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Wilshire Webb Staunton Beattie
Lawyers

Our Ref: KW:UM:212176

14 August 2013

Mr J Nassif
Toplace Pty Ltd
C/- LJB Urban Planning Pty Ltd
26 Shoplands Road
ANNANGROVE NSW 2156

Dear Sir

42-44 PEMBERTON STREET, BOTANY ("PARKGROVE TWO")
DA12/206

We provide the following brief summary of the legal status of DA12/206 which is to be determined by the JRPP on 21 August 2013.

DA12/206

This application relates to the property at 42-44 Pemberton Street, Botany and is generally for works to buildings referred to as D, E and F on the site. The works include the construction of underground parking for the buildings.

DA12/206 is a properly made development application. There is a onus and expectation for the consent authority to determine properly made development application (see section 80(1) Environmental and Planning Assessment Act (the Act))

The only legal caveat for not doing so would be the provisions of section 83D(2) of the Act. This section states:

While any consent granted on the determination of a staged development application for a site remains in force, the determination of any further development application in respect of that site cannot be inconsistent with that consent.

DA10/313

This consent, which is termed the masterplan consent, is not a staged development consent.

Council's assessment of the original application and subsequent consent together with Council's own legal advice come to the conclusion that

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DA10/313 is not a staged consent. See A, Houston Dearn O'Connor Letter 22 July 2013; B, Further Memorandum of Advice P. Clay SC 6 August 2013; C, Email 6 August 2013.

The Applicant agrees with this position.

The consequence of this factual circumstance is that section 83D(2) of the act is not applicable and therefore is no bar to the JRPP determining DA12/206.

Can DA12/206 amend DA10/313

DA12/206 can modify DA10/313 see section 80A(b) of the Act. A subsequent development consent can modify a previous consent on the same land. Given the original consent is not staged, it can be modified by DA12/206.

Is a section 96(2) Application necessary to modify DA10/313

No. The Council recommendation in the Supplementary Report to the development meeting dated 7 August 2013, that the section 96(2) application DA10/313/04, be received and noted is appropriate (see D Supplementary Report).

Has DA10/313 lapsed?

We note the Council resolution in relation to DA12/206 where the status of DA10/313 was raised.

A development consent generally is not invalid until declared to be so. Whether a masterplan consent which in its terms does not consent to any physical development works, can lapse is a debateable issue.

The important point is that even if it is accepted DA10/313 has lapsed it does not prevent determination of the subject DA. The only additional issue which it raises is one of merit in the assessment process. There is a requirement in the DCP for a masterplan consent to be in place. The lack of a masterplan does not operate as a statutory bar to determination or approval of the subject DA. The DCP is not an Environmental Planning Instrument as defined. The DCP requirement after proper analysis including recognition of DA10/313 and its subsequent amendments, can be dispensed with, see also section 79C(3A) of the Act.

14 August 2013

Conclusion

We are advised that Council resolved to recommend refusal of DA12/206 on the following grounds:

1. The application made under Section 96(2) of the EP&A Act 1979 to modify the Masterplan consent under DA10/313 has been refused by Council as the consent authority.
2. The development application as proposed under DA12/206 for buildings D, E & F at 42-44 Pemberton Street, Botany does not constitute a development that will be substantially the same as the Masterplan development approved under DA10/313.

Having regard to this advice we make the following comments:-

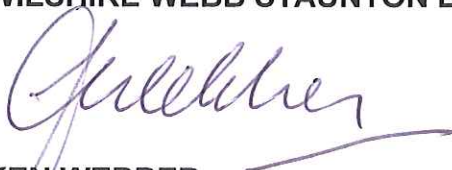
In relation to the first ground, it is of no relevance that the Section 96 modification was refused. It would only be relevant if DA10/313 was a staged development consent. Its refusal does not stop DA12/206 from being determined.

The second ground for Council's recommended refusal again flows from its misunderstanding of the status of DA10/313. It is not necessary that DA12/206 is substantially the same as DA10/313. It is only relevant if DA10/313 was a staged consent where section 83D(2) requires subsequent development applications to be not "*inconsistent*" with the original staged consent. When section 83D(2) does not apply there is no requirement that a subsequent DA needs to be substantially the same or consistent with the original consent.

There is no legal bar to the JRPP determining DA12/206 on 21 August 2013. The JRPP is required to undertake a merit assessment of the application and it may, after doing so, grant a consent (with conditions) to Development Application DA12/206. (See E, Development Assessment Report for DA12/206 7 August 2013).

Yours faithfully

WILSHIRE WEBB STAUNTON BEATTIE



KEN WEBBER
Partner

"A"

HOUSTON DEARN O'CONNOR

Solicitors and Attorneys

T.J. O'Connor, B.A., LL.B.
S. E. Shneider, B.A., Dip Law (LPAB)
Consultant
A.J. Houston, LL.B.

Our Reference:
AJH:AS:B5749

Your Reference:

22 July 2013

The General Manager
Council of the City of Botany Bay
DX 4108 MAROUBRA JUNCTION NSW

Attn: Rene Hayes

Hayesr@botanybay.nsw.gov.au

Dear Sir

RE: 42-44 PEMBERTON STREET, BOTANY – DA 10/313

We refer to Council's letter of instructions to us of 3 July 2013 requesting our advice as to whether a Section 96(2) modification application currently before Council to modify the above development consent satisfies the threshold test to enliven the modification power, namely, whether Council 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).

It appears from the material provided to us by Council that the subject property is partly within Zone Residential 2(b) and partly within Zone 4(B1) Mixed Industrial Restricted.

On 27 May 2011 Council granted deferred commencement consent to DA10/313 for an approved masterplan comprising a mixed residential development and for demolition of all existing structures. The masterplan development was indicated as stage 1 and the demolition indicated as stage 2. Stage 1 approved a concept masterplan development consisting of mixed residential and studio workshops including industrial, commercial and retail.

It approved building envelopes and footprints for 6 buildings designated A-F with buildings A, B and C located within the 4(B1) zone comprising residential and industrial commercial components and buildings D, E and F located within the residential 2(b) zone comprising the predominance of the residential component.

The modification application proposes no changes to buildings A, B and C housing the mixed residential industrial/commercial component of the development which therefore remain unchanged.

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The modifications are proposed to buildings D, E and F and propose:

- A one storey increase in block D from 5 to 6 storeys.
- A two storey increase in block E from 5 to 7 storeys.
- A two storey increase in block F from 4 to 6 storeys.
- An increase in the total number of residential units from 165 to 195.
- An additional 125 parking spaces and amendments to the basement car park.
- Increased FSR from 1.38:1 to 1.52:1.
- Minor changes to the setbacks of buildings D and F to comply with required separation distances as consequence of the proposed height increases of those buildings.

We understand that the applicant has lodged with Council DA12/206 (being the DA to construct buildings D, E and F as proposed to be modified) but that such application cannot be dealt with by the Joint Regional Planning Panel until the current modification application has been approved as it is considered that it would not be consistent with the current masterplan consent DA10/313 and thus in contravention of Section 83D(2) of the EP&A Act.

The applicant has provided Council with an opinion by Philip Clay SC in support of its contention that the development as proposed to be modified will be substantially the same development as that approved in the original masterplan consent. Mr Clay sets out the relevant case law dealing with the appropriate tests for addressing the question of whether the development as proposed to be modified will be substantially the same as the development originally approved and we generally concur with what he has set out in that regard.

Mr Clay argues that the masterplan consent stage 1 is in the nature of a concept plan approval and that it is similar to, but probably not, a staged development consent under Division 2A of Part 4 of the EP&A Act. In his opinion the masterplan stage 1 consent does not authorise any of the elements of "development" as that term is defined in Section 4 of the EP&A Act. As a consequence he takes the view that the masterplan consent therefore operates effectively as a policy document and that it is therefore difficult to conclude other than that the modified development is substantially the same as the original development.

At paragraphs 32 and 33 Mr Clay states as follows:

"32. If the enquiry is to go further, (which I do not suggest it needs to), that is comparing the original and proposed modification as policy documents, setting indicative envelopes and the like, then the conclusion will be the same.

33. The changes are not so radical as to change the essence or materiality of the policy represented by the Masterplan consent. It remains a mixed-use

development with buildings in the same or similar locations, commercial/retail space, terrace houses, units and underground parking. Heights vary, but are generally within the policy framework set."

He then concludes that the development to which the consent as modified relates is substantially the same development as that for which consent was originally granted.

We would respectfully agree that a comparison involving an appreciation of both the qualitative as well as the quantitative aspects of the concept development as originally approved, within the concept development to which it is sought to be modified, leads to the conclusion that they are essentially or materially the same and that accordingly the threshold test for further consideration under Section 96(2)(a) is met.

However, there is a further issue to be considered. What Section 96(2)(a) requires is that the consent authority be 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. If Mr Clay is correct in his view that the consent does not approve any development, and that it is probably not a staged development consent under Division 2A of Part 4 of the Act, then the question arises as to how Section 96(2)(a) can be availed of.

If consent DA10/313 is in fact a staged development application then Section 96(2)(a) can apply to it by virtue of Section 83D(1) of the Act which provides:

"(1) The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a staged development application and a development consent granted on the determination of any such application."

Section 83B(1) defines as staged development application as follows:

*"(1) For the purposes of this Act, a **staged development application** is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications. The application may set out detailed proposals for the first stage of development."*

Section 83B(2) provides:

"(2) A development application is not to be treated as a staged development application unless the applicant requests it to be treated as a staged development application."

On 10 October 2007 Council issued a consent DA06/311 for a masterplan development for the subject site consisting of mixed residential and studio workshops including industrial commercial and retail in a similar form to that which was later the subject of the present consent DA10/313 also for demolition of existing buildings.

However, "stage 1" of that consent appears to have comprised the whole of the concept proposal, and "stage 2" the proposed demolition of existing buildings. Condition 4(a) of

the consent made it clear that separate further development applications were required for both the proposed concept development and demolition of existing buildings.

Given that there was apparently no proposal by, or request from, the applicant for staging of elements of the concept development proposal we are doubtful that the consent was a "staged development application" as earlier defined, despite the reference to the concept development proposal and demolition as separate stages.

The statement of environmental effects which accompanied DA10/313 described the application as being for "amendment to a stage 1 DA for a mixed residential development and detailed consent for demolition". Although it was lodged as a separate DA it was described in the statement of environmental effects as essentially being an application to modify the earlier consent DA06/311. Our doubts that that earlier development application was a staged development application to which Section 96(2)(a) could apply by virtue of Section 83D(1) seem to be supported by the applicant's decision to seek to modify it via a fresh development application rather than by way of an application to modify under Section 96(2)(a).

We similarly have doubts that the current DA10/313 is a staged development application as defined in Section 83B(1). At the request of the applicant, as set out in the accompanying statement of environmental effects, the consent was structured so that stage 1 was the whole of the concept proposal for development of the site and stage 2 was designated as demolition of existing buildings with the applicant being able to proceed with the latter immediately upon the consent becoming active.

Despite the references to stage 1 and stage 2 in the current consent we believe that the "staging" referred to in Section 83B(1) and (2) is staging of the actual development the subject of the concept proposal and that the concurrent application for demolition of existing buildings may well not constitute a staged development application as defined by Section 83B(1). If that view is correct, then it appears to us that Section 83D(1) would not operate so as to apply the provisions of Section 96(2)(a) to the current consent with the result that Council is not entitled to entertain the current modification application.

As we noted earlier, Mr Clay also expresses the view at paragraph 13 of his opinion that the masterplan consent stage 1 is probably not a staged development consent under Division 2A of Part 4 of the Act. If that view is correct, several results follow, namely:

- (i) the consent is not capable of being modified under Section 96(2)(a);
- (ii) the stage 1 masterplan consent in DA10/313 operates only as a policy document setting a framework for future development applications (as Mr Clay suggests);
- (iii) the provisions of Section 83D(2), which prohibits subsequent development applications inconsistent with a staged development consent that remains in force, would also not apply;
- (iv) Council would be entitled to consider DA12/206 for buildings D, E and F on its merits.

We suggest that in the first instance Council might like to instruct us to obtain senior counsel's opinion. If not, then we recommend that Council communicate our views to the applicant for consideration and response by its legal representatives. A tax invoice of our costs and disbursements of attending to this matter on Council's behalf is enclosed for attention in due course.

Yours faithfully,



HOUSTON DEARN O'CONNOR
Beyt Houston

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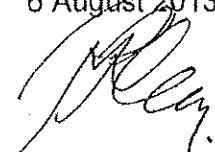
PROPOSED MODIFICATION AND DEVELOPMENT APPLICATION
MASTERPLAN PEMBERTON -- WILSON STREET PRECINCT
42-44 PEMBERTON STREET, BOTANY

FURTHER MEMORANDUM OF ADVICE

WILSHIRE WEBB STAUNTON BEATTIE LAWYERS
LEVEL 9, 60 YORK STREET, SYDNEY
DX 777 SYDNEY

1. On 21 June 2013 I gave certain advice and since that time I have had the benefit of reading an advice from Houston Dearn O'Connor dated 22 July 2013 and a subsequent discussion with Mr Tim O'Connor of that firm.
2. My advice included the conclusion that the consent granted in respect of DA 10/313 (the Masterplan Consent) was probably not a staged development consent. Council has since reviewed material not available to me, and has formed that view that it is not staged development having regard, amongst other things, to the lack of a request by the Applicant to treat it as such as required by Section 83B (2) of the *Environmental Planning & Assessment Act* (the Act).
3. I remain of the opinion, shared by the Council solicitors, that the Masterplan consent does not authorise any development and operates only as a form of policy document to guide future applications. It does not operate as a statutory constraint on future development applications (cf s83D(2) EPA Act in respect of staged development applications).
4. In my advice I addressed the "substantially the same" question at the request of the applicant for the modification on the assumption (at [19]) that the Council required an application to modify the Masterplan consent.
5. In circumstances where the Masterplan consent does not authorise or grant consent to any development, a modification application under Section 96(2) of the Act is in fact not necessary, appropriate or probably possible. The question of any "modified" development being substantially the same simply does not arise in respect of this type of consent, where no development is authorised by it.
6. Council has before it DA 12/206 which is a development application to construct buildings D, E and F in the form as was proposed to be modified in the modification application.
7. There is no reason why the development application cannot be determined by the JRPP or Council. There is no need to modify the Masterplan consent prior to that consideration, or at all.
8. The provisions of Section 83D (2) of the act do not apply and therefore Council and or the JRPP can consider the development application on its merits.

6 August 2013



Philip Clay SC
Martin Place Chambers

" C "

Ken Webber

From: Philip Clay <philip@clay.com.au>
Sent: Tuesday, 6 August 2013 11:19 AM
To: Tim O'Connor
Cc: Ken Webber
Subject: Re: Botany

I agree.

(Morning tea at court).

Philip

Sent from my iPad

On 06/08/2013, at 11:14 AM, Tim O'Connor <tim@hdo.com.au> wrote:

Dear Philip

I confirm our discussion this morning when it was agreed that ParkGrove number one is a staged development whilst ParkGrove number two is not. Thus, section 83D (2) of the EP and A act is not applicable with respect to ParkGrove number two and the development application seeking approval for the three buildings can be determined by the Council. We further understood agreement was that the section 96 modification application therefore did not need to be determined.

The matter is going up to Council tomorrow evening and it would assist if you could confirm in writing that your views are as above.

Regards
Tim O'Connor
Houston Dearn O'Connor
Solicitors
Tel: 9744 9247
Fax: 9744 6739
email: Tim@hdo.com.au

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" D "

**SUPPLEMENTARY REPORT TO ITEM NO. 4.2 RELATING TO S96(2)
APPLICATION TO AMEND DA10/313 - 42-44 PEMBERTON STREET,
BOTANY (PARKGROVE TWO)**

File No: DA-10(313).04
Responsible Officer: Rodger Dowsett - Director of Planning and Development
Date of Preparation: 6 August 2013

DA No: DA10/313/04
Consent Date: Operational Consent DA10/313 issued 2 April 2013
Deferred Commencement Consent originally issued 18 May 2011
Property: 42-44 Pemberton Street, Botany
Lot & DP No: Lot 100 in DP 875508
Details: Section 96(2) Application to modify Development Consent No.10/313 to amend the approved staged Masterplan by proposing the construction of 164 residential units within Buildings D, E and F comprising the following;

- To construct Building D being a 6 storey building containing 41 units;
- To construct Building E being a 7 storey building containing 63 units;
- To construct Building F being a 6 storey building containing 60;
- To construct 346 underground car parking spaces. (285 spaces are to be dedicated to Buildings D, E and F); and,
- To have a FSR for the 3 Buildings of 1.21:1 (as calculated under BLEP 1995), and 1.08:1 (as calculated under the Botany Bay LEP 2013).

Applicant: Krikis Tayler Architects
Applicant Address: Level 7, 96 Pacific Highway, North Sydney, 2060
Builder: To be advised
Principal Certifying Authority: To be advised

| | |
|------------------------------------|---|
| Property Location: | Within Pemberton-Wilson Street Precinct, bounded by Pemberton Street, Warana Street and Wilson Street |
| Zoning: | R3 – Medium density residential B4 – Mixed Use Botany Bay Local Environmental Plan, 2013 |
| Present Use: | Container Storage Terminal |
| Classification of Building: | Class 2 - residential flat building Class 7a - carpark |
| Value: | \$57,500,000 (Quantity Surveyor Feb 2012 – for entire original DA incl. mixed-use) |

SUMMARY OF REPORT

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| Recommendation: | Note the legal advice that states that Section 96 Application is NOT required to amend the Masterplan. DA2012/206 |
| Special Issues: | Accompanying DA12/206 to be considered by JRPP; Residents' Consultative Committee. |
| Public Objection: | Yes – 1 submission with accompanying petition signed by 44 surrounding (residential) neighbours. |
| Permissible: | Yes |

THE DIRECTOR – PLANNING AND DEVELOPMENT REPORTS:-

Executive Summary

This report is a supplementary report to Item 4.2 of the Development Committee Meeting to be held on 7 August 2013. Item 4.2 recommends that the Section 96(2) Application be received by Council pending receipt of further legal advice.

The legal advice has now been received and is the subject of this report.

This report recommends that the legal advice be received and that the initial recommendation remains unchanged.

Section 96(2) Application for Parkgrove Two

The current Section 96(2) Application proposes the following:

- Amend the number of approved residential units on the site from 165 to 195;
- Increase the dedicated number of residential carparking spaces for Buildings D, E and F from 230 to 285 spaces;
- Amend the basement parking;
- Increase the height of Building D from 5 to 6 storeys;
- Increase the height of Building E from 5 to 7 storeys;
- Increase the height of Building F from 4 to 6 storeys;
- To have an entire FSR of 1.38:1 (as calculated under Botany Bay LEP 2013); and,
- Modification to the description of the development and amendment to Conditions 1, 7, 13, 14, 15 and 22.

It should be noted that no alterations or amendments are being proposed to the previously approved Building A, B and C which face Pemberton Street and comprise the mixed-use portion of the site.

The Section 96 Application has also been accompanied with a development application (DA12/206) which is a JRPP matter which is Item 4.14 of the Development Committee Meeting to be held on 7 August 2013. DA12/206 seeks consent for the following:

- Construction of 164 residential units within Buildings D, E and F;
- The total number of residential car parking spaces for Buildings D, E and F being 285 spaces within a basement level car park;
- To construct Building D being a 6 storey building containing 41 units;
- To construct Building E being a 7 storey building containing 63 units;
- To construct Building F being a 6 storey building containing 60; and,
- To have a FSR for the 3 Buildings of 1.21:1 (as calculated under BLEP 1995), and 1.08:1 (as calculated under the Botany Bay LEP 2013)

Legal Advice

There has been an exchange of legal correspondence regarding whether or not the current Section 96 Application was required.

Council received final legal advice dated 6 August 2013 from Houston Dearn O'Connor. The advice includes email correspondence dated 6 August 2013 between Mr O'Connor of Houston Dearn O'Connor and Philip Clay SC.

The email from Mr O'Connor to Philip Clay SC states:

I confirm our discussion this morning when it was agreed that Parkgrove number one is a staged development whilst Parkgrove number two is not. Thus, section 83D(2) of the EP and A act is not applicable with respect to Parkgrove number two and the development application seeking approval for the three buildings can be determined by the Council. We further understood agreement was that the section 96 modification application therefore did not need to be determined.

The email reply from Philip Clay SC was:

I agree.

Houston Dearn O'Connor by covering letter dated 6 August 2013, Council's Solicitors advised:

We refer to previous advices given to Council in this matter by Bert Houston and to the conference he had with Council officers yesterday. The writer has spoken with the Applicant's Senior Counsel, Philip Clay, and we enclose a copy of our email sent to Philip Clay today. We also enclose a copy of his response today.

This is consistent with the earlier view expressed that we did not believe that DA 10/313 was a Staged Development Application and thus s83D(2) (prohibiting subsequent inconsistent Development Applications) did not apply to Council when considering the Development Application for the three (3) buildings being Development Application 10/206.

Council can therefore consider that application in isolation and the earlier Parkgrove No. 2 approval would only be seen as a policy document which evidenced Council's then preferred development for the whole site, as indicated in the penultimate paragraph of Mr Houston's letter to the Council of 1 August 2013.

Copies of all the advices are contained on the File.

In summary the legal advices received indicate:

- The current Masterplan approval (DA10/313) does not grant consent to "development" by condition 2 of that consent. Section 96 cannot be used to vary the physical built form within the approved Masterplan, when the Masterplan itself has not approved any building works. Therefore the consent is not capable of being modified under Section 96(2)(a);
- The stage 1 Masterplan consent in DA10/313 operates only as a policy document setting a framework for future development applications;
- The provisions of Section 83D(2), which prohibits subsequent development applications inconsistent with a staged development consent that remains in force, would not apply as the consent to DA10/313 is not a staged Development Consent; and
- DA12/206 for buildings D, E and F on its merits can be considered on its merits.

Conclusion

Taking into account this supplementary report and the legal advices received, there is no change to the original recommendation in Item 4.2 of the agenda – being that the Section 92(2) Application to amend DA10/313 be received.

RECOMMENDATION

THAT:

1. Council the contents of this supplementary report; and
2. Council receive and note the Section 96 Application No. DA10/313/04.

4.14 42-44 PEMBERTON STREET, BOTANY (PARKGROVE TWO) - DA12/206 - TOCONSTRUCT BUILDINGS D, E AND F, UNDERGROUND CAR PARKING AND ASSOCIATED LANDSCAPE WORKS - JOINT REGIONAL PLANNING PANEL

File No: DA-12(206).04

Responsible Officer: Rodger Dowsett - Director of Planning and Development

Date of Preparation: 1 August 2013

DA No: 12/206

Application Date: 7 November 2012

Property: 42-44 Pemberton Street, Botany

Lot & DP Nos: Lot100 in DP875508

- Details:**
- Construction of 164 residential units within Buildings D, E and F;
 - To construct 346 underground car parking spaces. (285 spaces are to be dedicated to Buildings D, E and F);
 - To construct Building D being a 6 storey building containing 41 units;
 - To construct Building E being a 7 storey building containing 63 units;
 - To construct Building F being a 6 storey building containing 60; and,
 - To have a FSR for the 3 buildings of 1.21:1 (as calculated under BLEP 1995), and 1.08:1 (as calculated under the Botany Bay LEP 2013)

Applicant: Krikis Tayler Architects

Applicant Address: Level 7, 96 Pacific Highway, North Sydney 2060

Builder: To be advised

Principal Certifying Authority: City of Botany Bay

Property Location: Within Pemberton-Wilson Street Precinct, bounded by Pemberton Street, Warana Street and Wilson Street

| | |
|------------------------------------|---|
| Zoning: | Residential 2(b) Industrial Light 4(b1) Botany LEP 1995 (Clause 1.8A of the BBLEP 2013 states: <i>If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.</i>) |
| Present Use: | Demolition already commenced |
| Classification of Building: | Class 2 - residential flat building Class 5 - commercial building Class 7a - carpark |
| Value: | \$57,500,000 (Quantity Surveyor Feb 2012 – for entire original DA incl. mixed-use) |
| Drawing No: | N/A |

SUMMARY OF REPORT

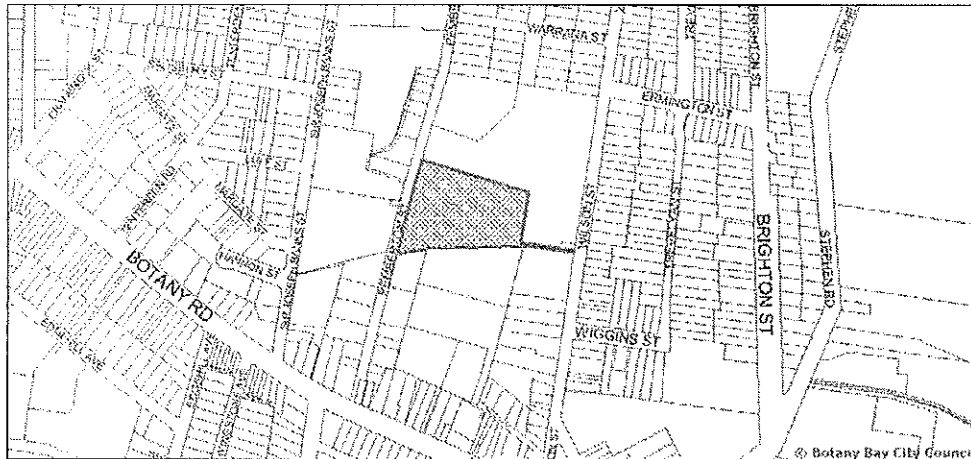
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| Recommendation: | Note the contents of this report; |
| Special Issues: | JRPP, Residents' Consultative Committee; |
| Public Objection: | 1 – petition signed by 44 neighbouring/surrounding residents; |
| Permissible: | Yes. |

THE DIRECTOR OF PLANNING AND DEVELOPMENT REPORTS:

Executive Summary

Council received DA12/206 on 7 November 2012. The development application is consistent with the Section 96 modification to amend the existing development consent currently applicable to the site (being DA10/313), the approval of which permits a mixed residential development of the site and the demolition of all existing structures.

The map below identifies the location of the subject site. The site has a total area of 13,162m² and is irregular in shape with street frontage of 117m to Pemberton Street and 3.7m to Wilson Street. A 3.5m wide easement to drain water is located along part of the site in the southern boundary.



The subject development application (DA12/206) proposes the following:

- Construction of 164 residential units within Buildings D, E and F;
- The total number of residential car parking spaces for Buildings D, E and F being 285 spaces within a basement level car park;
- To construct Building D being a 6 storey building and having a maximum building height of 19.42m (to the roof) and containing 41 units;
- To construct Building E being a 7 storey building and having a maximum building height of 21.8m (to the roof) containing 63 units;
- To construct Building F being a 6 storey building and having a maximum building height of 20m (to the roof) containing 60; and,
- To have a FSR for the 3 Buildings of 1.21:1 (as calculated under BLEP 1995), and 1.08:1 (as calculated under the Botany Bay LEP 2013)

The total floor space over the entire site will become 1.38:1 (as calculated under Botany Bay LEP 2013) inclusive of the previously approved Buildings A, B and C.

This development application does not seek development consent for Buildings A, B and C fronting Pemberton Street, which also form part of the development site.

Given that the application was submitted prior to the gazettal of Botany Bay LEP 2013, the application has been considered and assessed under Botany LEP 1995.

The DA was advertised and publicly exhibited for a period of 30 days from 4 December 2012 until 8 January 2013. Surrounding and adjoining property owners were also notified by mail. No submissions were received in response to the DA.

The S96 Application (DA10/313/04) which accompanies DA12/206 was notified for a 14 day period from 14 May 2013 until 28 May 2013, during which time one submission was received comprising a petition signed by 44 residents. The issues raised in the submission will be addressed as part of the report to the JRPP for DA12/206.

Council Officers held a Resident Consultative Committee Meeting on 29 July 2013 to address the development proposal and the petition.

State Environmental Planning Policy No. 65 – Residential Flat Building

On 3 May 2013, the Design Review Panel considered the amended application and concluded as follows:

The application is supported subject only to the relatively minor comments above being addressed to the satisfaction of Council.

In addition to the above, further detailed design certification has been submitted to ensure compliance with SEPP 65. In this regard the proposal also complies in all respects with the separation distances of the Residential Flat Design Code that accompanies SEPP 65.

Development Standards – Building Height

The table below provides a detailed comparison of the total height variations of each of the proposed buildings (D, E and F) and the variation to Council's height controls which currently exist under Botany Bay LEP 2013 and the controls which existed at the time the original Masterplan was approved (DA10/313) under Botany LEP 1995.

| Building | Approved Masterplan (DA10/313) | PROPOSED DA12/206 | BBLEP 2013 (22m incl. lift overrun) |
|----------|-----------------------------------|--|---|
| D | 5 storeys (17.05m) | 6 storeys 20.72m (lift overrun) 19.42m (to roof) | Yes -1.28m |
| E | 5 storeys (17.05m) | 7 storeys to New Street 1 6 storeys to courtyard 22.9m (lift overrun) 21.8m (to roof) | Yes -0.2m (Note1) |
| F | 4 storeys (13.3m) | 6 storeys 21.32 (lift overrun) 20.02m (to roof) | Yes -0.68m |

Note 1: Building E will have a building height 0.9m beyond the 22m height limit to accommodate the lift overrun.

With respect to the table provided above, Council should note that the provisions relating to the maximum permissible height of development within the Botany local government area as contained and currently exhibited in the Draft Botany Bay Comprehensive DCP 2013 has been amended to become consistent with provisions of BBLEP 2013.

Clause 4.3(2A) of the BBLEP 2013 permits on land zoned R3 or R4 and in excess of 2,000m² a maximum permissible height of 22m.

As can be seen from the table above, except for a minor variation to Council's building height requirement where the lift overrun of Building 'E' exceeds that requirement by 900mm, the proposal otherwise complies with the maximum building height requirements as provided under Clause 4.3.

Development Standard – FSR

The table below provides a detailed comparison of the total FSR variation that the development proposal will have over the entire site.

| | Approved Masterplan (DA10/313) | PROPOSED (DA12/206) | BBLEP 2013 1.5:1 |
|------------|---|--|-----------------------------|
| FSR | 1.53:1 with additional units (calculated under Botany LEP 1995) | 1.38:1 with additional units (calculated under BBLEP 2013) | YES |

Development Standard – Unit sizes and car parking

Council's DCP 35 - Multi Unit Housing and Residential Flat Buildings sets the following minimum internal areas for units:

- Studio: 60m²
- 1 bedroom: 75m²
- 2 bedrooms: 100m²
- 3 bedrooms: 130m²

The development proposal complies with the above minimum area requirements for each unit typology.

The proposal otherwise complies with the minimum car parking requirements of Council's DCP which requires the apportionment of spaces in the following manner:

Studios: 1 space per dwelling
 1 bedroom units: 1 space per dwelling
 2 bedroom units: 2 spaces per dwelling
 3 bedroom units: 2 spaces per dwelling
 1 visitor space/10 units; and
 1 car wash bay per 10 dwellings (with carwash bays being permitted to double as visitor spaces).

The proposed unit mix is 60 studio and 1 bedroom units; and, 104 x 2/3 bedroom units. Based on this mix a total of 268 resident car parking spaces are required, plus 17 visitor spaces/car wash bays, being a total of 285 spaces for Building D, E and F.

The application proposes the construction of 346 spaces, 285 of which will be dedicated to Buildings D, E and F, with the remaining to be apportioned to Buildings A, B and C.

Residents Consultative Committee

The Residents Consultative Committee met on Monday evening 29th July at which time the four (4) items of the petition were responded to, the essence of which included:-

- Confirmation of Council's current controls under the recent Botany Bay LEP 2013;
- Building Height;
- Privacy of adjoining R2 Zoned land on Wilson Street; and
- Traffic Issues.

The residents were keen to see a traffic sharing strategy be developed, and closed intersections such as Bay Street and Wentworth Ave be opened to permit a general use of Bay Street as an alternative to Page Street.

In respect of height, concern was raised at the proposed height of Building E (calculated at 7 storeys) notwithstanding that the height is within the LEP control of 22m. The concern is predicated on privacy and precedence in that it exceeds 6 storeys.

Whilst Building E may not set a precedent, undertakings were given to the residents to respond to the privacy issues.

CONCLUSION

The application was registered with the JRPP on 13 December 2012. The Panel was briefed about the subject application on 16 January 2013. A meeting date to hear the matter has been scheduled for 21 August 2013.

RECOMMENDATION

THAT:

Council receive and note the report.