

Ph: (02) 9986 3362 Fax: (02) 9986 3364

Suite 1, 9 Narabang Way, Belrose 2085

PO Box 716, Turramurra 2074

Email: [james@jameslovell.com.au](mailto:james@jameslovell.com.au)

Web: [www.jameslovell.com.au](http://www.jameslovell.com.au)

26 October 2021

The General Manager  
Ku-ring-gai Council  
Locked Bag 1006  
GORDON NSW 2072

Dear Sir/Madam,

**DEVELOPMENT APPLICATION No. 0145/2015**  
**2 – 8 PYMBLE AVENUE, PYMBLE**

---

**Introduction**

This Statement of Environmental Effects (SEE) has been prepared to accompany an Application to amend Development Consent No. 0145/2015 pursuant to Section 4.56 of the *Environmental Planning and Assessment Act 1979*.

The subject site formally comprises Strata Plan 97280, and is commonly known as No's 2 – 8 Pymble Avenue, Pymble.

The site is located at the junction of Pymble Avenue and Everton Street. The site encompasses an area of approximately 7,879m<sup>2</sup>, and is generally rectangular in shape with frontages of approximately 73.8 metres to Pymble Avenue and 99.5 metres to Everton Street.

The site is currently occupied by a multi-storey residential complex accommodating 93 residential apartments and one (1) non-residential tenancy. The approved development provides a gross floor area of approximately 8,548.4m<sup>2</sup>, including the non-residential tenancy (identified as Lot 94) with a floor area of 100m<sup>2</sup>, occupying a portion of the ground floor level at the corner of Pymble Avenue and Everton Street.

**Approved Development**

On 25 July 2016, the Land and Environment Court upheld an appeal (by way of a Section 34 agreement) in relation to a Development Application (DA No. 0145/2015) for the demolition of the (then) existing dwellings and the construction of a residential flat development.

The approved development was formally described as *“Demolition of existing structures and the erection of three residential flat buildings containing 98 units, a neighbourhood shop, basement car parking and associated landscaping at 2-8 Pymble Avenue and 2-4 Everton Street, Pymble”* (the site is now known as No’s 2 – 8 Pymble Avenue, Pymble).

The approved development (which has now been constructed) generally consists of three (3) residential towers extending above shared off-street car parking facilities. The non-residential tenancy (approved as a *“neighbourhood shop”*) occupies a portion of the ground floor level at the corner of Pymble Avenue and Everton Street.

On 12 December 2019, the approved development was amended pursuant to Section 4.56 of the *Environmental Planning and Assessment Act 1979*. The approved amendments included *“internal reconfiguration, and the addition of waste storage facilities and two water tanks”*.

On 29 September 2020, the Strata Subdivision of the approved development was registered, and an Occupation Certificate was issued on 2 October 2020.

### **Proposed Amendment**

The Applicant has reconsidered the use of the non-residential tenancy (identified as Lot 94) as a *“neighbourhood shop”*, and has identified an alternate use a rental management office.

The general purpose of the rental management office is to facilitate the rent and sales of the residential apartments within the complex, accommodate the building manager and Strata Manager for the complex, and host the general meetings and extraordinary meetings of the Body Corporate.

The physical works associated with the change of use are all internal, and generally limited to the fit-out, with the floor space accommodating two (2) enclosed offices/meeting rooms, a reception and open plan work space, and amenities comprising a kitchenette and accessible bathroom.

The internal works associated with the fit-out are the subject of a separate and concurrent Application for a Building Information Certificate (BIC).

Condition 95 of the Development Consent dictate the hours of operation of the approved *“neighbourhood shop”* as 7.00am to 7.00pm, Monday to Friday, 8.00am to 7.00pm, Saturdays, and 9.00am to 5.00pm, Sunday and Public Holidays.

The proposed rental management office will operate during the same times, and no change is necessary or proposed to the approved hours of operation.

The site is zoned R4 – High Density Residential pursuant to the Ku-ring-gai Local Environmental Plan (LEP) 2015, and *“residential flat buildings”* and *“neighbourhood shops”* are permissible in the zone with the consent of Council.

The location of the non-residential tenancy (identified as Lot 94) is identified on the extracts of the Strata Plan and Architectural Plans below.

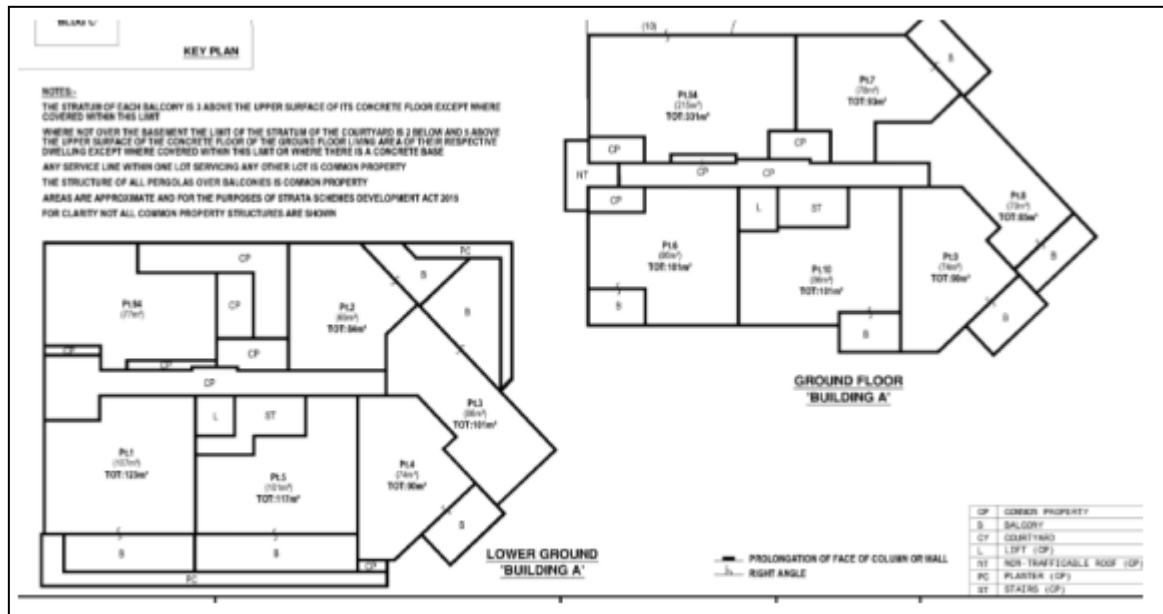


Figure 1 – Extract of Strata Plan Identifying Lot 94



## Legislative Context

Section 4.56 of the *Environmental Planning and Assessment Act 1979* specifies that:

- (1) *A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court 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 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*
  - (c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and*
  - (d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*

Further, Section 4.56(1A) specifies that in determining an application of a consent, the consent authority shall take into consideration such of the matters referred to in Section 4.15 as are of relevance to the development the subject of the application.

## Substantially the Same Development

In *Tipalea Watson Pty Ltd v Ku-ring-gai Council NSWLEC 253*, it was held that substantially the same development maintains the “essential characteristics” of the approved development. Further, in *Moto Projects (No. 2) Pty Ltd v North Sydney Council* [1991] 106 LGERA 298, Bignold J said (at 309 [56]):

*The requisite factual finding 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. The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and 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 prepared in their proper contexts.*

The reference of Bignold J to “essentially” and “materially” the same is derived from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his Honour said in reference to Section 102 of the *Environmental Planning and Assessment Act 1979* (the predecessor to Section 4.55 and 4.56) that “Substantially when used in the Section means essentially or materially or having the same essence”.

In terms of a qualitative assessment, the proposed amendment will not change the physical form of the approved building, its external appearance, or its physical relationship with surrounding land.

In that regard, the physical works associated with the change of use are all internal, and will not be externally visible. Accordingly, the proposed amendment does not alter the location of the buildings and/or uses on the site, and the overall complex retains exactly the same appearance as the approved development.

Further, no changes are proposed to the approved hours of operation, and the general activity of people attending the tenancy will remain substantially unchanged. In that regard, no changes are proposed to the approved off-street car parking provision, or the approved vehicular and pedestrian access arrangements.

In terms of a quantitative assessment, the approved development consists of 93 residential apartments, and one (1) non-residential tenancy. The proposed amendment does not change the overall mix of residential and non-residential uses.

Further, the approved development has a total floor area of approximately 8,548.4m<sup>2</sup>, circumstances in which the non-residential tenancy of 100m<sup>2</sup> represents less than 1.2% of the total floor area of the approved development.

In the circumstances, the amended development maintains the essential features and characteristics of the approved development, and the use, operation and function of the site remain substantially unchanged.

On that basis, the approved development is not being radically altered, and the amended development remains substantially the same as the approved development.

### **Consultation and Notification**

The approved development was formally exhibited in accordance with the relevant legislative requirements, and the consent authority remains responsible for any formal exhibition of the proposed amendment, if required.

Irrespective, the proposed amendment will not change the physical form of the approved building, its external appearance, or its physical relationship with surrounding land.

## Section 4.15 Assessment

The heads of consideration incorporated in Section 4.15 of the *Environmental Planning and Assessment Act 1979* comprise:

- any environmental planning instrument;
- any proposed environmental planning instrument that is or has been the subject of public consultation and that has been notified to the consent authority;
- any development control plan;
- any planning agreement;
- any matters prescribed by the Regulation;
- the likely impacts of the development, including environmental impacts on both the natural and built environments, and the social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made in accordance with the Act or the Regulations; and
- the public interest.

### Environmental Planning Instruments

#### *Ku-ring-gai Local Environmental Plan (LEP) 2015*

The site is zoned R4 – High Density Residential pursuant to the Ku-ring-gai LEP 2015, and “residential flat buildings” and “neighbourhood shops” are permissible in the zone with the consent of Council.

The Applicant has obtained legal advice (*Mills Oakley*, 23 September 2021) which confirms that the use of the non-residential tenancy for the purposes of a rental management office is ancillary to the use of the land as a “residential flat building”, and is therefore, permissible in the zone with the consent of Council.

Clause 2.3 requires the consent authority to have regard to the objectives for development in a zone when determining a DA. The objectives of the zone are expressed as follows:

- *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 provide for high density residential housing close to public transport, services and employment opportunities.*

The amended development remains consistent with (or not antipathetic to) the objectives of the zone on the basis that the residential flat development will continue to provide for the housing needs of the community within a high density residential environment.

Similarly, the residential flat development will continue to contribute to the variety of housing needs within a high density residential environment, and encourage the use of the public transport, services and employment opportunities in the surrounding locality.

Finally, the proposed change of use of the non-residential tenancy to a rental management office will support the management, co-ordination and operation of the approved residential flat development.

The physical works associated with the change of use are all internal, and will not be externally visible. Accordingly, the proposed amendment does not alter the location of the buildings and/or uses on the site, and the overall complex retains exactly the same appearance as the approved development.

Further, no changes are proposed to the approved hours of operation, and the general activity of people attending the tenancy will remain substantially unchanged. In that regard, no changes are proposed to the approved off-street car parking provision, or the approved vehicular and pedestrian access arrangements.

In the circumstances, the LEP does not incorporate any further controls of specific relevance to the proposed amendment.

#### Proposed Environmental Planning Instruments

There are no proposed environmental planning instruments of specific relevance to the proposed amendment.

#### Development Control Plans

The Ku-ring-gai Development Control Plan (DCP) 2021 is generally intended to supplement the provisions of the Ku-ring-gai LEP 2015, and provide more detailed objectives and controls to guide future development.

Again, the physical works associated with the change of use are all internal, and will not be externally visible. Accordingly, the proposed amendment does not alter the location of the buildings and/or uses on the site, and the overall complex retains exactly the same appearance as the approved development.

Further, no changes are proposed to the approved hours of operation, and the general activity of people attending the tenancy will remain substantially unchanged. In that regard, no changes are proposed to the approved off-street car parking provision, or the approved vehicular and pedestrian access arrangements.

In the circumstances, the DCP does not incorporate any further controls of specific relevance to the proposed amendment.



### Impacts of the Development

The physical works associated with the change of use are all internal, and will not be externally visible. Accordingly, the proposed amendment does not alter the location of the buildings and/or uses on the site, and the overall complex retains exactly the same appearance as the approved development.

Further, no changes are proposed to the approved hours of operation, and the general activity of people attending the tenancy will remain substantially unchanged. In that regard, no changes are proposed to the approved off-street car parking provision, or the approved vehicular and pedestrian access arrangements.

Finally, the amended development maintains the essential features and characteristics of the approved development, and the use, operation and function of the site remain substantially unchanged.

### **Conclusion**

I trust this submission is satisfactory for your purposes, however should you require any further information or clarification please do not hesitate to contact the writer.

Yours Sincerely,



James Lovell  
Director  
James Lovell and Associates Pty Ltd