

## APPENDIX D – Council response to late submission by Herbert Geer Lawyers

The JRPP Panel Secretariat has forwarded a late submission from Herbert Geer Lawyers dated 24 October 2013 and has requested a response to the issues raised therein. The submission was received outside the notification period and the concerns raised have generally been previously addressed and are outlined as follows.

- View sharing – Concern raised that Council has not properly assessed view impacts, in particular the difference between the approved envelope under the Concept Plan and building within the envelope, or properly considered the Site Design Principles.

**Comment:** It is agreed with the submission that there is a difference between an approved envelope and the proposed building within that envelope. It is also acknowledged that the Site Design Principles do require consideration of view sharing within the building envelopes. Council's previous report dated 12 August 2013 discussed this issue upon request of the JRPP. Council's reports have considered the impact on views of the actual proposed building, including options for alternative design of the building within the approved envelope. Refer to the extracts from the report dated 13 June 2013 set out below. Council is of the opinion that it has properly assessed view impacts in this regard.

It needs to be appreciated that the approved envelopes in this case are relatively constrained such that there is limited opportunity for redistribution of building mass across the site.

It is also important to note that the proposed building does not occupy the entire building envelope approved under the Concept Plan (as modified). In terms of the proposed southern building adjoining the Arvia Building, the western wall from Levels 4 to 6 fall approximately 3.8m inside the envelope. Therefore the subject proposal does provide for additional view sharing from the Arvia Building above and beyond the approved Concept Plan envelope. The proposed building also does not extend to the eastern extremity of the envelope therefore the subject proposal does provide for additional view sharing from The Royal above and beyond the approved Concept Plan (as modified) envelope.

The following extracts are from the original report considered by the JRPP dated 13 June 2013:

- *View sharing*

*The site design guidelines (as amended 9 April 2013) state 'The design, height and bulk of proposed buildings within the building envelopes should incorporate the sharing of views through the location and orientation of buildings and land uses, gaps between buildings, placement of windows, balconies and open space.'*

*The orientation and position of the building is constrained by the approved envelope (footprint). It is noted that it does not extend to the east of the envelope with this area being used as the forecourt area. This would provide for improved southerly views from 'The Royal' development to the north. The landuses within the building itself have no affect on view sharing. The location of decks and windows would not affect view sharing. While some floorspace could possibly be redistributed from Southern Building (reduced*

height or gap) it could only reasonably be placed into the eastern portion of the envelope. This would compromise the forecourt area which is considered a highly positive design aspect of the proposal and would then likely compromise southerly views from 'The Royal'. On balance, given the constraints of the approved envelope, the view sharing is considered reasonable.

and

- Views - Objection was raised to the proposed development on the grounds of potential view loss. Objectors believe the development will obstruct views from 'The Royal' (McCaffrey Wing) and suggest moving the building as far west and south as possible. Other objectors believe the proposed development would obstruct easterly views from the 'Arvia' apartments at 67 Watt Street. They believe the development does not satisfy the planning principles on View Sharing.

It is noted that Concept Plan 05\_0062 was approved in January 2007, before the development application DA2009/0766 for the 'Arvia' was lodged (29 June 2009) and accordingly the impact upon views was effectively predetermined. The proposed buildings are cited as far south and west as could possibly be accommodated as per the current Concept Plan envelope (footprint) as a number of the objectors have requested. The applicant submitted, to the NSW Department of Planning and Infrastructure, a detailed view analysis to support their application to modify the Concept Plan. This analysis has been reviewed and it is agreed that the 'splaying' of the southern envelope effectively maintains view sharing as per the original Concept Plan. Given that the proposal sits within the approved envelope (footprint) under the Concept Plan as modified 9 April 2013 it could not reasonably be considered unreasonable in the circumstances.

Considering the NSW Land and Environment Court principle on 'views' as established under *Tenacity Consulting V Warringah Council*.

- Step 1 – Assess views to be affected – The ocean views are generally highly valued.
- Step 2 – Where are the views obtained – The views of the ocean from the 'Arvia' (which are of concern to the objectors) are gained across a side boundary. The principles of the Court acknowledge that side views are difficult to retain. This is particularly relevant in this case where the Concept Plan had already been approved prior to the affected 'Arvia' development application being lodged.
- Step 3 – Extent of impact – The ocean views from 'The Royal' would be relatively unaffected. The impact to the 'Arvia' to the west will be more significant. The majority of the 99 units within this development would currently have some ocean view. A review of the approved plans for this development would suggest that approximately 44 of these 99 units (44%) that currently have some ocean view towards the east (over the subject site) will lose that view. The remaining units would still maintain at least some of the ocean view. The affected units within the 'Arvia' are single aspect facing towards a side boundary and are therefore highly susceptible to view loss as adjacent sites are developed. It is therefore unrealistic to expect that all units could maintain ocean views.

- *Step 4 – Reasonableness of the proposal – The proposal complies with the height, envelope and GFA of the Concept Plan. While some floor space could possibly be redistributed on the site (e.g. reduced height or gap between the north and south building) it could only reasonably be placed into the eastern portion of the envelope. This would compromise the forecourt area which is considered a highly positive design aspect of the proposal and would then likely compromise southerly views from ‘The Royal’. Both these aspects are considered undesirable. Having regards to the controls on the site the proposal is considered to be reasonable.*

*On balance, given the constraints of the approved envelope, the impact upon views is considered reasonable and acceptable.*

On reconsideration, it was perhaps unfortunate that the expression “*the impact upon views was effectively predetermined.*” was used in the previous assessment report. As has been demonstrated however, the impact on views of the actual building has been fully assessed as part of this application and is considered satisfactory given the location of the building envelope under the Concept Approval (as modified).

In addition, the applicant has submitted further view analysis including consideration of the planning principle and 3D visual analysis. This was provided to the JRPP under the second supplementary report dated 12 August 2013.

- Public domain views – Concern raised that Council has not properly assessed potential loss of views from the public domain on Shortland Esplanade to the Cathedral.

**Comment:** The site is not affected by a nominated view corridor from Shortland Esplanade to the cathedral under the Concept Plan (as modified). It is considered unreasonable to impose such a requirement through the site.

It is noted that a substantial public domain view to the cathedral from Fletcher Park (opposite the subject site) exists along the Church Street road corridor. This point is some 50m from where the objector suggests a view corridor should be established and is considered a far more relevant vantage point than an ‘arbitrary’ point along the Shortland Esplanade footpath.

- Amenity impacts – Concern raised that Council has not properly assessed amenity impacts, in particular implying that under the Residential Flat Design Code a habitable wall needs to be setback the same distance irrespective as to whether it has windows.

**Comment:** The previous reports have addressed amenity matters including overshadowing, privacy and views in relation to the building proposed. In particular, separation distances which deal with privacy have been clarified in detail for the JRPP and considered consistent with the Residential Flat Design Code.

In terms of separation distances the Concept Plan (Condition 5) refers to building separation in accordance with SEPP 65 – Design Quality of Residential Flat Development. SEPP 65 is a merits based policy that actually contains no numerical separation distances.

SEPP 65 is supported by the Residential Flat Design Code (RFDC); again a merit based set of guidelines. The objectives of the building separation guidelines of the RFDC are outlined below with an explanation of how the proposal satisfies the objectives:

- *To ensure that new development is scaled to support the desired area character with appropriate massing and spaces between buildings.*

In terms of spacing between buildings the RFDC envisages that buildings could be separated by a distance equivalent to that between 'non-habitable' rooms. Therefore the first objective would be achieved by separating the buildings by this minimum distance. In the case of the subject proposal and the adjoining the Arvia Building the separation distance is actually greater than this as a distance of habitable to non-habitable walls has been achieved. It is considered appropriate in this case to consider the western wall of the subject proposal (which is devoid of openings other than small obscure glass windows) as a non-habitable wall to still achieve a reasonable spatial separation. It is, however, noted that the RFDC does envisage situations (such as street wall building typology) where this could be further relaxed. In fact the generally building typology in the City East area typically has buildings (including habitable rooms) built to side boundaries.

The objector's view that the building separation guidelines must be applied in the strictest sense, including that a habitable wall must be treated in the same manner regardless of whether there is openings, is not supported and is not consistent with the RFDC itself that clearly demonstrates situations where habitable walls are closer than the nominated distance, even being directly adjoined.

In this case it is considered that the objective of the guidelines relating to massing and spacing between buildings has been achieved.

- *To provide visual and acoustic privacy for existing and new residents.*

In applying a merits based approach to the RFDC guidelines Council is of the opinion that a habitable wall devoid of openings cannot reasonably be treated in the same manner as one with openings. The privacy impact is clearly different. Similar to the point above in this instance it is considered appropriate to consider the western wall of the proposal (adjoining the Arvia Building) as a non-habitable wall to ensure reasonable separation distance is achieved. However, it is once again acknowledged that the RFDC itself would suggest that such a wall could be setback a lesser distance.

In this case the objective in terms of privacy has been achieved.

- *To control overshadowing of adjacent properties and private or shared open space.*

As discussed under previous reports the overshadowing impacts are considered acceptable in relation to the RFDC guidelines. Given that the minimum separation distance is achieved this objective has been satisfied.

- *To allow for the provision of open space with appropriate size and proportion for recreational activities for building occupants.*

The open space is located elsewhere on the site so this objective is considered not applicable in this case.

- *To provide deep soil zones for stormwater management and tree planting, where contextual and site conditions allow.*

The space between the buildings is not suitable for deep soil planting being an existing (and maintained) vehicular access point.

In this case the spatial separation objective of the RFDC has been achieved and the privacy objective has also been achieved by removing opposing windows and balconies. Council is of the opinion that the single 600mm wide obscure glass windows on Levels 5 to 8 do not pose an unreasonable impact. However if the JRPP is of the opinion that such obscure glass windows create an unacceptable privacy impact then it may consider deleting these via a condition of consent.

In summary, Council is of the opinion that the proposal is acceptable in relation to the RFDC separation guidelines.

- Public exhibition – Concern raised that the amended design required additional notification.

**Comment:** As outlined in Council's previous reports, in accordance with Councils Public Notification Policy the amended design did not require further notification as it was considered to not result in greater environmental/amenity impacts.

- Traffic – Concern raised in relation to traffic impacts that have not been addressed.

**Comment:** Traffic impacts have been further assessed in the current supplementary report and discussed under various previous reports presented to and considered by the JRPP.

**Appendix E** to the current supplementary report contains a copy of a letter dated 14 November 2013 from Norton Rose Fulbright Lawyers, solicitors for the applicant, responding to the submission from Herbert Geer Lawyers dated 24 October 2013.