructure available to accommodate the proposed development.
- The site is identified as a “key landmark site” in Council’s endorsed LSPS.
- The site is not subject to significant environmental constraints or hazards, such as bushfire or flooding. This means the location of the site is not placing new homes or workplaces in high-risk, hazard-affected areas.
- The proposal has carefully considered neighbouring land uses, including the surrounding commercial and residential uses. The site is an ‘island’ site, the development of which will not detrimentally impact the local area, given the proposed uses already largely occur in the local area. No adverse shadowing impacts to the surrounding locality to the south of the site will occur, and privacy impacts have been managed through the proposed built form.

This PP demonstrates strategic and site-specific merit and addresses all relevant considerations under the Local Environmental Plan Making Guidelines (Aug 2023). The proposed concept is consistent with State, Regional and Local planning policies and the relevant Section 9.1 Ministerial Directions.

Justification for Why an Alteration of the Gateway Determination is Warranted

There is agreement between the Proponent, Council and DPHI in relation to the strategic and site specific merits of the PP. However, the Proponent has one fundamental area of disagreement in relation to the PP regarding affordable housing.

As outlined in the DPHI Gateway Determination report:

The planning proposal seeks to set a 9.27% affordable housing contributions levy contribution in accordance with the Waverley Affordable Housing Contribution Scheme 2023. This would enable a condition to be imposed on any future development consent requiring a contribution in line with the LEP.

The proposal seeks to achieve this by activating the ‘Affordable housing contributions on Planning Proposal sites’ provision and supporting schedule which was deferred from the making of the Waverley LEP 2012 (Amendment No.25) until such time as there was land to list in the Schedule and thereby have a purpose for the proposed new local provision to give effect to.

Council engaged Hill PDA to prepare an affordability housing feasibility analysis in support of this planning proposal and the contribution rate identified. The proponent also submitted a report assessing the financial viability of the development scheme prepared by John Virtue Valuers (15 July 2024) to Council. The proponent’s report suggests marginally viability with no contribution included and scenarios with contributions are found to be not feasible. Council commissioned an updated report from Hill PDA to address the matters raised in the report submitted by the proponent. The updated report supports the intended outcomes of the planning proposal.

The site is being rezoned for residential purposes via this proposal and the proposed contribution rate is supported by the affordable housing feasibility analysis undertaken by Hill PDA on behalf of Council in August 2024. The Department is satisfied that this is adequate with regard to the requirements of the Guidelines for the planning proposal to proceed to consultation.



The planning proposal is the best means of amending the Waverley LEP 2012 to achieve the intended outcomes and will create well-located homes and contribute to the provision of affordable housing in the Waverley LGA.

The Proponent has a fundamental objection to the conclusion that an affordable housing contribution of the amount quantified above can and should be supported by the PP. If implemented, the affordable housing contribution will impose an arbitrary financial burden on any future development on the Site, which will in turn, prohibit or limit, the delivery of much needed “new housing supply and... dwelling diversity in the local area.”

Whilst the Proponent accepts there is a desire for Council to levy contributions for the purpose of affordable housing from developers for particular development, since February 2024, we have raised consistent objection to the:

- Lawfulness of the contribution requested by Council's strategic planners; and
- Quantum of the contribution requested by Council's strategic planners.

We have obtained legal advice in relation to this matter which is attached to this letter ('Attachment 1'). Notwithstanding this objection, on 25 March 2024, the Proponent issued a letter of offer to enter into a Voluntary Planning Agreement ('VPA') with Council as part of the PP, which offered a monetary contribution to be made to Council in the sum of \$100,000.00 for the provision of (or the recoupment of the cost of providing) affordable housing. This offer remains valid.

The objections to the affordable housing contribution include:

Objection: lawfulness of the requested affordable housing contribution.

See legal advice obtained in relation to this objection at **Attachment 1** of this letter.

Objection: quantum of the requested affordable housing contribution

The Council Assessment Report asserts that “following a comprehensive process to determine a feasible contribution amount, this report (and relevant attachments) recommends a contribution amount of 9.27% of total gross floor area (GFA) be provided as affordable housing which equates to a monetary contribution of \$1,652,738.”

That comprehensive process is said to be premised on the Affordability Housing Feasibility Analysis – 50 Botany Street, Bondi Junction, prepared by Hill PDA dated August 2024 ('Hill PDA Report').

Relevantly, the Hill PDA Report makes economic assumptions regarding a hypothetical future development to be approved, constructed and sold on the Site, post-PP, that realises the maximum permitted Floor Space Ratio ('FSR') of (0.75:1), including:

- (a) Gross Realisation of \$24,645,855.00, which reflects \$29,029/m², inclusive of a 3.5% escalation; and
- (b) Profit and Risk margin of 17%.

In response, the Proponent submitted a peer review of the Hill PDA Report titled Consultancy Report, prepared by John Virtue Valuers dated 15 July 2024 ('JVJ Report'), which confirms that:

- (a) The Gross Realisation assumption adopted in the Hill PDA Report is not correct and is above market parameters;



- (b) There is no basis provided for the inclusion of a 3.5% escalation in Gross Realisation. In the current climate it is entirely possible (e.g. due to increasing interest, construction and labour costs) that there could be a de-escalation in Gross Realisation of 3.5% or 15% or 25%;
- (c) The Profit and Risk Margin assumption in the Hill PDA Report is below industry standard for similar size/scale projects;
- (d) If a \$1,652,738.00 contribution were to be made to Council as part of the PP for the purpose of affordable housing it would not be economically feasible for the hypothetical future development and would reflect 38.8% of the developers profit;
- (e) It is not feasible for any contribution to be made to Council as part of the PP for the purpose of affordable housing based on the hypothetical future development to be approved, constructed and sold on the Site, post-PP.

The above conclusions in the JVV Report are strikingly at odds with the conclusions in the Hill PDA Report and Council Assessment Report, which have not been adequately considered and/or conveniently dismissed.

This conduct is oppressive and imposes an arbitrary financial burden on any future development on the Site.

Finally, from a legal perspective, developers who argue that their development applications are compliant in terms of FSR are often rebuffed by Councils who argue that FSR controls within applicable Local Environmental Plans are “*maximums, not entitlements*” (see: *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191 at [24]). That being the case, it is ironic that the Hill PDA Report assumes that the hypothetical future development to be approved, constructed and sold on the Site, post-PP, will realise the maximum permitted FSR of 0.75:1.

Disclosure of Reportable Political donations

There are no reportable political donations as per the submitted political donations forms.

We consider that we have met the requirements for the lodgement of a Gateway Rezoning Review.

Should you have any questions in relation to the above, please do not hesitate to contact me.

Your sincerely,



Andrew Pigott
Director
Willowtree Planning Pty Ltd

Attachment 1: Legal advice / submission



**Planning Proposal No. 2024-104
50 Botany Road, Bondi Junction**

Advice – Gateway Review

Introduction

1. My instructing solicitors act for Bondi Exchange Pty Ltd, the proponent of planning proposal no. 2024-104 (**PP**). The PP principally seeks to rezone land known as 50 Botany Road, Bondi Junction (**Site**), for medium density residential development.
2. The Site:
 - 2.1 is within the Waverley local government area;
 - 2.2 is presently zoned SP2 Infrastructure (Telecommunications) under *Waverley Local Environmental Plan 2012 (LEP)*;
 - 2.3 is otherwise surrounded by land zoned R3 Medium Density Residential;
 - 2.4 historically contained a (heritage-listed) telecommunications tower and building, now demolished;
 - 2.5 is approved for a yet-to-be registered subdivision to create two allotments, the smaller of which accommodates a replacement telecommunications monopole (significantly smaller than the tower) which has been erected; and
 - 2.6 comprises the larger residual allotment, the subject of the PP.
3. The PP is proponent-initiated, by way of a planning proposal prepared by Willowtree Planning dated 19 January 2024.
4. The specific outcomes of the PP are (i) to rezone the portion of the Site to R3 Medium Density Residential, (ii) to introduce a minimum lot size, and (iii) to remove the LEP heritage listing of the tower¹.
5. Additionally, the PP identifies a related objective to “make a financial contribution to the provision of affordable housing”².

¹ Executive Summary, page 5 and Section 3.1 Overview, page 20.

² Executive Summary, page 6.

6. However, notably, the making of this financial contribution is **not** proposed by way of amendments to the LEP.
7. Instead, the PP has been accompanied by a letter of offer to enter in a voluntary planning agreement dated 25 March 2024 (**VPA Offer**). The VPA Offer proposes to make a financial contribution of \$100,000, payable upon issue of any occupation certificate for future residential development on the Site.
8. On 20 August 2024, Waverley Council resolved to forward a planning proposal to the Department of Planning, Housing and Infrastructure (**Department**) and seek a gateway determination for the proposal.
9. Notably, the planning proposal the subject of Council's resolution was significantly different to the PP, in terms of affordable housing.
10. Council's proposal included an additional specific amendment to the LEP - to provide a mechanism for levying affordable housing contributions for future development on the Site (at a rate of 9.27% of the total floor area of all buildings), and a framework for levying similar contributions on development elsewhere in the local government area.
11. A delegate of the Minister for Planning and Public Spaces issued a gateway determination on 11 October 2024 (**Gateway Determination**) that the Council's proposal could proceed. The Council was also conditionally authorised to exercise the functions of the plan-making authority, effectively to make the amending LEP at the end of the planning proposal process.
12. On 5 November 2024, Willowtree Planning lodged a request for a Gateway review (**Review**). The substance of the Review is objection to the Council's proposed affordable housing mechanism, as a matter of principle and in terms of the quantum.
13. Against this background, I have been asked to advise generally on the Review, and particularly on the grounds on which the Review might, or should be, upheld.

Summary of Advice

14. For the reasons discussed below, I consider that there are cogent grounds for the Review to be upheld.
15. Principally, it is apparent that the proposal forwarded by Council to the Department, for which the Gateway Determination has been made, is tainted by substantively misleading statements about the PP, either expressly and/or by omission.

16. Specifically, there is a serious mis-characterisation of the PP as lodged by the proponent, making it appear that the proponent has proposed the affordable housing contribution mechanism that is sought to be inserted into the LEP.
17. Further, the proposed percentage affordable housing contribution, 9.27%, is materially misrepresented as allowing financially feasible development to occur. Council's commissioned feasibility report prepared by Hill PDA identified a feasible contribution rate of no more than 6.75%. The proposed contribution rate is almost 40% higher, rendering development of the Site not financially viable.
18. Further, it appears from historical attempts in 2021 and 2023 that the Council's proposal is a continuation of efforts to insert its adopted Waverley Affordable Housing Contributions Scheme into the LEP, without sufficient justification.
19. In my view, the above matters are sufficiently misleading so as to justify a review of the Gateway Determination.
20. In the circumstances, it would be appropriate that the PP is permitted to proceed, but without the Council-introduced affordable housing contribution mechanism. Further, in view of Council's continued attempts to adopt its target 10% contribution rate by reference to the Waverley Affordable Housing Contributions Scheme, it would be appropriate that plan-making authority not be delegated to Council.

Discussion

Introductory Observations

21. At the outset, I observe that it is common ground that the PP has site specific merit and strategic merit.
22. The PP has site specific merit because it will enable appropriate residential development on a redundant infrastructure site. The likely potential form of residential development has been tested by preparation of a reference design, and evaluated against relevant development controls. The PP has strategic merit because it will enable new housing that will add to housing stock and diversity in a manner consistent with the adopted Local Housing Strategy and the Local Strategic Planning Statement.
23. These justifications were considered in detail in Willowtree Planning's planning proposal and summarised in Part H (page 51), reproduced below:

PART H CONCLUSION

The proposed amendment to WLEP 2012 would enable the creation of a sensitively designed residential development on land that would otherwise remain redundant due to the existing telecommunications facility coming to the end of its functional life. As a result of changes in technology, the telecommunications infrastructure is now only needed to occupy a small portion of the eastern part of the subject site. The PP is appropriate for the following reasons:

- The existing telecommunications facility has come to the end of its functional life and has been decommissioned. As a result of changes in technology, the telecommunications infrastructure is now only needed to occupy a small portion of the eastern part of the subject site. The existing Telstra building has been decommissioned.
- The site is no longer needed for Telecommunications purposes and the current SP2 zoning precludes its development for other purposes. The site would however be suitable for more sensitive residential uses which would create a logical land use having regard for the adjoining properties.
- In accordance with the priorities of the LHS, LSPS, District Plan and Region Plan, the introduction of medium density residential accommodation on the subject site would provide additional housing capacity and supply, the right diversity of housing, and would assist in tackling affordability. This would help make the established neighbourhood more complete, offering residents housing diversity and opportunity to age in place, downsize within their community, or enter the property market within their social sphere.
- The GCC's District Plan clearly identifies increased housing density in proximity to green amenity as a desirable outcome. The site benefits from green infrastructure and the introduction of medium density housing typology onto the site is consistent with the above.
- The proposed LEP amendment aligns with the relevant Section 9.1 Ministerial Directions.
- No notable land affections have been identified that suggest the proposed land use could not be suitably designed on the subject site.
- The PP will facilitate urban renewal of the land that is no longer required for SP2 Infrastructure (Telecommunications) purposes;
- The PP will enhance the ecological values of the site;
- The PP will minimise land use conflicts by permitting land uses that are sympathetic to the existing character of the area by creating a sensitive residential development that is consistent with the established residential neighbourhoods surrounding the subject site;
- The PP will deliver new housing supply and improve dwelling diversity in the local area by providing appropriate housing typologies that will co-exist with the natural and infrastructure assets of the site without compromising their environmental or heritage significance;
- The PP will make a financial contribution to the provision of affordable housing; and
- The PP will remove a redundant heritage listing.

24. For its part, Council's report on the PP concurred, but qualified its conclusion on the PP's strategic merit, noting "the contribution of an appropriate amount towards Council's affordable housing program is a key consideration": Report to Council dated 20 August 2024, page 54.
25. The "appropriate amount" was explicitly identified as "9.27% in line with Council's AHCS". That is, Council sees merit because it accords with the target it has pre-determined in the ACHS.

Council's AHCS

26. The 'AHCS' is a reference to Council's adopted "Waverley Affordable Housing Contribution Scheme" (**Waverley AHCS**). This appears to be a non-statutory policy which was first adopted in 2020 (Version 1), and which has been amended on a number of occasions, most recently being in March 2024 (Version 6). As first adopted, the AHCS was described as giving:

.. Council the legislative backing to require affordable housing contributions of 10% from proponents that are granted uplift through the planning proposal process.

(AHCS Version 1, section 1.2, page 4)

Currently, the corresponding part says:

...Council will seek to apply an affordable housing contribution target of 10% of total gross floor area for sites subject to uplift via a Planning Proposal.

(AHCS Version 6, section 1.2, page 4 – underlining added)

27. Under the Waverley AHCS, the relevant percentage is applied to a single 'gross realisation\$/sqm' figure by suburb, set out in Table 1. The Waverley AHCS identifies the rates "will be updated on a regular basis in line with current market conditions".
28. At the time of adoption, Table 1 identified a rate for Bondi Junction of \$18,500. I understand the rate currently identified by Council, updated in September 2024, is \$21,000.³

Statutory scheme for affordable housing contributions

29. It is not controversial that the statutory scheme enables local environmental plans to contain provisions that provide for levying of an affordable housing contribution (**AHC**): *Environmental Planning and Assessment Act 1979 (EPA Act)*, Division 7.2.
30. Such AHC is a condition to be imposed on the grant of development consent: s7.32(2).

³ I have been instructed that ACHS Version 6 dated 8 March 2024 is not available on Council's website. My instructing solicitors have indicated that its existence appears to only be ascertainable if specific searches are made of Council's Business Papers – a laborious exercise that is unlikely to be undertaken by members of the public. Even then, it is apparently not readily accessible - Version 6 has been accessed only because it has been published by the Department as part of Council's planning proposal made in 2023.

31. The power to impose such a condition depends on authority for imposition to be contained within a local environmental plan: s7.32(3)(b). The relevant local environmental plan is required to be “in accordance with a scheme for dedications or contributions set out in or adopted by the plan”.
32. This requirement means the plan-making provisions of the EPA Act are the appropriate means of making, or amending, a local environmental plan to introduce such a mechanism.

AHC – comparing the PP and Council’s proposal

33. As noted above, the PP proposed three (3) amendments to the LEP – zoning, lot size and removal of a heritage listing. This is explicitly set out in Part C, Explanation of Provisions, section 3.1 (page 20).
34. The PP did not propose any mechanism for affordable housing contributions. And the LEP presently does not contain such provisions.
35. The ‘objectives and intended outcomes’ of the PP are in Part B, section 2.1 (page 19):

PART B OBJECTIVES AND INTENDED OUTCOMES

2.1 OBJECTIVES AND INTENDED OUTCOMES

Objective
To amend the WLEP2012 to achieve a land use and built form which supports a residential development outcome at the subject site that integrates with the heritage and environmental qualities of the site insofar as residential development will provide a more sensitive and logical land use and be consistent with the established medium density residential character of the surrounding area.

Intended outcomes:

- To facilitate urban renewal of land that is no longer required for SP2 Infrastructure (Telecommunications) purposes;
- To enhance the ecological values of the site;
- To minimise land use conflicts by permitting land uses that are sympathetic to the existing character of the area by creating a sensitive residential development that is consistent with the established residential neighbourhoods surrounding the subject site;
- To deliver new housing supply and improve dwelling diversity in the local area by providing appropriate housing typologies that will co-exist with the natural and infrastructure assets of the site without compromising their environmental or heritage significance;
- To make a financial contribution to the provision of affordable housing; and
- To remove a redundant heritage listing.

36. The second last dot point referred to the making of a financial contribution, but *not by way of amendment to the LEP*. This is clear from Part C of the PP.

37. Instead a proposed financial contribution was set out in the VPA Offer.
38. Council's consideration of the PP was reported to Council on 20 August 2024. It included Council's proposal, identified as PP-2/2024 and attachment 1 to the business papers of item CM/7.3/24.08. The Executive Summary said (at page 3):

EXECUTIVE SUMMARY

A Planning Proposal was prepared by Willowtree Planning Pty Ltd on behalf of Bondi Exchange Pty Ltd (the Proponent) and submitted to Waverley Council (the Council) as the Planning Proposal Authority in support of a site-specific Planning Proposal at 50 Botany Street, Bondi Junction (the subject site). This report has been prepared which provides a council officer assessment of the Planning Proposal, as well as provides an explanation of the proposed provisions and mapping changes.

The Planning Proposal seeks to amend the following controls in the Waverley Local Environmental Plan 2012 (WLEP2012) as it applies to the subject site:

- rezone part of the subject site to R3 Medium Density Residential;
- introduce a minimum lot size of 232m²; and
- remove the heritage listing from the site.

The proposal also seeks to provide a contribution for affordable housing with the proposed mechanism as outlined in this Planning Proposal via clause in the Waverley Local Environmental Plan (WLEP).

The proposal – subject to a number of key considerations discussed in this report – is considered to have strategic and site-specific merit.

39. The second and third paragraphs should be noted. They directly attribute the proposed new clause of the LEP to the PP, which was manifestly not the case. The report to Council also misrepresented the PP. It said (pages 51-52):

Assessment process and key issues

To determine if a planning proposal should proceed, assessment is undertaken against the relevant DPHI criteria outlined in the LEP Making Guidelines (August 2023). A discussion against these criteria is summarised below and in Attachment 1 (Council) and Attachment 2 (proponent).

Relevant supporting attachments submitted by the proponent (and attached to this report) include:

- Proponent planning proposal report.
- Urban design analysis.
- Social and community needs assessment.
- Statement of heritage impact.
- Arboriculture impact assessment.
- Parking and traffic impact assessment.
- Preliminary site investigation.

In relation to these studies, the planning proposal report concludes that:

- Previous approvals for the site render the current heritage listing as defunct. Therefore, the removal of the heritage listing is supportable.

- Other relevant technical studies (relating to urban design analysis, arboriculture impact assessment, parking and traffic impact assessment and preliminary site investigation) are considered reasonable with no substantial issues identified at the planning proposal stage.
- In relation to the proposed affordable housing contribution, it is recommended that a clause and schedule be included in the WLEP.

40. However, the 'proponent planning proposal report', that is, the PP never recommended a clause to be included in the LEP for affordable housing contributions.

41. It was entirely misleading for Council to represent that the proponent had proposed, or recommended, the insertion of a proposed clause into the LEP when the PP did not do so, and the proponent had only ever made the VPA Offer.

Council's proposed AHC clause

42. A proposed clause, subject to PC drafting is contained in Council's proposal (page 7):

An example provision to be included in the Waverley Local Environmental Plan 2012 is provided as follows, noting that the final wording will be subject to Parliamentary Counsel drafting.

6.XX Affordable housing contribution on Planning Proposal sites

(1) This clause applies to development on land identified in Schedule 7.

(2) The consent authority may, when granting development consent to development to which this clause applies, impose a condition requiring an affordable housing levy contribution equivalent to the contribution specified for the land in Schedule 7 (the contribution).

(3) A condition imposed under this clause must satisfy the affordable housing levy contribution

(a) by way of a monetary contribution to the Council that is the per square metre value calculated in accordance with subclause (4), or

(b) by way of a dedication in favour of the Council of land comprising 1 or more complete dwellings (each having a total gross floor area of no less than 50 square metres).

(4) For the purposes of this clause, the per square metre monetary value is to be calculated in accordance with the Waverley Affordable Housing Contributions Scheme.

(5) This clause does not apply to development for the purposes of any of the following –

(a) development for the purposes of residential accommodation that is used to provide affordable housing or social housing

(b) development for the sole purposes of generating employment.

(c) The demolition of a building, or a change in the use of land, does not give rise to a claim for a refund of a contribution.

Schedule 7 Planning Proposal Land

Planning Proposal Land	Contribution requirement
50 Botany St, Bondi Junction, Lot 1 DP619753	9.27% of the total floor area of all buildings —the contribution applying to the development under clause 6.XX.

43. Two things may be noted. First the clause applies to land identified in Schedule 7. It is able to be expanded by adding to Schedule 7 particular land, precincts or indeed, the whole of the local government area.
44. Second, the AHC condition is constrained to be (and only be) the “per square metre value calculated in accordance with subclause (4)” that is, the Waverley AHCS.
45. It is unclear how, and by what methodology, the rates in the Waverley AHCS are determined, updated or changed. Nor is it clear that any opportunity for public consultation is required⁴, or exists if not required.
46. On its face, the clause is capable of reserving a broad discretion to Council simply by dint of determining changes to the rates in the Waverley AHCS. Presumably this could be achieved by Council resolution, or even by an authorised delegate.
47. For an important issue and what amounts to an exaction of a form of tax on development, there is clear inconsistency with the object of public participation in the EPA Act and potentially general law requirements of procedural fairness.
48. Further, the historical context of the use of the present PP to introduce such a clause has to be noted. Council has tried twice to introduce an affordable housing contribution scheme into its LEP – in 2021 (PP-2021-3131) and 2023 (PP-2023-2221). On both occasions the proposals sought to enable the Waverley AHCS, with its 10% contribution rate, to be implemented. Both times, the Department rejected the proposals because, *inter alia*, of a lack of sufficient feasibility testing of specific sites or identification of areas of uplift.
49. As will be next seen, the identification of the 9.27% contribution percentage is similarly not supported by feasibility testing.

⁴ The Department’s Guideline for Developing and Affordable Housing Contribution Scheme, February 2019 (**AHCS Guideline**), identifies that community consultation is ‘optional’: Figure 6, page 25. The apparent non-publication of the AHCS (see footnote 3 above) may be consistent with no consultation.

Evidence base for determination of the AHC percentage

50. The AHCS Guideline emphasises the importance of a robust evidence-based approach to developing an affordable housing scheme. The framework for analysis includes data-gathering, needs assessment and then, importantly in the present context, evaluation of financial viability.
51. The evident purpose is to ensure that an affordable housing contribution rate is not set too high so as to render development not financially viable. This speaks directly to the EPA Act object of promoting ‘orderly and economic use and development of land’: s1.3(c)⁵.
52. The AHCS Guideline evaluation is a residual land value (**RLV**) analysis of the kind commonly used to evaluate development feasibility, as well as routinely employed in legal contexts such as compensation for compulsory land acquisition.
53. The point is that process of determining RLV-based feasibility is (i) not the subject of any special knowledge that only a planning authority has – indeed, some assumptions may be considered to be more likely better known by those carrying out development as their everyday commercial activity; (ii) is highly sensitive to assumed inputs; and (iii) is typically highly contestable as to the input assumptions.
54. Here, Council engaged a registered valuer from Hill PDA to prepare a RLV analysis. It was the subject of several rounds of peer review by the proponent’s registered valuer from Virtue Valuers as well as revisions by Hill PDA.
55. I note that many of Hill PDA assumptions are contested and have been the subject of alternatives suggested by Virtue Valuers. Whilst the specifics of the contest may be considered further in the planning proposal process, that a site-specific RLV is in such contest with the land owner/developer highlights the questionable confidence in the evidence base for determination of the AHC percentage.
56. Many aspects of the Hill PDA analysis are of doubtful provenance. For example, even the starting point of development margin of 17% is advanced by way of assertion of unexposed ‘industry standard performance indicators’, the apparent source of which

⁵ It is noteworthy that the State Government has just introduced a base affordable housing contribution rate of 3% in the Transport Oriented Development (TOD) accelerated precincts. This is the rate that has been evaluated by the Department from a financial feasibility perspective, even with the significant development uplifts in the TOD precincts.

Hill PDA. Virtue Valuers suggested a margin of 20% was appropriate. The difference is significant for RLV analysis.

57. However, there is another more fundamental problem with Council's AHC determined percentage.
58. The final version by Hill PDA dated 12 August 2024 was reported to Council. The results of the analysis was set out in section 2.5 of the valuation report. An extract of the commentary (from page 14) is reproduced below:

What do the results show?

The results showed that based on our assumptions, a 10% affordable housing contribution would not be viable based on the average sale revenue rate of \$23,840/sqm of NSA. The resulting RLV is \$3.65m (based on a DM of 17%) and is lower than the land purchase cost of \$4.688m, inclusive of GST.

However, the tipping point scenario that meets our hurdle rates shows an affordable housing contribution rate of 6.75%. The monetary equivalent of the affordable housing contribution equates to \$1,652,738, inclusive of GST and is based on the calculation of \$28,839/sqm of GFA (adopted average sales rate) that would apply to an area of 57.31sqm of GFA (6.75% x total GFA). This amount is inclusive of GST as Council would be expected to pay market value, which would include GST if Council chose to go to the open market to acquire residential apartments for the provision of Council-owned affordable housing.

We note that the published contribution rate for Bondi Junction is \$21,000 and based on this rate equates to an area of 78.7sqm which shows a 9.27% affordable housing contribution. From our understanding, this rate is for apartments that broadly represent the suburb of Bondi Junction. Nevertheless, this assessment is based on what is the contribution amount that may be payable and not affect development viability which we have established amounts to \$1,652,738.

59. It is clear that 9.27% is the percentage 'back calculated' by Hill PDA from the Waverley AHCS. It is also clear that the tipping point for financial viability (accepting the appropriateness of all assumed inputs) is a contribution rate of 6.75%.
60. Council's proposed rate is nothing more than an adoption of a figure close to its own 10% target, that exceeds the Hill PDA determined viable rate by almost 40% and results, on its own analysis, in development being not feasible.
61. Yet, the Council's proposal and its report both fundamentally misrepresent that a contribution rate of 9.27% is financially viable and was the finding of the feasibility analysis.
62. In Council's proposal, the statement is made (at page 12):

This feasibility study was undertaken and is provided an attachment. The feasible amount equates to

In the report to Council, the statement was made (at page 52):

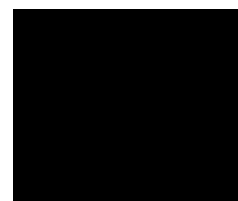
Following a comprehensive process to determine a feasible contribution amount, this report (and relevant attachments) recommends a contribution amount of 9.27% of total gross floor area (GFA) be provided as affordable housing which equates to a monetary contribution of \$1,652,738. It is recommended that this contribution be levied via inclusion of a clause in the WLEP and as discussed in Council's planning proposal report (Attachment 1).

Implications of misrepresentations about the PP and the AHC contribution rate

63. It is well established that misleading material can have legal implications for the validity of statutory processes.
64. In previous plan-making processes under the EPA Act, such misleading material has resulted in the invalidity of public notice of a draft environmental planning instrument: *Litevale Pty Ltd v. Lismore City Council* (1997) 96 LGERA 91; see also *Gales Holdings Pty Ltd v. Minister for Infrastructure and Planning* (2006) 69 NSWLR 156.
65. There, the Court of Appeal determined that the omission from public notice and exhibited material about additional consequences of the draft LEP had the effect of being sufficiently misleading to result in invalidity of the exhibition process.
66. The plan-making pathway of the EPA Act has of course since changed to the present Gateway system. Nonetheless it remains a statutory process. One consequence is that the requirements of procedural fairness will still be ordinarily implied at general law unless excluded by the statutory scheme.
67. Here, the legal issue is slightly different – whether misleading statements in the proposal affects validity of a gateway determination.
68. Section 3.34(2) allocates to the Minister (usually a delegate) to determine if a planning proposal should proceed, either with or without variation – the gateway determination. This determination occurs only after a review of the proposal. The proposal is the one submitted to the Minister, via the Department.
69. The importance that a planning proposal does not contain misleading material is readily apparent. It is the material submitted that is reviewed to evaluate if sufficient merit exists to permit it to proceed. Thus the decision to issue a gateway determination depends on the veracity of the information provided.

70. There is first-instance authority to support the proposition that departure from the information requirements of s3.33(2) at least do not necessarily invalidate a gateway determination: *Help Save Mt Gilead Inc v. Mount Gilead Pty Ltd (No 4)* [2018] NSWLEC 149 at [95]-[100] (Moore J).
71. A ground also considered in *Help Save Mt Gilead* was whether air quality assessment was defective and misleading, so as to lead to invalidity of the gateway determination. This was because certain opinions of the air quality expert were questionable given assessment information. This ground of challenge also failed: at [141]-[148].
72. What is notable about the second ground is the finding that that nothing in *Gales Holdings* mandates that a finding that a ‘conclusive general opinion’ is misleading, even accepting one of the elements was on the basis of incorrect or inadequate information: at [148].
73. *Help Save Mt Gilead* suggests that it is possible that material, beyond a ‘conclusive general opinion’ may be sufficiently misleading to potentially ground invalidity, particularly where it is manifestly unreasonable.
74. This specific type of challenge - manifest unreasonableness by reason of misleading statements in the proposal – does not appear to have been further judicially considered under the present regime.
75. Irrespective, it is important to recognise a gateway review is not a judicial review challenge. The Department’s Local Environmental Plan Making Guideline, dated August 2023 provides a broad discretion to review and vary a gateway determination (at pages 45-46).
76. Here, it is well open to the Minister to recognise that the Council’s version of the proposal, as submitted for gateway determination:
- 76.1 seriously misrepresents what the PP actually proposed as it never proposed or recommended introduction of a AHC clause into the LEP;
 - 76.2 misleads that a 9.27% contribution rate is feasible— in fact, it is almost 40% higher than the ‘tipping point’ for feasibility;
 - 76.3 misrepresents that the 9.27% contribution rate is the feasible rate concluded by Council’s feasibility study;

- 76.4 is a continuation of efforts to insert the Waverley AHCS into the LEP without sufficient justification; and
- 76.5 the clause, as suggested, contains significant potential transparency and accountability flaws as it apparently permits substantial changes to the AHC contribution (in dollar terms) that might be levied by condition, through changes to the Waverley AHCS rates adopted or applied from time to time.
77. It is thus open to the Minister to review the Gateway Determination and direct that the PP proceed without the proposed AHC clause.
78. Finally, given the history of Council's attempts to embed its 10% contribution rate in to the LEP, but without sufficient justification, in my view it would be appropriate that plan-making authority not be delegated to Council.



.....
T To
Sir Anthony Mason Chambers

28 November 2024