

Addendum State Environmental Planning Policy No. 1 Development Standards, Objection

Clause 29(2) – Building height – Building 1

This Addendum State Environmental Planning Policy No. 1 - Development Standards (**SEPP 1**) Objection accompanies a Development Application (**DA**) for a mixed use development at 200-220 Pacific Highway, Crows Nest (**the site**). It relates to the building height standard and the variation proposed by Building 1. It amends and should be read in conjunction with the earlier SEPP 1 objection dated October 2010.

1.0 Standard objected to

This Addendum SEPP 1 objection relates to the proposed departure of Building 1 from Clause 29(2) – Building height.

Lloyd J, in *Winten Property Group Ltd v North Sydney Council* (2001) NSWLEC 46, posed five questions to be addressed in SEPP 1 objections. The extent of departure proposed and the Winten questions are addressed below for each of the development standards to be varied.

2.0 SEPP 1 considerations

Clause 29(2) states:

A building must not be erected in the mixed use zone in excess of the height shown on the map.

For the site, the Map shows a maximum height of 16 metres.

Figures A1 and **A2** compare the existing, approved/commenced and proposed building height of Building 1 (using the definition of *height* and *existing ground level*¹ in LEP 2001). They illustrate the following:

- At the Pacific Highway boundary, new Building 1 has a height of 16m at the southern end of the site which complies with the 16m height standard
- At the Pacific Highway boundary, new Building 1 has a height of 17.25m at the centre of the site which exceeds the 16m height standard by 1.25m
- At the western elevation of new Building 1, a height of 17.2m to 17.7m is proposed which exceeds the 16m height standard by 1.2m to 1.7m
- The air conditioning plant and stair overrun on Building 1 (located at the centre of the roof to Building 1) exceed the 16m height standard by 2.9m and to 3.6m respectively.

An assessment based upon the Winten questions follows.

1 Pursuant to LEP 2001:

***height** in relation to a building, means the greatest distance measured vertically from any point on the building to the existing ground level, or the level of the lowest habitable floor, immediately below that point, whichever is the lower, excluding chimneys.*

***existing ground level** means the level of the ground as at December 1997, as shown on Council's digital photogrammetric maps dated December 1997.*





1) Is the planning control in question a development standard²?

The building height control is not framed as a prohibition.

The building height control is therefore a *development standard* as defined at clause 4 of the *Environmental Planning and Assessment Act, 1979 (EP&A Act)* (part (c) of the definition refers to the height of a building).

2) What is the underlying object or purpose of the standard?

The building height objectives at Clause 29(1) of LEP 2001, and the proposal's satisfaction of same, are detailed below:

Building height objectives (a) and (b)

- (a) *ensure compatibility between development in the mixed use zone and adjoining residential areas and open space zones*
- (b) *encourage an appropriate scale and density of development for each neighbourhood that is in accordance with, and promotes the character of, the neighbourhood*

Building 1 satisfies building height **objectives (a) and (b)** as:

- New Building 1 partially complies with the 16m height standard (16m – 17.7m) and has a scale/height consistent with nearby buildings on the Pacific Highway
- The parapet to the mixed use building to the north of the site at 236 Pacific Highway is at RL 114.980 which is generally consistent (570mm higher) with the proposed Building 1 parapet which is at RL 114.410.

Building height objective (c)

- (c) *provide reasonable amenity for inhabitants of the building and neighbouring buildings*

Building 1 (and the proposal overall) satisfies building height **objective (c)**, providing a reasonable standard amenity for inhabitants of the building and neighbouring buildings as demonstrated below.

An overview of the amenity of the proposed apartments follows (with more detailed set out in the SEE):

² Pursuant to clause 4 of the Act:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

...

- (c) *the character, location, siting, bulk, scale, **shape**, size, **height**, density, design or **external appearance** of a building or work,*
- (d) ***the cubic content or floor space of a building**,..... (our emphasis)*

- The apartments generally comply with the Residential Flat Design Code Rules of Thumb (as detailed in the Detailed Schedule of Apartments, **Appendix F** and Section 4.1.2 of the SEE)
- The apartments will have a good standard of privacy (privacy is addressed in more detail at Section 4.2.1 of the SEE)
- 71.3% of the proposed apartments are cross ventilated (DCP 2002 requires 75% and the RFDC Rule of Thumb suggests 60%)
- 56.9% of the proposed apartments receive two hours or more of sunlight to their living room balconies between 9am and 3pm in midwinter. If times are extended to 7.30am to 4.30pm, 89.1% of apartments comply (RFDC Rule of Thumb suggests 70% between 9am and 3pm)
- There are no south facing apartments (the RFDC suggests that the number of apartments with a southerly aspect be limited to 10%)
- 169 of 203 residential apartments will enjoy a view to the east, south or west.

The amenity of neighbouring residents is protected as:

- There are no views over the site
- Privacy will be protected by orientation, grade separation, privacy shelves, screens and planting (refer Section 4.2.1 in the SEE)
- Adjoining residents will not experience any significant reduction in solar access (refer Section 4.2.3 and **Appendix L** in the SEE)
- The approved parking at the base of Building 3 has been replaced by apartments and landscaped courtyards, improving acoustic amenity for the adjoining residents in Sinclair Street.

Building height objective (d)

(d) provide ventilation, views, building separation, setback, solar access and light and to avoid overshadowing of windows, landscaped areas, courtyards, roof decks, balconies and the like

Building 1 (and the proposal overall) satisfies building height **objective (d)** as:

- The impact on ventilation to adjoining buildings is unlikely to be appreciable
- There are no views over the site
- Privacy will be protected as detailed above
- Adjoining residents will not experience any significant reduction in solar access (refer Section 4.2.3 and **Appendix L** in the SEE)

Building height objective (e)

- (e) *promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient*

Building 1 (and the proposal overall) generally maintains the existing relationship between buildings on the site and the natural landform (no new excavation is proposed).

Building height objective (f)

- (f) *avoid the application of transitional heights as justification for exceeding height controls.*

The justification for exceeding the height control does not in any way rely upon transitional heights, satisfying **objective (f)**.

Notwithstanding the departure from the building height development standard, the proposal is consistent with the underlying objectives of the standard, as demonstrated above.

3) Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act?

The aims of SEPP 1, as stated at clause 3 of the Policy are:

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

Clause 5(a)(i) and (ii) of the EP&A Act state:

The objects of the Act are:

(a) to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the building height development standard for Building 1 would tend to hinder the attainment of the objects specified in Clause 3 of SEPP 1 and Section 5(a)(i) and (ii) of the EP&A Act as it would:

- Necessitate a reduced ground floor ceiling height in Building 1 which would:
 - Reduce the clearance for the proposed ground floor loading dock (which must have a 4.5m clearance to accommodate furniture trucks and to achieve concurrence from the Roads and Traffic Authority)
 - Reduce the ground floor retail floor to ceiling heights such that it does not comply with North Sydney Development Control Plan 2002, Section 6.3m which requires a minimum finished floor to ceiling height of 3.6m for the ground floor of mixed use buildings (3.95m is proposed which provides flexibility for a range of retail and other non-residential uses)
- Frustrate the provision of 203 new dwellings on the site which could make a very meaningful and well located contribution to the dwelling targets for North Sydney (consistent with the Draft North Sydney Residential Development Strategy 2008, as detailed in Section 4.1.2 of the SEE)

4) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

In this instance, compliance with the building height development standard for Building 1 is unreasonable as proposed Building 1, the only new building, partially complies with the building height standard at its frontage to the Pacific Highway and the proposed departure of up to 1.25m (RL 114.410 to the parapet) is generally consistent with the existing mixed use building at 236 Pacific Highway to the north of the site (RL 114.980/RL 112.540).

5) Is the objection well founded?

For the reasons set out above, the proposed departure from the building height development standard is well founded.

3.0 Compliance with the planning objectives of the locality

Pursuant to the zoning and permissible land use table at Clause 14 of LEP 2001, the objectives of Mixed Use Zone are to:

Mixed Use Zone

1 Objectives of the zone

The particular objectives of this zone are to:

- (a) encourage a diverse range of living, employment, recreational and social opportunities, which do not adversely affect the amenity of residential areas, and*
- (b) create interesting and vibrant neighbourhood centres with safe, high quality urban environments with residential amenity, and*
- (c) maintain existing commercial space and allow for residential development in mixed use buildings with non-residential uses at the lower levels and residential above, and*
- (d) promote affordable housing.*

Notwithstanding the Building 1 departures from the building height standards in LEP 2001; the proposal is consistent with the objectives of the Mixed Use Zone as it:

- Includes residential apartments, retail/cafe uses and serviced apartments and will not unreasonably affect the amenity of any residential areas (in the Mixed Use Zone) (satisfying **objective (a)**);
- Apartments will overlook the Pacific Highway footpaths and internal courtyard, improving safety, a high standard of architectural design is proposed and good residential amenity will be achieved within the limitations imposed by the orientation of the site and dimensions of the existing building (satisfying **objective (b)**);
- The proposal has ground level shops addressing the full site frontage to the Pacific Highway (satisfying **objective (c)**); and
- Apartments have been designed to accommodate a range of households including professional couples, retirees and small families. Notably, the proposed apartment mix is consistent with the projected demand for small dwellings identified in the Draft Residential Development Strategy 2008 and predicted by residential market experts CBRE (refer Section 4.1.2 and **Appendix O** of the SEE) (generally consistent with **objective (d)**).

4.0 Conclusion

Whilst proposed Building 1 does not comply with the building height (clause 29(2)), development standard in LEP 2001; it nevertheless satisfies the five SEPP 1 tests established by the Court.

Compliance with the development standard is therefore unreasonable in the circumstances of the case, and refusal of the DA on these grounds is not warranted.