

## SYDNEY SOUTH PLANNING PANEL - ASSESSMENT REPORT

<b>PANEL REF NO.</b>	<b>2019SSH007</b>
<b>DA NUMBER</b>	<b>DA-70/2019</b>
<b>LOCAL GOVERNMENT AREA</b>	<b>City of Canterbury-Bankstown</b>
<b>STREET ADDRESS</b>	<b>677-687 Canterbury Road and 48 Drummond Street, Belmore</b>
<b>PROPOSED DEVELOPMENT</b>	<b>Concept development application for a high density mixed use development for three x six storey building envelopes (as amended) with retail/commercial tenancies and basement car parking. This application is made pursuant to State Environmental Planning Policy (Affordable Rental Housing) 2009 with 50% of apartments to be dedicated as affordable housing.</b>
<b>CAPITAL INVESTMENT VALUE</b>	<b>\$52,799,002</b>
<b>DATE OF LODGEMENT</b>	<b>6 March 2019</b>
<b>ZONING</b>	<b>Part B6 Enterprise Corridor and Part R3 Medium Density Residential under the Canterbury Local Environmental Plan 2012.</b>
<b>APPLICANT OWNER</b>	<b>Pacific Planning Belmore Linx Pty Ltd</b>
<b>NUMBER OF SUBMISSIONS</b>	<b>13 submissions received and one petition with 27 signatures</b>
<b>RECOMMENDATION</b>	<b>Refusal</b>
<b>AUTHOR</b>	<b>Shona Porter – Acting Team Leader Planning East</b>

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## EXECUTIVE SUMMARY

The subject application is reported to the Sydney South Planning Panel in accordance with the provisions of *State Environmental Planning Policy (State and Regional Development) 2011*. The proposed development has an estimated Capital Investment Value (CIV) of \$52,799,002 and is therefore 'regionally significant' development as nominated under Schedule 7.

Development Application DA-70/2019 seeks approval for a concept development application pursuant to Division 4.4, Sections 4.21 and 4.22 of the *Environmental Planning and Assessment Act 1979*. As amended, the concept application proposes three x six storey building envelopes, basement layout and vehicular access for a mixed use development. Subsequent stages include the demolition of existing structures and then the construction of the buildings and basement.

The proposed mixed use development comprises residential flat buildings and retail development, both prohibited in the B6 Enterprise Corridor and R3 Medium Density Residential zones. The proposal was lodged pursuant to Division 5 residential flat buildings – social housing providers, public authorities and joint ventures of *State Environmental Planning Policy (Affordable Housing) 2009* (SEPP ARH).

The proposal relies on a site compatibility certificate (SCC) issued by the (then) Department of Planning and Environment on 15 July 2014.

The SCC was valid for five years and expired at the close of 15 July 2019, rendering the development prohibited.

The application was not lodged 'by or on behalf' of a social housing provider, public authority or the Land and Housing Corporation, which is a precondition to applying the flexible zoning provision pursuant to Division 5 of SEPP ARH.

The site is currently split zoned. The applicable development standards that apply to the site under the Canterbury Local Environmental Plan 2012 restrict development to a maximum of 12m on the B6 Enterprise Corridor zoned sites and 8.5m on the R3 Medium Density Residential zoned portion of the site.

On the B6 portion of the site, the proposal seeks a height of approximately 21m. A variation to the FSR on the R3 portion is also sought. A letter detailing an extensive list of issues was issued to the applicant following an assessment of the concept application, detailing that the significant variations sought could not be supported.

The applicant, who lodged the application shortly before the expiry of the SCC on 6 March 2019, has been provided with numerous opportunities to withdraw. This offer has not been taken up.

It is noted that a new SCC application has been lodged with the Department of Planning, Industry and Environment on 3 June 2019 and remains under assessment. Council has objected to the issue of a new SCC based the proposal's inconsistency with the changed landscape of state and local policies, in particular the Canterbury Road Review and South District Plan.

As the application is now a prohibited form of development in the zone, the application is submitted to the Sydney South Planning Panel with a recommendation of refusal. Accordingly, the Panel has no power to approve the DA as it is prohibited development.

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## **BACKGROUND**

### Site Compatibility Certificate and Planning Proposal History

A site compatibility certificate (SCC) for the subject site was lodged with the Department of Planning and Environment on 25 June 2013 by Evolve Housing c/- Stimson Consultant Services. Council generally supported the issue of the SCC based on the proposal's consistency with the proposed rezoning of the site under the Canterbury Residential Development Strategy, which included an increased height limit from 12m to 18m.

The subject SCC was issued on 15 July 2014 by the Acting Secretary of the Department of Planning and Environment.

During 2014 the former Canterbury Council initiated a planning proposal seeking to increase density along Canterbury Road. Although supported by the Canterbury Residential Development Strategy, the planning proposal was not supported (in part) by the Department of Planning and Environment due to an objection from the NSW Roads and Maritime Services about the capacity of Canterbury Road. The planning proposal included increasing the maximum height and rezoning the land to permit residential accommodation on the subject site, thereby increasing the volume of traffic along Canterbury Road.

A private landowner initiated site specific planning proposal was submitted during this time in response to the concerns raised about the Canterbury Residential Development Strategy. The planning proposal sought a similar rezoning (from B6 Enterprise Corridor / R3 Medium Density Residential to B5 Business Development as a 'key site' to permit residential accommodation) and the 18m height provision as sought by the Canterbury Residential Development Strategy. The proposal also included a laneway through the site.

After the amalgamation of the former Canterbury and Bankstown Council on 12 May 2016, the Administrator resolved to review development and planning controls along Canterbury Road due to ad-hoc decision making along the Canterbury Road Corridor with development applications and planning proposals.

All planning proposals along Canterbury Road were deferred by the Administrator until the Canterbury Road Review was finalised.

The Canterbury Road Review and its subsequent report recommendations were subject to a steering committee formed with the Greater Sydney Commission, Department of Planning and Environment (chair), RMS, Transport for NSW and Council.

As part of the process, the RMS also submitted a submission reiterating past concerns about cumulative traffic impacts from proposed rezoning of land to B5 Business Development, which permits residential development for 'key sites' along Canterbury Road. All B5 sites (except one) are key sites.

The Canterbury Road Review was adopted in-principle by Council on 18 May 2018.

On 13 June 2018, the planning proposal for the subject site was ultimately recommended to 'not proceed' in accordance with the findings of the Canterbury Road Review by the Local Planning Panel and subsequently later resolved by Council to 'not proceed'.

Council concurrently resolved to write to the Department of Planning and Environment to revoke the subject site compatibility certificate.

The Department agreed to 'not proceed' with the planning proposal, however declined to revoke the site compatibility certificate stating:

*'The Department's powers to revoke an SCC are extremely limited...The SCC has not and will not rezone the site, it merely provides the opportunity for the proponent to lodge a development application'.*

A copy of the Independent Planning Commission's advice has been provided to the Panel under separate cover.

On 3 June 2019 the applicant lodged a new SCC to the Department of Planning, Industry and Environment.

On 21 June 2019 Council objected to the issue of a new SCC on the basis of considerable changes to the strategic planning context for the site since the issue of the previous 2014 SCC. In particular, the Canterbury Road Review and South District Plan.

A copy of Council's correspondence has been provided to the Panel under separate cover.

#### Concept Development Application History

On 6 March 2019 the subject concept application was lodged.

On 29 March 2019 Council requested a clause 4.6 objection for the significant breaches sought to height and FSR and rejected the submission of a revised quantity surveyors report which sought to amend the CIV.

On 8 April 2019 the applicant submitted a memorandum of advice from Justin Doyle (counsel) that a clause 4.6 was not required, however should be provided as a cautionary approach. The applicant stated a clause 4.6 would be provided.

On 14 May 2019 the applicant submitted unrequested amended plans. The clause 4.6 written request remained outstanding.

On 20 May 2019 the clause 4.6 was submitted to Council on the basis of the amended plans provided on 14 May 2019.

On 29 May 2019 Council met with the applicant and conveyed issues around the application not being 'by or on behalf of an affordable housing provider' (as required by SEPP ARH), excessive height, compatibility of the development and changed strategic direction of Canterbury Road.

On 30 May 2019 the RMS objected to the application on the basis of the clause 4.6 variation to 'increase units beyond existing controls'. The RMS objected to the increase until the broader traffic and transport study and associated traffic mitigation works (including potential road widening) and funding mechanisms are determined.

On 14 June 2019 Council sent an issues letter based on the assessment of the application. The issues raised included:

- Lapsing SCC.
- Application could not be considered under Division 5 SEPP ARH as the following pre-conditions had not been met:
  - Demonstration by survey that the site was within 800m walking distance (cl.34).
  - Applicant is not an affordable housing provider and DA is therefore not 'by or on behalf' of a public authority or social housing provider (cl.35).
- The subject site is zoned for commercial purposes, however residential was proposed along street frontages contrary to cl.36(2)(b).
- The SCC found the site to be compatible, subject to certain requirements. The requirements relating to height, dwelling numbers and additional impacts within and adjoining the site that were imposed by the Acting Secretary in the SCC have not been satisfied. The proposal therefore fails to satisfy that it is compatible (cl.37).
- Council's own assessment, which is not limited to the terms of the SCC, finds that the application should not be supported based on the above matters and merits assessment against the CLEP 2012 and CDCP 2012 (cl.36).
- The Clause 4.6 written request is inadequate and the excessive breach to height is not reflective of the provisions of clause 4.6, and instead seeks to affect general planning change. The correct approach to achieve planning change is through a planning proposal.
- RMS objection to the additional density above the height limit.
- Apartment Design Guide non-compliances with visual privacy, contributing to blank wall conditions which in turn impacts the indicative ventilation performance (overall 48% instead of 60%) and solar access performance (overall 58% instead of 70%).
- General amenity issues with placement of indicative apartments along driveway ramps.
- CDCP 2012 issues regarding setbacks, ziggurat built form and easements/services.
- Submitted contamination report does not satisfy *State Environmental Planning Policy 55 – Remediation of Land*. The contamination on site requires the appointment of a NSW EPA accredited Site Auditor to audit all reports. Further, a Site Audit Statement and Site Audit Report are required.
- The submitted traffic report is out of date, with traffic volumes collected in 2014-2015.
- Other issues relating to indicative floor plans regarding waste, landscaping and engineering.

On 19 June 2019 the Sydney South Planning Panel was briefed on the proposal.

On 9 July 2019 the applicant sought to electronically lodge 'updated concept and updated plans for consent'. The applicant was advised that the plans were not accepted pursuant to clause 55 of the Environmental Planning and Assessment Regulation 2000. It was later clarified by the applicant on 12 July 2019 that the reference to 'updated plans for consent' was instead reference to an urban design report.

In response, Council advised that the information was not accepted pursuant to clause 55 of the Environmental Planning and Assessment Regulation 2000 and that the application should be withdrawn by close of business 15 July 2019.

By the close of 15 July 2019, the SCC expired.

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## **SITE AND LOCALITY DESCRIPTION**

The subject site is located at 677-687 Canterbury Road and 48 Drummond Street, Belmore and is legally described as:

- Lot 91 DP 3862
- Lots A and B DP 952115
- Lots 1 and 2 DP 533919

The consolidated site has a primary frontage of 101m along Canterbury Road with secondary frontages to Drummond Street and Anderson Street of 92.995m and 44.27m respectively. The irregularly shaped consolidated lot has an overall site area of 7,050.5m<sup>2</sup>.

The site falls from Canterbury Road to the rear of the site with a maximum total fall of 3m, the site also has a slight cross fall down to Drummond Street of approximately 1m over the width of the site.

The subject site is currently occupied by large warehouse / light industrial buildings and a residential flat building.

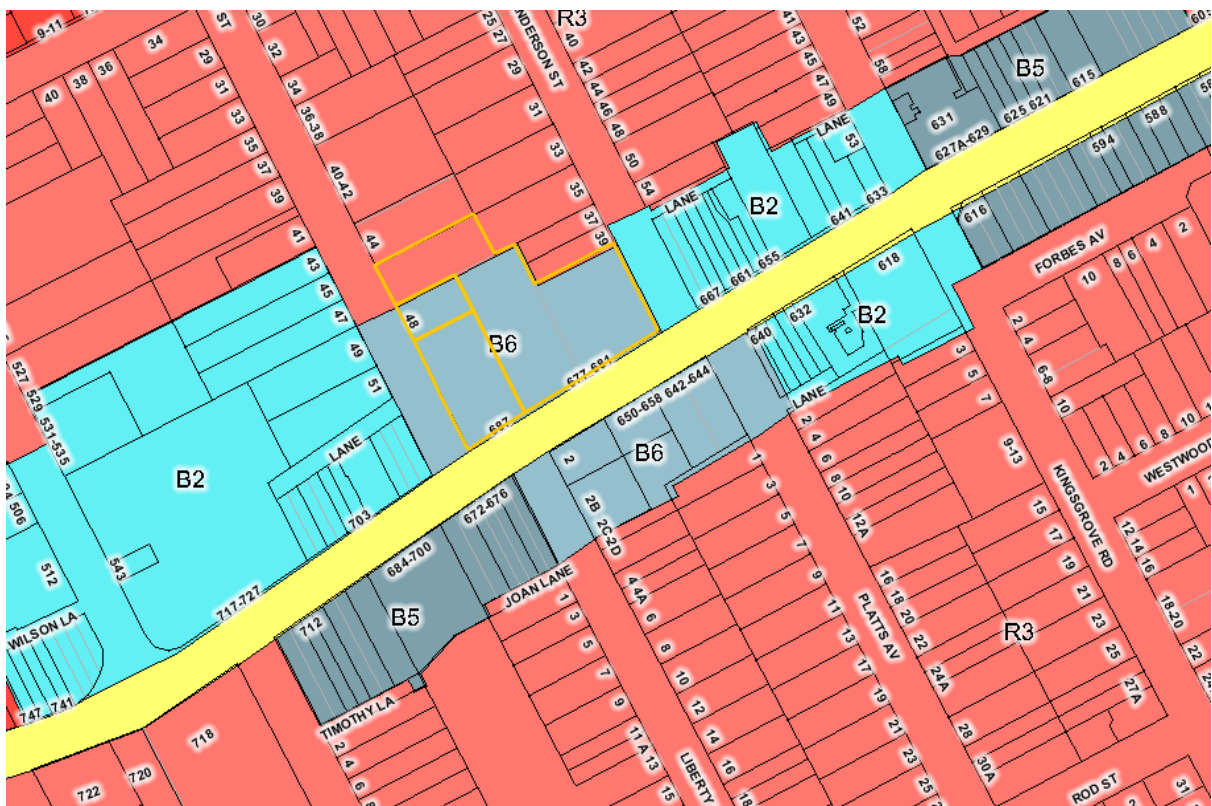
Development to the north / north east of the site (being Anderson Street) is primarily single storey dwellings. Development along Drummond Street is mixed, with warehouses, two storey residential flat buildings, townhouses and detached dwellings. Directly to the east of the corner of Anderson Street and along Canterbury Road are commercial/industrial buildings and a car sales premises. To the west of the site on the corner of Drummond Street and Canterbury Road, development is a mixture of commercial buildings and new mixed use residential buildings either under construction or completed. Directly opposite the site to the south are vehicular repair stations and warehouses, with the same B6 zoning as the subject site.

The below figures show an aerial of the site, zoning and height of the area:





**Figure 1 | Aerial of the subject site** Source: NearMap



**Figure 2 | Extract of the zoning of the Canterbury Local Environmental Plan 2012.** Source: Canterbury Maps



**Figure 3** Extract of the height of the Canterbury Local Environmental Plan 2012. **Source:** Canterbury Maps

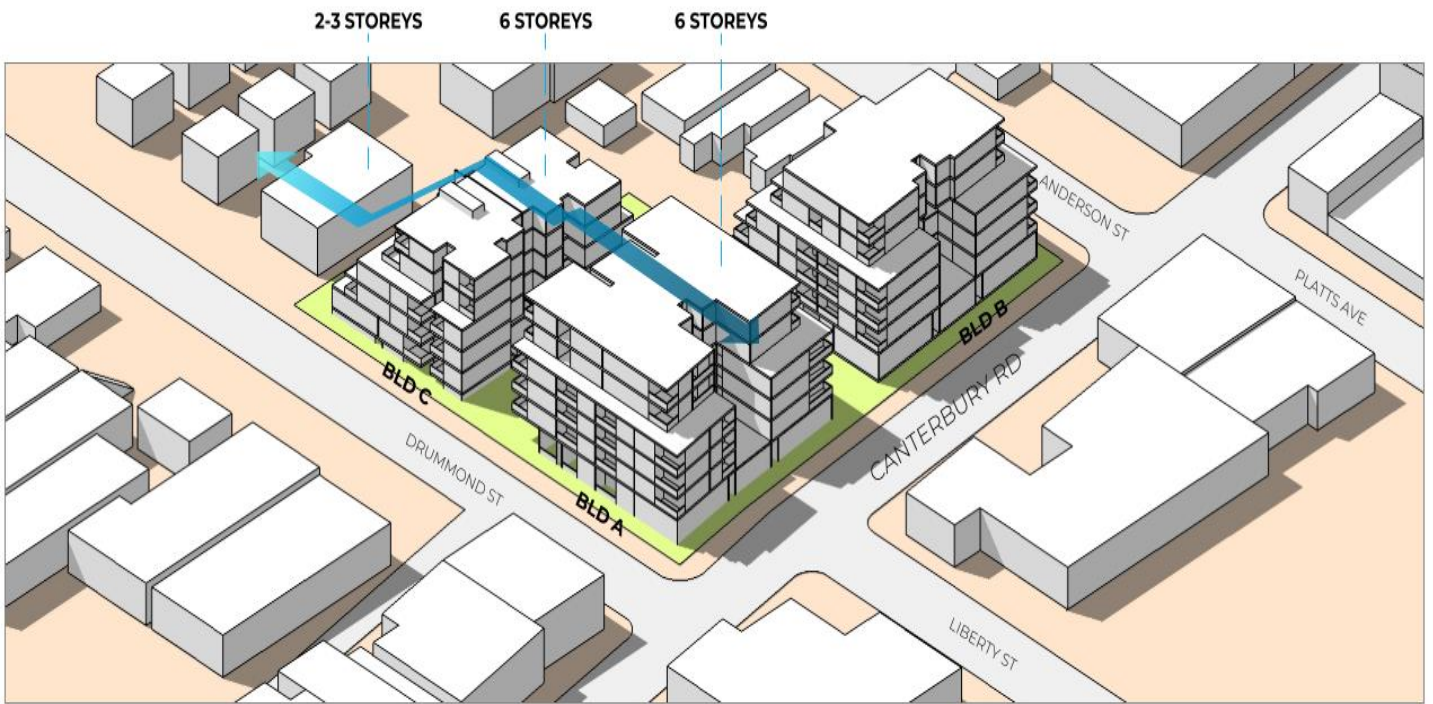
**M** = 12m and **I** = 8.5m maximum height limit.

## PROPOSED DEVELOPMENT

As amended, the concept application seeks approval for three x 6 storey mixed use development building envelopes. The amended proposal primarily removed one storey from the seven storey building at the corner of Canterbury Road and Drummond Street. The amended plans make the following changes to the proposal:

Concept DA (current stage)	<ul style="list-style-type: none"> <li>Indicative building envelopes for three x six storey buildings (as amended).</li> <li>Current indicative plans show 174 apartments.</li> <li>50% of apartments are affordable housing.</li> <li>Indicative basement location and layout.</li> <li>Vehicular access / egress location.</li> <li>No demolition works proposed in current stage.</li> </ul>
Demolition	<ul style="list-style-type: none"> <li>Demolition and site clearing.</li> </ul>
Stage 1	<ul style="list-style-type: none"> <li>Development application for physical works, including construction of basement and buildings.</li> </ul>





**Figure 4 |** Proposed Concept Envelopes - Perspective by Aleksander Projects Architects



**Figure 5 |** Proposed Site / Roof Plan by Aleksander Projects Architects

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## **SYDNEY SOUTH PLANNING PANEL BRIEFING**

The Sydney South Planning Panel was briefed on 19 June 2019. The key issues discussed are set out below for further response:

- **Pending expiry of the Site Compatibility Certificate**

The SCC has now expired, as of 15 July 2019.

A new SCC has been lodged but has not been determined by the Department of Planning, Industry and Environment. Discussions with the Department have not indicated any timeframe or determination direction.

- **Need for any application reliant on an SCC under SEPPARH to satisfy the provisions of clause 35 1(a)**

As required by clause 35, the applicant has not provided evidence to demonstrate that they are a registered social housing providing or undertaking work by or on behalf of a social housing provider. The applicant has not indicated that they are undertaking work with the Land and Housing Corporation and the applicant is not a public authority. Accordingly, the application cannot access the zoning flexibility afforded by Division 5 of SEPP ARH for these authorities.

- **Consistency with the principles of the Canterbury Road Review**

The proposed development is inconsistent with the following principles and recommendations of the Canterbury Road Review:

- Concentrate residential development into seven (7) 'Junctions' formed around intersection streets.
- Allow eleven (11) residential 'Localities' between the Junctions along the northern side of Canterbury Road.
- Exclude multi-storey development (meaning high density residential development including residential flat buildings, shop top housing and the like) from land outside of the identified Junctions and Localities.
- Investigate potential for bulky goods retail and light industry on the ground floor of mixed use residential development.
- Establish appropriate planning controls to ensure a continuous network of rear lanes parallel to Canterbury Road.
- Investigate the critical shortage of open space, urban amenity and street connectivity.

- **Transition between the R3 zone and B6 zone.**

An assessment of the application, particularly the submitted clause 4.6 submission has found that the requests to significantly breach the height limit and FSR have not been adequately justified and are not supported. The applicable maximum heights under the Canterbury Local Environmental Plan 2012 would ensure an appropriate transition to the lower density R3 zoned sites.

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## SECTION 4.15 ASSESSMENT

### Prohibited development

The proposed application seeks concept approval for a mixed use building envelopes comprising a 'residential flat building' and 'commercial premises'. Residential flat buildings and commercial premises are both prohibited in the B6 Enterprise Corridor zone and R3 Medium Density Residential zone.

The development application for a prohibited development was accepted pursuant to clause 36, Division 5 of SEPP ARH, which permits lodgement of development applications for residential flat buildings where prohibited in a form specified on a site compatibility certificate. Such an application must be accompanied by a site compatibility certificate at lodgement as per 50(2A) of the *Environmental Planning and Assessment Regulation 2000*. The subject application was lodged on 6 March 2019 with an eligible SCC.

At the close of 15 July 2019, the SCC relied on by the application expired. The applicant advised that an extension was sought from the Department, however this request was not granted. Therefore, the proposed development is now prohibited.

On this basis, a merits assessment under Section 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) cannot occur. The operation of Section 4.15 only facilitates a merit assessment for development that may be carried out with development consent, being permissible development (Division 4.3, Section 4.9).

Pursuant to Section 4.3 and 4.9 of the EP&A Act, prohibited development as specified in an environmental planning instrument is not a form of development that can obtain development consent.

Accordingly, an assessment of a prohibited form of development on its merits is irrelevant as development consent cannot be granted.

This is consistent with the procedure of the NSW Land and Environment Court for Class 1 appeals, where the permissibility of a development is often determined in a separate preliminary hearing prior to allowing a hearing of the merit issues.

### New Site Compatibility Certificate

The applicant has applied for a new SCC. In communication with the Department, an assessment or determination timeframe has not been established. Further, a position on granting or refusing the new SCC application has not been disclosed by the Department.

There is uncertainty regarding the determination of the new SCC. Given that the last SCC took over a year to determine. If a positive determination were to be issued, there is further uncertainty regarding the wording of a development described in a new SCC. This may render the current DA as inconsistent and ineligible to rely on the new SCC, if issued in a different form with different compatibility requirements. The changed strategic planning that applies to the area sets a different context than when the initial SCC was issued when the former Canterbury Council sought to increase density along Canterbury Road.

Further, as noted throughout the history and response to the Panel's concerns, the preconditions regarding the applicant not being an eligible housing provider that has access

to this part of the ARH SEPP would also preclude the grant of consent. Similarly, the inadequate clause 4.6 written request would also restrain the ability of the consent authority to grant development consent.

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## **CONCLUSION AND RECOMMENDATION**

The subject development application was lodged pursuant to Division 5 of SEPP ARH, reliant on a site compatibility certificate issued on 15 July 2014. The SCC expired at the close of 15 July 2019. The applicant was given numerous opportunities to withdraw the application, however did not accept the offer.

The expiry of the site compatibility certificate renders the proposed concept application for 3 x six storey mixed use buildings comprising residential and commercial development as prohibited in the zone and is accordingly recommended for refusal for the following reasons:

1. The proposed development, pursuant to the provisions of Section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979, is a prohibited development within the B6 Enterprise Corridor zone and R3 Medium Density zone under the Canterbury Local Environmental Plan 2012.
2. The proposed development has not been lodged by or on behalf of a public authority, social housing provider or by a person undertaking development with the Land and Housing Corporation. Pursuant to the provisions of Section 4.15(1)(a)(i), Division 5 of State Environmental Planning Policy (Affordable Housing 2009) is not applicable in order to permit development for the purposes of a residential flat building, where otherwise prohibited under the Canterbury Local Environmental Plan 2012.