



Application to Review the determination of DA 528/2019

SCCPP reference	PPSSCC-28
DA No.	528/2019
Date of receipt	24 February 2021
Proposal	Review of decision to refuse DA 528/2019 which sought consent for the construction of two residential towers comprising 419 apartments over four levels of basement car parking, construction of a new road plus associated landscaping, civil and public domain works
Street address	12 - 14 Birnie Avenue, Lidcombe
Property Description	Lot 1 DP 802479
Applicant	Altus Consulting Group Pty Ltd
Owner	SLA Homebush Pty Ltd and YYS & Co. Pty Ltd
Attachments	Attachment 1 - Original assessment report for DA 528/2019 – Dec 2020 Attachment 2 - Draft conditions of consent following 8.3 Review Attachment 3 - Selected plans
Draft conditions	The applicant has agreed to the draft conditions at Attachment 2.

1. Introduction and summary

By Notice of Determination dated 24 December 2020, DA 528/2019 was refused for the following reasons:

- The application is not satisfactory for the purposes of section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 in that insufficient information has been provided to demonstrate compliance with the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.*
- The application is not satisfactory for the purposes of section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 in that the proposal will result in adverse wind outcomes that will affect the comfort and safety of residents and those using the adjoining public domain.*

3. *The application is not satisfactory for the purposes of section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 in that the proposal has not demonstrated the design will avoid adverse glare outcomes that would otherwise affect the amenity and safety of residents and those using the adjoining public domain and roads.*

The applicant is seeking a review of that decision pursuant to Division 8.2 of the Environmental Planning and Assessment Act 1979. The outcomes of the Review are set out below, but in summary, the issues of concern with the original DA are now resolved and consequently approval of the application is now recommended.

2. Division 8.2 of the Act

Division 8.2 of the EPA Act makes provision for reviews and appeals of decisions made by a consent authority under Part 4 of the Act. Once a review under this Division has been completed, that decision itself cannot then also be the subject of a further review.

Sections 8.3 – 8.5 of the Act set out the process and conduct of any such review. Compliance with all relevant obligations is demonstrated in the following table:

Table 1: Compliance with Division 8.2 of the EPA Act

Requirement	Compliance
<p><i>Section 8.3(1)</i> <i>The consent authority must undertake a review of a determination if requested to do so by an applicant</i></p>	<p>Yes – A request for a review of the decision to refuse DA 528/2019 was received on 24 February 2021</p>
<p><i>Section 8.3(2)</i> <i>Timeframes which limit the review process</i></p>	<p>Yes – Section 8.3(2)(a) provides that a decision cannot be reviewed after the period in which an appeal may be lodged with the Land and Environment Court. That period is 6 months via section 8.10 of the Act, meaning the section 8.3 review must be finally determined before 24 June 2021.</p> <p>Note however that the COVID-19 Legislation Amendment (Emergency Measures – attorney General) Act 2020 has extended the timeframe for a review to 12 months, meaning the Review must be finally determined before 24 December 2021.</p> <p>The second criteria (request for a review after the LEC has already heard an appeal against the same determination) is not relevant.</p>
<p><i>Section 8.3(3)</i> <i>The application may be amended for the purposes of the review but must remain “substantially the same” development</i></p>	<p>Yes – as discussed at section 3.2 below the application has been amended but nevertheless would satisfy the “substantially the same” test otherwise associated with section 4.55 of the Act.</p>

Section 8.3(4) <i>Review of determination made by delegate of a council</i>	Yes – In December 2020 the SCCPP delegated this DA back to council for determination. However, the Panel has confirmed it will determine this Review application.
Section 8.3(5) <i>Review of a decision made by a local planning panel must be conducted by the Panel</i>	Not applicable
Section 8.3(6) <i>Review of a decision made by a council must be conducted by the council, and not a delegate</i>	Not applicable
Section 8.3(7) <i>Review of a decision made by a regional planning panel must be conducted by the Panel</i>	Not applicable
Section 8.3(8) <i>Review of a decision made by the Independent Planning Commission must be conducted by the Commission</i>	Not applicable
Section 8.3(9) <i>Review of a decision made by a delegate of the Minister (other than the IPC) must be conducted by the Commission or by another, more senior, delegate of the Minister</i>	Not applicable
Section 8.4 <i>Following its review, the consent authority may confirm or change the determination for the DA</i>	Noted
Section 8.5 <i>Miscellaneous provisions relating to reviews</i>	Noted

3. Assessment

3.1 Background

DA/528/2019 presented challenges for investigation during the assessment. It was ultimately the case that the issues at section 1 above were of such significance that it was neither appropriate to delay the DA any longer for further information, nor attempt to resolve those matters by way of conditions. The assessment report subsequently prepared for the Sydney Central City Planning Panel recommending the application be refused is provided at **Attachment 1**.

This circumstances around the recommendation of that report were clearly communicated to the applicant at the time and guidance given with regards to options for a way forward, leading to this application for a Review under Division 8.2 of the Act.

The Panel delegated its authority back to Council to determine this and several other applications, and the DA was refused on 23 December 2020.

3.2 Scope of the Review

Section 8.3(3) of the Act provides that:

In requesting a review, the applicant may amend the proposed development the subject of the original application for development consent or for modification of development consent. The consent authority may review the matter having regard to the amended development, but only if it is satisfied that it is substantially the same development.

The applicant has amended the design of the scheme and has also provided additional technical reports, all of which is limited only to addressing the matters which informed the reasons for refusal. These are discussed in more detail at section 3.4 below. The application is also supported by a planning report which demonstrates, via both a qualitative and quantitative comparison, that the scheme the subject of this Review is 'substantially the same' as that which was refused.

The design amendments presented to resolve the reasons for refusal are elemental rather than fundamental changes to the original proposal, and it is therefore agreed the revised scheme is substantially the same as that which was refused. Consequently, this request for a Review is properly made and can be considered.

3.4 Assessment of the Review

Given the highly technical nature of the issues which are the basis for the reasons for refusal, the applicant consulted with Council's external experts prior to formalising the Review submission. Nevertheless, several amendments to the technical reports were required after lodgement.

An assessment of how the Review application responds to the three reasons for the refusal of DA/528/2019 is provided below:

1. *The application is not satisfactory for the purposes of section 4.15(1)(a)(i) of the Environmental Planning and Assessment Act 1979 in that insufficient information has been provided to demonstrate compliance with the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.*

Discussion

DA 528/2019 was supported by the required Certificate and associated supporting plans and reports. However, review of that information by Council's sustainability consultant identified various errors or omissions from the applicant's assessment, and consequently a revised Certificate and supporting information was requested.

That further information was again found to be inadequate and while it was recognised those matters could be resolved, the Basix details provided at that time were not sufficient to demonstrate that the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 were satisfied.

Consequently, this Review application is supported by new:

- Basix Certificate
- Basix stamped plans
- Basix Assessment Report

That Assessment Report provides the following conclusion:

The proposed development has been assessed in terms of its ability to conserve water and minimise energy consumption. The proposed development will be constructed to optimise the thermal performance (passive and fabric design) using the BASIX thermal comfort requirements.

With the recommendations contained within this report the proposed development is able to achieve the BASIX requirements and is eligible for BASIX certification.

For further details, please refer to the BASIX Certificate 1038818M_05 provided.

Peer review of this new information by Council's sustainability consultant again identified various shortcomings, but those matters do not challenge the conclusion that Basix obligations are achieved.

Accordingly, the first reason for the refusal of DA/528/2019 is, upon Review, now resolved.

2. *The application is not satisfactory for the purposes of section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 in that the proposal will result in adverse wind outcomes that will affect the comfort and safety of residents and those using the adjoining public domain.*

Discussion

Peer review of the reflectivity report supporting DA 528/2019 revealed that the glare impacts would be so significant that the application could not be supported, with Council's sustainability consultant concluding:

The methodology applied remains fundamentally flawed and cannot be relied upon to identify risks of glare adequately. The recommendations for mitigating glare risk are also unacceptable as either unresolved or unsubstantiated. By way of example, there is one facade that is now identified with a high potential for glare and the recommendation is to increase the density of shading, without any objective measure for such.

This Review application is supported by a new reflectivity report which has again been peer reviewed, with Council's sustainability consultant concluding:

I have reviewed the updated reflectivity reportand it adequately addresses both the amendments I requested. On this basis, I am happy to accept the report and recommended mitigation treatments.

Accordingly, the second reason for the refusal of DA/528/2019 is, upon Review, now resolved.

3. *The application is not satisfactory for the purposes of section 4.15(1)(b) of the Environmental Planning and Assessment Act 1979 in that the proposal has not demonstrated the design will avoid adverse glare outcomes that would otherwise affect the amenity and safety of residents and those using the adjoining public domain and roads.*

Discussion

The application as originally lodged was only supported by a desktop wind impact assessment, which was insufficient for a development of this scale. A Wind Tunnel report was requested, and eventually received after a significant delay.

In summary that further report analysed 45 locations across the ground plane, of which 6 are outside the site, and established:

- 26 locations failed the comfort criteria (of which 2 are outside the site)
- 3 of those locations (all within the site) are also shown to be at the maximum wind speed for the safety criterion.
- A further 7 locations (5 of which are inside the site) are just under the maximum wind speed for the safety criterion.

The wind tunnel report then nominated a range of mitigation measures comprising:

- Localised 1.5m high porous screens to provide local direct shielding for minor exceedances in comfort.
- Extensive porous screening, 2m—3m high to reduce the effect of corner accelerations and funnelling at ground level between the towers resulting in higher exceedances in comfort.
- Localised full height corner screen to mitigate comfort and safety exceedances.
- Awnings along the north-eastern aspect of the eastern tower, and north-western aspect of the western tower that wrap around the corners to mitigate adverse downwash effects due to the tower form.

That report then concluded:

With the inclusion of these treatments to the final design, it is expected that wind conditions for all ground floor outdoor trafficable areas around the development will be suitable for their intended uses or be better than or equivalent to existing wind conditions.

A peer review by Council's external consultant confirmed that while the methodology and safety/comfort criteria used in that report were acceptable, there were multiple concerns, notably that:

- The nominated mitigation measures had not been tested to quantify their effectiveness, which is essential given the multiple and significant exceedances of both comfort and safety criteria; and
- Those mitigation measures only respond to windflow that is horizontal to the ground, and do not address downwash from the buildings themselves. Such downwash would reduce the effectiveness of the mitigation measures.

Given that, Council's consultant concluded that on the information provided the wind impacts were so significant that the application in its current form could not be supported.

This Review application is support by a new Pedestrian Wind Environment Study, which again nominates a similar combination of built form and onsite landscape treatments to mitigate wind impacts. This current report has also been peer reviewed by Council's external consultant, with that evaluation confirming:

- The proposed landscaping scheme with a screen that the majority of the ground level wind conditions would satisfy the target pedestrian wind comfort criteria and have no safety issues or the wind conditions would be similar to the Existing Configuration.
- For location 28 between the towers, the outcomes have only been shown to shown to satisfy the walking criterion and not the target short duration activities criterion. Additional mitigation measures to rectify that have been nominated, but not tested.
- Additional treatments for terraces and balconies are generally appropriate but concerns remain that such may not be sufficient to achieve the target criterion.

Subsequent discussion with Council's consultant indicates that those remaining concerns can reasonably be addressed via conditions of consent.

Accordingly, the third reason for the refusal of DA/528/2019 is, upon Review, now resolved.

3.5 Public Notification

There is no requirement for this application to be notified under Auburn DCP 2010. However, submitters to original DA/528/2019 were notified of the decision to refuse that DA. If this Review is successful it would be a poor outcome for those persons not to be advised of that circumstance. Therefore, this application was notified for 14 days between 5 March 2021 and 19 March 2021. No submissions were received.

3.6 Agency notification

While there is no legislative requirement for Council to notify this application, noting that obligations under section 27 of the SOPA Act 2001 rest with an applicant and relate only to development applications, for the same reasons noted at section 3.5 above it was considered appropriate to notify SOPA of this Review application.

SOPA did not object to the application but did raise various matters which are summarised and addressed below:

Table 2: SOPA submission issues

Provide further information better describing the interface of the site with Edwin Flack Avenue including details of fencing and landscaping	Council's Public Domain team has thoroughly reviewed the relationship of the proposal with all adjoining public spaces and is satisfied with the nominated treatments.
The main pedestrian pathway through the site should be publicly accessible to improve permeability within the precinct	The DCP does not identify the need for a through site link over this site.

Strongly encourages City of Parramatta to require the signalisation of Birnie Avenue and Carter Street prior to the approval of this development.	Signalisation of this intersection is identified in the current s94A Plan, however Council's Traffic Team is satisfied there is no nexus to warrant installation of those signals prior to, or a requirement of, the approval of this application.
Requests that a pre-construction dilapidation report be provided to SOPA detailing the current structural condition of any SOPA buildings, roads and public domain or infrastructure assets within the zone of influence	Agreed – resolved by conditions
Requests that the development be subject to a Noise Covenant to preserve SOP's status as a major events precinct	Agreed – resolved by conditions
Requests a condition of consent requiring the applicant to obtain written approval from SOPA's Director – Environment and Planning to undertake formative pruning of any trees on SOPA land prior to the issue of a Construction Certificate.	Agreed – resolved by conditions
Requests to be consulted if the scope of works changes to result in any new or additional impacts to trees on SOPA land, noting that any tree removal would require SOPA approval including agreement on any replacement planting.	Agreed - resolved by conditions
Requests a condition of consent requiring that the Construction Traffic and Pedestrian Management Plan be approved by SOPA's Director, Environment and Planning prior to the issue of a Construction Certificate for the development	Agreed - resolved by conditions

3.7 Consideration of section 4.15 of the Environmental Planning and Assessment Act

A detailed assessment against all relevant matters for consideration having regard to section 4.15 of the EPA Act was prepared for DA 528/2019 and is provided at **Attachment 1**.

That assessment remains valid given the scheme under this Review application remains substantially same, but noting:

- The reasons for refusal are now resolved as discussed above, and
- The application no longer needs to rely upon a 4.6 request to vary the building height control from 70m to 90m, as the previously exhibited draft amendments to Auburn LEP 2010, prepared by the Department of Planning, Infrastructure and Environment, have now been formalised (gazetted).

3.8 Delegation to determine the Review

At its meeting on 3 March 2021 the Panel confirmed it would determine this Review.

Conclusion

The assessment above demonstrates that all relevant legislative criteria has been addressed

and satisfied. The additional information and further technical reports provided by the applicant are satisfactory and resolve the issues which were the basis for the decision to refuse DA 528/2019. Accordingly, as all relevant matters for consideration under section 4.15 of the EPA Act are now satisfied, approval of the application is appropriate.

Recommendation

- A. That pursuant to Section 8.4 of the Environmental Planning and Assessment Act 1979, and following completion of a Review of pursuant to section 8.3 of that same Act, that consent be granted to DA/528/2019 for the construction of two residential towers comprising 419 apartments over four levels of basement car parking, construction of a new road plus associated landscaping, civil and public domain works at 12 - 14 Birnie Avenue, Lidcombe, being Lot 1 DP 802479, for a period of five (5) years within which physical commencement is to occur from the date on the Notice of Determination, subject to conditions of consent at **Attachment 2**.
- B. That those persons who made submissions to original DA 528/2019 be advised of the decision.