

Joint Regional Planning Panel
GPO Box 3415
SYDNEY NSW 2001

Our Ref: GMC:dt:21705

5 December 2011

Attention: Panel Secretariat

By Email: Angela.Kenna@planning.nsw.gov.au

Dear Secretariat,

JRPP REF No: 2011SYE042

Property: 2 - 4 Riverhill Avenue & 751 - 757 Warringah Road, Forestville

Re: DA 2011/0400

We refer to the above matter and the independent urban planning report prepared by Brett Newbold dated 1 December 2011.

We have reviewed Mr Newbold's report and offer the following overall comments:

1. This urban design or compatibility report does not carry out any "balancing" exercise pursuant to s79C of the *Environmental Planning and Assessment Act 1979* ("the EP&A Act") or, for example, considered in the context of the aims of the Affordable Rental Housing SEPP 2009 ("the ARH SEPP").
2. The report does not identify (except in the summary) the open "orientation of certain dwellings" that are unsatisfactory.
3. The design character of exterior architecture would not be considered a matter of significant weight, especially in circumstances where the "older stock" buildings are being replaced by project homes that are significantly greater in size, height and density.
4. The amenity of the six neighbours to the west is protected by the design of the building which prevents overlooking. The minimum 5m and maximum 10m setback, which allows for small canopy trees to reach a height of 6-8m and the separation of buildings, also permits an additional depth of landscaping essentially every 14m.

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Our response

Is 5m too “close to the western boundary”?

The report singles out the western boundary and “*the proposed concentration of accommodation and activities close to the western boundary*” as the most significant issue.

The report links to and concludes that the 5m setback and the reduced effectiveness of landscape screening along this boundary due to compromised deep soil “*would affect the current level of amenity which is enjoyed by immediate neighbours*”.

The proper test is not whether or not there would be a change in the level of amenity which is enjoyed by immediate neighbours, but whether or not the proposed development is reasonable and in line with expectations of the planning controls. These planning controls in turn set the reasonable and appropriate expectations of neighbours as to the type of character and development that is likely to occur. In the circumstances of this case, where the previous and current state governments have identified affordable rental housing as an urgent and important need within Sydney, the relevant planning control is the ARH SEPP.

It is relevant to note that under the complying development SEPP a side setback would be 1.9m for a two storey residential dwelling. The proposed 5m setback exceeds the expectations set by the Warringah planning controls and the ARH SEPP which envisages a 3m setback to allow for deep soil planting. The 5m is within 1m of the SEPP 65 and RFDC setback which would require for apartment buildings up to four stories, a 6m setback.

Landscaping will reinforce the existing character. The landscape plan clearly identifies the plantings proposed within the 3m deep planting area from the boundary adjoining the western ends of buildings C and D. In addition, there is a 1m deep planter on top of the basement which will provide for a variety of shrubs and small trees. We note that further landscaping of the significant scale and proportion is included between buildings C and D, and A and C. Building E has a 10m setback which is wholly set over to landscaping.

Overlooking

The Newbold assessment concludes that six dwellings are impacted by overlooking from 12 balconies and increased levels of noise from general occupancy. The following assessment of overlooking potential is based on reasonable occupant behavior. This means that they don’t hang out over the balcony and the angle of view is less than 45°. (Refer AMCORD). An analysis of the landscape plan and the proposed buildings highlights that there is no potential for overlooking from the western portion of building G of 7 Forestville Avenue. The separation distances between 5 Forestville Avenue and

the balcony of unit 323 is 14m. We note that 1a – 7 Forestville Avenue are all orientated to have their address to Forestville and, therefore, it's rear yard directly adjoins the proposed site. Building E is setback 10m from the boundary. It has a 200m² area of planting which significantly benefits and will screen the proposed development for the owners of 3, 5 and 7 Forestville Avenue. Importantly, the owners of 759 and 761 Warringah Road and 1a Forestville Avenue benefit from this landscaped area as it breaks the 100m plus length of development into two. The five buildings will not be visible in "one line". The proposed development does have varied setbacks. The western setback of building A is different from the setback of building's C and D, which is different from the western setback of building E.

We disagree with Mr Newbold's conclusion that the 5m setback provided for building C and D does not adequately provide for physical built form separation and the opportunity for landscaping. The proposed development when viewed from 759, 761 and 1a Forestville Avenue from their backyards will be consistent with the C1 Middle Harbour Character Statement. The expectation of these owners would have been, given the north-south configuration of the battleaxe site, that the side boundaries of dwellings would have been in the order of 2m from the boundary.

We would argue, in summary, that the proposed development could not be considered in urban design, town planning or in terms of the existing and future character to be "*close to the western boundary*".

There is an appropriate balance between sighting of built form, variation of setbacks and provision of sustainable landscaping that will ensure that the amenity for the neighbours, in a real sense, is maintained and enhanced.

Land and Environment Court interpretation of the character test

The Court's decision in *Peninsular Developments Australia Pty Ltd v Pittwater Council* confirms that the savings provision in Clause 54A(3) of the amending ARH SEPP requires consideration of "*whether the design of the development is compatible with the character of the local area*".

The Newbold report confirms that the distribution of floor area into eight separate buildings is "*similar to those of surrounding detached dwellings, which contributes to positive effects in relation to context and scale*". The design of the development orientated the dwellings to the north so that rather than adopting a carriage style facing the west and east. The design of the development has positively adopted a "*distinct residential address proposed for all dwellings facing and next to street frontages*".

The proposed development is consistent with Middle Harbour Suburbs Locality Statement which seeks future development that "*will maintain the visual pattern and predominant scale of existing detached style housing in the locality*". The street

frontages to Warringah Road and Riverhill Avenue are characterized by landscaped front gardens and have front building setbacks that comply with and are consistent with the existing and future and desired character.

Consistent with Commissioner Tuor's judgment at paragraph 70 of *Peninsula Developments v Pittwater Council*, the design of the development is compatible with the character of the area by orientating the apartments north to south, and ensuring that any perception of overlooking is addressed by privacy wing walls to balconies.

Why the proposal is compatible

The ARH SEPP encourages and allows a greater intensity of development within existing low density residential areas deliberately. The intent is to achieve affordable rental housing within existing residential areas to provide critical housing for key workers and moderate income earners. This cannot be achieved by a development that is identical in most respects to the houses adjacent to the site. Therefore, there must by definition be some differences between the two. The goal is to ensure that they sit in harmony and, in the true sense of the word, are compatible.

The test, therefore, is whether the new development sits reasonably within the existing context, not that it must provide the same relationships and physical bulk and scale as a single house on a lot. The case for this site would be six houses on six lots. The proposed development is compatible with the character of the local area because;

1. The location of the individual discreet buildings respond to the topography of the site and retains all of the significant existing trees on the site.
2. The buildings facing Riverhill Avenue are of a domestic scale and respond to the existing and future desirable elements of the streetscape.
3. There is landscaping within the front yards and the dominance of driveways or paved areas is kept to a minimum.
4. The proposal follows the form and relationship established by existing dwellings on the low side of Riverhill Avenue, and stretching to Warringah Road. The maximum height of building G to Riverhill Avenue is 6m. This is an appropriate level of massing and sits comfortably within the Riverhill Avenue streetscape.
5. The retention of the significant trees in the front setback pushes back building B to an average of 17m to the glass line. The existing trees between buildings B and F create an opportunity which has been maximised to create an active and passive open area or meeting place for future residents. It reinforces the desired future character by ensuring that landscaping and significant trees within the Middle Harbour suburbs locality are retained wherever possible.



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6. The changed access arrangements mean that building A is now 20m wide and the balance between building and separation between buildings can only be described as reasonable, appropriate and compatible.
7. The development provides for the 12m separation between buildings providing for individual courtyards or balconies and the opportunity for appropriate planting to create privacy and high levels of amenity for future occupants.

It is not reasonable to expect it to achieve the same outcomes as a dwelling house as it is an affordable housing development, which will create 36 studio, 1 bedroom and 2 bedroom dwellings available for rent for 10 years. Therefore, fulfilling the aims of the ARH SEPP and addressing a critical rental shortage within Sydney.

The proposed development does satisfy the compatibility test as it has been designed to protect the amenity of neighbouring properties whilst achieving a different mix and type of dwelling. The guiding ethic of the proposed development is to ensure "*the design of the development*" is compatible, responds to it's neighbours in particular on the edges and is both reasonable and courteous.

We look forward to answering any questions on Wednesday night.

Should you have any questions please contact Graham McKee or David Tyrrell in his absence.

Yours faithfully

McKEES LEGAL SOLUTIONS



Graham McKee
Principal

Encl.