

L K A D V I S O R Y

Urban & Regional Planning | Strategy | Policy | Governance | Performance

5 August 2019

Mr Steve Cope
Acting Chief Executive Officer
City of Melville
10 Almondbury Road
BOORAGOON WA 6154

By email: Steve.Cope@melville.wa.gov.au

Dear Mr Cope,

Draft Local Planning Policy (LPP) 1.18: Canning Bridge Activity Centre Plan (CBACP) – Bonus Building Height Provisions

Thank you for the opportunity to meet with you and Mr Gavin Ponton on Tuesday 30 July 2019 to discuss the status of Draft LPP 1.18.

As mentioned at our meeting, I have been engaged by Eastcourt Property Group (756 Canning Highway, Applecross) to undertake an independent, expert review of the City's Draft LPP and provide a submission to the City of Melville outlining my observations and recommendations, in the hope this may further assist Council in making an informed decision on this important matter.

My review of the Draft Policy has focussed on the three fundamental principles of good public policy:

- > Firstly, the **Process** involved in preparing the Draft Policy;
- > Secondly, whether the **Structure and Content** of the Draft Policy will provide improved certainty, consistency, clarity and guidance for the exercise of discretion; and
- > Thirdly, **Alignment** of the Draft Policy with the vision and strategic objectives for the area.

My feedback on Draft LPP 1.18 is set out below under these three principles and:

- a. Is intended to be honest and constructive, to support development of a robust and responsive local planning policy framework;
- b. Is not an exhaustive list of my professional opinions on the Draft Policy; and
- c. Should *not* be misconstrued or misrepresented as being either 'pro-density' or 'anti-density', because I do not subscribe to either of those one-dimensional arguments.

1. Process

- 1.1 Draft LPP 1.18 has been prepared in accordance with the relevant requirements of the *Planning and Development (Local Planning Schemes) Regulations 2015*. However, those requirements represent the minimum (not the optimum) approach to be taken by a local government when preparing or amending a LPP. For this reason, many progressive local governments are now opting for a more participatory and inclusive approach to policy development when dealing with complex planning issues with high public interest and impact – as in this case. In those circumstances, early and targeted engagement with all relevant stakeholders is key to building good policy, by defining stakeholder sentiment up-front and establishing an evidence base to inform policy preparation.

- 1.2 The predictably high number and nature of submissions received in response to Draft LPP 1.18 evidences the significant public interest in this matter and a strong desire for stakeholders to contribute more constructively to the City's position on this issue, rather than merely responding to an already drafted Policy.

Considering this, I believe it would have been far better if the project plan prepared in response to Council's decision from 18 September 2018 (Item M18/5640) recommended the following approach to develop LPP 1.18:

- a. Identify all external stakeholders who could be impacted by the Policy; namely – residents, developers, consultants, Development Assessment Panel Members, and Design Advisory Group Members.
- b. Through facilitated workshops and surveys, invite external stakeholders to:
 - i. Describe the 'problem' which the Policy should seek to address. For example – How can we provide greater clarity and consistency for assessing community benefits in relation to bonus heights in the M10 and M15 zones of the CBACP?; and
 - ii. Define and address the 'critical issues' underpinning this 'problem', which need to be interrogated and resolved in order to develop an appropriate Policy 'solution'. These 'critical issues' would include (but are not limited to) –
 - > What is a community benefit? How localised or far-reaching should the benefit be?
 - > When assessing community benefit, how can we ensure consideration is given to both the positive and negative impacts on the community of the proposed additional (bonus) height?
 - > When would a community benefit be considered too small to have any real benefit, if at all?
 - > What community benefits are needed most – Where? How? Why? When? For Whom?
 - > Are all community benefits equal or are some 'worth' more than others? To what extent does this depend on the location and circumstances of the proposal?
 - > Given that a proposal only needs to achieve a minimum of four sub elements under Element 22 of the CBACP, which four sub elements are considered most important – In which combination? Under which circumstances? In what priority order?
 - > How enduring do community benefits need to be and how can this be secured?
 - > How does the size, type and location of community benefit relate to the amount of bonus height allowed/approved, if at all?
 - > How much bonus height is too much, if at all?
 - iii. Synthesise the diverse (and potentially disparate) stakeholder feedback from i. and ii. above to identify common themes and key principles. Then, validate those results with stakeholders, consistent with the philosophy of 'We asked / You said / We heard'. This ensures the body of evidence presented to Council accurately reflects stakeholder sentiments.
- c. Present the evidence gathered from Step b. to Council, to consider and determine whether, how, why and to what extent the stakeholder feedback should inform the Draft Policy position. This ensures transparency, awareness and understanding around how the Draft Policy responds to stakeholder sentiment.

- d. Prepare the Draft Policy in line with Council's direction from Step c. and present the Policy to Council for the purposes of advertising, as occurred at the 19 March 2019 Council meeting (Item P19/3805). As part of this step, a sample of already approved developments in the M10 and M15 zones should be assessed against the Draft Policy to demonstrate the effect of the Policy.

Council should only advertise the Draft Policy for public comment if it is satisfied that the Draft Policy comprehensively responds to the items described in Step b. and the direction provided in Step c.

- e. During advertising of the Draft Policy, convene a limited number of public information sessions to explain –
 - i. How, where and why the Draft Policy responds to stakeholder feedback;
 - ii. How the Draft Policy is intended to operate; and
 - iii. What difference the Draft Policy would make compared to maintaining the status quo.

This would ensure greater awareness and understanding of the Policy among affected stakeholders, leading to more informed submissions with fewer questions and concerns than have been generated by the current Draft LPP 1.18.

- 1.3 In my experience, advertising a Draft Policy without prior stakeholder input (particularly on such a topical issue) will only generate narrow feedback on the specific content of that advertised Draft Policy, rather than comprehensive feedback on the broader issues which the Policy needs to respond to.
- 1.4 Fortunately, the opportunity is not lost for the City to take a more engaging approach to development of Draft LPP 1.18. This could be achieved by:
 - a. Council deferring consideration of Draft LPP 1.18, pending the collection and analysis of meaningful stakeholder feedback, as outlined in Step b. of Item 1.2 earlier;
 - b. Impartially assessing and reporting on the degree to which Draft LPP 1.18 aligns with the stakeholder feedback referenced in the preceding point a., so that Council can determine how that stakeholder feedback should influence the Draft Policy;
 - c. Revising or replacing Draft LPP 1.18 in accordance with Council's direction from the preceding point b., including assessing a sample of already approved developments in the M10 and M15 zones against the new Policy provisions;
 - d. Advertising the new or revised Draft LPP 1.18 for public comment, including convening a limited number of public information sessions to explain the purpose, application and effect of the Policy.
 - e. Reviewing all submissions received on the advertised Draft Policy and presenting the Policy to Council for consideration of adoption, with or without amendments.
- 1.5 In my view, taking the approach described in Item 1.4 will generate more comprehensive stakeholder conversation about this issue and produce a far more considered Policy outcome than the current version of Draft LPP 1.18.

2. Structure & Content

2.1 The sentence and paragraph structure of Draft LPP 1.18 has produced a document that is unnecessarily lengthy, clumsy and difficult to navigate. This is principally due to:

- a. Referencing and repeating (verbatim) provisions from the CBACP rather than simply requiring the Policy to be read in conjunction with the CBACP;
- b. A complete absence of 'Parts', 'Sections' or 'Subsections' in the document, coupled with unclear and inconsistent use of headings. For example, all but the first page of the Policy is contained under the main heading "POLICY STATEMENT", with the first sub-heading being "Assessment of Applications". The second sub-heading though is written in larger, bolder text as "Threshold to Bonus Height:" suggesting a degree of primacy over the first sub-heading. This inconsistency occurs throughout the Policy, including (for example) under the sub-heading "Performance Assessment of Bonus Items" which includes a further sub-heading titled "Element 21", written in the same size and style as the provisions relating to "Intent", "Performance Criteria" and "Required Documentation".
- c. Use of more than 180 dot-points instead of structured and sequential clause numbering/lettering to describe new Performance Criteria and Required Documentation. This causes all the dot-points to be 'lost' amongst themselves, making it difficult to identify and isolate applicable criteria and requirements. As a result, reader fluency and familiarity with the Policy is severely compromised.

By way of example, how would the Performance Criteria of "maintenance arrangements" under Requirement 22.1.7 be referenced by stakeholders, City staff and decision-makers? Would this be referred to as *'the second hollow dot-point under the last solid dot-point of the Performance Criteria relating to Requirement 22.1.7'*? To address this, the Policy needs to introduce a simple and consistent nomenclature of its own.

- d. An unclear relationship between the provisions contained under the sub-heading "Performance Assessment of Bonus Items" and those contained under the sub-heading "Desired Outcomes with Opportunity to Exceed Base Requirements".
- 2.2 The current structure of the document does not lend itself to adaptation over time, if additional Policy responses are required to augment and inform other aspects of the CBACP in future.
- 2.3 The Draft Policy would be better suited to a simple tabular form, with one row dedicated to each Requirement of Elements 21 and 22 and columns setting out the corresponding Performance Criteria and Required Documentation (with properly numbered clauses). Two new columns should also be included, describing Unacceptable Outcomes (where applicable) and Model Conditions (where necessary) that will be imposed to secure a particular result. These two aspects are vital for effective and consistent policy operation but are entirely absent from the current Draft Policy.
- 2.4 The fundamental premise of the Draft Policy is critically flawed for three simple reasons –
- a. The Draft Policy proposes to arbitrarily raise the Bonus Height Thresholds already established in the CBACP (by 50% in the M10 zone and 66²/₃% in the M15 zone). The only basis for this approach, as stated in the Draft Policy (page 3) and previous Council Reports, is that *"generally any proposal for a height which is substantially greater than the DO3 requirement for building height is likely to be considered inconsistent with the Desired Outcomes for building height"* (emphasis added). These terms are entirely subjective, lacking any supporting facts or evidence, and do not represent a robust foundation for this Policy position.

- b. The Draft Policy ignores the fact that the height limits stipulated in the CBACP for the M10 and M15 zones are indeed maximum as-of-right building heights that cannot be exceeded, *unless* the decision-maker is satisfied that:
 - i. The Desired Outcomes of all Elements are met or exceeded; and
 - ii. Exemplary design is proposed in the opinion of the Design Advisory Group; and
 - iii. The development includes the provision of a *significant* benefit to the community. (emphasis added)

Draft LPP 1.18 cannot 'lower the bar' set by the CBACP, by promoting greater as-of-right heights than those stated in the CBACP without the assessment and discretion mandated by the CBACP.

- c. The Draft Policy complicates and partly contradicts the CBACP stipulation that applicants are *only* eligible for consideration of bonus provisions, where the responsible authority is satisfied:
 - i. With the applicant's responses to *all* requirements of Elements 21 and 22; and
 - ii. That the proposed provision of a community benefit is proportionate to the extent of the bonus being sought and how the means by which that benefit will be guaranteed into the future.

To this end, for the sake of simplicity and for the benefit of applicants, residents and decision-makers alike, the Draft Policy should concentrate on explaining how the requirements of Elements 21 and 22 will be assessed; and defining the proportionality between the extent of bonus being sought and the level of community benefit required. This discussion must be informed by feedback from all affected stakeholders, as recommended in Item 1.4 earlier in this letter.

- 2.5 By way of comparison, the Victorian Planning Provisions include mandatory requirements for assessing the Net Community Benefit of different planning proposals. These Provisions may assist the City of Melville to enhance its approach to assessing community benefit under the CBACP.

In March 2017, the Victorian Auditor-General's Office (VAGO) released its report into "*Managing Victoria's Planning System for Land Use and Development*" which (among other things) examined local government practices for assessing community benefit. Key findings relating to community benefit assessments included:

- a. A comprehensive analysis of community benefit should address the full spectrum of both positive and negative environmental, social and economic impacts of the proposal. These should then be compared and balanced to arrive at a conclusion about whether the proposal is likely to make the community better or worse off, in net terms.
- b. A key weakness of some approaches to assessing community benefit was a narrow focus on physical amenity concerns to the detriment of broader public interest concerns.

If Draft LPP 1.18 were measured against these findings it would clearly fall short on both accounts.

The full Auditor-General's report is available on the VAGO website here:
<https://www.audit.vic.gov.au/sites/default/files/20170322-Land-Use.pdf>

- 2.6 In my view, the majority of provisions contained in Draft LPP 1.18 need to be replaced or re-written because they are confusing, unclear, and would complicate (rather than simplify) the assessment process under the CBACP.

Council should use the following questions to test the clarity and meaning of every Draft Policy provision:

- > Would an applicant easily understand what is expected of them?
- > Would an affected stakeholder understand what is acceptable or unacceptable?
- > Does the provision say what it means and mean what it says?
- > When applied literally, does the provision make sense?
- > How clear and defensible would the provision be if it was subject to review in the State Administrative Tribunal?
- > Would different City staff consistently reach the same conclusion if they were independently assessing the proposal in the same way?
- > Would decision-makers be able to clearly articulate the reasons for their decisions under these provisions and the matters taken into account in doing so, particularly when contrasted against other decisions on similar proposals?

2.7 Two examples of Policy provisions that would benefit from being reworded are provided below:

a. The fifth Performance Criteria dot-point under Element 22.1.1, which states:

- *The design of any space, treatment or furniture must be designed and maintained so that its availability for use by the general public at all practical times is obvious.*

Flaws in this wording are as follows:

- > This provision literally states that the 'design must be designed and maintained', whereas in reality it is the 'space, treatment or furniture' that needs to be 'designed and maintained';
- > The need for the 'space, treatment or furniture' to be 'maintained' is a requirement that should be imposed as a condition of approval, not an obligation that can be demonstrated in a design.
- > What is meant by 'all practicable times'?

A re-worded example of this provision to better address the intent of Element 22.1.1 might be:

- *The entire street frontage(s) of the proposed development shall seamlessly blend the public and private realms, by incorporating:*
 - i. *A palette of materials, fixtures and finishes (such as paving, kerbing, tree wells, street furniture, waste bins, bollards and lighting) consistent with or complementary to those used or specified by the City for the CBACP area; and*
 - ii. *Versatile spaces (including provision of essential services) that can be used for a variety of private and public activations and events; and*
 - iii. *Unique design elements (such as landscaping, public art, shading, lighting, and seating) that elicit a sense of curiosity, exploration and comfort to draw pedestrians into the space on a year-round basis and at all times of the day and night.*

This wording would produce easier-to-understand Required Documentation provisions, guided by a City of Melville streetscape masterplan (if not already in place), to ensure desirable streetscape themes are applied throughout the CBACP area.

A further example of a confusing Draft Policy provision is provided in the third Performance Criteria dot-point under Element 22.1.7, which states:

- *Merit of the operational focus of the proposed facility as community, communal or commercial to be assessed in terms of benefits and need having regard to the overall ongoing benefit of the community.*

I have not attempted to translate this provision because I simply do not understand its meaning.

Council should not adopt Draft LPP 1.18 unless the meaning and effect of every Policy provision is clear.

3. Alignment

- 3.1 According to its title, the sole focus of LPP 1.18 should be to expand and elaborate on the CBACP provisions relating to community benefit and height bonus. However, the Draft Policy diverts into more areas than its Bonus Building Height title suggests and does much more than merely augment CBACP provisions. In many cases, the Policy distorts the standards and expectations enshrined in the CBACP, to establish new (lower) benchmarks that are fundamentally at odds with the CBACP.
- 3.2 By contrast, taking the alternate Policy approach mentioned earlier and addressing the issues described above will produce a superior Policy that better responds to CBACP Goals G1 – Consultation; G2 – Place Activation; G5 – Built Form; and G6 – Innovation.

Conclusion

Policy guidance is clearly needed on the relationship between bonus heights and community benefits in the M10 and M15 zones of the CBACP, and I commend the City for attempting to address this complex and contentious issue through LPP 1.18. However, in my view, there are too many questions and concerns, and too much room for improvement in the current Draft Policy for it to progress to final adoption in its current form. For these reasons, Council would be justified in reassessing the design and direction of the current Draft Policy, recognising that getting it right is more important than getting it done.

I would welcome the opportunity to discuss my views on Draft LPP 1.18 with City staff and Council Members in more detail. If required, I would also be pleased to assist you in charting the way forward, engaging with stakeholders, and ultimately preparing a new Draft Policy for Council's consideration.

Please do not hesitate to contact me on 0439 044 967 or len@lkadvisory.com.au if you would like to discuss this matter further.

Yours sincerely,



LEN KOSOVA
Managing Director

