

**JOINT REGIONAL PLANNING PANEL
(East)**

JRPP No	2011SYE130
DA Number	2010/DA-461REV6 Section 96(2) application to modify the approved development (Development Consent No 10/DA-461)
Local Government Area	Hurstville City Council
Approved Development	Demolition of existing structures and construction of a mixed retail, commercial and residential development and associated car parking and road works
Proposed modification	Additional twenty two (22) apartments to the development and twenty eight (28) additional car spaces in basement level 5.
Street Address	11 Mashman Avenue and 7 Colvin Avenue, Kingsgrove
Applicant/Owner	Applicant/Owner: Kingsgrove Village Apartments Pty Ltd and Kingsgrove Retail Management Pty Ltd
Number of Submissions	Seven (7) submissions received
Recommendation	Refusal
Report by	Paula Bizimis – Senior Development Assessment Officer Hurstville City Council

Assessment Report and Recommendation

ZONING	3c Business Centre
APPLICABLE PLANNING INSTRUMENTS	<ul style="list-style-type: none"> • State Environmental Planning Policy No 1 – Development Standards • State Environmental Planning Policy (Infrastructure) 2007 • State Environmental Planning Policy No 55 - Remediation of Land • State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development • State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 • Draft State Environmental Planning Policy (Competition) 2010 • Hurstville Local Environmental Plan 1994 • Hurstville Development Control Plan No. 1 – Section 2.2 Neighbour Notification and Advertising of Development Applications, Section 3.1 Car Parking, Section 3.3 Access and Mobility, Section 3.4 Crime Prevention through Environmental Design, Section 3.5 Energy Efficiency, Section 3.7 Drainage and On-Site Detention Requirements, Section 3.9 Waste Management, Section 6.10 Mashman Site, Kingsgrove
HURSTVILLE LOCAL ENVIRONMENTAL PLAN 1994 INTERPRETATION OF USE	“Demolish”, “Shop”, “Office Premises”, and “Residential Flat Building”
EXISTING DEVELOPMENT	Approved development under construction
COST OF DEVELOPMENT	\$25,377,000
REASON FOR REFERRAL TO JRPP	Section 96(2) application to approved development
FILE NO	10/DA-461:10 (2010/DA-461REV6)
HAS A DISCLOSURE OF POLITICAL DONATIONS OR GIFTS BEEN MADE?	No

EXECUTIVE SUMMARY

1. On the 19 May 2011 a deferred commencement development consent was granted to 10/DA-461 for demolition of existing structures and construction of a mixed retail, commercial

and residential development and associated car parking and road works. The approved development has been modified on five (5) previous occasions under Section 96 (1A) of the Environmental Planning and Assessment Act (E P & A Act). The modifications primarily included reconfiguration of basement areas and size/number of apartments.

2. The current Section 96(2) application seeks permission to modify the development consent by providing an additional twenty two (22) apartments to the development and twenty eight (28) additional car spaces in basement level 5.
3. The development, as amended does not comply with the development standards in the Hurstville Local Environmental Plan (HLEP) and the Hurstville Development Control Plan No 1 (DCP 1) with regards to floor space ratio and height. The applicant has lodged an objection under State Environmental Planning Policy No 1 – Development Standards to the development standards in the HLEP.
4. The application was notified/advertised in accordance with Council’s requirements and seven (7) submissions were received in reply.

RECOMMENDATION

THAT the application be refused for the reasons detailed in the report.

DESCRIPTION OF THE PROPOSAL

An application under Section 96(2) of the Environmental Planning and Assessment Act, 1979 has been received to modify the approved development by:

- Addition of one (1) residential level (Level 5) to Block C comprising 10 x 2 bedroom apartments
- Addition of two (2) residential levels (Level 5 and 6) to Block D comprising 12 x 2 bedroom apartments
- Provision of 28 additional car spaces in basement level 5 (including 6 visitor spaces).

The proposed amendments will result in Block C being part five (5)/part six (6) storeys and Block D being part six (6)/part seven (7) storeys.

BACKGROUND

- On 19 May 2011 deferred commencement development consent was granted to 10/DA-461 by the Joint Regional Planning Panel for demolition of existing structures and construction of a mixed retail, commercial and residential development and associated car parking and road works. The deferred commencement condition of the consent was satisfied on the 11 August 2011.
- The consent was modified on 4 August 2011 (10/DA-461REV01) under delegation by amending Condition 169 which relates to the timing of the dedication of the road widening.
- The consent was modified on the 12 September 2011 (10/DA-461REV02) under Development Assessment Committee Delegations by amending conditions 2, 17, 22, 23,

24, 25, 55, 153, 173, and 175 due to amendments to the car parking area and the number of residential units.

- The consent was modified on the 10 November 2011 (10/DA-461REV03) under delegation by amending the car park areas and relocating the plant area (conditions 2 and 175).
- The consent was modified on the 11 November 2011 (10/DA-461REV04) under delegation by amending conditions 85 and 200 relating to road works.
- The consent was modified on 21 November 2011 (10/DA-461REV05) under delegation by undertaking internal and external amendments.

DESCRIPTION OF THE SITE AND LOCALITY

The subject site has a street address of 11 Mashman Avenue and 7 Colvin Avenue, Kingsgrove with the two (2) lots known as Lot 2 DP 534643 and Lot 69 DP 356823 respectively. 11 Mashman Ave has a site area of 7209sqm and 7 Colvin Ave has a site area of 456sqm with a total site area of 7665sqm. The site has a frontage to Mashman Avenue and Colvin Avenue on most of its western boundary, a frontage to Mashman Lane on most of its eastern boundary, and adjoins the Tempe-East Hills Rail line on its northern boundary.

The site contained various industrial buildings, sheds and associated infrastructure related to the former use of the site as a pottery. The scale of the buildings varied from a large traditional saw tooth roofed styled industrial building approximately two (2)/three (3) storeys in height to smaller single storey buildings principally located along the eastern boundary of the site. These buildings have been demolished and the approved development is under construction.

The site is relatively flat and contains a minimal number of trees which are primarily located to the eastern side of the site. The site was listed as a heritage item of local significance in the Hurstville Local Environmental Plan.

Located to the east and adjacent to the site is the main commercial/retail precinct of Kingsgrove (Kingsgrove Town Centre). It is centralised along Kingsgrove Road, which is a 'traditional strip style' shopping centre. Buildings within this area are generally the traditional single and two (2) storey 'shop-top' style buildings some of which have been modified over time. The uses within the area vary and are typical for the strip style shopping and include a newsagency, butcher, real estate agent, delicatessen, chemist, banks and takeaway food shops.

To the south of the subject site are predominantly low density single and two (2) storey residential dwelling houses. The former Kingsgrove Police Station is located to the south east of the site on the corner of Paterson Avenue and Mashman Lane. Residential development is also located to the west of the subject site along Mashman Avenue.

Adjoining the subject site to the north along the boundary is the Tempe-East Hills Rail line. The rail line separates the site from the main industrial area of Kingsgrove, which primarily contains large industrial/commercial buildings up to five (5) storeys in height with some smaller scale buildings. The buildings also vary in age and architectural design from contemporary to the more traditional style industrial buildings.

It is noted that the lots surrounding the subject site are identified on the Register of the National Estate. The identification of these lots has no statutory effect and as such they are not considered to be heritage items.

COMPLIANCE AND ASSESSMENT

Assessment of Section 96(2) Application

Under section 96(2) of the E P and A Act an application to modify the development consent under section 96(2) can be considered as follows:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*

Comment

The applicant has submitted the following information regarding the proposed development being substantially the same development as that for which consent was originally granted:

- *The use of the development remains a mixed use retail and residential building*
- *The basement and ground floor retail uses are not affected by the proposed modification*
- *The existing residential apartment floors are not affected by the proposed changes*
- *The approved footprint of the buildings and resulting public domain is not affected by the proposed changes;*
- *The overall architectural language of the buildings is maintained as part of the proposed changes*

It is considered that the proposed development is not substantially the same development as the development for which consent was originally granted for the following reasons:

- The proposed development will be a non compliant development in terms of floor space ratio for the whole development and for the residential component of the development. The originally approved development complied with the floor space ratio requirements of the Hurstville Local Environmental Plan (HLEP) and Hurstville Development Control Plan No 1 (DCP 1). As such an objection to the development standards relating to floor space ratio has to be considered under State Environmental Planning Policy No 1 – Development Standards (SEPP 1) for the proposed non compliances. In this regard, the proposed development is not substantially the same development given the proposed variation to the development standards.
- The scale of the proposed development is different to that originally approved. The proposed development results in an additional height to the development of up to two (2) storeys which results in a development that is higher and larger in terms of bulk and scale. The additional height to the development results in non compliance to the height requirements of the HLEP and DCP 1. As such an objection under SEPP 1 has to be considered for the non compliance. In this regard, the proposed development is not substantially the same development given the proposed variation to the development standards.

- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*

Comment

The application was referred to NSW Roads and Maritime Services (formerly RTA) as the original application was subject to the provisions of the State Environmental Planning Policy (Infrastructure) 2007 as a traffic generating development. NSW Roads and Maritime Services has advised that it raises no objection to the modification proposed as it is considered that there will not be a significant traffic impact on the State road network.

- (c) *it has notified the application in accordance with:*
- (i) *the regulations, if the regulations so require, or*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*

Comment

The application was notified in accordance with Council's requirements.

- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

Comment

Seven (7) submissions were received in response to resident notification/advertising of the proposed development. The issues raised in the submissions are detailed in the report below under the heading entitled "Referrals, Submissions and the Public Interest".

Other Considerations Relevant to a Section 96(2) Application

Although the proposed development is not considered to be substantially the same development, an assessment of the other considerations relating to the application is made.

In determining an application for modification of the development consent, the relevant matters referred to in Section 79C(1) must be taken into consideration. The following is a discussion of matters under Section 79C as being relevant to the current Section 96 application:

1. Environmental Planning Instruments

Hurstville Local Environmental Plan 1994 (HLEP)

The subject site is zoned 3c Business Centre and the proposed development, being a modification of an approved development is permissible in the zone with the consent of Council.

The objectives of this zone are:

- (a) To maintain a commercial and retail focus for larger scale commercial precincts*
- (b) To allow for residential development in mixed use buildings, with non-residential uses on at least the ground level and residential uses above, so as to promote the vitality of business centres, and*
- (c) To provide opportunities for associated development such as parking, service industries and the like.*

It is considered that the proposed development does not meet objective (a) of the zone for the following reasons:

- The provision of additional residential floor area results in the development not complying with the maximum floor space ratio requirements of the HLEP and DCP 1. In this regard the proposed development does not reflect the development anticipated by the controls as the residential component is greater than that permitted. The zone of the subject site is 3c Business Centre and the commercial and retail focus of the development is eroded with the provision of additional residential floor area to the development.

The relevant clauses of the HLEP apply to the proposed development are as follows:

Clause 13 – Floor space ratios

Clause 13(2A)(d) of the Hurstville Local Environmental Plan states that:

- (d) if the buildings are on the land shown edged heavy black on Sheet 1 of the map marked “Hurstville Local Environmental Plan 1994 (Amendment No 71)”:*
 - (i) the maximum floor space ratio overall is 2:1, and*
 - (ii) the minimum floor space ratio for the exclusively non-residential component is 0.5:1, and*
 - (iii) the maximum floor space ratio for the exclusively residential component is 1.5:1.*

The proposed development compares with the floor space ratio requirements as follows:

Floor space ratio	Required	Proposed	Complies
For whole development	2:1 maximum	2.3:1 (current approval 2:1)	No
Non residential component	0.5:1 minimum	0.6:1 (no change to current approval)	Yes
Residential component	1.5:1 maximum	1.7:1 (current approval 1.39:1)	No

The proposed development will result in a non compliance with the maximum floor space ratio requirements of the HLEP with regards to the whole development and the residential component of the development. The applicant has submitted an objection under State Environmental Planning Policy No 1 – Development Standards (SEPP 1) to these development standards. The SEPP 1 objection is detailed in the report below under the heading entitled “State Environmental Planning Policy No 1-Development Standards (SEPP 1)”.

Clause 15A – Height restrictions for land within zones Nos 3(a) and 3(c)

Clause (1A) of the Hurstville Local Environmental Plan states that:

- (1A) *Consent may be granted for development for the purposes of the erection of a building that exceeds 2 storeys in height on the land shown edged heavy black on Sheet 2 of the map marked “Hurstville Local Environmental Plan 1994 (Amendment No 71)” but only if:*
- (a) *the building will not exceed the number of storeys shown on that map in respect of that land, or*
 - (b) *the consent authority is satisfied that the proposed development:*
 - (i) *constitutes no more than a minor variation to the height limits indicated on that map, and*
 - (ii) *is not inconsistent with the aims of Hurstville Local Environmental Plan 1994 (Amendment No 71).*

The subject site is identified on the map marked “Hurstville Local Environmental Plan 1994 (Amendment No 71)” as having a maximum height of four (4) storeys.

The approved development has a height of four storeys, however a mezzanine level has been provided to part of Block C and D which results in that part of the development being five (5) storeys in height. The extent of this variation was limited to the proposed mezzanine which provides the second bedroom of nine (9) townhouses which face the railway line.

The current proposed development will result in one (1) additional storey to Block C and two (2) additional storeys to Block D. This will result in Block C being part five (5)/part six (6) storeys high and Block D being part six (6)/part seven (7) storeys high.

The applicant has submitted an objection under SEPP 1 to the development standard for height. The SEPP 1 objection is detailed in the report below under the heading entitled “State Environmental Planning Policy No 1-Development Standards (SEPP 1)”.

State Environmental Planning Policy No 1-Development Standards (SEPP 1)

The applicant has submitted an objection under SEPP 1 seeking a variation to the development standard contained in the HLEP in relation to the floor space ratio and height of the proposed development.

To assess whether the development standard is unnecessary or unreasonable in this case the following questions are applied:

SEPP 1 objection to floor space ratio

Question 1: Is the planning control a development standard?

Applicant’s Answer (in summary)

Yes, Clause 13 of the Hurstville Local Environmental Plan 1994 (HLEP), as amended by Amendment 71, relates to floor space ratio controls. The proposed development involves modification to an approved mixed use development (retail/commercial/residential) on the former Mashman Pottery site at 11 Mashman Avenue, Kingsgrove.

The development (DA 10/DA-461) was approved by the Joint Regional Planning Panel on 12 May 2011 achieved as overall floor space ratio of 1.999:1 with the non-residential component achieving an FSR of 0.64:1.

The proposed development involves an additional storey to Building C and two storeys to Building D comprising a total of twenty two 2-bedroom dwelling units and an additional 28 car parking spaces in Basement Level 05. The additional residential floor area is 2520sqm...The proposed development will therefore result in non-compliance with the FSR development standards in Clause 13(2A)(d)(i) and (iii).

Assessment Officer's Comment

The planning control is a development standard and the proposed development will result in the proposed development having a floor space ratio as follows:

Floor space ratio	Required	Proposed	Complies
For whole development	2:1 maximum	2.3:1 (current approval 2:1)	No
Non residential component	0.5:1 minimum	0.6:1 (no change to current approval)	Yes
Residential component	1.5:1 maximum	1.7:1 (current approval 1.39:1)	No

Question 2: What is the underlying objective of the standard?

Applicant's Answer:

There are no specific objectives for the floor space ratio development standard embodied in Clause 13 of the HLEP.

However, it is considered that the underlying objectives of the development standard are:-

- to control the bulk and scale of any development to ensure amenity impacts on adjoining residential properties are minimised or ameliorated;*
- to ensure built form outcomes are consistent with the desired future character of the locality envisaged in the planning instruments; and*
- to provide a degree of consistency in the bulk and scale of new buildings in the locality.*

In this context it is appropriate to identify that 0.46:1 (3535m²) of the overall floor space ratio of 2.33:1 is located below the ground level of the site, thereby not contributing to the bulk and scale of the building massing on the site. In terms of what is perceived to be the scale of the development, it is in the order of 1.87:1, approximately 15% less than the maximum permitted on the site through Clause 13(2A)(d).

A similar circumstance was considered in the Land & Environment Court Appeal Proceedings Citadel Property Group (Sutherland) Pty Limited v. Sutherland Shire Council [2009] NSWLEC 1082. The proposal was for a commercial building at 686-696 Old Princes Highway, Sutherland including a large (4000m²) supermarket located over 2 basement levels.

In a discussion on whether the supermarket floor space formed part of the floor space ratio on the site, Commissioner Bly, at paragraphs 22 and 23 of his judgment stated:-

- “22. Broadly speaking these objectives are concerned to ensure that the impact of the building, including its bulk and scale would not adversely impact upon the character and amenity of the surrounding area. In this regard I do not see how applying a floor space ratio to hidden basements is of any assistance in achieving these objectives.*
- 23. Hence I accept Mr Ball's approach of excluding basements (including the lower ground floor area) in his calculation of gross floor area and floor space ratio. Consequently no issue of non-compliance with floor space ratio arises.”*

The same scenario exists with the proposed development for alterations and additions to the approved development.

In terms of perceived or actual bulk and scale of the development reflected in the four approved buildings, the addition of a further 2520 square metres of floor area will, using the reasoning of Commissioner Bly in Citadel, only increase the FSR of the approved development from 1.54:1 to 1.87:1 still well within the maximum FSR permitted on the site.

Furthermore, the location of the additional floor area on Buildings C and D have been designed such that shadows generated by the additional built form will remain within the shadow outline cast by the approved development, thereby ensuring no change to the status of amenity impacts on residential dwellings to the south and west.

In the circumstances it is considered that the proposed additional floor area of 2520 square metres on Buildings C and D satisfy the underlying objectives detailed above.

Assessment Officer's Comment

The HLEP does not identify objectives for the floor space ratio requirements, however Section 6.10.3 Development and Design Controls of DCP 1 does identify the objectives for floor space ratio that apply specifically to the subject site. As such it is considered appropriate to consider these objectives. The objectives are as follows:

- *To define the allowable development density to ensure that development is in keeping with the desired future scale of the site and the local area.*
- *To define the allowable development density to ensure that development does not detrimentally impact on local traffic.*
- *To encourage balconies and terraces within the development.*

The proposed development does not comply with the first objective as the proposed floor space ratio of the development does not reflect the allowable development density. As such the proposed development is not in keeping with the future scale of the site which is anticipated by the floor space ratio controls as the additional floor space results in a larger development in terms of bulk and scale.

The applicant's submission that the floor area of the supermarket should not be considered in the floor space calculations is not agreed with. The supermarket is located underground however it contributes to the intensification of the site. The supermarket is in fact, the most intense non residential use of the development having a floor area of 3535sqm (of a total 4792sqm). It is also the largest contributor of non residential vehicle generation to the site. The approved development was defined as a traffic generating development under State Environmental Planning Policy (Infrastructure) 2007. This was triggered by the development having over 4000sqm of commercial floor area (3535sqm of which is for the supermarket). Although the supermarket is located underground its floor area can not be dismissed because it is not apparent external to the building.

Question 3: Does compliance with the development standard hinder the attainment of the objects of s.5(a)(i) and (ii) of the EP&A Act?

Applicant's Answer:

Section 5(a) of the Environmental Planning and Assessment Act, 1979 states:-

“5. The objects of this 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 coordination of the orderly and economic use and development of land.”

The proposal satisfies the objectives of s.5(a)(i) and (ii) of the Environmental Planning and Assessment Act by ensuring that there are no adverse environmental, social or economic impacts to the community arising from the proposed additional 2520 square metres of floor area on Buildings C and D of the approved mixed use development and its non-compliance with the floor space ratio standard under Clause 13(2A)(d) of the Hurstville LEP 1994, as amended.

The form and massing of the additional floor area on the site is influenced by the characteristics of the site and the scale of the surrounding development, namely:-

- *The height and bulk of the Court-approved 5-storey mixed use development, directly adjoining the subject site to the east, provides a visual screen to the subject site from Kingsgrove Road and the railway station;*
- *The additional building mass has been located on Building C and part of Building D which adjoin the commercial area and railway line respectively, thereby minimising any potential for additional overshadowing impacts on adjoining dwellings in Paterson Avenue, Colvin Avenue and Mashman Avenue;*
- *The removal of the subterranean floor area (supermarket) from the floor space ratio calculations, as it does not contribute to the height, bulk and scale of the development, would result in a complying development in terms of the floor space ratio development standard.*

In terms of bulk and scale of the proposed alterations and additions to the approved development, the proposal is consistent with the built form outcomes envisaged under the relevant planning instruments.

In the circumstances, it is considered that compliance with the development standard would hinder attainment of the objectives of s.5(a)(i) and (ii) of the Environmental Planning and Assessment Act.

Assessment Officer’s Comment

Compliance with the development standard does not hinder the attainment of the objects of s.5(a)(i) and (ii) of the EP&A Act as it is considered that the proposed development does not promote “the social and economic welfare of the community and a better environment” and “coordination of the orderly and economic use and development of land.”

The proposed development results in a development that does not comply with the floor space ratio requirements which is not consistent with the development anticipated by the development standards. As such the proposed development does not promote the orderly and economic use and development of the land as it provides floor area beyond the maximum requirements which results in a larger development in terms of bulk and scale. In addition to this, the proposed

development erodes the commercial focus of the development in the context of it being in a commercial zone.

The proposed development does not result in a development that promotes the social and economic welfare of the community and a better environment. The additional residential floor area intensifies the use of the site and results in a larger development which does not result in any tangible social or economic benefit to the community or a better environment.

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

Applicant's Answer:

Yes, compliance with the floor space ratio development standard is considered unreasonable and unnecessary in the circumstances of this case as the impacts of the non-compliance will have no adverse consequences on the amenity of adjoining dwellings in terms of overshadowing and privacy. The proposed additional floor area to Buildings C and D will be consistent in bulk and scale with the adjoining building to the east and not have any adverse streetscape impacts when viewed from Kingsgrove Road.

Furthermore, as 20% of the floor area which forms part of the FSR calculations is located below ground level, the perceived bulk and scale will be actually less than that considered appropriate under Clause 13 of the Hurstville LEP 1994.

In these circumstances it is considered that compliance with the development standard would be unreasonable and unnecessary for the reasons outlined above.

Assessment Officer's Comment

Compliance with the development standard is not unreasonable or unnecessary in the circumstances of the case. The floor space ratio controls have been specifically adopted for the subject site and its context in relation to the adjacent residential areas. The proposed development does not introduce or identify any specific site circumstances that justify a departure from the height controls that apply to the subject site.

Question 5: Is the Objection well founded?

Applicant's Answer:

Yes, the non-compliance with the floor space ratio standard will have no adverse impacts on the amenity of adjoining dwellings nor on the streetscape of the Kingsgrove Town Centre.

The location of the additional floor area on Buildings C and D adjacent to the railway line and commercial area ensures that it will not contribute adversely to the amenity of residents in Colvin, Paterson and Mashman Avenues.

The fact that the built form of the approved and proposed development will only achieve a perceived FSR of 1.87:1, well within the maximum of 2:1, ensures that the bulk and scale is consistent with that envisaged by the planning instruments and in the circumstances of this case, the SEPP1 objection is considered to be well founded.

Assessment Officer's Comment

The objection to the development standard is not considered to be well founded. The site has no specific site circumstances that justify a departure from the development standard and the provision of additional residential floor area to the development. The development standards for

the subject site were developed specifically for the subject site and as such identify the bulk and scale envisaged for the subject site. The proposed departure from the development standard results in a larger development in terms of bulk and scale which is not consistent with that envisaged by the controls. The additional floor area to the building is apparent as it results in up to two (2) additional storeys being provided to the approved development.

SEPP 1 objection to height

Question 1: Is the planning control a development standard?

Applicant's Answer:

Yes, Clause 15A of the Hurstville Local Environmental Plan 1994 (HLEP), as amended by Amendment 71, relates to height controls. The relevant provisions to the subject site are in Clause 15A(1A) which states:-

“(1A) Consent may be granted for development for the purposes of the erection of a building that exceeds 2 storeys in height on the land shown edged heavy black on Sheet 2 of the map marked “Hurstville Local Environmental Plan 1994 (Amendment No 71)” but only if:

- (a) the building will not exceed the number of storeys shown on that map in respect of that land, or*
- (b) the consent authority is satisfied that the proposed development:*
 - (i) constitutes no more than a minor variation to the height limits indicated on that map, and*
 - (ii) is not inconsistent with the aims of Hurstville Local Environmental Plan 1994 (Amendment No 71).”*

The subject site is identified on the map marked “Hurstville Local Environmental Plan 1994 (Amendment No 71)” as having a maximum height of four (4) storeys.

The proposed additions to Buildings C and D of additional residential level results in Building C being 5 storeys in height, and Building D being 6 storeys in height, thereby not complying with the development standard in Clause 15A.

Assessment Officer's Comment

The planning control is a development standard and the proposed development will result in Block C being part five (5)/part six (6) storeys high and Block D being part six (6)/part seven (7) storeys high.

Question 2: What is the underlying objective of the standard?

Applicant's Answer:

There are no specific objectives for the number of storeys development standard embodied in Clause 15A of the HLEP.

However, it is considered that the underlying objectives of the development standard are:-

- to control the bulk and scale of any development to ensure amenity impacts on adjoining residential properties are minimised or ameliorated in terms of overshadowing and loss of privacy;*

- *to ensure built form outcomes are consistent with the desired future character of the locality envisaged in the planning instruments; and*
- *to provide a degree of consistency in the height, bulk and scale of new buildings and to minimise visual intrusion;*
- *to ensure visual impact of buildings is minimised when viewed from the street and the public domain.*

Assessment Officer's Comment

The HLEP does not identify objectives for the height requirement, however Section 6.10.3 Development and Design Controls of DCP 1 does identify the objectives for height that apply specifically to the subject site. As such it is considered appropriate to consider these objectives. The objectives are as follows:

- *To provide a vibrant mixed use development that takes advantage of its proximity to the Kingsgrove Commercial Centre to the east.*
- *To ensure that height of the development responds to the desired scale and character of the adjacent residential areas to the west and south.*
- *To allow reasonable daylight access to all developments and the public domain.*
- *To increase amenity of the development by taking advantage of long distance views from the site while avoiding overlooking to adjacent residential areas*

It is considered that the proposed development is not consistent with the first and second objective above. The proposed development provides additional residential floor area to the development which erodes the focus of the commercial component of the development. The location of the subject site within a commercial zone and in close proximity to the Kingsgrove Commercial Centre justifies the development having a commercial focus. The provision of additional residential units to the site intensifies the residential component of the development beyond that envisaged by the controls.

The height of the proposed development, being seven (7) storeys at its highest, does not respond to the desired scale and character of the adjacent residential areas. The adjacent residential areas have a height limit of two (2) storeys and the maximum height of four (4) storeys for the subject site was considered to be an appropriate height as a transition to the Kingsgrove Commercial Centre. The proposed height of the development does not respond to the adjacent residential areas as it provides a stark contrast to the two (2) storey height limit.

Question 3: Does compliance with the development standard hinder the attainment of the objects of s.5(a)(i) and (ii) of the EP&A Act?

Applicant's Answer:

Section 5(a) of the Environmental Planning and Assessment Act, 1979 states:-

"5. The objects of this Act are:

(b) to encourage:

- (j) *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 coordination of the orderly and economic use and development of land.”*

The proposal satisfies the objectives of s.5(a)(i) and (ii) of the Environmental Planning and Assessment Act by ensuring that there are no adverse environmental, social or economic impacts to the community arising from the proposed additional level on Buildings C and two additional levels on Building D of the approved mixed use development and its non-compliance with the number of storeys standard under Clause 15A of the Hurstville LEP 1994, as amended.

The form and massing of the additional floor area on the site is influenced by the characteristics of the site and the scale of the surrounding development, namely:-

- *The height and bulk of the Court-approved 5-storey mixed use development, directly adjoining the subject site to the east, provides a visual screen to the subject site from Kingsgrove Road and the railway station, as detailed in the montage at Figure 5.1;*
- *An additional storey has been located on Building C and two levels on Building D which adjoin the commercial area and railway line respectively, thereby eliminating any potential for additional overshadowing impacts on adjoining dwellings in Paterson Avenue, Colvin Avenue and Mashman Avenue.*

In terms of height, bulk and scale of the proposed modifications to the approved development, the proposal is consistent with the built form outcomes envisaged under the relevant planning instruments and approved in proceedings before the Land & Environment Court.

In the circumstances, it is considered that compliance with the development standard would hinder attainment of the objectives of s.5(a)(i) and (ii) of the Environmental Planning and Assessment Act.

Assessment Officer's Comment

Compliance with the development standard does not hinder the attainment of the objects of s.5(a)(i) and (ii) of the EP&A Act as it is considered that the proposed development does not promote “the social and economic welfare of the community and a better environment” and “coordination of the orderly and economic use and development of land.”

The proposed development results in a development that does not comply with the height requirements which is not consistent with the scale of development anticipated by the development standards. As such the proposed development does not promote the orderly and economic use and development of the land as it is of height beyond the maximum requirements which results in a larger development in terms of bulk and scale.

In its context the proposed development is excessive in height and does not respond to the adjacent residential area which has a two (2) storey height limit. The five (5) storey development approved by the Court referred to by the applicant above, has a direct frontage to Kingsgrove Road, is within the Kingsgrove Commercial Centre and adjoins the railway station. In contrast, the subject site is located behind the Kingsgrove Commercial Centre with no direct frontage to Kingsgrove Road. The subject site sits directly adjacent to residential areas with access being via local roads or laneway. Notwithstanding this, the proposed development seeks a height of up to seven (7) storeys which is higher than the Kingsgrove Road site and any other approved development in the Kingsgrove Commercial Centre.

The proposed development does not result in a development that promotes the social and economic welfare of the community and a better environment. The additional height to the development is a direct result of the additional residential floor area proposed to the development. This results in a larger development which does not result in any tangible social or economic benefit to the community or a better environment.

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

Applicant's Answer:

Yes, compliance with the number of storeys development standard is considered unreasonable and unnecessary in the circumstances of this case as the impacts of the non-compliance will have no adverse consequences on the amenity of adjoining dwellings in terms of overshadowing and privacy. The proposed additional storeys to Building C and part of Building D will be consistent in bulk and scale with the adjoining building to the east and not have any adverse streetscape impacts when viewed from Kingsgrove Road, as indicated in Figure 5.2.

Furthermore, as 20% of the floor area which forms part of the building mass is located below ground level, the perceived bulk and scale of the development will be actually less than that considered appropriate under Clauses 13 and 15A of the Hurstville LEP 1994.

In these circumstances it is considered that compliance with the development standard would be unreasonable and unnecessary for the reasons outlined above.

Assessment Officer's Comment

Compliance with the development standard is not unreasonable or unnecessary in the circumstances of the case. The height controls have been specifically adopted for the subject site and its context in relation to the adjacent residential areas. The proposed development does not introduce or identify any specific site circumstances that justify a departure from the height controls that apply to the subject site.

The submission by the applicant that as 20% of the floor area which forms part of the building mass is located below ground level, the perceived bulk and scale of the development will be actually less than that considered appropriate under Clauses 13 and 15A of the Hurstville LEP 1994, is not agreed with. The perceived bulk and scale of the development will be greater than that originally approved due to the additional two (2) storeys proposed to the building. The additional height is apparent to the development. The floor space ratio and height controls do not work independent of each other, but rather, form a suite of controls for the development. Even if the supermarket floor area was removed from the floor space calculations, the development would still be of a height and bulk that is greater than that proposed by the development controls.

Question 5: Is the Objection well founded?

Applicant's Answer:

Yes, the non-compliance with the number of storeys standard will have no adverse impacts on the amenity of adjoining dwellings nor on the streetscape of the Kingsgrove Town Centre.

The location of the additional floor area on Buildings C and D adjacent to the railway line and commercial area ensures that it will not contribute adversely to the amenity of residents in Colvin, Paterson and Mashman Avenues.

The fact that the built form of the approved and proposed development will maintain an unchanged height and scale of the buildings adjacent to single and two-storey dwellings in Mashman, Colvin and Paterson Avenues (Buildings A and B) and that the additional level is located adjacent to the railway line and the commercial development ensures that there will be no adverse amenity impacts on its neighbours and the height, bulk and scale is consistent with that envisaged by the planning instruments and other consents granted by the Court on the adjoining site (215-231 Kingsgrove Road). In the circumstances of this case, the SEPP1 objection is considered to be well founded.

Assessment Officer's Comment

The objection to the development standard is not considered to be well founded. The site has no specific site circumstances that justify a departure from the development standard and the provision of additional height to the development. The development standards for the subject site were developed specifically for the subject site and as such identify the bulk and scale for the subject site. The proposed departure from the development standard results in a larger development in terms of bulk and scale which is not consistent with that envisaged by the controls. The additional floor area to the building is apparent as it results in up to two (2) additional storeys being provided to the approved development.

State Environmental Planning Policy (Infrastructure) 2007

The application was referred to NSW Roads and Maritime Services (formerly RTA) as the original application was subject to the provisions of the SEPP as a traffic generating development. NSW Roads and Maritime Services has advised that it raises no objection to the modification proposed as it is considered that there will not be a significant traffic impact on the State road network.

State Environmental Planning Policy No 55 - Remediation of Land (SEPP 55)

The proposed amendments to the development do not impact the development's compliance with the requirements of SEPP 55.

State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development (SEPP 65)

The application was not referred to the Design Review Panel for assessment. The proposed development has however, been assessed against the Design Quality Principles of SEPP 65 and is not considered to be consistent with Principle 1: Context, Principle 2: Scale, and Principle 4: Density as follows:

Principle 1: Context

The proposed development is not consistent with Principle 1: Context. In the context of the adjacent residential areas which have a two (2) storey height limit the proposed development is excessive in height. The proposed development is not consistent with the desired future character of the area in which the proposed development is a maximum four (4) storeys and forms a transition from the residential areas to the Kingsgrove Commercial Centre.

Principle 2: Scale

The scale of the proposed development is not consistent with that anticipated by the development controls for the site. The development controls restrict the height to a maximum four (4) storeys with the proposed development having a height of up to seven (7) storeys. As such the proposed development is not consistent with Principle 2: Scale.

Principle 4: Density

The proposal exceeds the maximum floor space ratio requirements of the Hurstville Local Environmental Plan and Development Control Plan No 1. The maximum floor space ratio identified in these documents is 2:1 for the overall floor space ratio and 1.5:1 for the residential component. The proposed development has a floor space ratio of 2.3:1 and 1.7:1 respectively. The proposed floor space ratio (or density) is not consistent with the stated desired future density identified for the subject site. Accordingly, the proposal is not consistent with Principle 4: Density.

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

A BASIX Certificate has been submitted with the application however, it is for 99 dwellings not 122 dwellings as proposed. As such an appropriate BASIX Certificate has not been submitted with the application.

2. Draft Environmental Planning Instruments

Draft State Environmental Planning Policy (Competition) 2010

Draft State Environmental Planning Policy (Competition) 2010 has been considered in the assessment of this report.

3. Development Control Plans

The proposed development has been assessed against the relevant requirements of DCP 1 that apply to the proposed development. The proposed development does not comply with the requirements relating to floor space ratio and height which are the same as the development standards of the Hurstville Local Environmental Plan. The non compliance with the floor space ratio and height requirements have been discussed previously in the report.

It is noted that the proposed development includes the provision of an additional twenty eight (28) car parking spaces within the basement levels. The additional twenty eight (28) car parking spaces comply with the requirements of DCP 1 for the additional residential units.

4. Impacts

Natural Environment

The proposed development has no apparent adverse impact to the natural environment.

Built Environment

The proposed development does not comply with the floor space ratio and height requirements and results in a development that is higher and larger than that envisaged by the planning controls. In its context to the adjacent residential areas that have a two (2) storey height limit, the proposed development is excessive in height and scale. The proposed development is also higher than any other development approved for the Kingsgrove Commercial Centre which the subject site is located behind. The proposed bulk and scale of the development is not consistent with the future desired character of the area and is therefore considered to have an adverse impact on the built environment.

Social Impact

The proposed development has no apparent social impact.

Economic Impact

The proposed development has no apparent economic impact.

5. REFERRALS, SUBMISSIONS AND THE PUBLIC INTEREST

Resident

The application was notified in accordance with Council's requirements and seven (7) submissions were received in reply. The issues raised in the submissions are as follows:

Issue

Loss of privacy

The addition of a further two storeys on the Block D building will severely effect our privacy in our backyard. The rooms which are on the western side of Block D are all living rooms which means they are occupied at all times of the day and night. Six storeys on Block D is totally unacceptable.

Applicant's Comment

Proposed Levels 5 and 6 in Building D include a secondary window to the living rooms of end apartments. The windows are setback from the boundary 16 metres to the midpoint of the window. This level of separation exceeds the AMCORD required separation of 12 metres between habitable windows. However, should Council consider this a relevant matter for consideration it is considered that the conditions can be imposed to include devices such as fixed louver screening to ameliorate any potential overlooking.

Assessment Officer's Comment

The non compliance with the height requirements has been discussed in the report above. The proposed development is not considered to adversely impact the adjoining residential developments in terms of overlooking if the windows and balconies of the new residential apartments proposed are appropriately treated with privacy screens.

Issue

Over Development – excessive bulk and scale

The complex is too large and a definite overdevelopment of the site for the land size it is in. To add further storeys to this development is absolutely preposterous. I would like to be advised as to what the height to land ratio is as I am sure it must be exceeding the recommended ratio or close to it. To add a further 22 units, which means more people, crowding and more traffic, is unacceptable.

Applicant's Comment

As provided for in the EP and A Act the application is supported by a SEPP 1 objection in relation to the current LEP standards for the site. The grounds for the SEPP1 objection are provided with the application.

Assessment Officer's Comment

The proposed development seeks a variation to the floor space ratio and height requirements. This is discussed in the report above.

Issue

Noise

The noise generated by approximately 120 units, residents, delivery trucks, potentially 2 cars per unit and retail and commercial facilities will be at a considerable to high level. This noise will be 7 days a week and could extend late in to the evening. There are serious issues with shift workers trying to sleep during the day.

Applicant's Comment

The retail component of the project does not alter as a result of this application. Additional noise generated by 22 additional apartments is not considered to be well founded or relevant to the application.

Assessment Officer's Comment

The proposed additional twenty two (2) residential apartments are unlikely to result in significant additional noise from the current approved development. This is due to vehicle and pedestrian movements from these apartments being intermittent. The location of these apartments adjoining the railway line and the rear of the Kingsgrove Commercial Centre assists in any associated noise being directed away from the residential uses.

Issue

Inadequate pedestrian or vehicular access and traffic generation

Paterson, Colvin and Mashman Avenues (East and West) are small narrow suburban streets which were not designed for a large scale development such as this. These streets cannot handle the amount of extra traffic that 120 units will bring. We experience enough traffic and parking issues in the backstreets already with City Rail commuters leaving their vehicles in the surrounding streets for more than 10 hours at a time and often all day and night making it difficult to access our driveways and navigate the streets.

We were told by the JRPP at the last meeting in 2011 that the RTA was consulted and were advised "that there would be no significant change to traffic in the area". This was one of the points that lead to the overall development application being approved by the JRPP.

We do not understand why the RTA would advise such a thing as there are already traffic problems in the area whilst the demolition and construction is occurring. This is caused by the numerous trucks blocking Kingsgrove Road which in turn banks the traffic back along Kingsgrove Road. Mashman Lane is regularly blocked by large trucks which makes it inaccessible.

Applicant's Comment

The traffic report prepared by 'Traffix' in relation to the application assess the additional parking and traffic generation as a result of the proposed additional 22 apartments. The report notes that:

"The proposed parking provision is considered supportable and is in line with the rates adopted in the previously approved development and the requirements of the JRPP.

The revised development yield which includes an additional 22 dwellings will result in an increase d generation of approximately 7 movements per hour....these additional 7 movements per hour equates to one additional movement every 8-9 minutes which is considered minor and will have no impact on the operation of existing or future critical intersections as assessed in the previous application."

The provision of new footpaths and a through site link will greatly improve pedestrian access in the area. It is noted that this aspect of the design is not impacted on by the proposed additional apartments.

Assessment Officer's Comment

The application was referred to NSW Roads and Maritime Services (formerly RTA) as the original application was subject to the provisions of the SEPP as a traffic generating development. NSW Roads and Maritime Services has advised that it raises no objection to the modification proposed as it is considered that there will not be a significant traffic impact on the State road network.

Issue

Non-compliance with LEP or DCP

I was originally told by the council that this development is a unique site and there were specific controls on this site. That was why the development was allowed to go to four storeys. I would like to know what the controls and specifications are now in relation to height and land ratios.

Applicant's Comment

See comment above regarding the submitted SEPP 1 objection to the proposed varying of the LEP development standards.

Assessment Officer's Comment

Council's requirements are the same for the subject site as they were when the original application was approved. The applicant is proposing a variation to the floor space ratio and height requirements with the current application and this has been discussed in the report above.

Issue

Character of Kingsgrove and scale of adjoining properties

We believe Kingsgrove is a unique suburb and has a traditional charm about it, which is what attracted us to the area and consequently bought a house 4 years ago. To overdevelop and add high rise buildings to Kingsgrove will spoil the village-like atmosphere and turn it in to a mini Hurstville. It is not in the best interests of Kingsgrove to add more storeys and more units to this development.

Applicant's Comment

It is noted that State Planning directions support increased density on infill sites in close proximity to public transport nodes such as Kingsgrove Railway Station. The proposed building heights vary from 4 to 6 levels with related setbacks to minimise adverse impacts on neighbouring properties. With regard to the character of the area it is noted that the adjoining property was approved (through the Courts) at 5 storeys in height and that the draft planning controls on the eastern side of Kingsgrove Road propose buildings up to 6 storeys in height. As a result it is considered that the proposed buildings are in keeping with the future character of Kingsgrove.

Assessment Officer's Comment

The variation to the floor space ratio and height requirements are not supported as detailed in the report above. It is considered that the proposed development is not consistent with the desired future character of the area and the proposed development is not indicative of the height and scale of development the development controls envisaged for the subject site.

Issue

The development will set a precedent in the area

Applicant's Comment

Due to the unique nature of the site including its size, location and the high proportion of floor space below ground it is not considered that approval of this application would set a precedent for future development in the area.

Assessment Officer's Comment

Although the development controls for the subject site are specific to this site only there is concern that if these controls are not applied consistently they erode their importance. In particular, it is considered that no site specific circumstances have been introduced or identified to justify the variation to the floor space ratio and height controls as proposed.

Issue

There is inadequate stormwater drainage for the area and how does the development we deal with overland water flow

Applicant's Comment

The issues of stormwater drainage and overland water flow has been addressed by the hydraulic consultants for the site with all documentation review and approved by Council's engineers. The potential impacts of the additional apartments has been assessed by the hydraulic consultants and no additional impacts are expected.

Assessment Officer's Comment

The original development was approved with appropriate stormwater disposal being provided to the development. The conditions of consent which apply to the approved development have to be complied with which includes the provision of stormwater disposal.

Issue

No dedication of public space to offset the additional height and FSR

Applicant's Comment

This comment is not supported as the proposed development includes the dedication of land for the widening of Mashman Lane and the provision of a publically accessible public plaza and through site link within the site.

Assessment Officer's Comment

The proposed development does not make additional provision of public land or space. Should the application be approved, the applicant will be subject to the payment of contributions under section 94 of Environmental Planning and Assessment Act for each additional dwelling proposed. These contributions relate to various public services and infrastructure.

Council Referrals

No Council referrals were required for this application.

External Referrals

NSW Roads and Maritime Services (formerly RTA)

No objection was raised to the application.

CONCLUSION

The application seeks permission to modify an approved mixed retail, commercial and residential development with the addition of twenty two (22) apartments and twenty eight (28) on site car parking spaces. The proposed development has been assessed against the requirements of the relevant planning instruments and development control plans and does not comply in terms of floor space ratio and height. The applicant has submitted an objection under the provisions of SEPP 1 for the variations. The objection has been considered and it is considered to be unfounded and the variation to the standards unnecessary and unreasonable in this case. Seven (7) submissions were received to the application and these have been addressed in the report. The application is recommended for refusal for the reasons detailed below.

RECOMMENDATION

- (A) The Objection pursuant to the provisions of State Environmental Planning Policy No 1 to the development standards relating to floor space ratio and height as identified in clause 13 and 15A respectively of the Hurstville Local Environmental Plan, 1994, is considered to be unfounded and variation to the standards is considered unnecessary and unreasonable in this case.
- (B) Pursuant to the provisions of Section 96 of the Environmental Planning and Assessment Act, as amended, the application (known as 10/DA-461REV6) to modify Development Consent No 10/DA-461 granted on 19 May 2011 (as amended by 10/DA-461REV5 dated 21 November 2011) for the demolition of existing structures and construction of a mixed retail, commercial and residential development and associated car parking and road works on Lot 2 DP 534643 and Lot 69 DP 356823 and known as 11 Mashman Ave and 7 Colvin Ave Hurstville be refused for the following reasons:
1. Pursuant to the provisions of Section 96(2) of the Environmental Planning and Assessment Act, 1979 the proposed development is not substantially the same development for which consent was originally granted.
 2. Pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, it is considered that the proposed development does not satisfy the objective (a) of Zone No 3(c) Business Centre Zone contained in the Hurstville Local Environmental Plan.
 3. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as it does not comply with the objectives of Section 6.10.3 for floor space ratio and height of the Hurstville Development Control Plan No 1.
 4. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as it does not

comply with the provisions of Clauses 13 and 15A of the Hurstville Local Environmental Plan.

5. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(a)(iii) of the Environmental Planning and Assessment Act 1979, as it does not comply with the requirements of Section 6.10.3 for floor space ratio and height of the Hurstville development Control Plan No 1.
6. The proposed development, pursuant to the provisions of Section 79C(1)(a)(i) of the Environmental Planning and Assessment Act 1979, is not consistent with the design Quality Principles 1, 2 and 4 of State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development.
7. Having regard to the above non-compliances with Council's development standards of the Hurstville Local Environmental Plan and Hurstville Development Control Plan No 1 and pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed development is unsatisfactory and represents an overdevelopment of the subject site.
8. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, providing an undesirable and unacceptable impact on the streetscape and adverse impact on the surrounding built environment.
9. Pursuant to the provisions of Section 79C(1)(b) and Section 79C(1)(c) of the Environmental Planning and Assessment Act 1979, insufficient information has been provided by the applicant in terms of a BASIX certificate for the proposed additional residential dwellings.
10. Having regard to the previous reasons noted above and the number of submissions received by Council against the proposed development, pursuant to the provisions of Section 79C(1)(e) of the Environmental Planning and Assessment Act 1979, approval of the development application is not in the public interest.