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29 June 2017

File Number: SSD 8351
Our Ref: R/2017/8/A

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Dear Amy,

RE: Concept Proposal for the Development over Martin Place Metro Station (SSD 8351)

I refer to the letter dated 29 May 2017 which invites the City of Sydney ("the City") to comment on the 'concept' application for the subject State Significant Development (SSD) application. We have had limited time to review the documents and have kept this submission to key considerations which must be addressed.

The City is prepared to consider dramatic but well considered developments, but not by cutting process corners. Transparency of process is important to restore and maintain faith in the planning system. This concept application relates to Macquarie Group's proposal for Over Station Development (OSD) in and around the proposed Martin Place metro station, being the building envelopes and the floor space proposed by Macquarie Group having gained Stage 3 support via the NSW Government Unsolicited Proposal process. This process is independent of planning determinations and should not influence the objectivity of the planning process.

The City has reviewed the development application and while some land use intensification for the north tower may be supportable with appropriate conditions, modelling and setbacks, the City **objects to the application** in its current form and strongly recommends that the consent authority in particular **reject**:

- Clause 4.6 variation request to increase the maximum floor space achievable under the LEP by approx. 35,520m^2 (47.2%) [refer to legal discussion in Attachment A]; and
- the 'alternative design excellence framework' over the competitive design process requirements of the Sydney LEP 2012 which apply to Over Station Development (OSD).

The reliance on the draft Central Sydney Planning Strategy to justify the floor space exceedance is selective in the extreme. The draft Strategy (which at present is not a matter for consideration under s 79C of the Environmental Planning and Assessment Act) needs to be considered as a complete package, including the fundamental principle that setbacks become increasingly important as buildings become taller and denser, and that accompanying measures be included with increased capacity including an affordable housing levy and an infrastructure contribution.

Competitive Design Processes

As noted in the proposed 'Sydney Metro Martin Place Precinct Design Excellence Framework May 2017' put forward by JBA *"In the case of the Macquarie proposal, one integrated design and one integrated construction is proposed. This is supported by Transport for NSW as the agency responsible for the Sydney Metro provided it does not impact on the delivery of the Metro rail line by 2024."*

While it is proposed in the JBA documents to integrate construction, from inception of the Metro the OSD associated with the Metro project has been required to be capable of being delivered separately without interfering with the delivery of the State Infrastructure approved Metro. That principle still prevails. It is also possible to ensure the OSD complies with the competitive design process provisions of the Sydney LEP 2012, which remains a prerequisite for this development's consent.

While the January 2017 Metro (CSSI) approval *"is not bound by any Local Environmental Plans including the Sydney Local Environmental Plan 2012"*, JBA asserts *"the SLEP 2012's 'design excellence' requirements are therefore not applicable to the Metro project."* But JBA fails to articulate that the OSD is excluded from the Metro project approval and is subject to the Design Excellence provisions of Division 4 of the Sydney LEP 2012 involving competitive design processes.

The Executive Summary of the State Significant Infrastructure Assessment (SSI 7400) dated December 2016 states: *"Stations would be designed to allow Over*

Station Development, incorporating structural elements and suitable space. However, this development, including associated future uses, does not form part of this project and would be subject to the relevant assessment pathway prescribed by the Environmental Planning and Assessment Act 1979".

With the OSD excluded from the infrastructure approval and the OSD subject to the requirements of Sydney LEP 2012, JBA is effectively seeking a waiver of the competitive design process and in its place an 'alternative design excellence framework' which relies on the operation of a design review panel (DRP). Such a waiver under the circumstances should not be granted.

While an existing DRP was required by conditions E100 and E101 of the State Infrastructure Approval dated 9 January 2007, the jurisdiction of the DRP is the Metro infrastructure approval and, as aforesaid, specifically excludes the OSD.

According to cl. 6.21 (5) LEP 2012 *"Development consent must not be granted…* (for development meeting the criteria listed)*…unless a competitive design process has been held in relation to the proposed development*". This means the Macquarie proposal cannot be granted consent unless it meets the requirements of this clause.

The LEP is clear about the circumstances where a departure can be made from the requirement for a competitive design process. The competitive design process provisions may only be waivered if the consent authority is satisfied that such a process would be unreasonable or unnecessary in the circumstances or that the development:

(a) involves only alterations or additions to an existing building, and

(b) does not significantly increase the height or gross floor area of the building and,

(c) does not have significant adverse impacts on adjoining buildings and the public domain, and

(d) does not significantly alter any aspect of the building when viewed from public places

Having regard to the above, the City contends that it does not meet these cumulative tests, and so the competitive design process cannot be waived in favour of an "alternative design excellence framework" which, in any case, appears to be less effective.

The influence of a DRP to exercise the equivalent design excellence control and outcome that the tension of competitive design process delivers is not proven. A

record of the DRP meetings to date for the CSSI, indicate that where the DRP has concerns and expressed strong views, the concerns are not necessarily taken on board by the Proponent. A contemporaneous example is the DRPs concerns with Macquarie's Planning Proposal seeking to reduce Martin Place setback to the South Tower – despite the lack of support by the DRP, the application was lodged unamended.

Clause 4.6 Variation Request

The application relies on limited justifications under cl. 4.6 of the LEP to seek an inappropriate degree of flexibility in applying the principal development standard for maximum floor space. This is not supported by the City and relies on a misinterpretation of common law and reliance on a draft strategy that cannot be given statutory weight (and is not a matter for consideration until Gateway Approval).

A cl. 4.6 variation requires a test against the objectives of the control and the zone in the current Sydney LEP 2012. A cl. 4.6 assessment cannot rely on other 'draft proposals' which may or may not become objectives of 'some future' control (CSPS). It is a matter for the consent authority to assess consistency with the existing objectives, however, the applicant's approach of relying on uncertain 'proposed draft' instruments which have not even been on formal public exhibition is not supported in current legal planning pathways. Also, to state that the Sydney LEP 2012 (LEP) is not a current instrument in relation to FSR controls is a clear falsehood manufactured to support the case for a variation. The site is capable of accommodating floor space for employment in the current existing controls reflected by the zoning and floor space of the 2012 LEP.

A further assessment of the above, is included within **Attachment A** to this letter.

The Department of Planning and Environment should be concerned about transparency in planning processes and the precedent this sets regarding the inappropriate use of cl. 4.6. We believe that the defendable process for reviewing the floor space standards of this magnitude is via a public planning proposal process.

At this stage, the application should only be granted consent for a concept incorporating floor space consistent with the Sydney LEP 2012, and the planning proposal be amended as necessary.

Other issues that require attention:

- The envelopes must be verified that they do not overshadow Hyde Park and Pitt Street Mall, which is prohibited by the Sydney LEP 2012.
- There will be significant heritage impacts on 50 Martin Place, with the northern proposed tower being too close to the item. This can be remedied by appropriate modelling.
- The proposed envelopes will overshadow and create significant wind impacts to the City streets due to its unrelieved form, particularly the lack of setbacks above heritage street wall height and likely impacts on pedestrian amenity.
- The construction related impacts have not been assessed.
- No approval is in place from the Commonwealth relating to airspace.
- Analysis of views and outlook impairment from surrounding buildings

Bay Simmer Investments Pty Ltd v State New South Wales [2017] NSWCA 135
At this stage, and as required by the decision of Bay Simmer Investments Pty Ltd v State New South Wales [2017] NSWCA 135, no discussion or assessment of construction related or social impacts on surrounding uses have been included within the application, and must be provided in order for a thorough assessment of the proposal to be undertaken. It is also noted that no dilapidation report, environment management plan, geotechnical report, construction management plan linked to a construction traffic management plan, no construction noise and vibration management plan (as the assessment is based on "*no physical works proposed*") or structural reports for the heritage building have been submitted with the application for a full assessment as they "*are yet to be resolved"*.

Section 79C
The City has provided within **Attachment B**, a view analysis of the existing site; which includes:

- A complying form and FSR proposal;
- A complying form proposal (this building could include voids); and
- The proposal, which is non-complying.

This analysis clearly indicates the detrimental impact the proposal will have on the streetscape due to lack of setbacks. This is due to its unrelieved bulk, scale, height and form and will result in reduced daylight to City streets.

Notwithstanding all of the above, s. 79C of the Planning Act identifies matters to be considered by the consent authority, to the extent that they '*are of relevance to the development the subject of the* development application'.

In particular s. 79C (1) (b), being *'the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.'* The application has failed to demonstrate the impacts of a complying scheme and the difference between it and the current proposal, nor has it quantified these impacts.

Further, the application has failed to consider the impacts of the SSI 7400 Mod 3 application as part of the current application made for the OSD even though these aspects are inherently interrelated and tied together "for those interface" areas at the lower levels of the proposal.

At the time of preparing this submission, the proposal is inconsistent with Sydney LEP 2012 which specifies under cl. 7.16 'Airspace Operations' that the consent authority must not grant development consent if the relevant Commonwealth Body advises that the development will penetrate the Limitation or Operations Surface and should not be constructed. An application to the Commonwealth body in this instance appears to not have been made or, at least, has not been assessed as part of the Stage 1 (the City is not aware of any application being made or approved by the Commonwealth). Unlike Darling Harbour or Barangaroo where this Planning Control in the LEP was not in place, the application is to be made and comments adequately assessed prior to determination. This cannot be deferred to a later stage.

Martin Place has long been the civic and ceremonial heart of the City. Its planned evolution and development is a result of the City and the NSW Government consistently applying good city planning principles since as early as 1870 when the idea of Martin Place was first suggested by the Government Valuer who saw the value in creating a grand public space for all of Sydney. The City of Sydney has also played a big part in its realisation in the twentieth century. The proposal as put is not

acceptable and will result in a poor urban outcome for Sydney, reducing amenity levels and with little regard to the surrounding built form.

Should you wish to speak with a Council officer about the above, please contact Christopher Corradi on 9265 9333 or at ccorradi@cityofsydney.nsw.gov.au.

Yours sincerely,

Graham Jahn AM
Director
City Planning I Development I Transport

ATTACHMENT A

Urban Design and Design Excellence

The proposed concept represents a significant departure from the desirable built form for the site as envisaged by the City's current planning instruments (SLEP 2012 & SDCP 2012). The non-compliances with the controls include, but are not limited to potential overshadowing, floor space departure, bulk and scale, street frontage heights and building setbacks.

From a quantitative point-of-view, the uplift in floor space of the North Tower significant and substantial increase to what is permissible under the SLEP 2012. The inability of the proposal to deliver a built form that conforms to the relevant planning controls for the site may relate to the excessive floor area being sought.

The maximum Floor Space Ratio (FSR) allowable on both the North Site and South Site when undertaking office/retail development is 12.5:1 as per the provisions of Clause 4.4 and Clause 6.4 (being the base FSR of 8:1 plus accommodation floor space of 4.5:1). Additional floor space (up to 0.3:1) maybe available for commercial office development under Clause 6.6 for the delivery of end of suitably located trip facilities.

It is noted that the Applicant has expressed their intention to not undertake a competitive design process as required by the LEP (Clause 6.21 of LEP 2012). This translates to the exclusion of the subject proposal from the 1.25:1 bonus FSR potentially achievable under the policy. They seek to be awarded the additional floor space in any case.

The proposal seeks approval for 104,270m² of predominantly commercial floor space for the North Tower, which constitutes an FSR of 17.314:1. This represents a variation to the 12.5:1 FSR control by 28,995m² (4.8:1) of **38.5%.** It is noted that this calculation excludes the floor space associated with the Martin Place Metro Station approved as part of the CSSI Approval.

However, in accordance with the definition of GFA in the SLEP 2012, all floor space is required to be included within the calculation. Therefore, when factoring in the CSSI GFA for the North Site (approx. 6,500m²) the North Site FSR increases to 18.394:1 (comprising a total GFA of 110,770m²) which equals to a **47.2%** increase (excluding end of trip).

The granting of additional floor space in relation to the delivery of end of trip facilities within the development would only marginally reduce the magnitude of the North Tower non-compliance with the applicable FSR control.

The Concept Proposal for the North Tower seeks approval for an envelope with no setbacks to Hunter, Elizabeth and Castlereagh Streets and there is no tower setbacks to southern boundary to 50 Martin Place. The building envelope proposed for this site takes up an area the size of an urban block and produces a significant urban scale shift when compared to the local context.

The concept scheme for the North Tower is contrary to the design intent for the area as anticipated by the local planning instruments which is to deliver the typical podium and tower form of buildings throughout the CBD.

The disregard of the planning controls that guide the built form for the subject site are considered to be a contributing factor to the degradation of the level of comfort which is currently enjoyed by pedestrians in the public domain areas around the proposal. In particular, the submitted Pedestrian Wind Environmental Study prepared by CPP (Appendix P) indicates an increase of wind speed along Hunter Street and in Martin Place.

Heritage

North Tower

The principle of integrating the design of the station with the tower above is not opposed in principle but any such proposal must optimise external and internal public spaces. It must deliver a clear public benefit and public spaces and amenity clearly delineated from private amenity. It is very important to bear in mind that the metro station is infrastructure with a 100+ design life whereas any commercial building above it would (looking at the history similar premium sites elsewhere in the city) be replaced up to three times during the next hundred years. The amenity of the station must therefore be independent of the building above it.

- The proposal in its current form does not deliver this and may have an unacceptable impact on its context and, in particular, on the heritage listed 48-50 Martin Place.

- The proposed tower to the north is too close to 48-50 Martin Place and is a poor contextual fit due to its bulk and lack of set-backs to north, east and west. It needs to be adjusted and competitive design processes would assist.

- The envelope results in a poor relationship with the surrounding street wall heights and the heritage buildings at 48-50 Martin Place and in the vicinity of Chifley Square including the former QANTAS building, Wentworth (Sofitel) Hotel and the City Mutual Building. The Datum set up around Chifley Square by the last two decades of development is weakened by a lack of street wall or set back to the north.

South Tower

- A minimum 25m setback above the Martin Place street wall is **essential** to maintain the distinctive objectives of the Martin Place controls for new buildings, daylighting, sky views and pedestrian amenity of Martin Place. This tower set back has been retained in developments over the past twenty years.

- In addition the proposed envelope does not set back the east and west sides of the tower as required by the DCP and this is not adequately justified. It will have an impact on views, sun and daylighting from north and south.

Public Domain

As discussed above, the proposed built form envelopes do not allow for setbacks above street frontage heights, which will result in reduced daylight in relatively narrow City streets. This is not supported and underlines the need for a design competition to resolve the design of the towers.

Of particular note is Clause 6.16 of the Sydney LEP 2012, which seeks to ensure that tower development does not impact on the amenity of public places; however, the proposal may overshadow a portion of Pitt Street Mall and Hyde Park in mid-winter. In addition, Clause 6.19 prohibits overshadowing at this time of year.

The SSD application documents include public domain plans, which refer to the Sydney Metro Urban Realm Design Guidelines as the source of colour and material palette. This is not supported. The City has a standard palette of materials and

finishes for all public spaces, including Martin Place. It is expected that works to Martin Place will be consistent with the City North Public Domain Plan, and the City's Streets Code and Standard Technical Specifications.

Removal of the existing station portals in Martin Place is supported, along with paving infill and kerb extensions at intersections. It is expected that these works will be completed with the development.

Colonnade to Martin Place

The colonnade represents a departure from the design principles identified in the Metro EIS and those long held by the City for Martin Place:

- The City has been working to eliminate colonnades and setback spaces at ground level across the City. Currently the infilling of these spaces on existing buildings are incentivised through floor space controls (Clause 6.9 of the LEP). New colonnade and ground level setbacks are not permitted in new development.
- These spaces create an ambiguous and untidy definition of the public domain, are unsafe at night and inactive during the day. Colonnades create a separation between ground floor uses and the public domain which are contrary to the objective of activating the edges of the public domain. On some older development sites at Martin Place, the street edge has been eroded by development. Each new development site offers an opportunity to reinstate that edge in line with significant heritage items that define the space.
- Further, the colonnade is not architecturally appropriate to either the Special Character Area controls for Martin Place, or the heritage item opposite the southern tower at 50 Martin Place. That building becomes more solid as it meets the ground, and the proposed colonnade space is contrary to that.

Activation of Hunter Street

The Hunter Street frontage of the northern tower is not considered to be an active frontage. The development should include retail tenancies on this frontage and ground level.

Sydney LEP 2012 Clause 4.6 variation request

A Clause 4.6 objection has been lodged with the application to support the variation to the FSR development standard under the Sydney LEP 2012 for the North Tower.

It should be noted that the characterisation of the Chief Judge's decision in *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 by the Applicant's consultant at page 9 of the Clause 4.6 objection is incorrect. The correct application of this test is neatly summarised by Commissioner Dickson in the recent decision in *Gabriel Stefanidis v Randwick City Council* [2017] NSWLEC 1307 at [23]:

> *23. It is clear from a reading of cl 4.6, within LEP 2012, that the onus is on the applicant to meet the tests of cl 4.6 in seeking flexibility to the lot size by demonstrating that the breaches of the development standard are justified. In Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7, Preston CJ outlined that commissioners, in exercising the functions of the consent authority on appeal, have a power to grant consent to developments that contravene the lot size standard, however they cannot grant such a development consent unless they:*
>
> 1. *Are satisfied that the proposed development will be consistent with the objectives of the zone,*
> 2. *Are satisfied the proposed development will be consistent with the objectives of the standard,*
> 3. *Have considered a written request that demonstrates compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and they are satisfied that the matters required to be demonstrated have adequately been addressed,*
> 4. *Have considered a written request that demonstrates there are sufficient environmental planning grounds to justify contravening the development standard and with the Court the matters required to be demonstrated have adequately been addressed.*

Although the cl. 4.6 objection refers to a number of cases explaining the process of applying cl. 4.6, it does not refer to the commonly cited approach to the clause set out by Commissioner Brown in *Bates Smart Pty Ltd v Council of the City of Sydney* [2014] NSWLEC 1001 at [39]:

39. *Clause 4.6 of LEP 2012 imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), the second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the height standard (cl 4.6(4)(a)(ii)), the third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and the fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).*

41. *A negative finding for any precondition must see the appeal dismissed and a positive finding would enliven the power to grant development consent subject to a merit assessment.*

It is clear from this outline that the consent authority is required to form its own opinion as to the consistency of the application to the objective of the zone and the relevant development standard, and is not bound to consider whether the applicant has addressed the issue in their written objection as argued by the applicant. This test has been cited extensively by Commissioners in the LEC when assessing cl. 4.6 applications.

The Applicant has asserted that the Central Sydney Planning Strategy is a relevant matter for consideration when assessing the cl. 4.6 application. It is also submitted that this Strategy is not a relevant consideration when considering the merits of the application as a whole in accordance with s 79C of the Act. The Strategy is not a draft Planning Proposal, the associated draft Planning Proposal has not yet received Gateway determination from the Department and neither document has yet been on public exhibition. As such they cannot be considered in any way to be imminent and certain.

The Applicant's has taken a 'cherry-picking' approach to future controls and does not reflect the true nature of the proposed Strategy – that any change in controls of

the nature and extent of that proposed by the Applicant is intended to be done by way of a Planning Proposal, with an associated public benefits, with impacts on amenity clearly assessed by evaluating a complying as opposed to a non-complying scheme.

ends