

INNOVATIVE

ITEM NUMBER	14.8
SUBJECT	Amendment to Planning Agreement (Executed April 2015) relating to land at 189 Macquarie Street, Parramatta
REFERENCE	RZ/7/2013 - D06843307
REPORT OF	Team Leader Land Use Planning
DEVELOPER	Toplace Pty Ltd
APPLICANT	Toplace Pty Ltd

PURPOSE

This report seeks Council's endorsement for the exhibition of a Draft Deed of Variation which seeks to amend the Planning Agreement executed in April 2015 relating to 189 Macquarie Street, Parramatta. The amendments to the Planning Agreement are required to ensure it reflects the agreements reached between Council and Toplace to sell the site, including the public car park, to Toplace.

RECOMMENDATION

- (a) **That** Council endorse the Draft Deed of Variation to amend the Planning Agreement (executed April 2015) relating to land at 189 Macquarie Street, Parramatta included as **Attachment 3** for the purpose of public exhibition.
- (b) **That** the outcome of the public exhibition be reported to Council to allow Council to determine whether the Draft Deed of Variation should be executed.
- (c) **Further**, that Council authorise the CEO to correct any minor inconsistencies or anomalies of an administrative nature relating to the Deed of Variation and associated exhibition documentation that may arise during the exhibition process.

THE SITE

1. The site, being 189 Macquarie Street Parramatta, is located in the eastern part of the Parramatta CBD (refer Figure 1). It has frontage to Macquarie Street and Hassall Street and has a total area of 5,211sqm.
2. A redevelopment of the site is currently underway. The following section contains details of the redevelopment approved for the site. The site is surrounded by mixed use buildings with towers of height ranging from 10 to 18 storeys.
3. The site is zoned B4 Mixed Use in Parramatta LEP 2011. Under this plan the site has a mapped FSR of 6:1 and a permitted maximum building height of 54m however there is also a site specific clause that allows up to 38750m² of floor space (an approximate FSR of 7.4:1) and 91.3m to be built on the site subject to certain conditions being met. The current controls and how they came to be enacted are discussed in detail in the following sections of this report. The site is also identified as flood prone land.



Figure 1 - Site Map

BACKGROUND - Process that led to current redevelopment of the site

4. A Planning Proposal (RZ/7/2013) seeking to amend the relevant LEP was lodged with Council on 14 October 2013. The Planning Proposal was supported by Council and the Department of Planning and Environment throughout the planning process and resulted in the following site specific clause being included in the Parramatta LEP 2011 on 20 February 2015.

7.9 Development on land at 189 Macquarie Street, Parramatta

- (1) This clause applies to land marked "Area 4" on the [Special Provisions Area Map](#).
- (2) Despite clauses 4.3, 4.4 and 7.10 (5), the consent authority may grant consent to development involving the construction of a new building or external alterations to an existing building on land to which this clause applies if:
 - (a) the design of the building or alteration is the result of a competitive design process as required by clause 7.10 (5), and
 - (b) the consent authority is of the opinion that the building or alteration exhibits design excellence with regard to the design criteria specified in clause 7.10 (4), and
 - (c) the development continues to include a public car park on the site (the area of which is not subject to paragraphs (e) and (f)), and
 - (d) the development does not result in a building with a building height that exceeds 91.3 metres above natural ground level, and
 - (e) the development does not result in a building with a gross floor area that exceeds 36,000 square metres, excluding any floor space used only for private balconies and communal open space, and
 - (f) the development does not result in a building with a gross floor area that exceeds 2,750 square metres that is used for the purposes of communal open space and private balconies.
- (3) In this clause:
 - communal open space means areas for the purpose of recreation for use by building tenants, including gymnasiums, common rooms and communal gardens.
 - private balcony means a balcony, terrace, deck or winter garden (whether unenclosed, partially enclosed or wholly enclosed) that is attached to a dwelling for private use.

5. At the time the Planning Proposal was lodged Council owned the site and had entered into a Property Development Agreement (PDA) with the proponent (Toplace Pty Ltd). The PDA granted Toplace the right to lodge applications to obtain approval for redevelopment of the site and to undertake the development ultimately approved by the Joint Regional Planning Panel (Sydney West). The PDA proposed the site be developed primarily for residential apartment towers, which would belong to Toplace, subject to a public car park being delivered to Council as part of the redevelopment of the site.
6. On 21 November 2013 the Design Competition Panel considered three alternative designs for the subject site. The winning design proposes two residential towers above a podium (containing the public car park) to a building height of 91.3 metres.
7. A development application (DA/852/2013) seeking approval to redevelop the site in accordance with the design competition-winning scheme was lodged with Council on 23 December 2013. This development application (DA) proposed the removal of the existing at grade Council car park, erection of a 30 storey mixed use building containing 425 apartments, 317m² of retail space on the Macquarie & Hassall Street frontages, three levels of residential basement car parking (389 spaces) and seven levels of public car parking (715 spaces). Approval was granted on 15 April 2015 by the Joint Regional Planning Panel (Sydney West) . Figure 2 shows the development approved.



Figure 2 - 189 Macquarie Street (outlined in red dashes) – Viewed from Macquarie Street Looking West

8. The proponent initially submitted a Voluntary Planning Agreement (VPA) offer on 19 February 2014, which was followed by a revised VPA offer on 1 May 2014 and Council at its meeting on 14 July 2014 considered the VPA offer and resolved the following:

- (a) **That** Council proceed with negotiations for a Voluntary Planning Agreement (VPA) in relation to a Planning Proposal for land at 189 Macquarie Street, Parramatta in accordance with the broad terms detailed in this report.
- (b) **That** delegated authority be given to the CEO to negotiate the VPA on behalf of Council.
- (c) **Further, that** a draft VPA be prepared in accordance with the broad terms detailed in this report and publicly exhibited at an appropriate stage prior to being reported back to Council.

9. The Draft VPA included the following:-

- Re-iterated the requirement for the applicant to deliver a car park to Council in accordance with the requirements of the PDA;
- requirements for the applicant to deliver road works, streetscape improvements and a public through site link as part of the development of the site;
- provisions for how the developer contributions would be applied to the delivery of the car park

It was exhibited from December 2014 until February 2015. No submissions were received. As a result Council resolved to enter into the VPA and it was executed on 15 April 2015. From this point on, this VPA will be referred to as the 2015 Planning Agreement.

10. Following completion of the processes that finalised the

- Property Development Agreement;
- 2015 Planning Agreement;
- Planning Proposal; and
- Development Application

as described above, Toplace had all necessary approvals and agreements in place to develop the retail floor space, residential apartments and car parking permitted in the development approval.

CURRENT STATUS

11. Toplace lodged a development application seeking approval for an additional two basement levels. This application was refused by the Sydney Central City Planning Panel. An appeal of the Panel's refusal of this application was lodged with the Land and Environment Court.
12. During the construction phase of the approved scheme Council's Enforcement Officers became aware that work on site was not in accordance with the Development Consent issued. Investigations revealed that the development had three additional unapproved underground levels constructed and the method of construction of the basement was not consistent with the approval. As a result, the basement is not water tight which means groundwater can seep into the basement.
13. A stop work order was issued and remains in force. Challenges to the Stop Work Order were also lodged with the Court.
14. The Court dismissed both the appeal and Stop Work Order claims.

15. In order to resolve the issues the applicant has been in discussions with Council and have now lodged Building Information Certificates relating to the construction of the additional basement levels and lodged a Development Application (DA/283/2019) for a ground water management system which if approved would address the concerns arising from the basement not being watertight.
16. A subdivision application (DA/252/2019) seeking to create five stratum lots so that the public carpark is contained within a lot separate to the lots containing the residential and retail development on this site has been lodged with Council.
17. Toplace lodged an additional Planning Proposal (RZ/22/2015) for this site in October 2015. The application seeks to further increase the floor space and height from that permitted under the previous Planning Proposal discussed above which came into force in February 2015 to align with the floor space and height controls envisaged in the CBD Planning Proposal. Council considered this additional Planning Proposal in August 2016. Details of the proposed increase in FSR and height in this Planning Proposal are in the following extract from Council's resolution of 8 August 2016 where Council resolved to proceed with the application.

(b) *That Council endorses the planning proposal at Attachment 2 that seeks to make the following site specific amendments to the Parramatta Local Environmental Plan 2011;*

 - Increase the maximum floorspace on the site from 36,000m² (6.9:1) to 60,000m² (11.5:1) &*
 - Increase the maximum building height on the site from 91.3m to 167m*

and forward it to the Department of Planning and Environment for Gateway determination.
18. The Planning Proposal was issued with a Gateway Determination by the Department of Planning and Council also endorsed a Draft Voluntary Planning Agreement (VPA) on 12 June 2018. The Draft VPA is consistent with the CBD Planning Proposal Value Sharing Framework. If executed it would require the applicant to make a cash payment of \$2,424,603.00.
19. The Planning Proposal and Draft VPA were exhibited from 8 May 2019 to 7 June 2019. An independent planner will be engaged to review the submissions received during the consultation process. A report to Council detailing the submissions and the independent assessment outcomes will allow Council to determine whether the Planning Proposal should be finalised and the Draft VPA executed.
20. On 24 March 2019 Council considered its position on the subject site and resolved to sell the site to the developer. Council is no longer the owner of the site as the settlement of the sale occurred on 24 May 2019.

PROPOSED 2015 PLANNING AGREEMENT AMENDMENT

21. Council's decision to sell the site means that the 2015 Planning Agreement Council executed in April 2015 needs to be amended. A copy of the 2015 Planning Agreement Council entered into on 15 April 2015 is included as **Attachment 1** of this report.
22. The 2015 Planning Agreement was linked to the PDA between Council and Toplace. It refers to the delivery of the car park to Council in accordance with the requirements of the PDA. The PDA has been amended to reflect the new agreement regarding the ownership of the carpark.
23. The 2015 Planning Agreement also required the developer to provide a roundabout, footpath improvements and a through site link to Council and allowed for concessions to Toplace on the payment of Developer Contributions for the following reasons:-
- the carpark would be delivered to Council as a public asset and therefore contributions should not be paid on this component of the development
 - an incentive process to maximise the number of car parking spaces was implemented where the developer contribution payable decreased as the number of spaces Toplace provided increased.
24. To obtain an assurance from Toplace that they would agree to an amendment of the 2015 Planning Agreement a request was made that they make an irrevocable offer to Council to amend the 2015 Planning Agreement. The irrevocable offer was received on 23 May 2019 a copy is included as **Attachment 2**.
25. The two tables below detail the existing requirements of the 2015 Planning Agreement and the amendments that are now proposed. These amendments are reflected in a Deed of Variation, provided at **Attachment 3**:-

Table 1 –Amendments to Clause 6 - Works Toplace must deliver under the 2015 Planning Agreement

Clause	Existing 2015 Planning Agreement Requirements	Proposed Amendments
6.1 Public Car Park	Car park to be delivered to Council in accordance with Project Development Agreement (PDA).	Council has sold all its interests in the land and amended the PDA so the car park will not be delivered to Council. Instead the applicant has agreed that they will continue to operate the public car park. The proposed amendment requires the applicant to operate the car park and to obtain consent from Council before they can cease operation of the car park at any point in the future and they must also reach agreement with Council on a Plan of Management for the carpark which seeks to ensure the operation achieves the following outcomes :-

		<ul style="list-style-type: none"> • Not impose parking pricing regimes that encourage trips in peak traffic periods • Operate 24 hours a day to ensure the carpark contributes to the CBD night time economy. • Car parking cannot be allocated to any residential units on site in a manner that is inconsistent with Council's car parking policy for residential development in the CBD
Clause 6.2 Road Works	Construction of a new roundabout at the intersection of Hassall and Wigram Street	No amendments to the provisions requiring the delivery of the roundabout are proposed. The roundabout will still be delivered by Toplace as part of the 2015 Planning Agreement.
Clause 6.2 Streetscape Works	Upgrades to footpaths and verges on both the Hassall Street and Macquarie Street frontages	The amended clauses proposed retain the requirement for these upgrades to be undertaken by Toplace. The only amendments to relevant clauses seeks to clarify that Council will only retain ownership of land it already owns as part of the road reservation and that improvements located on the subject site, that effectively transition to or from an extension of the footpath will not be transferred to Council ownership. This is consistent with Council's decision to sell the site to Toplace.
Clause 6.2 Public Thoroughfare Work	Requires the delivery of a through site link, landscaped to Council's requirements along the eastern boundary of the site. In addition, Council would retain ownership of the land, as a stratum lot, containing the footpath.	Given Council's decision to sell the site the clauses have been reworded so that Council retains the through site link via an easement for public access in perpetuity. As part of the development approval process the location and construction, details for the laneway were determined. The proposed amendment reflects the change in ownership, that is, rather than the land containing the through site link being owned by Council it will remain in the ownership of Toplace but publicly accessible via the proposed easement. The construction and delivery of the walkway is still a requirement Toplace will have to satisfy.

Table 2 – Amendment to Clause 7 – Repayment of Developer Contributions concessions under the 2015 Planning Agreement

The table below details exemptions to developer contributions, provided to Toplace. The exemptions were justified on the basis that Toplace was constructing the car park for Council. These exemptions are not appropriate if the car park is not to transfer to Council ownership and the developer contributions should be repaid.

Clause 7 (b) (i) Developer Contribution - Exemption	The Parramatta City Centre S94A Development Contribution Plan is the relevant plan and it requires a payment based on 3% of the cost of development.	The applicant acknowledges that given that the car park will not be delivered to Council there is no public benefit that warrants the reduction in the contribution payable.
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	<p>The construction value of the car park was estimated and based on that estimate the 2015 Planning Agreement indicated that the value of the contribution payable on the total development would be reduced by \$836,352 because the car park was being built for Council.</p> <p>This figure was also to be subject to indexation as required by the contributions plan and so at the time the contribution was payable (i.e. around the time of issue of a construction certificate) the contribution payable to Council was reduced by \$850,447.</p>	<p>Toplace advised that the repayment was factored into their negotiations on their purchase of the land from Council. Council's Property Development Group has advised that the terms of the sale of the land took into account that the car park will no longer be delivered to Council.</p> <p>Adjusting for CPI \$901,349.39 from the proceeds of the sale of the site will be paid into the contributions plan account to ensure Council's developer contributions accounting requirements are satisfied and that these funds are expended on infrastructure specified in the Parramatta City Centre S94A Development Contribution Plan.</p>
<p>Clause 7 (b) (ii) Incentive for Developer to Provide additional parking</p>	<p>The agreement included a clause which reduced the developer contribution if they provided more spaces as in incentive for the developer to build the largest possible car park.</p> <p>For each space above 650 spaces the contribution payable would be reduced by \$38,000 per space. The agreement did set a requirement that regardless how many spaces were provided a minimum contribution of \$1,000,000 would be payable to Council.</p> <p>The development consent issued provided for a public car park with 715 spaces. At the time the contribution was paid the contribution payable was reduced by \$2,511,629.21 (figure adjusted for CPI) based on the applicant providing 65 more spaces than the 650 space minimum.</p>	<p>The applicant acknowledges that given that the car park will not be delivered to Council there is no public benefit that warrants the reduction in the contribution payable and that it should be repaid.</p> <p>Toplace advised that the repayment of this was factored into their negotiations on their purchase of the land from Council. Council's Property Development Group has advised that the terms of the sale of the land took into account that the car park will no longer be delivered to Council.</p> <p>However, it is noted that the applicant has not provided the 715 spaces the developer contribution discount was based on.</p> <p>The applicant has provided to Council a plan that shows that the carpark constructed has 692 spaces not 715. The applicant acknowledges the parking shortfall and that:-</p> <ul style="list-style-type: none"> • they are considering options to reinstate some of these spaces; and • they will repay to Council the developer contributions discount they received for the spaces that they are ultimately unable to provide; and • this payment was not included in negotiations on the purchase of this property

		<p>A follow up site visit has also been undertaken and it has identified that up to 14 spaces may not be viable as they do not meet relevant design standards. The applicant has challenged the assessment of officers. It may be necessary to bring in an independent reviewer if agreement cannot be reached.</p> <p>Given the lack of certainty about how many viable spaces have been, and will ultimately, be provided the proposed amendment contains a formula that requires Toplace repay to Council the developer contribution discount previously granted for spaces that are not provided.</p> <p>The amount payable to Council will depend on the confirmed/agreed number of spaces provided on site and the amount will be adjusted to take into consideration CPI changes.</p> <p>Table 3 below shows scenarios on what the applicant may need to pay Council depending on the agreement on how many parking spaces will be agreed</p>
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26. The table below shows three potential scenarios detailing the payment the applicant will need to make to Council based on the number of spaces ultimately provided in the carpark. In all scenarios the total that will need to be paid into the developer contribution account is \$3,563,306.32. The more car parking is provided by the applicant the less they need to repay and the greater the amount that will need to be transferred from the site sale proceeds into the development contribution plan account.

Table 3 – Funds to be Transferred into Contributions Plan Account

Scenario	Parking Space shortfall	Payment required by Applicant for car parking shortfall	Proceeds from site sale that must be transferred to Development Contributions Plan account	TOTAL
Applicant provides 715 spaces	Zero	Zero	\$3,563,306.32	\$3,563,306.32
Applicant provides 692 spaces - number in plan provided by Toplace	23	\$941,923.22	\$2,621,383.10	\$3,563,306.32
678 spaces- Current number agreed viable spaces	39	\$1,515,267.79	\$2,048,038.53	\$3,563,306.32

Note – All figure adjusted based on March 2019 CPI index

27. Clause 35 of the *Environmental Planning and Assessment Act 2000* requires Council to account for all contributions collected and how they are used to fund infrastructure. The developer contributions funds repaid by Toplace to Council either directly due to the parking shortfall or indirectly via the funds paid to Council to purchase the site will need to be transferred into the Developer Contributions accounts to ensure Council's developer contribution accounting requirements are met.

PUBLIC BENEFITS ASSESSMENT

28. At the time the 2013 Planning Proposal was considered and endorsed there was an increase in the permissible floor space of 4358m² permitted on the site. At the time this planning proposal was being considered the assessment would include consideration of the potential public benefits that might be obtained to improve local infrastructure. The potential public benefit accruing to the community from the additional 4358m² in this case was attributed to the construction of the car park. Now that the carpark will not be provided to Council this issue should be reappraised.

Public Benefit Being Provided in Amended Planning Agreement

29. The quantum of public benefits required in the 2015 planning agreement considered both (a) the land value uplift provided by the additional floor space provided by the 2013 planning proposal and (b) the cash payment required as part of the Project Development Agreement.
30. Public benefits required by the 2015 planning agreement comprise:
- Public car park – construction and dedication to Council of a public car park, with some offset provided against development contributions;
 - Through site link – construction and dedication of a through site link;
 - Roundabout – construction of a new roundabout; and
 - Footpaths – footpath upgrades.
31. Current proposed amendments to the 2015 planning agreement include:
- Public car park – removal of the requirement to provide a public car park to Council and insertion of two new requirements:
 - i. the applicant to operate the car park, under a Plan of Management agreed with Council; and
 - ii. the applicant must get Council's consent to amend the Planning Agreement before they can use the car park for another purpose;
 - Through site link – replacement of the requirement for a through site link to be dedicated with the requirement for an easement to be provided via a public right of access;
 - Roundabout – no change to roundabout provisions; and
 - Footpaths – no changes to footpath provisions.
32. It is considered that the amended planning agreement is still providing the following benefits:-

- The achievement of a through site link via an easement is tangible public benefit that has been recognised in other Planning Agreements in the CBD such as 184-188 George Street.
- The ability for Council to influence future decisions about the operation of the car park is a public benefit. Council has the opportunity to influence decisions about the operation of this car park that it would not normally have without the amended Planning Agreement. It can utilise this opportunity to ensure the carpark operates in a way that maximises public benefits. Without the Planning Agreement Council would have little or no influence if the applicant/owner proposed to close down the car park at some point in the future.

CBD Planning Proposal Value Sharing Framework

33. The quantum of public benefits is also considered to be commensurate with the financial contribution that would be required if the CBD Planning Proposal Value Sharing Framework was applied.
34. It is considered appropriate to apply the CBD Planning Proposal Framework in this case because it is Council's current adopted position and the policy in force on the date the decision to sell Council's interests in the site was made.
35. Council adopted the Value Sharing Framework in 2017, after completing the 2013 Planning Proposal and 2015 Planning Agreement. The 2017 Framework seeks to capture a proportion of the land value uplift generated when the maximum floor space control is increased via a planning proposal. Under the Framework, when applicants lodge a planning proposal to increase the maximum floor space control, they are expected to enter into a planning agreement to make a monetary, or works in kind contribution toward local infrastructure. In this case if the 2013 Planning Proposal was lodged today the contribution would be calculated at \$150 per square metre, equivalent to 20 per cent of the land value of the additional floor space generated by the planning proposal.
36. The benefits detailed above are considered to be comparable to or greater than the 20% value uplift contribution that would have been payable if the CBD PP Value Sharing Framework (i.e. \$653,700) was in place at the time of negotiating the 2015 Planning Agreement. Therefore, no further contribution from Toplace is required to address Council's value sharing framework in this case.

CONSULTATION

37. The provisions of Clause 25D of the *Environmental Planning and Assessment Regulation 2000* requires Council to publicly exhibit any proposal to enter into, amend or revoke a Planning Agreement.
38. Should Council resolve to proceed with the amendment in the form recommended then the exhibition process will be undertaken and will include:-
 - A notice in local papers;
 - Letters being sent to adjoining landowners
 - Relevant documents being made available on Council's website and in hard copy at Council Administration building and the Parramatta CBD Library.

CONCLUSION

39. The decision by Council to sell its interests in the subject site to Toplace necessitates an amendment the Planning Agreement executed in 2015 for this site. The Planning Agreement implemented a number of planning decisions that now must be reviewed.
40. The amended agreement recognises the public use of the car park and provide Council with the opportunity to respond to parking issues in the future should the owner at some point in time seek to stop operating the public car park. A through site link will also be delivered. It is considered that these public benefits are commensurate with the value uplift that might otherwise be payable by Toplace due to the 4358m2 increase in FSR permitted by the 2013 Planning Proposal.
41. The road works and footpath improvements remain requirements of the Planning Agreement.
42. The concessions on payment of developer contributions given to the developer on the basis that they were providing the car park to Council are no longer appropriate. The developer funds previously conceded will be recouped either via from the proceeds of the sale of the site or via payments made by Toplace due to shortfalls in the number of parking spaces provided. This will ensure that the appropriate funds are placed into the relevant developer contribution account where Council will hold them in trust so they can be spent in accordance with the Parramatta City Centre S94A Development Contribution Plan.
43. The Deed of Variation negotiated addresses the planning issues arising from Council's decision to divest ownership of 189 Macquarie Street. It is recommended that the Deed of Variation and supporting documentation be placed on public exhibition.

Robert Cologna
Team Leader Land Use Planning

Jonathon Carle
Manager Land Use Planning

Jennifer Concato
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ATTACHMENTS:

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|---|--|-------------|
| 1 | Planning Agreement (Executed April 2015) relating to land at 189 Macquarie Street, Parramatta | 48
Pages |
| 2 | Irrevocable offer to amend Planning Agreement (Executed April 2015) relating to land at 189 Macquarie Street, Parramatta | 2
Pages |
| 3 | Draft Deed of Variation to amend Planning Agreement (Executed April 2015) relating to land at 189 Macquarie Street, Parramatta | 14
Pages |

REFERENCE MATERIAL