



JRPP No.	2017HCC050
DA No.	DA2017/01399
Proposal	Demolition of buildings and erection of 14-storey mixed use development, including 149 residential units, two commercial units (500m ²), four levels for parking for 165 cars and associated site works
Property	No.38 Hannell Street, No.2-4 Bishopsgate Street and No.13 Dangar Street Wickham
Recommendation	Approval
Applicant	Thirdi 38 Hannell St Pty Ltd
Report By	Newcastle City Council

SUPPLEMENTARY ASSESSMENT REPORT AND RECOMMENDATION

Proposed Development

Demolition of buildings and erection of 14-storey mixed use development, including 149 residential units, three commercial units (500m²), four levels of parking for 165 cars and associated site works.

Joint Regional Planning Panel Determination - JRPP (19 July 2018)

The JRPP considered the original application on 19 July 2018 and resolved the following:

'That the Joint Regional Planning Panel defer determination of the subject matter until receipt of the following:

a) Amended plans which:

- I. Remove the western side balconies adjoining the living area(s) from the western elevation of the northern and southern buildings, with the exception of the single aspect balconies for the one bedroom apartments in the northern tower. Consideration may be given to retaining some sun screening devices if needed, provided such devices are not capable of access as a balcony (including in the future);*
- II. Include privacy screening devices (eg external louvres) to living windows in the western elevation given the orientation and ADG non-compliance;*
- III. Revise the living room windows in the western elevation of the southern building to a "slot" design window as proposed for the northern building;*
- IV. Incorporate additional balconies to the southern elevation to Dangar Street to better activate that street and soften the elevational treatment (without altering the FSR) with consideration given to the front balcony being the principal private open space area for apartments facing west to minimise potential privacy impacts should the*

adjoining site be redeveloped in the future considering the non-compliant building separation distance; and

- V. *Detail (finish, colour, material) the blank sections of wall to the south and west of the podium, where this podium does not directly adjoin the existing podium to the west.*
- b) *A revised Clause 4.6 Variation Request which accurately identifies the height non-compliance in both 2 and 3 dimensions, and addresses the objectives of Clause 4.6 in Newcastle LEP 2012;*
- c) *Consideration of the provision of public art to be integrated into the design. It is noted that the existing mural on the site has local community value, and options related to a mural installation referencing the existing mural (for example by engaging the same artist) should be considered for the blank wall component facing Dangar Street.*
- d) *An archaeological assessment that in particular assesses indigenous archaeology in relation to the site'.*

Response to matters raised by JRPP

The applicant has submitted additional information and revised plans (refer to **Appendix A**) to address the matters raised by the JRPP. These are discussed below under the relevant headings.

- 1. Remove the western side balconies adjoining the living area(s) from the western elevation of the northern and southern buildings, with the exception of the single aspect balconies for the one bedroom apartments in the northern tower. Consideration may be given to retaining some sun screening devices if needed, provided such devices are not capable of access as a balcony (including in the future).**

The applicant has submitted amended plans (Revision F) addressing the above issues as follows:

- Removal of western balconies from both towers – with the exception of some non-accessible areas which provide solar access to bedrooms and incorporates screening;
- Reduction in windows to western facade for both buildings – 'slot' style windows and external screening has been provided to the non-accessible balconies;
- 'Slot' style windows provided to western facade on the southern building;
- Additional balcony space for south tower's southern facade.

The amended plans have addressed the above concerns, with all the western side balconies removed from level 4 and above. The amended plans reduce the potential privacy impacts on the adjoining development at 12 Bishopsgate Street Wickham.

The deletion of the side balconies increases the setbacks to 8.4m from the property boundary. The apartments in the northern tower are now orientated toward Bishopsgate Street and out towards the Harbour (ie north-west). The amended design is considered to have adequately addressed the issues of privacy raised by the JRPP.

- 2) Include privacy screening devices (eg external louvres) to living windows in the western elevation given the orientation and ADG non-compliance.**

The applicant has submitted amended plans that include a number of privacy screens on the western elevation. A condition has been recommended regarding compliance with the requirement (refer to **Appendix B**).

- 3) Revise the living room windows in the western elevation of the southern building to a 'slot' design window as proposed for the northern building.**

The applicant has submitted amended plans which reduce the width of the windows on the western elevation. The amended design is considered to be a significant improvement in terms of privacy for the adjoining residents.

- 4) Incorporate additional balconies to the southern elevation to Dangar Street to better activate that street and soften the elevational treatment (without altering the FSR) with consideration given to the front balcony being the principal private open space area for apartments facing west to minimise potential privacy impacts should the adjoining site be redeveloped in the future considering the non-compliant building separation distance.**

The amended proposal includes a number of balconies on the southern elevation which provide natural surveillance and improve the streetscape to Dangar Street. The amended proposal is considered to be an improvement in terms of streetscape and presentation to Dangar Street Wickham.

- 5) Detail (finish, colour, material) the blank sections of wall to the south and west of the podium, where this podium does not directly adjoin the existing podium to the west.**

The applicant has submitted an amended material board which provides for a lighter tone to reflect the comments and concerns raised by the JRPP.

The amended proposal is considered to be satisfactory with regard to the built form, including street presentation and building envelope. It is considered that the overall design, including colours and materials are consistent with those commonly found within the Wickham area.

The amended plans also include a painted mural on the southern elevation to improve the previous blank wall facing Dangar Street Wickham. The inclusion of the painted mural on the southern wall provides for articulation, addressing the concerns raised by the JRPP about the lack of articulation and presentation to Dangar Street.

- 6) A revised Clause 4.6 Variation Request which accurately identifies the height non-compliance in both two and three dimensions, and addresses the objectives of Clause 4.6 in Newcastle LEP 2012.**

The applicant has lodged a revised clause 4.6 Exception to Development Standard submission under Newcastle Local Environmental Plan 2012 (NLEP 2012) - see below.

Clause 4.3 - Height of Buildings

The site has a maximum height limit of 45 metres. The proposed development exceeds the height limit by 1.6m. The non-compliances are located on the upper level and include the plant

and lift overrun. The applicant has provided a height plan analysis which details the proposed breach (refer to **Appendix C** and Clause 4.6 Variation).

Clause 4.6 - Exception to development standard

The objectives of clause 4.3 of NLEP 2012 are:

- a) *to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy,*
- b) *to allow reasonable daylight access to all developments and the public domain.*

Clause 4.6 of NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard. In assessing the proposal against the provisions of clause 4.6, it is noted that:

1. Clause 4.3 is not expressly excluded from the operation of this clause; and
2. The applicant has prepared a written request seeking support to vary the development standard and demonstrating that:
 - a) compliance with the development standard is unnecessary in the circumstances of the case, and
 - b) there are sufficient environmental planning grounds to justify contravening the development standard.

The applicant has argued that adherence to the 45 metre height limit is unnecessary for the following reasons:

'The proposed variation from the development standard is assessed against the accepted "5 Part Test" for the assessment of a development standard variation established by the NSW Land and Environment Court in Wehbe vs Pittwater Council (2007) LEC 827. In the matter, the Commissioner stated within the judgement the following, in reference to a variation:

"...the case law developed in relation to the application of SEPP 1 may be of assistance in applying Clause 4.6. While Wehbe concerned an objection under SEPP 1, in my view the analysis is equally applicable to a variation under Clause 4.6 where Clause 4.6 (3)(a) uses the same language as Clause 6 of SEPP 1."

It is therefore our submission that the Wehbe test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary in the circumstances of the case and it is evident, the above test is relevant.

In the decision of Wehbe vs Pittwater Council (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

First – *The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.*

Second – A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

Third – A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

Fourth – A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

Fifth – A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.”

The following discussion is provided in response to each of the above:

i. The objectives of the standard are achieved notwithstanding non-compliance with the standard

The objectives supporting the maximum building height control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental impacts, would demonstrate that strict compliance with the standards would be both unreasonable and unnecessary in this instance.

With respect to the building height objective, we need to acknowledge that the subject site is located within part of the Wickham area which is a renewal and active development precinct. Development within the immediately vicinity of the subject site, have a height commensurate with the height proposed. With the development complying with the FSR provisions within the LEP, a better understanding of scale, use intensity and dominance is achieved with the built form and appropriate for the area.

In view of the sites prominent central location of the site, the position, its relationship to the block and immediate locality. Supplementary considerations are the availability of local infrastructure and current public transport services and future light rail all play a part in the consideration. The proposed building height would reinforce the position of the subject site creating a development that reinforces the urban design considerations of the area. It is therefore considered the proposal is in keeping with the locational attributes, consistent and in keeping with the surrounding established character of the area.

In response to objective (1)(b), the proposed development is of a high quality urban form and responds to the constraints of the site.

The proposed development provides for two free standing buildings to reflect the size and nature of the site. The proposal provides for consistent setbacks to the side and front boundaries enabling a clearly definable, modern form that acts as an exemplar exhibition of built form to the area.

As demonstrated in the perspectives provided, the development promotes an attractive and active street frontage. Large commercial spaces and glazed shopfronts addressing

both the Hannell Street and Bishopsgate Street frontages. The residential lobbies are clearly defined and the form is reinforced through a strong vertical elements.

The upper residential levels, include additional setbacks and will be broken up by glass balustrading and balconies and cladding features providing for visual interest and creating a visual balance to the development.

In response to the abovementioned supplementary considerations, the proposal will result in some additional overshadowing to the adjoining buildings, though it is considered that this is a consequence of both the orientation of the site and not the higher built form.

The subject site currently has access to electricity, reticulated water and sewer, stormwater and telecommunications. Service connection and any capacity augmentation will be determined through application to the relevant service providers (Hunter Water, Ausgrid, Jemena, Telstra, NBN etc).

The subject site is within 50 metres of several major bus stop routes bus stops (see map below). Public transport is provided by government and private bus companies. Newcastle Buses provides several routes to various local centres, town centres, to the north, south and west.



Figure 2: Major Transport Routes and Bus Stops

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard. As demonstrated, the objectives of these standards have been achieved.

ii. The underlying objective or the purpose of the standard is not relevant to the development and therefore compliance is unnecessary

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above. Therefore, this clause is not applicable.

iii. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

The underlying objective or purpose would not be defeated or thwarted if compliance was required. However, on balance the proposed development provides a better outcome.

iv. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable; and

While the standard has not been abandoned or destroyed, Newcastle Council has varied LEP standards in the past. As demonstrated in this letter, the proposal will not result in any significant adverse environmental impacts and will result in a high quality mixed use development consistent with the surrounding character and commensurate with the development expectations for the site.

v. The zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Not applicable as the zoning of the site is appropriate'.

A merit assessment of the proposed development confirms that the likely resultant impacts in terms of privacy, overshadowing, streetscape, character of the locality, bulk scale and context are acceptable.

It is therefore considered that the variation to the height standard is reasonable in this instance having regard to the criteria under Clause 4.6; the zone objectives; the objectives of clause 4.3, and an assessment of the likely impacts of the proposal.

The issue of the proposed height variation was also examined and discussed at length by the Urban Design Consultative Group. The group raised no objections and considered it a minor variation.

Accordingly, it is considered that the proposed variation to the height development standard is acceptable in this instance as:

- It adequately addresses the matters required to be demonstrated by clause 4.6(3); and
- The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the overarching objectives for development within the zone in which the development is proposed to be carried out.

7) Consideration of the provision of public art to be integrated into the design. It is noted that the existing mural on the site has local community value, and options related to a mural installation referencing the existing mural (for example by engaging the same artist) should be considered for the blank wall component facing Dangar Street.

The applicant has had preliminary discussions with an artist who painted the mural on the site. The artist has agreed to reproduce the work on the southern elevation of the building.

A condition has been included in the schedule of conditions to ensure compliance with the 1% public art levy provided for by Newcastle Development Control Plan 2012.

8) An archaeological assessment that in particular assesses indigenous archaeology in relation to the site.

A search of the Aboriginal Heritage Information Management System (AHIMS) - NSW Department of Environment and Heritage, was carried out and no Aboriginal sites or places were identified. There was no physical evidence on site, such as rocky outcrops or the like, to suggest Aboriginal relics.

Notwithstanding the above comments, the applicant has submitted two reports from Eco-logical Aboriginal Cultural Heritage Assessment (refer to **Appendix D**). Both reports conclude that the sites have undergone significant disturbance from past activities and that likely discovery of any aboriginal relics is low. The reports concluded with the following:

'A site inspection undertaken by ELA Senior Archaeologist Tyler Beebe on 11 April 2018 identified high levels of disturbance across the study area. There were no identified areas of ground exposure. The study area appeared to have been subject to significant subsurface and surface activities associated with commercial and residential development. In addition, a contamination investigation of the property immediately to the east of the study area identified imported fill to a maximum depth of 1.1m, just above the highest identified water table level.

The study area is considered to have high levels of soil disturbance from past activities and has been assessed as having a nil to low potential for an intact subsurface archaeological deposit. It is highly unlikely that the proposed activities will harm Aboriginal cultural heritage. No further archaeological assessment is warranted'.

A condition has been included in the schedule of conditions to require compliance with the *National Parks and Wildlife Act 1974*.

Conclusion

Subject to a number of relevant conditions recommended in the attached condition schedule, the proposal is considered to be acceptable against the relevant heads of consideration under section 4.15 of the *Environmental Planning and Assessment Act 1979*.

Recommendation

- A. That the Hunter and Central Coast JRPP notes the objection under clause 4.6 Exceptions to Development Standards of Newcastle Local Environmental Plan 2012, against the development standard at Clause 4.3 Height of Buildings, and the JRPP considers the objection to be justified in the circumstances and consistent with the aims and objectives of the relevant NLEP 2012 clauses; and
- B. That the Hunter and Central Coast JRPP determine to grant consent to DA2017/01399 (2017HCC050) for the demolition of buildings and erection of a 14-storey shop top housing development, including 149 residential units, three commercial units, four levels of parking and associated site works at No.38 Hannell Street, No.2-4 Bishopsgate Street and No.13 Dangar Street Wickham, pursuant to Section 4.16 of the *Environmental Planning and Assessment Act 1979*, subject to the conditions in **Appendix B**; and
- C. That those persons who made submissions be advised of the determination.