

JRPP No.	2015STH016
DA No.	DA-2015/884
Proposal	A 'shop top housing' development comprising the construction of three separate buildings over two levels of basement parking
Property	19-23 Flinders Street, Wollongong Lot 1, DP 214579
Applicant	PRD Architects
Responsible Team	Development Assessment and Certification - City Centre Team (RH)

ASSESSMENT REPORT AND RECOMMENDATION

Executive Summary

Reason for consideration by Joint Regional Planning Panel

The proposed development must be considered by the Joint Regional Planning Panel (JRPP) as it has a capital investment value of more than \$20 million [Clause 3 in Schedule 4A of the Environmental Planning and Assessment Act 1979].

Proposal

The proposal is for a 'shop top housing' development comprising the construction of three separate buildings over two levels of basement parking.

Permissibility

The site is zoned B6 Enterprise Corridor pursuant to Wollongong Local Environmental Plan 2009. The applicant has indicated that the proposal is 'shop top housing' however the proposed building form does not meet the definition. The proposed business premises are permissible however the residential apartments defined as 'residential flat building' are prohibited.

Consultation

The proposal was notified in accordance with Council's Notification Policy and received 7 submissions.

Main Issues

The main issue is permissibility and compliance with the shop top housing definition. The site is affected by a significant slope and when applying the definition to the proposed development the location of ground floor business component is critical. As proposed, the ground floor contains residential development, and not business as required by the definition and ultimately the development does not constitute 'shop top housing'. The residential components of the development are then defined as a 'residential flat building' which is prohibited in the B6 Enterprise Corridor zone.

As the proposal is for prohibited development, and this being a threshold issue, the Panel has no ability to grant consent to the proposal. The application has not been assessed against design criteria of relevant environmental planning policies.

RECOMMENDATION

It is recommended that the application be refused for the reasons contained at Attachment 4 to this report.

1. APPLICATION OVERVIEW

1.1 PLANNING CONTROLS

The following planning controls apply to the development:

State Environmental Planning Policies:

- SEPP No. 55 – Remediation of Land
- SEPP No. 65 – Design Quality of Residential Flat Development
- SEPP (Infrastructure) 2007

Local Environmental Planning Policies:

- Wollongong Local Environmental Plan (WLEP) 2009

Development Control Plans:

- Wollongong Development Control Plan 2009

Other policies

- Wollongong Section 94A Development Contributions Plan 2014

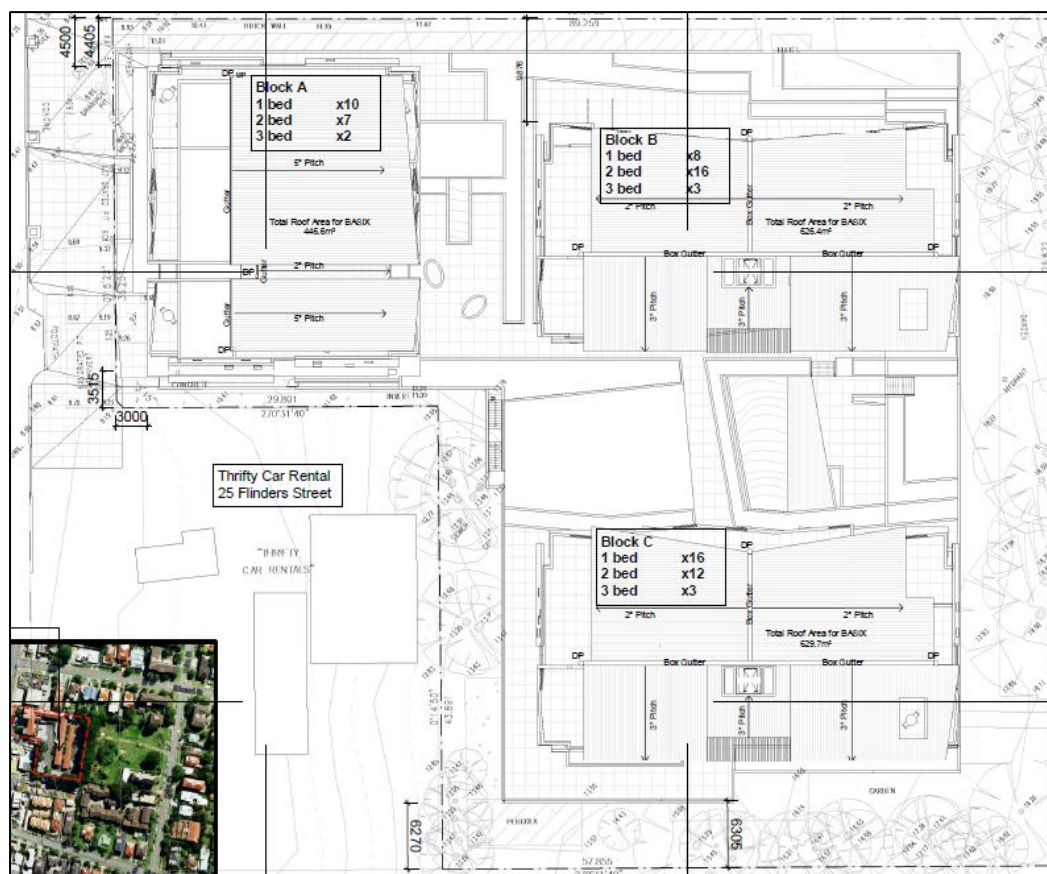
Other comments / matters to be addressed

None

1.2 PROPOSAL

The proposal is for the establishment of a 'shop top housing' development comprising the construction of three separate buildings over basement parking.

The site plan shows the proposed layout of the site.



Specifically the development comprises the following:

Site preparation

- Demolition of the existing Motel
- Tree removal with retention of significant sized trees along the eastern and southern boundaries.
- Excavation of the two basement parking levels

Building details

- Building A
 - Is located with frontage to Flinders Street.
 - It is 6 storeys in height
 - Business premises is located on the ground floor having an area of 126.1sq.m and a first floor area of 115.2sq.m
 - It contains a total of 19 residential apartments comprising 10 x 1 bedroom units, 7 x 2 bedroom apartments and 2 x 3 bedroom apartments.
 - This building also contains the commercial lift to access the two buildings at the rear of the site.
- Building B
 - Is located in the north eastern portion of the site.
 - The building is 6 storeys in height when measured from the new courtyard
 - Business premises is located on the courtyard level and has an area of 341sq.m
 - Common room and outdoor area is also located on the courtyard level within the building.
 - The building contains a total of 27 residential apartments comprising 8 x 1 bedroom units, 16 x 2 bedroom units and 3 x 3 bedroom apartments.
- Building C
 - Is located in the south eastern portion of the site.
 - The building is 6 storeys in height when measured from the new courtyard.
 - Two Business premises are located on the courtyard level with an area of 1031sq.m and 248.5sq.m
 - A common room and outdoor facility is also located on the courtyard level within the building
 - The building contains a total of 31 residential apartments comprising 16 x 1 bedroom units, 12 x 2 bedroom apartments and 3 x 3 bedroom units.
- All three buildings are positioned over common basement parking.
- Landscaped areas surrounding the site including the retention of significant sized fig trees along the rear of the site and trees along the southern boundary.
- Common open space is located on the courtyard level between the two buildings at the rear and includes a swimming pool.

Traffic, parking and servicing

- Within the two levels of basement there are 102 parking spaces. Of the 102 spaces, 19 are required for the business premises, 71 residential spaces and 12 residential visitor spaces. There are also a total of 41 bicycle spaces and 8 motor cycle spaces.
- Access to the site is via a combined driveway from Flinders Street.
- Servicing e.g. waste and deliveries is being undertaken within the basement within dedicated loading bays.

- No direct pedestrian access is available from the Flinders Street to the two buildings at the rear of the site.

1.3 BACKGROUND

Council's records indicate that the site has been approved as a Motel since 1959. During that time the Motel was also approved in 1975 to be used as a Hostel for the aged. The site was converted back to a motel as part of a Complying Development application in 2006.

No pre-lodgement meeting was held regarding the current application.

Customer service actions

There are no outstanding customer service requests that are relevant to the proposed development.

1.4 SITE DESCRIPTION

The 5808m² site is located at 19-23 Flinders Street, Wollongong and has a title reference of Lot 1, DP214579.

The site is located on the eastern side of Flinders Street. An existing Motel currently operates form the site.

Property constraints

- Council records identify the land as being impacted by acid sulphate soils
- Council records identify the land as being located within the Coastal zone

There are no restrictions on the title.

2. ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 SECTION 79C ASSESSMENT

2.1 SECTION 79C 1(A)(I) ANY ENVIRONMENTAL PLANNING INSTRUMENT

2.1.1 STATE ENVIRONEMNTAL PLANNING POLICIES

No assessment has been undertaken against the relevant SEPP's as the application has a threshold issue as discussed above that prevents the application being approved.

2.1.2 WOLLONGONG LOCAL ENVIRONMENTAL PLAN 2009

Part 2 Permitted or prohibited development

Clause 2.2 – zoning of land to which Plan applies

The zoning map identifies the land as being zoned B6 Enterprise Corridor.

Clause 2.3 – Zone objectives and land use table

The objectives of the zone are as follows:

- *To promote businesses along main roads and to encourage a mix of compatible uses.*
- *To provide a range of employment uses (including business, office, retail and light industrial uses).*
- *To maintain the economic strength of centres by limiting retailing activity.*
- *To encourage activities which will contribute to the economic and employment growth of Wollongong.*
- *To allow some diversity of activities that will not:*

- (a) significantly detract from the operation of existing or proposed development, or
- (b) significantly detract from the amenity of nearby residents, or
- (c) have an adverse impact upon the efficient operation of the surrounding road system.

The land use table permits the following uses in the zone:

2 Permitted without consent

Building identification signs; Business identification signs

3 Permitted with consent

Advertising structures; Bulky goods premises; Business premises; Car parks; Child care centres; Community facilities; Depots; Entertainment facilities; Environmental facilities; Garden centres; Hardware and building supplies; Heavy industrial storage establishments; Hotel or motel accommodation; Industrial retail outlets; Landscaping material supplies; Light industries; Office premises; Passenger transport facilities; Places of public worship; Plant nurseries; Recreation areas; Recreation facilities (indoor); Recreational facilities (outdoor); Registered clubs; Respite day care centres; Roads; Service stations; Serviced apartments; Sex services premises; Shop top housing; Storage premises; Take away food and drink premises; Timber yards; Transport depots; Truck depots; Vehicle sales or hire premises; Veterinary hospitals; Warehouse or distribution centres

4 Prohibited

Any development not specified in item 2 or 3

Comment:

As is evident by the above land use table, within the B6 Enterprise Corridor opportunity for residential development is extremely limited. This is also reflected in the objectives of the zone. The site is located in a zone reserved mainly for economic and employment generating business, office and light industrial uses, amongst others. Specifically, dwellings, multi dwelling housing and residential flat buildings are prohibited in the B6 Enterprise Corridor. Residential development is only permissible when it forms part of a 'shop top housing' development. As detailed below, the definition as shop top housing is rejected, and therefore the proposed residential development would be defined 'residential apartment building', which is prohibited. The business component is permissible in its own right.

Shop top housing is defined as follows:

shop top housing means one or more dwellings located above ground floor retail premises or business premises.

The shop top housing definition does not stipulate how ground floor is identified. For example, is 'ground floor' measured from the notations on the plans, natural/existing levels or ground level as finished. Whilst 'ground level' is defined within the dictionary in the WLEP2009 there is no 'ground floor'.

The application involves the construction of three separate buildings on a sloping site. Whilst construction of shop top housing development is possible on sloping sites, the L-shape configuration of this site in combination with the topography are problematic in regard to the technical application of the definition and compliance with the zoning table.

The site slopes down from east to west, with the lowest point being Flinders Street. Along the northern boundary, the north eastern corner of the site has an RL of 19.59 and the north western corner has an RL of 8.93. This equates to a fall of 10.66m over 89.259m.

Along the southern boundary, the south eastern corner has an RL of 18.20 and the south western corner has an RL of 13.47. This equates to a fall of 4.73m over 57.855m.

The subject development proposes three separate buildings on site, one being on the street front and the other two at the back of the property, where neither building has direct street access.

The business premises of Buildings B and C is located on the same level as the courtyard between the buildings. This is accessed through the front building via the lift to its first floor. Due to the significant slope on the site there is significant excavation of the site required to create the proposed

development. The excavation at the rear of the site to create the basement parking under the two buildings extends from a depth of 8m to 13m.

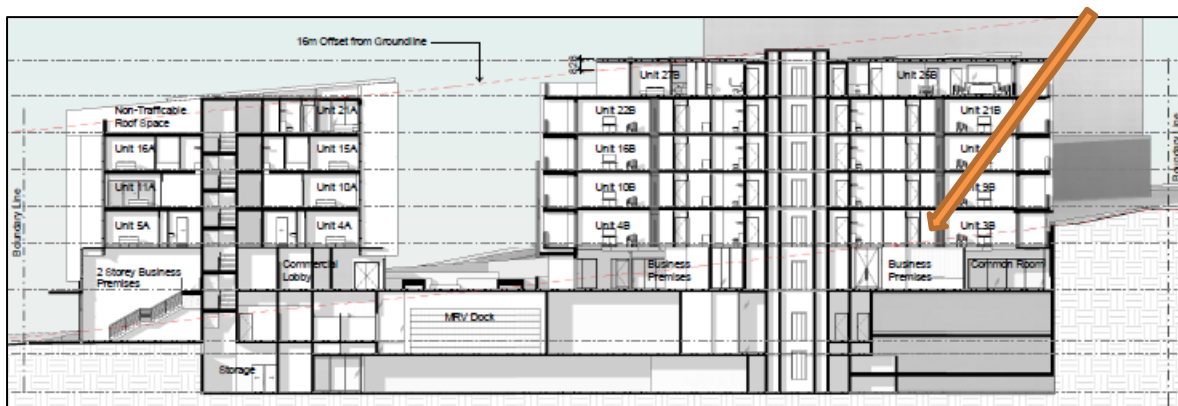
The floor level of the business premises in the two rear buildings is at RL 13.2. When comparing this to natural ground, no part of the business premises is located at that level.

Building A at the front of the site has business premises at ground level (refer Level 2 Plan podium). However this same level turns into basement parking at the rear of the site for Buildings B and C.

In some circumstances, parking located on the ground floor required by and dedicated as business parking can be considered as business for compliance with the shop top housing definition. However in this case the proposed business parking is located in the basement, well below ground level, below these two buildings at the rear and as such does not classify as ground floor business.

Building B

At the western elevation for the Building B the business premises starts at a depth of 0.8m below natural ground and at the eastern elevation of the building the business premises is located 4.8m below natural ground. In this location the top of the highest retaining wall has an RL of 18.60 creating a series of four stepped retaining walls reaching an overall height of 5.4m high. This can be seen in the section below:



Building C

At the western elevation of Building C the business premises starts at a depth of 0.6m below natural ground and at the eastern elevation of the building the business premises is located 4m below natural ground. In this location the top of the highest retaining wall has an RL of 17.20 creating two stepped retaining walls reaching an overall height of 4m high. This can be seen in the section below:



The section below shows the two buildings at the rear of the site (Building B on the left and Building C on the right) and the location of the natural ground, being the red line dissecting the business premises level.



As indicated earlier the shop top housing definition does not stipulate how or what 'ground floor' is measured from. In any case this development does not achieve ground floor business premises from any of the plans, where the business is nominated as Level 2 (podium); the natural/existing is underground; and the created finished level is via a lift from another building up to the first floor.

When the buildings are assessed individually more doubt is raised as to compliance with the shop top housing definition:

Building A

Being the building at the street front concern is raised over the small amount of business premises located on the ground floor. The residential floor area is 564sq.m whilst the ground floor business premises has an area of 126.1sq.m. This equates to 22% of the residential floorarea. Whilst it is acknowledged the access driveway and garbage room can be classified as relating to the business premises the unrelated commercial lobby that accesses the building at the rear and large residential lobby cannot be classified as associated as business space for Building A.

Building B

As discussed earlier within the report whether this is ground floor retail is questionable due to the levels. In addition to this, the common room that is located at the eastern end of the floor sits directly above residential parking. None of this area can be classified as business and as such residential components of the building are not classified as shop top housing.

Building C

As for Building B, the issue of what constitutes ground floor is questionable and the same common room and outdoor area is also proposed that sits above residential parking.

Relevant Case Law

The applicant has addressed the matter by citing the Blackman Design Group V Manly Council [2014] NSWLEC 164 where in his Honour Biscoe J said *"to qualify as shop top housing' a dwelling must be located above ground floor retail premises or business premises. Shop top housing must be at a place or level higher than the top most part of the ground floor retail premises or business premises"*.

The applicant has indicated that the plans provided show that the site will be excavated to receive the buildings, and that the proposed business premises, therefore, will be above the ground level as finished i.e. the ground surface after completion of the earthworks.

As discussed earlier the term 'ground floor' is not defined and how to measure has not been stipulated however in this case the business premises is located below ground when measured from natural ground and when accessed from street level is located via a lift up to what is the first floor. Neither of these ways of measuring the ground floor could be considered as 'ground floor'.

In another case in the Land and Environment Court of Hrs to v Canterbury Council [2014] NSWLEC 121, his Honour Sheahan J in an application that related to 5 separate buildings above the same basement parking determined that the application was prohibited because it could not be categorised as shop top housing due to a number of residential units being proposed on the ground floor of two of the buildings. The following findings were made:

"To qualify as 'shop top housing' the relevant part of the building must be truly 'above' the relevant retail or commercial parts".

“The proposed development is not one indivisible “building”, but a series of “buildings”, and, as the Council contends (contention 2(b) – [3] above), the predominant use in the proposal is “shop top” residential accommodation, properly so described”.

And further in the judgement of Blackman v Manly his Honour Biscoe J found that:

“Each of the apartments in the proposed development is a dwelling as defined in the LEP. None of the ground floor retail premises or a ground floor business premises. It follows that the ground floor residential apartment cannot be development for the purpose of “shop top housing”.

“The development application seeks consent for residential development that is not “shop top housing” but is instead a species of “residential accommodation” that the land use table identifies as prohibited on the subject land”.

“The proposed retail, business and commercial uses are not predominant, and are not “ancillary”, but they clearly serve the objective(s) of the zone, while the residential elements on the same level as those uses, i.e. ground floor, are prohibited, and not severable”.

In light of the above, the proposal seeks consent for business premises in locations other than ground level, where shop top housing requires business to be provided at ground level. Residential development that is not in the form of shop top housing is prohibited in the zone. Stand-alone residential development is unsatisfactory with regard to the objectives of the zone as discussed earlier. The B6 Enterprise Corridor focuses on the economic and employment generating aspects, which is in contrast with the proposed majority residential development,= something which the application does not. In part this is due to the L-shaped nature of the site. If the proposal included the site to the south (Thrifty car rental) greater opportunity for orderly and compliant development may be possible.

On a separate matter, the poor visibility and relatively difficult access raises questions in regard to the likely success as business premises in such an isolated location. The applicant has not provided details of projected tenants.

The two buildings at the rear have no direct street access for pedestrians. Pedestrians coming from Flinders Street would need to access the front building commercial lobby (Basement Plan DA05-B) to Level 2 (podium) and then walk through the courtyards to the rear buildings. This distance is approximately 62m to Business Premises B-C. Alternatively, business visitors in a vehicle would enter the car park from Flinders Street and take the relevant commercial lift to the business premises.,

2.2 SECTION 79C 1(A)(II) ANY PROPOSED INSTRUMENT

None applicable.

2.3 SECTION 79C 1(A)(III) ANY DEVELOPMENT CONTROL PLAN

No assessment has been undertaken as the application has a threshold issue as discussed above that precludes the application from being approved.

2.4 SECTION 79C 1(A)(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

There are no planning agreements entered into or any draft agreement offered to enter into under S93F which affect the development.

2.5 SECTION 79C 1(A)(IV) THE REGULATIONS (TO THE EXTENT THAT THEY PRESCRIBE MATTERS FOR THE PURPOSES OF THIS PARAGRAPH)

No assessment has been undertaken as the application has a threshold issue as discussed above that precludes the application from being approved.

2.6 SECTION 79C 1(A)(V) ANY COASTAL ZONE MANAGEMENT PLAN (WITHIN THE MEANING OF THE COASTAL PROTECTION ACT)

There is no Coastal Zone Management Plan currently applicable to the land. Whilst being in the coastal zone, the land is not identified as being impacted by coastal hazards and there are not expected to be any adverse impacts on the coastal environment arising from the development.

2.7 SECTION 79C 1(B) THE LIKELY IMPACTS OF DEVELOPMENT

As a merit assessment of the application has not been undertaken as discussed earlier within the report the likely impacts are unknown.

2.8 SECTION 79C 1(C) THE SUITABILITY OF THE SITE FOR DEVELOPMENT

Does the proposal fit in the locality?

As discussed earlier within the report proposal is not considered appropriate with regard to the zoning of the site and meeting the objectives of the zone.

Are the site attributes conducive to development?

The significant slope for the site restricts the use of the shop top housing definition and therefore the proposed development incorporates prohibited residential apartments.

2.9 SECTION 79C 1(D) ANY SUBMISSIONS MADE IN ACCORDANCE WITH THIS ACT OR THE REGULATIONS

The application was notified to adjacent/adjoining properties from 3 August 2015 to the 19 August 2015 in accordance with WDCP 2009 Appendix 1: Public Notification and Advertising. During that time 7 submissions were received, comprising 6 objections and 1 submission in support of the application.

The submissions raised relate to the merit of the application which is not being assessed in light of the threshold issue.

Submissions from public authorities

None received

2.10 SECTION 79C 1(E) THE PUBLIC INTEREST

It is considered inappropriate with consideration to the zoning and the character of the area and is therefore not considered to be in the public interest.

3. RECOMMENDATION

This application has been assessed having regard to the Heads of Consideration under Section 79C(1) of the Environmental Planning and Assessment Act 1979, the provisions of Wollongong Local Environmental Plan 2009 and all relevant Council DCPs, Codes and Policies.

The proposal is not considered to satisfy the provisions of WLEP2009 as outlined in the report. The application cannot be defined as 'shop top housing' but rather 'residential flat building' and 'business premises'. However within the B6 Enterprise Corridor, 'residential flat buildings' are prohibited. In this regard the application cannot be supported by Council as outlined in the report.

It is recommended that the application be refused pursuant to Section 80 of the Environmental Planning & Assessment Act 1979, for the reasons at Attachment 4.

ATTACHMENTS

1. Aerial photograph
2. Wollongong Local Environmental Plan 2009 Map
3. Plans
4. Draft reasons for refusal