

General Manager
Fairfield City Council
PO Box 21
FAIRFIELD NSW 1860

26 February 2024

Our ref 240925

Attention: City Development and Compliance Group

Dear Sir,

**Development application for affordable housing
Property: 46 Court Road, Fairfield**

We act for Fairfield Developments No. 1 Pty Ltd.

We are instructed to prepare this submission in support of a development application (**DA**) in relation to the property identified as Lot 100 in Deposited Plan 1277808 and known as 46 Court Street, Fairfield (**Property**).

The DA will propose development for **affordable housing** pursuant to *State Environmental Planning Policy (Housing) 2021 (Housing SEPP)*, associated with a mixed-use development that is currently under construction at the Property.

The purpose of this submission is to identify and address the relevant provisions of the Housing SEPP which permit a development to benefit from additional floor space ratio (**FSR**) and building height, above and beyond the general development standards for such that apply to the land, in exchange for the provision of an affordable housing component.

1. SUMMARY

1.1 For reasons set out in the following:

- 1.1.1 A new DA is an appropriate means of seeking, and (subject to other jurisdictional matters and a merit assessment outside the scope of this submission) being granted consent to provide a development that comprises affordable housing under the Housing SEPP.
- 1.1.2 The Property and the development to be proposed under the new DA is eligible and can benefit from the additional FSR and building height available under the Housing SEPP.

2. BACKGROUND

- 2.1 On 21 December 2015, Council approved development application number 687.1/2014, granting consent subject to conditions (**Consent**) for:

Demolition of existing structures and the construction of an 8-12 storeys mixed use development consisting of 4 multi-storey buildings containing 290 residential apartments (9 studio apartments, 92 x 1-bedroom apartments, 152 x 2-bedroom apartments and 37 x 3-bedroom apartments) and 1,413sqm of commercial/retail floor space above 3 levels of basement car park and associated landscaping

(Approved Development)

- 2.2 Prior to the Consent lapsing, the Approved Development was physically commenced on the Property.
- 2.3 Construction of the Approved Development has continued and currently remains ongoing and is at an advanced stage.
- 2.4 On 14 December 2023, the *State Environmental Planning Policy Amendment (Housing) 2023 (SEPP Amendment)* was published on the NSW Legislation website and (to the extent relevant in this matter) came into force as part of the amended Housing SEPP.
- 2.5 Broadly, the SEPP Amendment and the amendments made to the Housing SEPP that are relevant to this submission are aimed at increasing the supply of affordable housing across the State.

3. PROPOSAL

- 3.1 Our client proposes to utilise the affordable housing provision of the SEPP Amendment and, under the Housing SEPP, seek consent for development comprising the following:

3.1.1 Additional levels atop the buildings of the Approved Development:

- a) Increasing the maximum overall height of buildings at the Property by 11.25 metres, from 38 metres (Approved Development) to 49.25 metres.

3.1.2 Additional gross floor area (GFA) of 6,784sqm to the Approved Development:

- a) Increasing the 27,767sqm of GFA of the Approved Development to 34,551sqm;
- b) Increasing the FSR of development at the Property from 3:1 (Approved Development) to 3.74:1;
- c) Provision of 15.5% of the FSR of the combined development, being the Approved Development and the proposed development (**Combined Development**) as an **affordable housing component**.

3.1.3 Based on the above parameters, a total of 91 additional apartments to the Approved Development, comprising:

- a) 7 x studio apartments (a reduction of 2 from the 9 x studio apartments of the Approved Development);
- b) 111 x 1-bedroom apartments (an increase of 19 from the 92 x 1-bedroom apartments of the Approved Development);
- c) 217 x 2-bedroom apartments (an increase of 65 from the 152 x 2-bedroom apartments of the Approved Development);
- d) 46 x 3-bedroom apartments (an increase of 9 from the 37 x 3-bedroom apartments of the Approved Development); and
- e) A total of 381 apartments (increase of 91 apartments from the 290 apartments of the Approved Development).

(Proposal)

3.2 We are instructed that:

3.2.1 The capital investment value (**CIV**) of the Proposal is below \$75 million and so is local development rather than ***State significant development***.

- a) The CIV for the new DA is based on the development for which consent is sought only, i.e. the Proposal;
- b) CIV for the new DA does not include the Approved Development, which has already been approved and is the subject of the Consent;
- c) Refer to our submissions below regarding an amending DA.

3.2.2 The 15.5% ***affordable housing component*** (as defined under section 15B of the Housing SEPP – **Affordable Housing Component**) will satisfy the definition of ***affordable housing*** under section 1.4 of the *Environmental Planning and Assessment Act 1979*, and section 13 of the Housing SEPP.

3.3 The Proposal, if approved, would have the effect of amending the Approved Development to the extent necessary to accommodate it.

4. AMENDING DEVELOPMENT APPLICATION

4.1 The Approved development at the Property is currently being undertaken in accordance with the Consent.

4.2 To provide affordable housing for the benefit of the community by utilising the Affordable Housing Provisions, and to ensure a Combined Development can be constructed in the most efficient manner, our client will lodge a (or lodges this) new DA with Council.

4.3 This can be sought through a further DA, in an approach sometimes referred to as an “amending DA”.

4.4 In *AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces* [2021] NSWCA 112 at [229] to [235], and referring to and consolidating earlier authorities on the same subject matter, the Court of Appeal held (paraphrasing):

- 4.4.1 If a proponent wishes to carry out a different development different the development approved under a development consent, the proponent has two options:
- a) Either make a fresh application for another development consent; or
 - b) Apply to modify the already granted development consent or approval.
- 4.4.2 Amendments to the EPA Act to include provisions allowing modification of a development consent (now sections 4.55 and 4.56 of the EPA Act) do not abrogate the right to seek to obtain successive development consents in respect of the same land: *Progress and Securities Pty Ltd v North Sydney Municipal Council* (1988) 66 LGRA 236 at [242].
- 4.4.3 An applicant has the option of either applying to modify an existing development consent, provided the modification sought falls within the scope of the provisions allowing for modification of a development consent, or applying for a further development consent.
- 4.4.4 A development application cannot be made to vary the terms of a development consent directly; a development application can only be made seeking consent for the carrying out of development: *Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 (**Gordon & Valich**) at [15] and [16].
- 4.4.5 Nevertheless, the grant of another development consent may have the consequence of effecting a modification of the original development consent in two ways;
- a) The second development consent may be granted subject to a condition requiring the modification or surrender of the original development consent (under section 4.17(5) of the EPA Act); or
 - b) The terms in which the second development consent is granted and the carrying out of development in accordance with the second development consent may have the consequence of effecting a variation of the original consent: *Gordon & Valich* at [17]; *Auburn Municipal Council v Szabo* (1971) 67 LGRA 427 (**Szabo**) at [432] to [433].
- 4.4.6 There is nothing to prevent a person having two development consents to carry out development on the same land: *Liverpool City Council v Home Units Australia Pty Ltd* [1973] 2 NSWLR 61 at [70]; *Szabo* at [433]; *Waverley Council v Hairis Architects* [2002] NSWLEC 180 (**Hairis Architects**) at [30].
- 4.4.7 A development application can be made, and development consent can be granted, to erect or use a distinct part of a building or land that is already the subject of another development consent: *Hairis Architects* at [32].
- 4.4.8 The two development consents applying to development on the same land need to be read together to ascertain the development that is authorised to be carried out on the land: *Pilkington v Secretary of State for the Environment* [1974] 1 All ER 283 at [287].

4.5 Applying the above authority to the subject scenario:

- 4.5.1 Our client seeks further development consent for the Property by way of a new DA rather than a modification application, as is its right.
- 4.5.2 The further development consent sought is for development at the Property, as detailed above in the description of the Proposal, rather than a mere variation of the terms of the Consent directly.
- 4.5.3 Any consent granted under the new DA can be conditioned accordingly so that it has the effect of modifying the Consent.
- 4.5.4 The development proposed under the Proposal would, if approved, have the practical effect of modifying the Approved Development.
- 4.5.5 If the new DA is approved, our client will have two development consents applicable to the development and the Property, which is acceptable.
- 4.5.6 Those two consents would be read together to ascertain the Combined Development, being the overall development authorised to be carried out at the Property.

5. AFFORDABLE HOUSING PROVISIONS

- 5.1 A key principle of section 2 of the Housing SEPP, since it came into force in its original form in November 2021, is to encourage ... *the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability.*
- 5.2 Further, the objective of Division 1, Part 2 of Chapter 2 of the Housing SEPP is stated at section 15A as:

... to facilitate the delivery of new in-fill affordable housing to meet the needs of very low, low and moderate income households.
- 5.3 In our submission, the assessment of a DA for development such as the Proposal, must take these overriding aims into account and be viewed and assessed in a manner that is beneficial to the achievement of these overriding aims.
- 5.4 In the following, we identify and provide a critical analysis of the Proposal and the Property against relevant affordable housing provisions of Division 1, Part 2 of Chapter 2 of the Housing SEPP (**Affordable Housing Provisions**) which our client seeks to utilise for the purpose of the Proposal.

Eligibility of Affordable Housing Provisions

- 5.5 The Housing SEPP, generally, applies to the State: section 7, Housing SEPP.
- 5.6 Specifically, the Affordable Housing Provisions apply to *development that includes **residential development*** (which includes residential flat building component within a mixed use development: section 15B(1), Housing SEPP) if:
 - 5.6.1 The development is permitted with consent under Chapter 3, Part 4 of the Housing SEPP or another environmental planning instrument.

- a) The Proposal is permitted with consent on the Property pursuant to the *Fairfield Local Environmental Plan 2013 (LEP)*.
- 5.6.2 The Affordable Housing Component is at least 10%.
- a) As detailed further below, we are instructed that the proposed Affordable Housing Component of the Proposal is 15.5% of the Combined Development.
- 5.6.3 For development on land within the Six Cities Region, is in an **accessible area** (as defined under Schedule 10 of the Housing SEPP).
- a) The Property is:
 - (i) Located in Fairfield which is within the Six Cities Region; and
 - (ii) Is in an accessible area, as it is within 800 metres walking distance of the public entrance of Fairfield Railway Station (as well as being within 400 metres of a bus stop).
- 5.6.4 The Affordable Housing Component of the Proposal does not include any affordable housing that is required under another environmental planning instrument or a planning agreement.
- 5.7 Based on the above, the Proposal and the Property satisfy the bare eligible requirements of the Affordable Housing Provisions: section 15C, Housing SEPP.

Additional FSR and Building Height

- 5.8 Pursuant to section 16 of the Affordable Housing Provisions (with our emphasis):
- (1) *The maximum FSR for development that includes residential development to which this division applies is the maximum permissible floor space ratio for the land plus an additional floor space ratio of up to 30%, based on the minimum affordable housing component calculated in accordance with subsection (2).*
 - (2) *The minimum affordable housing component, which must be at least 10%, is calculated as follows—*
$$\text{affordable housing component} = \frac{\text{additional floor space ratio}}{(\text{as a percentage})} \div 2$$
 - (3) *If the development includes residential flat buildings or shop top housing, the maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height that is the same percentage as the additional floor space ratio permitted under subsection (1).*

Example—

Development that is eligible for 20% additional floor space ratio because the development includes a 10% affordable housing component, as calculated under subsection (2), is also eligible for 20% additional building height if the development involves residential flat buildings or shop top housing.

- (4) *This section does not apply to development on land for which there is no maximum permissible floor space ratio.*

Additional FSR

5.9 Based on the above:

- 5.9.1 We note that section 16(1) of the Affordable Housing Provisions refers to “... *development that includes residential development* ...” and so involves the overall FSR of the development and not merely the residential FSR component of a development.
- 5.9.2 Pursuant to section 4.4(2) of the LEP, the maximum FSR applicable to the Property is 3.5:1 (**FSR Development Standard**), which equates (based on the 9,233sqm total area of the Property) to a maximum GFA of 32,315.5sqm.
- 5.9.3 To benefit from the full additional 30% FSR of section 16(1) of the Affordable Housing Provisions (**Additional 30% FSR**), the Proposal is required (in accordance with the equation at section 16(2) of the Affordable Housing Provisions) to provide 15% Affordable Housing Component.
 - a) We are instructed that the proposed Affordable Housing Component of the Proposal is 15.5%, which is in excess of the 15% required Affordable Housing Component;
 - b) This being so, the Proposal may benefit from the Addition 30% FSR.
- 5.9.4 The FSR Development Standard and the Additional 30% FSR results in an applicable maximum FSR of 4.55:1, equating to a total GFA of 42,010.15sqm.
- 5.9.5 The Approved Development comprises an FSR of 3:1 and a total GFA of 27,767sqm, significantly below the FSR Development Standard, and we are instructed that:
 - a) The Proposal proposes an additional 6,784sqm of GFA;
 - b) The Combined Development would comprise an FSR of 3.74:1 and a total GFA of 34,551sqm; and
 - c) Thus, the Proposal and the Combined Development would be well below the maximum FSR permitted under the Affordable Housing Provisions.

Additional Building Height

- 5.10 Following the same assessment criteria and analysis as carried out for FSR at paragraphs [4.9.3] above, pursuant to section 16(3) of the Affordable Housing Provisions, the Proposal may also benefit from an additional 30% in building height.
 - 5.10.1 Pursuant to section 4.3(2) of the LEP, the maximum height of buildings applicable to the Property is 38 metres (**Height Development Standard**).
 - 5.10.2 To benefit from the full additional 30% in building height (**Additional 30% Height**), the Proposal is required (in accordance with the equation at section 16(2) of the Affordable Housing Provisions) to provide 15% Affordable Housing Component.

- a) We are instructed that the proposed Affordable Housing Component of the Proposal is 15.5%, which is in excess of the 15% required Affordable Housing Component;
 - b) This being so, the Proposal may benefit from the Additional 30% Height.
- 5.10.3 The Height Development Standard and the Additional 30% Height results in an applicable maximum building height of 49.4 metres.
- 5.10.4 The Approved Development comprises a maximum building height of 38 metres in compliance with the Height Development Standard, and we are instructed that:
 - a) The Proposal proposes an additional 11.25 metres of building height;
 - b) The Combined Development would comprise an overall building height of 49.25 metres; and
 - c) Thus, the Proposal and the Combined Development would comply with the maximum building height permitted under the Affordable Housing Provisions.
- 5.11 We are instructed that, pursuant to section 21(1) of the Affordable Housing Provisions, the Combined Development would include the proposed Affordable Housing Component, managed by a registered community housing provider, for at least 15 years from the issue of an occupation certificate for the Combined Development.
- 5.12 Relevant and appropriate conditions can be imposed on any consent granted for the Proposal to ensure the retention and management of the Affordable Housing Component in accordance with the Housing SEPP.

Other Provisions

- 5.13 Sections 17 and 18 of the Affordable Housing Provisions do not apply to the Proposal.
- 5.14 Other documents lodged with the DA, including the architectural plans and Statement of Environmental Effects, will address the non-discretionary development standards and design requirements of the Affordable Housing Provisions (as well as the overall merits of the Proposal in general).

6. CONCLUSIONS

- 6.1 Seeking further consent through a new DA is a lawful and appropriate means of pursuing the Proposal. If granted, the second consent would effectively modify the Consent and would need to be read in conjunction with it.
- 6.2 The Affordable Housing Provisions are available to the Property.
- 6.3 The Proposal satisfies the requirements of the Affordable Housing Provisions to benefit from the Additional 30% FSR and the Additional 30% Height on account of it providing a 15.5% Affordable Housing Component.
- 6.4 The Proposal complies with the Affordable Housing Provisions in relation to the additional FSR and the additional building height.

- 6.5 Other jurisdictional matters and an assessment of the merits of the Proposal are beyond the scope of this submission but will be addressed in other documents lodged in support of the DA (including architectural plans and a Statement of Environmental Effects).

To discuss any of the information in this letter, please contact the undersigned.

Yours faithfully

Bartier Perry



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