



Addendum Assessment Report to Sydney Central City Planning Panel

SCCPP reference	2016SYW0114
DA No.	DA/485/2016
Date of receipt	17 June 2016
Proposal	Demolition of all existing structures on site, (including the heritage listed residence), tree removal and construction of a mixed use development in the form of 2 towers (15 and 18 Storeys tall, respectively) over a podium and basement car parking.
Street address	44-48 Oxford Street, Epping
Property Description	Lot 1 DP 206646, Lot 2 DP 206646, Lot A DP 390454, Lot B DP 390454
Applicant	Pirsata Pty Ltd
Owner	Pirsata Pty Ltd
Submissions	50
List of All Relevant s79C(1)(a) Matters	<ul style="list-style-type: none">• Environmental Planning and Assessment Act 1979 (EP&A Act) and Environmental Planning and Assessment Regulation 2000.• State Environmental Planning Policy No. 55 – Remediation of Land• State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development• State Environmental Planning Policy (Sydney Harbour Catchment) 2005• State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004• State Environmental Planning Policy (State and Regional Development) 2011• State Environmental Planning Policy (Infrastructure) 2007• Hornsby Local Environmental Plan 2013 (HLEP)
Recommendation	Deferred Commencement
Council Officer	Liam Frayne

1. Introduction

DA/486/2016 (the application) was reported by the City of Parramatta Council (the Council) to the Sydney City Central Planning Panel (the Panel) on 7 February 2018.

The Panel determined to defer a decision on the application for the reasons as stated in the Record of Deferral:

“The Panel unanimously decided to defer consideration of the application until legal advice had been received regarding:

- *Necessity of the use of Planning Proposal when it is proposed to demolish a heritage item.*
- *Whether the activities concerning Isolation of the site meet the requirements of the Court’s Planning Principle.*
- *Response from Design Excellence and City Architect Office in relation to height variation, the zone boundary interface and feasibility of development on the isolated site in terms of whether that represents the orderly and economic use of the sites.*
- *Clarification whether in the circumstances here the concurrence of the Secretary of the Department of Planning can be assumed for the extent of the variation to the standard, i.e. greater than 10%.*

The Panel encourages a further report to:

- *Address the justification for determination of this application prior to the outcomes of the traffic study of Epping being available which will take into account cumulative impact.*
- *Provide a summary of the issues raised and outcomes of Council’s community conciliation meeting held on 24 January 2018.*

As this reporting may take some little time the Panel encourage adjoining owners and the applicant to consider some form of mediation to resolve the isolation question.”

This Addendum Assessment Report has been prepared by Advisian Pty Ltd on behalf of the Council to report on the above items as requested by the Panel as well as the following additional items:

- Correct a minor error in description in Section 4.4.1 of the previous Assessment Report with respect to the adjoining sites.
- Updating the earlier references to Section numbering and their respective provisions to reflect the recent amendments to the numbering of sections as well as to their provisions of the EP&A Act referred to in the previous Assessment Report following the amendments to the EP&A Act that came into force on 1 March 2018.
- Assessment of the amended Clause 4.6 Request and the Interpretation Strategy as submitted by the Applicant.

2. Legal Issues Raised by SCCPP

2.1 Necessity of the use of Planning Proposal when it is proposed to demolish a heritage item

As requested by the Panel, legal advice was obtained from the Council's Lawyer on 23 February 2018 which in summary advised that:

“(a) a consent authority may grant consent to the demolition of a local heritage item subject to proper assessment under clause 5.10 of the HLEP, without the necessity of it being removed from schedule 5 of the HLEP ('delisted');

(b) a planning proposal is required to remove a local heritage item from schedule 5 of the HLEP ('delisting');”

Legal advice on this matter was also sought from the Applicant. The advice from Pikes & Verekers Lawyers, dated 8 March 2018 concluded that *“There is no requirement to lodge a planning proposal in relation to the demolition of the heritage item.”*

Planning Comment: The respective legal advices concur and confirm that the Panel, as consent authority for this application, may, in accordance with Clause 5.10(4) of the HLEP, determine the application and grant consent to the demolition of the heritage item subject to considering the effect of the demolition of the heritage item.

2.2 Whether the activities concerning Isolation of the site meet the requirements of the Court's Planning Principle

The Applicant was requested by the Council to submit legal advice in relation to the isolation of the adjoining site at 48A Oxford Street, Epping (the Isolated Site) and the NSW Land and Environment Court where **Tour C** set out the planning principle in *Karavellas v Sutherland Shire Council* [2004] NSWLEC 251 (Karavellas).

The relevant planning principle is stated at paragraphs [17]-[19] of Karavellas:

“17 The general questions to be answered when dealing with amalgamation of sites or when a site is to be isolated through redevelopment are:

- Firstly, is amalgamation of the sites feasible?*
- Secondly, can orderly and economic use and development of the separate sites be achieved if amalgamation is not feasible?*

*18 The principles to be applied in determining the answer to the first question are set out by Brown C in **Melissa Grech v Auburn Council** [2004] NSWLEC 40. The Commissioner said:*

Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application.

Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of the properties. These details should include offers to the owner of the isolated

property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, is to be based on at least one recent independent valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.

Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s 79C of the Environmental Planning and Assessment Act 1979.

19 In the decision **Cornerstone Property Group Pty Ltd v Warringah Council** [2004] NSWLEC 189, I extended the principles of *Brown C* to deal with the second question and stated that:

The key principle is whether both sites can achieve a development that is consistent with the planning controls. If variations to the planning controls would be required, such as non compliance with a minimum allotment size, will both sites be able to achieve a development of appropriate urban form and with acceptable level of amenity.

To assist in this assessment, an envelope for the isolated site may be prepared which indicates height, setbacks, resultant site coverage (both building and basement). This should be schematic but of sufficient detail to understand the relationship between the subject application and the isolated site and the likely impacts the developments will have on each other, particularly solar access and privacy impacts for residential development and the traffic impacts of separate driveways if the development is on a main road.

The subject application may need to be amended, such as by a further setback than the minimum in the planning controls, or the development potential of both sites reduced to enable reasonable development of the isolated site to occur while maintaining the amenity of both developments.”

Legal advice was provided by Pikes & Verekers Lawyers, dated 9 March 2018 which advised the following:

- (i) *“Firstly, we are of the view that the Isolated Site is not in fact isolated as it is capable of being amalgamated with the site to the north at 50 Oxford Street which is likewise zoned B2.*
- (ii) *In any event, amalgamation of the Subject Site and the Isolated Site is not feasible.*
- (iii) *Reasonable offers have been made to the Isolated Site.*
- (iv) *Those offers were informed by an independent valuation report.*
- (v) *The actions of the owners of the Isolated Site indicated a reluctance to sell the Isolated Site for a reasonable price.*
- (vi) *Orderly and economic use and development of the separate sites can be achieved.*
- (vii) *The Subject Site can be plainly developed in accordance with the submitted plans which are recommended for approval subject to conditions.*
- (viii) *The Isolated Site could be developed as shown in attachment to the Statement of Environmental Effects dated June 2016.*

- (ix) *It is acknowledged that the development of the Isolated Site separately would not meet the full development potential of the Isolated Site. That being said, a transition to the Arden Anglican School to the north appears to be an appropriate planning outcome in the circumstances. Further, the Site may be amalgamated with and used by the Arden Anglican School in the future.*
- (x) *It would not be orderly and economic development to prevent the development of the Subject Site where amalgamation is not feasible and separate development of the sites is possible.*
- (xi) *In summary, we are of the view that the applicant has satisfied the relevant planning principles in Karavellas."*

Planning Comment: Further examination of the environmental planning principles leads to a sound conclusion that the nub of the matter is captured in (vi)-(viii) and that the three points made in (ix) reflect an outcome that is a call made by the owners of 48A Oxford Street Epping. Finally, for the reasons set out in (x), it is considered that the requirements of the planning principle in Karavellas in relation to 48A Oxford Street, Epping have been satisfied.

2.3 Response from Design Excellence and City Architect Office in relation to height variation, the zone boundary interface and feasibility of development on the isolated site in terms of whether that represents the orderly and economic use of the sites

The Council's Design Excellence Advisory Panel (DEAP) was requested to provide advice in relation to the Panel's three specific issues:

- "(1) Whether the height variation was acceptable to DEAP;*
- (2) Whether the zone boundary treatment (to the east or rear of the site to the adjacent R4 zone) was appropriately dealt with in the design; and*
- (3) Whether the adjoining isolated site could be developed in a manner that represents the orderly and economic use of both sites."*

In relation to issue 1, the following information regarding precedents within Epping Town Centre for building height variations was supplied by Council to DEAP:

"Precedent exists for height variation on the former Hornsby Shire side of Epping. Examples include:

DA/585/2017 (Parramatta reference) 30-42 Oxford Street Epping –

Max – 48m

Approved – 52.8m – 10% variation – predominantly 1 storey above the control.

DA/468/2016 – 12 – 22 Langston Place Epping

Max – 72m

Approved – Tower 1 - 92.85m (28.9% over, Tower 2 - 77.3m (5.7% over), Tower 3 62.4m (13.3% below maximum height)

Langston Place is at the southern end of this side of the Epping Town Centre.

It is noted that a report from Council for 37-41 Oxford Street also supported (and was subsequently approved by Panel) a concept proposal. This concept will have a maximum height of 95.67m, a 23.67m breach above the 72m maximum height (variation of 32.9%).

It is noted that Oxford Street is the height boundary between 48m affecting the subject site and the 72m on the opposite site as per the below map. The light purple is 48, dark purple is 72m.

On this site, the rear tower is only slightly above the height limit (3.12m over a 48m height limit or 6.5%), whereas the front tower is where the bulk of the variation is (14.2m over 48m limit (29.5%). At least in terms of an east-west height plane, the variation to the front tower could be said to provide a transition up to the 72m limit if other impacts were considered satisfactory."



As DEAP's advice was sought and obtained, in this instance, no comment from the Council's City Architect Office will follow.

The DEAP made the following comments in relation to each issue:

"(1) The Panel has been provided with the statutory height maps for this area as well as the Applicant's shadow diagrams. It is noted that the height limit on the western side of Oxford Street, opposite the subject site has a substantially greater height limit than sites on the eastern side. Further, sites to the south in Langston Place have been approved and/or proposed for substantially taller development than that proposed on the subject site.

The proposed height variation is the result of the developer taking advantage of the allowable site FSR, which results in almost 4 floors above the existing height limit for the front residential tower but only a small height exceedance in the case of the rear tower which generally sits within the height line except for the lift tower. Given, the likely taller nearby development in the future, the additional floors proposed in the

variation would not adversely impact the townscape and could be seen as somewhat of a height transition between the sites to the east and west.

The Panel notes that the additional height would not result in adverse heritage impacts or cause additional adverse overshadowing impacts.

Taking into consideration the potential impacts on the existing streetscape, district views, the conservation area to the east and overshadowing, the Panel considers that the height variation would not result in significant adverse environmental impacts and is acceptable in this particular case.

Whilst the height variation is considered acceptable, the DEAP is mindful that this is a substantial variation to the height limit which should not be permitted to set a precedence for other developments in the precinct. To this end, Council should consider testing/ reviewing all other potential developments in the town centre in relation to the allowable FSR and assess whether any adjustment of the height limits is warranted.

(2) The landscape plan shows a series of grassed terraces with larger canopy trees on mounds, forming a continuous screen against the east boundary. As this area is a deep soil zone, it should be possible for larger canopy trees to be planted and thrive, subject to proper care and maintenance. The stepped terraces are given over to each adjacent apartment as private open space.

The Panel is of the opinion that the landscaping has been appropriately dealt with in principle, with the proviso that:

- i) the trees selected are of sufficient scale, height and numbers to create an effective, contiguous screen to the east;*
- ii) the screen planting is extended to include the north and south boundaries within this zone; and*
- iii) semi-automatic irrigation is provided to the planting beds.*

(3) The Panel notes that it has been well demonstrated that the owners have tried to negotiate with the adjacent neighbour, but to no avail. It is also noted that the site adjoins a site to the north that is owned by a school which has recently been approved for low-scale development. It is possible that this latter site would remain low-scale, at least for the foreseeable future, thereby retaining the amenity of this property. In any case, the 'isolated' would still have the potential to be amalgamated with the adjacent site to the north in the future. Additionally, sites to the east will most likely remain low scale given their R4 zoning.

In the circumstances, the Panel considers that the subject development would not unduly impact the 'orderly and economic use of both sites'."

Additional comments were made by DEAP in relation to the podium height as follows.

As a further comment, the Panel notes that the podium height of the proposed development is still effectively 3 storeys, notwithstanding that the street elevation has been designed to give it the appearance of being 2 storeys. The Panel had previously recommended that the height be reduced from 3 storeys to 2 storeys in

order that it relate better to the podium height and retained heritage item in the approved development immediately to the south. It is considered that this reduction is still warranted as it would also help it retain a more appropriate (and equitable) height relationship with the 2-storey building on the 'isolated' site to the north. It would also lessen the impact of the blank side walls of the podium.

It is noted that the above comments in relation to the podium height have been forwarded to the Applicant who provided the following response in that regard:

- During consultation with council's urban design team, it was requested the team provide a 3 storey podium to increase the amount of commercial space available. Through the design process, the architects argued that the correct height for the streetscape should only be 2 storeys to broadly align with the adjacent heritage building located on 30-42 Oxford Street.*
- Council's urban design team requested a minimum internal height be provided to the commercial spaces. That being a minimum of 4m from the floor to the underside of the floor above for the ground floor and a minimum of 3.6m ceiling height for level 1. The DA drawings provide this height with tolerance for structural slab thickness + insulation required.*
- The height of both the ground floor retail and first floor commercial level enhances not only the function of the space, but also provides a more flexible working environment to a wider range of commercial users within the Epping Town Centre.*

Planning Comment: The comments made by DEAP are noted. Item (1) – in relation to variation in height, in this regard, the DEAP's comments in paragraphs 1-4 are important findings from an urban design/impact perspective. The observation in paragraph 4 of (1) seems to fly somewhat in the face of a planning merit system that each case is dealt with on its merits within a holistic and context and setting frame. This matter reflects this approach. Items (2) and (3) – these comments are supported.

With respect to the podium height, given the need to provide office space within the Town Centre, and the need for this space to be located at the front of the development for reasons of site functionality, the additional height is considered justified to accommodate the provision of useable office space on the site.

2.4 Clarification whether in the circumstances here the concurrence of the Secretary of the Department of Planning can be assumed for the extent of the variation to the standard, i.e. greater than 10%

Legal advice was obtained from the Council's Lawyer on 23 February 2018 which advised that:

"17. Yes, concurrence of the Secretary can be assumed on the basis of the recent planning Circular no. 17-006 dated 15 December 2017 (Circular), and its attachment.

18. The Circular was issued to advise councils when they may assume the Secretary's concurrence to vary development standards, and clarify requirements around reporting and record keeping where that concurrence has been assumed.

19. *The Circular provides that only a full council can assume the Secretary's concurrence where the variation to a numerical standard is greater than 10%, or the variation is to a non-numerical standard. A determination of such applications cannot be made by individual council officers unless the Secretary has agreed. In all other circumstances, individual council officers may assume the Secretary's concurrence.*

20. *Under clause 64 of the Environmental Planning and Assessment Regulation 2000, provides that written notice of the concurrence must be given to a Council. The Secretary has provided that notice by attaching it to the Circular. The notice provides that Council may assume the Secretary's concurrence for exceptions to development standards for applications made under clause 4.6 of the SILEP and clause 6 of SEPP 1. The specific restrictions as set out in paragraph 19 above, are set out in the notification."*

It is noted that Circular No. 17-006 as referred to above has been replaced by the new Circular 18-003, dated 21 February 2018. Circular 18-003 indicates that (including pending applications):

"Sydney district and regional planning panels may also assume the Secretary's concurrence where development standards will be contravened."

Planning Comment: In accordance with the instructions set out in Circular 18-003, the Panel may assume the concurrence of the Secretary in respect of Clause 4.6(4)(b) of HLEP. In assuming the concurrence of the Secretary, the Panel is to be satisfied as to the following matters in sub-clauses (3) to (5):

"(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.”*

Section 2.5.1 of the previous Assessment Report concluded that the Clause 4.6 Request satisfied the above requirements with regard to sub-clauses (3) and (4) and was therefore supported. Further, the advice of DEAP was sought on proposed height variation as discussed in Section 2.3 above.

3. Further Reporting Raised by SCCPP

3.1 Address the justification for determination of this application prior to the outcomes of the traffic study of Epping being available which will take into account cumulative impact

The Panel has sought justification for the determination of this application noting that a revised Traffic Study is currently under preparation by the Council that considers the cumulative impact of development of the Epping Town Centre.

Planning Comment: Although the preparation of a comprehensive Traffic Study of Epping by the Council is underway, this has not yet been adopted by Council. Further, it has not formed part of any formal planning policy development at this early stage. Neither has it been used in the preparation and assessment of this Application. It is expected it will be some significant time before the comprehensive Traffic Study is in a position to be said to have informed adopted planning policy.

The zoning, heights, and floor spaces in the Epping Town Centre (as they currently stand) were developed as part of the Epping Structure Plan which informed the Department of Planning and Infrastructure's Epping Town Centre Urban Activation Precinct Finalisation Report of November 2013, which ultimately recommended the changes to the planning controls in Epping Town Centre be supported.

As part of the development of these policy documents, a Traffic report was prepared in 2011 by Halcrow which informed the structure plan, the finalisation report, and ultimately the adopted changes to the planning controls for the Epping Town Centre by Hornsby Shire Council and approved by the NSW Department of Planning and Infrastructure.

In that context, as the latest completed and adopted traffic study informed the current planning controls, there is little reasonable justification for determination of this application

being held off until such a time as a new Traffic Study is able to inform a new set of planning policies in the indefinite future.

3.2 Provide a summary of the issues raised and outcomes of Council's community conciliation meeting held on 24 January 2018

A memo was prepared by Council, dated 2 February 2018 that provided a report on the Conciliation Meeting held on 24 January 2018. This memo was submitted to the Panel prior to the meeting on 7 February 2018 and provides a summary of the key issues raised and the outcomes of that meeting.

Planning Comment: The attached memo is understood to be a summary of the issues raised and outcomes at the Conciliation Meeting.

3.3 The Panel encourage adjoining owners and the applicant to consider some form of mediation to resolve the isolation question

The previous Assessment Report discussed the negotiations that occurred up to that point in time between the Applicant and the owners of 48A Oxford Street. It is considered that subject to any further negotiations that may have occurred between the parties that as discussed in Section 2.2 above, the requirements of the planning principle in Karavellas in relation to 48A Oxford Street, Epping have been satisfied.

4. Other Items

4.1 Correct a minor error in description in Section 4.4.1 of the previous Assessment Report with respect to the adjoining sites

Section 4.4.1, paragraph 1 of the previous Assessment Report is amended as follows:

The site is at the northern extremity of the Epping main street retail area along Oxford Street, situated between Arden Anglican School ~~48A Oxford Street~~ and the site of the demolished former Epping Uniting Church and almost opposite the Catholic Church.

Planning Comment: The above amendments be accepted by the Panel.

4.2 Updating the earlier references to Section numbering and their respective provisions to reflect the recent amendments to the numbering of sections as well as to their provisions of the EP&A Act referred to in the previous Assessment Report following the amendments to the EP&A Act that came into force on 1 March 2018

At the time of the previous Assessment Report, the then proposed amendments to the EP&A Act were not yet in force. The amendments came into force on 1 March 2018. **Table 1** provides a summary of the sections of the EP&A Act referred to in the previous Assessment Report that has been changed.

Table 1: EP&A Act Amendments

Original Provision	New Provision
Section 5 - Objects	Section 1.3 - Objects of Act
Section 5A - Application of Part 7 of Biodiversity Conservation Act 2016 and Part 7A of Fisheries Management Act 1994	Section 1.7 - Application of Part 7 of Biodiversity Conservation Act 2016 and Part 7A of Fisheries Management Act 1994
Section 77A - Designated development	Section 4.10 - Designated development
Section 79C - Evaluation	Section 4.15 - Evaluation
Section 80(3) - "Deferred commencement" consent	Section 4.16(3) - "Deferred commencement" consent
Section 91 - What is "integrated development"?	Section 4.46 - What is "integrated development"?
Section 93F - Planning agreements	Section 7.4 - Planning agreements
Section 94EF – Special infrastructure contributions	Section 7.24 - Special infrastructure contributions

Planning Comment: The above information be accepted by the Panel.

4.3 Assessment of the amended Clause 4.6 Request and Interpretation Strategy as submitted by the Applicant

Amended Clause 4.6 Request

The Applicant has submitted an amended Clause 4.6 Request to vary Clause 4.3 of the HLEP, prepared by Higgins Planning Pty Ltd, dated 9 March 2018 that:

- Clarifies the quotation of the assessment provided previously in the Clause 4.6 Request prepared and submitted with the original SEE by SJB on pages 9 and 10.
- Clarifies the reference proposed amended FSR on page 10 being *“The amended design has a FSR 4.35:1, which remains compliant with the maximum permitted of 4.5:1 under the FSR Mapping for the site”*.
- Includes additional assessment on pages 10 and 11 in relation to visual impacts.
- Deletes the last paragraph on page 13.

Planning Comment: The amended Clause 4.6 Request be accepted by the Panel.

Interpretation Strategy

The Applicant has submitted an Interpretation Strategy, prepared by Weir Philips Heritage, dated March 2018. The submission of the Interpretation Strategy at this stage of the process as indicated by the Applicant is intended to demonstrate the Applicant's commitment to implementing draft condition 12 which requires:

“The applicant is to prepare a Heritage Interpretation Plan for the “House” at 48 Oxford Street that is to be submitted to Council’s satisfaction prior to the issue of a Construction Certificate.”

Planning Comment: The receipt of the Interpretation Strategy is noted by the Panel. The Interpretation Strategy will be subject of a formal review and assessment process by Council.

Conclusion

On balance the application has demonstrated a satisfactory response to the objectives and controls of the applicable planning framework.

RECOMMENDATION

- A. That pursuant to Section 4.16(3) of the *Environmental Planning and Assessment Act 1979* the Sydney Central City Planning Panel grant a Deferred Commencement to Development Application DA/485/2016 subject to the conditions in the Final 79C Report document and the following additional condition:

119. The ground floor courtyard area is to be open for public access between 7.00a.m and 10.00p.m seven days, and secured outside that time to ensure security of this space.

Reason: To ensure the space is available for public access.

- B. That all the objectors be advised of the Sydney Central City Planning Panel's decision.