

**Objection to Mirvac's Staged Development Application known as
'Redevelopment of Harbourside Shopping Centre'**

1. The designated authority cannot issue a permit to Mirvac under the *Darling Harbour Development Plan No 1* for carrying out the proposed development in its current form because the proposed residential tower is inconsistent with the Plan's achievement of its objects.

According to Mirvac's **Request for SEARs**, *Darling Harbour Development Plan No 1* is the "principle environmental planning instrument" (p. 6) applicable to the Harbourside site. Under the Plan, development within the Darling Harbour area is generally prohibited, though the designated authority may exceptionally allow certain kinds of development to be carried out "in accordance with the terms of a permit". While development for the purpose of "residential buildings" is permissible (cf. permitted) under subclause 6(d) of the Plan, the Plan does not expressly encourage the development of residential facilities. By contrast, a stated object of the Plan is "to encourage the development of a variety of tourist, educational, recreational, entertainment, cultural and commercial facilities" within the Darling Harbour area. In light of this object, Mirvac's characterisation of Darling Harbour as a "tourism and convention centre precinct" (p. 75) in its **Environmental Impact Statement ('EIS')** is accurate.

Another stated object of the Plan is "to make provision with respect to controlling development" within the Darling Harbour area. The means by which the Plan aims to achieve this, and its other objects, are set out in clause 3(2). This clause, in addition to imposing the general prohibition of development within the Darling Harbour area, provides for the Plan's permit system. It should be noted that, pursuant to this system, the designated authority may only exceptionally permit "certain kinds of development", and can grant its permission subject to terms. In light of the Plan's stated object of development control, and the associated means for achieving it, described above, Mirvac's assertion in its **Request for SEARs** that "[t]here are no height, FSR [floor space ratio] or other development controls contained within the DHDP [*Darling Harbour Development Plan No 1*]" (p. 6) is misleading.

Clause 6 of the Plan sets out the kinds of development with respect to which the authority may issue permits. It consists of five subclauses. When this clause is read in conjunction with the objects of the Plan, enumerated in clause 3(1), it is clear that the Plan's drafters arranged the five subclauses hierarchically (i.e., in descending order of *prima facie* importance to the Plan's achievement of its objects). The first subclause, (a), contains those permissible (cf. permitted) kinds of development that have purposes *directly* related to the Plan's objects. (The repetition of the formulation "tourist, educational, recreational, entertainment, cultural or commercial facilities" evidences this.) The purposes contained in subclauses (b) through (e) are *indirectly* related to the Plan's objects. Whereas development for the purposes contained in subclauses (b) and (c) is nevertheless likely to be important to the Plan's achievement of its objects, development for the purposes contained in subclauses (d) and (e) is not. (This conclusion is supported by the incorporation of Schedule 1 into the clause by subclause (d). This Schedule reads as a laundry list, designed to give the designated authority flexibility should a situation unanticipated by the Plan's drafters arise.)

With this in mind, Mirvac's assertion in its **Visual and View Impact Analysis** that residential development is "nominated under the [Plan] as a *permitted* and *expected* form of development" (emphasis added) (p. 12) is plainly erroneous. Notwithstanding the ostensible power of the designated authority under subclause 6(d) of the Plan to issue a permit for carrying out development within the Darling Harbour area for the purpose of "residential buildings", the circumstances in which the authority can actually issue a permit for carrying out this kind of development are limited. This is because the breadth of the authority's power under subclause 6(d) is effectively capped by clause 3(2). First, despite the conferral of power under subclause 6(d), the default position under the Plan remains that development in the Darling Harbour area is generally prohibited. Second, the permit system, provided for by subclause 3(2)(a), forms part of a "means" by which the Plan aims to achieve its objects, and must be implemented as such. It follows that the authority may only issue a permit if the permissible development concerned will advance the Plan's achievement of its objects. It also follows that the terms of any permit issued must restrict the permitted development to that which will advance the Plan's achievement of its objects.

Mirvac's proposed residential tower does not advance the Plan's achievement of its objects. To the extent that Mirvac's application, particularly the appended **Retail Strategy**, demonstrates that the proposed redevelopment of the Harbourside site will entail the development of "tourist, educational, recreational, entertainment, cultural and commercial facilities", those facilities will be wholly contained in the separable podium below the tower. This conclusion is supported by the virtual absence of the tower from Mirvac's **Public Domain Design Report**. The best that Mirvac can say for the proposed tower is that its "residential use *will not undermine* the functionality or experience of Darling Harbour as a tourism and convention centre precinct" (emphasis added) (**EIS**, p. 75). This formulation betrays Mirvac's knowledge that the residential tower contributes nothing to the Plan's achievement of its objects. (Incidentally, this knowledge could explain why Mirvac appears so eager throughout its application, including on p. 12 of its **EIS**, to attribute the choice of a residential (cf. commercial) tower to the residents of 50 Murray Street).

In actual fact, the construction of the proposed residential tower would impede the Plan's achievement of its objects (which means that Mirvac's claim about the tower's residential use, above, is patently false). By Mirvac's own admission, construction of the proposed residential tower would have a "visual impact on the immediate setting of the Pyrmont Bridge and its surrounds" (p. 3), including "increasing the obstruction of direct views to the bridge" (p. 41) from within and around the site (**Heritage Impact Statement**), and would make impossible a "view corridor to the city from the future Bunn Street connection" (**EIS**, p. 11). Even without taking into account the heritage listed status of the Pyrmont Bridge, it is evident that construction of the residential tower would diminish the value of existing and future tourist facilities (the Pyrmont Bridge and the Bunn Street connection, respectively) within the Darling Harbour area.

Mirvac tellingly observes in its **Environmental Impact Statement** that "the refurbishment of the existing shopping centre in isolation would not capitalise on the opportunities available to the site", and that "in order to achieve the highest quality refurbishment of the existing shopping centre and accompanying public domain improvements, significant investment would be required" (p. 5). In doing so, Mirvac

implicitly argues that the designated authority should permit construction of the proposed residential tower, despite the deleterious effects that it is likely to have on the Plan's ability to achieve its objects, because Mirvac does not (subjectively) consider the redevelopment of the shopping centre in isolation to be a sufficiently lucrative endeavour.

The authority should reject this argument in the strongest possible terms. Awarding Mirvac this undue windfall would go well beyond "encouragement" of the development of the facilities listed in subclause 3(1)(b), and would therefore be outside the powers of the authority. Moreover, doing so would set an undesirable precedent. In future, any developer that proposes to make a capital investment in the facilities listed in subclause 3(1)(b), and that considers its projected profit margin unsatisfactory, could reasonably expect the authority to issue to it a permit for any permissible kind of development of its choosing. The simple fact is that Mirvac is in possession of a mere "long term lease to operate the Harbourside Shopping Centre" (EIS, p. 24). It should not be able to obtain, for the price of acquiring that lease, a licence to dictate the use to which an important site "in the single ownership of the NSW Government" (EIS, p. 24) is put.

For the foregoing reasons, the designated authority cannot issue a permit to Mirvac for carrying out the proposed development in its current form. If the designated authority issues a permit to Mirvac with respect to this application, the permit's terms must prohibit the construction of a residential tower.

2. In the alternative, the designated authority should not issue a permit for carrying out the proposed development in its current form because Mirvac has not satisfactorily complied with the requirements of the SEARs issued on 30 August 2016.

In response to Mirvac's 3 August 2016 **Request for SEARs**, SEARs were issued on 30 August 2016. Mirvac has not satisfactorily complied with the requirements of the **SEARs**, and so the designated authority should not issue a permit for carrying out the proposed development in its current form. The respects in which Mirvac has not satisfactorily complied with the requirements of the **SEARs** are addressed in turn below.

a. *Mirvac did not undertake the requisite pre-submission consultation*

Pursuant to the **SEARs**, Mirvac's **EIS** needed to "include a report describing *pre-submission* consultation undertaken, including consultation with the local community, issues raised during that consultation and how the proposal responds to those issues [...] in relation to *this proposal* [SSD 7874] and the alternative proposal [SSD 7375] for the redevelopment of the Harbourside Shopping Centre" (emphasis added) (p. 4). It follows that the **SEARs** implicitly require Mirvac to undertake pre-submission consultation in relation to this proposal. Mirvac, despite its assertions that it is "committed to open, accessible and genuine consultation with affected stakeholders" (**Community Consultation Summary Report**, p. 3), and that "the level of consultation undertaken [was] well in excess of that required by the SEARs" (EIS, p. 46), failed to satisfactorily comply with this requirement.

In its **Visual and View Impact Analysis**, Mirvac observed that 50 Murray Street/One Darling Harbour “has the closest relationship to the subject site” (p. 27). Similarly, in its **Urban Design Review**, Mirvac acknowledged that, of the apartment buildings analysed, 50 Murray Street/One Darling Harbour “is the closest to the subject site and thus the most affected”. And yet, Mirvac determined that the residents of 50 Murray Street/One Darling Harbour should not be given an opportunity to discuss Mirvac’s so-called ‘election’ to proceed with the residential/retail concept, the defining feature of this proposal, until *after* its development application was submitted (*see Community Consultation Summary Report*, pp. 11 and 28). It is immaterial whether representatives of 50 Murray Street/One Darling Harbour eventually acquiesced to this approach; it was incumbent on Mirvac under the **SEARs** to initiate the consultation process, rather than propose its postponement. The end result is that issues that might have been raised by key stakeholders during consultation, and Mirvac’s eventual responses to them, have been omitted from Mirvac’s application. The application is therefore susceptible to giving the false impression that stakeholders have agreed to Mirvac’s proposal.

b. Mirvac did not thoroughly consider the benefits and potential impacts of each option for the tower’s location

Pursuant to the **SEARs**, Mirvac’s **EIS** had to “provide a comprehensive options analysis for the built form, exploring a range of heights, tower locations and built forms, with justification of the selected option based on a *thorough consideration* of the benefits and potential impacts of each option” (emphasis added) (p. 2). Mirvac did not thoroughly consider the benefits and potential impacts of each option for the tower’s location, and therefore failed to satisfactorily comply with this requirement.

In this proposal, Mirvac purported to consider three possible locations within the Harbourside site for its proposed residential tower, viz. the southern location, the central location, and the northern or central northern location. In both its **Design Report** (on p. 33) and its **EIS** (on p. 11), Mirvac made no more than a superficial attempt to weigh the benefits and potential impacts of each location.

In the **Design Report**, Mirvac records overshadowing of the podium’s roof as the only negative feature of the central northern location. It completely fails to mention, for example, that “the obstruction of direct views” (**Heritage Impact Statement**, p. 41) from locations in and around the site to the heritage listed Pyrmont Bridge will increase due to the tower’s close proximity; that the Harbourside site is narrowest at its northern end, so the opportunities for the tower to be set further back relative to Cockle Bay will be lost; or that the prevailing view to the east from 50 Murray St/One Darling Harbour, the building with the “closest relationship to the subject site” (**Visual and View Impact Analysis**, p. 27), will be significantly impacted. The table in the **EIS**, in which the benefits and disadvantages of each location were weighed, was not revised in light of Mirvac’s decision to propose a residential, rather than commercial, tower. As such, the key benefit of the northern location is still identified as “the ability for a commercial address to be achieved” (p. 11).

So lazy is Mirvac’s attempt at listing the potential impacts of the northern location and the benefits of the other locations, one would think that Mirvac has a vested interest in building the tower in the northern location instead of elsewhere on the site.

This conclusion is almost irresistible when the supposed positive and negative features of each location, as listed in the **Design Report**, are critically considered. For example, the **Design Report** lists as a negative feature of the southern and central locations “poor connection for tower to Pyrmont Bridge, CBD [and] beyond” (p. 33). Mirvac undermines the credibility of this claim by observing in the same document that the redevelopment of Harbourside will create a key urban link “from the waterfront to the city via an improved and generous access to Pyrmont Bridge” (**Design Report**, p. 30). Elsewhere, Mirvac proudly proclaims that the Harbourside site as a whole has a “walk score” of 98 percent, with a score above 90 percent deemed to denote a “walker’s paradise” (**Ecologically Sustainable Design Statement**, p. 11).

Similarly, the **Design Report** gives the impression that only a tower in the central northern location could give effect to the all-important design principle of “tower separation” (pp. 33 and 36). Having declared in the body of its **EIS** that the proposed tower’s 30m setback from 50 Murray Street/One Darling Harbour is “well in excess of the recommended separation within the [Apartment Design Guide]” (p. 81), Mirvac goes on to observe that “the preferred location of the tower results in it being *166.5m* from the new ICC Hotel” (emphasis added) (p. 39). Mirvac also implicitly considers a 50m separation between the proposed tower and the heritage listed Pyrmont Bridge to be adequate, but the 59m separation that could be created between the ICC Hotel and a tower in the southern location (without disturbing the Bunn Street axis) to be inadequate.

For the foregoing reasons, the designated authority should not, as a matter of good policy, issue a permit to Mirvac for carrying out the proposed development in its current form. If Mirvac wishes to persist with its application, it should be required to properly comply with the requirements of the **SEARs** issued on 30 August 2016, and the public should be given a further period of time to comment on Mirvac’s revised application.