

JOINT REGIONAL PLANNING PANEL
(Sydney East Region)

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| JRPP No | 2012SYE035 |
| DA Number | 11/DA-21 REV03 |
| Local Government Area | Hurstville City Council |
| Proposed Development | Section 96(2) modification to Stage 2 of "East Quarter" development - addition of two (2) x storeys to buildings A, B & E, deletion of commercial floor space in Building B, associated facade and basement changes |
| Street Address | 93 Forest Road Hurstville |
| Applicant/Owner | Applicant: Milestone (Aust) Pty Ltd Owner: East Quarter Hurstville Pty Ltd |
| Number of Submissions | Three submissions |
| Recommendation | Refusal |
| Report by | Laura Locke – Team Leader Development Assessment |

Assessment Report and Recommendation

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| ZONING | 3(b) City Centre Business 5(a) Special Uses |
| APPLICABLE PLANNING INSTRUMENTS | <ul style="list-style-type: none"> • Hurstville Local Environmental Plan 1994 • Environmental Planning and Assessment Act • 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 Development Control Plan No 2 – Hurstville City Centre: Sections 2.2 Neighbour Notification and Advertising of Development Applications, Section 4.2 The Controls (Block), Section 5.1 Design Guidelines, Section 5.2 The Public Domain, Section 6.1 Car Parking, Section 6.3 Access and Mobility, Section 6.4 Crime Prevention through Environmental Design, Section 6.5 Energy Efficiency, Section 6.9 Waste Management, Section 9.1 Development of a Heritage Item or in the Vicinity of a Heritage Item, |
| HURSTVILLE LOCAL ENVIRONMENTAL PLAN 1994 INTERPRETATION OF USE | “Shop”, “Office”, and “Residential Flat Building” |
| EXISTING DEVELOPMENT | Stage 1 (Buildings C&D) of three stage development completed. Stage 2 currently under construction |
| COST OF DEVELOPMENT | Original development: \$80,300,000 |
| REASON FOR REFERRAL TO JRPP | S96(2) Modification – original application determined by the JRPP |
| FILE NO | 11/DA-21REV03 |
| HAS A DISCLOSURE OF POLITICAL DONATIONS OR GIFTS BEEN MADE? | No |

DESCRIPTION OF THE PROPOSAL

The Section 96(2) application proposes modifications to Buildings A, B and E and basement car parking levels 1, 2 and 4 relevant to Stage 2 of the development.

The proposed modifications to the approved development include:

- Increase in the building height of Buildings A, B and E as a result of the addition of two residential floors on each building (an additional 56 residential units in total);
- Reduce the total commercial floor space from 1,724.8m² to 1,027.3m² (reduction of 697.5m²) and conversion to residential units;
- Revised basement parking area (Levels 1, 2 and 4) including an additional 9 car parking spaces;
- Increase in floor space ratio for Stage 2 of the development from 3.34:1 to 3.83:1
- Increase in floor space ratio over the whole site from 2.63:1 to 2.82:1 and
- Internal reconfiguration of ground level retail service corridors, fire stairs, toilets and revised lift configuration to Buildings A and B.

Specifically the modifications propose:

Basement:

- Level 4 – 5 additional spaces
- Level 2 – 1 additional space
- Level 1 – 3 additional spaces

Building A

- Inclusion of two additional floors resulting in a total of 13 storeys in Building A.
- Level 10 contains 12 residential units and level 11 will contain five residential units and 500m² of commercial offices on the northern half of the floor plate. The unit mix of the 17 additional units are 7 x 1 bedroom units and 10 x 2 bedroom units.
- Minor internal reconfiguration of Ground Floor level retail service corridors, fire stairs, toilets and lifts.

Building B:

- Building B is proposed to have a total of 13 storeys and will include two additional floors resulting in an additional 18 residential units (9 residential units per floor). The unit mix of the 18 additional units are 10 x 1 bedroom units and 8 x 2 bedroom units.
- Removal of 697.5m² of commercial floor space on Level 1 and replace with 11 residential units (comprising 6 x 1 bedroom units, 3 x 2 bedroom units and 2 x 3 bedroom units).
- Minor internal reconfiguration of Ground Floor level retail service corridors, fire stairs, toilets and lifts.

Building E

- Addition of two typical floors to the approved scheme resulting in a total 19 storeys and 10 additional residential units (comprising 2 x 1 bedroom units, 6 x 2 bedroom units and 2 x 3 bedroom units).

BACKGROUND

Original development application 03/DA-1046

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| 17 June 2004 | Council approved a three (3) stage mixed use/retail/commercial development comprising seven (7) buildings and basement parking including remediation of the site. This application is known as 03/DA-1046. Stage 1 (Buildings C and D) of the development has been completed and occupied. Stage 2 of the development contained Buildings A, B and C and the public plaza of the development. Stage 3 has not commenced (Buildings X and F). |
| 14 July 2005 | Section 96 Application (known as 03/DA-1046 Rev01) was approved to allow the development to be constructed in three stages. This modification also proposed changes to Buildings C and D. |
| 26 September 2006 | Section 96 Application (known as 03/DA-1046 Rev02) approved to delete approved commercial floor area for gymnasium, remove levels of basement parking, and amend facades. |
| 25 May 2007 | Section 96 Application (known as 03/DA-1046 Rev04) was approved to increase heights of Buildings C and D (Stage 1), amend window design, facade alterations. |
| 12 February 2009 | Section 96 Application (known as 03/DA-1046 Rev10) was approved to alter facades of Buildings C and D. No increase in height or floor space was approved as part of this application. |
| 13 September 2010 | Section 96 Application (known as REV13) was refused for the modification of the development as it relates to Stage 2 only which included an increase of unit numbers, increase to the size of building, redistribution of floor space and redesign of the public plaza. |
| 3 December 2010 | The applicant lodged an appeal in the NSW Land and Environment Court to the refusal of the above Section 96 application. The appeal was dismissed by the Court as it was the Commissioner's finding that the proposed development, the subject of the application, was not substantially the same development to that approved by the consent. |

The application 03/DA-1046 has been the subject of eight (8) other Section 96 Applications that relate to conditions of consent (eg payment of bonds, timing of Section 94 contributions) that did not make any physical alterations to the development.

Development application 11/DA-21 for Stage 2 of the Development

- 8 November 2011 The Joint Regional Planning Panel granted a deferred commencement development consent for development application no 11/DA-21 to remediate the site and construct a mixed retail/commercial/residential development comprising three (3) buildings containing basement car parking area, ground floor retail, first floor commercial, and two hundred and fifty eight (258) residential units (known as Stage 2) at 93 Forest Road, Hurstville. The deferred commencement consent was activated on 12 January 2012. This development consent replaces Stage 2 of development consent 03/DA-1046.
- 28 February 2012 S96(1) approved for alterations to the basement levels to add 39 more parking space and to allow the deferral of s94 contributions. This application is known as 11/DA-21Rev01
- 10 April 2012 S96(1) application approved for an additional basement level and to allow the relocation of 122 car parking spaces from stage 3 of the development This application is known as 11/DA-21 Rev03

DESCRIPTION OF THE SITE AND LOCALITY

The subject site is located on the southern side of Forest Road near the corner of Hill Street, Hurstville. The subject site has an irregular shape with a frontage to Forest Road of 225.5m and a site area of 2.84 hectares. The site has its northern boundary to Forest Road and a southern boundary to the Illawarra Railway Line. To the east of the site is Kempt Field. Directly to the west of the site is an approved development site (thirteen (13) storey mixed use development) which is yet to commence construction and the now empty former Hill Street Tavern (there is a concurrent development application 12/DA-132 lodged with Council for the development of these two sites). Beyond Kempt Field and approximately 500 metres to the east are single dwelling houses and on the southern side of the Illawarra Railway Line is mixed development comprising single dwellings and older style residential flat buildings.

Stage 1 of the development is located to the east of the development site and comprises Buildings C and D. Building C is a 6 storey building fronting Forest Road and building D is a 12 storey building located behind Building C.

The subject of this modification - Stage 2, is located at the centre of the site and comprises approximately a third of the whole site in area. The bulk excavation and earthworks for this stage of the development have commenced.

Voluntary Planning Agreement

As part of the original development consent Council and the applicant entered into a voluntary planning agreement including works at Kempt Field; a dedication to Hurstville Public School and the allocation of some commercial floor space in Building E for community use. This modification application does not alter the planning agreement.

COMPLIANCE AND ASSESSMENT

The development has been inspected and assessed under the relevant Section 79C(1) "Matters for Consideration" of the Environmental Planning and Assessment Act 1979.

1. Environmental Planning Instruments

DISABILITY DISCRINATION ACT 1992 & ACCESS TO PREMISES STANDARD

As part of the first modification to the development (11/DA-21- Rev01) Council approved the staging of construction for Stage 2 of the development to allow a construction certificate to be lodged for the excavation and shoring works and a separate construction certificate to be lodged for the works from ground level upwards.

The applicant has submitted an Access and Adaptable Housing statement of compliance prepared by Accessible Building Solutions which states "It is noted that BCA 2010 applies."

A further Building Code of Australia Assessment report has been submitted with the application. Part 1.3 of this report observes "It is understood that the application for a Construction Certificate (CC) was made prior to 1st May 2011, therefore BCA2010 is the version applicable to this development".

Council sought confirmation of this from applicant, and subsequently received confirmation that the date of lodgement for the CC was 19th April 2011.

The CC documentation provided to Council describes the work for which approval was sought states "Mixed Use Development- Bulk Excavation and Piling", and has an estimated cost of works of \$1.1 million.

Council is not the certifier but has responsibilities as the consent authority for the S96 (2) application with regard to the Disability Discrimination Act 1992(DDA).

Council is aware that the applicant proposes not to comply with the Premises Standards. This is stated in two (2) consultants' reports and confirmed in the CC issued by Dix Gardner. Council is aware that at this stage only earthworks and associated piling have been undertaken on the site, and therefore compliance with the premises standard can still be achieved.

Section 23 of the DDA covers access to premises and makes it unlawful to discriminate against a person with disability in relation to access to, or use of, premises. However while Section 23 of the DDA states it's unlawful to discriminate it does not provide information for people responsible for buildings to assist them to design, construct or manage buildings in ways that do not discriminate.

Section 31(1) of the DDA allows the Minister responsible for the DDA to develop Disability Standards. The Premises Standards is a Disability Standard made under the DDA, and effectively is a substitute for the requirements of the relevant parts of the DDA.

Council has concern that the completed development will fail to comply with a Disability Standard under the DDA (i.e. Premises Standard) and that it is unlawful to contravene a disability standard. Section 122 of the DDA also makes it unlawful to cause instruct induce aid or permit another person to do an act that is unlawful. There is also case law that indicates

that council in its role as consent authority can contravene Section 122 of the DDA (Cooper v Coffs Harbour City Council).

Council contends that the development should comply with the Premises Standard and that to achieve this a redesign of the internal circulation spaces and car parking areas may need to be undertaken. As the redesign may have impacts on the finished layout of the building it is considered appropriate that this be considered as part of the development assessment process, rather than the certification process. Council can not support the application in its current form as Council can not be certain that the proposal will comply with the provisions of the BCA and the DDA.

Council has contacted the Access consultant with a view to determining what is required to comply with the Premises Standard and is awaiting a response. If the applicant is unwilling to comply, I would recommend refusal of the application on the grounds that it fails to comply with the DDA.

SECTION 96(2) OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT, 1979

(2) Other modifications

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(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 proposal modifies the building height and number of units and deletes some commercial floor space, but otherwise the building footprints and nature of the development is unaltered. In terms of overall built form the proposal is substantially the same development as which consent was granted, however the impacts of the modification in terms of view loss are not acceptable.

(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

(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 proposal was notified to adjoining residents and a notice was placed in the local newspaper in the same manner as the original application.

(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: The submissions are discussed under a separate heading in the report below.

STATE ENVIRONMENTAL PLANNING POLICY (INFRASTRUCTURE) 2007

This modification was referred to Roads and Maritime Services and Railcorp consistent with the requirements of Clauses 85, 86 and 106 of the SEPP. Both these agencies raised no objection to the amended plans.

This modification application has been supported by amended acoustic and traffic reports which conclude that the impact of the additional units and vehicles will not result in any adverse impacts.

STATE ENVIRONMENTAL PLANNING POLICY NO 55 - REMEDIATION OF LAND

A report and remediating plan prepared by DLA Environmental (dated 12 November 2010) was submitted with the original development application. The report concludes that the subject land is suitable for its proposed intended use and there is no environmental or geotechnical reason that could inhibit the future development of the property. In reaching that conclusion, DLA Environmental reviewed other documentation relating to the site including the Remediation Action Plan prepared by Golder Associates Pty Ltd (dated 14 December 2004, Reference 03623097/024-M) which included recommendations to be adopted in remediating the site.

The original development consent provides requirements for site remediation in accordance with State Environmental Planning Policy No. 55 and these conditions will remain as part of any modified consent notice.

STATE ENVIRONMENTAL PLANNING POLICY (BUILDING SUSTAINABILITY INDEX: BASIX) 2004

BASIX Certificates have been submitted for the proposed development. The Certificates show that the proposed development will achieve the minimum target scores required.

STATE ENVIRONMENTAL PLANNING POLICY NO 65 – DESIGN QUALITY OF RESIDENTIAL FLAT DEVELOPMENT (SEPP 65)

The proposal was referred to the Design Review Panel who made the following comments:

1. Context

Buildings A and B

These building form the eastern and western edges of the Urban Square and, together with Building E, define the extent of the proposed Urban Square or Public Plaza. They both have a frontage to Forest Road along their northern side.

Building E

Building E is the southernmost of the three buildings which together describe the Urban Square. It has a frontage to Railway Street and with buildings D and F, form the backdrop to buildings on the southern edge of the site overlooking the Illawarra Railway. To the south are

1-2 storey residential and 3-4 storey apartment buildings. Building E overshadows these residential buildings being located to the north.

2. Scale

The proposal seeks an increase of 2 levels for each block which would make buildings A and B 13 levels, with a height of 41.5 metres and building E to have 20 levels with a height of 65.15 metres. In the original proposal of 2003 buildings A and B had 10 levels and building E had 16 levels. In the reports written by the Panel in 2003 it had no issue with building E being 16 levels but considered that the then 10 level buildings A and B should be reduced in height so as to improve the amenity of the public plaza both in terms of scale and overshadowing.

As well the Panel considered that buildings A and B should be of a similar scale to the Stage 1 building D fronting Forest Road. The Panel remains of the opinion that the buildings, especially now being approved for 11 storeys, should not be increased in height. (The issue of building E is not so much the scale but of overshadowing of residential buildings south of the railway line.)

3. Built Form

The Panel accepts the overall form except for the increase in height to all the buildings.

4. Density

The proposed density of the proposal over the whole site is 2.8:1 with an FSR control of 2.5:1. The FSR of the 3 buildings A, B and E for Stage 2 separately is 3. 83. One significant factor in accepting the higher density for Stage 2 was the provision of the public plaza for the benefit and use for all residents and Hurstville public generally. However it is now proposed that this facility be diminished in quality.

The Panel considers that this density cannot be achieved without diminishing the amenity of the public plaza due to the increase in overshadowing and a significant increase in scale as noted elsewhere in this report. For this reason the Panel cannot support this increase in density.

5. Resource, Energy and Water Efficiency

Subject to BASIX.

6. Landscape

The issue that is critical to the Panel is the amenity and form of the public plaza created by the buildings A, B and E. The Panel is concerned that the increase in scale and overshadowing caused by the extra two levels on each block will significantly diminish the quality of this public space.

7. Amenity

The increase of two levels to each of the buildings will increase the overshadowing to the public plaza, as well as to the existing Stage 1 buildings, the future buildings to the east as well as to the existing dwellings south of the railway line.

As well the increase to buildings A and B will reduce the outlook from the existing Stage 1 buildings as well as to the future buildings to the east.

8. Safety and Security

Not an issue.

9. Social Dimensions

The Panel considers that the proposed increase in height in the 3 buildings A, B and C will be detrimental to the social dimensions to both the public generally as well as the residents of the entire project as it pertains to the public plaza. This public plaza is considered to be a crucial element to the whole project and increasing the scale and overshadowing as noted above will diminish the amenity for people using this space. Also the overshadowing caused by building E on the residential buildings south of the railway line by reducing the extent of solar access will diminish the social amenity of residences in these areas.

10. Aesthetics

Not relevant.

Recommendations

The Panel has no problem with the decrease in the commercial content of neither the proposal nor the proposed changes to the basement levels. It also agrees to the increase in the number of residential units that will replace the existing commercial area.

However the Panel cannot recommend the increase of two levels in height for the three buildings A, B and E and the increase in density caused by this increase in height, as a consequence of this increase in the levels for reasons outlined above.

Applicant response:

The Design Review Panel (DRP) comments received in relation to the proposed Section 96(2) application raise no objection to the proposed reduction of commercial office floor area and discuss the potential overshadowing and amenity impacts to the public plaza as a result of the two additional storeys to Buildings A, B and E.

The enclosed overshadowing diagrams at Attachment C depict the shadowing impacts from both the north east and north west perspectives and demonstrate the two additional floors will not result in any additional overshadowing onto the public plaza between 9am to 3pm, on 21 June. The proposed increased building height of Buildings A, B and E will therefore not result in any significant adverse amenity impacts on the public plaza.

With respect to visual impacts, the proposed modifications to the approved building heights have been coordinated to respect the built form, and bulk and scale of the buildings within Stage 1 and 3 of the overarching East Quarter approval.

The proposed additional building height for Buildings A, B and E maintain the function of Building E as a marker building on the axis of views into the site from Forest Road and will

result in inconsequential environmental impacts when viewed from the public plaza given the minor additional height in context of the overall site and the site context of a large island site.

Council response:

The proposed modifications generally follow the built form of the approved development. The applicant has provided a 3D showing the integration of Stage 2 into the rest of the development and in this respect the proposal is generally acceptable.

The applicant has also provided shadow diagrams that indicate that the public plaza still maintains at least 4 hours of solar access to a minimum of 50% of the space during the winter solstice. In terms of solar access the proposal is acceptable.

HURSTVILLE LOCAL ENVIRONMENTAL PLAN 1994

The subject site is zoned 3(b) City Centre Business and 5(a) Special Uses. The 5(a) Special Uses zone applies to a small portion of the site in the south western corner which is part of Stage 1 of the development. As such it does not affect the proposed development, the subject of this application.

The permissibility of the site for the development was established in the original approval for the site.

The objectives of the 3(b) City Centre Business zone are as follows:

- (a) *to designate sufficient areas of land to meet the projected needs of the Hurstville Town Centre as a multi-functional regional centre,*
- (b) *to facilitate development of land within the Hurstville Town Centre for commercial, retail, residential and community purposes,*
- (c) *to provide a single business zone for the Hurstville Town Centre as a sub-regional centre,*
- (d) *to facilitate the implementation of a development control plan for the Hurstville Town Centre:*
 - (i) *by introducing appropriate floor space ratio controls,*
 - (ii) *by encouraging an economically viable retail core which is centrally located and in close proximity to public transport,*
 - (iii) *by enhancing employment opportunities and to service the needs of the local and regional community,*
 - (iv) *by encouraging and facilitating the use of public transport,*
 - (v) *by providing and enhancing pedestrian and public open space areas for shoppers and workers,*
 - (vi) *by maintaining and improving the environmental and aesthetic quality of the Hurstville Town Centre and its surrounds,*
 - (vii) *by ensuring adequate and accessible off-street car parking, and*
- (e) *to improve traffic flow in and around the Hurstville Town Centre.*

The other relevant sections of the Local Environmental Plan that relate to the proposed development are as follows:

Clause 15 – Services

The proposed development will have facilities for the supply of water and for the removal or disposal of sewage and drainage in accordance with the requirements of the Local Environmental Plan.

Clause 22 – Excavation, filling of land

The excavation of the site for the development has already been accepted as part of the original development application.

Clause 22B – Remediation of contaminated land

Clause 22B states:

- (1) *This clause applies to any development on contaminated land.*
- (2) *Consent must not be granted for development to which this clause applies unless the consent authority is satisfied:*
 - (a) *that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and*
 - (b) *if the land requires remediation to be made suitable for that purpose, that the land will be remediated before the land is used for that purpose.*
- (3) *Nothing in this clause affects the application of State Environmental Planning Policy No 55—Remediation of Land to land to which this plan applies.*

See heading - State Environmental Planning Policy No 55—Remediation of Land above.

Clause 33 - Development in the Vicinity of a Heritage Item

Clause 33 states:

- (1) *Before granting consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item.*
- (2) *This clause extends to development:*
 - (a) *that may have an impact on the setting of a heritage item, for example, by affecting a significant view to or from the item or by overshadowing, or*
 - (b) *that may undermine or otherwise cause physical damage to a heritage item, or*
 - (c) *that will otherwise have any adverse impact on a heritage item or of any heritage significance of the item.*
- (3) *The consent authority may refuse to grant any such consent unless it has considered a heritage impact statement that will help it assess the impact of the proposed development on the heritage significance, visual curtilage and setting of the heritage item.*
- (4) *The heritage impact statement should include details of the size, shape and scale of, setbacks for, and the materials to be used in, any proposed buildings or works and details of any modification that would reduce the impact of the proposed development on the heritage significance of the heritage item.*

Comment

The subject site is in the vicinity of several buildings which are identified as heritage items under the Hurstville Local Environmental Plan, namely, 112 Forest Road which is directly opposite the subject site, 136-136A Forest Road, and 140-142 Forest Road, Hurstville.

These proposed modifications are considered to have a negligible impact on the adjoining heritage items.

2. Draft Environmental Planning Instruments

DRAFT HURSTVILLE LOCAL ENVIRONMENTAL PLAN (HURSTVILLE CITY CENTRE) 2011

At the time that the original development application (11/DA-21) was lodged and considered by the JRPP the Draft Hurstville Local Environmental Plan (Hurstville City Centre) 2011 had not been on public exhibition and therefore was not a matter for consideration pursuant to S97(C) of the Act.

The draft LEP 2011 was placed on public exhibition from 23 January 2012 to 29 February 2012. Following exhibition the LEP was adopted by Council on 12 April 2012. At the meeting on 12 April Council resolved to make an amendment to the draft LEP to rationalise the proposed building heights on this site as agreed with the applicant.

Council forwarded the LEP to Planning & Infrastructure on 18 May 2012 for the Minister to make the plan. Since that time Council has had several meetings with the Department regarding the content of the plan and it is proposed that a report be considered at the Council meeting of 25 July, 2012 to address queries from the Department.

The draft LEP 2011 proposes to rezone the site to B4 Mixed Use Zone. Development for the purposes of retail/commercial premises and residential flat buildings are permissible with Council's development consent in the B4 Mixed Use Zone.

The following is a table depicting the proposal's compliance with the core controls within the draft LEP:

| Controls | Draft Hurstville Local Environmental Plan (Hurstville City Centre) 2011 | Current approval granted under 11/DA-21 for Stage 2 of the site | Proposed S96(2) |
|-----------------------------|--|---|--|
| cl.4.3: Height of buildings | 35m – 60m | Building A: 35.9m Building B: 35.9m Building E: 58.65 | Building A: 42.2m Building B: 41.9m Building E: 65.15m |
| cl. 4.4: Floor space ratio | 2.5:1 | 3.34:1 (for stage 2) 2.63:1 for the site as a whole | 3.83:1 2.82:1 for the site as a whole |

The FSR approved by the JRPP for Stage 2 of the development is 3.34:1; this application proposes a FSR of 3.83:1 which is an increase 14.7% increase in floor space ratio. The Draft LEP specifies a floor space ratio of 3:1 for the site. The increase to FSR proposed for Stage 2 of the development would result in this stage of the development exceeding the proposed floor space ratio of the draft LEP by 27%.

The proposed modification also involves an increase in height of 10.2% - 21% over the controls in the draft LEP.

At the time of writing this report Council has not had confirmation from the Department of Planning & Infrastructure regarding the timing for the gazettal of the LEP and therefore the draft LEP is not considered to be ‘imminent and certain’.

Although the draft LEP is not imminent and certain it has been through a public exhibition process, submissions have been considered and the Council has adopted the plan. Therefore, some consideration must be given to the provisions of the plan as being indicative of Council’s desired future direction for the Hurstville City Centre.

The 27% increase to the floor space ratio contained in the draft LEP and the up to 20% increase to the height can not be supported.

3. Development Control Plans

Hurstville Development Control Plan No 2 (DCP 2) applies to the subject site. The relevant sections of DCP 2 that are relevant to the application are as follows:

Section 2.2 – Neighbour Notification and Advertising of Development Applications

The modification was notified to adjoining land owners and occupiers and a notice was placed in the St George and Sutherland Shire Leader in accordance with the DCP. The submissions are discussed under a separate heading in this report.

Section 4.2 – The Controls for Block 27 Site B

The proposed development complies with the requirements of Section 4.2 as follows:

| Block 27 Site B Controls | Requirement | Proposal | Complies |
|---------------------------------|---|---|-----------------|
| Use | As per LEP | Proposed uses are permissible in the zone | Yes |
| Height | 4 storeys (to be negotiated depending on use) | 13-19 storeys | No (1) |
| Floor Space Ratio | 1:1 (to be negotiated depending on use) | 3.83:1 for Stage 2 | No (1) |
| Street setback | No | No change to original approval | N/A |
| Awnings | No requirement | No change to original approval | N/A |

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| Balconies | -To rear of site -Minimum 1 per unit 8sqm -2m minimum dimension -Can extend 450mm beyond the envelope -French balconies on Forest Road | Some units are 6.6sqm and do not comply with the 2m dimensions | No (2) |
| Vehicular Access | Forest Road | Forest Road, Durham Street, and Hill Street as per existing development consent for the site | Acceptable |

(1) Floor Space Ratio & Height

The original development as approved in 2004 did not comply with the floor space ratio and height controls contained within DCP No.2. The original development was approved on merit, largely due to the provision of the public plaza and the provision of commercial floor space.

The Stage 2 development application was approved by the JRPP in excess of the DCP controls for the site largely based on the original development consent.

Whilst it is accepted that the height and floor space ratio provisions of the DCP have largely been ignored in previous approvals, there is no justification on why additional height and floor space should be considered as part of this modification.

(2) Balconies

The balconies to the residential units of the proposed development do not meet the requirements of DCP 2 with regards to:

- Balconies are not exclusively provided to the rear of the site
- Balconies provided to Forest Road are not “French balconies”
- Balconies extend 450mm beyond the envelope of the building
- Some of the units do not have balconies with minimum 8sqm and minimum depth of 2m

The first three points above relate to the design of balconies and in particular their relationship with Forest Road and the envelope of the building. These non-compliances are accepted due to architectural and amenity merit and they were previously accepted by Council and the JRPP.

The non-compliance with the minimum size and dimensions of the balconies is not supported. The applicant has stated that the majority of the units comply with the 8sqm and

many of the units have two balconies. The applicant has also requested that the non-compliance be supported as the development site provides significant open space in the form of the plaza and the site is also adjacent to a large public open space in Kempt Field. While it is conceded that the site is well serviced by open spaces, this does not negate the need to provide private open space for the occupants of each unit. The adjoining open spaces are considered as public spaces and it is unlikely that the residents of the development would use it for passive recreation, or when they have visitors for example.

The applicant has stated that the non-compliance with overall balcony size is minor at only 1sqm; and while this is agreed with, the non-compliance with the minimum balcony depth requirements of the DCP is considered to be more important. Some of the balconies within the development do not comply with the minimum depth. This is considered to be inadequate, particularly as the units are two bedroom units. This non-compliance could easily be overcome by conditions of consent on any future approval.

Car Parking

| Block 27 B Parking controls | Requirement | Proposal | Complies |
|---|--------------------|--|---|
| Residential car spaces: 1 car space/100sqm (29,458sqm proposed) | 295 spaces | 295 | Yes |
| Residential visitor car spaces: 1 car space/4 dwellings (314 dwellings proposed) | 79 | 63 | No (1) |
| Retail: 1 car space/27.5sqm (1,718sqm retail floor space proposed) | 63 | 63 | Yes |
| Commercial: 1 car space/55sqm (1,027 sqm) | 19 | 19 | Yes |
| Total car spaces for stage 2 of development: | 456 | 482 +161 spaces approved under REV01 and REV02 (see explanation below) Total = 643 spaces | Yes - see explanation in (1) below this table |

(1) Residential Visitors Spaces & Parking Allocation

The applicant is seeking a variation to the DCP in terms of the parking rate for residential visitors. The DCP specifies a rate of 1 space per 4 units. The applicant is seeking a variation to 1 space per 5 units. The applicant's traffic & parking study has supported the variation based on the RTA's *Guidelines to Traffic Generating Development* and based on other metropolitan Sydney Council's parking rates.

The submitted parking study uses an incorrect interpretation of the overall required parking spaces for residential development by using a calculation of spaces per unit. The Block controls in DCP No.2 allocate parking based on floor space. Using the Block controls in the DCP the proposed development has an excess of 26 spaces and therefore can easily comply with the visitor car parking allocation as per DCP No.2.

The two previous s96(1A) modifications to this development (known as 11/DA-21Rev01 and Rev02) involved one additional basement level and the reconfiguration of the existing basement to add a total of 161 car parking spaces to be allocated to Stage 3 of the development. These modifications were sought to minimise the excavation of quarry materials for Stage 3.

Due to the incorrect interpretation of the DCP parking requirements and given the previous modifications the proposal has an additional 187 car parking spaces than required. A strict interpretation of Council's definition of gross floor area means that these additional spaces could be counted towards the overall FSR for this stage of the development. This would result in approximately 2,500sqm of additional floor area, or an additional FSR of 0.09:1 for this stage.

As Council has previously approved the additional basement levels and is satisfied that the majority of the excess parking will be allocated for Stage 3 uses, there is no objection to the additional floor space being provided in the form of parking for this stage.

Section 5.1 – Design Guidelines

The design of the proposed development in terms of architectural merit is consistent with the requirements of Section 5.1.

Section 5.2 – The Public Domain

The proposed development has been assessed against the relevant public domain requirements of Section 5.2 and is consistent with these requirements.

Section 6.3 – Access and Mobility

The proposed development complies with the requirements of Section 6.3 as follows:

| Access and Mobility Requirements | Requirement | Proposal | Complies |
|---|--------------------|-----------------|-----------------|
|---|--------------------|-----------------|-----------------|

| | | | |
|--|---|--|---------|
| Adaptable Housing | 32 adaptable dwellings required to be provided, designed in accordance with the AS 4299. Access to the adaptable dwelling and relevant car spaces to be in accordance with the Australian Standards and the BCA | Conditions could be placed on any consent to ensure that the correct number of dwellings are provided. | Yes |
| Car parking for adaptable dwellings | One space required for each adaptable dwelling | One car space can be provided for each adaptable dwelling | Yes (1) |
| Commercial/Business Premises | Access in accordance with AS1428.2 and AS1735 (Lifts, escalators and moving walkways where required under the BCA. | Access can be provided as per the requirements. | Yes |
| Car parking for commercial/business premises | 2% of parking spaces where 50 or more parking spaces provided in accordance with AS 2890 (9 accessible spaces required based on required 434 car spaces. | Car spaces can be provided as per the requirements. | Yes (1) |

NB: an assessment of the proposal in relation to the Disability Discrimination Act and the BCA is in this report above.

(1) Disability accessible car spaces

The requirements relating to the design of disability accessible car spaces changed on the 1 May 2011 and apply to the proposed development. The new requirements in particular, require larger areas around a disability accessible car space. The development as lodged, does comply with these requirements. The applicant was advised of the new requirement as part of the original approved DA.

The new requirements can be adopted in the proposed development however it will require a redesign of the car parking areas and will result in a loss of some car spaces. Given that the proposed development has provided car parking in excess of the minimum requirements, the new requirements may be achieved.

Section 6.4 – Crime Prevention through Environmental Design

The proposed modification does comply with the requirements of Section 6.4 and the principles of Crime Prevention through Environmental Design.

Section 6.5 – Energy Efficiency

A BASIX Certificate has been provided for the proposed modifications. The development meets the target scores required for residential development.

Section 6.9 – Waste Management

The original conditions of consent applying to waste management still apply to this development

Draft Development Control Plan No.2 – Hurstville City Centre

At its meeting of 6 June 2012 Council resolved to exhibit Draft Development Control Plan No.2 – Hurstville City Centre. The purpose of the DCP was to adopt the height and floor space ratio controls of the Draft LEP.

The DCP is on public exhibition from 14 June 2012 to 12 July 2012.

Although it is acknowledged that Draft development control plans are not statutory considerations for the purposes of the Act, a table indicating this modification application's compliance with the DCP is shown below for the information of the Panel.

| Controls | Draft DCP No.2 | Current approval granted under 11/DA-21 for Stage 2 of the site | Proposed S96(2) | Complies |
|---------------------|-----------------------|---|--|----------|
| Height of buildings | 35m – 60m | Building A: 35.9m Building B: 35.9m Building E: 58.65 | Building A: 42.2m Building B: 41.9m Building E: 64.65m | No |
| Floor space ratio | 2.5:1 | 3.34:1 (for stage 2) 2.63:1 for the site as a whole | 3.83:1 2.82:1 for the site as a whole | No |

4. Impacts and the Public Interest

Natural Environment

No additional impact than originally approved.

Built Environment

The overall architectural merit and internal amenity of the proposal is considered to be acceptable (with the exception of the balcony sizes). The increased height does have an adverse impact on the view loss for some of the existing residents of Stage 1 of the development and this is discussed below.

Height and FSR

The non-compliances with height and floor space are discussed in the report above. The applicant has supported the non-compliances with Council's Draft LEP and current DCP

No.2 by stating that the increased density is consistent with the NSW Government policy to deliver accessible housing and that other sites in the near vicinity has much higher floor space ratios. Whilst these statements are true, the same could be said for any development site within the Hurstville City Centre, or in fact any city centre. If Council were to accept such statements then there would be little need for any planning controls to apply.

View Loss:

During neighbour notification and exhibition of the proposal, Council received an objection from a resident in Stage 1 of the development relating to view loss from the additional height.

Council raised this concern in writing with the applicant and further met with the applicant to discuss the view loss. In response the applicant has provided Council with justification based on the planning principle set down in *Tenacity Consulting v Warringah Council [2004] NSWLEC*.

The following is an assessment of the proposal against the four steps for view assessment set down in the *Tenacity* planning principle. The applicant's submission has been provided in italics and council officer comment is provided for each of the four steps.

Step 1. What views will be affected?

The Court said: "26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg. of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured."

Applicant's submission:

The view potentially impacted by the modified proposal is of the Sydney CBD skyline which is a distant element on the horizon located approximately 14km from Building D in the East Quarter site (Attachment B). We note the view of the Sydney CBD skyline is dependent on clear weather conditions.

The view of the Sydney CBD skyline is a distant element on the horizon and on a clear day allows views of individual building elements. The view northwards does not include clearly visible views of the interface between land and water. The views to the north east and east to Brighton-Le-Sands, Botany Bay and the Tasman Sea (approximately 4km to the east of the site) from the potentially affected units will not be impacted by the proposed increased height of Building B.

The Tenacity Court case considers water views and views showing the interface of land and water as more valuable than land views. In addition to views of these water features, views to the south of the Royal National Park will continue to be enjoyed by the units along the east and southern side of Level 12 in Building D

Council comment:

The applicant has stated that the views to the north- east and south will be maintained by the proposal. The views to the south are irrelevant for this assessment as there are no buildings

south of the existing Stage 1. This argument is also irrelevant as some of the units affected do not have a southerly view as existing.

The applicant has also stated that the views to the east will be maintained, however this is incorrect as Building E located immediately east of Building D is already approved 4 storeys higher than Building D which would block the views in an easterly direction. Further to this any views obtained to the north east would be obstructed by the additional proposed height in Building A.

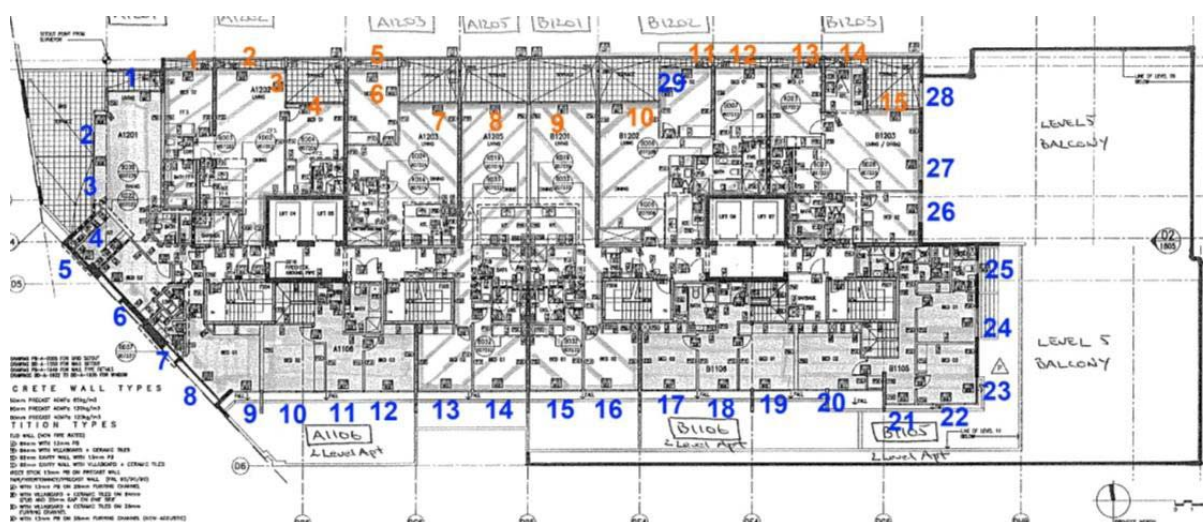
The primary view for units B1203 and B1204 on level 12 of Building D is towards the CBD skyline and this view would be totally lost. Whilst it is acknowledged that the views of the CBD are obtained over some distance, the city skyline Harbour Bridge and Sydney Tower can still be distinctively seen from Level 12 of Building D. The views currently obtained from these units are considered to be iconic.

Step 2: Where views are obtained

The Court said: "27 The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic."

Applicant's submission:

*The second step is to consider from what part of the property the views are obtained. **Figure 1** below identifies all windows/sliding doors located on Level 12 of Building D that will be potentially affected by the proposed increased height of Building B. There are a total of 44 glazed openings including windows and sliding doors within Level 12 of Building D. A total of 29 or 66% of the glazed openings will not be affected by the proposed height increase of Building B by virtue of these windows/sliding doors providing views to the west, east and south. 15 glazed openings will be potentially affected by the proposed modified development.*



Council comment:

The applicant has identified 15 openings that will potentially be affected by the development and argues that the proposed is reasonable as 66% of the openings for the whole level will not be affected. Given that the proposed modifications do not affect views to the south, east or west, this is misleading. The proposed modified building heights alter Buildings to the north of Building D and in this respect 100% of the north facing openings will be affected.

Further to this 6 of the openings are to the primary living areas of the units and the primary private open space of 6 units will be impacted. The views available from these 6 affected units are obtainable from a sitting position.

Step 3: Extent of the Impact

The Court said: "28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating."

Applicant's submission:

The third step is to assess the extent of the impact for the whole of the property and not just the windows affected. In this instance it is relevant that we will consider the views obtained for all units on Level 12 of Building D rather than the whole property.

The extent of the potential view impact for all units on Level 12 of Building D is summarised as follows:

- *The potential view impacts are limited to 6 of the 10 units on Level 12 of Building D. These units are A1202, A1203; A1204, B1201, B1202 and B1203.*
- *Of the 6 potentially affected units, Units A1205 and B1201 include south facing windows located off bedrooms. These bedroom windows are not affected by the proposed increased height of Building B. Additionally, Unit B1203 also includes east facing windows that are not affected by the proposed increased height of Building B.*
- *The proposed increased height of Building B does not impact any views to the 4 south facing units on Level 12, being Units 1201, A1106, B1106 and B1105 as they do not have any north facing windows.*

Council Comment:

The applicant has discussed the extent of the impact on Level 12 as a whole level, rather than the extent of the impact on each of the units affected. As 6 of the units potentially stand to lose their views towards the city skyline (considered an iconic view) the impact of the additional height is considered to be devastating – especially given that the views are obtained from primary living areas within the units.

The impact of the modification on the south facing units is not relevant to this modification.

Step 4: Reasonableness of the Impact

*29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of **non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design** could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable."*

Applicant's submission:

The proposal seeks to increase the height of Building B in conjunction with Buildings A and E and in harmony with the overall scale of the East Quarter site. The height increase is acceptable in the context of the site.

Further we note that only a single objection has been received by Council during the public notification period of the Section 96(2) application in relation to potential view loss impact. In summary, although the views to the Sydney CBD skyline are highly valued and currently easily obtained, the degree of view obstruction is considered acceptable for the following reasons:

- *A relatively small proportion of the views are affected for the whole of Level 12 (34% of windows/sliding doors);*
- *Only views from the units on the northern side of Level 12 are affected, with no impacts on views from the western, southern and eastern ends of the building;*
- *The Sydney CBD skyline views obtained are a significant distance from the site (14km), and recognising distinguishable individual buildings is dependent on exceptionally clear weather conditions; and*
- *Three potentially affected units on Level 12 (Unit A1205, B1201 and B1203) include other windows on secondary elevations to the east and south that provide other valuable views.*

Council comment:

The applicant has not addressed the fourth step in the Tenacity Principle. In their submission the applicant has addressed the reasonableness of the impact and not the reasonableness of the development causing the proposal. The development site already contains 703 units in buildings of various heights. There is no justification for the additional height except for the desire to provide more residential units.

Further to this, the proposed modification is unreasonable as it not only breaches the original height approved for the site, it also breaches the height in Council's adopted DCP No.2, the Draft Hurstville Local Environmental Plan (Hurstville City Centre) 2011 and the Draft Development Control Plan No.2.

Although not strictly a planning concern, the proposal is also unreasonable as residents who performed their due diligence in checking the planning controls and approved plans when

purchasing an affected unit in Stage 1 are being unreasonably impacted due to loss of significant views. It is reasonable to expect that the units on the top level of Building D would have been purchased for a premium price due to the city views – views which would no longer exist if this modification was approved.

Social Impact

The proposed modifications are not considered to result in any additional social impact than the development as approved.

Economic Impact

Concern is raised over the cumulative decrease in commercial floor space over the development from the original 2004 consent for the site to the current proposed modification.

The modification proposes the loss of 697.5sqm of commercial floor space on level 1 of Building B. This floor space is proposed to be converted into residential floor space. The resultant commercial floor space is 1,027sqm. This floor space is located in Building E and on level 10 of Building A.

To support the loss of commercial floor space the applicant submitted a Hurstville Office Review undertaken by Urbis dated 23 March 2011. The review was originally submitted to support the original development application for Stage 2.

This review specifies that the vacancy rate for the Hurstville CBD is generally at 18-22%. The review also goes on to conclude that the introduction of 1,500sqm of commercial space would be appropriate for the site, along with the increase in residential accommodation.

Although it is conceded that there is a high vacancy rate for commercial development in the Hurstville CBD, the applicant has not demonstrated that the commercial floor space is not viable for this site. Further to this, the applicant's own Hurstville Office Review states that 1,500sqm of commercial floor space is achievable on the site, whilst the applicant is only proposing 1,027sqm.

It should also be noted that the planning agreement previously entered into on the site proposes that 527sqm of commercial floor space be dedicated to community uses. Therefore, in reality only 500sqm of lettable commercial floor space is being provided for this stage of the development.

Therefore, the deletion of further commercial floor space is not supported.

Suitability of the Site

The previous development consents on this site have established that the site is suitable for a large mixed use development. This modification application does not alter this.

Public Interest

The proposed modification results in a development that exceeds Council's existing and anticipated future planning controls for the area. The modification also results in a decrease in potential employment generating floor space and results in a 'devastating' impact on the

views of some of the residents in Building D of the development. The proposal is therefore not in the public interest.

5. REFERRALS, SUBMISSIONS AND THE PUBLIC INTEREST

Resident

Adjoining residents were notified by letter and given fourteen (14) days in which to view the plans and submit any comments on the proposal. A notice was also placed in the St George and Sutherland Shire Leader.

Four (4) submissions were received. These are summarised below:

The proposal does not comply with the current LEP and DCP or the draft LEP adopted by Council

Comment: An assessment of the proposed modifications against Council's current and proposed planning controls is in this report above.

The FSR proposed is excessive and there is no public benefit resulting in the increase

Comment: The proposed increase to the FSR is discussed in the report above. It is agreed that there is no public benefit resulting from the increase to FSR or height.

The buildings proposed are in excess of the original approval and the development results in an unreasonable impact on the existing infrastructure such as roads

Comment: although the buildings are in excess of the original approval the impact on the road network has been considered by Roads and Maritime Services and Council's Traffic Engineers and no objection has been raised.

The proposal will impact on existing views to the city. When the property was purchased a premium was paid for the city view

Comment: The view loss to the existing dwellings in Building D is considered to be severe to devastating. A full assessment of the view loss is contained in the report above.

The additional levels will overshadow the buildings in Stage 1

Comment: The additional height proposed will have a minor impact on the north facing units in Stage 1, however due to the orientation of the site most of the units will still receive between 3-4 hours of sunlight during the winter solstice.

The deletion of commercial floor space does not support the business community

Comment: The applicant has provided an office market review with the modification application. This review and an assessment of the impact of the modification on the commercial space is discussed in the report above.

Senior Environmental Health and Building Surveyor

Council's Senior Environmental Health and Building Surveyor have raised concerns about the non-compliance of the proposed development with the current BCA, the Access to Premises Standard and the Disability Discrimination Act. These concerns are addressed in the report above.

External Referrals

Roads and Maritime Services

No objections

RailCorp

RailCorp raised no objection to the development subject to conditions of consent being attached to any consent granted.

Design Review Panel (DRP)

The comments of the Design Review Panel have been addressed in the report in the section entitled "State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development".

6. CONCLUSION

The existing approval for the site already exceeds Council's current and future intended planning controls. Further to this, the addition of two additional storeys to Buildings B and A would have devastating impacts on the views obtained from the top levels of Building D of Stage 1 of the development. The applicant has provided inadequate justification for the increase in height and floor space ratio and therefore these increases can not be supported.

There is no public benefit in approving a development that decreases commercial floor space; does not provide adequate information to satisfy the Disability Discrimination Act; has a devastating view loss impact and does not comply with Council's planning controls.

RECOMMENDATION

THAT pursuant to Section 96(2) of the Environmental Planning and Assessment Act, 1979, as amended, the Joint Regional Planning Panel refuses the modification to Development Consent 11/DA-21 for the addition of two (2) x storeys to buildings A, B & E, deletion of commercial floor space in Building B, associated facade and basement changes

1. Pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, the proposed modification would have a devastating impact on the views obtained from Stage 1 of the development
2. Pursuant to the provisions of Section 79C(1)(a)(ii) of the Environmental Planning and Assessment Act 1979, the proposal is not supported as it does not comply with the requirements of Draft Hurstville Local Environmental Plan (Hurstville City Centre 2011)
3. The proposed development is unsatisfactory, pursuant to the provisions of Section 79C(1)(b) of the Environmental Planning and Assessment Act 1979, in that inadequate

justification has been given for the loss of commercial floor space in the development. The loss of commercial floor space is considered to have an adverse economic impact

4. Council can not be certain that the proposal can comply with the provisions of the Disability Discrimination Act 1992 or the Access to Premises Standard.
5. Having regard to the previous reasons noted above, 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.