

**JOINT REGIONAL PLANNING PANEL  
Sydney West Region**

<b>JRPP No</b>	<b>2009SYW007</b>
<b>DA Number</b>	<b>DA0410/09</b>
<b>Local Government Area</b>	<b>Ku-ring-gai Council</b>
<b>Proposed Development</b>	Demolition of four existing dwellings and construction of two residential flat buildings comprising 62 units including basement car parking, front fence and landscaping.
<b>Street Address</b>	27 – 33 Boundary Street, Roseville
<b>Applicant/Owner</b>	Hyecorp Property Fund No. 6 Pty Ltd
<b>Number of Submissions</b>	18
<b>Recommendation</b>	<b>Refusal</b>
<b>Report by</b>	<b>Ku-ring-gai Council Staff</b>

**SUMMARY SHEET**

<b>WARD:</b>	Roseville
<b>OWNER:</b>	Mr EP D'Agular, Mrs VC D'Agular, Mrs S Shirinian, Estate of V Shirinian, Mr C Hsiao, Mrs OF Hsiao, Roads & Traffic Authority
<b>DESIGNER:</b>	Van Aratoon – Amglen Pty Ltd
<b>PRESENT USE:</b>	Residential
<b>ZONING:</b>	Residential 2(d3) and part zoned for County Road Widening
<b>HERITAGE:</b>	Yes
<b>PERMISSIBLE UNDER:</b>	Residential Flat Buildings permissible within 2(d3) zone under the KPSO
<b>COUNCIL'S POLICIES APPLICABLE:</b>	KPSO - LEP 194, DCP 31 - Access, DCP 40 – Construction and Waste Management, DCP - 43 Car Parking, DCP 47 - Water Management, DCP - 55 - Multi-unit Housing, DCP - 56 Notification, Section 94 Contribution Plan, Draft Town Centres LEP 2008
<b>COMPLIANCE WITH CODES/POLICIES:</b>	No
<b>GOVERNMENT POLICIES APPLICABLE:</b>	SEPP 1 – Development Standards, SEPP 55 – Remediation of Land, SEPP 65 – Design Quality of

Residential Flat Development, BASIX 2004, SEPP Infrastructure 2007, SREP 2005 – (Sydney Harbour Catchment)

**COMPLIANCE WITH GOVERNMENT POLICIES:**

No

**DATE LODGED:**

4 July 2009

**40 DAY PERIOD EXPIRED:**

13 August 2009

**OWNER:**

MR EP D'AGULAR, MRS VC D'AGULAR, MRS S SHIRINIAN, ESTATE OF V SHIRINIAN, MR C HSIAO, MRS OF HSIAO, ROADS & TRAFFIC AUTHORITY

**DESIGNER**

VAN ARATOON - AMGLEN PTY LTD

**PURPOSE FOR REPORT**

To determine Development Application No.0410/09, following the Land and Environment Court's decision in Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270 which made void the decision to approve the application by the Joint Regional Planning Panel on 31 January 2011.

The development application is for demolition of four existing dwellings and construction of 2 residential flat buildings comprising 62 units including basement car parking, front fence and landscaping.

The application is required to be reported to the Joint Regional Planning Panel as the cost of works (CIV) exceeds \$10 million.

**EXECUTIVE SUMMARY**

Issues:

Permissibility  
Number of single aspect units  
Traffic  
Privacy  
Ground floor units  
County road widening  
Site coverage

Submissions:

Thirteen (13) submissions

Land & Environment Court Appeal:

Yes - Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270

Recommendation:

Refusal

**HISTORY**

Development Application No.410/09

11 March 2009

A Pre-DA meeting took place for a proposal involving demolition of existing dwellings and site works and construction of two residential flat buildings comprising 62 units, car parking for ninety (90) vehicles, associated site works and landscaping.

The issues discussed at the meeting included maximum number of storeys and height, deep soil, site coverage, front setback zone, materials and finishes and requirement to exclude the road reserve from all calculations.

The plans submitted with the Pre DA referenced the road reserve area in accordance with the Draft Town Centres LEP.

14 April 2009

The RTA wrote to Hyecorp and advised the land physically required for road widening is 29.7m<sup>2</sup>. The RTA did not provide this correspondence to Council.

2 July 2009

DA0410/09 lodged. The calculations for net site area, deep soil landscaping, site coverage and floor space ratio were based on an area of only 29.7m<sup>2</sup> being required by the RTA for road widening.

17 July – 17 August 2009

Application notified.

8 September 2009

Council officers send correspondence to the applicant raising issues with deep soil landscape area, landscape plan, BASIX certificate, air conditioners on roof top, privacy between properties, solar access, private open space and communal open space.

17 September 2009

Additional information was requested from the applicant to address urban design issues relating to communal open space, cross ventilation and privacy between properties.

21 September 2009

Amended plans and additional information was received, which included a revised deep soil landscape area compliance diagram, amended landscape plan, amended BASIX certificate, solar access diagrams, further details on privacy, cross ventilation diagrams and nomination of private and common open space. The air conditioners were also relocated to the basement.

21 September – 5 October 2009

Notification was extended to the Sydney Anglican Schools Corporation and the Heritage Officer at Willoughby Council.

24 September 2009

The Sydney West Joint Regional Planning Panel was briefed on the DA.

9 October 2009

The amended plans and additional information submitted by the applicant fail to satisfy the concerns

raised by Council officers in the letter dated 8 September. Council officers again raise issues with deep soil landscape area non-compliance, landscape plan, BASIX certificate, solar access, cross ventilation and the stormwater management plan.

14 October 2009

Further information was received from the applicant which included a further revised deep soil landscape area compliance diagram, amended landscape plan, solar access diagrams, cross ventilation diagrams. The information indicated DCP 55 requirements for solar access prevailed over the requirements of the RFDC.

15 October 2009

Council Officers advise the applicant that the provisions under the RFDC for solar access were used in the assessment given they prevail.

RTA register DP1143956 as a plan of land to be acquired for the purposes of the Roads Act 1993. The plan subdivides the road reserve on the Land into two sections. One was the required road widening area of 29.7m<sup>2</sup> and the other was the residue.

20 October 2009

Amended information received including solar access information regarding assessment against the RFDC provisions and an amended BASIX Certificate.

30 October 2009

Council officers meet with the applicant regarding solar access issues.

12 November 2009

Council officers wrote to the applicant recommending that the application be withdrawn due to outstanding information not being submitted within a reasonable time frame.

17 November 2009

The applicant submitted amended plans which reconfigured units and created single bedroom units to address solar access issues.

21 December 2009

Council officers wrote to the applicant regarding the amended plans submitted on 17 November and raised concerns with the reduction in the internal size of units. Council officers raise concern regarding the amenity of eight units which were now undersized.

24 December 2009

The applicant submitted amended plans converting the eight units from one (1) bedroom units to studio apartments.

- 13 January 2010 Amended basement plans were submitted demonstrating the location of air conditioning condensers.
- 20 January 2010 A scaled plan of the southern elevation and construction management diagram were provided to Council.
- 4 February 2010 Meeting held with applicant, their representatives and Council's Assessment Officer and Team Leader to discuss the issue relating to the road reserve land not being excluded from calculations which resulted in significant departures from development standards (this issue was also raised at the Pre DA meeting in March 2009).
- At this meeting, the applicant was advised that the Draft LEP did not contain the prohibitive clause 13 and that they should lodge a new development application pursuant to the Town Centres LEP once gazetted. Alternatively, a rezoning application could be made. Lengthy discussions were held regarding options to address the road reserve. The applicant also suggested they could contact the Minister of Planning to have the zoning maps changed. Council officers indicated this would be an unlikely option.
- 11 February 2010 Council officers again wrote to the applicant recommending withdrawal of the application given the issues relating to the front portion of the site being reserved for road widening purposes and multi-unit housing not being permissible there upon.
- 17 February 2010 The applicant advised Council in writing that the application would not be withdrawn and provided a letter from RTA which included a copy of DP1143956 and advised land required for road widening is 29.7m<sup>2</sup>.
- 18 February 2010 Council Officers wrote to the applicant advising the concerns raised were of critical importance and would complete its assessment report for consideration by the JRPP with a likely recommendation for refusal.
- As the application was not being withdrawn, it was recommended submission of a SEPP 1 objection for the breaches with the deep soil landscape area and site coverage development standards be submitted.

23 February 2010

The applicant submits a SEPP 1 Objection in respect of the non-compliance with the site coverage development standard.

12 April 2010

The assessment report was provided to the JRPP. The report recommended refusal for the following reasons:

**FAILURE TO SUBMIT SEPP 1**

**The development does not comply with the minimum deep soil landscape area requirement of Clause 25I(2) of the KPSO.**

*Particulars*

- (i) By operation of Clause 25A land not zoned Residential 2(d3) is not subject to the controls of Part IIIA of the KPSO. The development cannot rely upon the portion of the site noted zoned Residential 2(d3) to achieve compliance.
- (ii) By operation of clause 25I(2)(c) of the KPSO the proposal must achieve 50% deep soil landscape area. The proposal has a deep soil landscape area of 38%.
- (iii) A SEPP 1 Objection has not been submitted. The development cannot be approved without this objection.

**BULK and SCALE**

**The development exceeds the maximum site coverage permitted by Clause 25I(6) of the KPSO and is considered unacceptable.**

*Particulars*

- (i) The proposal results in a site coverage of 41% which exceeds the maximum site coverage permitted under Clause 25I(6) of the KPSO. The site of the building is too large for the portion of the site zoned Residential 2(d3). This is demonstrated by inadequate front setback, excessive FSR and failure to comply with landscaped area requirements. The development is contrary to the objectives of Clause 25D(2)(e) of the KPSO.
- (ii) The SEPP 1 objection is not considered to be well founded. The underlying purpose of the standard is described in clause 25D(2)(e) of the KPSO which is to provide built upon area controls to ensure the provision of viable deep soil landscaping so as to achieve a balance between the built form and landscaping. The development does not provide adequate deep soil landscaping or front setback and therefore the purpose of the control has not been met.

**The development does not comply with the front setback requirement from Boundary Street contributing to the scale of the buildings as viewed from the streetscape.**

*Particulars*

- (i) Both buildings A and B are setback between 600mm and 4.2 metres from the Boundary Street frontage and occupies more than 40% of this zone with the building footprint. Control C-1(b) of Part 4.3 Setbacks of DCP 55 requires a setback zone of between 10 – 12 metres and no more than 40% of this zone may be occupied by the building footprint. As a result of this non-compliance, insufficient area is provided to accommodate landscape screening which is consistent with the scale of the development.
- (ii) The application is contrary to the residential zone objective set out in clause 25D(2)(e) of the KPSO, which is to provide built upon area controls that ensure sufficient deep soil landscaping is provided such that the tree canopy will be in scale with the built form of a proposal.
- (iii) The application is contrary to the heads of consideration for multi-unit housing set out in clause 25I(1)(e), of the KPSO as adequate landscaping has not been provided to ensure that the built form does not dominate the landscape.

**The development has an excessive floor space ratio which contributes to the unacceptable density of the development.**

*Particulars*

- (i) The development results in a FSR of 1.55:1. The control C-4 of Part 4.2 Density of DCP 55 requires a maximum floor space ratio of 1.3:1 for multi-unit housing.
- (ii) The development results in a built upon area of 41% which is contrary to Clause 25I(6) of the KPSO and Principle 4 of SEPP 65. The control C-1 states that the total built upon area of a site must not prevent the minimum deep soil landscaping standards under the LEP 194 being achieved on any site. The development does not satisfy the minimum deep soil landscape area requirement.
- (iii) The density of the proposed development exceeds the optimum capacity of the site and the desired future landscape and built character of the area.

**RESIDENTIAL AMENITY**

**The orientation of the units in the proposal are in breach of the amenity provisions set out in the RFDC (page 85), which limit the number of single aspect apartments with a southerly aspect (SW-SE) to a maximum of 10% of the total units proposed.**

*Particulars*

- (i) The development includes eight (8) studio apartments which are single aspect south facing apartments. The Residential Design Flat Code and Part 4.5.1 Solar Access of DCP 55 C-4 states no single aspect units should have a southern orientation. 12.9% of the apartments in the proposal have a southern orientation which results in poor residential amenity.

- (ii) The development is contrary to the aim of Part IIIA set out in Clause 25C(2)(g) of the KPSO which requires development to achieve a high level of residential amenity in building design for the occupants of the building through solar access, acoustic control, privacy protection, natural ventilation, passive security design, outdoor living, landscape design, indoor amenity and storage provision.

#### **BASIX COMPLIANCE**

**The development has not been support by a compliant BASIX Certificate with respect of landscape commitments.**

##### *Particulars*

- (i) The BASIX Certificate 254953M\_10 has made numerous landscape related commitments for the development including 601.11m<sup>2</sup> of common lawn area, 1102.07m<sup>2</sup> of common garden area and 997.56m<sup>2</sup> of low water use/indigenous planting area within the common area.
- (ii) The commitments made rely upon the area within the Boundary Street frontage that is part of the County Road Reservation. This area can be resumed for road expansion and contain structures which would prevent landscaping as identified on the submitted plans. The proposal cannot rely upon these areas to achieve compliance with BASIX due to landscaping commitments on the land reserved for road widening.

**The applicant has not submitted a crime risk assessment in accordance with the provisions of the Residential Flat Design Code.**

##### *Particulars*

- (i) The provisions of the Residential Flat Design Code require a formal crime risk assessment for all residential development of more than 20 dwellings. This provision applied to the proposed development. A crime risk assessment has not been submitted.
- (ii) The required lighting plan for all communal open spaces and pedestrian entry points has not been provided.

**The proposal is inconsistent with the intent and key design principles envisaged for the Roseville Town Centre under the Draft Local Environmental Plan (Town Centres) 2008.**

##### *Particulars*

- (i) The front portion of the site presently unzoned but identified for County Road Widening is reduced in area and zoned SP2 Infrastructure under the Draft LEP (Town Centres) 2008. As a result, the proposal would have a FSR of 1.44:1 and would breach the development standard.

28 April 2010

The applicant's Solicitor, Kanjian & Company, wrote to the JRPP referring to Clause 13(1) and 13(2) of



the KPSO. The advice argued the letters from RTA dated 27 August 2009 and 17 February 2010 modified its road widening requirement and made the road reserve KPSO zoning redundant and the RTA's deposited plan evidenced satisfaction of the precondition to Clause 13(2).

The applicant submitted a SEPP 1 objection to the Panel relating to Deep Soil Landscape Area. Neither of these documents was submitted to Council at this time.

29 April 2010

The Sydney West Joint Regional Planning Panel considered the development application. Two motions were passed at this meeting.

The first, passed by a four-one majority, Councillor Malicki dissenting:

*“that the SEPP 1 objection on deep soil landscaping be accepted for consideration as part of the application taking into account the discussions at the site inspection, pre panel discussion and at the panel meeting itself all of which included the subject issue.”*

The second motion was passed by a three – two majority, Councillors Malicki and Cross dissenting:

*“The application be approved subject to conditions that have been issued without prejudice by the Council staff with the addition of a further condition that the gross floor area of the development is not to exceed 4,895m<sup>2</sup> and that in reaching the decision the panel accepts the SEPP 1 objections on the basis that compliance with the relevant standards is unreasonable and unnecessary in the circumstances of this case.”*

25 May 2010	The Ku-ring-gai Local Environmental Plan (Town Centres) 2010 was gazetted.
1 September 2010	Ku-ring-gai Council commenced Class IV proceedings in the Land and Environment Court.
31 December 2010	The judgement in the matter of Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270 is handed down which declared the consent to be void.
17 February 2011	The applicant submits a letter from their solicitors, Kanjian & Company, a SEPP 1 objection to site coverage standard and amended stormwater plans.
30 March – 13 April 2011	The application is renotified to owners of surrounding properties.
12 April 2011	The applicant submits a crime risk assessment report and pays outstanding assessment fees.

## **FINDINGS OF LAND AND ENVIRONMENT COURT**

The Land and Environment Court proceedings commenced by Council in September 2010 were not a merit based appeal. These were Class IV proceedings concerning the process adopted by the JRPP in their decision making of the application. The key findings of the case which are relevant to the consideration of this application include:

1. Clause 13 determines the question as to whether permanent works are prohibited on land reserved under Division 3 of Part II of the KPSO.
2. Landscaping and pathways are works of a permanent character as described in Clause 13(1) of the KPSO.
3. Clause 13(1) prohibits permanent work, but only if clause 13(2) does not apply.
4. Clause 13(2) avoids the prohibition by giving a power of consent to the responsible authority and the Commissioner for Main Road subject to a pre condition.
5. The Panel as the consent authority is the responsible authority for the purposes of forming the requisite opinion required by clause 13(2) of the KPSO that the purpose

- for which the road reserve is reserved could not be carried into effect within a reasonable time after the appointed day (1 October 1971).
6. If the pre condition is not met, that is the responsible authority has not formed that opinion, then clause 13(2) does not apply and clause 13(1) prohibits carrying out permanent work.
  7. The area shown on the RTA deposited plan (29.7m<sup>2</sup> in area) cannot be distinguished from the entire 760.5m<sup>2</sup> of road reservation.
  8. The Panel does not have power to determine a development application if Council has not undertaken an assessment of a SEPP 1 objection to a development standard.
  9. A SEPP 1 objection to Clause 25I(2) Deep Soil Landscape Area is not necessary as the definition of site area does not exclude the inclusion of the road reservation in the calculation.

## THE SITE

Zoning:	Residential 2(d3) and part zoned for County Road Widening
Visual Character Study Category:	1920-45
Lot Number:	Lot 1 in DP 344086 (27 Boundary Street), Lot 2 in DP 344086 (29 Boundary Street), Lot A in DP 318673 (29 Boundary Street) and Lot B in DP 318673 (33 Boundary Street).
Area:	4,013m <sup>2</sup> (inclusive of all land regardless of zoning)
Side of Street:	Northern
Cross Fall:	West to east
Stormwater Drainage:	By gravity to Spearman Street
Heritage Affected:	Yes – adjacent to Heritage Conservation Area in Willoughby Council
Integrated Development:	No
Bush Fire Prone Land:	No
Endangered Species:	Yes – Sydney Blue Gum High Forest. The proposed development will not have a detrimental impact on the critically endangered ecological community.
Urban Bushland:	No
Contaminated Land:	No

## THE SITE AND SURROUNDING AREA

### The site

The site comprises four lots and is located on the north-western corner of Boundary Street and Spearman Street. The site is rectangular in shape, with an area of 4013m<sup>2</sup> (3252.5m<sup>2</sup> zoned Residential 2(d3) and 760.5m<sup>2</sup> subject to County Road Reservation). The site has frontages of 88.39 metres to Boundary Street, and 41.21 metres to Spearman Street. The northern (rear) boundary measures 91.44 metres and the side (western) boundary measures 42.26 metres.

The site falls from the west (RL90) to the east (RL85.8) along Boundary Street. The site is relatively flat along the Spearman Street frontage. The front portion of the site, approximately 760.5m<sup>2</sup> in area, is subject to County Road Reservation under the KPSO. A

drainage easement traverses the south-eastern corner of the site. The eastern edge of the site is subject to flooding.

The site presently comprises four (4) dwellings. No. 27 Boundary Street contains a two storey brick late Federation style dwelling. No. 29 Boundary Street is occupied by a single storey dwelling. A single storey house late Federation dwelling is located at 31 Boundary Street. No. 33 Boundary Street is occupied by a single storey dwelling of a Georgian Revival style.

The site is characterised by an established landscape setting with mature trees and shrubs within formal garden beds and grassed expanses. The individual properties are in varying states of upkeep\condition, from unkempt and weed invaded to well maintained properties. The site is dominated by numerous trees, mostly exotic species, planted along the boundaries. No native endemic or remnant species are located on or adjacent to the site.

### **Surrounding development**

The site is located at the south-eastern segment of the block defined by Boundary, Spearman, Victoria and Hill Streets, which are zoned Residential 2(d3) for the most part with the exception of sites fronting Boundary Street which are partially zoned for County Road Widening. The subject site and immediately adjoining sites are also zoned R4 High Density Residential under the draft Town Centres LEP 2008.

Immediately to the west, at 25 Boundary Street is a large dwelling set back one (1) metre from the shared boundary. To the north, at 23, 25, 27, 29 and 31 the site is adjoined by five residential allotments with frontages to Victoria Street which are occupied by two storey dwellings, except for No. 29 Victoria Street which is single storey.

The area is visually distinctive in its overall cohesiveness of high-quality, mainly single storey houses from the Federation and Inter War periods complemented by a small number of flats.

### **THE PROPOSAL**

The application involves the following:

Demolition of the four existing dwellings and ancillary structures.

Construction of two residential flat buildings containing 62 units (8 x studio, and 1 x 1 bedroom, 49 x 2 bedroom and 4 x 3 bedroom), basement parking over two levels with a total of 85 car parking spaces.

Details of each floor level are as follows:

Basement 1 RL 84.15	23 residential car parking spaces, 16 visitors car parking spaces including 4 disabled spaces, garbage storage area, bicycle parking and visitor disabled/carwash/loading area. 2 lifts, hydraulic plant room, fire pump room, 2 WC, on site detention and rain water tanks.
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Basement 2, RL 81.35	46 residential car parking spaces, 4 disabled spaces and 58 storage units
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### Building A

Ground Floor

RL 87.45

7 units (5 x 2 bedrooms, 1 x studio & 1x 1 bedroom)

First Floor

RL90.49

7 units ((6 x 2 bedrooms including 2 adaptable & 1 x studio)

Second Floor

RL93.53

7 units (6 x 2 bedrooms including 1 adaptable & 1 x studio)

Third Floor

RL96.57

7 units (6 x 2 bedrooms including 1 adaptable & 1 x studio)

Fourth Floor

RL99.80

3 units (2x 3 bedrooms & 1 x 2 bedroom)

### Building B

Ground Floor

RL 89.70

7 units (5 x 2 bedrooms including 1 adaptable and 2 x 1 bedroom)

First Floor

RL 92.74

7 units (6 x 2 bedrooms including 1 adaptable and 1 x studio)

Second Floor

RL 95.78

7 units (6 x 2 bedrooms including 1 adaptable and 1 x studio)

Third Floor

RL 98.82

7 units (6 x 2 bedrooms including 1 adaptable & 1 x studio)

Fourth Floor

RL 102.05

3 units (2 x 3 bedrooms and 1 x 2 bedrooms)

### **Vehicular and pedestrian access**

Vehicular access to the basement car park area is provided from Spearman Street via an entry/exit driveway ramp located to the north-eastern corner of the site. Two pedestrian entrances are proposed from Boundary Street, a pathway access to the internal central entrance and two individual pathways to the front units.

### **CONSULTATION - COMMUNITY**

#### **Original notification**

In accordance with Council's Notification DCP, owners of adjoining properties were given notice of the application on 2 July 2009. In response, Council received thirteen (13) submissions from the following:

- |     |                             |                               |
|-----|-----------------------------|-------------------------------|
| 1.  | Sue Cooper & Barbara Walker | The Archbold Estate           |
| 2.  | Mr & Mrs Currie             | 23 Victoria Street, Roseville |
| 3.  | Julia & Harley Wright       | 20 Victoria Street, Roseville |
| 4.  | Larry Wilson                | No address provided           |
| 5.  | D.L & H.M Pearson           | 25 Boundary Street, Roseville |
| 6.  | Helen Johnston              | 19 Victoria Street, Roseville |
| 7.  | Mr and Mrs Pangestu         | 22 Boundary Street, Roseville |
| 8.  | Mr and Mrs Currie           | 23 Victoria Street, Roseville |
| 9.  | Dr Davis & Mr Healy         | 25 Victoria Street, Roseville |
| 10. | Mr & Mrs Widagdo            | 27 Victoria Street, Roseville |
| 11. | Mrs Wang                    | 29 Victoria Street, Roseville |
| 12. | Mr and Mrs Chuang           | 31 Victoria Street, Roseville |
| 13. | Dr Briony Scott             | Roseville College             |

The submissions raised the following issues:

***Design is unsympathetic in the streetscape***

The proposal has been considered by Council's Urban Design Consultant, Scott Pedder who provided the following comments in relation to the development's presence in the streetscape:

*"The proposed residential flat building takes the form of two separated five-storey, apartment buildings. The height of the building is significantly higher than context of the area, however complies with the anticipated future development height for this location. The two residential buildings provide an all round orientation but incorporate frontages that address Boundary and Spearman Street. Given that the frontage to the site is subject to road widening, the front setback control applicable to the 2d(3) zone is not achieved. If that road widening were to occur, there would be a substantial impact on the character of the area."*

***Concern that garbage trucks cannot enter the basement***

Council's Engineer provided the following comments with respect to waste management:

*"The waste storage and collection area is conveniently located inside the entrance to the Basement Level 1 carpark. A turning bay is provided for the waste collection vehicle, and the driveway grades and clear headroom are satisfactory."*

***The Canary Island Date Palm fronting Boundary Street should be retained***

The amended plans now show the Canary Island Date Palm (Tree 8) as retained.

***The vehicle entrance from Spearman Avenue poses a potential safety issue***

Council's Engineer provided the following comment in relation to the vehicle entrance:

*"The proposed access to the basement carpark is from Spearman Street, to the north of the hump. This is considered the most suitable location. The landscape plan indicates that only*

*low-growing plants are proposed within the splays required for pedestrian sight lines at the driveway entry/exit point.”*

The location of the vehicle entrance is therefore considered satisfactory.

### ***The bus shelter with roof to be constructed from s94 contributions***

It is not possible to specifically condition what the section 94 contributions required by this development will be utilised for. Nevertheless, the contributions must be used in accordance with Council’s Section 94 contribution plan.

### ***Air conditioners on the roof top***

The air conditioning condensers are provided in the basement of the development. The individual air conditioners for each unit are provided within the allocated car parking spaces and hung on the walls so as to not prevent use of the spaces.

### ***Recycling of the historical materials***

If the application were recommended for approval, a condition would require stone salvaged from the demolished buildings to be stored on the site and reused in landscaping works.

### ***Photographs for the Historical Society***

A photographic record of the existing buildings would be required prior to demolition works if the application were to be recommended for approval.

### ***Traffic impacts upon Victoria Street because of entrance in Spearman Avenue***

The proposed location of the vehicular entrance on Spearman Avenue is considered acceptable by the RTA and Council’s engineers. The application has been supported by a traffic management plan which deems the increased traffic generation from the development to be acceptable.

### ***The development will constrain sites fronting Victoria Street and isolate them and prevent their future development because of the minimal setback***

The development complies with the required setback of 6.0 metres shared with properties fronting Victoria Street. The properties fronting Victoria Street are zoned Residential 2(d3) which permits residential flat building development.

The development proposed is considered against the relevant controls and objectives. The anticipation of a future development and potential impact upon the development proposed cannot be made prematurely. The future solar access implications will be considered if and when a development application for properties fronting Victoria Street is lodged. It is unreasonable to require setbacks greater than the control requires on the basis of a future application being lodged.

### ***The impact upon adjoining properties during demolition and construction phases***

If the application were being recommended for approval, conditions requiring the preparation of dilapidation reports for adjoining properties prior to the commencement of works and after completion would be imposed. Conditions regarding construction hours to minimise impacts upon adjoining properties during construction of the development would also be recommended.

***Loss of privacy from balconies overlooking 20 Victoria Street***

The proposal is not considered to result in an unreasonable loss of privacy to the balconies of 20 Victoria Street. This is discussed in detail within the assessment report.

***The proposal will cause irreparable damage to Roseville's unique environment and heritage***

The proposal has been considered by Council's Heritage Adviser, Paul Dignam, who considers the proposal to be unsatisfactory in this regard.

***Loss of morning sunlight to 25 Boundary Street***

The proposal will result in a loss of morning sunlight to 25 Boundary Street. This issue is discussed in detail within this report.

***Increased traffic flows and congestion in Victoria and Spearman Streets***

Council's Engineer provided the following comment in regard to traffic levels:

*"Following completion, the development is expected to generate approximately 32 vehicle trips per peak hour. This is not expected to adversely affect traffic flows in the surrounding streets."*

***The development should consist of a mixture of trees and not just the one species***

The proposal incorporates a mix of trees in the submitted landscape plan which is considered satisfactory by Council's Landscape Officer. The proposed evergreen and deciduous species would maintain the existing landscape character.

***To maintain privacy to Victoria Street properties, planter boxes should be provided along north-facing balconies at fifth floor and opaque balustrading***

If the proposal were to be supported, a condition would be recommended to require fixed planter boxes to the north facing terrace at the fifth floor and opaque balustrading.

***Streetscape impact as the opposing side of the road is a conservation area and 5 storey development will be unbalanced in the streetscape***

The application was referred to the Heritage Officer at Willoughby Council for consideration. No formal response was received. However, the application was considered by Ku-ring-gai Council's Heritage Adviser, Paul Dignam, made the following comments:

*"The site is within the vicinity of a Heritage Conservation Area listed in the Willoughby Local Council Area...In my opinion there would be some impact on the Willoughby Heritage Conservation Area as a result of the proposed development. However, the land is zoned for*



*residential flat development up to 5 storeys in height and the height of the proposed development is within the development expectations of the site.”*

### ***Loss of visual privacy to 22 Boundary Street***

The development will not result in a significant loss of visual privacy to 22 Boundary Street. This is discussed in further detail in the assessment report.

### ***Reduction to property value of 22 Boundary Street as a result of overshadowing, increased traffic and loss of privacy***

No evidence has been provided to support this submission. The development does not result in overshadowing or a loss of privacy to 22 Boundary Street. Reduced property values are not a relevant consideration under the Environmental Planning and Assessment Act 1979.

### ***Insufficient plantings along northern boundary to maintain privacy***

The proposed plantings adjacent to the northern boundary include canopy trees, intermediate feature planting trees and screening shrubs to maintain and enhance and resident amenity once mature. Further, the existing row of mature Lilly pillys are being retained with appropriate setbacks from development works. The proposed plantings, combined with the existing and built form setbacks are considered satisfactory to maintain privacy.

### ***Truck use on Spearman Street and Roseville Avenue***

The applicant has submitted a traffic management plan – construction and demolition which proposes access for construction vehicles to and from Boundary Street. Approval has been obtained from the RTA for access to the site from Boundary Street. Use of heavy vehicles in Victoria and Spearman Streets within school peak hours would also be prevented.

### ***Truck use during school drop off and pick up times***

The use of heavy vehicle movements in Victoria Street and Spearman Street during school pick up and drop off periods would be restricted via conditions of consent were the application to be approved.

### ***Damage to roads and pavements***

Conditions of consent would ensure the protection of public roads and pavements were approval to be recommended.

### ***Loss of on street parking on Spearman Street due to increased residents***

The development provides a compliant number of off-street parking spaces in accordance LEP 194 and DCP 55 requirements.

### ***Notification after LEC judgement***

In accordance with Council's Notification DCP, owners of adjoining properties were given notice of the application on 30 March 2011. In response, Council received six (6) submissions from the following:

- |                                |                               |
|--------------------------------|-------------------------------|
| 1. Sue Cooper & Barbara Walker | The Archbold Estate           |
| 2. Mr & Mrs Currie             | 23 Victoria Street, Roseville |
| 3. Graham & Helen Johnston     | 19 Victoria Street, Roseville |
| 4. Dr Davis & Mr Healy         | 25 Victoria Street, Roseville |
| 5. TF and CA Sayer             | 33 Victoria Street, Roseville |
| 6. Dr Briony Scott             | Roseville College             |

### ***Traffic impacts from the closure of Hill Street***

There is speculation that Hill Street which is located to the west of the subject site will be closed and there will subsequent traffic impacts as a result of the proposed development. This issue has been discussed with Council's Development Engineer and Strategic Planning Engineer. No concerns have been raised from an engineering perspective regarding traffic impacts.

### ***The development will constrain sites fronting Victoria Street and isolate them and prevent their future development because of the minimal setback***

This concern again was raised and reference was made to a recent decision by the Sydney East Joint Regional Planning Panel on 10 March 2011. An application for multi-unit housing at 544- 550 Mowbray Road, Lane Cove North was refused for several reasons, including that the proposal resulted in an *unreasonable and excessive impact on surrounding properties particularly to the south in terms of overshadowing and visual privacy. These impacts are such that the future development of these lands would be seriously affected. This may also preclude compliance with relevant standards.*

In this circumstance, the proposed development is located to the south of the sites fronting Victoria Street. Concern is raised regarding the potential restriction of development potential on the properties fronting Victoria Street because of a shadow impact their future development may cause upon the subject site to the south. This impact cannot be determined because no proposal is before Council. The circumstance of the decision of the Sydney East Joint Regional Planning Panel was that the proposal was causing the impact upon adjoining sites. In this circumstance, the adjoining properties may cause impact upon the proposed development but the extent of impact is unknown. Impact in this scenario can be minimised through design. In the circumstance considered by the Sydney East Joint Regional Planning Panel the extent of impact caused by a development seeking consent was known.

## **CONSULTATION – EXTERNAL TO COUNCIL**

### **Roads and Traffic Authority**

The application was referred to Roads and Traffic Authority pursuant to SEPP (Infrastructure) 2007 and for concurrence in accordance with the Roads Act 1993. The RTA indicated it would give concurrence to the application, subject to conditions included in any development consent.

## **CONSULTATION - WITHIN COUNCIL**

## Urban Design

Council's Urban Design Consultant, Scott Pedder, commented on the proposal as follows:

### ***“Principle 1: Context***

*The subject site is regular shaped, comprising four residential allotments addressing Boundary Street. The eastern boundary of the site addresses Spearman Street. There are a number of prominent trees within the frontage along which dominate the streetscape presence of the four allotments. Development in this part of Boundary Street is characteristically single storey detached housing with large frontages and gardens.*

*The proposed residential flat development takes the form of two separated five-storey, apartment buildings. The height of the buildings is significantly higher than context of the area, however, complies with the anticipated future development height for this location. The two residential buildings provide an all round orientation but incorporate frontages that address Boundary and Spearman Street. Given that the frontage to the site is subject to road widening, the front setback control applicable to the 2d(3) zone is not achieved. If that road widening were to occur, there would be a substantial impact on the character of the area.*

*The proposed development is set back 6m from both the northern and western side setbacks, which provides minimal private and communal open space.*

### ***Principle 2: Scale***

*The scale of the proposal would conform to the desired future character of the area in terms of height. The potential impact on adjacent development and the streetscape has been addressed by the separation of the building along the frontage and a recessed fifth storey. As stated above, given that the frontage to the site is subject to road widening, the front setback control applicable to the 2d(3) zone is not achieved. If that road widening were to occur, there would be a substantial impact on the character of the area.*

### ***Principle 3: Built form***

*Given that the Boundary Street setbacks is affected by a proposed road widening, the setback from the street may be significantly reduced in future, with the potential for significant reductions in landscaped area and therefore on the building's setting. This would have a significant impact on the future character of the location, and therefore it is recommended that the site retain a substantial area of well treed, landscape within the frontage to both Boundary Street and Spearman Street. To do this, the proposed development would have to be substantially altered.*

*Given the potential for road widening, concern is also raised regarding impacts on internal amenity particularly in relation to acoustic impact and cross ventilation. (Solar access is further covered below under Principle 5.)*

*Those apartments located along the southern boundary are provided the least amenity in terms of solar access and in terms of impacts from road noise. The acoustic report submitted with the original application, indicated that, to achieve internal noise criteria, the windows and doors of those apartments facing Boundary Street would need to be closed – meaning that no natural cross ventilation could occur and recommending that mechanical ventilation be provided – and that upgraded glazing be used. (Note, it is unclear whether in the assessment of the cross ventilation of the revised floor plans whether this has been considered.)*

If road widening was to occur, it is likely that the amenity of these apartments would be further impacted from road noise.

#### **Principle 4: Density**

The site is located within walking distance of the Roseville station and is consequently in a location that is accessible to major transport infrastructure. With an increase in the order of 62 new dwellings, sufficient open space should be provided for this development, either as communal or private open space. The Residential Flat Design Code, prepared by the State Government, in part to provide a resource for assessing development under SEPP 65, recommends at least 25-30% of the site area be provided as communal open space. Communal space should be 'consolidated, configured and designed to be useable and attractive'. Given the distance to any public open space or recreational opportunities, consideration to active communal spaces or recreational provision on site should be given. Currently, part of that communal space is proposed to be included in the Boundary Street front setback. As this is zoned for road widening it is not appropriate for this area to be included as part of the communal area of the site.

#### **Principle 5: Resource, energy and water efficiency**

The revised drawings for levels 1 – 4, indicate that 8 of the apartments are predominantly south facing and will receive no direct sun access during the year between 9am and 3pm. The Residential Flat Design Code recommends that single aspect apartments with a southerly aspect be limited to a maximum of 10% of the overall dwellings. This proposal does not meet this rule of thumb.

#### **Principle 6: Landscape**

The proposed development should retain prominent trees where possible along the Boundary Street frontage. Council's trees officer should review the plans to ensure that new planting will contribute to the contextual fit of the development within the locality, particularly through the inclusion of a number of tree species along the roadway frontage. Concern is raised that if the frontage was resumed for road widening, there would be a significant impact upon the desired future character of the location. It is recommended that the site retain a substantial area of well treed, landscape within the frontage to both Boundary Street and Spearman Street. To do this, the proposed development would have to be substantially altered.

#### **Principle 7: Amenity**

The swimming pools located in the rear yards of Victoria Street, adjacent to the northern boundary of the site, are particularly sensitive land uses with regard to visual privacy. In relation to the potential for overlooking:

- the windows and balconies of units along the northern frontage appear to overlook the swimming pools and rear yards and swimming pools as referred to above.

This may be resolved by either inviting the applicant to provide additional detail demonstrating appropriate landscape or other means which will prevent impacts on privacy or alternatively by conditioning the relevant windows and balconies to have a minimum sill/balustrade height and/or fixed louvered privacy screens.

It is considered that the accessible areas of the level 5 roof terrace should be sufficient to retain visual privacy.

Acoustic privacy

*Given the highly trafficked nature of Boundary Street, the adequacy of the proposed design in relation to acoustic insulation, particularly of the southern facing apartments, should be assessed by suitably qualified persons on behalf of Council.*

**Principle 8: Safety and security**

*There are no issues of concern in relation to security or safety. The internal layout of the dwellings promotes casual surveillance of pedestrians on the adjacent streets and also the communal open spaces and footpaths.*

**Principle 9: Social dimensions and housing affordability**

*The apartment mix appears appropriate, however this should be considered by Council in relation to the suitability of housing choice in this location.*

**Principle 10: Aesthetics**

*It is considered that the development incorporates an appropriate composition of building elements, textures, materials and colours that respond to the environment and context. It was previously recommended that significant trees be provided in the front setback (and retention where possible of large plantings) to ensure a primarily green presentation. If this were not the case and if that frontage was resumed for road widening, there remains a significant concern in relation the impacts upon the desired future character of the location. It is recommended that the site retain a substantial area of well treed, landscape within the frontage to both Boundary Street and Spearman Street. To do this, the proposed development would have to be substantially altered.”*

**Landscape**

Council’s Landscape Assessment Officer, Geoff Bird, commented on the proposal as follows:

**“Site characteristics**

*The site is characterised by an established landscape setting with mature trees and shrubs within formal garden beds and grassed expanses. The individual properties are in varying states of upkeep\condition ranging from unkempt and weed invaded to well maintained. The site is dominated by numerous trees, mostly exotic species, planted along the boundaries. No native endemic or remnant species are located on or adjacent to the site.*

**Tree & vegetation removal & impacts**

*The proposal will result in the substantial clearing of the site of existing trees and vegetation to accommodate the proposed development works. With the exception of Tree 8, a mature Phoenix canariensis (Canary Island Date Palm) located centrally adjacent to the Boundary Street site boundary (outside the development envelope), Landscape Services can support the nominated tree removal, as none of the trees are considered significant within the broader landscape setting, and despite site amenity, can be replaced with appropriate species for future amenity.*

*Many of the trees to be removed, particularly along the Boundary Street frontage, are either weed or exempt tree species. Amended plans have identified Tree 8 to be retained. It is noted that Tree 8 is located within the road reservation for the widening of Boundary Street. It can be conditioned for Tree 8 to be transplanted and relocated elsewhere on site outside of the road reservation area.*

With the exception of Tree 41 *Pistacia chinensis* (Chinese Pistacio) located within the nature strip at the junction of Spearman and Boundary Street, Landscape Services recommends that the existing street trees within Spearman Street adjacent to the site be removed and replaced with new trees as the existing street trees (Bottlebrush) are over mature and poorly pruned due to the overhead wires.

### **Landscape plan/tree replenishment**

Landscape Services does not raise objections to the landscape design for the site. However, the non-compliances with the landscape BASIX commitments for common areas and deep soil landscaping as a result of the county road reservation result in an amended landscape plan being required. These changes cannot be conditioned.

The landscape design proposes an open grassed area adjacent to the north-eastern site corner which cannot be directly accessed, and therefore does not function as a usable space. It could be conditioned for the lawn to be deleted and the area extensively planted out, including an additional endemic canopy tree.

### **Deep soil**

By the applicant's calculations, the proposal will have a deep soil landscape area of 2045m<sup>2</sup> or 50.96% of the site area. Landscape Services does not agree with the areas included within the total deep soil landscape area. The areas in disagreement include:

- 833.5m<sup>2</sup> of unzoned land that is reserved within the KPSO as 'County Road Reservation'. As the land is not zoned as Residential 2(d3) it cannot be included within the deep soil calculable area.

Under the draft 'Town Centres LEP' the area of zoned land for road reservation is being reduced to 247.8m<sup>2</sup>. At the time of assessment the Town Centres LEP has not been gazetted but the development would still not comply with the deep soil landscape area requirement.

As a result of the road reservation exclusion from the deep soil landscape area, the proposed development does not comply with the deep soil landscaping development standard as required by LEP194.

### **BASIX**

BASIX certificate 254953M\_10 has made numerous landscape related commitments for the development including:

- 601.11m<sup>2</sup> of common lawn area, 1102.07sqm of common garden area and
- 997.56m<sup>2</sup> of low water use/indigenous planting area within the common area.

These commitments include the area within the Boundary Street site frontage that is part of the 'County Road Reservation'. As this area, can be resumed for road expansion and would no longer be part of the site, and be built upon, it is required that no BASIX commitments be made within the road reservation area.

### **Stormwater plan**

Overall, Landscape Services raises no objections to the proposed Concept Stormwater Plans. Previous concerns raised have been satisfactorily resolved through the deletion of the drainage swale. The assessing Development Engineer should confirm that drainage

*infrastructure works are located outside of the county road reservation area. If changes are required, and these changes result in additional tree impacts a further referral to Landscape services is required.*

### **Other comments**

#### *County road reservation*

*The county road reservation if taken up will remove a significant portion of land from the site frontage. This has the landscape impact of removing*

- *any landscape works and planting from within the reservation area, and*
- *reducing the quality of the landscape setting as envisaged by LEP194 and DCP55.*

*The landscape setting would be permanently altered due to the loss of width (setback) of the soft landscape area which is characteristic of the treed Ku ring gai landscape character. This would result in the five storey built form of the development having a greater dominance within the streetscape/landscape setting and a reduction in the available deep soil landscape area within the site frontage for the planting of tall trees. This is not in compliance with the aims and objectives of LEP194 and DCP55.*

*As discussed previously, the county road reservation also results in the developments non compliance with the BASIX certificate and the deep soil landscape area development standard.*

### **CONCLUSION**

*The application cannot be supported by Landscape Services due to; non compliance with the minimum deep soil landscape area of 50%, and non compliance with BASIX.”*

Following the decision of the Land and Environment Court, it was determined that the site area definition of Clause 25B of the KPSO does not exclude the inclusion of the road reserve within the site area calculation. Therefore, the proposal could rely upon the road reserve area to achieve compliance with the deep soil landscape area development standard of Clause 25(2) of the KPSO. However, this does not set aside the concern regarding the reliance upon land to satisfy BASIX landscape requirements which is reserved for road widening.

### **Heritage**

Council's Heritage Advisor, Paul Dignam, commented on the proposal as follows:

#### ***“Impact on North Chatswood Heritage Conservation Area***

*The site is within the vicinity of a Heritage Conservation Area listed in the Willoughby Local Council Area. The application was referred to a number of property owners in Willoughby Council. Several responses were received. The submissions raised issues about the scale between the single storey conservation area and the scale of the proposed development, visual dominance, privacy, amenity and loss of value. Submissions suggested a three storey scale might be acceptable similar to scale of existing residential flat development in the street.*

*In my opinion, there would be some impact on the Willoughby Heritage Conservation Area as a result of the proposed development. However, the land is zoned for residential flat development up to 5 storeys in height and the height of the proposed development is within the development expectations of the site.*

## **National Trust UCA**

*The National Trust included the following information in their classification of the area:*

*The area is visually distinctive in its overall cohesiveness of high-quality, mainly single storey houses from the Federation and Inter War periods complemented by a small number of flats and is remarkable for the high proportion of contributory items. These buildings combine with large private gardens and significant avenue plantings, which help create substantially harmonious regular grided settlement pattern, with buildings on similar-sized allotments and set back uniformly from the street behind low fences.*

## **DCP 55 issues**

### **Design controls for development within a UCA – Ch 3.4.**

*C – 1 New development should respect the predominant architectural character of the UCA and be designed with reference to it. Major issues are massing, style, roof pitch and complexity of roof shapes, proportions of doors and windows, materials and colours*

*The proposed development is contemporary in form and character and does not relate to the existing low scale residential character. An issue with this site is that it is on the edge of the LGA and the development would form a buffer between the low scale residential streets and a busy connecting road. The facades provide some articulation and the use of materials and general fenestration pattern relates to the area.*

*C – 2 Facades well articulated to avoid long continuous facades.*

*The development is designed as two separate buildings further articulated by the use of different materials in horizontal bands with a clearly defined base and top.*

*C – 3 Scale and massing should be proportioned to respect and enhance character of adjacent development.*

*The scale and massing of the development is larger than the surrounding development. The scale has impacts on the Heritage Conservation Area in the Willoughby Council Area on the opposite side of Boundary Street.*

*C – 4 Form and outline of new development should be designed to respect existing development, particularly roof forms.*

*The proposed roof is flat and does not try to mimic the lower scaled development. It is articulated along the main elevation to Boundary Street and the design is considered appropriate for the zoning.*

*C – 5 Setback should not be located forward of existing development.*

*The development is not set forward of the neighbouring development. The houses to the west are rezoned and have potential to be developed for medium density. However, this site and the rezoned sites to the west are subject to road widening and ultimately the front boundary will be considerably reduced. New development in this context should be sited to respond to the future street alignment so adequate front setbacks and landscaping can be achieved to compliment the heritage landscape character of the UCA.*

*C – 6 The building layout should not be orientated across the site contrary to existing pattern.*

*The development is broken into two blocks and further articulated to relate to existing lot layouts. This is considered to be satisfactory.*



*C – 7 Development should be good contemporary design but sympathetic to the character of the UCA.*

*The contemporary design of the proposed building is considered acceptable. However the reduced setback of the building that would occur as a result of future road widening would not be sympathetic to the character of the UCA.*

*C – 8 A range of building materials should be chosen and that are commonly used in the area and the colour range should blend with existing development.*

*The use of materials and colours is considered acceptable and compatible with the surrounding development.*

*C – 9 Colours and building textures should be complimentary to UCA*

*The proposed colours and textures are found in the UCA and are satisfactory.*

*C – 10, 11 & 12 Front fence.*

*The proposed front fence consists of a variety of solid stone clad masonry and open horizontal timber fencing between masonry piers to a height of about 1800mm. Given the context of the site on a busy main road, the fence is considered acceptable.*

#### **DCP 55 issues - 3.5 within the vicinity of a heritage item**

*The site does not adjoin any listed items and is a reasonable distance from listed items in the immediate area. It is considered there would be no adverse impacts on the nearby items in Ku-ring-gai.*

*This part of Ku-ring-gai is relatively uniform and consistent in appearance with regular size lots on relatively flat land with housing developed in the Federation and Inter War periods. Gardens are mature and mainly exotic plantings.*

*The main issue with this application is the impact of the future road widening and the resultant loss of setback and landscape setting. A key heritage objective is to respect the character and landscaped setting of the UCA and minimise visual impact upon the streetscape. In this aspect the development is unsatisfactory.*

#### **Conclusions and recommendations**

*The application is not supported on heritage grounds due to the implications of any future road widening and loss of front setback.*

*Any new development on the site should be designed to comply with the future street widening and to minimise impact on the UCA and to a limited extent to limit visual impacts on the nearby Heritage Conservation Area in the Willoughby Council Area.”*

## **Engineering**

Council’s Team Leader, Engineering, Kathy Hawken, commented on the proposal as follows:

### **“Water management**

*The site is subject to a Council drainage easement across the south-eastern corner. The flood study results show that overland flow is generally confined to the road, and therefore no impacts are expected to result from the development. As well, the ground floor has adequate freeboard above the 1:100 year flood level.*

*The BASIX water commitments are for a 10 000 litre rainwater tank, with re-use for irrigation.*

*The stormwater plans show 76 cubic metres of on site detention which has been calculated in accordance with DCP 47. The site has gravity drainage to Spearman Street.*

*The proposed water management for the development is satisfactory.*

### **Traffic and parking**

*The proposed access to the basement carpark is in Spearman Street, to the north of the hump. This is considered the most suitable location. The landscape plan indicates that only low-growing plants are proposed within the splays required for pedestrian sight lines at the driveway entry/exit point.*

*Following completion, the development is expected to generate approximately 32 vehicle trips per peak hour. This is not expected to adversely affect traffic flows in the surrounding streets.*

*The site is further than 400 metres from Roseville Station, so 66 resident and 16 visitor spaces are required. A total of 85 spaces is provided, which complies.*

*Dimensions and grades are in accordance with the requirements of AS2890.1:2004 Off street car parking.*

### **Construction management**

*The traffic report contains an appendix "Traffic Management Plan - Demolition and Construction".*

*The Plan proposes access for construction vehicles to and from Boundary Street. This appears to be a suitable option, as it will keep construction vehicles away from residential streets and the school. Approval has been obtained from the RTA for this access, subject to restricted hours. The RTA requirements will be incorporated into the conditions of consent. A restriction on heavy vehicle movements in Victoria Street and Spearman Street during school pick-up and drop-off periods is also recommended.*

*A palm tree, Tree 8, is located in the path of vehicles using the proposed construction entry, and Council's Landscape Assessment Officer requires its retention. The proposed access was only roughly indicated on the plan and the recommended conditions will include a requirement for the access to be relocated so that Tree 8 can be protected.*

*The RTA have vetoed a works zone in Boundary Street, however, it is considered that a works zone should be set up in Spearman Street, even if only small.*

### **Waste management**

The waste storage and collection area is conveniently located inside the entrance to the Basement Level 1 carpark. A turning bay is provided for the waste collection vehicle and the driveway grades and clear headroom are satisfactory.

### **Geotechnical investigation**

One borehole was drilled, to about 2 metres below basement level. Residual clay was encountered to 5 metres depth, underlain by sandstone of medium to high strength. Seepage was noted into the excavation at about 3.5 metres depth.

The report contains recommendations for further subsurface and groundwater investigation, as well as excavation support, vibration monitoring and foundations. The recommended conditions reflect the recommendations of the report, including a requirement for further investigation prior to commencement of bulk excavation.”

## **STATUTORY PROVISIONS**

### **State Environmental Planning Policy No. 55 - Remediation of Land**

The provisions of SEPP 55 require consideration of the potential for a site to be contaminated. The subject site has a history of residential use and, as such, it is unlikely to contain any contamination and further investigation is not warranted in this case.

### **State Environmental Planning Policy No.65 - Design Quality of Residential Flat Development (RFDC)**

SEPP65 aims to improve the design quality of residential flat buildings across NSW and provides an assessment framework, the Residential Flat Design Code (RFDC), for assessing ‘good design’.

Clause 50(1A) of the EPA Regulation 2000 requires the submission of a design verification statement from the building designer at lodgement of the development application. This documentation has been submitted and is satisfactory.

The SEPP requires the assessment of any development application for residential flat development against 10 principles contained in Clauses 9-18 and Council is required to consider the matters contained in the publication “Residential Flat Design Code”. As such, the following consideration has been given to the requirements of the SEPP and Design Code.

### **Residential Flat Design Code Compliance Table**

Pursuant to Clause 30(2) of SEPP 65 in determining a development application for a residential flat building the consent authority is to take into consideration the Residential Flat Design Code (RFDC). The following table is an assessment of the proposal against the guidelines provided in the RFDC.

	<b>Guideline</b>	<b>Consistency with Guideline</b>
<b>PART 02 SITE DESIGN</b>		
<b>Site Configuration</b>		
<i>Deep Soil Zones</i>	A minimum of 25 percent of the open space area of a site should be a deep soil zone; more is desirable. Exceptions may be made in urban areas where sites	YES The proposal complies with the

	are built out and there is no capacity for water infiltration. In these instances, stormwater treatment measures must be integrated with the design of the residential flat building.	development standard of 50% deep soil landscape area and satisfies the control requirement.
<i>Open Space</i>	The area of communal open space required should generally be at least between 25 and 30 percent of the site area. Larger sites and brown field sites may have potential for more than 30 percent.	YES
<i>Planting on Structures</i>	In terms of soil provision there is no minimum standard that can be applied to all situations as the requirements vary with the size of plants and trees at maturity. The following are recommended as minimum standards for a range of plant sizes:  Medium trees (8 metres canopy diameter at maturity) - minimum soil volume 35 cubic metres - minimum soil depth 1 metre - approximate soil area 6 metres x 6 metres or equivalent	YES  The long section shows the depth of the planter over the basement has a depth between 1.4 metres and 600mm. The submitted landscape plan shows a mixture of small and medium trees set amongst shrubs and ground cover.
<i>Safety</i>	Carry out a formal crime risk assessment for all residential developments of more than 20 new dwellings.	YES  A formal crime risk assessment has been submitted.
<i>Visual Privacy</i>	Refer to Building Separation minimum standards	NO  Building B at ground level is located within 8.2 metres of the adjoining dwelling at 25 Boundary Street. Refer to discussions.
<i>Pedestrian Access</i>	Identify the access requirements from the street or car parking area to the apartment entrance.	YES  Defined pedestrian entries are proposed from both street frontages.
	Follow the accessibility standard set out in Australian Standard AS 1428 (parts 1 and 2), as a minimum.  Provide barrier free access to at least 20 percent of dwellings in the development.	YES  A lift has been provided from the basement to each level of the development. The application has been supported by an accessibility report.
<i>Vehicle Access</i>	Generally limit the width of driveways to a maximum of six metres.	YES  Council's Traffic Engineer has reviewed the proposal and has raised no objections to the width of the driveway.
	Locate vehicle entries away from main pedestrian entries and on secondary frontages.	YES  Council' Traffic Engineer has reviewed the proposal and has raised no objections to the location of the basement entrance.
<b>PART 03 BUILDING DESIGN</b>		
<b>Building Configuration</b>		
<i>Apartment layout</i>	Single-aspect apartments should be limited in depth to 8 metres from a window.	YES  Units 3,5,7,10,12,14,17,19,21,24,26 and 28 are single aspect apartments. The depths of the units are within 8 metres of a window.

	The back of a kitchen should be no more than 8 metres from a window.	YES  The back of all kitchens within the development are generally within 8 metres of a window.
	The width of cross-over or cross-through apartments over 15 metres deep should be 4 metres or greater to avoid deep narrow apartment layouts.	YES  The minimum width of the crossover apartments within the development is approximately 4.5m.
	If Council chooses to standardise apartment sizes, a range of sizes that do not exclude affordable housing should be used. As a guide, the Affordable Housing Service suggest the following minimum apartment sizes, which can contribute to housing affordability: (apartment size is only one factor influencing affordability)  - 1 bedroom apartment 50m <sup>2</sup> - 2 bedroom apartment 70m <sup>2</sup> - 3 bedroom apartment 95m <sup>2</sup>	YES  Development contains 8 x studio, 1 x 1 bedroom unit, 49 x 2 bedroom and 4 x 3 bedroom units. All units comply with the minimum required apartment size.
<i>Apartment Mix</i>		
<i>Balconies</i>	Provide primary balconies for all apartments with a minimum depth of 2 metres. Developments which seek to vary from the minimum standards must demonstrate that negative impacts from the context- noise, wind – can be satisfactorily mitigated with design solutions.	YES
<i>Ceiling Heights</i>	The following recommended dimensions are measured from finished floor level (FFL) to finished ceiling level (FCL). These are minimums only and do not preclude higher ceilings, if desired. - in residential flat buildings or other residential floors in mixed use buildings: - in general, 2.7 metre minimum for all habitable rooms on all floors, 2.4 metres is the preferred minimum for all non-habitable rooms, however 2.25m is permitted. - for two storey units, 2.4 metre minimum for second storey if 50 percent or more of the apartment has 2.7 metre minimum ceiling heights	YES  All habitable rooms have a floor to ceiling height of 2.7m.
<i>Ground Floor Apartments</i>	Optimise the number of ground floor apartments with separate entries and consider requiring an appropriate percentage of accessible units. This relates to the desired streetscape and topography of the site.	NO  Ground floor apartments are not provided within separate entries. Refer to detail discussions below.
	Provide ground floor apartments with access to private open space, preferably as a terrace or garden.	YES  All ground floor apartments have direct access to private open space areas which include balconies and courtyards.
<i>Internal Circulation</i>	In general, where units are arranged off a double-loaded corridor, the number of units accessible from a single core/corridor should be limited to eight. Exceptions may be allowed:  - for adaptive reuse buildings - where developments can demonstrate the achievement of the desired streetscape character and entry response - where developments can demonstrate a high level of amenity for common lobbies, corridors and units, (cross over, dual	YES  Lift provides access to a maximum of 7 units. The application has been supported by an accessibility report.

	aspect apartments).	
<i>Storage</i>	In addition to kitchen cupboards and bedroom wardrobes, provide accessible storage facilities at the following rates:  <ul style="list-style-type: none"> <li>- studio apartments 6m<sup>3</sup></li> <li>- one-bedroom apartments 6m<sup>3</sup></li> <li>- two-bedroom apartments 8m<sup>3</sup></li> <li>- three plus bedroom apartments 10m<sup>3</sup></li> </ul>	YES  64 storage spaces plus 3 common storage spaces nominated within garage. Proposed areas acceptable.
<b>Building Amenity</b>		
<i>Daylight Access</i>	Living rooms and private open spaces for at least 70 percent of apartments in a development should receive a minimum of three hours direct sunlight between 9 am and 3 pm in mid winter. In dense urban areas a minimum of two hours may be acceptable.	YES  A detailed solar access study has been submitted with the application. The study demonstrates that all of the units will receive solar access to both 50% of their private open space and window to the main living area between 9am and 3pm mid winter.
	Limit the number of single-aspect apartments with a southerly aspect (SW-SE) to a maximum of 10% of the total units proposed. Developments which seek to vary from the minimum standards must demonstrate how site constraints and orientation prohibit the achievement of these standards and how energy efficiency is addressed (see Orientation and Energy Efficiency).	NO  Units 7, 14, 21 and 28 within each building (8 in total) have a southern orientation. This equates to 12.9% of the total units proposed. Refer to discussion below.
<i>Natural Ventilation</i>	Building depths, which support natural ventilation typically range from 10 to 18 metres.	YES  The building depth is generally between 10-18 metres.
	Sixty percent (60%) of residential units should be naturally cross ventilated.	YES  Units 3, 5, 7, 10, 12, 14, 17, 19, 21, 24, 26, 28 are all single aspect. This equates to 20 units within the development, which results in 70% compliance.  The development complies with the 60% control requirement.
<b>Building Performance</b>		
<i>Waste Management</i>	Supply waste management plans as part of the development application submission as per the NSW Waste Board.	YES  A Waste Management Plan has been submitted with the application.
<i>Water Conservation</i>	Rainwater is not to be collected from roofs coated with lead- or bitumen-based paints, or from asbestos- cement roofs. Normal guttering is sufficient for water collections provided that it is kept clear of leaves and debris.	YES  The proposed development is satisfactory in this regard.

## Building separation and visual privacy

The following separation distances between buildings are required under the RFDC for five storey buildings:

- 18 metres between habitable rooms/balconies
- 13 metres between habitable/balconies and non-habitable rooms

- 9 metres are provided between non-habitable rooms.

The objectives of the suggested dimensions are to provide visual and acoustic privacy for existing and new residents, control overshadowing and ensure that new development is scaled to support the desired area character with appropriate massing and spaces between buildings, to allow for the provision of open space and to provide deep soil zones.

Building B at ground level is located within 8.2 metres of the adjoining dwelling at 25 Boundary Street and does not satisfy the required separation distance. Concern has been raised by the owner of this property regarding loss of privacy.

Building B and Building A provide at least 17 metres separation between the dwellings and associated decks of adjoining properties fronting Victoria Street to the north. Concern has also been raised by the owners of these properties regarding loss of privacy.

Between Buildings A and B a minimum separation distance of 13 metres is provided which is consistent with the control requirements.

The dwelling at 25 Boundary Street adjoins the south-western corner of Building B. The siting of the existing dwelling adjoins the location of two bedrooms associated within units 2, 9, 16 and 23 and the balcony associated with Units 1, 8, 15 and 22. There is no concern regarding the bedrooms, given the low intensity usage of these rooms. **Figure 1** below represents the relationship between Building B and the existing dwelling at 25 Boundary Street. A sight line has been drawn from 1.6 metres on the balcony at Levels 3 and 4 to a distance of 9 metres at 45°. This demonstrates that the balconies within the development above Level 2 will not impact on the privacy of this property.

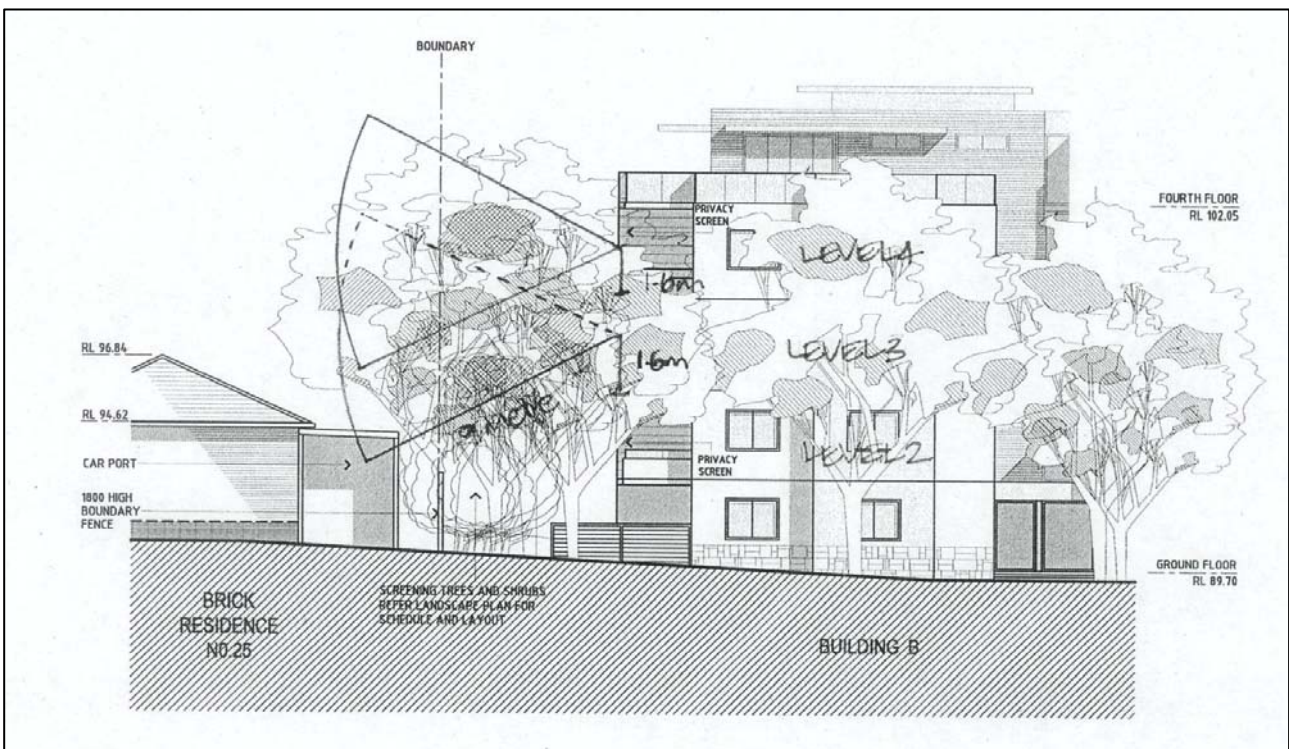


Figure 1 privacy relationship between 25 Boundary Street and proposal

It is considered that the provision of privacy screens at Levels 1 and 2, combined with the extensive landscaping along the western boundary will provide a reasonable level of privacy to 25 Boundary Street.

If the development were to be supported, a condition would be recommended to require the proposed planter boxes to be extended in a western direction along the northern elevation and southern direction at Level 5 and to have landscaping with a height of 1.8 metres to maintain the relationship with properties fronting Victoria Street.

### **Ground floor apartments**

The RFDC requires designs to optimise the number of ground floor apartments with separate entries. Presently, Unit 2 within each building is provided with separate entry. However, a review of the plans indicates separate entry can be provided from the communal open space areas through the private courtyards to the apartments at ground floor. This could be addressed by condition if consent were to be granted.

### **Building amenity**

The RFDC states that the number of single aspect apartments with a southerly aspect (SW-SE) should be limited to a maximum of 10% of the total units proposed. The development proposes eight (8) apartments which have a southern orientation (SW-SE). This equates to 12.9% of the total units proposed and does not satisfy the design requirement. The applicant has indicated that the apartments should not be considered single aspect as they have an external wall to a western elevation.

The control permits developments which seek to vary from the minimum standards to demonstrate how site constraints and orientation prohibit the achievement of these standards and how energy efficient is addressed. The windows within the western elevation which the applicant relies upon to say the apartments are not single aspect do not receive sunlight and are positioned, particularly the window associated with the bedroom within an enclave. These windows do not function as required by the controls.

The site is a corner allotment with a north-south orientation due to the required relationship with Boundary Street and its secondary frontage to Spearman Street. The southern elevation fronts Boundary Street with the eastern elevation fronting Spearman Street. It is considered that the creation of single aspect studios has been undertaken to maximise density at the cost of internal amenity. The departure from the control in this circumstance is not considered reasonable and is contrary to the objectives of the SEPP to provide high level of internal amenity for future occupants.

### **State Environmental Planning Policy Infrastructure 2007 (SEPP 2007)**

Pursuant to Clause 104 in SEPP 2007, the application was referred to the Roads and Traffic Authority for consideration under the provisions of Clause 104 and Column 3 of Schedule 3. The RTA has granted its concurrence under Section 138 of the Roads Act 1993, subject to conditions.

### **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

A BASIX certificate has been submitted with the application (Certificate No. 254953M\_10 dated 17 November 2009). The certificate makes landscape related commitments which JRPP (Sydney West Region) Business Paper – Item # 1 – 7 July 2011 – 2009SYW007 Page 32



rely upon the portion of the site reserved for country road reservation. The Ku-ring-gai Local Environmental Plan (Town Centres) 2010 zones the front portion of the site as SP2 Infrastructure. The commitments which are relied upon as part of this application cannot be guaranteed as part of the development. Consequently, the proposal does not satisfy the SEPP requirements.

## **SREP (Sydney Harbour Catchment) 2005**

Matters for consideration under SREP 2005 include biodiversity, ecology and environmental protection, public access to and scenic qualities of foreshores and waterways, maintenance of views, control of boat facilities and maintenance of a working harbour. The proposal is not in close proximity to, or within view, of a waterway or wetland and is considered satisfactory.

## **KU-RING-GAI PLANNING SCHEME ORDINANCE (KPSO)**

### **Zoning, permissibility and aims and objectives for residential zones**

#### **Clause 13**

The front portion of the site is vacant land reserved for widening of existing county roads. Clause 13 of the KPSO states:

#### ***Buildings, etc, not to be erected on reserved land without consent***

13. (1) *Except as provided in subclause (2) of this clause a person shall not on land reserved under this Division erect a building or carry out or alter a work of a permanent character or make or alter a permanent excavation other than a building or a permanent work or a permanent excavation required for or incidental to the purpose for which the land is so reserved.*
- (2) *Where it appears to the responsible authority that the purpose for which the land is reserved under this Division cannot be carried into effect within a reasonable time after the appointed day the owner of such land may with the consent of the responsible authority and of the Commissioner for Main Roads erect a building or carry out or alter a work of a permanent character or make or alter a permanent excavation.*
- (3) *Any such consent shall be subject to such conditions with respect to the removal or alteration of the building, work or excavation or any such alteration of a work or excavation or the reinstatement of the land or the removal of any waste material or refuse, with or without payment of compensation, as the responsible authority thinks fit, and to such conditions as the Commissioner for Main Roads requires to be imposed.*
- (4) *Nothing in this clause shall operate to prohibit the erection of a fence on any land reserved under this Division.*

The appointed day referred to is 1 October 1971. Clause 13(1) is the control which prohibits the proposed works on the road reserve. Council Officers do not have the delegated authority to form the essential opinion under Clause 13(2) which provides for the circumstance where the responsible authority may lift the prohibition. The proposal seeks consent to carry out work of a permanent character on the road reserve. For the development to be permissible, an opinion would need to be formed pursuant to Clause 13(2) of the KPSO that the purpose for which the road reserve is reserved could not be carried into effect within a reasonable time after the appointed day.

There is disagreement between the applicant and Council officers that the development involves carrying out of works of a permanent character on the road reserve within the meaning of Clause 13(1) of the KPSO. The applicant has submitted amended plans which relocate the drainage works outside of the road reserve. Despite this amendment, the proposal maintains landscaping and access pathways which are of a permanent character and are located within the road reserve. The applicant indicates these works are not of a permanent nature but the decision of Justice Biscoe in paragraph 61 indicates *...the works compromising landscaping and access pathways, at least, are of a permanent character and are located along the frontage of the Land, well within the DLEP area.* Therefore, it is considered the prohibition in clause 13(1) of the KPSO does apply as the works are of a permanent nature and the need for the exercise of the dispensing power in clause 13(2) is relevant.

If the JRPP were to form the requisite opinion it would need to resolve that it is satisfied that the purpose for which the land is reserved under Division 3 of the KPSO cannot be carried into effect within a reasonable time after the appointed day.

If the Panel does not form the requisite opinion then Clause 13(2) does not apply to the development and the proposal is prohibited pursuant to Clause 13(1) of the KPSO. This is a decision for the Panel to make. However, the following reasons are advanced as to why it is considered that the development is prohibited and why it is considered that the facts of the matter would not support the conclusion that is required under clause 13(2):

- The road reserve is for the purpose of “widening of existing county roads”
- The appointed day referred to in Clause 13(1) of the KPSO is 1 October 1971. The Ku-ring-gai Local Environmental Plan (Town Centres) 2010 came into effect on 25 May 2010. The LEP repeals the KPSO. The new LEP maintains a road reserve despite being reduced in area from that identified in the KPSO. The road reserve is a recently zoned piece of land.
- The RTA letter dated 17 February 2010 indicates it is currently developing a road widening project in Boundary Street, Roseville between the Pacific Highway and Spearman Street.
- The Roads and Traffic Authority is currently developing a road widening project in Boundary Street, Roseville between the Pacific Highway and Spearman Street. The intentions of the RTA are maintained in the preliminary stages of the Principal LEP consultation process.

On this basis, it is not felt that the purpose for which the land is reserved cannot be carried into effect within a reasonable time.

The Ku-ring-gai Local Environmental Plan (Town Centres) 2010, however, does not require the same requisite opinion to be formed as the Ku-ring-gai Planning Scheme Ordinance and would avoid the impediment imposed by Clause 13(1). An application made pursuant to the Ku-ring-gai Local Environmental Plan (Town Centres) 2010 would overcome the substantive reasons for the refusal of this application made pursuant to the KPSO.

### **Part IIIA Clause 25A**

Clause 25A within Part IIIA establishes the land to which this part of the KPSO applies. As shown on the zoning map below in **Attachment 1**, the 2(d3) zoning does not apply to the front portion of the site which is reserved for county road widening. The area not zoned JRPP (Sydney West Region) Business Paper – Item # 1 – 7 July 2011 – 2009SYW007 Page 34

Residential 2(d3) is calculated to be approximately 760.5m<sup>2</sup> and therefore the development cannot rely upon this area for the development standards of Clause 25I(6) and 25I(7) of the KPSO.

Under Clause 25B (definitions) of KPSO – LEP 194, a residential flat building is defined as ‘a building containing three or more dwellings’. The residential flat buildings proposed on the land zoned 2(d3) is permissible with consent.

The development is considered to be contrary to the aims and objectives under Clause 25C and 25D of the KPSO for the following reasons:

- The proposal does not provide sufficient viable deep soil landscape area within the front setback to accommodate tall trees.
- The extent of built form does not achieve the required relationship with landscaping on site.
- The development results in poor residential amenity as a result of the number of single aspect south facing units and minimal front setback for outdoor living spaces.

<b>COMPLIANCE TABLE</b>		
<b>DEVELOPMENT STANDARD</b>	<b>PROPOSED</b>	<b>COMPLIES</b>
<b>Site area (min):</b> 1200m <sup>2</sup>	4013m <sup>2</sup> (all land) 3252.5m <sup>2</sup> (zoned 2(d3))	YES
<b>Deep landscaping (min):</b> 50% (2006.5m <sup>2</sup> )	50%	YES
<b>Street frontage (min):</b> 23m	88.9m Boundary and 41.2m spearman	YES
<b>Number of storeys (max):</b> 4 + top storey (maximum of 5 storeys)	Building A: 5 storeys Building B: 5 storeys	YES YES
<b>Site coverage (max):</b> 35% (1138.375m <sup>2</sup> )	42.77% (1391.09m <sup>2</sup> )	NO
<b>Top floor area (max):</b> 60% of level below	Building A = 372m <sup>2</sup> (60%) Building B = 372m <sup>2</sup> (60%)	YES YES
<b>Storeys and ceiling height (max):</b> 5 storeys and 13.4m	Building A = 5 & 13.2m Building B = 5 & 13.2m	YES YES
<b>Car parking spaces (min):</b> <input type="checkbox"/> 16(visitors) <input type="checkbox"/> 66 (residents) <input type="checkbox"/> 82 (total)	16 69 85	YES YES YES
<b>Zone interface setback (min):</b> 9m	Adjoining 2(d3) sites	YES
<b>Manageable housing (min):</b> 10% or 7 units	7 units	YES
<b>Lift access:</b> required if greater than three storeys	All lifts service all floors including basement levels.	YES

### **Clause 25I(6) Maximum site coverage**

The site is zoned Residential 2(d3) and has an area of 3252.5m<sup>2</sup>. The development standard requires a maximum site coverage of 35%. This equates to a site coverage of 1138.375m<sup>2</sup>. The proposal results in a site coverage of 1391.09m<sup>2</sup> or 42.77% of the site area. The applicant has submitted a SEPP 1 Objection seeking a variation to the development standard. The following is an assessment of the SEPP 1 objection:

#### ***whether the planning control in question is a development standard***

The maximum site coverage for land zoned Residential 2(d3) for multi unit housing of 35% prescribed under Clause 25I(6) of the KPSO is a development standard. The applicant agrees this is a development standard, but makes the following comments:

*The definition of 'site area' is critical in [the] application of this objection and therefore is important to closely analyse the implication of the various definitions contained in Ku-ring-gai PSO, which have [bearing] on this application. It could be argued that the definitions of 'site area' and 'site coverage' contained in Clause 25B of the KPSO take precedence over the sub-definition of site area contained in Sub-clause 25I(b) for the purpose of calculations of the site coverage. The definitions are quoted below:*

*'site area' is defined in Clause 25B as:*

*In relation to the proposed development means the area of land to which an application for consent to carry out the development relates, excluding the area of any access handle.*

*'site coverage' is defined in Clause 25B as:*

*The proportion of the building footprint to the site area expressed as a percentage.*

*Subclause 25I(6) which deals with site coverage states:*

*Buildings of a kind described below are not to occupy a greater percentage of the site area than is specified below for the kind of buildings. If a site is comprised of land in Zone No. 2(d3) and other land, the other land is not to be included in calculating site area.*

*Residential flat buildings – 35%*

*The development application was submitted for a site of 4013m<sup>2</sup> identified on all DA plans, which includes 760m<sup>2</sup> of the County Road Reservation. The definition of site area in CL25B clearly allows for the inclusion of the CRR in the site area. Based on this definition the development complies with the 35% site coverage standard.*

*However, if the sub-definition in CL25I(6) is adopted for the purpose of determining the site coverage, an area of 760m<sup>2</sup>, which represents the current County Road Reservation, has to be excluded from the 'site area'. This results in a 'site area' of 3253m<sup>2</sup> and 'site coverage' of 43%, which exceeds the nominal site coverage by 8%.*

There is no disagreement that the land not zoned Residential 2(d3) does not form part of the site for the purpose of Clause 25I(6) which states:

(6) *Maximum site coverage*

*Buildings of a kind described below are not to occupy a greater percentage of the site area than is specified below for the kind of buildings. If a site is comprised of land in zone no 2(d3) and other land, the other land is not to be included in calculating the site area.*

The site area for the purpose of this control is 3252.5m<sup>2</sup> and the proposal results in a site coverage of 1391.09m<sup>2</sup> or 42.77%.

***the underlying objective or purpose behind the standard***

The control sets a maximum site coverage based on the building type. The applicant indicates in their SEPP 1 objection that:

*It is impossible to discern the specific purpose of the sub-definition of 'site area' provided in Clause 25I(6), which excludes land not zoned 2(d3) from site area and is contrary to [the] definition of site area and site coverage contained in CI 25B.*

*The purpose of the sub-definition for determining of site coverage is questionable since the deep soil landscaping standard only refers only to site area as defined in Clause 25B. The rationale for the sub-definition of site area in Clause 25I(6) for [the] calculation of site coverage is further eroded by the fact that a development application for a residential flat building can only be made for land zoned 2(d3) and, subject to RTA concurrence, for land zoned County road Reservation. It cannot include land in a zone, which expressly prohibits residential flat buildings.*

*Clause 25B and Clause 25I(6) are silent as to the purpose of the site coverage standard, however the general purpose of the site coverage standard can be discerned from the objectives set out in Clause 25C(2) and Clause 25D(2) which are quoted below:*

25C(2)

*(c) to achieve high quality urban design and architectural design...*

*(g) to achieve a high level of residential amenity in building design for the occupants of buildings through sun access, acoustic control, privacy protection, natural ventilation, passive security design, outdoor living, landscape design, indoor amenity and storage provision.*

25D(2)

*(e) to provide built upon area controls to protect tree canopy of Ku-ring-gai, and to ensure particularly the provision of viable deep soil landscaping in order to maintain and improve the tree canopy in a sustainable way, so the tree canopy will be in scale with the built form.*

The applicant's objection does not provide any comments with respect to how the development meets the above identified objectives.

It is accepted that Clause 25D(2)(e) reflects the underlying objective of the control, to provide built upon area controls to ensure the provision of viable deep soil landscaping so as to achieve a balance between the built form and landscaping. However, other provisions within Part IIIA of the KPSO also serve to inform the underlying objectives. The heads of consideration for consent authorities considering multi-unit housing, as set out at Clause 25I provides:

- (a) the desirability to provide a high proportion of deep soil landscape to the site area,*
- (b) the impact of any overshadowing, and any loss of privacy and loss of outlook, likely to be caused by the proposed development,*
- (c) the desirability to achieve an appropriate separation between buildings and site boundaries and landscaped corridors along rear fence lines,*
- (d) the environmental features that are characteristic of the zone in which the site is situated by requiring sufficient space on site for effective landscaping,*
- (e) the desirability of adequate landscaping so that the built form does not dominate the landscape,*

*(f) how the principles of water cycle management can be applied to limit the impacts of run-off and stormwater flows off site.*

These considerations, in addition to the objectives in Clause 25D(2)(e), demonstrate that the objectives of the control in seeking to limit site coverage is to enable landscaping with an aim to minimise the opportunity for impacts resulting from the bulk and scale of built form. Limiting site coverage allows for greater landscaping opportunities. By way of example, villas, which by definition of Clause 25B of the KPSO are only single storey in scale and permitted a site coverage of 50%. Conversely, a residential flat building by definition will be at least three storeys in scale and will be limited to a 35% site coverage. The limiting of site coverage coincides with the scale of the built form permitted.

The development does not respond to the properties being partially unzoned and reserved for Country Road Widening. The development is too large for the portion of the site zoned Residential 2(d3) and as a result of the extent of built form, the development does not provide a compliant front setback and, as such, prevents the objectives of the control being achieved.

***whether compliance with the development standard is consistent with the aims of the policy and, in particular, whether compliance with the development standard hinders the attainment of the objectives specified under Section 5(A)(i), (ii), (iii) and (iv) of the Environmental Planning and Assessment Act 1979***

For the reasons indicated above, it is considered complying with the standard would be consistent with the aims of the policy in this instance. Compliance with the maximum site coverage would not hinder the objectives of the Act. This aspect of the proposed development does not promote and coordinate an orderly and economic development of the land.

***whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case***

The applicant submits that strict compliance with the site coverage standard, based on Clause 25I(6) of [the] Ku-ring-gai PSO, is unreasonable and unnecessary in the circumstances on the following grounds:

- *The apparent departure from the site coverage standard is triggered only by sub-definition of site area in Clause 25B. If the definitions of site area and site coverage under C25B are applied, the development would comply with the site coverage standard and an objection under SEPP 1 would not be required.*
- *The departure from the standard is of a technical nature only. The site component which is currently identified as Country Road Reservation and excluded from the site area pursuant to C25I(6), is no longer required by RTA for the purpose of road widening. If the County Road Reservation land, which is no longer required by RTA, is included in the site area, the development fully complies with all objectives of the Ku-ring-gai PSO concerning quality of urban and architectural design, high level of residential amenity and provision of viable deep soil landscaping which can sustain tall trees canopy, consistent with the desired garden setting character of Ku-ring-gai.*
- *While partly zoned 2(d3) Residential and partly County Road Reservation, the site area subject to the application is consistent with the definition of 'site area' and 'site coverage' under Clause 25B. The proposed development can be carried out on the site, subject to*

concurrence of the RTA, pursuant to Clause 13(2) of the KPSO, which may be assumed in view of RTA registration of the land subdivision, which reflects its actual requirements for road widening. The development is also consistent with the proposed R4 High Density Residential zone under the Draft Ku-ring-gai LEP (Town Centres) 2008, which is awaiting gazettal.

- This surplus land, currently zoned County Road Reservation, being situated between land zoned 2(d3) residential and the existing county road, can only be utilised for residential flat buildings development. This option is clearly confirmed by the R4 zoning of the abandoned County Road Reservation, proposed in the Draft Ku-ring-gai LEP (Town Centres) 2008.
- It is evident from the above that strict application of the site coverage standard based on provision of Clause 25I(6) would prevent residential flat building development at scale and density envisaged by Ku-ring-gai PSO and Draft Ku-ring-gai LEP (Town Centres) 2008. It would sterilise 760m<sup>2</sup> of land and reduce the residential development potential assumed under the Draft Ku-ring-gai LEP (Town Centres) 2008 and in the NSW Draft North Sub-Regional Strategy for Ku-ring-gai LGA.
- Flexible application of the 'site coverage' standard under Clause 25I(6) of KPSO is, in the circumstances, fully consistent with the objectives specified in Section 5(a)(1)(ii) of the Environmental Planning and Assessment Act 1979, namely:
  - (i) the proper management development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, town and villages for the purposes of promoting the social and economic welfares of the community and a better environment
  - (ii) the promotion and coordination of the orderly and economic use and development of land.

An additional submission was provided by Kanjian & Company dated 16 February 2011 which outlines the following additional reasons to support the SEPP 1 objection:

1. the objection commences on the premise also adopted by Council that the underlying purpose of the site coverage development standard finds immediate, but not exclusive, expression in cl 25D(2)(e) KPSO which reads:

*to provide built upon area controls to protect tree canopy of Ku-ring-gai, and to ensure particularly the provision of viable deep soil landscaping in order to maintain and improve the tree canopy in a sustainable way, so the tree canopy will be in scale with the built form.*
2. the core objective is reinforced by the suite of matters which cl 25I(1) KPSO requires the consent authority to take into account before granting consent
3. the focus of the core objective is to achieve a satisfactory balance or interplay between deep soil landscaping and the built form of a development
4. the first point to be made is that as the DA complies with the deep soil landscaping development standard, prima facie, the extent of tree canopy must be acceptable for a site having an overall area of 4043m<sup>2</sup>
5. if the KPSO road reserve applied to the site without more, Hyecorp concedes that a 42.77% site coverage ratio would be somewhat difficult to justify given that it entails a 22.2% exceedance over the 35% benchmark
6. however, the incontestable reality is that the KPSO road reserve does not apply to the site without more. The acquisition plan liberates 730.8m<sup>2</sup> of the KPSO road reserve. There is no sound reason, either at law or in policy, not to allow this liberated area to be subsumed into de facto site coverage calculations to determine whether

- there is merit in relacing a KPSO standard which is only breached if one applies an out of date and superseded measure for the road reserve.*
7. *seen in this light, the DA achieves a site coverage ratio of 34.98% which is compliant with cl 251(6) KPSO if it is read and applied in the context of that which is proposed by the RTA as the relevant statutory authority*
  8. *simply put, there is no social, economic or planning benefit derived by the indiscriminate or inflexible application of that which in truth is now an anachronistic metric for the road reserve*
  9. *the entire purpose of SEPP 1 is to give the consent authority latitude to make due allowance where due allowance is called for and is otherwise justified*
  10. *in this instance, to do otherwise and to reject the SEPP 1 objection:*
    - a. *firstly, serves no discernible beneficial purpose because by adopting the proposed de facto calculations for site coverage, the physical and visual balance between deep soil landscaping and built form is achieved*
    - b. *secondly, ignores the underlying reality of that which in time will occur; and*
    - c. *thirdly, unnecessarily sterilises a significant part of the site which I its own right is a valuable economic and social resource husbanded conformably with the overarching objectives in s5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979 which we earlier recounted and which, after all, combine to constitute the fulcrum on which SEPP 1 objections ultimately turn for their outcome.*

Clause 251(6) specifically excludes land not zoned Residential 2(d3) from being part of the site area. The clause states that *if a site is comprised of land in Zone No 2(d3) and other land, the other land is not to be included in calculating site area.* The purpose for the standard doing this is to prevent the double dipping of site area to increase built upon area upon a site which is not zoned for that purpose. The wording of the standard specifically prevents a circumstance such as that proposed from occurring. The front portion of the site is for county road widening and this is reiterated in the Town Centres LEP 2010 which maintains a portion of the front of the site for SP2 Infrastructure.

The planning policy is clear in that the road reserve (front portion of the site) is not zoned Residential 2(d3) for multi unit housing. Regardless of any RTA subdivision, the zoning of the land does not alter. The zoning is modified by the Ku-ring-gai LEP (Town Centres) 2010 but principally the front portion of the site is still for road widening purposes. The Ku-ring-gai LEP (Town Centres) however does anticipate a circumstance such as proposed. Clause 5.3 addresses development near zone boundaries which would facilitate development within the SP2 zone and is addressed in detail below.

Land which in itself cannot be developed for multi unit housing under the KPSO, should not be calculated to permit a greater building footprint on the component of the site where a residential flat building is permissible. This is Council's contention with accepting a SEPP 1 objection, which significantly breaches the standard without recognising it has a planning purpose and intent. The SEPP 1 objection is not considered to be well founded.

The development application was lodged under the provisions of the KPSO and under this instrument, the road reservation is approximately 760.5m<sup>2</sup> in area. The proposed development would still exceed the maximum permitted site coverage under the Ku-ring-gai Town Centres LEP 2010 and this is discussed below. The road reserve is reduced to approximately 187m<sup>2</sup> in area and is zoned R2 Infrastructure under the Ku-ring-gai Town Centre LEP 2010.



The exclusion of the road reserve is not considered to prevent multi-unit housing development upon the site. Clause 25I(3) of the KPSO permits multi-unit housing on land with an area greater than 1800m<sup>2</sup> and a street frontage of 30 metres. In addition, Clause 25I(5) permits 5 storey residential development on land with an area greater than 2400m<sup>2</sup>. These provisions would still permit multi-unit housing on this land. Alternatively, this issue would be overcome in any development application lodged pursuant to the new Town Centres LEP which does not have the impediment of Clause 13 of the KPSO.

The proposed site coverage represents excessive built form on the site and insufficient area for landscaping. The proposal as a result will not achieve the required relationship between built form and landscaping. The proposal cannot rely upon providing landscaping within land identified for road widening. Landscaping to screen the development must be provided on the site. The proposal has not demonstrated compliance with the minimum setbacks. As a result, the proposed residential flat building could under the current zoning have residential units set back 600mm from Boundary Street. This is considered a poor outcome for the site and would result in unacceptable amenity impacts. In this case, the SEPP 1 Objection is not considered to be well founded and is not supported.

### **Clause 33 – Aesthetic appearance**

The subject site adjoins a main road, being Boundary Street, and the proposed development will be visible from the main road. The proposed development complies with the height requirement and number of storeys. The development would not provide adequate setbacks from the street. As a result, the aesthetic appearance presented to the streetscape would be unacceptable.

### **Clause 61E – Development in the vicinity of heritage items**

The site is in the vicinity of three heritage items (No. 1 Hill Street, 5 Victoria Street and 3 Boundary Street) and is located within vicinity of a Heritage Conservation Area and listed item in the Willoughby Local Council Area. The application has been considered by Council’s Heritage Advisor who has concluded the application should not be supported due to the implication of the future road widening and loss of front setback. Concern was also expressed regarding the visual impacts on the nearby Heritage Conservation Area in the Willoughby Council Area. The Heritage Advisor concluded that the proposal would not have adverse impacts on the nearby heritage items.

## **POLICY PROVISIONS**

### **Development Control Plan No. 55 - Railway/Pacific Highway Corridor & St Ives Centre**

Clause 1.3 of DCP 55 states that this plan applies to land zoned Residential 2(d3) under the Ku-ring-gai Planning Scheme Ordinance 1974 (as amended). Therefore, the front portion of the land which is identified for road widening is excluded from all calculations.

<b>COMPLIANCE TABLE</b>		
<b>Development control</b>	<b>Proposed</b>	<b>Complies</b>
<b>Part 4.1 Landscape design:</b>		
<b>Consolidated deep soil landscaping (min)</b>		

<b>COMPLIANCE TABLE</b>		
<b>Development control</b>	<b>Proposed</b>	<b>Complies</b>
150m <sup>2</sup> per 1000m <sup>2</sup> of site area = 601.95m <sup>2</sup>	1211m <sup>2</sup>	YES
<b>No. of tall trees required (min):</b> 14 trees	14+ trees	YES
<b>Private outdoor space differentiation</b> Up to 1.2m solid wall with at least 30% transparent component	Up to 1.8 timber fencing	YES
<b>Part 4.2 Density:</b>		
<b>Building footprint (max):</b> 35% of total site area	42.77%	NO
<b>Floor space ratio (max):</b> 1.3:1	1.52:1	NO
<b>Part 4.3 Setbacks:</b>		
<b>Street boundary setback (min):</b> 10-12 metres  <40% of the zone occupied by building footprint)	Building A and B 600mm to 4.2 metres on Boundary Street frontage	NO
	Building A is 10-12 metres from Spearman Street	YES
	40% Spearman Street frontage >40% Boundary Street frontage	YES NO
<b>Side and rear boundary setback (min):</b> 6m  <b>Setback of ground floor courtyards to street boundary (min):</b> 8m  <b>% of total area of front setback occupied by private courtyards (max):</b> 15%	Building A and B – 6m from northern boundary – 6 m from western boundary	YES YES
	Building A – 11m to Spearman Building B – 600mm and Building A – 1.4 metres to Boundary Street	YES NO
	<15% Spearman Street frontage >15% Boundary Street frontage	YES NO
<b>Part 4.4 Built form and articulation:</b>		
<b>Façade articulation:</b> Wall plane depth >600mm  Wall plane area <81m <sup>2</sup>	>600mm	YES
	<81m <sup>2</sup>	YES
<b>Built form:</b> Building width < 36 metres  Balcony projection < 1.2 metres	Building A – 26.8m Spearman Street 32m to Boundary Street	YES YES
	Building B – 32.6m Boundary Street  All < 1.2metres	YES  YES
<b>Part 4.5 Residential amenity</b>		
<b>Solar access:</b> >70% of units receive 3+ hours direct sunlight in winter solstice	>70%	YES

COMPLIANCE TABLE		
Development control	Proposed	Complies
>50% of the principle common open space of the development receives 3+ hours direct sunlight in the winter solstice	The principle common open space located to the north east of the development will receive 3+ hours of direct sunlight in the winter solstice	YES
<15% of the total units are single aspect with a western orientation	12.9% single aspect	YES
<b>Visual privacy:</b> Separation b/w windows and balconies of a building and any neighbouring building on site or adjoining site: Storeys 1 to 4 12 metres b/w habitable rooms	<u>Ground Floor</u> Building A - minimum 24.6m to north Building B – minimum 17.8m to north  Building B to west 10.2 m	YES  NO
	<u>Floors 1 to 4</u> Building A– minimum 24.8m to north Building B– minimum 17.8m to north  Building B to west 10.8m	YES  NO
5th Storey 18 metres b/w habitable rooms	Between Building A and B minimum 13m  Buildings A – 24.8m Building B – 22.8m  Building B- 17.6m balcony to balcony  Between A and B – 19.6m Building B 10.8m to west	YES  YES  YES NO
<b>Internal amenity:</b> Habitable rooms have a minimum floor to ceiling height of 2.7 metres	>2.7m	YES
Non-habitable rooms have a minimum floor to ceiling height of 2.4m	>2.7m	YES
1-2 bedroom units have a minimum plan dimension of 3m in all bedroom	All bedrooms have 3 metres minimum dimension	YES
3+ bedroom units have a minimum plan dimension of 3m in at least two bedrooms	All bedrooms have 3 metres minimum dimension	YES
Single corridors: - serve a maximum of 8 units 1.8m wide at lift lobbies	7 units per floor (GF – third) 4 units on fourth floor  1.8m at lift	YES  YES
<b>Outdoor living:</b> Ground floor apartments have a terrace or private courtyard greater than 25m <sup>2</sup> in area	>25m <sup>2</sup>	YES

<b>COMPLIANCE TABLE</b>		
<b>Development control</b>	<b>Proposed</b>	<b>Complies</b>
Balcony sizes: - 10m <sup>2</sup> – 1 bedroom unit - 12m <sup>2</sup> – 2 bedroom unit - 15m <sup>2</sup> – 3 bedroom unit NB. At least one space >10m <sup>2</sup> primary outdoor space has a minimum dimension of 2.4m	10m <sup>2</sup> (Units 5,7, 13, 20 &27) 12m <sup>2</sup> (min) to 68m <sup>2</sup> (Units 1 -4,6, 8-12, 14-19, 21 – 26, 28 & 31) 79m <sup>2</sup> - 142m <sup>2</sup> (Units 29 and 30) >2.4 metres	YES YES YES YES
Common Open space ( 30% Of the site area	32.5%	YES
Private open space adjoining common open space not to be enclosed with high solid fences	No high solid fencing, timber to be used.	YES
<b>Part 4.7 Social dimensions:</b>		
<b>Visitable units (min):</b> 70%	46 units (74%)	YES
<b>Housing mix:</b> Mix of sizes and types	9 x studio, 49 x 2 bedroom and 4 x 3 bedroom units	YES
<b>Part 5 Parking and vehicular access:</b>		
<b>Car parking (min):</b> 66 resident spaces 16 visitor spaces 82 total spaces	69 spaces 16 spaces 85 spaces	YES YES YES

### **Part 4.2 Density**

The proposal has a building footprint of 42.77% which exceeds the control maximum of 35%. In order to achieve the desired landscape and built character of Ku-ring-gai, the capacity of development in the 2(d3) zone is limited by the ability to achieve the minimum deep soil landscaping requirements on a particular site. The proposal results in a floor space ratio of 1.52:1 and exceeds the control requirement of 1.3:1. The proposal is contrary to Principle 4 of the RFDC in that the proposed density is considered unacceptable. The extent of built form is not offset by complying setbacks or landscape treatment.

### **Part 4.3 Setbacks**

The proposal is set back between 600mm and 4.2 metres from the Boundary Street frontage zoned Residential 2(d3) and represents a significant departure from the control requirement of a setback between 10 – 12 metres. As a result, greater than 40% of the setback zone is occupied by the building footprint. The private courtyard of Building B is set back 600mm from the front boundary and Building A, 1.4 metres which is a departure from the 8 metres control minimum.

In addition, the proposal is inconsistent with the objectives of the control which seek to achieve adequate space to sustain landscaping and provide a high level of residential amenity. The potential impact upon residential amenity of the apartments fronting Boundary Street given the reduced setbacks from the road reserve is unacceptable.

### **Part 4.5 Residential amenity**

## **Solar access**

Concerns have been raised by the owners of adjoining properties to the north regarding the proposed development resulting in a site constraint for their future development due to the proposed setbacks. The concern is that the proposed development being to the south, having the minimum setback will prevent their development due to the potential future solar access impacts from their development.

It is considered that any future development of the properties fronting Victoria Street will inevitably result in shadow being cast upon the proposed development. However, in the absence of an actual proposal, it is unreasonable for Council to require the proposed development to provide a greater setback or be designed to prevent a future development on the adjoining property impacting their solar access. The objector provided a recent decision by the Sydney East Joint Regional Planning Panel in which a development was refused because of impact on an adjoining property and restriction of their development potential. In that circumstance, the properties being impacted were to the south and therefore the impact was more foreseeable than in this circumstance where it would necessitate a design to be prepared by the assessing officer to determine a likely impact.

Concern has also been raised by the owners of 25 Boundary Street regarding potential loss of morning sun. The proposal will result in a shadow impact to 23 and 25 Boundary Street at 9am. At 10am, the shadow impact would be limited to the dwelling at 25 Boundary Street only and the shadow impact progressively decreases until the dwelling is unaffected by 12 noon. However, it is recognised that the dwelling will cast shadow on itself at 12 noon, with the rear of the dwelling and north-eastern corner being in sunlight at 12 noon. Despite the shadow impact in the morning period, the proposal is not considered to result in an unacceptable impact. The rear private open space and rear of the dwelling will be maintained in sunlight from 10am in accordance with Council's policy.

## **Visual privacy**

Concern has been raised by the owner of the adjoining property to the west, 25 Boundary Street regarding loss of privacy. Similar concerns have also been raised by the owners of properties to the north.

Building B results in a non-compliance with the minimum required separation distances to 25 Boundary Street. The development is set back 8.2 metres where a minimum setback of 12 metres is required at storeys 1 to 4 and 18 metres at Level 5.

As discussed above under the SEPP 65 assessment, the development is not considered to result in a significant loss of privacy to 25 Boundary Street. The upper levels of the development overlook the dwelling as demonstrated in **Figure 1**. The lower levels are provided with privacy screens and landscape screening within the side setback which is considered sufficient to maintain privacy.

There are valid concerns regarding the privacy impact upon 21 Victoria Street and if the development were to be approved, a conditional requirement could be that the proposed planter boxes to be extended along the northern elevation in a western direction and along the southern boundary to maintain privacy to the private open space of this property. This would reduce the impact to a satisfactory level.

## **Air conditioning**

Air conditioning (A/C) units have been located within the basement associated with the individual spaces for each unit. It is recommended if the development were approved, that all mechanical ventilation be installed in accordance with the BCA and Australian Standard requirements and shall not emit a noise level of greater than 5dbA above the background when measured at the nearest adjoining property.

#### **Development Control Plan No. 31 Access**

Matters for assessment under DCP 31 have been taken into account in the assessment of this application against DCP 55 and the proposal is satisfactory in this regard.

#### **Development Control Plan No. 40 - Construction and Demolition Waste Management**

Matters for assessment under DCP 40 have been taken into account in the assessment of this application against DCP 55 and the proposal is satisfactory in this regard.

#### **Development Control Plan No. 43 - Car Parking**

Matters for assessment under DCP 43 have been taken into account in the assessment of this application against DCP 55 and the proposal is satisfactory in this regard.

#### **Development Control Plan No.47 - Water Management**

Matters for consideration under DCP 47 have been taken into account in the assessment of this application against DCP 55 and the proposal is satisfactory in this regard.

#### **Section 94 Plan**

The application is recommended for refusal and is therefore not subject to a Section 94 contribution.

#### **KU-RING-GAI LOCAL ENVIRONMENTAL PLAN (Town Centres) 2010**

On 25 May 2010 Ku-ring-gai Local Environmental Plan (Town Centres) 2010 was gazetted. It repeals all local environmental plans and deemed environmental plans including the KPSO. However, as the development application was lodged before this date and has not been determined given that the Land and Environment Court declared the consent granted by the Sydney West Joint Regional Planning Panel as being void, the subject application must be assessed and determined as if the Ku-ring-gai Local Environmental Plan (Town Centres) 2010 had not commenced as identified in clause 1.8 and clause 1.8A of this instrument.

The development application was lodged on 4 July 2009. This was after the exhibition of the draft LEP and prior to the making of LEP (Town Centres) 2010 on 25 May 2010. The Land and Environment Court has previously considered the weight to be given to a draft LEP and the effect of the transitional provisions and has adopted a consistent approach in these circumstances and recognises the provisions of Section 79C(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* which requires consideration of the provisions of any Draft Environmental Planning Instrument (EPI) that has been placed on public exhibition. The fact that the LEP 2010 has been made ensures that the plan is

certain and imminent and, accordingly, the LEP must be given significant weight in the determination of the application.

It is necessary to consider whether the proposed development is consistent with the aims and objectives of LEP (Town Centres) 2010 and that allowing the development would not detract from those objectives. The aims of the LEP are found at cl 1.2(2) and state:

*(2) The particular aims of this Plan are as follows:*

- (a) establish a hierarchy of centres for Ku-ring-gai*
- (b) to facilitate the development of the centres to enhance Ku-ring-gai's economic role and cater to the retail and commercial needs of the local community*
- (c) to provide a variety of housing choice within and adjacent to the centres*
- (d) to protect, enhance and manage land having special aesthetic, ecological, social, cultural or conservation values for the benefit of present and future generations.*

Of these aims, (c) and (d) are relevant. The LEP provides a variety of housing choice by way of adopting different residential zones across the area to which the plan applies ranging from low density residential to high density residential. The site is zoned R4 High Density Residential which permits residential flat buildings and SP2 Infrastructure as shown in **Attachment 3**. The objectives for the Residential R4 zone are:

- to provide for the housing needs of the community within a high density residential environment*
- to provide a variety of housing types within a high density residential environment*
- to enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The front portion of the site 187m<sup>2</sup> is zoned SP2 Infrastructure and the objectives for this zone area:

- to provide for infrastructure and related uses*
- to prevent development that is not compatible with or that may detract from the provision of infrastructure*

It is necessary for the proposed development to be consistent with the aims of LEP (Town Centres) 2010 and the future anticipated character that will result over time when development takes place under the provisions of the LEP 2010. The zoning of the front part of the site as SP2 Infrastructure emphasises the intent of the zone is for the use of this land for infrastructure and related uses. However, Clause 5.3 (Development near zone boundaries of the LEP (Town Centres) 2010) is a relevant consideration. The objective of Clause 5.3(1) is as follows:

*(1) the objective of this clause is to provide flexibility where the investigation of a site and its surroundings reveals that a use allowed on the other side of a zone boundary would enable a more logical and appropriate development of the site and be compatible with the planning objectives and land uses for the adjoining zone.*

Clause 5.3(2) applies to land within Zone SP1 Special Activities or SP2 Infrastructure. It permits this land to be developed for the same purpose as the adjoining zone, but only

within 15 metres of the zone boundary. This clause, would allow the SP2 zoned portion of the site (that is within 15 metres of the zone boundary) not required for road widening to be development for the same purpose as the R4 zoned land. The SP2 zoning is less than 15 metres in depth on the subject site. The entire site would be capable of development for residential purposes under this clause.

Part 4 of the LEP 2010 establishes the principal development standards.

<b>COMPLIANCE TABLE – PRINCIPLE DEVELOPMENT STANDARDS</b>			
<b>Development standard</b>	<b>Requirement</b>	<b>Proposal</b>	<b>Complies (Yes/No)</b>
<b>Cl.4.3: Height of Buildings</b>	17.5m	17.5m	YES
<b>Cl.4.4: Floor Space Ratio</b>	1.3:1	1.29:1	YES

The site area for the purpose of calculating floor space ratio is the land zoned R4 high density residential. Cl 4.5 (4)(a) calculation of floor space ratio and site area prevents the inclusion of land on which the proposed development is prohibited to be included in the site area. The proposal would be compliant with the height and floor space ratio development standards of the LEP (Town Centres) 2010.

## **LIKELY IMPACTS**

The likely impacts of the development have been considered within this report and are deemed to be unacceptable.

## **SUITABILITY OF THE SITE**

The site is zoned 2(d3) and reserved for road widening under the KPSO. The proposal seeks to rely upon all land for the purposes of supporting a development for multi-unit housing. The proposal includes landscaping works and pathways within the road reservation which are considered to be of a permanent nature. The proposed development is not considered suitable for the site, as the development relies upon the unzoned road reserve to achieve compliance with development standards and control provisions. It is not considered suitable to approve a development which relies upon land reserved for another purpose which is prohibited development pursuant to Clause 13(1) of the KPSO.

## **ANY SUBMISSIONS**

The matters raised in the submissions have been addressed in this report.

## **PUBLIC INTEREST**

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are minimised. The proposal has been assessed against the relevant environmental planning instruments and policy provisions and is deemed to be unacceptable. On this basis, the proposal is considered to be contrary to the public interest.

## **ANY OTHER RELEVANT CONSIDERATIONS**



There are no other relevant considerations.

## **CONCLUSION**

This application has been assessed under the heads of consideration of Section 79C of the Environmental Planning and Assessment Act 1979 and all relevant instruments and policies.

The site is partially zoned Residential 2(d3) to permit 5 storey residential flat buildings and contains 760.5m<sup>2</sup> of unzoned land identified as being for County Road Reservation. Pursuant to Clause 13(1) of the KPSO the proposed works landscaping and pathways are of a permanent nature and prohibited without the concession of Clause 13(2). It is considered that the recent gazettal of the Ku-ring-gai LEP (Town Centres) 2010 and rezoning of the site and the works presently being undertaken in the road reserve for the purposes of the zoning demonstrate that the intended purpose of the road reserve is being carried out within a reasonable time frame from the appointed day. The development is therefore prohibited.

The development exceeds the maximum permitted site coverage because the control specifically excludes the addition of land not zoned Residential 2(d3) from being used in the site area calculation. A SEPP 1 Objection has been submitted regarding the site coverage breach and it is not considered to be well founded.

The development exceeds the permitted FSR, provides inadequate front setbacks and is considered to have inadequate internal amenity, with more than 10% of the apartments proposed having southern orientation and being single aspect. The provisions of Development Control Plan 55 are relevant to land zoned Residential 2(d3) only, pursuant to Clauses 1.3, 1.4, 1.5 and 1.7 of this DCP.

The proposal is considered to be inconsistent with the relevant Council statutory and policy controls. The proposal is contrary to the objectives of these controls. It is, therefore, recommended that the application be refused.

## **RECOMMENDATION**

That pursuant to Section 80(1) of the Environmental Planning and Assessment Act 1979, the Sydney West Joint Regional Planning Panel, as the consent authority, refuse development consent to DA0410/09 for the demolition of 4 existing dwellings and the construction of two residential flat building comprising 62 units, basement parking, landscaping and front fence on land at Nos. 27 – 33 Boundary Street, Roseville for the following reasons:

## **PROHIBITED DEVELOPMENT**

### **1. The development is prohibited by Clause 13(1) of the KPSO.**

#### *Particulars*

- (a) The proposal seeks consent to carry out works of a permanent character on land reserved for the purpose of widening of existing county roads.
- (b) Clause 13(a) of the KPSO prohibits works of a permanent character on an area so reserved, subject to Clause 13(2).

- (c) Clause 13(2) provides that such works may be carried out where it appears to the responsible authority that the purpose for which the land is reserved cannot be carried into effect within a reasonable time after the appointed day.
- (d) The appointed day is 1 October 1971.
- (e) A relevant opinion for the purposes of Clause 13(2) has not been formed.
- (f) Council Officer's do not have the delegated authority to form the relevant opinion.
- (g) The JRPP as consent authority is the responsible authority for the purposes of Clause 13(2).
- (h) An opinion that the purpose for which the reserved land cannot be carried into effect within a reasonable time of the appointed day is not formed for the following reasons:
  - i. The road reserve is for the purpose of "widening of existing county roads"
  - ii. The appointed day referred to in Clause 13(1) of the KPSO is 1 October 1971. The Ku-ring-gai Local Environmental Plan (Town Centres) 2010 (TCLEP) came into effect on 25 May 2010. The LEP repeals the KPSO. The TCLEP maintains a road reserve despite being reduced in area from that identified in the KPSO. The TCLEP road reserve is a recently zoned piece of land.
  - iii. The RTA letter dated 17 February 2010 indicates it is currently developing a road widening project in Boundary Street, Roseville between the Pacific Highway and Spearman Street.
  - iv. The Roads and Traffic Authority is currently developing a road widening project in Boundary Street, Roseville between the Pacific Highway and Spearman Street. The intentions of the RTA are maintained in the preliminary stages of the Principal LEP consultation process.

## **BULK and SCALE**

### **2. The development exceeds the maximum site coverage permitted by Clause 25I(6) of the KPSO and is considered unacceptable.**

#### *Particulars*

- (a) The proposal results in a site coverage of 42.77% which exceeds the maximum site coverage permitted under Clause 25I(6) of the KPSO. The site of the building is too large for the portion of the site zoned Residential 2(d3). This is demonstrated by inadequate front setback and excessive FSR. The development is contrary to the objectives of Clause 25D(2)(e) of the KPSO.
- (b) The SEPP 1 objection is not considered to be well founded. The underlying purpose of the standard is described in clause 25D(2)(e) of the KPSO which is to provide built upon area controls to ensure the provision of viable deep soil landscaping so as to achieve a balance between the built form and landscaping. The development does not provide adequate deep soil landscaping or front setback and therefore the purpose of the control has not been met.

- 3. The development does not comply with the front setback requirement from Boundary Street contributing to the scale of the buildings as viewed from the streetscape.**

*Particulars*

- (a) Both buildings A and B are setback between 600mm and 4.2 metres from the Boundary Street frontage and occupies more than 40% of this zone with the building footprint. Control C-1(b) of Part 4.3 Setbacks of DCP 55 requires a setback zone of between 10 – 12 metres and no more than 40% of this zone may be occupied by the building footprint. As a result of this non-compliance, insufficient area is provided to accommodate landscape screening which is consistent with the scale of the development.
- (c) application is contrary to the residential zone objective set out in clause 25D(2)(e) of the KPSO, which is to provide built upon area controls that ensure sufficient deep soil landscaping is provided such that the tree canopy will be in scale with the built form of a proposal.
- (d) The application is contrary to the heads of consideration for multi-unit housing set out in clause 25I(1)(e), of the KPSO as adequate landscaping has not been provided to ensure that the built form does not dominate the landscape.

- 4. The development has an excessive floor space ratio which contributes to the unacceptable density of the development.**

*Particulars*

- (a) The development results in a FSR of 1.52:1. The control C-4 of Part 4.2 Density of DCP 55 requires a maximum floor space ratio of 1.3:1 for multi-unit housing.
- (b) The development results in a built upon area of 42.77% which is contrary to Clause 25I(6) of the KPSO and Principle 4 of SEPP 65.
- (c) The density of the proposed development exceeds the optimum capacity of the site and the desired future landscape and built character of the area.

**RESIDENTIAL AMENITY**

- 5. The orientation of the units in the proposal are in breach of the amenity provisions set out in the RFDC (page 85), which limit the number of single aspect apartments with a southerly aspect (SW-SE) to a maximum of 10% of the total units proposed.**

*Particulars*

- (e) The development includes eight (8) studio apartments which are single aspect south facing apartments. The Residential Design Flat Code and Part 4.5.1 Solar Access of DCP 55 C-4 states no single aspect units should have a southern orientation. 12.9% of the apartments in the proposal have a southern orientation which results in poor residential amenity.
- (f) The development is contrary to the aim of Part IIIA set out in Clause 25C(2)(g) of the KPSO which requires development to achieve a high level of

residential amenity in building design for the occupants of the building through solar access, acoustic control, privacy protection, natural ventilation, passive security design, outdoor living, landscape design, indoor amenity and storage provision.

## **BASIX COMPLIANCE**

### **6. The development has not been support by a compliant BASIX Certificate with respect of landscape commitments.**

#### *Particulars*

- (g) The BASIX Certificate 254953M\_10 has made numerous landscape related commitments for the development including 601.11m<sup>2</sup> of common lawn area, 1102.07m<sup>2</sup> of common garden area and 997.56m<sup>2</sup> of low water use/indigenous planting area within the common area.
- (h) The commitments made rely upon the area within the Boundary Street frontage that is part of the County Road Reservation. This area can be resumed for road expansion and contain structures which would prevent landscaping as identified on the submitted plans. The proposal cannot rely upon these areas to achieve compliance with BASIX due to landscaping commitments on the land reserved for road widening.

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**Attachments:**

- Zoning Extract**
- Location Sketch**
- Survey**
- North and South Elevation**
- East and West Elevation Boundary Street**
- East and West Spearman Street**
- Site calculations**
- Basement Level 2**
- Basement Level 1**
- Ground floor plan**
- First floor plan**
- Second floor plan**
- Third floor plan**
- Fourth floor plan**
- Roof plan**
- Long Section**
- Fence detail**
- Landscape plan**
- Judgement of LEC dated 31/12/2010**