

Arnold Bloch Leibler

Lawyers and Advisers

Submission:

Better Apartments
in Neighbourhoods
Discussion Paper

Arnold Bloch Leibler
September 2019

1 Who are we?

- 1.1 This submission has been prepared by Andrea Towson, Special Counsel on behalf of the Property and Development Practice of Arnold Bloch Leibler (**ABL**), in response to the Better Apartments in Neighbourhoods Discussion Paper (**Discussion Paper**) released by the Department of Environment Land and Water (**DELWP**) on 1 August 2019.
- 1.2 ABL's Property and Development Practice is a 'one-stop-shop', covering all aspects of property development – from site due diligence, obtaining a planning permit, through to project finance and construction.
- 1.3 ABL has first-hand experience of how planning regulations impact the entire life cycle of a residential apartment project and is therefore uniquely positioned to make submissions on the proposed changes to the Better Apartments Design Standards (**BADS**).
- 1.4 In this submission we do not propose to comment on the merits of the various performance standards of the updated BADS. There are other design and planning experts, much better qualified to comment on this. Instead, consistent with our legal expertise, our submission will outline the supporting legal framework required to enable the development sector (working collaboratively with Government) to deliver better apartments in a certain, timely and cost-effective manner; for the ultimate benefit of the end consumer and their neighbourhood.

2 Background to the Discussion Paper

- 2.1 In 2017, the Victorian Government first introduced the BADS, in order to improve the internal amenity of new apartments. The BADS covered a range of controls including building setbacks, room sizes, natural ventilation and private open space.
- 2.2 A key driver of the development of the original BADS was the Government's desire to crack down on 'dog box'¹ apartment product and encourage the delivery of a broader mix of apartment types.
- 2.3 In August 2019, DELWP announced the release of the Discussion Paper, which proposes changes to the BADS, focused on improving external building and streetscape amenity (**Updated BADS**).
- 2.4 The Updated BADS propose five key changes for new apartment developments, namely:
 - (a) **Green space** in common areas of buildings, which preferably include trees to provide shade and landscaping that softens the street.
 - (b) **High quality building facades** made from robust, durable and attractive materials that complement surrounding buildings and provide visual interest.
 - (c) **Protection from wind impacts** on surrounding streets and open space, so the spaces are comfortable to use and likely to be used more often.
 - (d) **Attractive, engaging streets** that enhance the amenity, safety and walkability of the neighbourhood.
 - (e) **Better managed construction impacts** on existing neighbourhoods.

¹ For details see "Victorian Government to crack down on Melbourne's 'dog box' apartments", published on 14 August 2016, 1:37pm on <http://www.abc.net.au/news/2016-08-14/melbourne-dog-box-apartments-targeted-in-new-design-guidelines/7732678>

- 2.5 Collectively, it is the aim of these changes to create greener, more robust apartment buildings that make a positive contribution to their neighbourhood and provide a legacy of quality housing stock for future generations.

3 Will the Updated BADS deliver better apartments in neighbourhoods?

- 3.1 The Updated BADS will not, in and of themselves, result in better apartments in neighbourhoods.
- 3.2 The Updated BADS (once finalised) need to be accompanied by radical reform of the overall planning framework; which:
- (a) specifically rewards developers for the early adoption of, and voluntary compliance with, the Updated BADS;
 - (b) fast-tracks the planning permit approval process for better apartments, to enable the State Government to be able deliver more better apartments to market sooner, consistent with its policy aspirations as set out in the Discussion Paper; and
 - (c) depoliticises the planning permit process at a local government level, through the establishment of an independent, multi-disciplinary design review panel, which will deliver an increased level of expertise and understanding as to assessing whether a proposed apartment building design, complies with the Updated BADS.

4 What is preventing the delivery of better apartments in neighbourhoods?

- 4.1 In our experience, the majority of developers want to deliver quality apartments. It is what the market demands and what sells. However, the difficulty many developers experience in delivering quality apartments is uncertainty during the planning permit application process.
- 4.2 The feedback we receive from many developers is that innovative apartment building types are often refused at the Council level (where the approval process is often highly political) and the matter is then referred to VCAT for determination. Refusal at the Council level tends to occur even if the apartment design:
- (a) has been peer reviewed and endorsed as reflecting best practice as part of the planning permit application process; and
 - (b) has the support of Council Officers and DELWP Officers (in respect of major projects).
- 4.3 The VCAT appeal process (even if a matter is eligible for inclusion on the fast-tracked major cases list) is both time consuming and costly.
- 4.4 These litigation costs in turn increase the overall project cost² and are reflected in the end price of the development and are preventing the timely delivery of better apartments in neighbourhoods.
- 4.5 There is presently a disconnect between state and local planning policy about where more dense housing types can and should be supported. To put it simply, the state planning policy aspires to have increased density in in-fill areas within established suburbs, which already have access to services and public transport. This will enable housing stock to be delivered to those areas where it is needed most, in order to accommodate projected future

² including additional development holding costs as a consequence of time delays.

population growth across Greater Melbourne. In contrast, many Councils have adopted directly contrary local housing policies, focussed entirely on neighbourhood preservation.

- 4.6 As a result of this policy disconnect it is taking developers a long time to bring apartment product to market – irrespective of the scale or quality of the apartment types being delivered.
- 4.7 We have received feedback numerous developers that on average:
- (a) it is taking well over 12 months (in best case scenario) for planning permits to be issued. These timeframes appear to apply even if a development comprises of 3 townhouses, 20 ‘world best ESD’ apartments or 100 conventional apartments;
 - (b) it takes at least 4 years to complete a development, from the date a planning permit application is first lodged. This does not factor in the additional time associated with actually transacting to purchase the development site.
- 4.8 The apartments to be delivered in emerging and outer neighbourhoods are likely to be in the smaller scale, by smaller, boutique or ‘mum and dad’ developers. The reality is, this end of the market cannot afford to sit on capital and bear development holding costs of 4 (or more) years.
- 4.9 Given that under the current planning system land prices are largely fixed, the planning permit and VACT appeal costs and timelines are fixed for all projects (irrespective of scale), the only variable is building quality. In this context, we are highly unlikely to see the delivery of better apartments – particularly in emerging and outer neighbourhoods.

5 How can planning certainty be improved and red tape reduced to deliver better apartments in neighbourhoods?

- 5.1 In our view, developers would more willingly adopt the performance standards set out in the Updated BADS if this resulted in increased certainty as part of the planning process.
- 5.2 We would go so far as to say, in order to encourage early adoption and voluntary compliance with the Updated BADS, compliance by developers should be expressly recognised and rewarded, and the legal framework amended to reflect this.
- 5.3 There has now been two extensive public consultation processes, which have resulted in the development and further refinement of the Updated BADS to address community concerns regarding apartment developments.
- 5.4 The Updated BADS (once finalised) will be an exhaustive set of best practice standards relating to apartment building design – both from an internal and external amenity perspective.
- 5.5 In light of this, appropriate provisions should be drafted into the Victorian Planning Provisions, which exempt BADS ~~complaint~~-compliant applications from third party notice and review provided that:
- (a) each and every performance standard set out in the Updated BADS has been complied with; or
 - (b) if a particular performance standard cannot be met:
 - (i) the objective of the relevant Updated BADS standard continues to be met; and
 - (ii) an independent multi-disciplinary, design review panel has endorsed the apartment building design.

- 5.6 If an apartment proposal fails to comply with the Updated BADS, it would be the case that this application would have to be publicly notified and subject to third party appeal rights under the *Planning and Environment Act*.
- 5.7 A switch to code assessable development in the residential apartment space in Victoria – with an appropriate check and balance built into the application process, in the form of an independent design review panel – would result in a performance-based approach to planning, which incentivises best practice outcomes. A performance-based approach will encourage the market to deliver the apartment stock which is aspired for by Government under the Discussion Paper.
- 5.8 This performance-based approach to planning permit applications is consistent with the:
- (a) code assessable development applications under the Brisbane City Plan³, which are exempt from public notification; and
 - (b) approach which applies to variations of Building Regulations in Victoria, in the context of residential houses (including alterations and extensions), where a Building Surveyor may determine that proposed building works are compliant where it considers a performance solution meets a performance requirements of the Building Code of Australia⁴.
- 5.9 A switch to code-assessable development will also remove the ‘NIMBY’ mentality from the planning decision making process at the local Council level, in circumstances where an apartment is BADS compliant and can therefore be exempted from third party notice and review.
- 5.10 Fast-tracking the planning permit application process for BADS compliant apartment buildings will deliver better apartments in neighbourhoods – as a more certain planning framework, will incentivise developers to deliver better apartments, as they can bring this better apartment product to market more quickly.
- 5.11 Integral to the successful implementation of code assessable applications, is the formal establishment of an independent, multi-disciplinary, Victorian design review panel. This panel must have the legal power to give a Council specific independent design advice, which must hold legal weight (such as the inclusion of the panel’s recommendations in the council officer’s report).
- 5.12 If the design review formal panel form the view that a design is acceptable as it meets the objectives of the Updated BADS, this decision must be upheld at the Council level.
- 5.13 This is similar to the position which already exists in New South Wales (NSW). In NSW:
- (a) The NSW State Environment Planning Policy No. 65 (**SEPP 65**) allows a Council to appoint a design review panel during the development assessment process. The design review panel can advise on whether an apartment development meets the design principles and, if not, make recommendations on ways to comply.
 - (b) The general function of the NSW design review panel is essentially advisory and is to:⁵
 - (i) provide independent expert design advice on applications and policy for apartment buildings; and
 - (ii) assist in improving the design quality of apartment development in NSW.

³ The Brisbane City Plan defines code assessable development as - *A Code assessable development application is expected development. It does not require public notification.*

⁴ *Building Regulations 2018* (Vic) reg 38.

⁵ NSW Apartment Design Guide, Part 5 Design Review Panels

- (c) The advice and recommendations of the NSW design review panel hold legal weight and can be relied on by Council when determining a development application under SEPP 65.
- 5.14 This multidisciplinary design review panel should comprise of the following appropriately qualified professionals:
- (a) architect;
 - (b) urban designer;
 - (c) ESD consultant;
 - (d) planning lawyer; and
 - (e) builder⁶.
- 5.15 The implementation of an independent design review panel in Victoria will deliver an increased level of expertise and understanding as to assessing alternative design solutions to comply with the Updated BADS (once finalised and implemented). This specialist expertise will:
- (a) provide Council and the local community with expert advice that an apartment design meets the overall objectives of the Updated BADS; and
 - (b) help deliver better apartments in neighbourhoods.

6 Conclusion

- 6.1 To summarise, in isolation the Updated BADS will fail to deliver better apartments in neighbourhoods.
- 6.2 In order to achieve the policy aspirations set out in the Discussion Paper and deliver better apartments to neighbourhoods in a timely fashion, there must be a corresponding, radical change to the planning framework, shifting it to an entirely performance based approach, with real incentives (in the form of planning certainty and time savings) for developers who adopt and deliver the objectives of the Updated BADS.
- 6.3 ABL would welcome the opportunity to discuss our submission face-to-face with the relevant DELWP advisors.

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⁶ To confirm the 'buildability' of a proposed design, as this may be the reason a particular BADS standard cannot be strictly met.