

COUNCIL ASSESSMENT REPORT

Panel Reference	2017SCL023
DA Number	74/2015
LGA	Burwood
Proposed Development	Section 96(2) application to Modify DC No. 74/2015 for an 8 storey residential flat building above basement parking by enlarging basement carpark level no's 1 & 2 and constructing a third basement carparking level to provide an additional 62 carparking spaces
Street Address	68, 68A, 70 & 72 Railway Parade & 2 Oxford Street, Burwood.
Applicant/Owner	James Matthews (Pacific Planning) on behalf of X-Sealant Pty Ltd
Date of DA lodgement	3 March, 2017
Number of Submissions	One
Recommendation	Refusal
Regional Development Criteria (Schedule 4A of the EP&A Act)	
List of all relevant s79C(1)(a) matters	<ul style="list-style-type: none"> Burwood Local Environmental Plan 2012 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality The suitability of the site for the development
List all documents submitted with this report for the Panel's consideration	Assessment Report One Attachment - (A)
Report prepared by	Robert Toohey, Executive Planner Burwood Council
Report date	26 July, 2017

Summary of s79C matters

Have all recommendations in relation to relevant s79C matters been summarised in the Executive Summary of the assessment report? **Yes**

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarized, in the Executive Summary of the assessment report? **Yes**

e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? **Not Applicable**

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S94EF)? **No**

Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment? **No**

Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

PLANNING ASSESSMENT REPORT

Property:	68, 68A, 70 & 72 Railway Parade and 2 Oxford Street, Burwood
Application:	Section 96(2) application to Modify DC No. 74/2015 for an 8 storey residential flat building above basement parking by enlarging basement carpark level no's 1 & 2 and constructing a third basement carparking level to provide an additional 62 carparking spaces
Applicant:	James Matthews (Pacific Planning) on behalf of X-Sealant Pty Ltd
Zoning:	R1 General Residential – Burwood Local Environmental Plan (BLEP) 2012

Background

The then Sydney East Joint Regional Planning Panel considered a report at its meeting on 26 November, 2015 in relation to Development Application No. 74/ 2015. The Panel resolved to issue a Deferred Commencement Consent for the construction of an eight storey Residential Flat Building containing 87 apartments above two basement parking levels.

The technical issues identified within the Deferred Commencement Consent were subsequently addressed and Development Consent No. 74/2015 was formally issued by Council on 20 April, 2016. Later in 2016 excavation work was conducted for the basement carpark, however, work has not progressed beyond that point.

Current Proposal - Section 96(2) Application

The current Section 96(2) Application to modify DC No. 74/2015 involves the following work;

- Enlarge approved Carparking Basement Level No.1 by **3 carspaces** from 52 to 55 carspaces
- Enlarge approved Carparking Basement Level No.2 by **1 carspace** from 64 to 65 carspaces
- Construct an additional basement Level (No.3) to provide an additional **58 carspaces**

Overall the proposal will result in a **total of 62 additional carspaces** above the 116 off-street carparking spaces required for the development as originally approved.

The Applicant in support of the Section 96(2) Application makes reference in their Statement of Environmental Effects to a Planning Proposal lodged with Council involving the subject site. The details are shown below;

Since this approval of DA 74/2015, the two allotments to the south being 4-10 Oxford Street have also been acquired. This provided an opportunity to undertake further analysis of the ability of the site to deliver a greater density building having regard to the impact on adjoining land and the site's strategic location.

A Planning Proposal was subsequently lodged on 13 February, 2017 and was supported by a detailed Urban Design analysis. While the urban design report considers a number of development options, the Planning Proposal sought an increase in the height and floor space ratio to facilitate a future 18 storey residential flat building providing approximately 219 apartments. While the Planning Proposal does not seek consent for development, it does note that up to 185 carparking spaces would be required.

The subject modification application has considered the Planning Proposal but does not rely on its progression. The additional basement level of carparking is required, notwithstanding any decision on the progression of the Planning Proposal.

Statutory Requirements

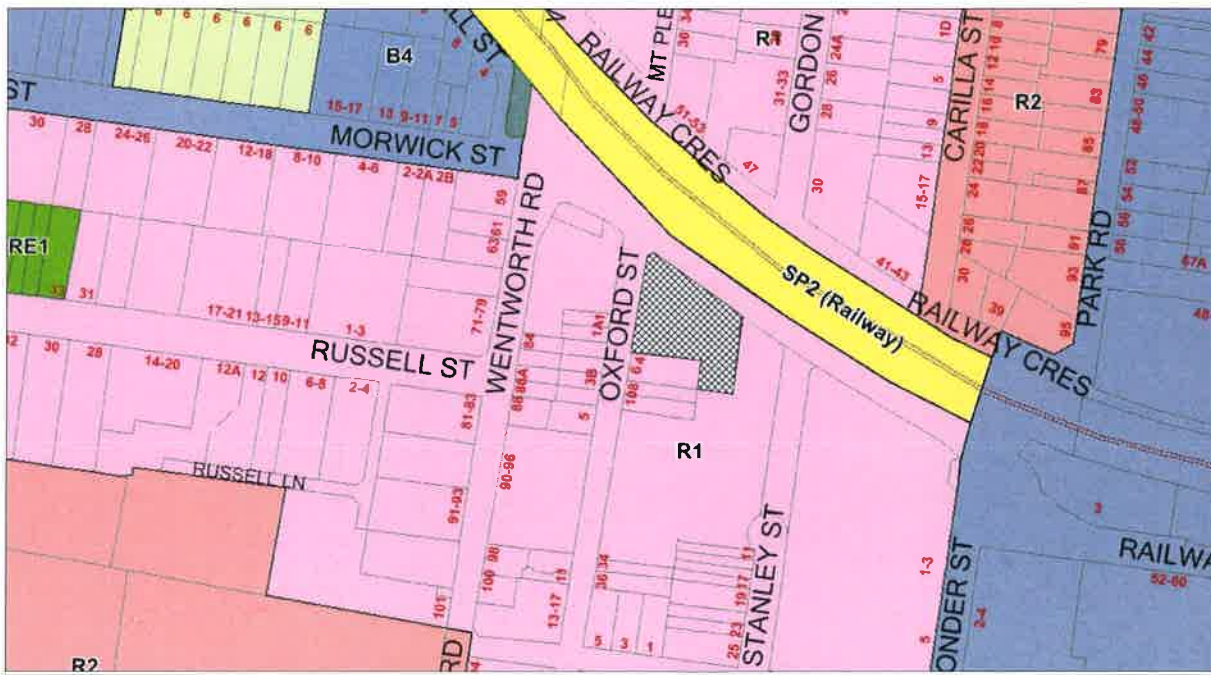
Heads of Consideration

The Application is assessed under the provisions of Section 79C of the *Environmental Planning and Assessment Act 1979*, which includes:

- The provisions of an environmental planning instrument – BLEP 2012
- The provisions of BDCP 2013
- The impact of the development in relation to:
 - The context and setting of the development
 - The impact on the natural and built environment
 - Shadowing of adjoining properties
 - Traffic impacts
 - Streetscape and urban design issues
- The suitability of the site for development
- The public interest
- Social and economic impacts
- Submissions made under the Act and Regulations

These matters are considered in this Report.

Locality



Site and Surrounding Area

The site has street frontages of 55.87 m to Railway Parade, 48 m to Oxford Street and a splay corner of 3.23 m. The east and south boundaries contiguous with the site of the Burwood Public School are 39.65 m (east) and 17.75 m (south) respectively. The south and west boundaries contiguous with No. 4-6 Oxford Street are 15.32 m (west) and 36.4 m (south) respectively. The site has an irregular shape and a total area (according to the application plans and the SEE) of 2293.29 m². The site slopes down about 3 m from north-east to south-west.

The Burwood Public School adjoins the site on its south-eastern and eastern boundaries. The School lands adjacent to the site comprise of open playground areas. A duplex residential building occupies the adjoining site to the south at Nos. 4-6 Oxford Street and two further sites to the south also fronting Oxford Street contain attached dwellings. Development on the western side of Oxford Street opposite the site comprises a mix of dwelling houses and residential flat buildings of different scales. The Main Western Rail line is located on the northern side of Railway Parade opposite the site.

Existing development within the general vicinity of the subject site includes a wide variety of housing types and scales and the area generally is in transition consistent with the R1 General Residential zone and relevant development standards under the BLEP 2012.

Planning Assessment

Zoning & Permissibility

The subject site is zoned R1 General Residential under BLEP 2012. The proposed development is categorized as carparking related to a "Residential Flat Building" which is a permissible use within the zone with Council consent.

Section 96 Modifications of Consents

Section 96(2) of the Environmental Planning and Assessment Act, 1979 enables consent authorities to modify development consents if they are 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.

The Applicant makes the following assertion:

The application is considered to be substantially the same development as that which was approved and will have a minimal environmental impact. The additional basement level and additional floorspace on levels 1 and 2 will provide extra parking, accessible spaces and bike storage for residents, visitors and potentially the broader community. Therefore, the proposed modification will have a negligible impact as follows:

- *The increase in floorspace is not included in the gross floor area and therefore has no impact on the approved floor space ratio;*
- *The design is consistent with previously approved basement provision and a slight variation from the basement form;*
- *The modifications are all below ground, meaning there will be no impact to the visible development outcome;*
- *The modification will not impact the existing character of the area;*

- *The additional traffic generated by the development is minimal and will have a negligible impact on nearby intersection performance;*
- *No additional dwelling yield is sought or provided for by the proposed modifications;*
- *The site is in close proximity to Burwood and Strathfield centres which also encourages non-car use trips;*
- *While there is some loss of deep soil planting, there is no change in the provision of landscaping and communal open space;*
- *There will be no amenity impact from the development on existing future residents in the area; and*
- *The neighbourhood is residential and the additional basement level and modifications to basements 1 and 2 are consistent with the character of the existing neighbourhood and will therefore have no impact on the site or adjoining sites.*

Comment

Council's view is that the proposed modification will not result in substantially the same development as was originally approved. A third level basement carpark represents an increase in carparking areas of 50% whilst the additional 62 carspaces compared to the 116 carspaces originally approved represents an increase of 53%. Furthermore, it is considered that the proposed modification will result in additional traffic movements beyond that which was envisaged with the original development. Finally, the additional level of excavation to accommodate the extra carspaces is also considered to be outside of the scope of satisfying the substantially the same development test.

BLEP 2012 Development Standards – Floor Space Ratio

The proposed Section 96 (2) Application does not seek to make changes to the approved development above ground level. The entire scope of the current application relates to Basement No's 1 & 2 as approved and the construction of a third basement level.

In view of the above the only Development Standard from BLEP 2012 which is relevant to the application is that of Floor Space Ratio.

The definition of Floor Space Ratio (FSR) is the gross floor area of all buildings within the site compared to the site area. The maximum FSR for the subject site is 3:1. As originally approved the proposed development achieved the maximum of 3:1. In calculating a FSR carparking provided to meet any requirements of the consent authority is excluded from the definition of gross floor area. However, any additional spaces above the maximum carparking requirement for any site are deemed as gross floor area and therefore are counted towards the overall FSR.

Of the 116 spaces approved in conjunction with the parent approval one space was in excess of Council's requirements and counts towards gross floor area. When this surplus space is added to the proposed increase of 62 carparking spaces it results in 63 surplus carparking spaces which along with associated manoeuvring areas equate to an extra 816m² of gross floor area which when compared to the site area of 2,293.29m² produces an additional FSR of 0.36:1 or an overall total of 3.36:1.

Clause 4.6 of BLEP 2012 provides powers and procedures for consent authorities to consider, and where appropriate grant consent to, development even though the development would contravene a particular development standard. The objectives of this clause are to provide an appropriate degree of flexibility in applying development standards, and to provide better outcomes for and from development by allowing flexibility. The provisions of Clause 4.6 may be applied to assessment of Development Applications subject to the submission of a written

request objecting that compliance is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the departure.

In the absence of a Clause 4.6 objection to the proposed increase in FSR it is nonetheless considered helpful to apply the same test in considering the proposed modification.

As outlined above the proposed development will result in an overall FSR of 3.36:1 which exceeds the maximum permissible of 3:1. The Applicant acknowledges the non-compliance with the FSR development standard and cites case law (refer to **Attachment A**) in forming their view that *a modification application may be approved notwithstanding the development would be in breach of an applicable development standard. From that decision it is now well established that no request under Clause 4.6 (nor an objection under SEPP 1 to development standards under LEPs to which it applies) is required for a modification to consent.*

In support of their Application the Applicant promotes the view that *Council is required to consider the objects of the FSR development standard as part of its deliberations but the absolute prohibition against the carrying out of development does not apply.*

In summary the Applicant's position is as follows;

Notwithstanding, the consideration of the proposal against Clause 4.6 of the Burwood LEP 2012 does not apply, which does not capture modifications to a Development Consent; rather it only applies to the making of a Development Consent.

Therefore, consideration against the objects of the FSR control under the BLEP 2012 is necessary to demonstrate the minimal impact of the proposal against Council's desired outcome sought through its land use plans. The objectives of the FSR controls under the Burwood LEP 2012 seeks :

- (a) to enable development density and intensity of land use to achieve an appropriate urban form,*
- (b) to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development and intensity of land use towards the edge of the Burwood Town Centre.*

In considering the modification against the objectives of the control it is concluded:

- That the modification does not affect the built form and therefore visual amenity of the development as the modification only impacts below ground floor space;*
- While the modification technically increases development density, it does not include residential or commercial land uses associated with density and intensity of development;*
- The site is outside of the Burwood Town Centre, although it is in very close proximity. It complies with the maximum building height, above ground floor space and does not generate additional density.*
- The provision of additional car parking spaces has minimal impact on the local road network and the amenity of the local neighbourhood.*

It has been demonstrated that the modification is substantially the same development and meets the objectives of the FSR clause while not creating any additional amenity or environmental impacts.

Whilst the applicant maintains the view that there is no additional bulk or scale above ground level and that the additional FSR is therefore negated it is nonetheless conferring a benefit to the Applicant, in terms of the market value of an additional 62 carspaces, that is otherwise not provided to other Applicants.

Furthermore, when the additional carparking spaces are counted as part of FSR it would be necessary to restrict the amount of FSR above ground level in terms of the built form in order for the proposed development to comply with the maximum FSR of 3:1. Therefore, overall the proposed development, inclusive of the additional FSR of 0.36:1, is indirectly achieving a built form and additional residential density beyond the maximum FSR of 3.1 contained in the BLEP 2012. Usually Applicant's requests to vary FSR are based on specific site circumstances or justified in relation to built form and improved urban design outcomes.

Overall, it is considered that the Applicant has failed to demonstrate that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the departure. This opinion is reinforced by the fact that the proposal for 62 additional carspaces are surplus to the parking requirement for the development as approved and is more likely speculation on the positive outcome of a Planning Proposal for a larger redevelopment of the subject site and two properties adjoining to the south situated at No's 4-10 Oxford Street, Burwood.

Burwood Development Control Plan (DCP) 2013

The subject Section 96 (2) Application to modify DC No. 74/2015 does not require assessment against any of the provisions contained in BDCP 2013.

Internal Referrals

External Referrals

The application was referred to Sydney Trains for concurrence on 17 March, 2017. The Applicant submitted additional information to Sydney Trains on 1 June, 2017 and a formal response regarding the matter is yet to be received by Council.

Internal Referrals

Council's Development Engineer reviewed the proposal and raised no objections subject to the imposition of two additional conditions relating to structural matters for the proposed Basement No. 3 carpark.

Council's Manager Traffic & Transport provided the following comments;

The previous approval provided a total of 116 parking spaces which was sufficient for the breakdown of units contained within the development. The current Section 96 does not look to modify the number of units but rather only to increase the number of parking spaces to 178, being an increase of 62 spaces. Council's DCP states that parking rates are both minimum and maximum and therefore any increase in parking will count towards the site's FSR.

Traffic generation for developments are based on the land use, in this case being the number of units. As there is no increase in units the traffic generation for the site will not increase from that which was assessed as part of the original approval.

The design and layout of the additional parking areas complies with the relevant Australian Standards for off-street parking areas and so there are no modifications which would be required.

Community Consultation

The application was placed on Public Notification for the period 11 April, 2017 – 2 May, 2017. Council received one letter which contained objections to the proposed development.

A summary of the issues raised together with planning comments are shown below:

1. The number of spaces proposed exceeds Council's requirements

Comment

It is acknowledged that the additional 62 off-street carparking spaces proposed exceed Council's parking requirements.

2. Providing additional spaces will encourage people to visit by car rather than Public Transport

Comment

The availability of additional on site carparking is likely to result in some additional traffic generation to and from the subject site. A Traffic & Parking Impact Report dated February, 2017 prepared by the Applicant's Traffic Consultant *Motion Traffic Engineers* concludes the following:

- *The proposed development is a low trip generator for the weekday AM and PM peak hours.*
- *The additional trips from the proposed development can be accommodated at the nearby intersection without noticeably affecting intersection performance, delays or queues.*

3. Adding a third level of basement carparking will increase the cost of the units

Comment

Given that the additional 62 parking spaces proposed can only be used in conjunction with the approved residential flat building they are required to be allocated to individual units within the development. Obviously, the creation of additional carspaces for various residential units within the complex will result in overall cost increases for those particular units.

Planning Proposal

Development Consent No. 74/2015 for the subject development was issued by Council on 20 April, 2016. Since that time the Applicant has acquired two properties adjoining to the south, namely No's 4-10 Oxford Street, Burwood.

Arising from the amalgamation of the abovementioned properties the Applicant submitted a Planning Proposal to Council in February, 2017 seeking to increase the maximum building height from 26 m to 58m and to increase the maximum FSR from 3:1 to 5.45:1. Essentially the concept included an 18 storey signature corner building with two lower 14 storey elements to the street edges. The proposal would result in an additional 132 residential apartments, beyond the 87 apartments originally approved, producing an overall total of 219 apartments.

Council engaged Cardno Pty Ltd Planning Consultants to undertake an independent assessment of the Planning Proposal. Cardno explored various options and ultimately recommended that Council support a scaled down version of the proposal consisting of the following:

- A 12 storey (or 39m) tower element on the corner of Railway Parade and Oxford Street, a 10 storey (32m) tower element away from the corner along Railway Parade and a nine storey (29m) tower element along Oxford Street.

Cardno concluded that the revised building configuration should minimise potential overshadowing of the school lands (adjoining to the east) and visual impact on the nearby heritage properties and be more in keeping with the adjacent residential area in Oxford Street, Burwood.

Council at its meeting on 25 July, 2017 considered a report on the subject Planning Proposal and resolved not to support not to support the Planning Proposal.

Conclusion

The subject Section 96(2) application seeks to modify DA No. 74/2015 for an 8 storey residential flat building above basement parking by enlarging basement carpark level no's 1 & 2 and constructing a third basement carparking level to provide an additional 62 carparking spaces.

The Applicant acknowledges that a Planning Proposal, involving the subject site, was lodged with Council on 13 February, 2017 seeking an increase in height and floor space ratio to facilitate a future 18 storey residential flat building providing approximately 219 apartments. While the Planning Proposal does not seek consent for development, it does note that up to 185 carparking spaces would be required.

The Applicant also reinforces that the subject modification application has considered the Planning Proposal but does not rely on its progression. The additional basement level of carparking is required, notwithstanding any decision on the progression of the Planning Proposal.

The Planning Proposal was rejected by Council at its meeting on 25 July, 2017.

The definition of Floor Space Ratio (FSR) is the gross floor area of all buildings within the site compared to the site area. The maximum FSR for the subject site is 3:1. As originally approved the proposed development achieved the maximum of 3:1. In calculating a FSR carparking provided to meet any requirements of the consent authority is excluded from the definition of gross floor area. However, any additional spaces above the maximum carparking requirement for any site are deemed as gross floor area and therefore are counted towards the overall FSR.

Of the 116 spaces approved in conjunction with the parent approval one space was in excess of Council's requirements and counts towards gross floor area. When this surplus space is added to the proposed increase of 62 carparking spaces it results in 63 surplus carparking spaces which along with associated manoeuvring areas equate to an extra 816m² of gross floor area which when compared to the site area of 2,293.29m² produces an additional FSR of 0.36:1 or an overall total of 3.36:1.

Whilst the applicant maintains the view that there is no additional bulk or scale above ground level and that the additional FSR is therefore negated it is nonetheless conferring a benefit to the Applicant, in terms of the market value of an additional 63 carspaces, that is otherwise not provided to other Applicants.

Furthermore, when the additional carparking spaces are counted as part of FSR it would be necessary to restrict the amount of FSR above ground level in terms of the built form in order for the proposed development to comply with the maximum FSR of 3:1. Therefore, overall the proposed development, inclusive of the additional FSR of 0.36:1, is indirectly achieving a built form and additional residential density beyond the maximum FSR of 3.1 contained in the BLEP 2012

Finally, given that the Planning Proposal for the larger amalgamated site has been rejected by Council it means that the proposed additional 62 carparking spaces must always remain allocated to the 87 residential apartments originally approved. In this regard Council needs to prevent the additional carspaces being created as "de facto" commercial parking spaces through the creation of individual allotments in a Strata Plan.

Recommendation

1. That the Section 96(2) application to Modify DC No. 74/2015 for an 8 storey residential flat building above basement parking by enlarging basement carpark level no's 1 & 2 and constructing a third basement carparking level to provide an additional 62 carparking spaces be **refused** for the following reasons:
 - i) The proposal is unsatisfactory pursuant to Section 79C (1)(a)(i) of the Environmental Planning & Assessment Act, 1979 in that the proposed development does not comply with the provisions of *Burwood Local Environmental Plan 2012*. In this regard the proposed Modification of Development Consent No. 74/2015 seeks to provide another 62 carspaces which generates an additional Floor Space Ratio (FSR) of 0.36:1. When the additional FSR is combined with the originally approved FSR of 3:1 it produces an overall total FSR of 3.36:1 which does not comply with the maximum FSR of 3:1 specified in Clause 4.4 of *Burwood Local Environmental Plan 2012*.
 - ii) The proposal is unsatisfactory pursuant to Section 79C (1)(b) of the Environmental Planning & Assessment Act, 1979 in that the proposed additional 62 carspaces, surplus to Council's parking requirements, are required to be allocated to residential units within the originally approved residential flat building containing 87 units. In this regard it is considered likely that the allocation of additional carspaces within the proposed development will increase the costs of purchasing the units which in turn is likely to have an adverse impact upon housing affordability in the locality.
 - iii) The proposal is unsatisfactory pursuant to Section 79C (1)(c) of the Environmental Planning & Assessment Act, 1979 in that the additional 62 carspaces for the proposed development are surplus to Council's parking requirements and considered unnecessary to ensure orderly operation of the development as approved. It is also highly likely that the additional 63 carspaces were earmarked for the speculative Planning Proposal involving the subject site and two properties adjoining to the south, namely No's 4-10 Oxford Street, Burwood. Given that the Planning Proposal has recently been rejected it further reduces any additional justification to provide the extra 63 carspaces proposed.
 - iv) The proposal is unsatisfactory pursuant to Section 79C (1)(c) of the Environmental Planning & Assessment Act, 1979 in that the Applicant has failed to demonstrate that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the departure. This opinion is reinforced by the fact that the proposal for 62 additional carspaces are surplus to the parking requirement for the development as approved and is more likely speculation on the positive outcome of a Planning Proposal for a larger redevelopment of the subject site and two properties adjoining to the south situated at No's 4-10 Oxford Street, Burwood.
- iv) It is considered that the proposed modification is not consistent with the provisions of Section 96 of the Environmental Planning & Assessment Act, 1979 and will not result in substantially the same development as was originally approved. In this regard the third level basement carpark proposed represents an increase in carparking/ manoeuvring areas of 50% whilst the additional 62 carspaces compared to the 116 carspaces originally approved represents an increase of 53%. Furthermore, it is considered that the proposed modification will result in additional traffic movements beyond that which was envisaged with the original development.

Attachments

- A. Submission from the Applicant Pacific Planning Pty Ltd dated 3 May, 2017

Pacific Planning Pty Ltd

Property | Planning | Project Management

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3 May 2017

Mr Robert Toohey
Executive Planner
Burwood Council
Suite 1, Level 2, 1-17 Elsie Street
BURWOOD NSW 2134

Dear Robert,

**Section 96(2) DA-2015/074
68A – 72 Railway Parade and 2-2A Oxford Street, Burwood**

I write to you in relation to the Section 96(2) application to modify Development Consent DA-2015/074 to include an additional basement level, and amend basement levels 1 and 2, for an approved residential flat building at 68-72 Railway Parade and 2-2A Oxford Street, Burwood.

As you advised recently, the application was recently on Public Notification for a 3 week period concluding on Monday 1 May 2017. Following the completion of the Public Notification the application will be finalised and referred to the Sydney Central Planning Committee for determination.

As discussed within the Statement of Environmental Effects (SEE), the proposed modification in seeking to provide additional car parking, exceeds Council's maximum under the Burwood Development Control Plan. In doing so, the proposal facilitates an additional 63 car parking spaces than the minimum/maximum required, which equates to approximately 816m² of floorspace.

In this context, I thank you for your email of 7 April 2017. I respond to the issues there raised of the increase in the FSR beyond the maximum and the matters for consideration under Section 96 of the *Environmental Planning and Assessment (EP&A) Act 1979*.

1. Principle Development Controls

The maximum floor space ratio (FSR) for the subject site is 3:1. Based on a site area of 2293.29 m² and a gross floor area of 6939.6 m², the proposal exceeded the maximum floor space ratio by 59.7 m² or 0.87%.

Council in its consideration of a request under Clause 4.6 of the Burwood LEP 2012 to vary the principle development standard in the making of the Development Consent 74/2015 concluded that there was Insufficient environmental planning grounds to depart from the standard and the variation was not supported. A condition of consent was included to require compliance with the maximum floor space control, and the total floor space was reduced to 6879.6m².

The proposed modification however, facilitates an additional 63 car parking spaces than the minimum/maximum required, which equates to approximately 816m² of floorspace not excluded from the gross floor area and therefore FSR calculation. The proposed modification technically exceeds the FSR by 0.35 or 11.8%.

Role of Section 96

In North Sydney Council v Michael Standley & Associates Pty Ltd (1998) NSWSC 163 the Court of Appeal held that s.96 is “a free-standing provision” such that “a modification application may be approved notwithstanding the development would be in breach of an applicable development standard”. From that decision it is now well established that no request under clause 4.6 (nor an objection under SEPP 1 to development standards under LEP’s to which it applies) is required for a modification to consent.

In this case, the Court of Appeal dealt with a modification to an 18 storey building. In granting consent to the modification the judgement of Justice Lloyd held:

“that the appellant had power to approve an application under s102 notwithstanding that the application involved a development which breached a development standard. His Honour then addressed s102(3A), concluding that the application should be approved on its merits”.

In dismissing the appeal, the Court noted:

“(3) A modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application. Lido Real Estate Pty Ltd v Woollahra Council (Land and Environment Court, Talbot J, unreported, 11 August 1997), approved.”

Further, in the decision of **Gann & Anor v Sutherland Shire Council [2008]** NSWLEC 157 Justice Lloyd dealt with a Section 96 modification to increase the building’s bulk to breach the applicable development standards. In granting consent for the application for modification, the Court, in respect to the application of relevant development standards, noted:

“15 This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s 79C, which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s 76A(1) does not apply.”

“19 It follows that there is no legal impediment to the grant of development consent in the present case despite the infringement of the three development standards in the LEP governing maximum building height, maximum gross floor area and the minimum landscaped area. These development standards will be part of the general considerations under s 79C of the Act.”

Therefore, having regard to the above established case law in respect to the ability of Council to approve or refuse the subject modification application, the Council is required to consider the objects of the FSR development standard as part of its deliberations but the “absolute prohibition against the carrying out of development does not apply”.

It is however relevant in considering the relevant development standard that clause 4.6 is included in the applicable LEP such that the development standard would in the assessment of a DA be susceptible to variation where:

- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) there are sufficient environmental planning grounds to justify contravening the development standard.

Objects of the FSR

Therefore, as per the decision of Justice Lloyd in *Gann & Anor v Sutherland Shire Council [2008] NSWLEC 157* consideration against the objects of the FSR control under the Burwood LEP 2012 is necessary to demonstrate the minimal impact of the proposal against Council's desired outcome sought through its land use plans.

The objectives of the FSR controls under the Burwood LEP 2012 seek:

- (a) *to enable development density and intensity of land use to achieve an appropriate urban form,*
- (b) *to focus higher development density and intensity of land use in the inner part of the Burwood Town Centre and to provide a transition in development density and intensity of land use towards the edge of the Burwood Town Centre.*

In considering the modification against the objectives of the control it is concluded:

- That the modification does not affect the built form and therefore visual amenity of the development as the modification only impacts below ground floor space;
- While the modification technically increases development density, it does not include residential or commercial land uses associated with density and intensity of development;
- The site is outside of the Burwood Town Centre, although it is in very close proximity. It complies with the maximum building height, above ground floor space and does not generate additional density.
- The provision of additional car parking spaces has minimal impact on the local road network and the amenity of the local neighbourhood.

It has been demonstrated that the modification is substantially the same development and meets the objectives of the FSR clause while not creating any additional amenity or environmental impacts. The absolute prohibition of the modification application does not apply and therefore the application should be considered against the objects of the development standard.

Way forward

All relevant Court judgments say that Section 96 is a 'free-standing provision'. It is section 96 itself which authorises the development to be approved notwithstanding any breach of development standards. In any event, as the modification does not offend the objectives of the FSR standard in any way, there is no reason to expect that the modified development would not have obtained development consent.

Section 96 is a broad power to approve, subject to its own stand-alone tests (such as the "substantially the same" test, and a requirement to consider all relevant s.79C matters). This means that strict numerical compliance with a standard must not be mindlessly enforced for the sake of compliance. It

does however, require proper consideration of the standard's objectives and all ensuing impacts to ensure they are acceptable in the context. An application can only be refused on the basis that the impact is unacceptable.

The application has demonstrated consistency with objects of the development standard and has also demonstrated that any additional trips generated by the modification can be accommodated at the nearby intersection without noticeably affecting intersection performance, delays or queues.

It is therefore recommended that Council recommend the modification application for approval to the Sydney Central Planning Committee for determination.

If you have any questions in relation to this matter, please do not hesitate to contact me on 0437 521 110.

Yours sincerely



James Mathews
Planning Director
Pacific Planning