

JOINT REGIONAL PLANNING PANEL (East)

JRPP No	2015SYE113
DA Number	453/134/2
Local Government Area	North Sydney Council
Proposed Development	Section 96(2) application to modify consent for demolition of existing building and construction of mixed use building consisting of 60 apartments, retail and 39 car-spaces
Street Address	231 Miller Street North Sydney
Applicant/Owner	Klimbe Pty Ltd
Number of Submissions	Two (2)
Regional Development Criteria (Schedule 4A of the Act)	Section 96(2) Modification application of Capital Investment Value > \$20M
List of All Relevant s79C(1)(a) Matters	North Sydney LEP 2013 - Zoning – B4 Mixed Use North Sydney DCP 2013 S94 Contribution SEPP 65 SEPP 55 - Contaminated Lands SREP (2005)
List all documents submitted with this report for the panel's consideration	Approved Plans Section 96 plans Comparative Performance Study
Recommendation	Refusal
Report by	Geoff Mossemeneer, Executive Planner, North Sydney Council

EXECUTIVE SUMMARY

The original application (2015SYE006 North Sydney – DA. 453/14) was reported to the JRPP (Sydney East Region) at its meeting of 1 July 2015 with a recommendation for refusal for the following reasons:

1. The proposed development fails to provide for adequate setbacks and building separation distances on its northern, eastern and southern boundaries.
2. The lack of setbacks results in adverse amenity impacts on adjacent development with regard to overshadowing, aural privacy, reduced daylight and ventilation.

Panel Decision:

1. The Panel resolves unanimously to defer the determination of the application to allow the applicant to submit amended plans by 24 July 2015. The amended plans should contain the following modifications:
 - a. The northern boundary is to have a setback of 1.5m from the western edge of the light well on the adjoining building to the eastern end of the building from level 5 up;
 - b. Levels 11 to 17 are to have a minimum 6m by 6m setback at the south east corner;
 - c. Levels 11 to 14 are to have a 1.5m setback from the eastern boundary; and
 - d. Levels 15 and 16 are to have a 3m setback from the eastern boundary.
2. The applicant is also requested to provide council, by 24 July 2015, with comments on the recommended conditions attached to the assessment report.
3. The Panel requests the council's assessment officer to prepare, within a week after receiving the amended plans, a supplementary report including recommended conditions, indicating whether the amended plans have responded to the above changes. This is subject to the amended plans not requiring further notification.
4. Following receipt of the supplementary report, the Panel will determine the application by communicating by electronic means.

The amended plans were submitted to Council on 24 July 2015. The amended plans were fully compliant with the modifications a, b, c and d as required in the above JRPP resolution.

The JRPP (Sydney East Region) at its meeting held electronically between 29 July 2015 and 30 July 2015 granted consent to the application subject to the recommended conditions.

The applicant has lodged a Section 96(2) application with regard to: increase in the number of apartments; change in mix; replace northern boundary setback with light well; increase parking; reduce setbacks to eastern and southern boundaries.

The Council's notification of the proposal has attracted two submissions raising particular concerns about reduced setbacks and the impact on surrounding buildings. The assessment has considered these concerns as well as the performance of the application against Council's planning requirements.

Following assessment of the plans, the development application is recommended for **refusal**.

DESCRIPTION OF PROPOSAL

The application seeks to modify the approved development to provide the setback opposite the light well rather than the 1.5m setback option chosen by the JRPP. The application also seeks to provide the originally proposed setbacks to the south east corner of the building and modified setbacks from the eastern boundary as follows:

Light well:

It is proposed to provide a light well, from Level 5 and above, with no openings and painted Vivid white opposite the light well to No. 237 Miller Street (note it is not proposed to paint the light well on No. 237 Miller Street unless consent is given by the owners of the property - however the lighting assessment is based on paint only within the subject site notwithstanding it also assesses the improvement if the adjoining site is painted) having dimensions of 3m x 2.5m in lieu of providing the 1.5m setback along the northern boundary from the light well to the rear of the property. This results in subsequent floor plan changes;

Basement/Ground:

No changes;

Level 1:

Apartment 105 changed from studio to 1 bedroom;

Level 2-4:

Apartments 205, 305 and 405 changed from studio to 1 bedroom;

Level 5:

Apartment 504 changed from 1 bedroom to 2 bedroom; Apartment 503 changed from 1 bedroom to studio;

Level 6:

Apartment 604 changed from 1 bedroom to 2 bedroom; Apartment 603 changed from 1 bedroom to studio;

Level 7:

Apartment 704 changed from 1 bedroom to 2 bedroom; Apartment 703 changed from 1 bedroom to studio;

Level 8-10:

Apartments 804, 904, 1004 changed from 1 bedroom to 2 bedroom; Apartments 803, 903, 1003 changed from 1 bedroom to studio;

Level 11:

Apartment 1103 changed from 1 x 2 bedroom apartment to 1 x studio; and 1104 1 x 2 bedroom apartments; Setback from eastern boundary of 1.15m provided for a length of 3.2m from the northern boundary in lieu of 1.5m for entire boundary; Setback from south-east corner changed from 6m x 6m to 5.218m x 3m;

Level 12-13

Apartments 1203 and 1303 changed from 2 bedroom to 3 bedroom apartments; Setback from eastern boundary of 1.15m provided for a length of 3.2m from the northern boundary in lieu of 1.5m for entire boundary; Setback from south-east corner changed from 6m x 6m to 5.218m x 3m;

Level 14:

Apartment 1402 changed from 2 bedroom to 3 bedroom; Setback from eastern boundary of 1.15m provided for a length of 3.2m from the northern boundary in lieu of 1.5m for entire boundary; Setback from south-east corner changed from 6m x 6m to 5.218m x 3m

Level 15:

Setback from eastern boundary of 2.2m provided for central portion of building in lieu of 3m for entire boundary; Setback from south-east corner changed from 6m x 6m to 5.218m x 3m;

Level 16:

Apartment 1602 changed from 2 bedroom to 2 bedroom plus study; Setback from eastern boundary of 2.2m provided for central portion of building in lieu of 3m for entire boundary; Setback from south-east corner changed from 6m x 6m to 5.218m x 3m;

Level 17:

Setback from eastern boundary of 4.0m provided for central portion of building in lieu of 3m Setback from south-east corner changed from 6m x 6m to 5.218m x 3m;

It is also proposed to increase the proposed parking provision within the approved basement levels from 39 car spaces and 6 motorcycle spaces to 43 car spaces and 6 motorcycle spaces by maximising the efficiency of the parking stacker system.

As such the proposed building is to contain a total of 270m² of gross café/retail space, and 61 apartments (24 x studio, 1 x 1 bed, 22 x 2 bed and 7 x 3 bed apartments) with parking for 43 cars and 6 motorcycles in an automated stacker system.

The amended proposal also makes subsequent changes to the facades of the building as well as a change in definition of proposal from "60 apartments, retail and 39 carspaces" to "61 apartments, retail and 43 carspaces".

JUSTIFICATION FOR MODIFICATIONS

The applicant's justifications are reproduced for the Panel's information as follows:

The modifications proposed are being sought to address construction impacts and improve the amenity of the apartments within the proposed building which was compromised by the amendments required by Council and the JRPP in order to gain approval. It is my understanding that the amendments sought were required to ensure an appropriate level of light and ventilation to the bedroom windows opening onto the light well within No. 237 Miller Street, to provide an appropriate outlook from the three upper level rear south-eastern balconies within that same building and to ensure an appropriate level of solar access and visual and acoustic privacy is retained to dwellings within No. 225 Miller Street.

As such the modifications proposed seek to redress the amenity and construction impacts upon the proposal whilst retaining an appropriate level of amenity to the buildings identified above.

The implications of the redesign of the rear of the approved building have been investigated and are discussed following:

Construction Impacts

As detailed in the letter from Structural Design Solutions, dated 11.8.2015, the modifications required by the JRPP, at the recommendation of Council, have significant impacts on the structural design of the building and have resultant impacts upon the layout and amenity of the proposed apartments along with the floor to ceiling height achievable within those affected apartments.

In summary, the report indicates that the need to provide a 1.5m setback from the side boundary above Level 5 and the changes in setbacks at the south-east corner mean that the proposed method of construction outlined in the development application to Council is no longer possible. The originally proposed method of construction was a load bearing precast wall system which allowed the floor to floor heights proposed to achieve a 2.7m floor to ceiling as a 180mm thick slab was used, given the narrow width of the building.

The approved design requires transfer beams to be provided on a number of levels to support the loads at the south-eastern corner of the building, which will no longer be able to be supported on the walls below due to the steps in the design. The size of the transfer beams is such that there will be a significant impact upon the layout of the apartments and as such there would be a need to increase the height of the building to maintain a 2.7m floor to ceiling height.

Secondly, the 1.5m setback requires the majority of the weight of the building at the northern boundary to be supported not on the external walls, but rather on a series of transfer beams (1.4m deep) and a series of columns (700mm x 800mm) extending down to the basement. This would have a significant impact upon the layout and design of the building and the apartments at the northern side of the building.

These construction difficulties would be resolved if the modified proposal, which provides for a central light well and less steps in the rear façade, were approved as the building could then be supported on the external walls and the original load bearing precast wall system could be used.

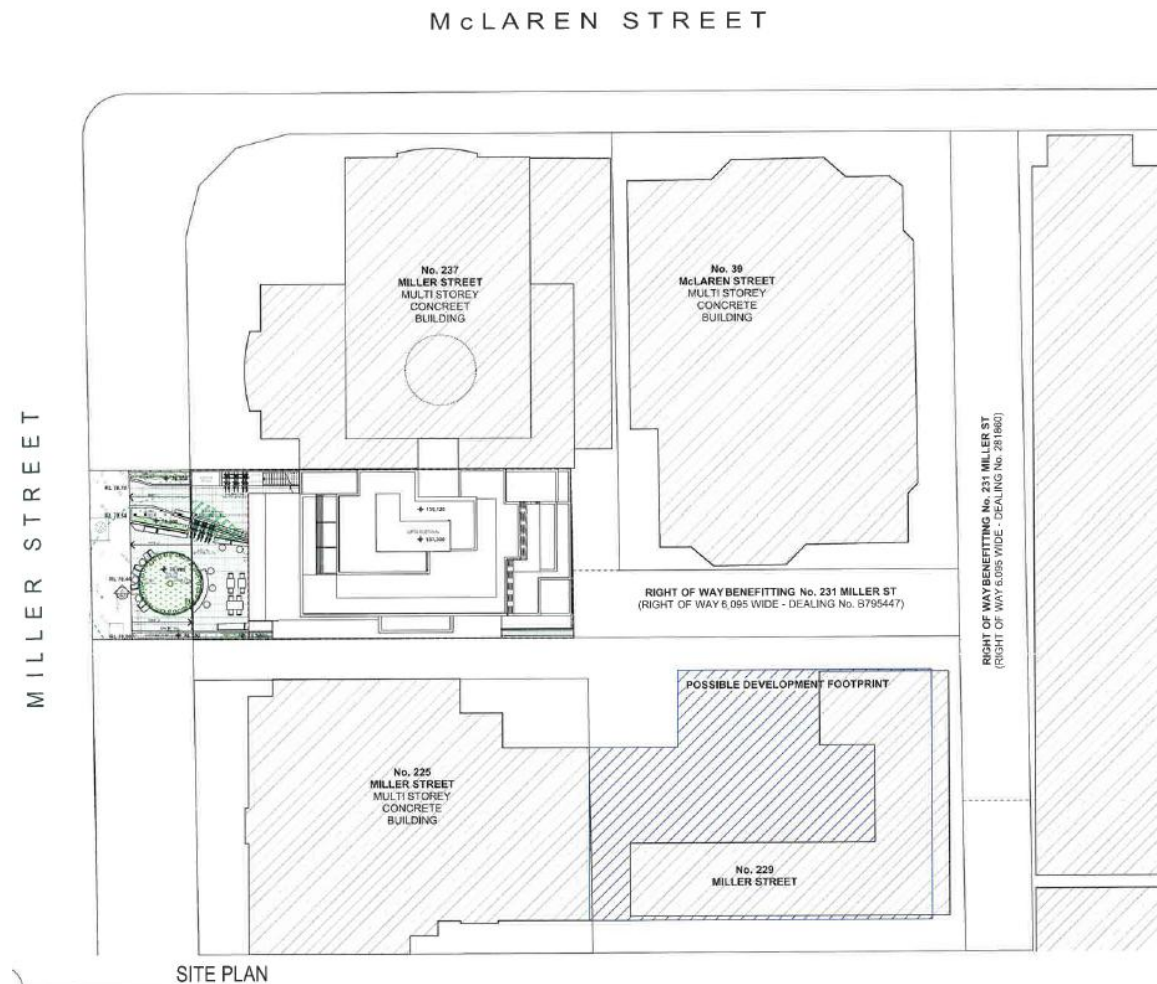
If this amended proposal is not supported a s96 modification application would need to be submitted seeking to raise the height of the building to achieve 2.7m floor to ceiling heights and also seeking to modify the layout to allow for the columns and transfer beams.

Finally, it is noted that the approved development would be more difficult to construct and also significantly more expensive due to the change in construction and support methods required to achieve the stepping and side setback required.

Comment:

Consideration of the proposal with regard to the surrounding apartment buildings relate to separation distances and adequate setbacks and not structural issues with the approved building. The site is small and isolated. None of the setbacks proposed on the northern, eastern and southern boundaries are even close to the recommended minimum distances under the Apartment Design Guide. The site borrows heavily from its neighbours. With an average site, there is a podium on the lower floors and a tower that is setback from the boundaries for usually its full height without stepping. If stepping is to be limited on this site, perhaps the full setbacks for the tower should commence at level 5 (podium) with the northern boundary to have a setback of 1.5m

from the western edge of the light well on the adjoining building to the eastern end of the building from level 5 up; levels 5 up to have a minimum 6m by 6m setback at the south east corner; and levels 5 up to have a 3m setback from the eastern boundary. The approved plans allowed stepping on the basis of the height and siting of the current building. It is noted that the Meriton site to the south, maintained consistent setbacks for its tower above a lower podium.



The site plan show adjacent sites and the setbacks that are provided. The subject site borrows heavily from the adjacent properties. It should be noted that the "possible development footprint" shown on 229 Miller Street does not represent any approved footprint from Council and in fact there was an expectation of the footprint being a mirror reversal of No.225.

Clause 4.3 of NSLEP2013 sets a maximum height for buildings on the subject site of RL 130m AHD. The amended application (same as the approved plans with regard to height) proposes a building height of RL 132.33 to the roof of Level 18 (highest level of accommodation), of RL 135.22 to the top of the plant room/common room and of RL 136.22 to the lift overrun, exceeding the height control in these places by 2.33m, 4.22 and 6.22m, respectively.

Clause 4.6 of the LEP permits variations to development standards, of which the RL 130 height control is one, in order to provide an appropriate degree of flexibility in applying

development standards and in order to achieve better outcomes for and from development by allowing flexibility.

The request with the approved plans was considered well founded as the increase in height did not provide additional density and a communal space was provided on the roof to the benefit of future residents. The variation was supported only after appropriate setbacks were provided to the northern and eastern boundaries to further reduce amenity impacts to adjoining properties. Should the height be increased further for structural reasons so that the floor level of the highest level of accommodation exceeds the height control, then it may be necessary to remove a residential floor.

Inefficient Layout

The 1.5m northern boundary setback requirement effectively "gifts" that portion of the subject site to the adjoining property which has no legal right to light or ventilation over the subject site in such a manner as it does not have an easement for light and ventilation over the subject site. The building at No. 237 Miller Street takes advantage of a nil setback to the southern boundary but it has been determined unreasonably that the proposed building cannot also have a nil setback because of the poor design of the adjoining building. The setback, in combination with the non-compliant openings (ie bedroom and bathroom windows that do not have fire shutters) means that the benefit of a side setback cannot be utilised by the apartments on the subject site as windows cannot be provided.

The requirement for a 1.5m setback for more than half the northern side boundary results in inefficiencies in the layout for each floor with a wider than necessary corridor on each level given the location of the lift shafts.

Further, the loss of such an amount of floor space on each level above Level 4 to benefit the adjoining building and at no benefit to the proposed building is unreasonable, particularly when there is an alternative which does not result in such inefficiencies for the building on the subject site. The light well alternative is discussed following.

Comment:

Relying on difficult site circumstances caused by an adjoining building not meeting current code standards should not be accepted as a reason for a lesser outcome than could be achieved by a more considered design. A side setback is now recommended for residential towers under SEPP 65. That setback can be between 3m and 12m. Requiring a minimal 1.5m setback for half the tower is not "gifting" land to the neighbour where greater setbacks are required. The applicant is getting a benefit from the neighbour being mostly on the boundary and therefore not having to setback. As demonstrated above, adjacent development to the south and east are "gifting" land that is heavily borrowed to provide separation between buildings.

Light Well

A light well option has been investigated, being similar to the option identified in the Council report, which provides a light well opposite the light well in the adjoining building. Again, given the non-compliant openings in the adjoining building, -the light well is gifting part of the subject site to the adjoining property at no benefit to the subject site as no opening windows can be provided to the light well, but the "gift" has less impact upon the proposed building.

The report prepared by WSP Parsons Brinckerhoff investigates in detail the two options in terms of light and ventilation to the adjoining building and clearly establishes that the light well option proposed in the

modification is the superior option. Given the improved light and ventilation to the adjoining building and the improved efficiency in floor layout for the subject site, in my opinion the modified design is in every way superior to the approved design and should be supported'

Comment:

A copy of the Comparative Performance Study is attached for the Panel's information. The above comments are quite misleading when the report is read. The two options investigated relate to the 1.5m setback (as approved) and an alternate 3m deep light well. The Section 96 is proposing only a 2.5m deep light well so it would be less efficient than the 3m option investigated.

The report concludes that the 3m light well is the same as the 1.5m setback option with regard to cross ventilation although there is no mention of any difference there might be by having a fully enclosed light well compared to the 1.5m setback to the open air over 12 levels.

With regard to light analysis, there is an unperceivable variance in daylight levels for the lower levels of No.237 up to level 11 with the variance in daylight levels for the upper 3 levels may be perceived but unlikely to impact amenity. In fact the 1.5m setback is shown to be better than the 3m light well. The 3m light well only improves to be marginally better if the 3 walls of the light well at No.237 painted with a vivid white paint. The conclusion even if the adjacent light well is painted is that there would be an unperceivable variation in daylight levels.

Rear Setbacks

The need for the rear setback of 1.5m from Level 11-14 is not justified by the location of the balconies at the south-eastern corner of No. 237 Miller Street at these levels. The setback will not preserve views as the redevelopment of No. 229 Miller Street (maximum height RL 135) will result in the loss of any views from these apartments (it being noted that negotiations are currently underway for the redevelopment of that site). Accordingly, the only benefit that could be derived is that the side of the balconies would not be enclosed, as they are on the balconies below. Whilst it is not considered reasonable that the proposed building not align with the end of these balconies for this reason alone, again, an alternative setback solution could achieve this end without such loss of floor space.

The amended design provides for a 1.15m setback from the rear boundary for a distance of 3.2m, which would align the rear wall of the proposed building with the rear wall of the adjoining apartment, achieving an open characteristic to the balcony. This setback achieves a similar level of amenity to the balconies and a privacy screen on the northern side of the proposed balconies to the apartments in this location will ensure privacy is maintained. It is considered that this amended design is more than reasonable in terms of protecting the amenity of the adjoining balconies.

The requirement to provide a 3m rear setback from Level 15 and above is largely retained in the amended proposal, with a setback of 3m other than for the rear balcony which has a setback of 2.2m. The difference in the sense of openness to the adjoining dwellings in No. 237 Miller Street would be minimal.

Comment:

In hindsight, the minimum setback from the rear boundary for the whole tower perhaps should have been 3m (increased at the SE corner) rather than nil, then 1.5m then 3m.

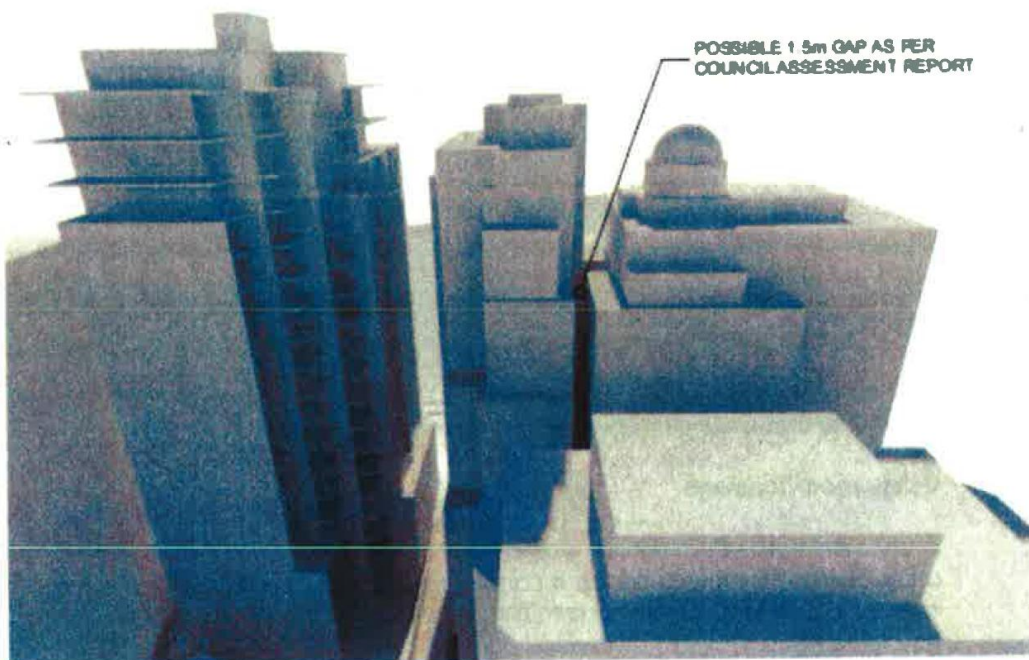
Separation distances for residential towers are important for amenity and urban design so that towers are not perceived as a wall of development from the surrounding area and the public domain and there is some reasonable distance between living areas where it is the only limited outlook. As the approved plans are already well under ADG recommended minimum setbacks, a further reduction cannot be supported.

South-East Corner Setbacks

The requirement to provide stepped setbacks at the south-eastern corner of the building results in construction difficulties, given the proposed number of steps in the design of this portion of the building and also results in an inferior architectural presentation of this portion of the building. The south-east corner of the building will, under the approved design, have multiple different side and rear setbacks as shown in the diagram on the following page. The aesthetics of the architectural design are destroyed by the multiple changes to setback and the difficulty and cost of construction is significantly greater.

It is not considered that these negative impacts are warranted for the minimal benefit achieved by the increased setbacks. The benefits sought were identified in the assessment report as improved solar access to the dwellings in No.225 Miller Street and improved visual and acoustic privacy. It is not considered that the setbacks improve visual privacy as all windows and balconies facing southward in the modified development have screens, ensuring the same level of visual privacy is maintained as in the approved development.

In terms of acoustic privacy, given the separation distances in the modified proposal at this point of the building are all 12m or greater and the separation between the building at No. 225 Miller Street and the approved development at No. 221 Miller Street are 6m-12.5m, it cannot be seen how the acoustic privacy would be assessed as being unacceptable.



3D diagram of series of setbacks approved in rear façade of building

Comment:

Separation distances for residential towers are important for amenity and urban design so that towers are not perceived as a wall of development from the surrounding area

and the public domain and there is some reasonable distance between living areas where it is the only limited outlook. As the approved plans are already well under ADG recommended minimum setbacks, a further reduction cannot be supported.

It is agreed that*The requirement to provide stepped setbacks at the south-eastern corner of the building results in construction difficulties, given the proposed number of steps in the design of this portion of the building and also results in an inferior architectural presentation of this portion of the building.*

The applicant was given the benefit of stepping at the lower levels only because of the scale and siting of the existing office building. The situation would definitely be improved by having consistent setbacks from level 5 up adopting the maximum higher level setbacks that were allowed (6m x 6m at SE corner and 3m from rear boundary). An increase in the setbacks at the lower levels to be consistent throughout the tower (removing the steps and structural difficulties) could possibly be supported.

STATUTORY CONTROLS

North Sydney LEP 2013 - Zoning – B4 Mixed Use
S94 Contribution
Environmental Planning & Assessment Act 1979
SEPP 65
SEPP 55 - Contaminated Lands
SREP (2005)

POLICY CONTROLS

North Sydney DCP 2013

CONSENT AUTHORITY

As this proposal has a Capital Investment Value (CIV) of greater than \$20 million the consent authority for the development application is the Joint Regional Planning Panel, Sydney East Region (JRPP).

DESCRIPTION OF LOCALITY

The property is known as No.231 Miller Street, North Sydney and comprises one lot identified as SP 54070. The site is located on the eastern side of Miller Street, one lot to the south of its intersection with McLaren Street. The property is rectangular in shape and has a frontage to Miller Street and rear boundary dimension of 15.24m and side boundary dimensions of 34.27m, with a site area of 521.3m². The site has a fall from Miller Street to the rear of approximately 4m. The site also benefits from two rights-of-carriageway, over Nos, 237 and 221 Miller Street, which provide vehicular access from McLaren Street. No vehicular access is currently available directly from Miller Street.

The site is currently occupied by a seven storey brick office building with two levels of basement parking and the building is currently strata titled. The existing building is

currently setback from Miller Street by approximately the same amount as the two immediately adjoining buildings, 6.1 - 6.9m.

Immediately adjoining the site to the south, No. 225 Miller Street, is a multi-storey mixed use building containing business premises at ground level and residential uses above.

Immediately adjoining the site to the north, No. 237 Miller Street, the building contains business uses at ground level and residential apartments above.



Fig.1 The existing 7 storey building on the subject site



Fig. 2 The recent redevelopment at No. 225 Miller Street, adjoins the site to the South



Fig. 3 The development at No 237 Miller Street, adjoins the site to the North. Note Southern blank wall with lightwell, which adjoins the subject site

BACKGROUND

The original application (2015SYE006 North Sydney – DA. 453/14) was reported to the JRPP (Sydney East Region) at its meeting of 1 July 2015 with a recommendation for refusal for the following reasons:

3. The proposed development fails to provide for adequate setbacks and building separation distances on its northern, eastern and southern boundaries.
4. The lack of setbacks results in adverse amenity impacts on adjacent development with regard to overshadowing, aural privacy, reduced daylight and ventilation.

Panel Decision:

1. The Panel resolves unanimously to defer the determination of the application to allow the applicant to submit amended plans by 24 July 2015. The amended plans should contain the following modifications:
 - a. The northern boundary is to have a setback of 1.5m from the western edge of the light well on the adjoining building to the eastern end of the building from level 5 up;
 - b. Levels 11 to 17 are to have a minimum 6m by 6m setback at the south east corner;
 - c. Levels 11 to 14 are to have a 1.5m setback from the eastern boundary; and
 - d. Levels 15 and 16 are to have a 3m setback from the eastern boundary.
2. The applicant is also requested to provide council, by 24 July 2015, with comments on the recommended conditions attached to the assessment report.
3. The Panel requests the council's assessment officer to prepare, within a week after receiving the amended plans, a supplementary report including recommended conditions, indicating whether the amended plans have responded to the above changes. This is subject to the amended plans not requiring further notification.
4. Following receipt of the supplementary report, the Panel will determine the application by communicating by electronic means.

The amended plans were submitted to Council on 24 July 2015. The amended plans were fully compliant with the modifications a, b, c and d as required in the above JRPP resolution.

The JRPP (Sydney East Region) at its meeting held electronically between 29 July 2015 and 30 July 2015 granted consent to the application subject to the recommended conditions.

REFERRALS

No referrals were required as the application is similar to the proposal originally submitted before amendments were required by the Panel.

SUBMISSIONS

The application was notified to the Edward, CBD and Union precincts and surrounding owners and residents in accordance with Council policy. A total of 2 submissions were received with the main issues being summarised as follows:-

Stanton Precinct

Precinct is concerned about modifications being proposed for this development: the setback and the fact that the plan does not enhance the other buildings in the streetscape.

Meriton Group

Meriton owns the adjoining property to the south (225 Miller Street).

We note that the proposed amended development includes reduced setbacks to the rear of the building.

This will increase overshadowing of Merion's property. We trust that Council will ensure that the proposed shadowing is within the limitations of the Council's DCP and other relevant planning controls. Otherwise, we would urge that that component of the Section 96 application be refused.

CONSIDERATION

The proposal is required to be assessed having regard to the following matters.

Section 96(2) of the Environmental Planning and Assessment Act 1979 enables a consent authority to modify a development consent upon application being sought by the applicant or any person entitled to act on the consent, provided that the consent authority:

- is satisfied that the development to which the consent as modified relates is substantially the same development;
- has consulted the relevant Minister, public authority or approval body 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;
- has notified the application in accordance with the regulations and has considered any submissions made concerning the proposed modification; and
- in determining the application for modification, has taken into consideration such matters referred to under Section 79C(1) as are relevant.

Therefore, assessment of the application to modify the subject development consent must consider the following issues:

Is the proposed development as modified substantially the same development approved?

Section 96(2)(a) of the EP&A Act states that a consent authority may modify a development consent if "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)".

The Land and Environment Court established some key principles to be taken in account when considering what constitutes a modification, these being:

- The verb "modify" means to alter without radical transformation.
- "Substantially" in this context means essentially or materially or having the same essence.
- A development as modified would not necessarily be "substantially the same development" simply because it is for precisely the same use as that for which consent was originally granted.

- A modification application involves undertaking both a qualitative and quantitative comparison of the development as originally approved and modified.
- Environmental impacts of the proposed modifications are relevant in determining whether or not a development is 'substantially the same'.

The Panel would not grant consent to the original proposal without a number of amendments to increase setbacks on the northern, eastern and southern boundaries which are now proposed to be varied/deleted by this application. This application is therefore reverting back to a proposal that is very similar to the original plans (particularly the setbacks) that was not recommended to (or supported) by the Panel.

The setbacks required by the Panel were the minimum requirements considered necessary having regards to the size of the site and circumstances with surrounding development. The required setbacks were still substantially below the recommended separation distances under the RFDC. Reduced setbacks are not going to improve environmental impacts. It is considered that reverting back to a design that was not recommended or favoured by the Panel cannot be considered as substantially the same as approved.

The proposed development as modified is considered not to be substantially the same development as approved.

Whether the application required the concurrence of the relevant Minister, public authority or approval body and any comments submitted by these bodies.

The application does not require the concurrence of the Minister, public authority or approval body.

Whether any submissions were made concerning the proposed modification.

Notification of the proposal has attracted 2 submissions raising particular concerns about the impacts of reduced setbacks on surrounding buildings. The issues raised are addressed within this report.

Any relevant considerations under Section 79C(1) of the Environmental Planning and Assessment Act 1979.

The relevant matters for consideration under Section 79C of the *Environmental Planning and Assessment Act 1979*, are assessed under the following headings:

NORTH SYDNEY LEP 2013

Permissibility within the zone

The proposal is permissible with consent under the B4 Mixed Use zoning as retail on the ground level and shop top housing above.

Zone B4 Mixed Use - Objectives of zone

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*
- *To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.*
- *To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses on the lower levels and residential uses above those levels.*

The design provides a flexible cafe/retail space, and residential apartments which are compatible uses with each other and surrounding land uses. The site is well located for access to public transport, being within a 700m walk from North Sydney Railway Station and being serviced by bus routes along Miller Street and Pacific Highway. The proposal is consistent with the objectives of the B4 zone.

Clause 4.3 Height of buildings

Clause 4.3 sets a maximum height for buildings on the subject site of RL 130m AHD. The amended application (same as the approved plans with regard to height) proposes a building height of RL 132.33 to the roof of Level 18 (highest level of accommodation), of RL 135.22 to the top of the plant room/common room and of RL 136.22 to the lift overrun, exceeding the height control in these places by 2.33m, 4.22 and 6.22m, respectively.

Clause 4.6 permits variations to development standards, of which the RL 130 height control is one, in order to provide an appropriate degree of flexibility in applying development standards and in order to achieve better outcomes for and from development by allowing flexibility.

The request with the approved plans was considered well founded as the increase in height did not provide additional density and a communal space was provided on the roof to the benefit of future residents. The variation was supported only after appropriate setbacks were provided to the northern and eastern boundaries to further reduce amenity impacts to adjoining properties. Should the height be increased further for structural reasons so that the floor level of the highest level of accommodation exceeds the height control, then it may be necessary to remove a residential floor.

Clause 4.4A Non-residential floor space

The provisions of clause 4.4A set requirements for floor space for non-residential uses, in this case the site is located within Area 9 which requires that the non-residential floor space ratio must not be less than 0.5:1. The site has an area of 521.36m² and as such the non-residential floor space is required to be a minimum of 260.68m². The proposal provides 268m² (0.51:1) of non-residential floor space, complying with the control.

Cause 5.1 Heritage conservation

The provisions of clause 5.1 address heritage conservation and require consideration of the impact of developments within the vicinity of items of heritage. The subject site is located within the vicinity of a number of items of heritage, opposite the site in Miller Street at Nos. 128 Miller Street (Monte Sant Angelo Group), 192 Miller Street, 196 Miller Street and 200 Miller Street (North Sydney Council Chambers and fountain) and to the rear at No. 41 McLaren Street (Simsmetal House).

Whilst the subject site is within the visual catchment of all of the above items of heritage, it is not considered that the proposal will have a detrimental impact on the heritage items or their settings as the building proposed is of commensurate height and design to surrounding development.

Clause 6.1 Objectives of Division (North Sydney Centre)

Objective	Comment
(a) to maintain the status of the North Sydney Centre as a major commercial centre	Proposal consistent with zoning
(b) to require arrangements for railway infrastructure to be in place before any additional non-residential gross floor area is permissible in relation to any proposed development in the North Sydney Centre	No additional non residential floor space
(c) to permit an additional 250,000 square metres of non-residential gross floor area in addition to the estimated existing (as at 28 February 2003) 700,000 square metres of non-residential gross floor area	The additional non residential gross floor area is within the 250,000m ² limit.
(d) to ensure that transport infrastructure, and in particular North Sydney station, will enable and encourage a greater percentage of people to access the North Sydney Centre by public transport than by private transport and: (i) be convenient and accessible, and (ii) ensure that additional car parking is not required in the North Sydney Centre, and (iii) have the capacity to service the demands generated by development in the North Sydney Centre	Council has instigated measures with State Rail to ensure that North Sydney Railway Station is upgraded to improve patronage. The proposal does not provide for car parking on site exceeding the maximum permitted.
(e) to encourage the provision of high-grade commercial space with a floor plate, where appropriate, of at least 1,000 square metres	Not possible on small isolated site
(f) to protect the privacy of residents, and the amenity of residential and open space areas,	Satisfactory.

within and around the North Sydney Centre	
(g) to prevent any net increase in overshadowing of any land in Zone RE1 Public Recreation (other than Mount Street Plaza) or any land identified as "Special Area" on the <u>North Sydney Centre Map</u>	The proposed development will result in no additional overshadowing.
(h) to prevent any increase in overshadowing that would adversely impact on any land within a residential zone	No impacts
(i) to maintain areas of open space on private land and promote the preservation of existing setbacks and landscaped areas, and to protect the amenity of those areas	No applicable to site

6.3 Building heights and massing

(1) The objectives of this clause are as follows:

(a) to achieve a transition of building heights generally from 100 Miller Street and 79–81 Berry Street to the boundaries of the North Sydney Centre,

The proposal provides for an appropriate transition of heights from the centre of North Sydney Centre to the boundaries.

(b) to promote a height and massing that has no adverse impact on land in Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map or on the land known as the Don Bank Museum at 6 Napier Street, North Sydney,

The height proposed has no adverse impacts upon any land zoned RE1 or identified as a Special Area.

(c) to minimise overshadowing of, and loss of solar access to, land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential, Zone R4 High Density Residential, Zone RE1 Public Recreation or land identified as "Special Area" on the North Sydney Centre Map,

The proposal has no detrimental shadow impacts upon any land zoned R2, R3, R4 of RE1 or land identified as a Special Area, with any shadow impact due to the proposal falling within existing shadows.

(d) to promote scale and massing that provides for pedestrian comfort in relation to protection from the weather, solar access, human scale and visual dominance,

The proposal provides a compliant podium at 5 storeys and as such provides for an appropriate "human scale" within the visual context of Miller Street. Awning not required due to 5m setback requirement.

(e) to encourage the consolidation of sites for the provision of high grade commercial space.

The site is an isolated surrounded by either relatively recent developments or rights-of-way to such properties and as such site consolidation is not possible. Both adjoining sites are not available for redevelopment so further consolidation is not practical.

(2) Development consent must not be granted for the erection of a building on land to which this Division applies if:

(a) the development would result in a net increase in overshadowing between 12 pm and 2 pm on land to which this Division applies that is within Zone RE1 Public Recreation or that is identified as "Special Area" on the North Sydney Centre Map, or

The proposed building does not overshadow land zoned RE1 or any Special Area between 12pm and 2pm.

(b) the development would result in a net increase in overshadowing between 10 am and 2 pm of the Don Bank Museum, or

The proposal does not overshadow Don Bank.

(c) the site area of the development is less than 1,000 square metres.

The site area is 521.3m² and the site is isolated surrounded by either relatively recent developments or rights of way to such properties and as such site consolidation is not possible.

As such, a variation pursuant to clause 4.6 was necessary to permit the site to be developed in isolation. The request was considered to be well founded with the approved plans subject the building being an appropriate development that does not result in unreasonable impacts.

(3) Development consent for development on land to which this Division applies may be granted for development that would exceed the maximum height of buildings shown for the land on the Height of Buildings Map if the consent authority is satisfied that any increase in overshadowing between 9 am and 3 pm is not likely to reduce the amenity of any dwelling located on land to which this Division does not apply.....

The shadow diagrams provided with the application show that between 9am and 3pm at midwinter the shadows cast by the portion of the building that exceeds the height control will not reduce the amenity of any dwelling located on land outside the North Sydney Centre

(5) In determining whether to grant development consent for development on land to which this Division applies, the consent authority must consider the following:

(a) the likely impact of the proposed development on the scale, form and massing of the locality, the natural environment and neighbouring

development and, in particular, the lower scale development adjoining North Sydney Centre,

The scale, form and massing of the proposed development is reflective of the scale, form and massing of the adjoining buildings which have been developed recently. The form with regard to setbacks impact on neighbouring development and should not be reduced from the minimum requirements required by the Panel in order to grant consent to the proposal.

(b) whether the proposed development preserves significant view lines and vistas,

There are no view lines or vistas affected by the proposal.

(c) whether the proposed development enhances the streetscape in relation to scale, materials and external treatments.

The scale is compatible with the surrounding buildings and the proposed materials and external treatments are appropriate for the setting.

6.4 Miller Street setback

- (1) The objective of this clause is to maintain the established setback and landscaped setting on the eastern side of Miller Street between McLaren Street and Mount Street.*
- (2) Development consent must not be granted for the erection of a building on land identified as "Miller Street Setback" on the North Sydney Centre Map unless:*
 - (a) the building height will be less than 1.5 metres, and*
 - (b) the part of the building that will be on that land is used only for access to the building or landscaping purposes.*

The proposal provides no works with a height greater than 1.5m above existing ground level within the front 5m of the subject site and provides a landscaped setting within that 5m setback, complying with the control. The front awning is not supported and was the subject of a condition in the approval requiring its removal.

6.5 Railway infrastructure

- (1) The objective of this clause is to require satisfactory arrangements to be made for the provision of railway infrastructure to satisfy needs that arise from development in North Sydney Centre.*
- (2) Development consent must not be granted for development on land to which this Division applies if the total non-residential gross floor area of buildings on the land after the development is carried out would exceed the total non-residential gross floor area of buildings lawfully existing on the land immediately before the development is carried out, unless:*
 - (a) the Director-General has certified, in writing to the consent authority, that satisfactory arrangements have been made for railway infrastructure that will provide for the increased demand for railway infrastructure generated by the development, and*
 - (b) the consent authority is satisfied that the increase in non-residential gross floor area authorised under the development consent concerned when added to the increases*

(reduced by any decreases) in non-residential gross floor area authorised under all consents granted since 28 February 2003 in relation to land in the North Sydney Centre would not exceed 250,000 square metres.....

The existing buildings on the site have a total non-residential gross floor area of approximately 2239m² and the proposal has a non residential floor area of 268m². There is no additional non residential floor space proposed and accordingly certification is not required.

SEPP 65 – Design Quality of Residential Flat Development

State Environmental Planning Policy No. 65 aims to improve the design quality of residential flat development in New South Wales by recognising that the design quality of residential flat development is of significance for environmental planning for the State due to the economic, environmental, cultural and social benefits of high quality design. The SEPP aims to:-

- (a) to ensure that it contributes to the sustainable development of New South Wales:
 - (i) by providing sustainable housing in social and environmental terms, and*
 - (ii) by being a long-term asset to its neighbourhood, and*
 - (iii) by achieving the urban planning policies for its regional and local contexts, and**
- (b) to achieve better built form and aesthetics of buildings and of the streetscapes and the public spaces they define, and*
- (c) to better satisfy the increasing demand, the changing social and demographic profile of the community, and the needs of the widest range of people from childhood to old age, including those with disabilities, and*
- (d) to maximise amenity, safety and security for the benefit of its occupants and the wider community, and*
- (e) to minimise the consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions.*

The primary design principles being Context, Scale, Built Form, Density, Resource Energy & Water Efficiency, Landscape, Amenity, Safety & Security, Social Dimensions and Aesthetics are discussed as follows:

PRINCIPLE 1: Context

The North Sydney commercial area consists largely of mid and high rise commercial and residential buildings. The proposed development has been designed in the context of the future desired character. The design responds to its context and the desired future character of the area, providing an appropriate stepping in height between the adjoining buildings and providing podium heights commensurate with the more recent development.

PRINCIPLE 2: Scale

The proposed development is generally consistent with the visual height and bulk of the existing and desired future character for development in this area, it being noted that the breach of the height control is a response to the site context and the scale of the

immediately adjoining buildings. However, aspects of this development are unsatisfactory in terms of setbacks and clearly do not meet the objectives of the RFDC (ADG).

PRINCIPLE 3: Built Form

The design of the development is appropriate for the site, taking its design queues in relation to height. The proposed building will complete this section of Miller Street in terms of providing development that steps down in height as one travels northward along the street. The setbacks above the podium to the south and the east should not be reduced further as the building would then borrow heavily on the setbacks provided by developments to the east and south.

PRINCIPLE 4: Density

The density of the development is generally consistent with that expected within the mixed use zone, where Council has determined that it is appropriate to provide for a higher density of residential development in order to ensure the zone is activated both day and night. The density is largely controlled by the height and setback controls. Whilst the proposed building is not fully compliant with setbacks and height, the design reflects the existing site context. Reduction in the approved setbacks will lead to an increased density on the site where the approved density was greater than adjoining developments.

PRINCIPLE 5: Resource, Energy and Water Efficiency

The building is designed for energy efficiency despite it being constrained by the orientation and the size of adjoining buildings to the north and north-east. Solar access is maximised by orienting all apartments to the west or east, with no south facing apartments proposed, thereby satisfying the rule of thumb guideline of 70% of apartments with 2 hours of solar access. The BASIX report submitted with the application shows appropriate use of energy and water efficient devices and design.

PRINCIPLE 6: Landscape

A landscape plan has been prepared detailing the intended planting of the proposed roof garden on Level 18 and front forecourt area of the development. The roof garden is designed to survive largely on rainfall once established. The design seeks to provide a green roof. The paving and landscaping of the forecourt of the building will allow for its appropriate activation and use in conjunction with a likely future café and the required retention of street trees.

PRINCIPLE 7: Amenity

A functional communal space is proposed on the roof which will receive good solar access.

PRINCIPLE 8: Safety and Security

The safety of the residents will be ensured as the lift lobby is only accessible from the ground level by the residents and by the provision of key locking of each level of the building when accessed from the lower ground level. An intercom access arrangement will be provided at the entrance to the residential lobby of the building. Windows are provided to the south of the café for surveillance of the adjoining right of way.

PRINCIPLE 9: Social Dimensions and Housing Affordability

A mix of unit styles and sizes is provided to cater for a mix of household types. The provision of a functional communal space on the roof provides good opportunities for the residents of the building to meet in addition to the ground floor public café. A number of the smaller apartment will not have a parking space on site.

PRINCIPLE 10: Aesthetics

The design of the building is simple and modern and is appropriate to the site's infill location within Miller Street. Architectural features have been included to provide both horizontal and vertical emphasis, with the strong horizontal emphasis of the podium and vertical elements provided by the proposed blade features on the Miller Street façade. Further articulation is provided by the louvre elements and metal screening to the balconies.

SEPP 55 and Contaminated Land Management Issues

The subject site has been considered in light of the Contaminated Lands Management Act and it is considered that as the site has been used for commercial purposes, contamination is unlikely.

SREP (Sydney Harbour Catchment) 2005

The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SREP. The site, however, is not located close to the foreshore and will not be readily visible from any part of the harbour and the application is considered acceptable with regard to the aims and objectives of the SREP.

DEVELOPMENT CONTROL PLAN 2013

NORTH SYDNEY CENTRE PLANNING AREA / CENTRAL BUSINESS DISTRICT

The subject site is within the Central Business District which falls within the North Sydney Centre Planning Area. The statement for the Central Business District indicates that the land use should be predominantly high rise commercial development with medium to high rise mixed commercial and residential development at the fringes. As the site is one at the fringes of the Central Business District, it is compatible with this land use intent, being a high rise mixed use development.

The statement further indicates that views between buildings on the east side of Miller Street, between Berry Street and McLaren Street are to be preserved. The existing building has a nil setback to the north and south and as such views or vistas are provided over the site. However, the view between the proposed building and the adjoining building at No.225 Miller Street is maintained by virtue of the right of way existing between the two properties.

The statement also indicates that streetscapes should include wide fully paved footpaths, active street frontages and continuous awnings, with irregular street tree

planting. The proposal provides for a wide paved footpath and front setback, allowing activation of the street frontage whilst still allowing for heavy pedestrian usage. No awning is allowed due to the required setback, but the existing street tree planting is retained by the proposal.

The proposed development is consistent with the desired future character, providing a high rise mixed use development, with appropriate non-residential uses at the lower level

Setbacks

Setbacks are to be provided in accordance with the character statement, with setbacks to consider the setbacks of adjacent buildings. A zero front, side and rear setback is to be provided for the podium unless a character statement requires an alternate setback. The LEP requires a front setback of 5m from Miller Street that has been provided.

The amended proposal has failed to provide adequate setbacks and separation to surrounding residential buildings. Council's controls require a minimum 3m setback from side and rear boundaries for a residential tower above a podium as well as consideration to the separation distances under the RDFC (ADG). The ADG recommends side and rear setbacks of 6m, 9m and 12m dependent on the height of the building. The proposal does not satisfy these requirements on any boundary. It is recognised that the site is small and isolated. However, the proposal is seeking a breach of the height control and 18 floors of development on a site of just over 500m². As such it borrows heavily on the setbacks of surrounding buildings and relies on extensive screening of its windows and balconies.

As part of the initial assessment of the original plans, the applicant was advised:

Setbacks in south eastern corner not supported above level 7 difficult to support borrowing of setbacks from other sites. Council normally requires minimum setback of tower above podium of 3m from boundary as well as consideration of RDFC. Need to increase setback at levels 7 -10 to a minimum 4m x 4m (square setback) at SE corner. Need to increase setback at levels 11 -17 to a minimum 6m x 6m (square setback) at SE corner. 3m setback from eastern boundary at level 15 and 16

The applicant responded with amended plans similar to this Section 96 application. Those plans were not supported as there was inadequate separation between buildings. Increased separation also improves shadow impacts. The space at the rear of the buildings fronting Miller Street and McLaren Street is quite tight and there are many apartments that have their balconies and living areas facing this space. It is important to maximise the setbacks while still permitting a reasonable level of development.

The setbacks suggested to the Panel was the minimum that could be supported to reach a balance with adjoining development. To reduce the setbacks further would not be reasonable to adjoining development.

SECTION 94 CONTRIBUTIONS

Section 94 Contributions in accordance with Council's Section 94 plan are based on the

number and mix of residential apartments with allowance for the reduction in non residential floor space on the site. The contribution will require modification should an amended proposal be supported that alters the mix and number of apartments.

237 Miller Street Consent

A development application was made to Council on 22 January 1995. This application was refused on 13 March 1995 and subsequently appealed. There were numerous reasons for refusal, in effect; the proposal did not comply with the planning controls at the time. The Land and Environment Court upheld the appeal and the existing building on this site largely reflects that consent. Of note, bulk, scale, height and floor space issues were key to this determination. The applicant's arguments in turn rely heavily on the lack of setback to the southern boundary. It is evident that less than desirable development such as this is what led to the introduction of SEPP 65. Relying on difficult site circumstances caused by an adjoining building not meeting current code standards should not be accepted as a reason for a lesser outcome than could be achieved by a more considered design. A side setback is now recommended for residential towers under SEPP 65. That setback can be between 3m and 12m. Requiring a minimal 1.5m setback for half the tower is not "gifting" land to the neighbour where greater setbacks are required. The applicant is getting a benefit from the neighbour being mostly on the boundary.

ALL LIKELY IMPACTS OF THE DEVELOPMENT

All likely impacts of the proposed development have been considered within the context of this report.

ENVIRONMENTAL APPRAISAL	CONSIDERED
1. Statutory Controls	Yes
2. Policy Controls	Yes
3. Design in relation to existing building and natural environment	Yes
4. Landscaping/Open Space Provision	Yes
5. Traffic generation and Carparking provision	Yes
6. Loading and Servicing facilities	Yes
7. Physical relationship to and impact upon adjoining development (Views, privacy, overshadowing, etc.)	Yes
8. Site Management Issues	Yes

9. All relevant S79C considerations of Environmental Planning and Assessment (Amendment) Act 1979 Yes

Submitters Concerns

The concerns raised by submitters have been addressed within the assessment report.

Conclusion

The application has been assessed against the relevant statutory controls and with regard to the existing and approved developments nearby. The amended proposal has failed to provide adequate setbacks and separation to surrounding residential buildings. Council's controls require a minimum 3m setback from side and rear boundaries for a residential tower above a podium as well as consideration being given to the separation distances under the RFDC. The proposal does not satisfy these requirements on any boundary. It is recognised that the site is small and isolated. However, the proposal is seeking a breach of the height control and 18 floors of development on a site of just over 500m². As such it borrows heavily on the setbacks of surrounding buildings and relies on extensive screening of its windows and balconies.

The Panel resolved not grant consent to the original proposal without a number of amendments being made to increase setbacks on the northern, eastern and southern boundaries which are now proposed to be varied/deleted by this application therefore reverting back to a proposal similar to the original plans that were not recommended to or supported by the Panel. The proposed development as modified is considered not to be substantially the same development as approved.

It is considered that the minimal setbacks allowed with the approved plans were generous to the applicant and the very minimum that could be supported. The applicant was also given the benefit of stepping of the building that allowed additional floor space. The alternative could have been consistent setbacks from level 5 up adopting the maximum higher level setbacks that were allowed (6m x 6m at SE corner and 3m from rear boundary).

The Section 96(2) application is not recommended for favourable consideration.

RECOMMENDATION

THAT the Joint Regional Planning Panel, as the consent authority, **refuse** to modify its consent dated 10 August 2015 in respect of a proposal for demolition of existing building and construction of mixed use building consisting of 60 apartments, retail and 39 car-spaces at 231 Miller Street North Sydney under the provisions of Section 96 of the Environmental Planning and Assessment Act with regard to 2015SYE113 – North Sydney - Development Application No.453/14/2, for the following reasons:

1. The proposed development fails to provide for adequate setbacks and building separation distances on its northern, eastern and southern boundaries.
2. The lack of setbacks results in adverse amenity impacts on adjacent development

with regard to overshadowing, aural privacy, reduced daylight and ventilation.

Geoff Mossemenear
EXECUTIVE PLANNER
