

<b>JRPP No. 2012SYW076</b>
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**Proposal:** Section 96(2) Modification Application proposing modifications to Development Consent No. 166.1/2010 approved for a mixed-use development within 6 multi-storey buildings comprising a medical centre, offices and 140 residential apartments and associated car parking and landscaping

**Location:** Lot 10, DP 1061484, No. 368 Hamilton Road and Lots 1-3, DP 1083074, No. 80-84 Tasman Parade, Fairfield West

**Owner:** Brenex Constructions Pty Ltd

**Proponent:** Dyldam Developments Pty Ltd

**Capital Investment Value:** \$24,624,046

**Zoning:** 3(c) Local Business Centre and 2(a) Residential A under Fairfield Local Environmental Plan 1994  
  
B2 Local Centre and R2 Low Density Residential under Draft Fairfield LEP 2011

**File No:** DA 166.1/2010

**Author:** Nelson Mu, Senior Development Planner  
Fairfield City Council

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## RECOMMENDATION

1. That Section 96(2) Modification Application No. 166.2/2010 be refused for the following reasons:
  - i. The provisions of Section 96(2) of the Environmental Planning and Assessment Act, 1979 do not apply to the modified development in that the proposed modifications render the development not substantially the same development as originally approved due to the number of dual key apartments proposed.
  - ii. The development will have an unacceptable traffic and parking impact due to the number of dual key apartments proposed and the impact of which, in terms of traffic and car parking, have not been considered.
  - iii. The proposed development, as amended, does not comply with the required number of car parking spaces as stipulated in Fairfield City Wide Development Control Plan 2006.

- iv. The development provides reduced amenity for residents due to overlooking between units.
- v. The proposed development would result in adverse visual impacts upon the amenity of surrounding properties.
- vi. The external appearance of the development is of a reduced quality due to the removal of various building articulations, and height and bulk increases have not been adequately justified.
- vii. The additional units proposed are considered to be excessive given the context and nature of the site and represent an over-development of the site.
- viii. Approval of the application is not considered to be in the public interest.

2. The objectors be advised of Council's decision in this matter.

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## **SUPPORTING DOCUMENTS**

<b>AT-A</b>	Locality Plan	1 page
<b>AT-B</b>	Architectural Plans	37 pages
<b>AT-C</b>	Supporting Documentation	17 pages
<b>AT-D</b>	Amended Traffic Impact Statement	5 Pages
<b>AT-E</b>	Letters of Objection	15 pages
<b>AT-F</b>	Section 150 Certificate detailing zoning	1 Page

## **EXECUTIVE SUMMARY**

This Section 96(2) Modification Application proposes modifications to Development Consent No. 166.1/2010, issued for a mixed-use development for the construction of a residential and retail development within 6 multi-storey buildings, comprising a medical centre, offices and 140 residential apartments above an existing shopping centre at 368 Hamilton Road and 80-84 Tasman Parade, Fairfield West.

The application seeks amendments to the approved development, as originally determined by the Joint Regional Planning Panel (JRPP), as follows:

- Raising of the subfloor levels to accommodate services, resulting in an increase of the height of the development by approximately 800mm to 985mm.
- Increase the number of residential apartments from 140 (5x 1 bedroom, 88x 2 bedroom and 47 x 3 bedroom units), to 159 residential apartments.

- Redesign 94 of the 2 and 3 bedroom units as dual key units. These contain a separate bedsitter with ensuite and balcony within the same strata lot. These proposed dual key apartments, if characterised as 2 separate units, would increase the total number of residential units from 140 to 253.
- Deletion of the office component of the development and its conversion into gym / community hall.
- Various modifications to comply with consent conditions.
- Additional podium and basement car parking which increases on site car parking from 197 spaces to 203 spaces.
- Various changes to the communal park, and associated landscape changes.

The applicants have advised that the proposed modifications, as they relate to the additional units, are necessary in order to make the development financially viable for the owners. It is also claimed that the requirement to provide skillion roofs will increase the height of the buildings by between 3.185m and 3.885m which therefore provides an opportunity to locate additional units under the voids created.

The modified application was advertised and 8 letters of objection were received. The grounds of objection may be summarised as being similar to those previously submitted to the originally advertised development application. Concerns have also been raised over a perceived parking shortfall for the development and that this may result in persons parking within the Aldi car park. In addition one objector has raised concerns over the structural safety of the slab over the existing shopping centre and the Executive of Fairfield West Public School have advised that they have major traffic concerns as well as child protection concerns due to their playground being overlooked.

Fairfield Council resolved at its meeting of 25 September 2012 to raise concerns with the proposal and this submission has been forwarded previously to the JRPP.

The application is referred to the Sydney West Joint Regional Planning Panel for consideration pursuant to Part 4 of State Environmental Planning Policy (State and Regional Development) 2011 and Schedule 4A of the Environmental Planning and Assessment Act 1979, as the development has a capital value in excess of \$20 million.

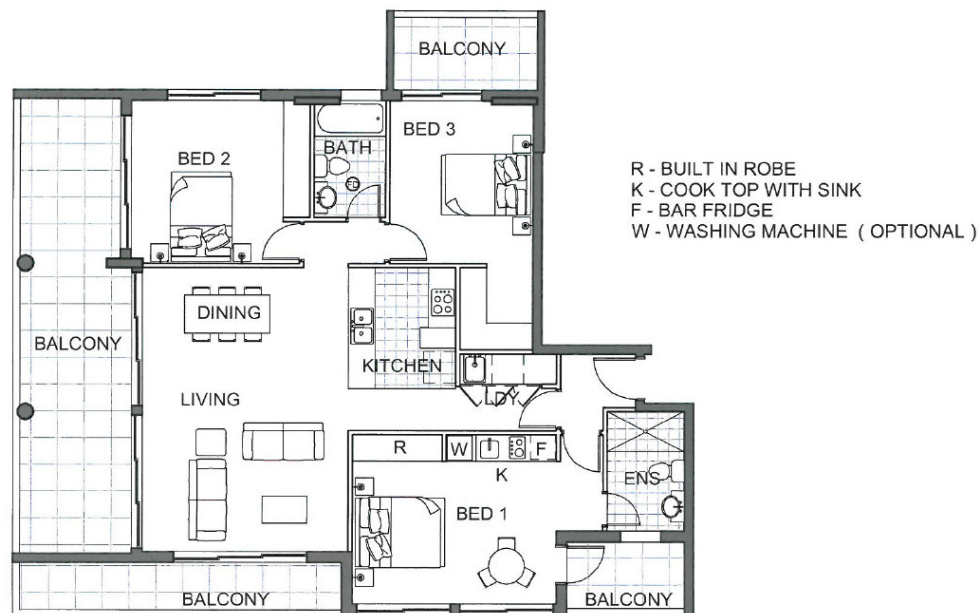
The key planning consideration associated with the modified application relates to the impacts of the proposed additional building height, the implications of the proposed dual key apartments in terms of parking and

traffic generation, and whether the proposed development is substantially the same development as that originally approved.

Concerns are raised that the modified development contravenes the planning approach adopted in respect to the assessment of the original application which was established to ensure that the approved development would provide an appropriate degree of transition and visual impact upon surrounding properties and would be more consistent with the low density character of the locality. Accordingly, the conditions of consent require the height of the approved development along the northern and western boundaries facing residential properties to be reduced so that the height of the development would be equivalent to the tallest dwelling in the area.

The modified application seeks to re-instate units that were previously required to be deleted as part of the process leading to the approval of the original development application, as well as the incorporation of an additional floor on top of the buildings facing the northern boundary and Fairfield West Public School. Furthermore, the applicant proposes to reconfigure most of the 2 and 3 bedroom apartments into dual key apartments.

With respect to the proposed dual key apartments, concerns are raised in relation to the additional potential for overlooking of the neighbouring properties. However, the fundamental issue with the dual key apartments relates to additional traffic and parking implications. Dual key apartments are ones that provide for a separate lockable living area within the one strata titled unit. This separate living area may be subleased by the unit owner or may be occupied by family members. In this case, the second apartment contains an ensuite, kitchenette and combined bedroom / lounge area and a separate balcony. Below is an example of a proposed dual key apartment.



Apartment - '3f'  
Total 139 sqm (106 + 33)

By virtue of their nature, organisation and purpose, the proposed dual key apartments are characterised as two (2) separate apartments. The applicant was advised that each dual key apartment is regarded as 2 separate apartments unless it can be satisfactorily demonstrated otherwise through a traffic and parking assessment report that dual key apartments do not generate additional car parking spaces.

It is proposed to provide only 1 car space for each dual key apartment. The applicable off street car parking rate per unit under Fairfield City Wide DCP – Chapter 12 is 1 car space per unit and an additional 1 car space per 4 units for visitor car parking.

The traffic consultant employed by the applicant has provided a traffic generation assessment of the proposed dual key apartments, but not a parking study, nor conducted any survey of similar dual key apartment complexes. The report acknowledges that traffic will increase in the peak hour but does not discuss or evaluate any associated additional car parking implications.

The lack of additional car parking spaces for the dual key apartments is considered unacceptable in the context that an inadequate case has been made to support the contention that such units does not generate demand for additional car parking given the locational characteristics of this development.

The development as originally approved by the JRPP was a well considered scheme which sought to balance the accessibility and location of the site with site constraints such as location of the adjoining Residential 2(a) zone that

predominantly contains single storey dwelling houses. The reduction of units required by the consent, the setting of a building height limit and redesign of roofs all contributed to making the development more compatible with its context and the existing and emerging character of the neighbourhood. In this regard what is now proposed is considered unacceptable as it seeks to set aside the design and planning principles upon which the original approval was granted. The submitted proposal is considered to represent an over-development of the site.

Having regard to the assessment of the application, it is contended that the proposed development is significantly different to that originally approved and therefore not within the scope of a modification application due to the number of dual key apartments proposed and the departure from the approved development with respect to building height and the provision of additional balconies that now unsatisfactorily overlook neighbouring properties.

It is further contended that the amended development provides reduced amenity for residents due to overlooking between units and the external appearance of the development is of a reduced quality as a result of the removal of various building articulations. Also, the proposed height, bulk and scale increases have not been adequately justified and concerns are expressed in respect to the unacceptable parking impact of the development due to the number of dual key units and the non examination of such impacts by the proponent.

Accordingly, it is recommended that the application be refused.

#### **SITE DESCRIPTION AND LOCALITY**

The site forms part of the Fairfield West Local Business Centre. This centre is zoned 3(c) Local Business Centre under the provisions of Fairfield LEP 1994.

The Fairfield West Local Business Centre is situated at the north-eastern intersection of Hamilton Road and Tasman Parade. Unlike most local business centres in the LGA, which generally comprise low scale, one and two storey attached buildings, this centre is a relatively large rectangular shaped site. It is bounded by Hamilton Road to the south, Tasman Parade to the west, Fairfield West Primary School to the east and residential properties to the north fronting Hartog Avenue and Baudin Crescent. Otherwise, this centre is surrounded by single detached dwellings within a residential context.

The centre presently contains 4 parcels of land: a vacant shop and an Aldi Supermarket, a 2-storey mixed-use development on the corner of Hamilton Road and Tasman Parade and the subject site. The Aldi Supermarket contains a large rectangular brick building with dual pitched metal gable roofs and is surrounded by a large open car park. Access to the Aldi site is via a combined entry/exit driveways from both Hamilton Road and Tasman Parade. To the east of Aldi is a vacant shop that was previously used as a fruit shop, which is housed within a brick building that is setback from Hamilton Road.

To the west of Aldi is a recently completed 2-storey mixed-use development containing 5 retail shops on the ground floor with 4 residential apartments on top.

The existing commercial buildings in the centre, whilst physically separated, are linked by large car parking areas.

To the rear of these sites is the subject site, which was previously occupied by a K-mart department store. The site has been re-developed and now contains a single storey shopping centre development, within which there is a Coles supermarket and 19 specialty shops with associated car parking. In front of the shopping centre, fronting Tasman Parade, is a vacant residential parcel of land that forms part of the site.

The site is irregularly shaped, having frontages to Tasman Parade, Hamilton Road and Baudin Crescent. Its site area is approximately 19,183m<sup>2</sup> and it has a significant fall across the site from north to south with an overall level difference of roughly 6 metres.

## **PROPOSAL**

### **Original DA as submitted and approved**

The original development application, when submitted to Council in March 2010, proposed for the construction of 151 residential apartments contained within 7 multi storey buildings up to 6 storeys in height. Six of these buildings were proposed to be constructed on the existing podium level above the existing shopping centre. The seventh building, which fronted Tasman Parade, also incorporated a medical centre and offices. The development proposed 189 car parking spaces.

The original application when advertised attracted seven letters of objection. The grounds of objection from local residents related to height, privacy impacts, loss of amenity, increased noise, rubbish and vermin, car parking and traffic, increased risk of child predators from overlooking of school, and devaluation of property concerns. A letter from the Principal of Fairfield West Public School raised concerns relating to traffic and location of a driveway in Hamilton Road.

The above application was subsequently amended to remove one of the proposed buildings and reduced the number of units to 147, increased the amount of open space provided, removed pitched roofs and provided flat roofs and made various other building reconfigurations. These plans were again advertised and two submissions including one objection were received. The objection was from a local resident who had previously objected and who raised similar issues to those detailed above. The other submission was from the owners of the adjoining Aldi supermarket who raised concerns relating to adequacy of car parking and traffic impacts and requested that Council examine these issues.

The application, as amended, was subsequently reported to the Joint Regional Planning Panel (JRPP) at its meeting on 7 October 2010 and was approved subject to further amendments. The JRPP endorsed the views of the assessing officer with respect to requiring a reduction in the height of some buildings and consequent reduction in unit numbers from 147 to 140 units. The height set in the consent was RL 43.18 which was the height of the tallest dwelling in the area, located at 1 Baudin Crescent. The flat roofs proposed were also required to be replaced with single pitched metal skillion roofs and clerestory windows were required to be provided for improved solar access.

### **Current Section 96(2) application No.166.2/2010**

This application proposes the following amendments to the approved development:

1. Raising of the subfloor levels to accommodate services. This will increase the height of the development by approximately 800mm to 985mm.
2. Increase the number of residential apartments from 140 (5x 1 bedroom, 88x 2 bedroom and 47 x 3 bedroom units), to 159 residential apartments (7x1 bedroom, 85x 2 bedroom and 67 x 3 bedroom units).
3. Redesign 94 of the 2 and 3 bedroom units as dual key units. These contain a separate bedsitter with ensuite and balcony within the same strata lot. As such, the proposed dual key units would be self-contained and are properly characterised as 2 separate domiciles.
4. Deletion of the office component of the development and its conversion into gym / community hall.
5. Various modifications to comply with consent conditions.
6. Additional podium and basement car parking which increases on site car parking from 197 spaces to 203 spaces.
7. Various changes to the communal park, and associated landscape changes.

### **STATUTORY REQUIREMENTS APPLICABLE TO THE SITE**

#### **1. Fairfield Local Environmental Plan 1994**

The subject site is located within two zones: Local Business Centre 3(c) and Residential 2(a) pursuant to Fairfield Local Environmental Plan 1994. The majority of the site is zoned Local Business Centre 3(c) and a small portion of the site fronting Tasman Parade is zoned Residential 2(a).



Five of the buildings are located within the 3(c) zone above the shopping centre and one building is located within the 2(a) zone part of the site fronting Tasman Parade.

In terms of permissibility and compliance with the provisions of Fairfield LEP 1994, the proposed development is permissible and consistent with the requirements of the LEP, as addressed in the previous JRPP report (7 October 2010) with respect to the original application.

## **STATE ENVIRONMENTAL PLANNING POLICY NO. 65 – DESIGN QUALITY OF RESIDENTIAL FLAT DEVELOPMENT**

### **State Environmental Planning Policy No. 65 – Design Quality of Residential Flat Development**

State Environmental Planning Policy No. 65 - Design Quality of Residential Flat Development is applicable to the subject application, as the proposal exceeds 3 storeys in height and contains more than 4 dwellings. The overriding objective of the SEPP is to improve the quality of residential flat development in NSW through the establishment, inter-alia, ten design quality principles that must be taken into consideration in the design and assessment of an application.

At the request of the assessing officer, the applicant has submitted a SEPP 65 report (refer to Attachment C). The SEPP 65 report is based on the previous Urban Design and SEPP 65 report that accompanied the original application. Whilst the submitted SEPP 65 report satisfies a submission requirement, it is contended the SEPP 65 analysis report has not provided any new compelling evidence justifying that the modified application is appropriate under the circumstances.

In addition, Council's Strategic position with respect to the site or surrounding properties has not changed since the determination of the original application in October 2010 by the JRPP. That is, Council has no proposal to increase height and density for the site and surrounding properties.

## **FAIRFIELD CITY WIDE DEVELOPMENT CONTROL PLAN 2006**

Fairfield City Wide Development Control Plan 2006 (the DCP) is applicable to the subject site.

The modified application does not comply with the requirements of the DCP with respect to parking, as addressed below in the report.

### **INTERNAL REFERRALS**

During the assessment process, comments were sought from a number of sections within Council, as detailed below:

<b>Building Control Branch</b>	No objection
<b>Development Engineering</b>	Has requested that the stormwater drainage plans be amended to reflect the latest architectural plans and stormwater drainage from the development shall be connected to underground pipe system as opposed to kerb outlet.
<b>Open Space Branch</b>	Has requested that detailed landscape plans submitted.
<b>Traffic and Road Safety Branch</b>	<p>Has requested that a parking study report be submitted in respect to the proposed dual key apartments including surveys of similar developments in a similar context to the site that incorporate dual key apartments.</p> <p>The applicant did not wish to provide a parking assessment report in relation to the proposed dual key apartments and has contended that dual key apartments do not generate additional car spaces.</p> <p>Notwithstanding, the applicant has submitted a report that deals with traffic generation issues. This does not include a parking assessment.</p>
<b>Environmental Management Branch</b>	<p>Has requested that an acoustic report be submitted confirming that the recommendations of the approved acoustic report for the shopping centre have been complied with and/or implemented.</p> <p>The applicant has requested this be made as a condition of consent to be complied with prior to the issue of a Construction Certificate.</p>

#### EXTERNAL REFERRALS

In accordance with Section 104 of State Environmental Planning Policy (Infrastructure) 2007, comments were sought from the Roads and Maritime Services with respect to the proposal. The RMS raises no objection to the proposal on the basis that the proposed development will not have a significant traffic impact on the classified road network. The nearest classified road is the Cumberland Highway, to the west of site.

The above have been taken into consideration as part of the assessment of the application.

## PUBLIC NOTIFICATION

In accordance with Fairfield City-Wide Development Control Plan 2006, the application was advertised in the local press and notified to adjoining and surrounding owners and occupiers for a period of fourteen (14) days from 11 July 2012 to 25 July 2012. Eight (8) submissions were received in response.

The following comments are provided with respect to the issues of concern as raised in the submissions:

- **Proposal will increase traffic in the area and inadequate parking provided**

The initial traffic report prepared by the applicant's traffic consultant Thompson Stanbury and Associates in support of the modified application did not take into consideration of the proposed dual key apartments. Hence, the assessment was based on a proposed 160 residential apartments.

The applicant's traffic consultant has since submitted an amended traffic impact statement that now takes into account the proposed dual key apartments. As a result, the traffic analysis is now based on the dual key apartment as 2 separate apartments and therefore, increases the number of proposed residential apartments to 253.

The report provides the following conclusion:

- *The assumption that all proposed dual key apartments comprise two dwellings results in the traffic generating ability of the proposed increasing by 20 and 23 peak hour vehicle trips over and above that previously assessed and approved respectively; and*
- *Such a minor level of additional traffic is not envisaged to invalidate the findings of previous assessments undertaken by this Practice; and*
- *Accordingly, the subject development is not anticipated to have any unreasonable external impacts over and above that previously assessed and approved.*

It is accepted that the additional traffic to be generated by the modified development in comparison to the approved development is not significant and as such, the modified development is unlikely to result in an unsatisfactory traffic impact upon the local road network.

However, and despite being requested by the assessing officer, the applicant's traffic consultant did not provide a parking study report in respect to the adequacy of parking for the proposed dual key apartments. Instead they relied upon the applicant's planning consultant's submission

for non assessment of parking impacts relating to dual key apartments, which reads as follows:

*The likely future owners and/or tenants of the proposed dual key apartments would be a couple and an adult relative/friend in the bedsit part of the apartment. It is considered that the occupants of a dual key apartment would not have a car ownership pattern substantially different that, for example, a 2 bedroom apartment in the same building that is shared between several adults. Therefore it is appropriate for the parking demand for dual key apartments to be assessed at the same rate as for the apartment if it was not dual key. That rate is 1 parking space per 1, 2 or 3 bedroom apartment and 1 visitor space per 4 apartments.*

The above justification for the non assessment of the parking implications of dual key apartments is not supported by any evidence and therefore, is considered unacceptable.

Council's Traffic Engineer advised that it is critical that the applicant provide a parking study to enable a proper assessment of the impacts of the proposed dual key apartments within the development and upon surrounding properties.

- **Proposal should adhere to original approval**

The scale and density of the development have been addressed in this report.

- **Height of development will impede privacy of residences and child protection issues with units overlooking the school grounds.**

The concerns that the development would result in the overlooking of surrounding residential residences and school grounds are considered justified, given that the modified application proposes additional building height, more balconies are now facing adjoining properties, and in some instances the balconies are now closer to adjoining properties.

- **Increased noise and traffic affect quality of life of residents**

In terms of noise, the previously submitted acoustic report had demonstrated that the proposal is unlikely to result in an adverse noise impact to any surrounding residential properties.

Council's Environmental Management Section have however requested that an acoustic report be submitted confirming that the recommendations of the previous acoustic report in relation to the approved shopping centre have been complied with and implemented. The applicant has requested that this matter be made as a condition of consent. Such an approach is considered reasonable.

With respect to traffic impacts, it is difficult to determine the traffic and parking impacts of the modified application in the absence of a parking study in relation to the proposed dual key apartments.

- **Approved landscape area behind the shopping centre is not maintained, it is now filled with rubbish**

Inspection of the site has revealed that the landscape area behind the shopping centre is not being maintained in a satisfactory condition and the area is overgrown with vegetation. Also, there is evidence of rubbish being scattered along the landscape area. This matter has been forwarded to Council's Investigation Branch to investigate and take appropriate action.

The applicant has requested that appropriate conditions be formulated in respect to the landscape area behind the shopping centre and that detailed landscape plan will be submitted as condition of consent.

- **Concerns about the structural integrity of the rooftop concrete slab to accommodate the proposal**

It is a standard requirement that a certificate prepared by a practising structural engineer be submitted to the Certifying Authority certifying the adequacy of the existing shopping centre to carry the loads imposed by the new works. This issue can be addressed through conditions of consent.

- **Proposal not provided with sufficient cars for the development. The development does not accommodate residents with 2 cars.**

This report contends that inadequate car parking spaces have been provided for the proposed development in particular with respect to the non provision of additional car spaces for the proposed dual key apartments.

- **Proposal is too high and too many units.**

The modified application proposes an additional floor on top of the buildings located along the western, eastern and northern edge of the site to cater for an additional 19 residential apartments over and above the approved 140 residential apartments. The amendments also include the conversion of 94 of the approved 2 and 3 bedroom apartments into dual key apartments. In doing so, the number of residential apartments will be increased to 253.

Assessment of the application has found the proposed modifications to be unsatisfactory and contravenes the planning principles adopted in respect to the assessment of the original application. Also, it is contended that the proposed amendments are beyond the scope of a Section 96(2)

application due to the intensification of the development relating to dual key apartments.

- **Concerns that Aldi car park will be utilised by non-Aldi customers**

Given the car parking inadequacy associated with this development, particularly relating to the non provision of additional car spaces for the proposed dual key apartments and only 3 car spaces being proposed for the medical centre, it is most likely that residents of the proposed development and customers of the proposed medical centre would be forced to utilise on street parking, and adjoining sites for parking.

Therefore, it is considered important that the required car parking spaces for the development be provided on site in order to limit the potential for car parking onto the adjoining site and streets.

- **Proposed medical centre only provided with 3 car spaces but Fairfield City Wide DCP requires 9 car spaces based on a floor area of 166m<sup>2</sup>. The required car spaces must be provided on site.**

The approved medical centre (182m<sup>2</sup>) that formed part of the approved mixed-use development for the site was allocated with 9 car parking spaces in the approved development. Whilst it is noted that the floor area of the medical centre has been reduced to 166m<sup>2</sup>, the car parking spaces allocated to the medical centre has been reduced to 3 spaces.

The applicant has advised that the medical centre staff and customers will be allocated the required car parking spaces within the approved shopping centre through strata title entitlement, however the applicant did not indicate the number of allocated car spaces and whether there are surplus car spaces available within the shopping centre. No arrangements have been proposed to access these spaces for the proposed development and in that context no allowance has been made for such spaces to be allocated towards meeting the parking requirements of the proposed development.

A review of the previous JRPP report in relation to the original application for the subject site notes that the shopping centre at the subject site is provided with 201 car parking, of which 77 are surplus car spaces.

- **No details provided with respect to the gym/community hall proposed and concerns are raised that this is not provided with any car parking spaces. Aldi contends that 20 car spaces are required in accordance with Council's DCP if the gym is leased to a commercial operator and its clients are likely to utilise Aldi car park for parking.**

The applicant was pressed as to the intended usage of the proposed gym/community hall within Building G. In response, the applicant has advised that the proposed gym/community hall is not a public gym/community hall and is proposed exclusively for residents only. That

being the case, this issue can be addressed via consent conditions, if the application were to be approved.

## **SECTION 96(2) OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979**

This is an application that has been made pursuant to Section 96(2) of the EP&A Act. The matters that are required to be taken into consideration as part of the assessment of the application are as follows:

*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*
- (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*
- (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.*

*Subsections (1) and (1A) do not apply to such a modification.*

Having regard to the assessment of the application, it is considered that the proposed development is significantly different to that originally approved and therefore not within the scope of the modification application as a result of the number of dual key apartments proposed and the likely additional adverse impact upon surrounding properties.

This assessment has concluded that the development as proposed to be modified is not substantially the same development both in form and impact as that originally approved. Therefore the test within s96(2)(a) that

the consent authority must be satisfied that the development is substantially the same development has not been met.

## TOWN PLANNING ASSESSMENT

### Parking

The approved development provides 140 car spaces for residents, 35 car spaces for visitors, 9 car spaces for the medical centre and 13 car spaces for the commercial suites in accordance with the following parking requirements of the DCP:

- **Residential** (*Business Zones*): 1 space per dwelling plus 1 visitor space per 4 dwellings where a development has more than 2 proposed dwellings.
- **Business Premises**: 1 space per 40 m<sup>2</sup> gross leasable area when provided on site.
- **Medical Centres**: 3 spaces per consulting room or per health care professional, whichever is the greater.

Applying the above requirements, the modified application requires 159 resident car spaces and 40 visitor car spaces. In respect to the proposed 166m<sup>2</sup> medical centre the applicant has not provided details in relation to the number of consulting room(s) or the number of health care professionals, other than stating that 'the number can be determined only after leased' and will be subject to a separate Development Application. The modified proposal provides 203 car parking spaces, meaning only 3 car spaces are allocated to the medical centre. Based on Council's DCP, the medical centre would be restricted to cater for 1 consulting room or 1 health care professional, which is considered unrealistic.

The modified application proposes to re-configure 94 of the approved 2 and 3 bedroom apartments into dual key apartments. Given that these dual key apartments are self-contained and are capable of being occupied or used as a separate domicile, they are properly characterised as 2 separate dwellings.

The term 'dwelling' is defined in the dictionary of Fairfield LEP 1994 as follows:

***'Dwelling'** means a room or number of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile.*

Accordingly, it is contended that each dual key apartment is appropriately characterised as 2 separate dwellings. Therefore, the modified application increases the number of residential apartments from 140 to 253, not 159 as proposed (a discrepancy of 94 residential apartments).



Based on Council's DCP, the modified application requires 316 car spaces, being 253 resident car spaces and 63 visitor car spaces. Therefore, there would be a shortfall of 116 car spaces.

The applicant's planning consultant, Brown Consultant, submits that the extra 'dual key' units will not have an additional parking impact because they will be occupied by an adult friend or relative of the couple occupying the main unit. This argument is not supported by any evidence and yet has been relied upon by the applicant's traffic consultant, Thompson Stanbury and Associates to justify the non examination of the parking demand of the dual key units.

Thompson Stanbury and Associates further submits that traffic generation is somewhat related to parking provision and traffic can be reduced if parking is reduced. This is not considered to be a valid argument in the context of the subject site. Consequently, it is most likely that car parking will be pushed into on-street locations, having regard to Section 5.2 of the Roads and Traffic Authority's Guide for Traffic Generating Developments, which relevantly reads:

*Adequate provision of off-street parking discourages on street parking, thereby maintaining the existing level of service and safety to the road network.*

Here, inadequate provision has been made for car parking and no evidence has been submitted that dual key units do not generate additional parking demand. The applicant was requested to provide survey evidence supporting the claim of no additional impact.

The applicant did not believe that it is necessary to submit the requested parking study in relation to the proposed dual key units, and instead requested that the application be reported to JRPP for determination as submitted.

The RTA's Guide for Traffic Generating Development, which would be applied to sub-regional sites, states the following in respect to parking: 0.6 spaces per 1 bed unit, 0.9 spaces per 2 bed unit and 1.4 spaces per 3 bed unit and 1 space per 5 units for visitors.

Given that Council's DCP does not cover dual key apartments and Council's parking rate of 1 space per unit may be unreasonably high to apply it for each unit within the complex, applying the RTA's Guide for Traffic Generating Development requirement may not be an unreasonable approach in this instance. Therefore, based on the RTA's Guide, the modified application requires 242 car spaces, representing a shortfall of 41 car spaces for the residential component of the development.

In any case, the modified application does not comply with Council's DCP or the RTA's Guide for Traffic Generating Development with respect to the provision of car spaces and the applicant's submission that the dual key apartments do not generate additional car spaces is unsupported.

It is noted from the previous JRPP report (7 October 2010) in respect to the original application that the existing shopping centre, for which the proposal is to be constructed above, is provided with 201 car parking spaces and has a surplus of 77 car spaces. It is also noted that the approved medical centre and office relied upon these surplus car spaces for parking.

In terms of the additional car parking spaces required by the dual key apartments, it is not considered appropriate for these units to rely upon the surplus car parking spaces for the shopping centre as permanent residential car spaces given the potential conflicts that are likely to result between residents and the shopping centre customers and the these shopping centre car spaces are not available all the time. Observations during a Saturday afternoon revealed that the shopping centre car park was operating near capacity. In any case no arrangements have been proposed to access these spaces. Moreover, there is no formal pedestrian connection between the proposed development and the shopping centre car park.

In order to minimise the likelihood of resident vehicles parking on the street, it is critical that all the residential car parking spaces for the development be provided wholly within the site. In this case, it is contended that the modified development is not provided with sufficient car parking spaces on site.

### **Visual Privacy**

In addition to concerns expressed in respect to the need to provide additional parking for dual key apartments, the re-configuration of 94 of the apartments into dual keys and general amendments to the layout of the development have resulted in more balconies being provided along the edges of the development facing adjoining properties. Consequently, it is considered that the modified development is likely to result in greater overlooking of the northern adjoining residential properties and the Fairfield West Public School to the west of the site. For example, the approved plans show that the northern elevation of Buildings A & B on the second floor are only provided with three balconies that face the northern adjoining residential properties.

The modified development has increased the number of balconies along the northern elevation of Buildings A & B to 9 facing the northern adjoining residential properties. Similarly, the approved plans show 5 balconies along the west elevation of Buildings D and E facing the Fairfield West Public School, whereas the modified application proposes balconies along the entire length of the west elevation of these buildings. It is also noted that the balconies are now located closer to the north and west adjoining sites.

### **Overlooking between balconies**

The approved scheme satisfactorily addresses overlooking within the development as the multi-storey buildings were provided with the required spatial separation in accordance with the Residential Flat Design Code and in

situations where the required building separation was not provided there were limited windows or balconies facing each other.

As the modified application proposes additional balconies within the development, as a result of the dual key apartments and the re-configuration of the apartments, visual privacy between the multi-storey buildings is now an issue. There are now balconies and living areas directly facing each other and these are located within the required building separation zone. For example, the bedrooms of the southern most apartments of Building D are directly opposite the balconies of Building E and there are directly facing balconies between Building E and Building F.

### **Building Height**

The conditions of consent of Development Consent No. 166.1/2010 require amendments to the development requiring the reduction of units, the setting of a building height limit and redesign of roofs, all of which contributed to making the development more compatible with its context and the existing and emerging character of the neighbourhood. The result of which is that the height of the development tapers down along the north, east and western boundaries so that the height of the buildings facing the northern adjoining residential properties and Tasman Parade is not higher than the tallest dwelling at 1 Baudin Crescent at RL 43.18.

The modified application proposes to re-instate the residential apartments that were deleted as well as provide an additional floor on top of two other buildings. In doing so, the height of the development along the north, west and eastern boundaries facing adjoining sites has been increased by a minimum of 3500mm (RL 45.785). This, combined with the additional balconies proposed along these boundaries, is considered unacceptable as it seeks to set aside the design and planning principles upon which the original approval was granted without sound justification. Moreover, the proposed additional building height further departs from the low density residential developments surrounding the site and the development now unsatisfactorily overlooks into neighbouring properties.

### **Bulk and Scale**

The modified scheme is considered to be unsympathetic to the low density residential character of the area, as the articulations, mass and varied building elements that were important elements of the approved scheme have been somewhat removed. These elements have been replaced with large expanses of continuous balconies that now dominate the development the result of which is that the development now has additional bulk and scale and is considered to have little relationship with the low density surrounding residential developments.

## **Section 79C Considerations**

The modified application has been assessed and considered having regard to the matters for consideration under Section 79C of the Environmental Planning and Assessment (EP&A) Act 1979. The following is an assessment of the proposal with regard to Section 79C.

(1) **Matters for consideration—general**

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

*(a) the provisions of:*

*(i) Any environmental planning instrument*

The subject site is located within two zones: Local Business Centre 3(c) and Residential 2(a) under Fairfield Local Environmental Plan 1994. The majority of the site is zoned Local Business Centre 3(c) and a small portion of the site fronting Tasman Parade is zoned Residential 2(a).

The proposed development is defined as 'residential flat buildings' and 'medical centre' under the LEP, which are permissible with consent within zone 3(c). These land uses are prohibited developments within zone 2(a) under the LEP. However, the applicant is relying on Clause 20C of Fairfield LEP with respect to these prohibited uses within the Residential 2(a) zone, which relevantly reads as follows:

- (1) Where it is intended to carry out development on a site that is divided by a zone boundary and the proposed development is prohibited within one of the zones, the Council may grant consent to the development if the development does not extend more than 20 metres into the zone where the development is prohibited.*

Having regard to Clause 20C of the LEP, the prohibited land uses have been sited such that they do not extend more than 20 metres into the 2(a) zone. Therefore, these uses are able to be approved under Clause 20C of Fairfield.

*(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and*

Draft Fairfield Local Environmental Plan 2011 is applicable to the site. It is not considered that the proposal is inconsistent with the Draft Fairfield LEP 2011.

The subject site is proposed to be zoned B2 Local Centre and R2 Low Density Residential under Draft Fairfield LEP 2011. The majority of the site is to be zoned B2 Local Centre and a small portion of the site fronting Tasman Parade is to be zoned R2 Low Density Residential.

The Draft LEP 2011 does not include a Floor Space Ratio control for the subject site. However, has stipulated a maximum building height of 18m, which is derived from the approved development for the site. The modified development, having a building height of approximately 23.4m, exceeds the allowable building set by the Draft LEP.

The Draft LEP proposes to reduce the concession in respect to 'Development near zone boundaries' (previously covered by Clause 20C of Fairfield LEP 1994) by reducing the relevant distance from 20m to 1m in accordance with Clause 5.3 Development near zone boundaries of the Draft LEP. Therefore, the proposed land uses within the proposed R2 zone of the site would be prohibited. Accordingly, the modified application would be prohibited under the Draft LEP 2011.

*(iii) any development control plan*

The proposed development does not comply with the requirements of the Fairfield City Wide DCP 2006 with respect to parking, as outlined earlier in the report.

*(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and*

No planning agreement has been entered into under Section 93F or any draft planning agreement that a developer has offered to enter into under Section 93F with respect to the proposal.

*(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*

There are no matters prescribed by the Regulations that apply to this development.

*(b) the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality*

It is considered that the modified application is likely to result in an adverse impact upon the amenity of the locality including potential

overlooking of neighbouring properties and parking implications as a result of the non provision of additional car spaces for the proposed dual key apartments.

*(c) the suitability of the site for the development*

The modified application is considered unsuitable for the site, having regard to the potential adverse impact upon surrounding properties and the intensity of the development is considered unsympathetic to the locality.

*(d) any submissions made*

Eight (8) submissions were received during the notification process. The issues of concerns have been addressed in the report.

*(e) the public interest*

Approval of the application is not considered to be in the public interest.

## **CONCLUSION**

The development as originally approved by the JRPP was considered a reasonably well conceived scheme that appropriately responded to the unique location of the site that is adjoined by low density residential area. The reduction of units required by the consent, the setting of a building height limit and redesign of roofs, were elements designed to ensure that the development is more compatible with its context and the existing and emerging character of the neighbourhood. The modified application is considered unacceptable as it seeks to set aside the design and planning principles upon which the original approval was granted.

It is contended that the modified development is significantly different to that originally approved and is beyond the scope of a modification application, having regard to the number of dual key apartments proposed and the departure from the approved development with respect to building height, the provision of additional balconies that now unsatisfactorily overlook neighbouring properties and the non provision of additional car parking spaces for the dual key apartments.

Furthermore, it is considered that the development is likely to result in reduced amenity for the residents due to overlooking between units, the external appearance of the development is of a reduced quality due to the removal of various building articulations and introduction of additional balconies, the concerns in respect to car parking design issues and the unacceptable parking impact of the development.

On the basis of the above, the modified application is considered to be an over-development of the site, unacceptable and not worthy of support. Accordingly, it is recommended that the application be refused.

#### **RECOMMENDATION**

That Section 96(2) Modification Application No. 166.2/2010 be refused for the following reasons:

- i. The provisions of Section 96(2) of the Environmental Planning and Assessment Act, 1979 do not apply to the modified development in that the proposed modifications render the development not substantially the same development as originally approved due to the number of dual key apartments proposed.
- ii. The development will have an unacceptable traffic and parking impact due to the number of dual key apartments proposed and the impact of which, in terms of traffic and car parking, have not been considered.
- iii. The proposed development, as amended, does not comply with the required number of car parking spaces as stipulated in Fairfield City Wide Development Control Plan 2006.
- iv. The development provides reduced amenity for residents due to overlooking between units.
- v. The proposed development would result in adverse visual impacts upon the amenity of surrounding properties.
- vi. The external appearance of the development is of a reduced quality due to the removal of various building articulations, and height and bulk increases have not been adequately justified.
- vii. The additional units proposed are considered to be excessive given the context and nature of the site and represent an over-development of the site.
- viii. Approval of the application is not considered to be in the public interest.