

SYDNEY CENTRAL PLANNING PANEL REPORT (2017SCL012) – ADDENDUM TO ASSESSMENT REPORT

DEMOLITION OF ALL STRUCTURES, AMALGAMATION OF TWO EXISTING LOTS INTO ONE LOT & CONSTRUCTION OF A 6 STOREY MIXED USE BUILDING CONTAINING 18 DWELLINGS, A GROUND FLOOR COMMERCIAL TENANCY & 27 BASEMENT CAR PARKING SPACES

DA2016/0492 – 227-231 VICTORIA ROAD, DRUMMOYNE

Department
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1.0 BACKGROUND

At the Sydney Central Planning Panel Meeting held on 16 November 2017, the Panel resolved as follows:

“To defer the determination of the matter, principally because it did not accept that the variation of height and FSR under cl 4.6 of the Canada Bay LEP 2013 was justified. The justification submitted by the applicant acknowledged that the decision of the Land and Environment Court (Four2Five v Ashfield (2015) NSWLC 1009) requires establishing that the imposition of these two development standards is unreasonable and unnecessary. However, the applicant’s justification does not establish this. There is nothing peculiar to this site that would indicate that the FSR of 2:1 and height of 20m should not be complied with. The fact that the site is well located to public transport, as suggested by the applicant, has already been taken into account when the zoning and development standards applying to the site were determined as part of making the Canada Bay LEP 2013.

The Panel notes other shortcomings in the proposal, namely:

- *Inconsistency in floor to floor heights – 3.04m and 3.1m – resulting in a loss of amenity in the apartments;*
- *Poor natural cross ventilation – using skylights;*
- *Inaccuracy in the floor space calculation which makes the exceedance even larger than indicated.*

The Panel requests the applicant to submit, by 4 December 2017, an amended proposal that complies with the FSR and height standards, (although the Panel would accept a height variation in respect of the lift tower if this resulted in access to communal open space on the roof) and addresses the other shortcomings of the proposal. The Panel requests the council assessment officer to provide, by 18 December 2017, a supplementary report that informs the Panel whether the amended proposal has complied with the Panel’s request.”

The purpose of this Addendum Report is to address the amended proposal, having regard to the Panel’s resolution.

2.0 ACTIONS BY THE APPLICANT

The Applicant submitted documentation to Council on 27 November 2017, principally incorporating the following amendments:

- reducing the Gross Floor Area (GFA) of the proposal from 2,145 m² to 1,734 m² essentially by deleting Level 6 and reducing the floorplate of Level 1;
- providing floor to floor heights of 4m at ground floor, 3.1m at Levels 1 – 4 and 3.3m at Level 5 (to allow for roof structure);
- reducing the overall height of the proposal by 2.72m;
- reducing the number of adaptable dwellings from 3 to 2; and
- providing compliant cross ventilation (12/18 units) without reliance upon skylights (which have been retained to provide additional amenity).

A meeting was conducted with the Applicant on 30 November 2017 to discuss the amendments. As a result of this meeting, the Applicant was requested to attend to the following additional matters:

- increase the width of the residential lobby (which had been reduced following the removal of an internal stair);
- increase the width of the main pedestrian entry from Victoria Road (as previously conditioned);
- provide additional robust and functional planter boxes on the northern side of the Level 1 terraces, to provide visual and acoustic privacy as well as solar control;
- reduce the overall provision of car parking to comply with the maximum permitted by CBDPC;
- provide an updated Clause 4.6 variation request in relation to Building Height; and
- provide an updated BASIX Certificate.

An amended Clause 4.6 request to vary Clause 4.3 of LEP 2013 in relation to building height and amended plans were submitted by the Applicant on 4 December 2017. An amended BASIX Certificate and endorsed plans were submitted on 5 December 2017.

3.0 AMENDED PROPOSAL

The amended proposal incorporates demolition of all structures, amalgamation of two lots into one lot and construction of a 6-storey mixed use building containing 18 dwellings, a ground floor commercial tenancy and basement parking for 27 vehicles.

Development schedule summary

	ORIGINAL PROPOSAL	AMENDED PROPOSAL	DIFFERENCE
Site Area	867m ²	No change	N/A
Gross Floor Area	2,145m ²	1,733m ²	412m ² reduction
Floor Space Ratio	2.47:1	1.99:1	24% reduction
Building Height	<ul style="list-style-type: none">• 25.08 metres (RL57.38) to roof feature• 24.92 metres (RL57.22) to lift overrun• 23.36 metres (RL54.52) to rooftop balustrade• 22.55 metres (RL53.62)	<ul style="list-style-type: none">• 22.36 metres (RL54.66) to roof feature• 22.2 metres (RL 54.5) to lift overrun• 20.64m (RL 51.8) to rooftop balustrade• 19.83m (RL 50.9) to roof top parapet	2.72m reduction

	ORIGINAL PROPOSAL	AMENDED PROPOSAL	DIFFERENCE
	Top of roof top parapet to rooftop parapet • 22.35m (RL53.42) to roof at NE corner	• 19.63m (RL 50.7) to roof at NE corner	
One bedroom/Studio apartments	7	4	Deletion of 3 units
Two bedroom apartments	16	14	Deletion of 2 units
Three bedroom apartments	0	0	N/A
Total number of apartments	23	18	5 unit reduction
Total Retail/Commercial Floor Area	110m ²	107m ²	3m ² reduction due to widening of main pedestrian entry
Car Parking Spaces	27	27 spaces	No change. Condition imposed requiring proposal to be amended to provide a maximum of 22 spaces as per CBDCA
Private Open Space	Private balconies for each dwelling ranging from 10m ² to 39m ² with a communal rooftop garden with a trafficable area of 100m ²	Private balconies for each dwelling ranging from 10m ² to 61m ² with a communal rooftop garden with a trafficable area of 100m ²	Level 1 units provided with large private terraces of 57m ² to 61m ² . No change to other units

4.0 CONSIDERATION OF ISSUES

4.1 Floor to floor heights

The amended proposal incorporates the following floor to floor heights (see DA-0-301):

- Ground Floor: 4m;
- Levels 1 – 4: 3.1m; and
- Level 5: 3.3m, including roof structure.

The proposal has been amended to address the Panel's comments in relation to floor to floor heights.

4.2 Reliance on skylights for cross ventilation

The amended proposal incorporates 12/18 units (ie 66%) which achieve cross ventilation, without reliance upon skylights. Skylights have been retained to Units 3.02 and 3.03 but are not required to achieve satisfactory cross ventilation. The ADG requires 60% of units to be cross ventilated and the proposal complies in this regard.

4.3 GFA Calculation

Concern was raised by the Panel in relation to the exclusion of some area at ground floor level from GFA calculations. LEP 2013 defines GFA in the following manner:

“Gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:

- (a) the area of a mezzanine, and*
- (b) habitable rooms in a basement or an attic, and*
- (c) any shop, auditorium, cinema, and the like, in a basement or attic,*

but excludes:

- (d) any area for common vertical circulation, such as lifts and stairs, and*
- (e) any basement:*
 - (i) storage, and*
 - (ii) vehicular access, loading areas, garbage and services, and*
- (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*
- (h) any space used for the loading or unloading of goods (including access to it), and*
- (i) terraces and balconies with outer walls less than 1.4 metres high, and*
- (j) voids above a floor at the level of a storey or storey above.”*

The GFA diagrams (DA-0-251) have been updated to include the fire egress to Victoria Road as GFA. The areas now excluded from GFA are as follows:

- pedestrian entry as this area comprises a handrail for the area adjacent to the retail tenancy and slatted screening adjacent to the plant areas, which would not constitute GFA;
- main switch room (as this would be considered to fall within (f) of the GFA definition);
- communications room (as this would be considered to fall within (f) of the GFA definition);
- fire pump room (as this would be considered to fall within (f) of the GFA definition);
- meter room (as this would be considered to fall within (f) of the GFA definition);
- plant room (as this would be considered to fall within (f) of the GFA definition);
- lift (as this would be considered to fall within (d) of the GFA definition); and
- plant airlock (as this would be considered to fall within (f) of the GFA definition). Should the Panel consider this to constitute GFA, it is noted that it has an area of 3.94m², which would result in a total GFA of 1,736.94m² and FSR of 2:1, maintaining compliance with the maximum 2:1 FSR development standard.

The upper residential levels have also been checked against the Applicant's GFA calculations, and are considered acceptable.

It is also noted that the proposal maintains provision of 27 car parking spaces. CBDP permits a maximum of 21.57 (rounded to 22) parking spaces, including:

- 2.37 commercial spaces
- 12.6 residential spaces
- 2 disabled spaces for adaptable dwellings;
- 1 disabled visitor space; and
- 3.6 residential visitor spaces.

The proposal therefore provides an excess of five (5) parking spaces which would constitute GFA. A condition of consent is recommended, requiring the proposal to be amended to provide a total of 22 parking spaces to ensure compliance with LEP 2013 in relation to FSR and CBDP in relation to the provision of parking.

4.4 Clause 4.6 variations

The amended proposal no longer relies on a Clause 4.6 variation in relation to FSR. The Applicant seeks to rely on Clause 4.6 to vary Clause 4.3 of LEP 2013 in relation to building height. As outlined in the Table above, the proposal now complies with the maximum 20m building height development standard, apart from elements associated with the communal roof terrace and access thereto (ie lift overrun and fire stair) as well as the roof feature designed to screen the air-conditioning plant which is located at roof level.

Such a variation is considered reasonable on the basis that:

- a. the breach of the height control does not result in a breach in maximum floor space so there is no tangible nexus between the height variation and the overall intensity of site use; and
- b. the proposed height variation is situated in a location which will not result in any demonstrable detrimental impact to any sensitive land uses (e.g. residential or open space) so the impact of the variation appears negligible.

Our assessment of the submitted Clause 4.6 Objection has had regard to:

- Land and Environment Court of NSW judgment in *Winten Property v North Sydney Council* [2001];
- Land and Environment Court of NSW judgment in *Wehbe v Pittwater Council* [2007];
- Land and Environment Court of NSW judgments in *Four2Five Pty Ltd v Ashfield Council* [2015]; and
- NSW Department of Planning and Infrastructure's *Varying Development Standards: A Guide* 2015.

In *Wehbe v Pittwater Council* [2007] NSW LEC 827 (*Wehbe*), the Land and Environment Court set out the following 5 different ways in which an objection to a development standard may be well founded:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. 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;
5. the zoning of the particular 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.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 & NSW LEC 90 (*Four2Five*), the Court established that the construction of Clause 4.6 is such that it is not sufficient for the applicant to demonstrate that there are sufficient environmental planning grounds to justify contravening the

development standards, as required by Clause 4.6(3)(b), or for the consent authority to be satisfied that the proposed development is consistent with 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, as required by Clause 4.6(4)(a)(ii).

The Court outlined that Clause 4.6 requires that in addition to the requirements listed above, the applicant must also establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, as is required by Clause 4.6(3)(a). This may involve reference to reasons 2-5 outlined within Wehbe.

4.4.1 Consistency with objectives of the zone

The objectives of the B4 Mixed Use zone are as follows:

- 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.

The proposed development is consistent with these objectives, as it incorporates a mix of commercial and residential accommodation within a highly accessible location which is well-served by public transport and walking/cycling routes.

4.4.2 Underlying objective of the standard

The objectives of the building height standard are as follows:

- (a) to ensure that buildings are compatible with the desired future character in terms of building height and roof forms,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development.

The proposed development is consistent with these objectives as:

- the apparent scale to Victoria Road and the adjoining properties, is commensurate with the maximum building height permitted under Clause 4.3. The area of greatest non-compliance (architectural roof feature) is located such that it will not be readily apparent from the public domain in the vicinity of the site and from areas where it is visible, it is considered to provide an effective and attractive means of screening plant, lift overrun and stair access to the communal roof terrace;
- the proposal has no known impacts on any significant views in the locality;
- the proposal does not create any loss of privacy; and
- overshadowing impacts associated with the proposal are acceptable.

4.4.3 Is compliance with the development standard consistent with the aims of the policy and in particular does compliance with the development standard tend to hinder the attainment of the objectives specified in section 5(a)(i) and (ii) of the EP&A Act

The aims and objectives of clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The objects set down in section 5(a)(i) and (ii) to encourage:

- i. the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.
- ii. the promotion and co-ordination of the orderly and economic use and development of land...

The development is generally consistent with the objectives of the EP&A Act, as:

- The site is located within an established urban and high density environment where buildings with heights commensurate with that proposed, are not uncommon;
- The redevelopment of the site for commercial and residential uses contributes to urban consolidation
- The delivery of new housing and jobs within an established urban environment located near public transport options without significant or unreasonable environmental impact is considered to be both orderly and economic use of urban land.

4.4.4 *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case*

Compliance with the development standard is considered unreasonable and unnecessary in the circumstance of the application based on the following:

- The proposal is consistent with the objectives of the development standard;
- The proposal is consistent with the objectives of the zone;
- The non-compliant elements comprises communal open space, which will be available for all residents of the building;
- There are no significant solar access impacts on residential properties in the locality of the site;
- The proposal complies with the maximum FSR standard applicable to the site;
- The scale of the proposal is consistent with that envisaged for the site by the Drummoyne Village DCP;
- The visual impacts associated with the additional height are negligible.

4.4.5 *Are there sufficient environmental planning grounds to justify contravening the development standard?*

The environmental planning grounds are sufficient to justify the contravening development. These include:

- The proposed height is visually acceptable when viewed from the surrounding locality;
- The height of building will allow the redevelopment of neighbouring sites to the south and west generally in accordance with Council's LEP and DCP;
- The proposal steps down towards the residentially zoned land to the north, to provide an appropriate transition; and
- The communal open space on the upper level will enjoy full solar access and views that will benefit future residents in a fashion which will not create adverse visual or acoustic privacy impacts to nearby residents.

4.4.6 *Is there a public benefit of maintaining the planning control standard?*

Under Clause 4.6 (5)(b) there must be consideration of the public benefit associated with maintaining the development standard. On the basis that the proposal complies with the objectives of the zone and the standard, allows the provision of communal open space and does not result in any unreasonable

adverse amenity impacts in relation to nearby properties, it is considered that the public benefit is met despite the non-compliance.

4.4.7 *Is the objection well-founded?*

In considering if this Objection is well-founded, consideration of the following five-part test, established by the NSW Land and Environment Court is required to be made:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. 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;
5. the compliance with development standard is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

As discussed above, the objectives of Clause 4.3 are met notwithstanding the non-compliance.

It is understood that at least one other new development has been approved in the Victoria Road corridor, where the 20m building height applies, with a height in excess of that permitted. Thus, it could be acknowledged that there is opportunity for flexibility in relation to compliance with Clause 4.3, where warranted by site and proposal specific characteristics.

4.4.8 *Conclusions*

Having regard to the discussion contained herein, it is considered that the matters required to be addressed, pursuant to Clause 4.6 of LEP 2013, the five-part test established in the Land and Environment Court and the Varying Development Standards: A Guide, have been fully considered in our assessment.

Having regard to the particulars of the proposal, as outlined above, it is considered that there would be no material benefit to requiring the proposal to comply with Clause 4.3 of LEP 2013 and on this basis, an exception to Clause 4.3 of LEP 2013, pursuant to Clause 4.6 of LEP 2013, is considered well-founded.

5.0 CONCLUSIONS AND RECOMMENDATIONS

It is considered that the Applicant has amended the proposal in accordance with the Panel's written resolution.

Given the nature of the amended proposal a number of conditions of consent contained in the original assessment report require amending. Furthermore, the Applicant has requested that the previous deferred commencement conditions relating to the design of the driveway layback and provision of driveway and civil plans for the kerb, gutter and footpath works required in the vicinity of the site are moved to Schedule B of the consent. Council's development engineer has raised no objection to this and the consent has been amended accordingly. Our recommendation is provided below.

Pursuant to Sections 80 of the Environmental Planning and Assessment Act 1979 (as amended)

- A. THAT the Sydney Central Planning Panel (SCPP), assume the concurrence of the Director General of the Department of Planning and invoke the provisions of Clause 4.6 and resolve that in the circumstance of the case a strict application of the statutory standards contained in clause 4.3 (Height of buildings) in the Canada Bay Local Environmental Plan 2013 is unnecessary and unreasonable.
- B. THAT the Sydney Central Planning Panel (SCPP), as determining authority, grant consent to Development Application No. 2016/0492 (JRPP ref. 2017SCL012) for demolition of all structures, amalgamation of two existing lots into one lot & construction of a 6-storey mixed use building containing 18 dwellings, a ground floor commercial tenancy & 27 basement car parking spaces on land at 227-231 Victoria Road DRUMMOYNE NSW 2047 subject to the following site specific conditions. In granting consent Sydney Central Planning Panel has regard to the merit considerations carried out in the assessment report and pursuant to s.79C of the Environmental Planning and Assessment Act. On consideration of the merits of the case Sydney Central Planning Panel acknowledges the areas of non-compliance arising from the application but notes that it supports the application based on the particular circumstances of the case and does not consider that the consent gives rise to a precedent.

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Attachments:

- 1. Assessment report to the 16 November 2017 Sydney Central Planning Panel Meeting
- 2. Amended architectural documentation
- 3. Amended Clause 4.6 variation in relation to Building Height
- 4. Amended BASIX Certificate No. 885430M dated 5 December 2017