

COUNCIL ASSESSMENT REPORT

Panel Reference	PPSSCC-341
DA Number	DA 736/2017/JP/B
LGA	The Hills Shire Council
Proposed Development	Section 4.55(2) Modification to an approved concept masterplan – changes to building height in Stage 4
Street Address	104 Fairway Drive, Norwest
Applicant	Greg Dowling (Dowling Urban)
Consultant/s	Town Planner: Dowling Urban Architect: Crone Architects
Date of DA lodgement	02 February 2022
Number of Submissions	Six
Recommendation	Approval
Regional Development Criteria (Schedule 7 of the SEPP (State and Regional Development) 2011	Section 4.55(2) to an application previously approved by the panel and subject to a departure from a development standard
List of all relevant s4.15(1)(a) matters	<p>EPIs:</p> <ul style="list-style-type: none"> SEPP (Planning Systems) 2021 SEPP 65 - Design Quality of Residential Apartment Development The Hills Local Environmental Plan 2019 <p>Relevant development control plan</p> <ul style="list-style-type: none"> The following sections of The Hills DCP 2012: <ul style="list-style-type: none"> Part B Section 5 – Residential Flat Building Part C Section 1 – Parking Part C Section 3 – Landscaping Part D Section 7 – Balmoral Road Release Area <p>Any relevant planning agreement:</p> <ul style="list-style-type: none"> Nil <p>Relevant regulations:</p> <ul style="list-style-type: none"> Environmental Planning and Assessment Regulation 2021
List all documents submitted with this report for the Panel's consideration	<ul style="list-style-type: none"> Submissions
Clause 4.6 requests	<ul style="list-style-type: none"> The Hills Local Environmental Plan 2019 (LEP) The Hills Clause 4.3 Height of Buildings R4 High Density Residential zone
Summary of key submissions	<ul style="list-style-type: none"> Substantially the same development Height variation Amenity and environmental concerns
Report prepared by	Robert Buckham – Principal Coordinator
Report date	1 September 2022 (Electronic Determination)

Summary of s4.15 matters	
Have all recommendations in relation to relevant s4.15 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? <i>e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP</i>	Yes
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 (S7.24)? <i>Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions</i>	Not Applicable
Conditions	
Have draft conditions been provided to the applicant for comment? <i>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</i>	Yes

EXECUTIVE SUMMARY

The proposed 4.55(2) modification to the masterplan application for the site consists of the re-distribution of Stage 4 building heights to form two towers on Spurway Drive up to 19 storeys and lowering the Spurway Drive built street wall from 12 to 7 storeys, with adjusted and reduced heights elsewhere.

- The key issues that need to be considered by the Panel in respect of the modification application are:
 - Whether the development is substantially the same as originally approved.
 - Proposed variations to building height.
 - Matters raised in the submissions.
- The approved masterplan application approved the redistribution of building height and floor space. The masterplan provides indicative details of each of the buildings which is detailed within future Development Applications. The purpose of this application is to amend the masterplan for Stage 4 to facilitate an alternate built form through altered building heights. There is no increase in density proposed.
- The proposal has a maximum height of 67 metres which is a variation of 40 metres or 148% within the 27m height control area. Variations to a lesser extent are also proposed within the 18m and 36m height control areas. A Clause 4.6 Exception to Development Standard is not required for a Section 4.55 application, however the variation is considered reasonable as the increase in building height and tower-like built form responds to the recent altered context of the locality. These amendments better facilitate the approved density and floor space and result in a more balanced built form that is compatible with that of adjoining development and the overall streetscape. The amendments also minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas, thereby satisfying the objectives of the height standard.
- The application was advertised and notified for a period of 14 days. Six submissions were received. The issues raised related to bulk and scale, view loss, solar access, appropriateness of the height, parking and traffic, and whether the development remains substantially the same.
- The merits of the amendments to building height for Stage 4 are addressed in this report. The amendments result in an approved design outcome that is supported by Council's Design Excellence Panel. The amended development results in an improved bulk and scale that responds to current development and recent approvals in the immediate locality.
- It is considered that the proposed modifications result in an outcome that is substantially the same development as originally approved. The modification application is satisfactory when evaluated against section 4.15 and section 4.55 of the Environmental Planning and Assessment Act 1979.

The Modification Application requires referral to the Regional Planning Panel for determination as the determination of Section 4.55(2) Modification Application includes a variation to a development standard exceeding 10%. The application is recommended for approval subject to conditions.

BACKGROUND

The approved Concept Masterplan Development Application (736/2017/JP) encompasses 10 buildings with a total of 1,300 dwellings, associated car parking, neighbourhood shops, fitness

centre building, civil works, internal roads and landscaping over 5 stages. The Masterplan was approved by the Sydney Central City Planning Panel on 11 April 2018.

The site was subject to a site specific Planning Proposal that amended The Hills Local Environmental Plan 2012 (LEP) as follows:

- Increased the maximum building height from 16 metres to heights ranging between 18 metres and 36 metres;
- Applied a maximum floor space ratio ranging from 1.5:1 to 3.2:1;
- Identified the site as “Area B” within the Key Sites Map; and
- Included a new local provision which ensures that future development on the site does not exceed a yield of 1,300 dwellings and that, in order to achieve this yield, development must comply with Council’s standards for apartment mix, apartment size and car parking.

Associated amendments to The Hills Development Control Plan 2012 (Part D Section 7 – Balmoral Road Release Area) also came into force. The amendments included the upgrade and inclusion of the existing portion of Spurway Drive as a public road to connect to the existing planned local road network within the Balmoral Road Release Area (from Windsor Road to Fairway Drive).

The application approved the redistribution of building height and floor space across the site compared to that identified within the LEP amendment. The masterplan provides indicative details of each of the buildings which will be further detailed within future Development Applications.

A 4.55(1A) Modification (736/2017/JP/A) was approved under delegated authority on 21 January 2020. This modification amended the approved staging of buildings and road construction specifically, it switched Stage 3 and 4.

Built form development applications have been approved for the first 3 stages, with stages 1 and 2 completed and stage 3 under construction.

The subject application was considered by Council's Design Excellence Panel on 10 November 2021 prior to lodgement. The minutes of the meeting are attached to this report (refer Attachment 8). The subject application was lodged on 2 February 2022. Legal advice was provided by the applicant was provided on 11 March 2022. The matter was briefed to the Panel on 17 March 2022. A built form development application for this stage, stage 4, (2059/2022/JP) was lodged on 06 June 2022 and is currently under assessment.

DETAILS AND SUBMISSIONS

Zoning:	R4 High Density Residential
Area:	21,528m ²
Existing Development:	(Stage 1 and 2 completed, Stage 3 under construction)
Section 7.11 Contribution	Not Applicable
Exhibition:	14
Notice Adj Owners:	Yes
Number Advised:	1,184
Submissions Received:	6

PROPOSAL

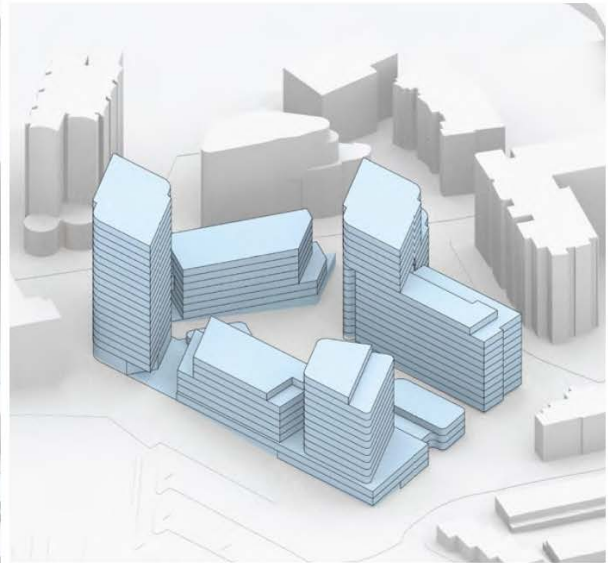
The proposed 4.55(2) modification to the masterplan application for the site consists of the re-distribution of Stage 4 building heights to form two towers on Spurway Drive up to 19 storeys and lowering the Spurway Drive built street wall from 12 to 7 storeys, with adjusted and reduced heights elsewhere.

The Masterplan application is a concept development application pursuant to Section 4.22 of the Environmental Planning and Assessment Act 1979.

The applicant has provided the following diagrams that detail the changes in built form and heights in storeys.



Approved Masterplan Massing



Proposed Masterplan Massing



Changes to Building Heights

The applicant has stated that the purpose of the modification is *to further adjust building heights within Stage 4 without change to development yield, to achieve a better planning and design outcome for the public domain, apartment amenity and adjoining development in response to Council and Design Excellence Panel feedback and consultation.*

This re-evaluation is informed by the experiences to date in optimising residential amenity in the physical and social context of The Hills as well as responding more appropriately to the changed future planned context from subsequent rezonings especially south of the site under the “The Greens” masterplan which introduced tower typologies to the locality.

The subject modification is required to facilitate the built form development application for stage 4 as it cannot be inconsistent with the consent for the masterplan (concept development application) as required by Division 4.4 - Concept development applications of the Environmental Planning and Assessment Act 1979.

1. State Environmental Planning Policy (Planning Systems) 2021

Part 2.4 and Schedule 6 of SEPP 2011 provides the following referral requirements to the SCCPP:-

- General development that has a capital investment value of more than \$30 million.

The development encompassed by the masterplan has a CIV of approximately \$488 million.

Clause 275(2) of the Environmental Planning and Assessment Regulation 2000 states that “A council must not determine an application to modify a development consent under the Act, section 4.55(2) on behalf of a Sydney district or regional planning panel if the application is of a kind specified in the Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents published on the NSW planning portal on 30 June 2020.”

The instruction states:

“A council is **not** to determine an application under section 4.55(2) of the Act to modify a development consent granted by a regional panel if the application:

- proposes amendments to a condition of development consent recommended in the council assessment report but which was amended by the panel, or
- proposes amendments to a condition of development consent that was not included in the council assessment report but which was added by the panel, or
- **meets the criteria relating to conflict of interest, contentious development or departure from development standards set out in Schedule 1 to this instruction.**

Note: Clause 275 of the Regulation requires councils to determine all other applications for the modification of development consents under section 4.55(2) of the Act, as well as applications for the modification of development consents under section 4.55(1) and section 4.55(1A) of the Act.

The subject 4.55(2) modification includes a variation to a development standard exceeding 10% given the amended built form proposed under this modification. The original application included a variation to the Building Height standard which was approved over the 10% threshold. The subject modification application seeks to further exceed the building height development standard.

2. Section 4.55 of the Environmental Planning and Assessment Act, 1979

Under the provisions of Section 4.55(2) of the Environmental Planning and Assessment Act, 1979, a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

(2) Other modifications A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is 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 and before that consent as originally granted was modified (if at all), and*
- (b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) it has notified the application in accordance with—*
 - (i) the regulations, if the regulations so require, or*
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

Subsections (1) and (1A) do not apply to such a modification.

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

The applicant has provided legal advice on their behalf from Mills Oakley in relation to whether the amendments proposed are within the scope of Section 4.55(2) of the Environmental Planning and Assessment Act, 1979. The advice is provided at Attachment 10.

The summary of the advice states:

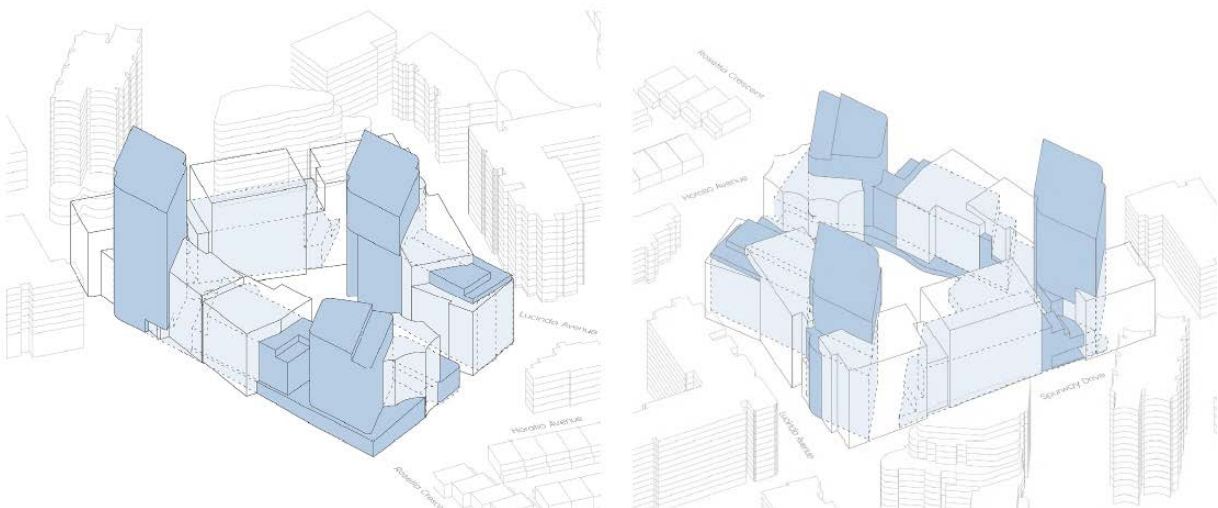
“In our opinion, the proposed amendments are readily capable of being approved as a modification application in accordance with s.4.55(2) of the EP&A Act rather than requiring a new development application. The proposed amendments do not impact the ‘essence’ of the approved development. The proposed amendments relate to a change in building heights (both in terms of a reduction and an increase in heights for various buildings) for just one stage of the development, namely Stage 4. No changes are being made to any other element of the proposed development or any other stage.

The proposal remains ‘substantially the same’ in its modified form and the proposed amendments do not undermine or radically alter any essential component of the development. Accordingly, the modifications proposed would still result in ‘substantially the same’ development as the approved development.

It is also possible to obtain approval for towers which exceed the height development standard. This is demonstrated by the fact that such a variation was approved as part of the original concept approval. For the purposes of a modification application, a clause 4.6 request is not needed (this has been established by case law). However, a clause 4.6 request will be required to be submitted with your development application for stage 4. There is nothing preventing you from submitting another clause 4.6 request along with the Stage 4 development application (even though a clause 4.6 variation was submitted and approved as part of the original concept approval) and we note that there is no numerical limit to the height variation.”

Further to the matters outlined in the applicant's legal advice, significantly the modification of the masterplan only relates to stage 4 of the 5-stage development site. The remaining 4 stages are unchanged. The development to be modified remains a residential development with the same density as approved with only amendments to building heights, both increases in height and reduction in height, and minor amendments to building footprints to facilitate the altered built form. The overall development remains a staged residential development for 1300 dwellings.

The images below provide a comparison of the building envelopes of the approved and proposed schemes viewed at aerial level from the north and south. The images identify the areas where the proposed built form exceeds or reduces the approved building envelopes.



In isolation the amendments to Stage 4 as a single development site only would likely be considered outside of the parameters of 'substantially the same'. Given the masterplan relates to four other stages that are not being modified (two have been completed, the other approved and under construction), the amendments are considered to be substantially the same when considered as the whole across the entire masterplan site. It is also considered relevant that the number of units and floor space for this stage is not sought to be modified and remains consistent with the original approval.

The other matters required to be addressed by 4.55(2) where relevant are addressed in this report and it is considered that overall, the nature of the approved development remains unchanged. Accordingly, no objection is raised to the proposal under the provisions of Section 4.55(2) of the EP&A Act, 1979.

3. Compliance with The Hills Local Environmental Plan 2019

a. Permissibility

The land is zoned R4 High Density Residential under Local Environmental Plan 2019. The proposal remains a residential flat building which is permissible in the zone.

b. Zone Objectives

The site is zoned R4 High Density Residential under The Hills LEP 2019. The objectives of the zone are:

R4 High Density Residential Objectives

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To encourage high density residential development in locations that are close to population centres and public transport routes.*

The proposal is considered to remain consistent with the stated objectives of the zone, in that the proposal will provide for a land use to meet the needs of the surrounding residents and is also considered to provide an alternative housing option for future residents.

As such the proposal is considered satisfactory in respect to the LEP 2019 objectives.

c. Development Standards

The following table addresses the principal development standards of the LEP:

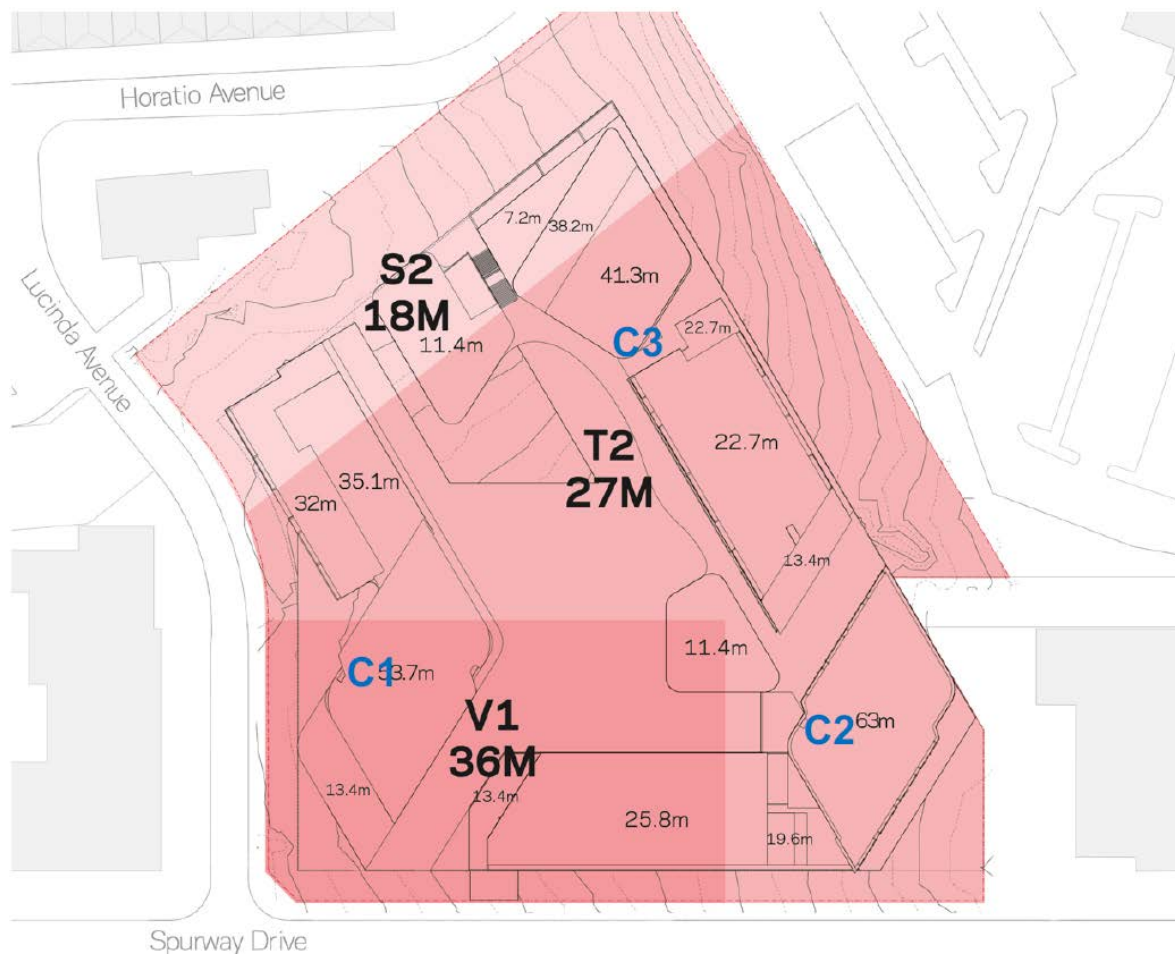
CLAUSE	REQUIRED	PROVIDED	COMPLIES
4.3 Height	Building C1 - 18 and 36 metres – Approved 43.3 metres Building C2 - 27 metres – Approved 32.5 metres Building C3 - 27 metres - Approved 33.9 metres Building C4 - 18 and 36 metres – Approved 8.2 metres	Building C1 – 18m, 27m and 36m Height Control – Proposed 57.7 metres Building C2 – 27m Height Control - Proposed 67 metres Building C3 – 18m and 27m Height Control – Proposed 45.3 metres	No, further variation proposed.
4.4 Floor Space Ratio	The site is subject to floor space ratio (FSR) development standards of 1.5:1, 2.6:1 and 3.2:1 in separate categories applying to the land. 54,000m ² anticipated by the concept development consent	54,000m ²	No further variation proposed under this modification application.

4.6 Exceptions to development standards	Exceptions will be considered subject to appropriate assessment.	Variations proposed to height are addressed below.	Yes
7.11 Residential development yield on certain land	Where development exceeds 600 dwellings certain the development must provide a specific mix, unit sizes and parking.	The masterplan is predicated on 1300 dwellings. Variations are proposed to unit sizes and carparking	No change

d. Variation to Height

LEP 2019 limits the height of the development site to 18m, 27m and 36 metres. The proposal has a maximum height of 67 metres. The amendments proposed under this modification application seek to amend built form as outlined in the table above and include a maximum variation of 40 metres or 148% within the 27m height control area.

This modification relates to the redistribution of built form as a result of the proposed changes to the building massing and subsequent amendments to building footprints. The proposed heights in the context of the LEP Building Height control are detailed in the image below.



The applicant has submitted a variation request (see Attachment 9) and is summarised as providing a better planning and design outcome for the following reasons:

- *improve mid-winter shadowing for the neighbouring 'Haven' residential apartments and surrounding domains which would otherwise have a low level of solar access ADG compliance and diminished amenity in general;*
- *improve Stage 4 apartment and communal open space amenity by facilitating better building separation and solar access through modified envelopes to be reflected in the Stage 4 development application;*
- *enhance the visual amenity of the Spurway Drive streetscape and locality in general through modulating building forms and heights by lowering the street wall height from 12 storeys to 7 storeys with stepping and relocating mass to tower forms of 18 and 19 storeys.*
- *more thoughtfully respond to the changed future planning context of 'The Greens' rezoning by utilising a modest tower topology more compatible with envisaged adjoining built forms and providing for a more coherent cluster of building forms within the wider precinct.*

It is noted that case law demonstrates that for a Section 4.55 application, a Clause 4.6 Exceptions to Development Standards is not required.

The relevant judgments say that Section 4.55 is a 'free-standing provision', meaning that "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". A Section 4.55 consent authorises the development to be approved notwithstanding any breach of development standards. Section 4.55 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.4.15 matters). Section 4.55 does not rely upon having any SEPP 1 objection or Clause 4.6 variation in order to enliven that power to approve.

The Courts have stated that SEPP 1 cannot be used at Section 4.55 stage, as SEPP 1 expressly only applies 'where a development application is made', not when a modification application is made. The same would apply to Clause 4.6 variations, which expressly only regulates whether 'development consent' may be granted, not whether an existing consent may be modified.

As such, a Clause 4.6 variation has no application to Section 4.55 modifications. This has also been confirmed by the applicant's legal advice, however a 4.6 variation request has been submitted and provides a detailed justification to support the variation.

The further variation to building height has been proposed to provide a built form outcome that responds to the current site opportunities and constraints whilst retaining the floor space and dwelling yield approved. The development as approved facilitates higher densities close to the Norwest station and centre and the amended built form seeks to improve the bulk and scale and associated impacts that are in place with the current masterplan by responding to a changing local character.

Specifically, the proposal responds to adjoining development sites such as 'The Greens' – No. 40 Solent Circuit, which provide controls for buildings up to 26 storeys in height (height control of RL 176.00m). When the masterplan was originally approved, this site (No. 40 Solent Circuit), had a height control that would allow approximately 12 storeys (RL 116.00m). Development in Maitland Place, in close proximity to the site, also has the benefit of an approval for a 25 storey development (height control RL 169.00) and is similar distance from Norwest Town Centre and Norwest Metro Station (approximately 400-500m). Both sites have recently started construction. These recent development sites in the immediate locality are consistent with the development outcomes proposed under this application. The plans submitted with the subject modification detail a maximum building height of RL 149.600m – top of plant and RL 145.600m – top of building which are lower than the examples outlined above. In combination with the amended built form and specifically the elements of the built form which have been reduced such as that fronting Spurway Drive, being seven storeys in height (RL 105.300m), the subject proposal is considered appropriate in context to the existing adjoining properties and other surrounding developments in the locality.

The impacts of the increase in height are offset by improved solar access and bulk and scale. The amendments result in greater separation and open space which is provided adjacent to the boundary with adjoining buildings in excess of that required under the Apartment Design Guideline and DCP.

The applicant has also provided a solar analysis to quantify the amended impact of the development on the adjoining development at No. 2 Natura Rise and No. 38 Solent Circuit. Although it is acknowledged that the north facing units currently enjoy uninterrupted solar access throughout the day, the impacts relating to solar access will improve when compared to the approved masterplan by virtue of the changes proposed as part of this modification application, particularly to units on the mid to lower floors.

The objectives of the height standard are as follows;

- a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*
- b) to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas.*

The applicant has responded to both objectives. Specially in response to both objectives the following responses were provided;

- The revised variations better responds to significant changes in planned built form context from adjoining rezonings, which now includes towers rather than town houses, while the streetscape is better treated with a lower street wall height and greater access to winter sun light.*
- Reduced shadowing on neighbouring development and planned open space areas will result from a lower street wall created by remassing to two tower forms while improving visual impact from the perception of bulk.*

It is agreed that the amended proposal, particularly the increase in building height and tower-like built form responds to the recent altered context of the locality. These amendments provide opportunities to adjust the built form to better facilitate the approved density and floor space. They result in a more balanced built form that is compatible with that of adjoining development and the overall streetscape and minimises the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas, thereby satisfying the objectives of the height standard.

In view of the above, the variation to building height is considered satisfactory and can be supported in this instance.

e. 7.7 Design Excellence

Clause 7.7 of the LEP specifies an objective to deliver the highest standard of architectural and urban design and applies to development involving the erection of a new building or external alterations to an existing building if the building has a height of 25 metres or more. The Clause also prescribes that development consent must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence. In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters:

- (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,*

- (b) *whether the form, arrangement and external appearance of the development will improve the quality and amenity of the public domain,*
- (c) *whether the development detrimentally impacts on view corridors,*
- (d) *whether the development detrimentally impacts on any land protected by solar access controls established under a development control plan,*
- (e) *the requirements of any development control plan to the extent that it is relevant to the proposed development,*
- (f) *how the development addresses the following matters:*
 - (i) *the suitability of the land for development,*
 - (ii) *existing and proposed uses and use mix,*
 - (iii) *heritage issues and streetscape constraints,*
 - (iv) *the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,*
 - (v) *bulk, massing and modulation of buildings,*
 - (vi) *street frontage heights,*
 - (vii) *environmental impacts such as sustainable design, overshadowing, wind and reflectivity,*
 - (viii) *the achievement of the principles of ecologically sustainable development,*
 - (ix) *pedestrian, cycle, vehicular and service access, circulation and requirements,*
 - (x) *the impact on, and any proposed improvements to, the public domain,*
 - (xi) *the configuration and design of public access areas, recreation areas and communal open space on the site and whether that design incorporates exemplary and innovative treatments,*
- (g) *the findings of a panel of 3 or more persons that has been convened by the consent authority for the purposes of reviewing the design excellence of the development proposal.*

Comment:

When the original masterplan was originally reported to the Design Excellence Panel, the proposal was generally supported noting that the Panel had only recently commenced and the masterplan was close to determination. At the time comments relating to solar access to north facing units of an approved development on the adjacent site will be reduced.

The design excellence of the subject proposal was considered at a Design Excellence Panel meeting convened by Council staff and held on 10 November 2021. The meeting minutes of the Design Excellence Panel are included at Attachment 8.

The current modification application received the concluding comments provided below;

The Panel acknowledges the work to date and is appreciative of the opportunity to review the proposed masterplan revision at an early stage. The Panel supports the proposal, in-principle, as previously noted and subject to demonstration of superior public domain outcomes and improved residential amenity in comparison to the currently approved outcome. It is recommended the applicant considers the issues identified in this report. The Panel considers a number of positive changes have occurred as a result of the revised massing and looks forward to further development of the proposal.

As such it is considered that the concept proposal exhibits design excellence and satisfies Clause 7.11 of the LEP. The built form development application for this stage will also be reported back to the Panel for consideration.

4. Compliance with State Environmental Planning Policy (SEPP) No. 65 – Design Quality of Residential Apartment Buildings

The proposal has been reviewed under the provisions of SEPP 65 and the Apartment Design Guideline. A detailed assessment will be undertaken under the built form application.

The Design Verification Statement from the modification was prepared by Julian Venning of Crone Architects.

Although the subject application does not include built form, the application includes sufficient detail to allow an assessment against the relevant design quality principles contained within SEPP 65;

Principle 1: Context and neighbourhood character

The proposal is compatible with the existing and future context and neighbourhood character of the precinct. The proposal seeks to respond to and contribute to the context of Norwest both in its present state as well as the desired future character.

The locality is comprised of a mixture of existing buildings, low to medium and high density, multi-residential and single dwellings, with the future vision of the area zoned to encourage an increased scale of high density residential development adjacent to the site.

Principle 2: Built form and scale

The amended proposal provides a more varied built form and allow for increased solar access to adjacent existing buildings on Spurway Drive and additional views from these apartments to the surrounds. The location of the 19 storey tower at the end of Natura Rise, and adjacent to the 13 and 23 storey towers proposed within The Green's Development, provides a suitable built form and scale at this intersection to Spurway Drive. Lower buildings are provided to Spurway Drive improving the street interface.

Principle 3: Density

The subject proposal remains at 1300 dwellings across the development site. The density complies and is appropriate for the site and precinct.

Principle 4: Sustainability

The design foreshadows that the proposal will achieve natural ventilation and solar access as required by the Apartment Design Guidelines.

Principle 5: Landscape

The plans indicates that all open spaces will be appropriately landscaped with native trees and shrubs to provide a high quality finish. The proposed landscaping integrates with the overall appearance of the development.

Principle 6: Amenity

Future building design has been developed to provide for the amenity of the occupants as well as the public domain. The proposal incorporates good design in terms of achieving natural ventilation, solar access and acoustic privacy.

Principle 7: Safety

Open spaces are designed to provide attractive areas for recreation and entertainment purposes. These open spaces are accessible to all residents and visitors whilst maintaining a degree of security. Private spaces are clearly defined and screened. All future building applications will be referred to The NSW Police.

Principle 8: Housing diversity and social interaction

The location of this development provides dwellings within a precinct that will provide in the future, a range of support services. The development complies with the mix requirements of the LEP.

Principle 9: Aesthetics

All future applications will address the aesthetics principle.

5. Compliance with The Hills Development Control Plan 2012

The proposal has been against the relevant provisions of The Hills Development Control Plan 2012 noting that some standards such as density, number of storeys, unit typology and parking are superseded by the site specific provisions in the LEP and approved masterplan. The modified proposal will not lead to any greater non-compliances with Part C Residential Flat Buildings and Part D Section 7 – Balmoral Road Release Area provisions of The Hills Development Control Plan 2012 (DCP) than were approved in the Concept Plan.

6. Issues Raised in Submissions

The proposal was notified for 14 days. In response, six submissions were received. The issues raised in the submissions are summarised below.

ISSUE/OBJECTION	COMMENT
I significantly oppose any proposed increase in height of the buildings proposed in this variation to the masterplan. Increasing building height to 19 levels, adjacent to the existing 7 level Imperial apartments (No. 11 and 13 Spurway Drive) will significantly reduce the sunlight to the Imperial Building and cast a significant shadow across that building in the afternoon.	A solar analysis was provided by the applicant. The original proposal nor the modified proposal cause any shadow impact on the adjoining development to the east (No. 11 and 13 Spurway Drive) in mid-winter at 3pm, or prior which is the relevant criteria for assessment.
Further increasing the height on the buildings in stage 4 is not keeping within the overall presentation and visual aspects of all the buildings in the masterplan.	The impacts and merits of the increase in height for the modification application are addressed in this report.
If the proposed height of the Mulpha DA opposite (No. 40 Solent Circuit) is too high and impacting solar, then it should be decreased in height.	The adjoining development is not subject to this modification application.
The proposed buildings both have significantly more than twice that number of levels. I believe the motivation for the changes is developer greed influenced by the recent ludicrous development application from Mulpha to which I have also objected some time ago.	The impacts and merits of the increase in height for the modification application are addressed in this report.

<p>The amended proposal does not satisfy the objectives of the height control. The development would be clearly out of scale and proportion with the surrounding structures. There are no solar projections to proposed buildings and open spaces over the road and to the south of C2. Shadowing from a 19-storey building would be significant. Any increase of say 25% would provide for additional height and visual modulation while maintaining scale and proportion.</p>	<p>The variation to height is addressed in this report. The impacts and planning and design outcomes that result from the amendments are addressed in this report. It is considered that the amended proposal remains consistent with the height objectives in the LEP.</p>
<p>The residential density of the proposed buildings is significantly greater than any existing apartment buildings in the immediate vicinity. Combined with the proposed Mulpha development, this proposed change will very significantly increase the population density along the entire length of Spurway Drive.</p>	<p>The density of the proposed development is not proposed to increase on the site as part of this application. The Sekisui development has a cap of 1300 dwellings which is being maintained.</p>
<p>Spurway Drive already is effectively reduced to a single lane street during daylight hours due to the number of vehicles parked on both sides along the entire length of the drive and along half its length each evening/night. It is very difficult to safely pass vehicles travelling in the opposite direction without one vehicle having to slow down, carefully move closer to the parked vehicles or come to a halt while the other vehicle passes.</p>	<p>As identified above, the density of the development is not intended to change. Traffic issues and parking restrictions will be reviewed by Council's Traffic section with individual development applications or as general local traffic safety issues arise.</p>
<p>People want certainty in their lives. The DA number has the year "2017" in it meaning the development had been agreed to by all stakeholders in 2017. This has allowed all existing neighbouring homeowners to know where they stand and has allowed subsequent home purchasers to know what they were buying into. It appears to me that Sekisui House has succumbed to the "missing out" syndrome due to the proposed Mulpha 24 level apartment project. The difference here is that the Mulpha building overlooks the commercial precinct and has little effect on the neighbouring residences.</p>	<p>The applicant is entitled under the Environmental Planning and Assessment Act to lodge a modification application.</p>
<p>We purchased our apartment in early 2021 knowing that the nearby Sekisui House buildings were to be constructed of a certain height to a maximum of 4 to 5 levels higher. We would definitely have not bought our apartment if the nearby building(s) were to be a further 5-6 levels higher. The proposed</p>	<p>Generally, the increase in height has been offset with greater separation and a reduced overshadowing impact, some buildings have also been lowered. The applicant is able lodge a modification application and the merits of the application are addressed in this report.</p>

<p>taller building in the south west corner would result in further loss of privacy and additional shadowing.</p>	
<p>There may be other consequences which are difficult to ascertain at this stage although the taller buildings would mean deeper excavation which means more noise, traffic, construction time etc. We live directly across the road from the Lumia building site and there have been numerous breaches of the DA time restrictions,</p>	<p>The density of the development remains as approved, hence the required parking and extent of basement will remain similar to that of the original masterplan. The physical works foreshadowed in this application will be subject to a further built form development application.</p>
<p>The proposal is a gross exceedance of the LEP building height control and result in substantially different development that is seriously non-compliant with the LEP building height control. Approval of the proposed building heights will result in a built form seriously at odds with the intent of the planning controls for the Norwest Town Centre and its surrounds, including the transition to lower scale development, away from the town centre and Norwest Lake.</p> <p>The increase in building height does not meet the objectives of Clause 4.3, and will cause additional overshadowing, visual impact and loss of privacy on adjoining development.</p>	<p>The modified masterplan responds to a changing local character specifically the adjoining development site 'The Greens' – No. 40 Solent Circuit which provide controls for buildings up to 26 storeys in height. When the masterplan was originally approved, this site (No. 40 Solent Circuit) had a height control that would allow 12 storeys. It is considered that the modified proposal provides an appropriate transition to adjoining properties. Development in Maitland Place in close proximity to the site also has the benefit of an approval for a 25 storey development and is similar distance from Norwest Town Centre and Norwest Metro Station (approximately 400-500m), as such development sites in the locality are consistent with the development outcomes proposed under this application.</p>
<p>The traffic along Fairway Drive in both directions is constant during the peak hours making it difficult to enter or exit the 'Moda' building (No. 100 Fairway Drive) underground carpark. With another major development including 1,300 dwellings will significantly add to this current congestion and is simply too much for Fairway Drive to safely handle. I am not against development that is consistent with the existing infrastructure, but this proposal is massively excessive and should not be considered by Council for approval in its present proposal.</p>	<p>The subject modification application does not alter the approved dwelling numbers of 1,300 dwellings. The existing infrastructure is considered appropriate for the development on the site and other surrounding apartment developments.</p>
<p>The proposed DA Amendment presents increased scale and bulk to Spurway Drive and changes the perceived scale of the street as it represents a significant departure from the LEP controls and undermines the overall</p>	<p>It is considered that the modified proposal provides an improved streetscape to Spurway Drive and facilitates more open space, separation and transparency through the site when viewed from Spurway Drive.</p>

strategic planning intent for the Norwest Town Centre and Frame.	
Areas of publicly accessible open space proposed in 40 Solent Circuit are likely to experience increased overshadowing, particularly in winter.	Generally, the amended development provides for improved solar access to adjoining sites. Specific regard has been given to the existing buildings at No. 2 Natura Rise and No. 38 Solent Circuit where improvised solar access outcomes have been achieved. The impacts on the future open space on part of the site at No. 40 Solent Circuit are considered minor and acceptable.
The increase in building height proposed and the new arrangement of buildings on 104 Fairway Drive would, if approved lead to the following decrease of outlook and views available to future residents of 40 Solent Circuit, relative to the approved scheme.	The modified proposal may have some impact on views for higher level units in adjacent developments, but will also improve the view of some lower units. In any event, views are distant district views and partially obscured.
A Section 4.55(2) modification needs to establish that the development as modified is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified. As such it is beyond the scope of this Section to consider as the development is not the same as approved.	It is considered for the reasons outlined in this report that the that the development as modified is substantially the same development as approved.

CONCLUSION

The Development Application has been assessed against the relevant heads of consideration under Section 4.15 and 4.55(2) of the Environmental Planning and Assessment Act, 1979, The Hills Local Environmental Plan 2019 and The Hills Development Control Plan and is considered satisfactory.

The further variation to building height is addressed in this report. The amendments result in an approved design outcome that is supported by Council's Design Excellence Panel. The amended development results in an improved bulk and scale that responds to current development and recent approvals in the immediate locality.

The issues raised in the submissions are addressed in this report and do not warrant further amendments or refusal of the application.

Approval is recommended subject to an amended condition of consent.

IMPACTS

Financial

This matter has no direct financial impact upon Council's adopted budget or forward estimates.

The Hills Future Community Strategic Plan

The proposed development is consistent with the planning principles, vision and objectives outlined within “Hills 2026 – Looking Towards the Future” as the proposed development provides for satisfactory urban growth without adverse environmental or social amenity impacts and ensures a consistent built form is provided with respect to the streetscape and general locality.

RECOMMENDATION

Modification Application 736/2017/JP/B be approved for the reasons listed below and subject to the following new and amended conditions:

- The site is considered suitable for the development (as proposed to be modified).
- The proposed modifications result in an outcome that is substantially the same development as originally approved.
- The proposed modifications adequately satisfy the relevant state and local planning provisions.
- The proposed modifications will have no unacceptable impacts on the built or natural environments.
- The variation to height results in a development that is consistent with the relevant objectives, and compliance with the standard are unnecessary in this instance, and the proposal results in a better planning outcome as outlined in this report.
- The proposal is in the public interest.

GENERAL MATTERS

Condition No. 1 be deleted and replaced as follows:

1. Development in accordance with submitted plans

The development being carried out in accordance with the approved plans and details associated with development application 736/2017/JP and 736/2017/JP/A as amended in red, and as further modified by the following plans approved with Development Consent No. 736/2017/JP/B, except where amended by other conditions of consent.

REFERENCED PLANS 736/2017/JP

The amendments in red include: -

- The 6 metre setback for Building A3 and all buildings east of Stranger's Creek is not approved as part of this application. All future built form applications east of Stranger's Creek shall address the Development Control Plan and justify any setback encroachments.

DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-000-005	Masterplan Setbacks	-	C	12 December 2017
MP-000-006	Masterplan Building Envelope	-	E	12 December 2017
MP-250-010	North Envelope Elevation – Linear Park	-	C	12 December 2017
MP-250-020	South Envelope Elevation – Spurway Drive	-	C	12 December 2017

MP-250-040	West Envelope Elevation – Fairway Drive	-	C	12 December 2017
MP-350-001	GA Section Envelope Section 01	-	E	12 December 2017
MP810-001	Staging Stage 1	-	D	21 March 2017
MP810-002	Staging Stage 2	-	D	21 March 2017
MP810-003	Staging Stage 3	-	D	21 March 2017
MP810-004	Staging Stage 4	-	D	21 March 2017
MP810-005	Staging Stage 5	-	E	13 December 2017
512SL	Landscape Masterplan – 2m Shared Path	25	J	24 April 2017
512SL	Landscape Sections	28	A	13/12/2017

REFERENCED PLANS 736/2017/JP/A

DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-410-001	Staging Plan	-	B	17 January 2020

REFERENCED PLANS 736/2017/JP/B

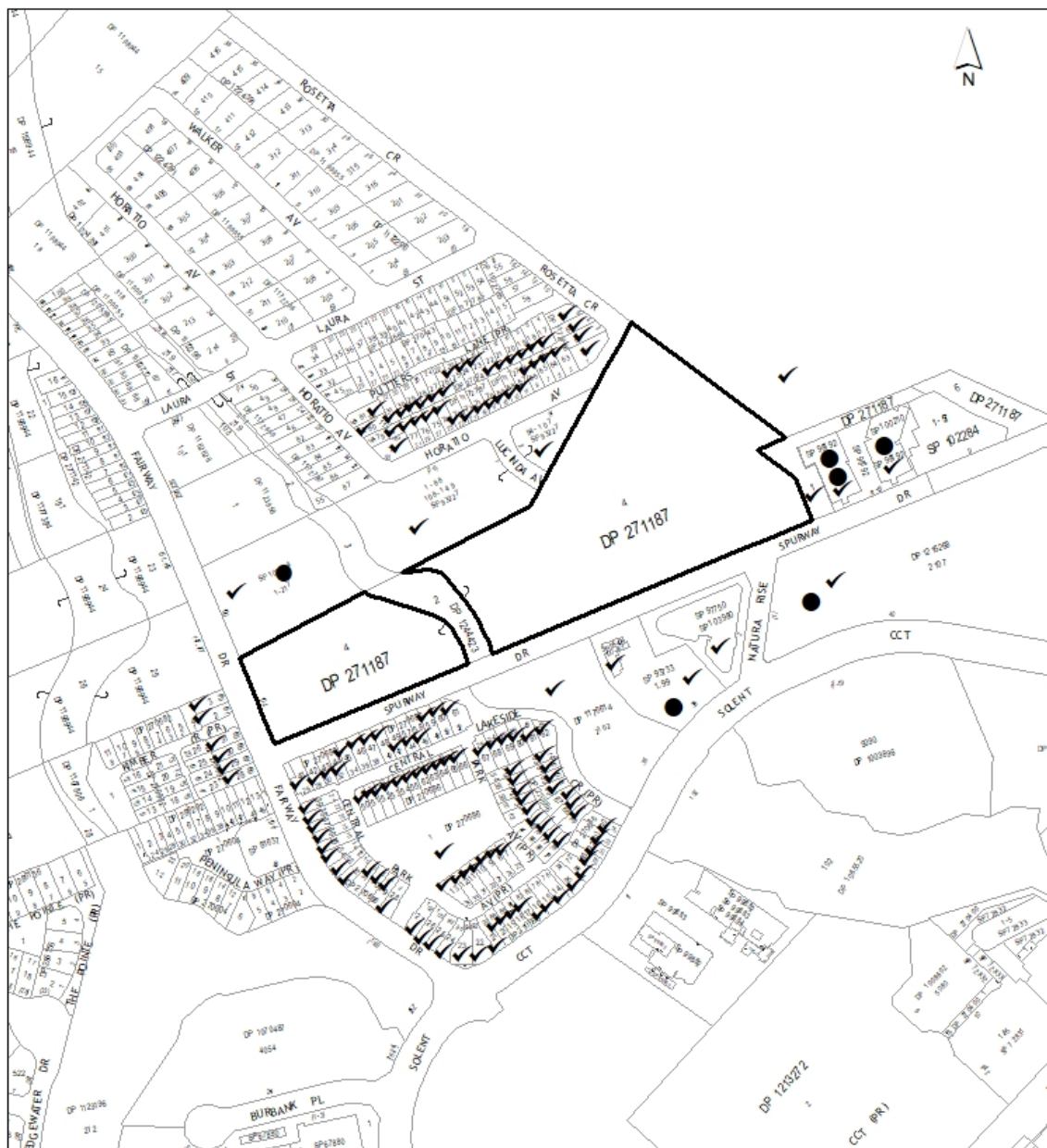
DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-000-006	Masterplan Building Envelope	-	F	23 December 2021
MP-250-010	North Envelope Elevation – Linear Park	-	D	23 December 2021
MP-250-020	South Envelope Elevation – Spurway Drive	-	D	23 December 2021
MP-350-001	GA Section Envelope Section 01	-	F	23 December 2021

ATTACHMENTS

1. Locality Plan
2. Aerial Map
3. Zoning Map

4. Height Map
5. FSR Map
6. Approved Plans
7. Proposed Plans
8. Design Excellence Panel Minutes
9. Applicant's Variation Request
10. Applicant's Legal Advice
11. Development Consent 736/2017/JP
12. Modification Consent 736/2017/JP/A

ATTACHMENT 1 – LOCALITY PLAN



- ☐ SUBJECT SITE
 - ☒ PROPERTIES NOTIFIED
 - ☒ SUBMISSIONS RECEIVED

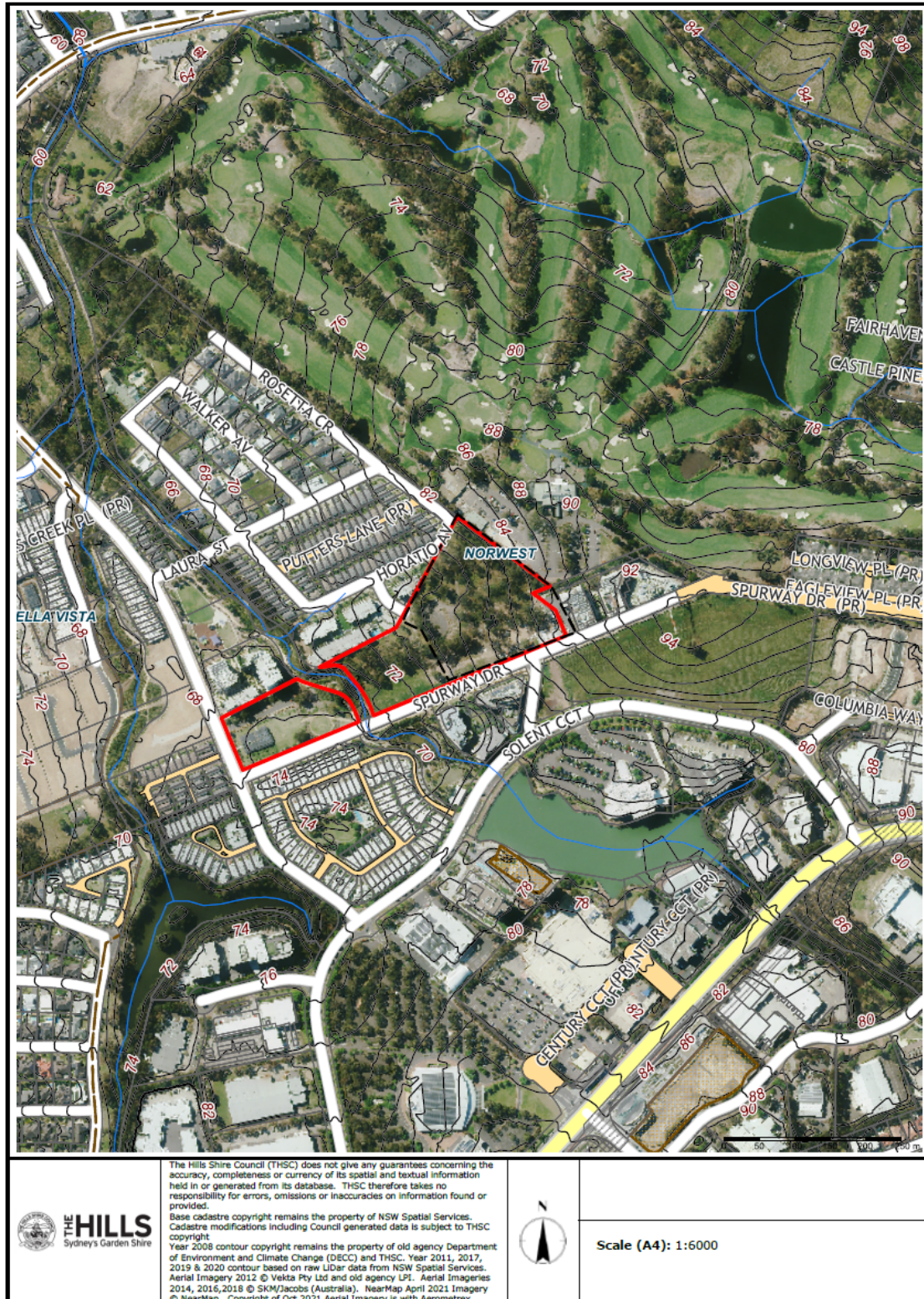
THE HILLS
Sydney's Garden Shire

THE HILLS SHIRE COUNCIL

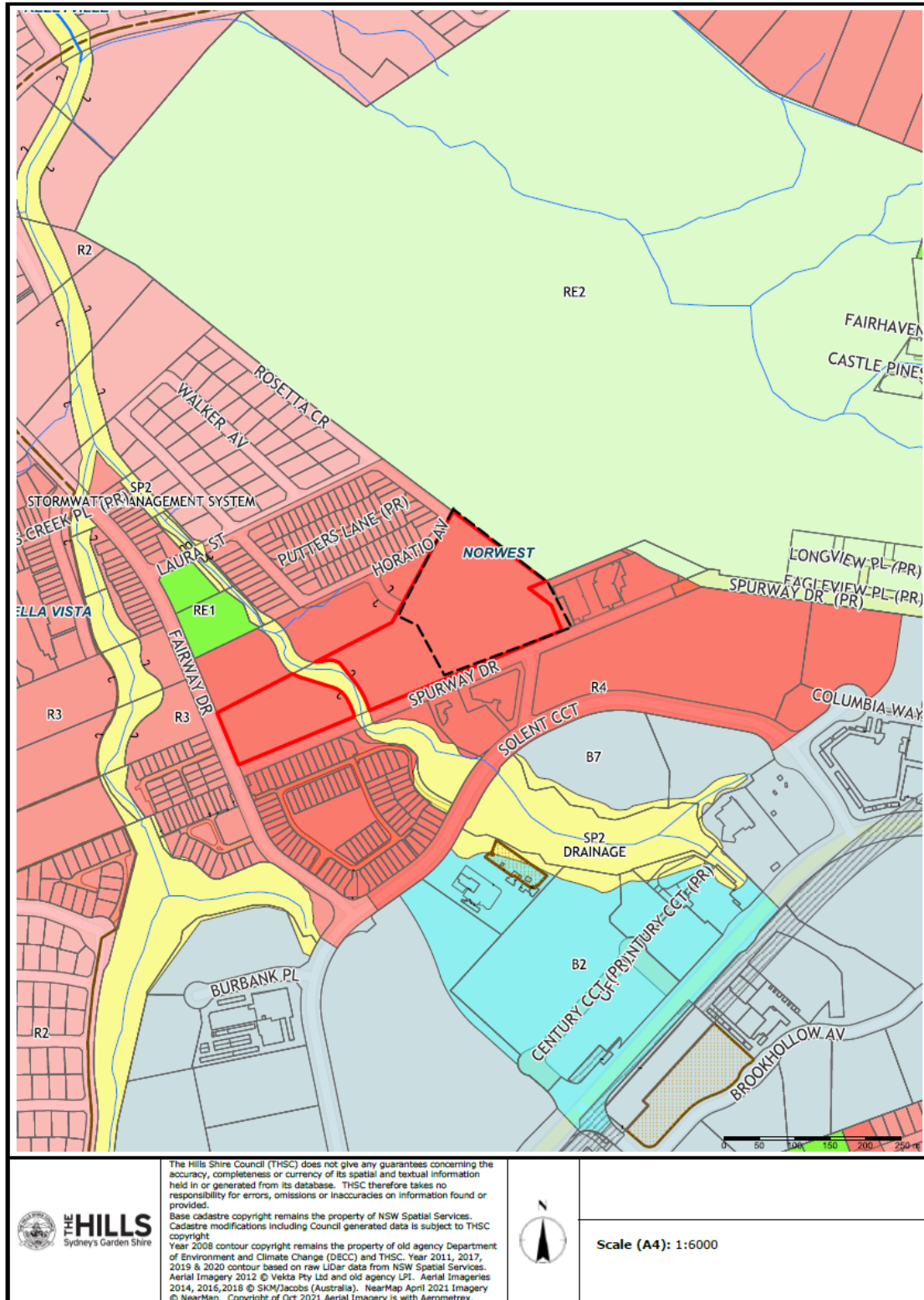
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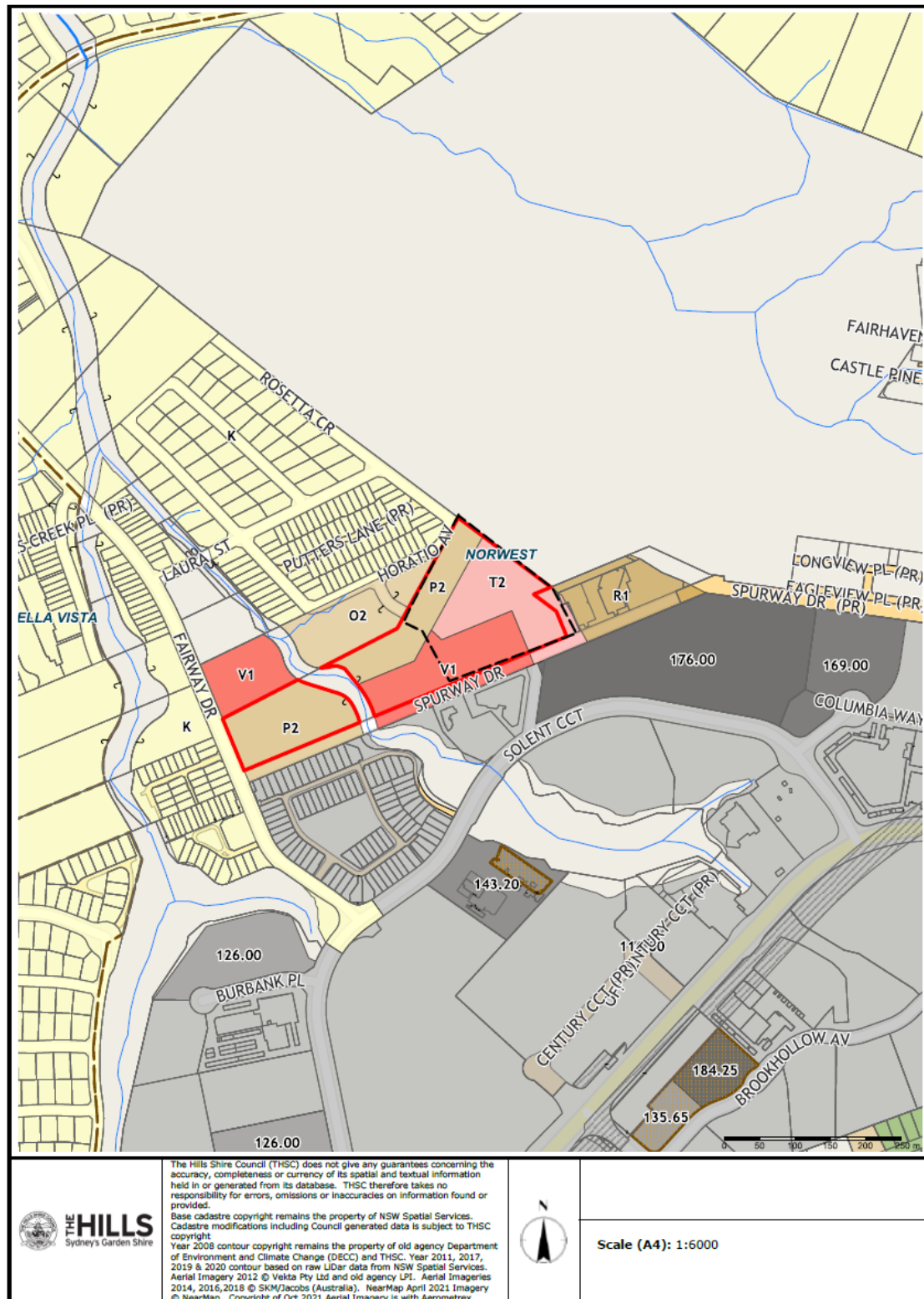
ATTACHMENT 2 – AERIAL MAP



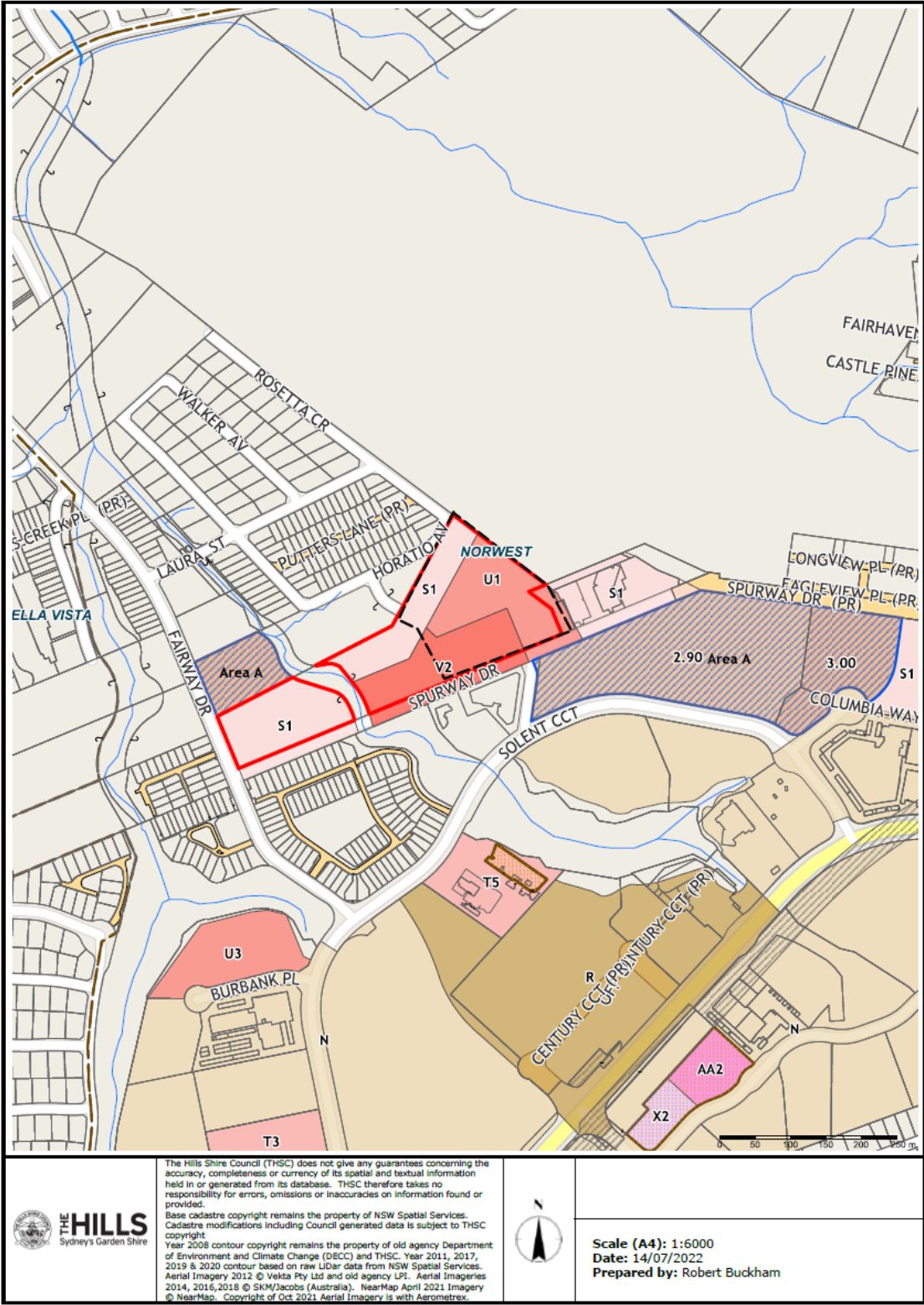
ATTACHMENT 3 – ZONING MAP



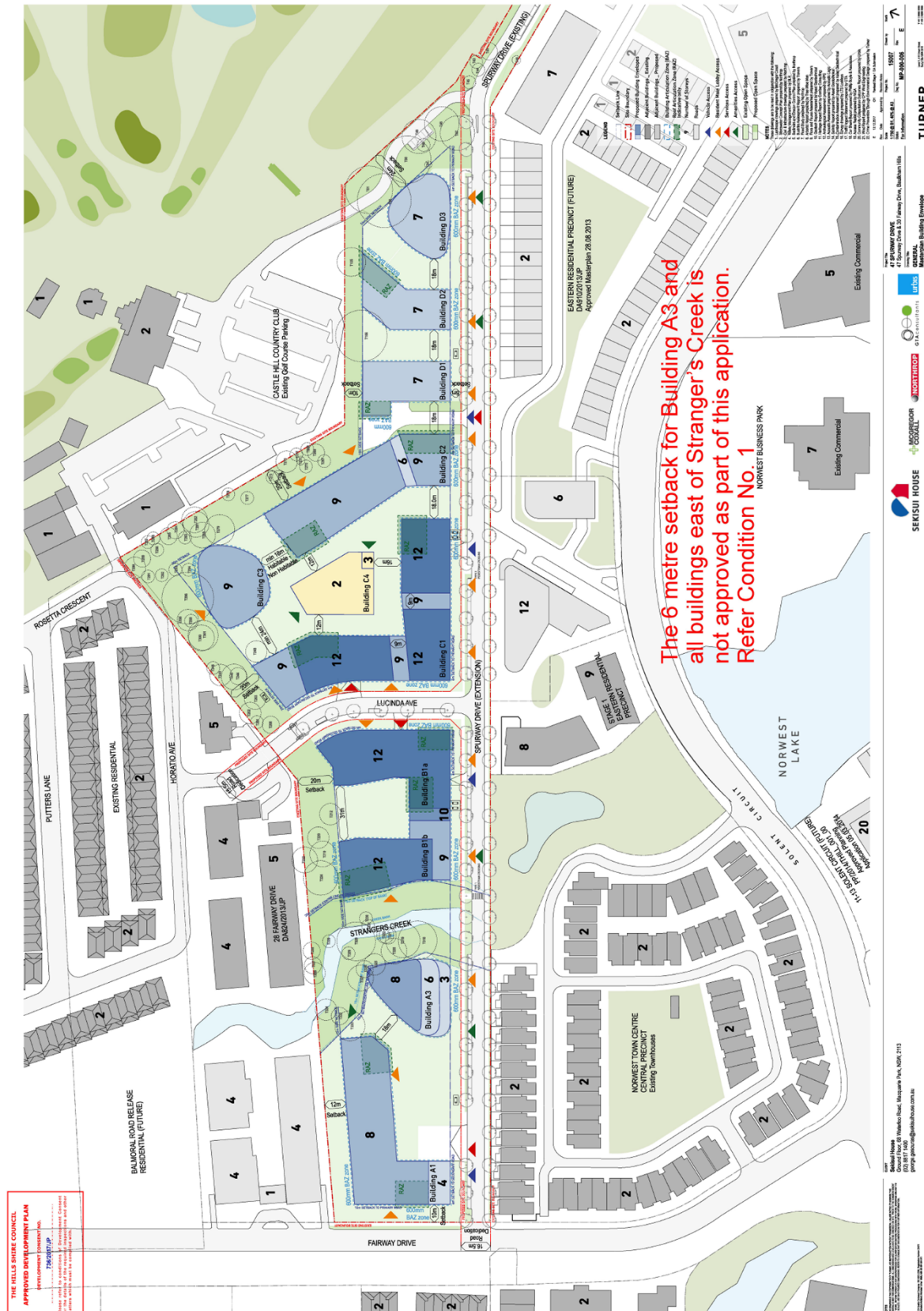
ATTACHMENT 4 - HEIGHT MAP



ATTACHMENT 5 - FSR MAP



ATTACHMENT 6 – APPROVED PLANS



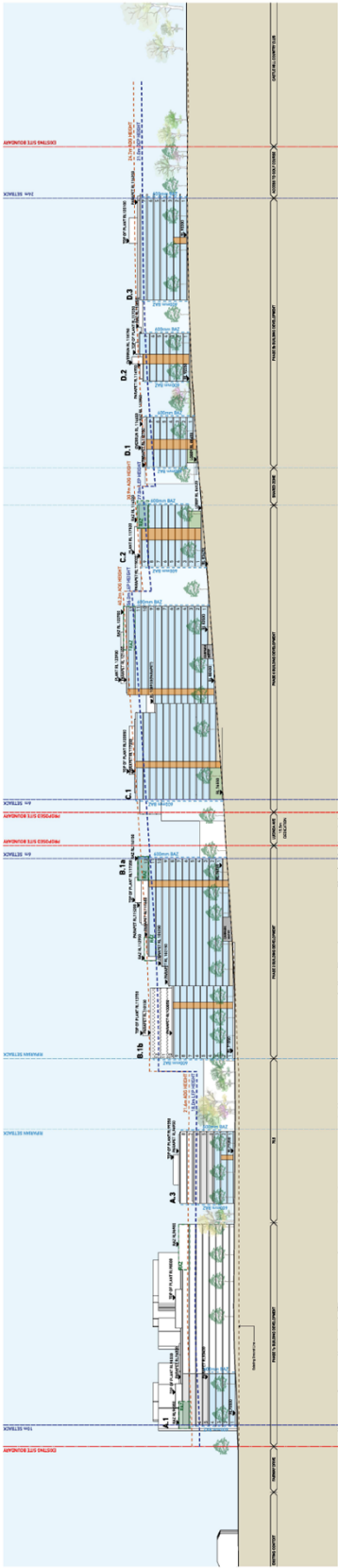
LEGEND

- Setback Line
- Site Boundary
- Proposed Building Envelopes
- Adjacent Buildings
- Building Articulation Zone (BAZ)
- Roof Articulation Zone (RAZ)
- ADG Height Allowance
- LEP Height Limit



SEKSU HOUSE 		TURNER 	
McCORCOR 		TURNER 	
TURNER 		TURNER 	
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THE HILLS SHIRE COUNCIL
APPROVED DEVELOPMENT PLAN
DEVELOPMENT CONSENT NO.
738217/AP
This plan is subject to the provisions of the Development Consent
No. 738217/AP and the provisions of the Development Consent
No. 738217/AP and the provisions of the Development Consent
No. 738217/AP.



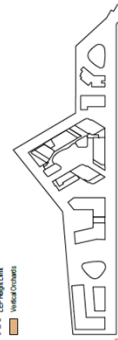
- LEGEND
- Setback Line
 - Site Boundary
 - Proposed Building Footprints
 - Proposed Landscaping
 - Adjacent Building
 - Building Articulation Zone (BAZ)
 - Road Articulation Zone (RAZ)
 - ASD (Height) Markers
 - ASD (Height) Markers
 - Vertical Structures



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[illegible]



ATTACHMENT 8 – DESIGN EXCELLENCE PANEL MINUTES



MEETING REPORT DESIGN EXCELLENCE PANEL

Date:	10/11/21	Time:	11.00am
Location of Meeting:	Online meeting hosted by The Hills		
Panel Members:	Chairperson – Nicholas Carlton, Manager Forward Planning, THSC Panel Member – David Reynolds, Group Manager THSC Panel Member – Tony Caro, Independent Design Expert Panel Member – Oi Choong, Independent Design Expert		
Councillors:	None Present		
Council Staff:	Paul Osborne, Robert Buckham, Marika Hahn, Megan Munari		
Guests:	Greg Dowling – Town Planner – Dowling Urban Julian Venning – Principal Crone Architects Ashley Dennis – Principal Crone Architects Xena Ma – Crone Architects George Gesouras – Sekisui House Daniel Rainone – Sekisui House Peter Valleau – Sekisui House		

BUSINESS ITEM AND MEETING REPORT

1. Welcome and Opening

The Hills Shire Council is committed to achieving design excellence in the built form environment and ensuring new high-density buildings are of a high quality design. The requirements for a development to achieve design excellence are found in Clause 7.7 'Design Excellence' of Local Environmental Plan 2019.

The Hills Shire Design Excellence Panel (The Panel), is an advisory Panel that provides an opportunity for applicants to receive expert design feedback on their developments and to provide comments to assist The Hills Shire Council in its consideration for development application.

The Panel provides recommendations on the following:

- any development which contains a building with a height of 25 metres or more; or
- any strategic planning matters for which design excellence is relevant.

The role of the Panel is to evaluate and critique design aspects of proposed development and provide recommendations on whether development exhibits "Design Excellence".

It is noted that the Design Excellence Panel does not determine or endorse applications. Rather, it is responsible for providing advice to Applicants and the consent authority to assist in the assessment of the Proposal against the design excellence criteria in Clause 7.7 of LEP 2019.


2. Declaration of interest

"Nil"

3. Confirmation of previous report

Confirmed by email

4. Presentations

Item 4.1	11.30am – 12.00pm
Pre- DA Number	Not allocated
Property Address	Lot 4 DP 271187, No. 104 Fairway Drive, Norwest
Proposal	 <p>Four residential towers comprising Block over 2-3 storey residential podiums resulting in a total 584 apartments above basement car parking.</p>
Applicant representative address to the Panel	Julian Venning – Principal Crone Architects

DOCUMENTATION

The application is a proposed modification to an approved Masterplan (736/2017/JP), known as Stage 4 of the Sekisui "Orchards" Development Site on Spurway Drive, Norwest. The modification is a response, in part, to comments provided by the Design Excellence Panel in 2018 and a change in the future character of the surrounding lots. The modification primarily seeks endorsement for changes to the massing to allow for improved outcomes in the public domain and the existing apartment development block to the west of Spurway Drive. In addition, the proposed changes seek to provide improved amenity to the future residents of the development blocks subject of the proposal and the residents who use the community facilities.

DOCUMENTATION

The Design Excellence Panel reviewed the following drawings:

- *Pre-Da Concept Plan Stage 4 Presentation*, November 2021, by Crone Architects
- *Sketches*, provided November 2021, by Crone Architects

PANEL COMMENTS

The proposal responds to previous Panel meeting comments in relation to the nexus between overall massing and acceptable design quality within the precinct. This is a vexing issue across the Hills LGA for the many new developments that are required to achieve design excellence, and most commonly arises where allowable maximum yields (density) are difficult to reconcile within height controls.

The Panel noted that the presented material was exploratory and is appreciative of the applicant's decision to discuss this alternative massing option with the Panel at an early stage.

Context / Character

1. The Panel noted the proposed revisions are responsive to the changing forms of development that are occurring across the precinct, and are better suited to preserving amenity within adjacent developments.
2. The Panel queried how the pronounced topography of the site was to be addressed and look forward to reviewing this further at a future meeting.
3. It is not presently clear how these relatively long buildings have been organised in section (stepped) to achieve well resolved interfaces with neighbours, the central communal open space, and the surrounding public domain.
4. The Panel queried the arrangement of the basement car-parking, which was confirmed to be two separate basement car-parks, each of which is largely contained within the building footprints thus allowing for deep soil within the central courtyard area.

Urban Structure

5. The Panel noted that the proposition has lost some of the urban clarity of the previous scheme, which delineated street edges without creating spatially indeterminate "left-over" spaces around the periphery. This is a consequence of the tower forms being brought to ground level. If the towers were to be above the podium to make it more continuous, this would allow for better definition of the public domain and interfaces around the site. The towers would then be able to be more freely arranged to better respond to residential amenity and views.
6. The Panel is in principle is supportive of the revised masterplan subject to:
 - a) The Public Domain outcome being demonstrated as superior to the current consent.
 - b) Increased solar access for the residents in existing developments along the southern side of Spurway Drive being demonstrated.
 - c) Improved residential amenity for residents of the subject development with respect to solar access, natural ventilation and visual/acoustic privacy being demonstrated.
 - d) A suitable synthesis of the courtyard typology around the lower/podium levels and the proposed modern paradigm of more freely organised towers and facades being achieved, (although the Panel anticipates that this will be possible).
7. The Panel notes a fine-grained address to the street and the public domain is a TOD principle that is being adopted by a number of new developments in the immediate surrounds. This should be considered in any future submission.
8. The early involvement of the Landscape Architect in defining and integrating the spatial qualities and character of the urban grain is critical to the project.

Density, Mix and Building Program

9. The Panel notes the number of dwellings provided remains unchanged from the existing approval, and the proposed changes seek to mitigate built form problems that adversely impacted upon residential amenity and the Public Domain.
10. The Panel notes that the masterplan is still in a concept design stage. The staging proposed would allow for the provision of genuine diversity in architectural expression between development blocks by utilising a different architectural firm for one of the stages.
11. The Panel advised that the residential podium and upper levels presently lack adequate visual differentiation, due to the similar floorplates and architectural treatments. The design of the proposal could be improved, and potential visual impacts minimised, through stronger differentiation between the residential podium and tower elements. It is also possible to partially bring the tower expression and entry to the ground if this leads to a better architectural outcome for the designers.

Height and Massing

12. As noted, the Panel considers that the revised massing is an improvement on the previous masterplan concept, including significant improvement in solar access for the existing residents on the southern side of Spurway Drive.

13. The Panel suggested as a design consideration the 7.5 level community building be considered as a "stand-alone" building with a distinctive, individual identity that caters to a greater residential community than this site. The residential floor space above the facilities could be redistributed around other building elements. A lower (1-2 storey) community building would then allow far more sunlight into the central court during winter mornings.

Apartment Mix and Size

14. The Panel noted that the proposed building envelopes were still very preliminary and testing of apartment layouts (including larger incentivised apartments) in the building envelopes was not evident.
15. The Panel anticipates that proposed apartment layouts and testing would form part of information submitted prior to a future Panel meeting.

Landscape Design

Site Coverage/ Landscaped Open Space

16. The Panel supports the proposed provision of deep soil in the central courtyard to enable the planting of a "lush landscape". Further thought is to be given to the functional uses, circulation and balance of paving in this space as the centrepiece of the development.
17. The Panel supports the integration of the external endemic landscape as 'fingers of green' into the development to reinforce the Hill's Garden Shire vision and of "buildings in a landscape".
18. Consideration should be given to the staged delivery of the central open space so that each stage of the project has adequate access to quality open space.
19. The Panel was informed that a Landscape Architect has just been appointed to the project. It is important to have the Landscape Architect involved in the site planning at this early stage of the concept design development. This leads to better landscape and public domain outcomes that are more integrated with the architecture, site contours and the site context.
20. The Panel noted all vehicular entries are to occur within the building envelope and not in the areas between building blocks that are important for landscaping. On site vehicular entries in setbacks also contribute to loss of acoustic amenity and trigger ADG concerns.
21. The Panel would like to view the Landscape Design principles and proposal at the next meeting including the following: Landscape character and functions of the open spaces, pedestrian circulation including wayfinding cues, definition between public and private domain landscaped areas, sustainable principles, materiality and species selection

Public Domain

22. Panel recommendations to most applicants concerning the public domain are as follows:
- a) Consider the Public domain from the pedestrian experience;
 - b) Dwellings fronting any public domain interface are not to be below ground level or the level of pedestrian access such as the street footpath;
 - c) No encroachments into any setbacks, this includes lower level privatised court yard areas;
 - d) All dwellings facing a street or pedestrian path should be able to be directly accessed from the street;
 - e) Vehicular entries are to be integrated into the building structure and not to occur within a setback area; and
 - f) Consideration of the location and screening of services that typically occur in the street setbacks and how these known entities are able to be designed to minimise visual impact.

Refer to council fact sheets:

[www.thehills.nsw.gov.au/files/sharedassets/public/ecm-website-documents/page-documents/fact-sheets-guides/fact sheet - building design site facilities - services.pdf](http://www.thehills.nsw.gov.au/files/sharedassets/public/ecm-website-documents/page-documents/fact-sheets-guides/fact%20sheet%20-%20building%20design%20site%20facilities%20-%20services.pdf)

and

www.thehills.nsw.gov.au/files/sharedassets/public/ecm-website-documents/page-documents/fact-sheets-guides/fact-sheet-building-design-site-facilities-mail-boxes-in-medium-and-high-density-development.pdf

Streetscape

23. The Panel recommends further development of the street interface to be presented at the next meeting, including views and vistas from key locations such as Natura Rise

Façade and Interface

24. It is recommended that the applicant consider means by which interest and variety can be introduced to the facades to break-down the overall massing of the development blocks.
25. Pedestrian points of entry to the community centre and individual residences/building blocks should be delineated at the next meeting.

SEPP 65 items to be clarified or revised:

26. The Panel notes that whilst the applicant is trying to improve ADG outcomes, minimum ADG metrics suitable for dense inner urban locations do not generally meet market expectations in The Hills. Areas to consider in particular are distance separations between buildings and the sustainability provisions such as solar amenity and natural ventilation.

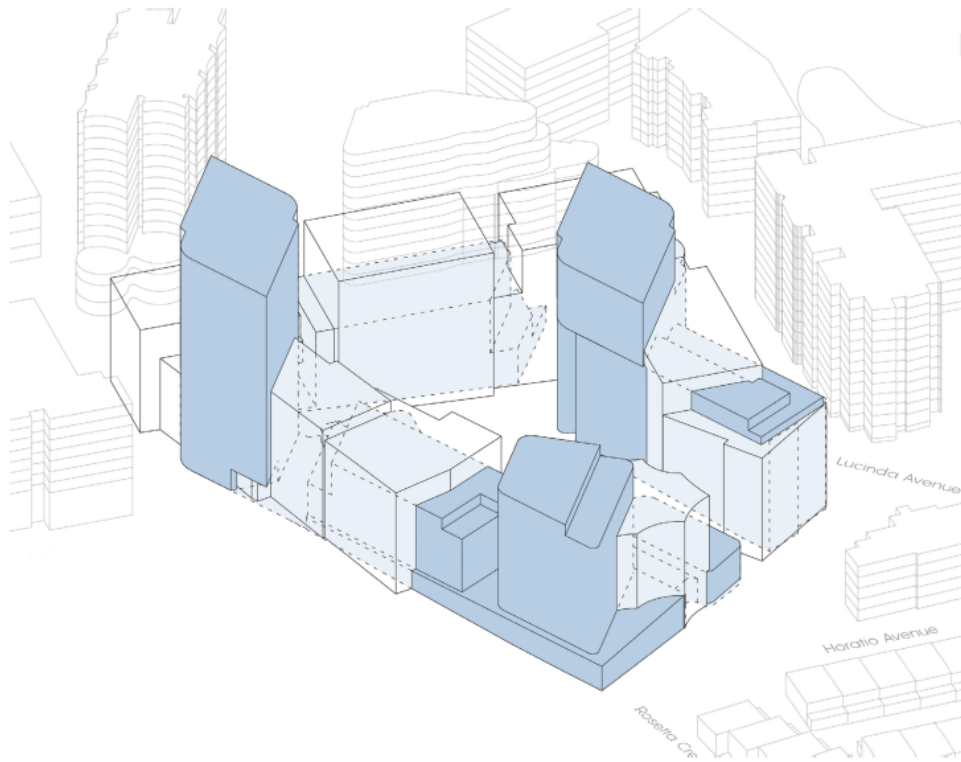
Sustainability and Environmental Amenity

27. There was minimal information provided with respect to innovative sustainability provision. The Panel notes a central area within the court has been preserved for deep soil planting and commends this design consideration.

PANEL CONCLUSION

The Panel acknowledges the work to date and is appreciative of the opportunity to review the proposed masterplan revision at an early stage. The Panel supports the proposal, in-principle, as previously noted and subject to demonstration of superior public domain outcomes and improved residential amenity in comparison to the currently approved outcome. It is recommended the applicant considers the issues identified in this report. The Panel considers a number of positive changes have occurred as a result of the revised massing and looks forward to further development of the proposal.

ATTACHMENT 9 – APPLICANT’S VARIATION REQUEST



The Orchards Concept Plan Modification 47 Spurway Drive, Baulkham Hills Clause 4.6 Request

Prepared on behalf of Sekisui House

December 2021

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COVER

3D diagram showing the nature of the proposed modification to Stage 4 of the Orchards concept development consent.

This Clause 4.6 Request and Assessment has been prepared by:

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Dowling Urban Pty Ltd, Suite 302 4-14 Buckingham Street, Surry Hills NSW 2010.

1 Introduction

This report has been prepared to supplement the Statement of Environmental Effects (SEE) for the modification of the Concept Development Consent for The Orchards at 47 Spurway Drive, Norwest to request revised variations to the height development standard under Clause 4.6 of *The Hills Local Environmental Plan 2012* (THLEP 2012).

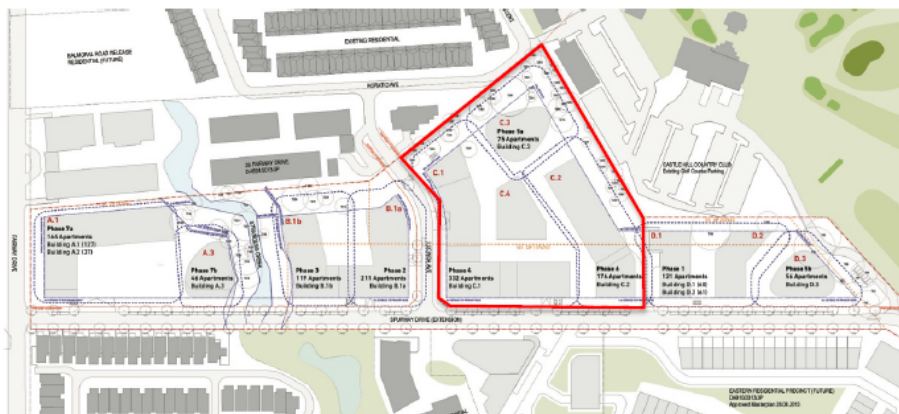
The proposed modification is limited to Stage 4 of the approved concept development and comprises the adjustment of building heights which were previously varied under clause 4.6 when originally granted development consent. Additional background and details are contained within the SEE.

This report assesses the potential impacts that may arise from the proposed variations and makes references to guidance from case law as summarised in addressing the requirements of the *Environmental Planning and Assessment Act 1979*.

1.1 DEVELOPMENT OVERVIEW

An overview of The Orchards masterplan and Concept development consent applying to the land is provided in the SEE accompanying the Section 4.55 Modification Application. The development consent included variations to development standards including the height of buildings as reflected in this report.

In general, the staged development will provide for 1,300 dwellings, with a mix of 1, 2, 3 and 4 bedroom apartments across 10 buildings with associated car parking, public roads, community amenities, publicly accessible parks and landscaping.



Above: extract from Concept Plan showing phases, building numbers and Stage 4 outlined in red.

The staged development consent for the masterplan (736/2017/JP) provides the framework for the coordinated approvals and construction of subsequent phases of development with staged applications. Stages 1, 2 and 3 of the masterplan have been granted development consent while a development application for Stage 4 which relates to the subject modification is being prepared for lodgement.

1.2 CASE LAW

This request has been prepared under Clause 4.6 of THLEP 2016 to justify the departures from development standards for height of building within clauses 4.3.

The request meets the objectives of clause 4.6(1),

- (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,*

and demonstrates for the purpose of clause 4.6(3):

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

Case law (such as *Winten V North Sydney Council*, *Wehbe V Pittwater*, *Four2five V Ashfield Council* etc) provides guidance when considering an exception to development standards as follows:

- Is the planning control in question a development standard?
- What is the underlying object or purpose of the standard?
 - *Would the proposal, despite numerical non-compliance be consistent with the relevant environmental or planning objectives.*
 - *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary;*
 - *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;*
 - *Has Council by its own actions, abandoned the development standard.*
- Is compliance with the development standard consistent with the aims of Cl 4.6?
- Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
- Are there sufficient environmental planning grounds (specific to the site and particular to the circumstances of the proposed development) to justify contravening the development standard?

- Is the objection well founded whereby Preston J provided five potential ways in which this may be established (*Wehbe v Pittwater Council (2007) NSW LEC 827*) of which the following is relevant in this case
 - *the objectives of the development standard are achieved notwithstanding non-compliance with the standard*

Recent case law (*Micaul Holdings v Randwick City Council, Moskovich v Waverley Council and Initial Action Pty Ltd v Woollahra Municipal Council for example*) has also established that:

- the written request has to adequately address everything necessary in clause 4.6(3), rather than the consent authority being “satisfied directly”;
- the consent authority must be personally satisfied that development will be “consistent with” the objectives of the zone and the development standard;
- being “consistent with” these objectives is not a requirement to “achieve” them but that development be “compatible” with them or “capable of existing together in harmony”;
- establishing that “compliance with the standard is unreasonable or unnecessary” does not always require that the objectives of the standard are achieved but also that it may not be achieved or would be thwarted by a complying development;
- clarification that while it may be desirable, it is not a requirement to achieve a better environmental planning outcome than a development that complies with the development standard in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*.

2 Proposed Variation

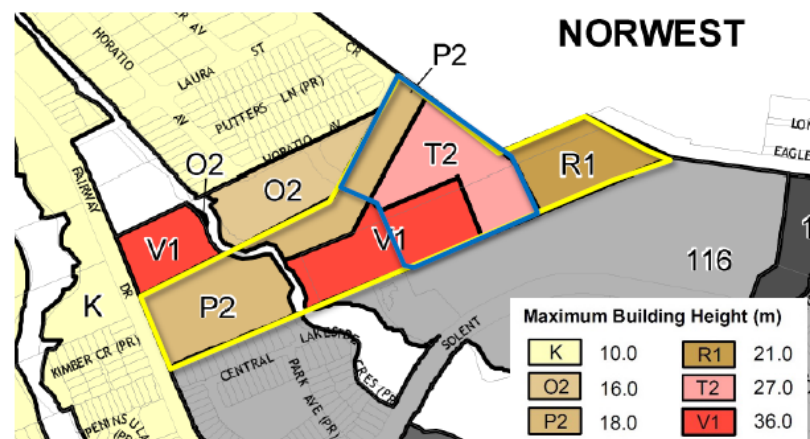
2.1 BACKGROUND

The Modification Application seeks to vary the prescribed development standards within THLEP 2012 relating to Clause 4.3 – Height of buildings for Stage 4 of the Concept Development Consent.

The Height of Buildings development standard contained in Clause 4.3(2) of The Hills LEP 2012 states:

(2) The height of a building on any land is not to exceed the maximum height shown for the land on Height of Building Map.

The site is subject to height of building development standards ranging from 18 to and 36 metres with Stage 4 of the masterplan subject to variable heights of 18, 27 and 36 metres.



Extract of THLEP HOB Map with Concept Plan & Stage 4 outline in yellow & blue

In granting development consent to the Concept, variations to the building heights prescribed under THELP 2102 were approved as a result of:

- a need to adjust the heights to accommodate the intended storeys while allowing for contemporary floor to floor heights of 3.1m, lift overruns and roof plant, and the slope of the land; and
- well-reasoned massing and design strategies providing an improved planning and design outcomes consisting of additional and improved open space available to the public; greater retention of significant trees; improved shadowing impacts; and better building relationships to adjoining properties and the context in general.

Stage 4 of the masterplan development represents an opportunity to respond to feedback to the masterplan and staged development applications approved to date from Council, Design Excellence Panel, Sydney City Central Planning Panel and apartments purchasers.

The factors prompting reconsideration of the massing for Stage 4 consists of the following with references to Design Excellence Panel comments of 22 January 2018.

- The Haven development opposite on Spurway Drive is vulnerable to the solar access falling well below ADG criteria from overshadowing from development of Stage 4 even when it is in compliance with LEP height and DCP setback controls. The design of the Haven did not properly take into account the shadowing to be generated from development under the LEP controls.

"The Panel is concerned however that solar access to north facing units of an approved development on the adjacent site will be reduced as a result of non-compliant street setback and recommend that the applicant review how this can be addressed."

Shadowing analysis provided with this application demonstrates that the proposed massing will result in less mid-winter shadowing than that which would have occurred with a scheme compliant with LEP height and DCP setback controls.

- The approved Stage 4 massing could contribute to an excessive street wall building height along Spurway Drive, potentially providing an overly urban environment.

"The Panel made a general comment in relation to the nexus between height and density. Residential FSRs of 2.5:1 and higher are generally best resolved with more flexibility in relation to height, particularly if the overall urban design vision is for buildings set within a generous landscape setting. The current height controls mean that built form will inevitably be compacted to achieve the target density..."

- Significant changes to the future built form context arising from the nearby Maitland Place and the "The Greens" rezonings opposite Spurway Drive have occurred, where planned building typologies have changed from two storey townhouses to residential towers up to 26 storeys.

The change in context south of the site is shown in the diagram below which summarises built, approved and DCP building heights as measured in storeys and includes the creation of a public open space area on Spurway Drive south east of the Stage 4 site.

- The importance of creating well landscaped and more permeable sites as well as better separations between building forms to improve site porosity and apartment amenity.

- Discussion by the then Sydney Central City Planning Panel and community members in past approvals of opportunities to utilise re-massing to create tower forms to moderate bulk in more sensitive locations of the site especially along Spurway Drive.



Above: Current Concept Development Consent showing building heights for "The Greens" redevelopment as per The Hills DCP Part D, Section 8, Figure 3.

2.2 DETAILS

The proposed modification consists of the re-distribution of Stage 4 building heights to form two towers on Spurway Drive up to 19 storeys and lowering the Spurway Drive built street wall from 12 to 7 storeys, embellished with adjusted and reduced heights elsewhere to improve internal amenity.

The approved height of building variations as stated in the Concept Plan Planning Report to the Sydney Central City Planning Panel (736/2017/JP 11 Apr 2018) ranged in the order of 20% to 140% across the site as follows.

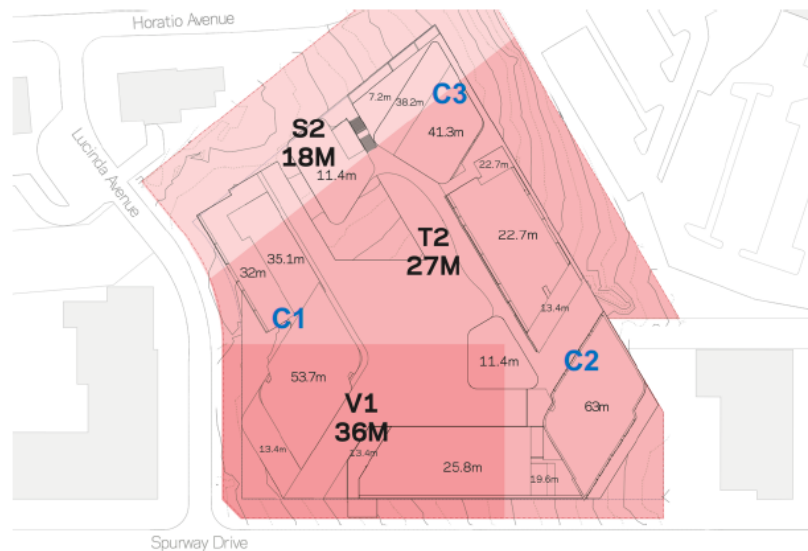
Building	Height Standard	Approved Heights
Building A.1	18 m	29.8 m
Building A.2	18 m	Removed
Building A.3	18 m	30.7 m
Building B.1	36 m & 18 m	43.4 m
Building C.1	36 m & 18 m	43.3 m
Building C.2	27 m	32.5 m
Building C.3	27 m & 18 m	33.9 m
Building D.1	21 m	26.1 m
Building D.2	21 m	27.5 m
Building D.3	21 m	28.1 m

The proposed adjustments to the approved height variations are summarised in the following diagram noting that building envelopes are subject to detailed design in the Stage 4 development application.



Above: Proposed increases and decreases to approved building heights in storeys. (Crone)

The anticipated resultant building heights is shown in the following diagram. These form the basis of the proposed variation to building heights under clause 4.6 as shown on the submitted replacement Concept Plans.

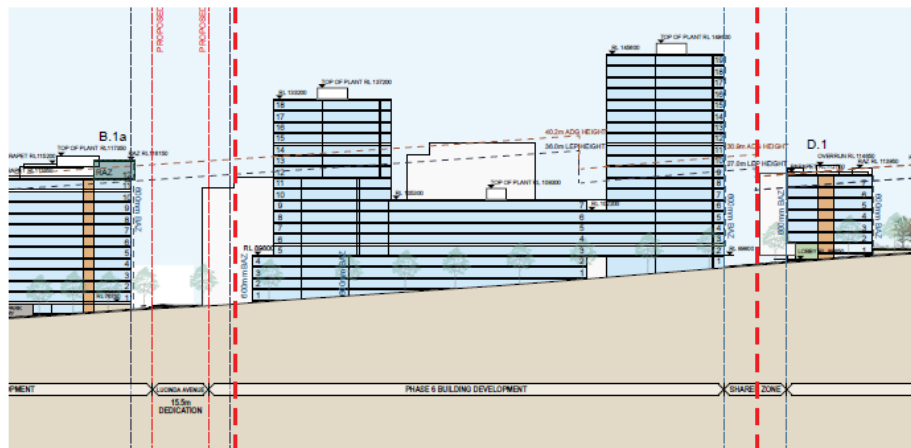


Above: Height of Building Variation Plan with Masterplan building references (Crone)

Note that the proposed building heights include a 4m allowance for lift overrun and terrain adjustment while the masterplan building references are indicated on the Variation Plan above.

Approved and Proposed Stage 4 Height of Building variations comparison

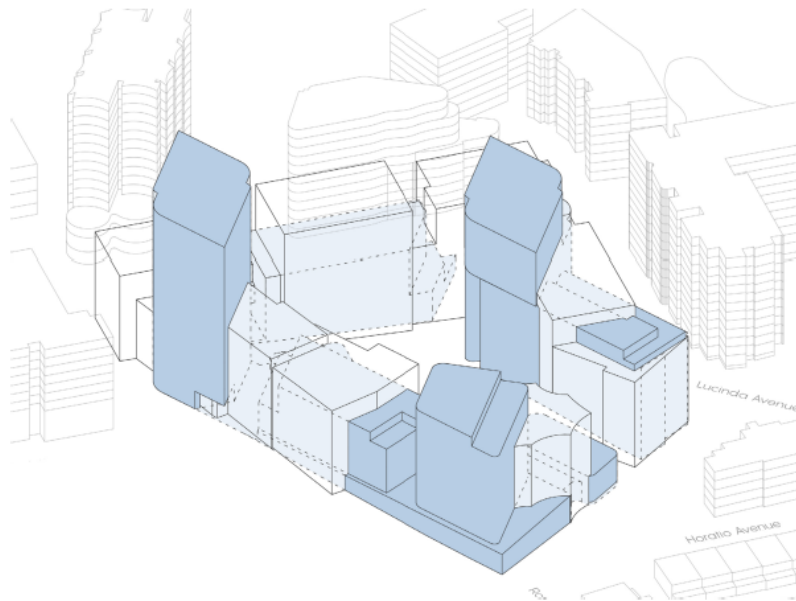
Building	Zone & standard	Approved Height	Proposed Height
Building C1	S2 – 18m	43.3 m	36 – 39.1 m
	T2 – 27m	43.3 m	36 – 57.4 m
	V1 – 36m	43.3 m	57.7 m
Building C2	T2 – 27m	32.5	26.7 – 67 m
Building C3	S2 – 18 m	33.9	10.2 – 45.3 m
	T2 – 27m		



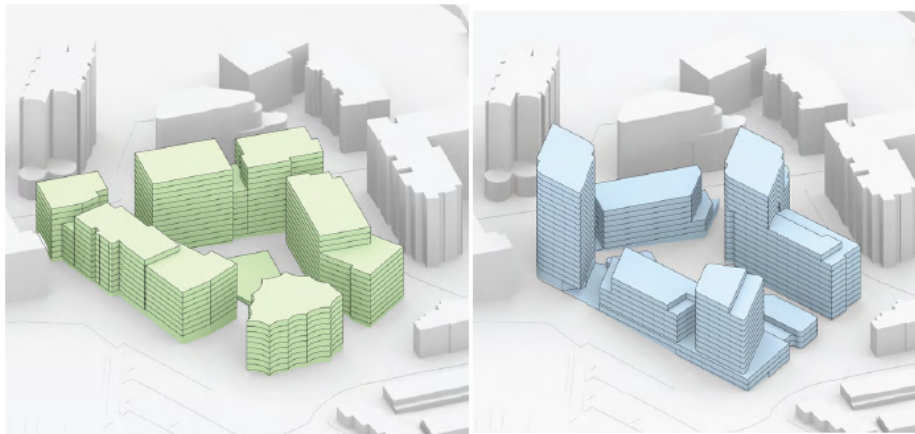
Above: Extract from submitted motivation elevation showing maximum heights apply to Stage 4

A Design Report prepared by Crone provides the design rationale and principles for the adjusted building heights as well as analysis of street views, urban integration and building separation, and shared solar amenity to the public domain and adjoining Haven façade.

The improved effect of the building height adjustments is represented in the general massing diagram below which superimposes envelopes formed from the approved and adjusted building heights and a direct comparison is provided further below.



Above & below: Diagrams showing comparisons of the building envelopes from the approved and proposed buildings heights (L and R below respectively). Source Crone.



The proposed re-massing is demonstrated in the diagrams above showing the effect of the redistribution of floor space from the adjustments to approved height variations heights to the current concept development consent.

3 Clause 4.6 Assessment

3.1 ARE THE PLANNING CONTROLS A DEVELOPMENT STANDARD?

The planning control in Clauses 4.3 relating to maximum height of buildings is a development standard as defined within the *Environmental Planning and Assessment Act 1979* as follows (*EP&A Act, Part 1 Section 4. Definitions*)

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including,

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,

3.2 ASSESSMENT AGAINST THE PURPOSE/OBJECT OF THE STANDARD

The design strategies within the originally approved Concept Plan reasoned substantial variations to the height standard which in turn allowed for:

- better distribution, site coverage and massing of floor area in order to create a larger setback on the northern boundary for linear open space accessible by the public; and
- improved shadowing, and privacy impacts on adjoining properties and open space areas, as well as overall visual amenity, given the then planned future context of the site.

The objectives of the Height of Building standards under clause 4.3 of THLEP 2102 are considered to be satisfied by the adjusted height variations as follows.

Clause 4.3 Height of Building Objectives

Objective	Response
<i>(a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,</i>	The revised variations better responds to significant changes in planned built form context from adjoining rezonings, which now includes towers rather than town houses, while the streetscape is better treated with a lower street wall height and greater access to winter sun light.
<i>(b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.</i>	Reduced shadowing on neighbouring development and planned open space areas will result from a lower street wall created by re-massing to two tower forms while improving visual impact from the perception of bulk.

The site is also the subject of variable floor space ratios which have been distributed over the site under the respective approved site design strategies. The revised heights will not alter the distribution of floor space across the five stages of development.

Notwithstanding, the objectives of the floor space ratio standards under clause 4.4 of THLEP 2102 are considered to remain satisfied from changes arising from the adjustments to the height variations as follows.

Clause 4.4 Floor Space Ratio Objectives

Objective	Response
<i>(a) to ensure development is compatible with the bulk, scale and character of existing and future surrounding development,</i>	The revised bulk and scale derived from the adjusted height variations will ensure better compatibility with the scale and character of existing and future surrounding development especially adjacent on Spurway Drive.
<i>(b) to provide for a built form that is compatible with the role of town and major centres.</i>	Overall site FSR remains compliant with the LEP standards and compatible with role of the Norwest Centre.

Clause 7.10 of THLEP 2012 under which development of the site for 1,300 dwellings is permitted also has a relevant objective as follows.

Relevant Clause 7.10 'Residential development yield on certain land' Objective

Objective	Response
<i>(c) to provide opportunities for suitable housing density that is compatible with existing development and the future character of the surrounding area,</i>	The proposed adjustment to the approved height variations will result in development that is a more compatible with the future character of the surrounding area in terms of solar access to apartments as well as a more coherent composition of building forms especially when viewed from the public domain.

Accordingly, the objectives of the height standard are better served by minimising “the impact of overshadowing, visual impact, and loss of privacy” especially on the ‘Haven’ residential apartments, and open space areas, while ensuring “the height of buildings is compatible with that of” ‘The Greens’ development and the overall streetscapes and wider public domain.

The objectives of the zone, as well as for FSR and clause 7.11 as they are effected by the height, are also better served mainly by maintaining responsiveness and compatibility with changes to the planned future context from subsequent rezonings on adjoining properties while minimising impacts and optimising public benefits from development.

Further, as demonstrated by the reasoning for the original approved height variations, adherence to the standards would defeat or thwart the purpose and objectives the zone and standards.

3.3 IS COMPLIANCE CONSISTENT WITH THE REQUIREMENTS OF CL 4.6?

The aims of Clause 4.6 are:

- (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.*

When the development is tested against the underlying objectives of the standard, compliance would not be inconsistent with the aims of the clause because the proposed height is a reflection of a considered design strategy for the entire development parcel that in turn is a response to the characteristics of the site and its context.

It is considered that the variation requested for the proposed modification will provide the better planning and design outcome by responding to the objectives of the zone and height standards as well as the existing and changed planned future context to Stage 4.

In particular, it is considered that the variation will:

- improve mid-winter shadowing for the neighbouring 'Haven' residential apartments and surrounding domains which would otherwise have a low level of solar access ADG compliance and diminished amenity in general;
- improve Stage 4 apartment and communal open space amenity by facilitating better building separation and solar access through modified envelopes to be reflected in the Stage 4 development application;
- enhance the visual amenity of the Spurway Drive streetscape and locality in general through modulating building forms and heights by lowering the street wall height from 12 storeys to 7 storeys with stepping and relocating mass to tower forms of 18 and 19 storeys.
- more thoughtfully respond to the changed future planning context of 'The Greens' rezoning by utilising a modest tower topology more compatible with envisaged adjoining built forms and providing for a more coherent cluster of building forms within the wider precinct.

3.4 IS COMPLIANCE UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES?

Strict compliance with the height of building provisions of THLEP 2012 is considered unreasonable and unnecessary in the circumstances of the case as it would impede the considered implementation of an accepted design concept and impede the achieving of a better planning and design outcome for the site and its immediate context.

Compliance with the development standard is considered unreasonable and unnecessary in the circumstances based on the following:

- The adjustment to the height variations is consistent with the objectives of the zone, development standard and related provisions of THLEP 2012 as discussed in section 3.2.
- The design strategy which underpinned height and other variations in the original consent is maintained and provide larger northern setback to preserve significant trees and create a publicly accessible linear open space as a buffer to adjoining lower scale development.
- The modified massing will result in better planning and design outcomes as set out in section 3.3 above including improved mid-winter solar access and greater compatibility with the adjoining development and planned future context south of Spurway Drive.
- The approved density and yield of the site; the overall structure of streets, entrances, open spaces and stormwater drainage; as well as the functioning and servicing of the site will remain unchanged.

3.5 ARE THERE SUFFICIENT GROUNDS TO JUSTIFY CONTRAVENTION?

As discussed above, the adjusted contraventions of the building height standard for Stage 4 responds to the issues identified by the Design Excellence Panel as well as the analysis in the Design Report prepared by Crone architects.

Firstly, it is understood from Council's assessment report that the Haven development achieved only 64% solar access compliance when approved.

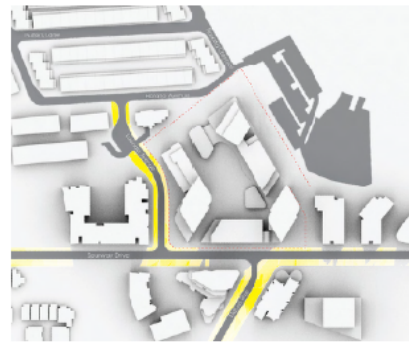
The Design Report at page 34 summarises an analysis of shadowing and demonstrates a significant improvement to the solar performance of the Haven development while the changes to mid-winter shadowing to the other nearby facades of Lumia and Watermark are more than compensated.

The Design Report analysis also demonstrates an 8% improvement to mid-winter solar access to the public domain and which excludes planned future open space areas in The Greens development south of Spurway Drive which would also benefit.



Approved Master Plan
Cumulative Public Solar Access - 10am, 11am, 12pm, 1pm, 2pm

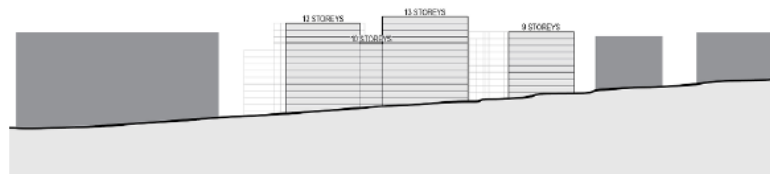
 SOLAR ACCESS



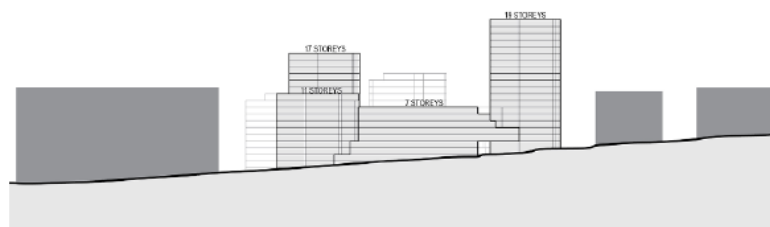
Proposed Master Plan
Cumulative Public Solar Access - 10am, 11am, 12pm, 1pm, 2pm

Extract from the public domain solar study in the Design Report prepared by Cron..

Secondly, the adjustment of building height variations allows the lowering of the building street wall to Spurway Drive building by transferring mass to two modest towers, thereby contributing to greater modulation of forms as well as improved compatibility to the bulk and height of existing and future planned building that adjoin the site immediately to its south.



Approved Scheme Elevation
Spurway Drive



Proposed Scheme Elevation
Spurway Drive

Study of approved and proposed modified street wall heights, Crone

In terms of visual impact, it is considered that the lowering of the street wall height and relocation of floor space to towers will result in a welcomed variation of building

forms along Spurway Drive from stages 1 to 5 and help moderate the perception of scale from the public domain when viewed from the street as well as locally.

It is noted that greater modulation of building heights will also allow greater view sharing with surrounding buildings with a high number of apartments being able to gain distance views across the site.

It is further considered that the introduction of a modest tower typology into Stage 4 in close association with the rezoning to the south of the site, will lead to a more coherent precinct in terms of the pattern of building forms and scales.

An adjusted height variation is also sought to the north of the site on Horatio Avenue to enable the further distribution of floor space and massing to allow for improved physical and visual porosity of the development and increased mid-winter solar penetration into the central common areas of Stage 4.

The visual effect from this aspect is moderated by the canopy heights of the significant trees being preserved within the adjoining linear park and further mitigated by being set back from a two storey 'townhouse' podium at the park frontages

Accordingly, given the improved mid-winter solar access internally and to neighbouring properties, improved visual outlook from the public domain on Spurway Drive and locality, achieving higher ADG compliance for apartments and greater compatibility of building forms with the future planned context, it is considered that there are sufficient grounds to adjust the approved contraventions of the height standard in the circumstance.

3.6 IS THE REQUEST WELL FOUNDED?

This request under clause 4.6 of THLEP 2012 is considered to be well founded for the following reasons.

- The proposed development remains consistent with the objectives of the zone and standard as well as the nature and intent of THLEP 2012 and the concept staged development consent.
- The proposed adjustment to height variations is based on a well-reasoned design strategy, and detailed design and analysis for Stage 4, to achieve better planning and design outcomes appropriate in this location, and provides for an appropriate response to the site and its context.
- The variation is supported by studies demonstrating improved mid-winter solar access to the adjoining public domain and existing developments while achieving better compatibility with the future planned context of the site and a more visually coherent cluster of buildings in the locality.
- Strict compliance with the height of building controls in the circumstance would result in unnecessary design limitations and a consequent diminished

urban outcome for the site and neighbouring development, and tend to defeat or thwart the achievement of those objectives.

- The variation to height of building standard is consistent with the masterplan approach which allowed for ADG requirements while mitigating shadowing impacts as well as responding to site conditions including for the retention of vegetation and the creation of public access ways and a linear park.

The proposed heights are supported by The Hills Design Excellence Panel which made the following comments. (Note that these are amongst a range of more detailed comments to be addressed in the detailed design for the Stage 4 development application.)

- *The Panel noted the proposed revisions are responsive to the changing forms of development that are occurring across the precinct, and are better suited to preserving amenity within adjacent developments.*
- *The Panel is in principle is supportive of the revised masterplan subject to:*
 - *The Public Domain outcome being demonstrated as superior to the current consent.*
 - *Increased solar access for the residents in existing developments along the southern side of Spurway Drive being demonstrated.*
 - *Improved residential amenity for residents of the subject development with respect to solar access, natural ventilation and visual/acoustic privacy being demonstrated.*
 - *A suitable synthesis of the courtyard typology around the lower/podium levels...*
- *The Panel notes the number of dwellings provided remains unchanged from the existing approval, and the proposed changes seek to mitigate built form problems that adversely impacted upon residential amenity and the Public Domain.*
- *As noted, the Panel considers that the revised massing is an improvement on the previous masterplan concept, including significant improvement in solar access for the existing residents on the southern side of Spurway Drive.*

4 Conclusion

The proposed exceptions to the height of building standard contained in The Hills Local Environment Plan 2012 Clause 4.3 Height of Buildings will result in a better planning and design outcome as they will:

- improve mid-winter shadowing for the neighbouring 'Haven' residential apartments and surrounding domains which would otherwise have a low level of solar access ADG compliance and diminished amenity in general;
- improve Stage 4 apartment and communal open space amenity by facilitating better building separation and solar access through modified envelopes to be reflected in the Stage 4 development application;
- enhance the visual amenity of the Spurway Drive streetscape and locality in general through modulating building forms and heights by lowering the street wall height from 12 storeys to 7 storeys with stepping and relocating mass to tower forms of 18 and 19 storeys.
- more thoughtfully respond to the changed future planning context of 'The Greens' rezoning by utilising a modest tower topology more compatible with envisaged adjoining built forms and providing for a more coherent cluster of building forms within the wider precinct.

The exceptions will result in development more compatible with the existing and planned future context in the locality. The concept as designed remains consistent with the underlying purpose and objectives of the respective zone and height standard which would be defeated or thwarted by strict compliance with that standard.

The adjustment of the approved variations to building height has the support of The Hills Design Excellence Panel.

It is therefore, concluded that the proposed contraventions to the height of building development standard as described, does not undermine or frustrate the underlying objectives to that standard.

The adjusted non-compliance does not give rise to any significant additional adverse environmental impacts but provides for a better urban planning and design outcome through a well-reasoned concept design.

It is therefore considered that strict compliance with the height of building development standard is unreasonable and unnecessary in the circumstances and that there are sufficient environmental planning grounds to justify contravening the development standard as proposed.

This written request has adequately addressed the matters required to be demonstrated in establishing the above and that the proposed development will be

in the public interest because it is consistent with the purpose and objectives of the respective zone and height of building standard.

It is also considered appropriate to provide the required flexibility in applying the development standards to achieve better outcomes for and from development as proposed for The Orchards site by allowing this flexibility in this particular circumstance.

Accordingly, the consent authority should find that it is able to support the requested exception to development standards under clause 4.6 of The Hills LEP 2012.

ATTACHMENT 10 – APPLICANT'S LEGAL ADVICE

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11 March 2022

Mills Oakley
ABN: 51 493 069 734

Our ref: AJWS/CYCS/3525429

All correspondence to:
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Dear Peter

Advice on mod to concept plan and clause 4.6 request for The Orchards, Baulkham Hills

We refer to your request for advice in relation to a s4.55(2) modification application submitted in relation to stage 4 of The Orchards concept plan for 47 Spurway Drive, Baulkham Hills (**the Site**). The modification application seeks to improve the overshadowing impacts of the proposed development and to achieve a better design outcome by balancing the heights of various buildings within stage 4. Whilst the height of some buildings will be reduced, in other locations within the stage 4 the height of buildings is being increased from 12 storeys (the LEP height limit) to 19 storeys. Due to this increase in height, a clause 4.6 variation was submitted as part of the modification application.

You have asked to review the Statement of Environmental Effects prepared by Dowling Urban dated December 2021 (**SEE**) and the clause 4.6 of the same date to advise on the following:

- a) Whether your proposed development may lawfully and appropriately be approved by way of a modification application under section 4.55(2) of the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, or whether a new development application needs to be submitted.
- b) Whether you are able to obtain approval for a variation to the approved height by way of a clause 4.6 request.

Summary Advice

In our opinion, the proposed amendments are readily capable of being approved as a modification application in accordance with s.4.55(2) of the EP&A Act rather than requiring a new development application. The proposed amendments do not impact the 'essence' of the approved development. The proposed amendments relate to a change in building heights (both in terms of a reduction and an increase in heights for various buildings) for just one stage of the development, namely Stage 4. No changes are being made to any other element of the proposed development or any other stage.

The proposal remains 'substantially the same' in its modified form and the proposed amendments do not undermine or radically alter any essential component of the development. Accordingly, the modifications proposed would still result in 'substantially the same' development as the approved development.

It is also possible to obtain approval for towers which exceed the height development standard. This is demonstrated by the fact that such a variation was approved as part of the original concept approval. For the purposes of a modification application, a clause 4.6 request is not needed (this has been established by case law). However, a clause 4.6 request will be required to be submitted with your development application for stage 4. There is nothing preventing you from submitting another clause 4.6 request along with the Stage 4 development application (even though a clause 4.6 variation was submitted and approved as part of the original concept approval) and we note that there is no numerical limit to the height variation.

3437-9622-4785, v. 1

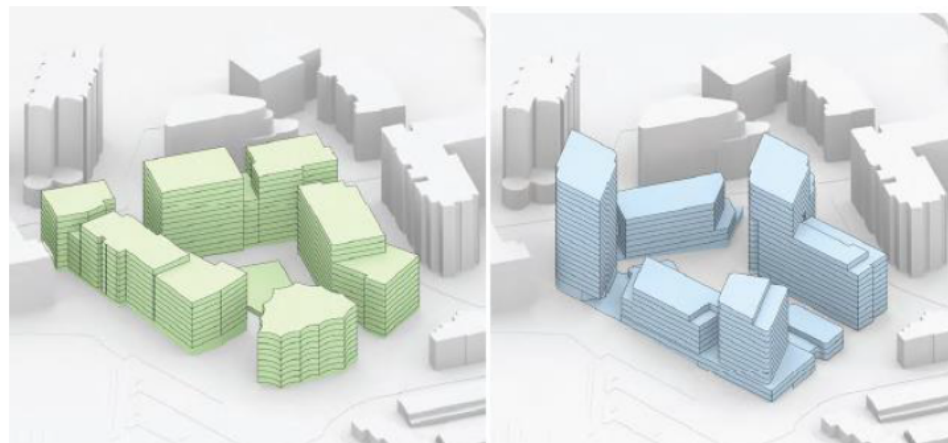
Background

- The Site is zoned mostly R4 High Density Residential with a section of RE2 private recreation under *The Hills Local Environmental Plan 2012 (Hills LEP)*.
- The Site is subject to a maximum building height of 18-36m. The Site also sits within Area B of the LEP Key Sites map and so the provisions of clause 7.11 apply. These development standards were varied in the original Concept Approval referred to below.
- In April 2018, concept development consent for The Orchards Masterplan was granted, ref 736/2017/JP (**Concept Approval**). The concept approval provides approval for 1,300 dwellings over five stages, adjustment to the height of buildings and GFA/dwelling distribution across the site and the creation of a linear publicly accessible park. The consent also permits the consolidation of lots, staged delivery of future works and removal of 84 trees to accommodate the works.
- The Concept application was accompanied by a clause 4.6 variation request in relation to height and the Concept Approval allows buildings A1 and A3 to run to 30m and buildings B1 and C2 to run to 43m, compared to the 18m standard that applies in this area. Other buildings included in the Concept Approval were at or lower than the height standard in the Hills LEP.
- It has now become clear that an adjustment of building heights within stage 4 of the development would achieve a better planning and design outcome for the public domain, apartment amenity and adjoining development. The adjustment of the building heights will not change the development yield.
- Therefore, an application to modify the Concept Development Consent for the Orchards Master Plan was made under s4.55(2) of the EP&A Act in December 2021 (**Mod Application**). The Mod Application sought to adjust the height of buildings for stage 4 of the development.
- The modification consists of the following:
 - A modification to stage 4 of the Concept Approval only. The Concept Approval relates to construction of The Orchards over 5 stages. None of the other stages are sought to be changed by way of the Mod Application.
 - The re-distribution of stage 4 building heights to form two towers on Spurway Drive up to 19 storeys and lowering the Spurway Drive built street wall from 12 to 7 storeys, along with embellishment and other minor adjustments;
 - The adjustment to building heights is show in Figure 11 from the SEE below. As can be seen from the diagram, some heights have increased whilst others have decreased. The biggest variation is an increase of 10 storeys and a decrease of 9 storeys. Most of the variations are a change of 1-6 storeys.



Figure 11: Proposed increases and decreases to approved building heights in storeys. (Crone)

- Figure 13 in the SEE provides a useful comparison between the currently approved (on left, in green) building masses and the proposed modification (on right, in blue).



- The proposed variations in building heights are shown in Table 1 below, which shows the 'approved roof level' and the 'proposed roof level' sought in the Mod Application.

Building Reference	Height Zone and standard	Approved Roof Level	Proposed Roof Level
C1	S2 – 18m	43.3 m	32 – 35.1 m
	T2 – 27m	43.3 m	32 – 53.4 m
	V1 – 36m	43.3 m	53.7 m
C2	T2 – 27m	32.5	22.7 – 63 m
C3	S2 – 18 m	33.9	38.2 – 41.3 m
	T2 – 27m		

- As some of the height adjustments will result in buildings which exceed the height standard in the LEP, a clause 4.6 request was submitted along with the Mod Application. We note that a clause 4.6 was also submitted along with the original Concept Approval and variation to heights was approved as part of the Concept Approval.
- As noted above, the current Mod Application seeks only amend the building heights for stage 4, with a consequential change to massing diagrams. All other aspects of the Concept Approval remain the same. The following will **not** be changed as part of the Mod Application:
 - The type of development (which remains a residential development);
 - The number of buildings;
 - The general location of the buildings for stage 4;
 - Total GFA;
 - The number of dwellings;
 - The structure and extent of dedicated streets and publicly accessible open space;
 - The staging of the development and the order of the stages;
 - Community title subdivision, utility provision, stormwater and drainage.

Substantive Advice

1. The proper approach to modification applications

1.1 Section 4.55(2) of the EP&A Act relates to modification of consents and provides that:

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) *it is 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** and before that consent as originally granted was modified (if at all)...* [Emphasis added in **bold**.]

1.2 We note that where a proposed modification would have only 'minimal environmental impact', a s4.55(1A) is appropriate. However, where proposed amendments may have an environmental impact that could be considered more than 'minimal', a s4.55 application should be made. As such, there is no threshold requirement that every s4.55 modification must be of 'minimal environmental impact'. This of necessity implies that there **will be** environmental impacts, perhaps considerable environmental impacts, for a s4.55(2) application, such as yours.

1.3 Provided the consent authority is satisfied that the modified development would be 'substantially the same as' the original development, it will then further assess the proposal on its merits to decide whether the environmental impacts are acceptable in all the circumstances.

1.4 The concept of 'modification' refers to 'alteration without radical transformation' (*North Sydney City Council v Michael Standley and Associates Pty Ltd* (1998) 43 NSWLR 468 and *Sydney City*

Council v Ilenace Pty Ltd [1984] 3 NSWLR 414. Hence, a power of a consent authority to 'modify' a consent is a power to alter without radical transformation the consent (*Scrap Realty Pty Limited v Botany Bay City Council* [2008] NSWLEC 333 at 14).

- 1.5 **The modification power is to be construed broadly and facultatively. In other words, it is generally to be interpreted in a way that is favourable to applicants** because the purpose of the provision is to enable development to be modified without the need for a full DA (*North Sydney v Michael Standley and Associates Pty Ltd* (1998) 97 LGERA 43. In that regard, the Court has said:

'The provisions of s96 are facultative and not restrictive and are designed to assist constructively the modification process rather than to act as a substantive impediment to it (Bassett and Jones Architects Pty Limited v Waverley Council (No 2) [2005] NSWLEC 530; and .

'...s96 is a facultative, beneficial provision and one which is to be applied in a way that is favourable to those who are to benefit from the provision' (May v Warringah Council [2004] NSWCCA 77.

2. What is meant by 'substantially the same' development?

- 2.1 As outlined above, a consent authority can approve a modification application if it is 'substantially the same development' as the development which was originally approved. The 'substantially the same' test is a threshold legal test that must be met before the modification can be dealt with on its merits.
- 2.2 In applying the 'substantially the same' test, the focus is on 'the development' **as a whole**. A comparison must be made between the development as modified and the development that was originally approved (*Scrap Realty v Botany Bay City Council* [2008] NSWLEC 333 at [16]).
- 2.3 Whether a modified development will be 'substantially the same' as the original approved development is a **factual** finding but with a **subjective** element of opinion. It requires a comparison between the two sets of plans. As such, there is no ready legal answer to this question, as each application will depend upon its own set of plans and its own set of facts, but subject always to the opinion of the consent authority. This arises from *Moto Projects (No 2) v North Sydney Council* [1999] NSWLEC 280, where Bignold J stated that the s96 test (now known as the s4.55 test):
- '...involves an ultimate finding of fact based upon the primary facts found. I must be satisfied that the modified development is substantially the same as the originally approved development. The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified'.*
- 2.4 Similarly in *Vacik Pty Ltd v Penrith City Council* (unreported 24 February 1992), Stein J held that 'in assessing whether the consent as modified will be substantially the same development, one needs to compare the before and after situations'.
- 2.5 To pass the test, the result of the comparison must be a finding that the modified development is '**essentially**' or '**materially**' the same as the approved development (*Moto Developments (No 2) v North Sydney Council* [1999] NSWLEC 280 at [55]; *Vacik v Penrith City Council* [1992] NSWLEC 8). The Court of Appeal has confirmed that 'substantially the same' in the context of modification applications means 'essential or materially or **having the same essence**' (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 433 NSWLR 468 at 446).
- 2.6 In *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 (**Moto Projects**), Bignold J confirmed (applying the predecessor to s 4.55(2)(a)) at [55]-[56] that a consent authority is to determine whether a modification application is 'substantially the same' as follows:

54. ...I must be satisfied that the modified development is substantially the same as the originally approved development.

55. The requisite factual finding **obviously requires a comparison** between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified

development is “essentially or materially” the same as the (currently) approved development.

56. The comparative task **does not merely involve a comparison of the physical features** or components of the development as currently approved or modified where the comparative exercise is undertaken in some type of sterile vacuum. **Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development was granted).**

[Our emphasis in bold.]

- 2.7 In *Moto Projects*, Bignold J found at [59]-[60] that the modification sought, being a separate ingress for vehicular access, was a ‘**material and essential physical element**’ of the approved development’ and ‘[i]ts proposed elimination **materially changes** the approved development’ [our emphasis in bold].
- 2.8 It is the ‘features’ or ‘components’ of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development (*Arrage v Inner West Council* [2019] NSWLEC 85 at [25]). Albeit, as stated above, ultimately what is required is a focus upon ‘the development’ as **a whole** (see *Scrap Realty*, at para 2.3 above).
- 2.9 Both a ‘**qualitative**’ and ‘**quantitative**’ assessment of the application is required. In that regard, the Courts have emphasised that a material change to **an essential feature** of a development may result in the development not being ‘substantially the same’ (*The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* (unreported 2 October 1998)). In that case, a proposed change of use at ground level only, for a 9 storey building, was held to be a ‘**radical transformation**’ of the originally approved development, even though the building envelope, size, shape and form would be identical.
- 2.10 However, in *Satellite Group*, the modification was deleting almost all of the retail component of a development (8 out of 9 approved retail shops, all of which were at the ground level) and to replace them with further residential floor space. This would have resulted in the development no longer retaining any real commercial/retail component. The Court held that the mixed use nature of the development was an essential feature of the approved development and, as such, the proposed **change of use** was a ‘radical transformation’ of the approved development. It was also highly relevant that the retail floor space was all to be removed from street level, where it was most highly visible in the original approval.
- 2.11 This is a classic example of a purely ‘qualitative’ change being too great to amount to a ‘modification’, even though the building’s envelope was not being changed.
- 2.12 However, even if each of the changes to be made are individually significant in their own way, the proposed modified development may still be substantially the same **as a whole** (*Tyagrah Holdings v Byron Bay Shire Council* [2008] NSWLEC 1420 at [12]).
- 2.13 The qualitative comparison involves an appreciation of the developments **in its proper context**, which includes the circumstances in which the development was approved (*Moto Developments* at [55]-[56]).
- 2.14 In practical terms, these principles mean that the consent authority should:
 - (a) Consider the numerical differences of the development (e.g. GFA, FSR, height etc.);
 - (b) Consider the non-numerical differences (e.g. visual impact, traffic impacts, land uses etc.);
 - (c) Consider any changes relating to a material and essential feature of the originally approved development; and
 - (d) Bear in mind that the modification power must be construed **broadly, beneficially and facultatively**, as it is ‘designed to assist constructively the modification process rather than to act as substantive impediment to it’.
- 2.15 For completeness, we note that the Land and Environment has confirmed that, in determining whether an application meets the ‘substantially the same’ threshold test in s4.55, the consent

authority is **not** to undertake an assessment of whether the proposed changes are acceptable. Rather, that question is a secondary step which comes **after** the threshold test (*Tenacity Investments Pty Limited v Ku-ring-gai Council* [2010] NSWLEC 1263 at 21).

3. Indicative case law

- 3.1 In addition to the numerous cases referred to above, the cases below give some guidance on how the Courts have viewed modification applications. The cases below particularly deal with modification applications which sought to add storeys/increase the height of buildings (though we note that in your case you are not simply 'adding' height but are redistributing height).
- 3.2 In the recent matter of *Ahmad Corp Pty Ltd v Fairfield City Council* [2018] NSWLEC 1526 (*Ahmad Corp*), the Land and Environment Court was required to consider whether an application to amend a consent to provide an additional level comprising 12 residential units and the addition of 9 basement car parking spaces to a mixed use development was 'substantially the same'. The modifications proposed by *Ahmad Corp* would result in an increase in the total number of units from 71 to 83, and the addition of one full storey to the approved development, and a significant increase in FSR (by approximately 15%).
- 3.3 In *Ahmad Corp*, Commissioner Gray concluded that the proposed modification was 'substantially the same', finding at [49]-[50]:

[49] ...The proposed modified building retains **the same use, and the same building typology**, as that for which consent was granted. It **remains a multi-storey mixed use development with ground floor retail uses, and the addition of another storey does not materially change the development or the essence of the development.**

[50] Fifthly, although the changes proposed through the modification application are quantitatively significant when expressed as a percentage, I accept that they are not so large so as to transform the development. **The increase in the floor space, the storeys and the overall height is significant, but is not so large as to change its essence or render it something other than "substantially the same development".**

[Emphasis added in bold.]
- 3.4 The *Ahmad Corp* case is significant as the Court held that a modification which added an entire storey (thereby increasing both the height and FSR significantly) and an additional 12 units, being approximately 15% greater FSR than originally approved, was still substantially the same development.
- 3.5 In contrast, in *Innerwest 888 Pty Ltd v Canterbury Bankstown Council* [2017] NSWLEC 1241, the proposed modification to add an additional storey was refused as the approved height was 'an essential element of Council's determination of the application' such that it was an express condition of the original consent that the additional storeys be removed. Therefore, if an approval is sought for a taller building but a consent only strictly and expressly approves a building of lesser height, it may be difficult to obtain approval to add further storeys by way of modification application. We note that there is no such condition in your Concept Approval and in fact the Concept Approval includes heights above the development standard (which was achieved by way of a clause 4.6 request). It is therefore possible to obtain approval for additional storeys to be added by way of modification application (particularly as here you are also somewhat offsetting the additional height by reducing the heights of some buildings).
- 3.6 In *Marana Developments Pty Limited v Botany City Council* [2011] NSWLEC 1100, the original approval was for the construction of five residential flat buildings, with basement car parking, comprising 76 units in total. The modification application sought 'significant changes to the external appearance and layout of the buildings' including an increase in unit numbers from 76 to 102 and an additional level of basement carparking. This also involved a change in unit mix.
- 3.7 In *Marana*, even though there were significant internal changes, the court found that the changes to external floorplates and layout were modest and that significant weight should be placed on this fact so that the 'substantially the same development' test was satisfied.
- 3.8 The case of *Eastview (Australia) Pty Ltd v Ryde City Council* [2005] NSWLEC 393 also demonstrates how a proposal can involve many changes but remain substantially the same development.

- 3.9 In *Eastview*, the modification application sought approval for an increase in the footprint of two buildings by 250 sq m per floor as well as changes in the position and shape of the basement carpark, additional loading dock facilities, changes to the public space in two buildings, the provisions of a 220 sqm café, the realignment of two buildings and the modification of the façade treatment of these two buildings. Despite the number of changes, the Court found that the proposal, when considered **overall**, would still remain substantially the same development.
- 3.10 We note that as recently as March 2020 the Land and Environment Court confirmed that an application which sought to increase height and internal changes was substantially the same development and was approved by way of modification application. In *AG Kellyville Pty Ltd v The Hills Shire Council* [2020] NSWLEC 1205, the Court held that the following changes to an approved development for two residential flat buildings was still substantially the same development: an additional 2 units being added to the development; an additional 74sq m of communal space; two new lifts; an increase in height and increase in the height of floor levels; an additional 5 car parking spaces, a change in the setback level of the basement and a change to the layout of the basement and the configuration of stairs.
- 4. Is the proposed development ‘substantially the same’ development?**
- 4.1 At the outset, when considering the Mod Application **it is important to remember that the Mod Application seeks to amend only one stage (Stage 4) of a five stage Concept Consent**. This is important to remember when making both a quantitative and qualitative assessment of the Mod Application.
- 4.2 Furthermore, **the proposed modification does not seek to change the nature of the development, the general layout, the staging or the development yield. In short, the Modification Application seeks to redistribute height between approved stage 4 buildings and this is the sum total of the proposed amendment.**
- 4.3 From a **quantitative** perspective:
- (a) There is a change to the proposed heights of the various buildings in stage 4. The greatest change is the addition of 10 storeys to one building. The smallest change is the removal of one storey. Most of the buildings are increasing or decreasing by 2 to 6 storeys;
 - (b) There is no change to the total number of dwellings;
 - (c) There is no change to FSR;
 - (d) There is no change to GFA; and
 - (e) There are no changes of any quantitative nature to stages 1, 2, 3, and 5 of the Concept Approval.
- 4.4 With regard to the **qualitative** assessment, on our review it is clear that:
- (a) The use, operation and function of the site remain unchanged;
 - (b) Changes to open space, the road network and the general layout of the development remains the same;
 - (c) Even though the massing of the buildings in stage 4 is changing, the buildings remain in broadly the same location and the key difference when comparing drawings/plans is a change in heights of buildings rather than the number of location of buildings;
 - (d) When viewed as a whole, the development remains the same.
- 4.5 In our opinion, **the diagram from the SEE which compares the existing approved stage 4 building development with the proposed modification (i.e. the green v the blue pictures), clearly shows that the proposed modification is not substantially different from the Original DA**. The comparison drawings which we have been provided with clearly show this. We note that in the assessment, one looks to substance not form (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [19]).
- 4.6 **In our view, if the proposed changes to stage 4 were to be viewed only as part of stage 4 they would likely be considered ‘substantially the same development’.** The fact that the

changes relate to only 1 stage of a 5 stage Concept Approval strengthens this argument even more and leaves no doubt in our mind that the proposed modification is substantially the same development.

- 4.7 As the case law referred to above shows, a change to the heights of buildings does not of itself mean that the development is not substantially the same (*Ahman Corp*). The case law also shows that even large variations in height can be approved as part of a modification, provided that the essence of the development remains. In this case, it is clear that the proposed modification does not impact or change the essence of the development. The development remains a staged development for 1,300 dwellings with a linear park and internal roads and none of this is changing.
- 4.8 **An applicant is perfectly entitled to seek to change the number of storeys via a s4.55 application and the section is to be construed broadly, beneficially and facultatively to enable an applicant to do so.**
- 4.9 In our opinion it is clear that the proposed modification is substantially the same development and can be approved by way of 4.55(2) application. In our view a new concept development application is not needed.
- 4.10 **Even if some of the increases in height are considered significant in a quantitative sense when considered at the scale of an individual building, when the proposed modification is viewed as a whole, it is clear that the essence of the development remains and that it is substantially the same development.**
- 4.11 Having regard to the above assessment, we do **not** consider the above changes amount to a 'radical; transformation' of the Original Development Consent. As stated, the legal requirement is to assess the extent of modification to the development consent **as a whole**, rather than to focus on any element of it in isolation. We consider that the Modification Application is 'substantially the same' development as the development approved by the Original Development Consent.
5. **Is it possible to vary the height by way of Clause 4.6 Request?**
 - 5.1 You have asked for advice as to whether approval may be obtained by way of the Mod Application for building heights which exceed the LEP standard by way of clause 4.6 request. We have been provided with and have reviewed the clause 4.6 request which was submitted with the Mod Application. Case law has established that a clause 4.6 request is only required for a development application and not for a modification application (*Gann & Anor v Sutherland Shire Council* [2008] NSWLEC 157; *BJ Eldridge & ME Vincent t/as Crossbones Gallery v Penrith City Council* [2019] NSWLEC 1377)
 - 5.2 The reason for this is that there is distinct wording in the *Environmental Planning and Assessment Act 1979 (EP&A Act)* for development applications compared to modification applications.
 - 5.3 Section 4.2 of the EP&A Act provides as follows:

(1) General If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless—

(a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.

(our emphasis)
 - 5.4 In contrast, the modification power at clause 4.55(2) of the EP&A Act does not require that the development be carried out in accordance with 'the instrument', being the LEP. The Courts have therefore held (in relation to the old s96 and the current s4.55 of the EP&A Act) that a clause 4.6 request is not needed for a modification application and in fact should not lawfully be considered **(as there is no power for a clause 4.6 request to be used in a modification application).**
 - 5.5 This means that you do not need to provide a clause 4.6 request with the Mod Application and in fact the consent authority cannot rely upon a clause 4.6 for your Mod Application.

- 5.6 However, the clause 4.6 request will be required for the Stage 4 development application, when you submit such an application.
- 5.7 This is because clause 4.3(2) of the Hills LEP is clearly a development standard and thus capable of being varied. Clause 4.2(2) sits within Part 4 which is titled 'Principal Development Standards'. Clause 4.6 of The Hills LEP excludes a number of clauses from the ambit of clause 4.6 but clause 4.3(2) is not such an excluded clause. The fact that a clause 4.6 request in relation to height has already been accepted further supports the view that it is possible to obtain approval for a development which exceeds the height development standard.
- 5.8 For some of the stage 4 buildings, the variation from the height development standard will be substantial. However, there is no limit on the extent of non-compliance with a development standard (*Legal and General Life v North Sydney MC (1990) 69 LGRA 201*).
- 5.9 What recent court decisions have shown is that the clause 4.6 must enable the consent authority to be satisfied that the proposed development will be consistent with the objectives of the development standard and relevant zone, and that there are 'sufficient environmental planning grounds to justify contravening the development standard' such that 'compliance with the development standard is unreasonable or unnecessary in the circumstances of the case'. The clause 4.6 request submitted with the Mod Application does this.
- 5.10 There is thus no numerical or percentage restriction on the quantity of non-compliance that may be approved. The degree or extent of variation from the development standard does not dictate whether approval should be granted (*De Stoop v Ku-ring-gai Council [2010] NSWLEC 1019*).
- 5.11 Furthermore, the courts have on a number of occasions approved clause 4.6 requests to increase heights in parts of a site to achieve an overall better planning outcome (*Panarea Investments Pty Ltd v Manly Council [2015] NSWLEC 1026* or *Lane Cove Council v Orca Partners Management Pty Ltd (No 2) [2015] NSWLEC 52*).
- 5.12 We again iterate that the clause 4.6 request is not required for the Mod Application and should not be assessed as such (although the consent authority may find it useful to assist in a more general merit assessment of the modification application). However, a clause 4.6 request **will be** required for the development application for Stage 4 at the time when this is to be submitted.

Conclusion

In our opinion, the changes you propose to seek by way of modification application would clearly result in development which is 'substantially the same as' the original approved development. In our view, consent for your proposal should be sought by way of modification application. It is clear to us that a new development application should not be required. Obviously you are seeking to make changes to the approved development but this is precisely what the modification process is for and the changes sought to stage 4 of the Concept Approval are clearly capable of being approved by way of modification application. The Modification Application does not require a clause 4.6 application as such clause 4.6 requests are not required for modification applications.

If you have any questions or require further information in relation to this advice, please do not hesitate to contact Anthony Whealy on +61 2 8035 7848 or Clare Collett on ccollett@millsOakley.com.au.

Yours sincerely




Anthony Whealy
Partner
Accredited Specialist — Local Government and Planning

ATTACHMENT 11 – CONSENT 736/2017/JP



16 April 2018

Sekisui House Australia Pty Ltd
Ground Floor 68 Waterloo Rd
MACQUARIE PARK NSW 2113

Ref No.:736/2017/JP
SCCPP: 11 April 2018

Dear Sir/Madam

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979
NOTICE TO APPLICANT OF DETERMINATION OF A DEVELOPMENT APPLICATION

Pursuant to Section 4.18(1) of the Environmental Planning and Assessment Act, 1979, notice is hereby given of the determination by Sydney Central City Planning Panel of the Development Application referred to herein.

The Application has been determined by the granting of Consent subject to the conditions referred to in this Notice.

The conditions of the Consent referred to herein are deemed necessary by The Hills Shire Council, pursuant to Part 4, Division 4.3, Section 4.17 of the Environmental Planning and Assessment Act, 1979.

This Consent shall become effective from the endorsed date of Consent.

This Consent shall lapse unless development, the subject of the Consent, is commenced within five (5) years from the endorsed date of Consent or as otherwise provided under Section 4.53 of the Environmental Planning and Assessment Act, 1979 which may vary the above date of the lapsing of the Consent.

Right of Appeal

Section 8.7 and 8.10 of the Environmental Planning and Assessment Act 1979 confers on the applicant who is dissatisfied with the determination of a consent authority, a right of appeal to the NSW Land and Environment Court exercisable within six (6) months after receipt of this notice. For development applications lodged before 28 February 2011, the statutory timeframe for appeal is twelve (12) months from the determination date.

APPLICANT Sekisui House Australia Pty Ltd

OWNER: SH Orchards Pty Limited

PROPERTY: Lot 101 DP 1176747 and Lot 1 DP 1233538,
RMB 47 Spurway Drive, Baulkham Hills and 104
Fairway Drive, Kellyville

DEVELOPMENT: Concept Masterplan encompassing a total of
1,300 dwellings.

ENDORSED DATE OF CONSENT: 11 April 2018

CONDITIONS OF CONSENT

GENERAL MATTERS

1. Development in Accordance with Submitted Plans (as amended)

The development being carried out in accordance with the approved plans and details submitted to Council, as amended in red, stamped and returned with this consent.

The amendments in red include: -

- The 6 metre setback for Building A3 and all buildings east of Stranger's Creek is not approved as part of this application. All future built form applications east of Stranger's Creek shall address the Development Control Plan and justify any setback encroachments.

REFERENCED PLANS AND DOCUMENTS

DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-000-005	Masterplan Setbacks	-	C	12 December 2017
MP-000-006	Masterplan Building Envelope	-	E	12 December 2017
MP-250-010	North Envelope Elevation - Linear Park	-	C	12 December 2017
MP-250-020	South Envelope Elevation - Spurway Drive	-	C	12 December 2017
MP-250-040	West Envelope Elevation - Fairway Drive	-	C	12 December 2017
MP-350-001	GA Section Envelope Section 01	-	E	12 December 2017
MP810-001	Staging Stage 1	-	D	21 March 2017
MP810-002	Staging Stage 2	-	D	21 March 2017
MP810-003	Staging Stage 3	-	D	21 March 2017
MP810-004	Staging Stage 4	-	D	21 March 2017
MP810-005	Staging Stage 5	-	E	13 December 2017

512SL	Landscape Masterplan – 2m Shared Path	25	J	24 April 2017
512SL	Landscape Sections	28	A	13/12/2017

No work (including excavation, land fill or earth reshaping) shall be undertaken prior to the issue of the Construction Certificate, where a Construction Certificate is required.

2. Compliance with Masterplan

Approval is granted for the proposed Masterplan in accordance with the plans and details provided with the application to provide guidance for future development of the site. All Stages of works the subject of the Masterplan will require the submission and approval by the relevant authority of an application as required by the relevant legislation including all external authorities with the exception of the Office of Environment and Heritage in relation to flora and fauna impacts which are required to be offset in accordance with Condition 3.

3. Ecology Requirements

i. Biodiversity Impact Mitigation Requirements

To mitigate the potential impacts of construction, the developer must comply with the conditions in Schedule 1 On-site Measures set out in Biobanking Statement ID 49 issued by the NSW Office of Environment & Heritage under the Masterplan development. The site-specific Construction Environmental Management Plan must be prepared taking into account conditions 1.2 to 1.14 of Schedule 1. The CEMP must be submitted to The Hills Shire Council and approved by the Manager – Environment and Health prior to issue of a Construction Certificate.

ii. Biodiversity Offsetting Requirements

To offset the loss of biodiversity from the site the developer must comply with all of the credit retirement conditions in Schedule 2 of Biobanking Statement ID 49 issued by the NSW Office of Environment & Heritage under the Masterplan development. The biodiversity credits must be retired prior to any physical works commencing for each stage of the development. Evidence of retirement of ecosystem credits in accordance with the Biobanking Statement conditions must be submitted to The Hills Shire Council's Manager – Environment and Health.

4. Southern Road Verge – Spurway Drive

All future Applications and construction works involving the southern verge of Spurway Drive west of the golf course entrance driveway shall incorporate a 2 metre wide shared path and street tree landscaping in accordance with Landscape Section 'Option B' Project No. 512SL Sheet No. 28 Revision A.

5. Engineering Works Requirements

a) Road Formation

Roads are to be delivered as per the early works/ infrastructure development application over the site (DA 634/2017/ZB), complying specifically with the following configurations:

Road Name:	Formation: (Footpath/ Carriageway/ Footpath) (m)
Spurway Drive	Road Type: Collector Road w/ cyclepath 3.5m/ 9.5m/ 3.5m (16.5m) Pavement Design: Collector Road (Design Guidelines Section 3.12)
Stone Mason Drive	Road Type:

	Collector Road w/ Cyclepath 3.5m/ 9.5m/ 3.5m (16.5m) Pavement Design: Collector Road (Design Guidelines Section 3.12)
Lucinda Avenue	Road Type: Access Street 3.5m/ 8.5m/ 3.5m (15.5m) Pavement Design: Access/ Local (Design Guidelines Section 3.12)
Castle Pines Drive	Road Type: Private Road 0m/ 7.0m/ 0m (7.0m) Pavement Design: Private (Design Guidelines Section 3.12)
Private Road (MC02)	Road Type: Private Road 0m/ 6.0m/ 0m (6.0m) Pavement Design: Private (Design Guidelines Section 3.12)

b) Stormwater & Water Sensitive Urban Design

All future development applications are to generally comply with the following, along with any other requirements of Council at the time:

- Flood Study Report prepared by Northrop dated 2 September 2016
- Water Sensitive Urban Design (WSUD) Strategy prepared by Alluvium dated September 2016 and their subsequent response memorandum dated 3 March 2017;

The following design requirements also apply:

- Runoff from each of the sites it to be treated and is to meet the following targets for nutrient and sediment removal:
 - o 95% reduction in the annual average load of gross pollutants
 - o 85% reduction in the annual average load of total suspended solids
 - o 65% reduction in the annual average load of total phosphorous
 - o 45% reduction in the annual average load of total nitrogen
- The bio-retention treatment systems (Basins 3 and 4) within the linear park are not to treat stormwater runoff from the public trunk drainage line. Public easements are to be created over private land.
- Gross Pollutant Traps (GPTs) are not to be located within any public trunk drainage lines or on public land. Any proposed GPT's are to be located within private land only.

These elements must be designed and constructed in accordance with best practice water sensitive urban design techniques and guidelines. Such guidelines include, but are not limited to:

- Water Sensitive Urban Design – Technical Guidelines for Western Sydney, 2004, <http://www.wsud.org/tools-resources/index.html>
- Australian Runoff Quality – A Guide to Water Sensitive Urban Design, 2005, <http://www.ncwe.org.au/arq/>

6. Acoustic Requirements

The recommendations of the *Masterplan DA Acoustic Assessment* for 47 Spurway Drive, Baulkham Hills, prepared by Acoustic Logic, project number 20160992.1, dated 22/02/2017 and submitted as part of the concept masterplan are to be complied with. In particular, site specific acoustic assessments are to be submitted for every stage (sections 4.3 and 5.3). The acoustic assessment is to address internal noise levels, mechanical plant and construction noise management.

The following overall project specific criterion is to be achieved at every stage of the development to prevent background creep.

- Day 0700-1800: 50dB(A)_{leq15min}
- Evening 1800-2200: 45dB(A)_{leq15min}
- Night 2200-0700: 40dB(A)_{leq15min}

6A. Acoustic Requirements Stage 5

The future development applications for Stage 5 are to include an acoustic report addressing the need for acoustic treatment to the rear of properties within the Central Park development backing on to Spurway Drive.

7. Contamination Requirements

The recommendations of the *Detailed Site Investigation* for 47 Spurway Drive, Baulkham Hills prepared by EI Australia, referenced as E23307 AA_Rev0, dated 6 April 2017 and submitted as part of the concept masterplan are to be implemented as conditioned in each approved stage of the development.

A validation report shall be submitted to Council's Manager – Environment and Health and the Certifying Authority (if not Council) prior to the subdivision certificate being issued. The validation report must reference the *Detailed Site Investigation* for 47 Spurway Drive, Baulkham Hills prepared by EI Australia, referenced as E23307 AA_Rev0, dated 6 April 2017 and include the following:

- The degree of contamination originally present;
- The type of remediation that has been completed; and
- A statement which clearly confirms that the land is suitable for the proposed use.

8. Waste Management Plans Required

All future built form applications must be accompanied by a construction and operational waste management plan. The built form designs must be generally in accordance with the details provided in the Master Plan. Built form designs are subject to a further detailed assessment.

9. Aboriginal Archaeological Sites or Relics

If, during activities involving earthworks and soil disturbance, any evidence of an Aboriginal archaeological site or relic is found, all works on the site are to cease and the Office of Environment and Heritage must be notified immediately.

10. European Sites or Relics

If, during the earthworks, any evidence of a European archaeological site or relic is found, all works on the site are to cease and the Office of Environment and Heritage be contacted immediately. All relics are to be retained in situ unless otherwise directed by the Office of Environment and Heritage.

ATTACHMENT: DEVELOPMENT ADVISORY NOTES

Pursuant to Section 4.17 of the Environmental Planning and Assessment Act 1979, the reasons for the conditions imposed on this application are as follows:-

1. To facilitate the orderly implementation of the objectives of the Environmental Planning and Assessment Act, 1979 and the aims and objectives of Council's planning instrument.
2. To ensure that the local amenity is maintained and is not adversely affected and that adequate safeguards are incorporated into the development.
3. To ensure the development does not hinder the proper and orderly development of the subject land and its surrounds.
4. To ensure the relevant matters for consideration under Section 4.15 of the Environmental Planning and Assessment Act 1979 are maintained.

Should you require any further information please contact Robert Buckham on 9843 0267.

Yours faithfully



Paul Osborne

MANAGER-DEVELOPMENT ASSESSMENT

ATTACHMENT 12 – MODIFICATION CONSENT 736/2017/JP/A



THE HILLS
Sydney's Garden Shire

THE HILLS SHIRE COUNCIL
3 Columbia Court, Norwest NSW 2153
PO Box 7064, Norwest 2153
ABN 25 034 494 656 | DX 9966 Norwest

21 January, 2020

Sekisui House Australia Pty Ltd
Ground Floor 68 Waterloo Rd
MACQUARIE PARK NSW 2113

Ref No.736/2017/JP/A
Delegated Authority

Dear Sir/Madam

SECTION 4.55 MODIFICATION OF DEVELOPMENT CONSENT

CONSENT NUMBER: 736/2017/JP/A

Pursuant to the provisions of Section 122(1) of the Environmental Planning and Assessment Regulation 2000, notice is hereby given of the determination by The Hills Shire Council of the Development Application described below:

APPLICANT:	Sekisui House Australia Pty Ltd
OWNER:	SH Orchards Pty Limited
PROPERTY:	Lot 4 DP 271187, Lot 101 DP 1176747, Lot 2 DP 1246113 104 Fairway Drive, NORWEST, PRIVATE ROAD, RMB 47 Spurway Drive, NORWEST
DEVELOPMENT:	Section 4.55 (1A) Modification to the staging of an approved concept masterplan.
DATE OF APPROVAL:	21 January 2020
ENDORSED DATE OF ORIGINAL CONSENT:	11 April 2018

www.thehills.nsw.gov.au | 9843 0555

The Section 4.55 application for modification of Development Consent 736/2017/JP be approved as follows:

CONDITIONS OF CONSENT

Condition No. 1 to be **deleted** and **replaced** as follows:

1. Development in accordance with submitted plans

The development being carried out in accordance with the approved plans and details associated with development application 736/2017/JP as amended in red, and as further modified by the following plans approved with Development Consent No. 736/2017/JP/A, except where amended by other conditions of consent.

REFERENCED PLANS 736/2017/JP

The amendments in red include: -

- The 6 metre setback for Building A3 and all buildings east of Stranger's Creek is not approved as part of this application. All future built form applications east of Stranger's Creek shall address the Development Control Plan and justify any setback encroachments.

DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-000-005	Masterplan Setbacks	-	C	12 December 2017
MP-000-006	Masterplan Building Envelope	-	E	12 December 2017
MP-250-010	North Envelope Elevation – Linear Park	-	C	12 December 2017
MP-250-020	South Envelope Elevation – Spurway Drive	-	C	12 December 2017
MP-250-040	West Envelope Elevation – Fairway Drive	-	C	12 December 2017
MP-350-001	GA Section Envelope Section 01	-	E	12 December 2017
MP810-001	Staging Stage 1	-	D	21 March 2017
MP810-002	Staging Stage 2	-	D	21 March 2017
MP810-003	Staging Stage 3	-	D	21 March 2017
MP810-004	Staging Stage 4	-	D	21 March 2017
MP810-005	Staging Stage 5	-	E	13 December 2017
512SL	Landscape Masterplan – 2m Shared Path	25	J	24 April 2017
512SL	Landscape Sections	28	A	13/12/2017

REFERENCED PLANS 737/2017/JP/A

DRAWING NO	DESCRIPTION	SHEET	REVISION	DATE
MP-410-001	Staging Plan	-	B	17 January 2020

Pursuant to Clause 122 of the Environmental Planning and Assessment Act Regulations 2000, the reasons for the conditions imposed on this application are as follows:-

1. To facilitate the orderly implementation of the objects of the Environmental Planning and Assessment Act, 1979 and the aims and objectives of Council's Planning instrument.
2. To ensure that the local amenity is maintained and is not adversely affected, and that adequate safeguards are incorporated into the development.
3. To ensure the development does not hinder the proper and orderly development of the subject land and its surrounds.
4. To ensure the relevant heads of consideration under Section 4.15 of the Act 1979 are maintained.

Right of Review

Section 8.2 of the Environmental Planning and Assessment Act 1979 confers on the applicant the right of review of determination, subject to such request being made within six (6) months of the determination date and accompanied by a fee as prescribed in clause 257 of the Environmental Planning and Assessment Regulation 2000.

Section 8.2(2) of the Environmental Planning and Assessment Act 1979 does not permit a review of determination in respect of:

- a) A Complying Development Certificate,
- b) Designated Development,
- c) Development referred to in Division 4.6

Right of Appeal

Section 8.9 and 8.10 of the Environmental Planning and Assessment Act 1979 confers on the applicant who is dissatisfied with the determination of a consent authority, a right of appeal to the NSW Land and Environment Court exercisable within six (6) months of the endorsed date of determination..

Should you require any further information please contact Robert Buckham on 9843 0267.

Yours faithfully



Paul Osborne

MANAGER-DEVELOPMENT ASSESSMENT

ATTACHMENT 1: STATEMENT OF REASONS FOR THE DECISION

ATTACHMENT 1: STATEMENT OF REASONS FOR THE DECISION

PUBLIC NOTIFICATION OF THE DETERMINATION PURSUANT TO ITEM 20(2) (c) AND (d) OF SCHEDULE 1 OF THE ENVIRONMENTAL PLANNING & ASSESSMENT ACT, 1979

DECISION:

APPROVED

DATE OF THE DECISION:

21/01/2020

REASONS FOR THE DECISION:

The Development Application has been assessed against the relevant heads of consideration under the following statutory requirements:

- Section 4.15 and 4.55 of the Environmental Planning and Assessment Act, 1979
- The Hills Local Environmental Plan 2012
- The Hills Development Control Plan 2012

and is considered satisfactory subject to conditions as outlined in the Notice of Determination.

HOW COMMUNITY VIEWS WERE TAKEN INTO ACCOUNT IN MAKING THE DECISION:

1. The Development Application was notified in the local newspaper in accordance with Section 3.1 of The Hills Shire Development Control Plan 2012 Part A Introduction which outlines the advertising and notification procedure pathways for various forms of development.
2. The submission received during the notification period has been considered in the assessment of the Development Application pursuant to Section 4.15(d) of the Act and issues raised do not warrant refusal of the application.
3. The Development Application has been assessed having regard to Section 4.15(e) of the Act taking into consideration the public interest.