



Office of Sustainable Development Assessment and Approvals, Urban Assessments
Planning Assessment Report

Development Application DA 296–12–2004

1 SUMMARY

This report is an assessment of the proposed development the subject of Development Application number DA 296-12-2004.

The application seeks consent for a construction of a pool, two spa's and associated timber decking on the roof top terrace of the existing five storey residential flat building.

The Minister for Planning is consent authority under Clause 10 of State Environmental Planning Policy No.71 – Coastal Protection.

It is recommended that the development application be determined by **granting consent**.

2 BACKGROUND

2.1 Site Context

The site is located at No.15 Government Road, Nelson Bay within the local government area of Port Stephens.

The development application was lodged with the Department on 2 December 2004 in accordance with the *Environmental Planning and Assessment Act, 1979* (the Act).

The subject property is located on the south western corner of Government Road and Church Street, Nelson Bay. The subject property is known as 15 Government Road and is described as Lot 1 DP 1058980. The subject site is rectangular in shape with a site area of approximately 990m². Upon the site is erected a recently constructed five storey residential flat building, comprising ten units over four storeys above a carpark.

To the immediate south is situated a single story cottage. Development to the east is also single storey house. To the west across the road is the former Nelson Bay Public School, to the north west the local police station and to the north a low rise motel building.

A site visit was conducted on 13 May 2004.

A site Plan is at **Tag "D"**

2.2 Relevant approvals

A development application (DA 16-1999-2239-1) for this residential flat building containing 10 units was approved by Port Stephens Council 11 April 2000 measuring up to approximately 14.8 m measure vertically from natural ground level. Notice of Determination is at **Tag "E"**

A development application (DA 16-2003-1167-1) for a roof top terrace was approved by Port Stephens Council on 4th September 2003. This resulted in the overall height being increased by approximately 1.1m by virtue of the perimeter balustrading. Council Notice of Determination is at attachment **"F"**.

3 THE PROPOSED DEVELOPMENT

The proposed development seeks consent for:

- The construction of a pool measuring approximately 8.5m X 4.0m above unit 9. The pool will be 1.2 m above existing floor level.
- The construction of a spa pool 2.9m X 2.9 m attached to the swimming pool above unit 9.
- The construction of a spa pool 2.4 m X 2.4 m above unit 10
- Associated timber decking / landing area.

Drawings illustrating the proposal are at **Tag “G”** to this report.

4 FRAMEWORK

4.1 *Statement of permissibility*

The site is zoned 2 (C) under the Port Stephens Local Environmental Plan 2000. Development for the purpose of roof top terrace pool development is permissible with development consent. The proposal satisfies the zoning objective and is ancillary to the main use as “Urban Housing” which is permissible with consent.

4.2 *Instrument of consent and other relevant planning instruments*

The proposed development is within the ‘Coastal Zone’ under State Environmental Planning Policy No. 71 – Coastal Protection and also Schedule 2 prescribes (inter alia) the development of structures over 13 metres in height to be State Significant Development. While concurrence of the Director General is required under clause 58 of Hunter REP, a SEPP 1 objection has been made regarding the height of the proposal for non – compliance with clause 19 of Port Stephens Local Environmental Plan. SEPP 1 objection is at **Tag “H”**. Therefore in accordance with clause 9 (2) of SEPP 71 the development is State Significant Development. The Minister is the consent authority under part 3, clause 10 of SEPP 71 – Coastal Protection. An assessment against the aims and matters of consideration under SEPP -71 Coastal Protection is provided in the Compliance Report at **Tag “C”**.

4.3 *Legislative context*

The proposed development is not integrated development. The development is State Significant Development by virtue of State Environment Planning Policy No.71- Coastal Protection.

4.4 *Other statutory provisions*

SEPP 1 – concurrence

An objection under SEPP 1 has been made regarding the proposed development exceeding the height limit of 15m under the Port Stephens Local Environmental Plan 2000. (Tag “H”) Under SEPP 1 the concurrence of the Director-General is required for non compliance with PSLEP 2000. However under s.79B (2) the Minister is required only to consent where concurrence is required. Consultation with the Regional Office was made on 9 February 2005 and no objection was raised to the proposal.

In the circumstances it is considered the objection under SEPP 1 should be upheld. Refer to minutes in the file at **Tag “I”**.

5 CONSULTATION

5.1 *Public consultation*

The application was notified, in accordance with the Regulations and including:

Notifications – landowners/occupiers	18 adjoining and nearby residents were notified of the proposal.
Newspaper advertisements	Advertised in Port Stephens Examiner on 10 February 2005.
Site notices	No site notice
Exhibition dates	Start: 11 February 2005. End: 24 February 2005.
Exhibition venues	<ul style="list-style-type: none"> ▪ Planning Information Centre, 20 Lee Street Sydney ▪ Hunter regional Office ▪ Port Stephens Council ▪ Tomaree library

No submissions received regarding the Application during the exhibition period however a submissions was later received from the Body Corporate of the subject site.

5.2 Referrals

5.2.1 Integrated Approval Bodies

The application was not integrated.

5.2.2 Council

The application was referred to the Port Stephens Council on 09 February 2005. Council responded on 4 March 2005 and advised that they didn't support the proposal for following reasons

- Overdevelopment of the site
- Loss of privacy/ amenity
- Loss of views – structure will be above the 15m height restriction
- Visual impact and loss of amenity

No detailed assessment has been undertaken by Port Stephens Council through this referral process. Further Council was previously dealing with a development application for this proposal which resulted in a court appeal, subsequently discontinued when it was established that Council was not the consent authority. Refer to legal opinion at **Tag "J"**.

Issues raised by Council are not agreed with the reasons for which are discussed in detail in Section 6.2 of this report. Council's full submission is at **Tag "K"**.

5.2.3 NSW Police

The application was referred to the NSW Police on 9 February 2005 who responded on 30 March 2005. NSW Police did not raise any issues from crime prevention and public safety point of view. No objection is raised to approval of the proposal.

5.2.4 Internal Consultation

Internal reference was made to Hunter Regional Office on 9 February 2005 and comments received on 21 of April 2005. The Regional Office reviewed the application and did not raise any issues with or objections to the proposed development from a regional planning perspective.

6 CONSIDERATION

6.1 *The Environmental Planning & Assessment Act, 1979*

6.1.1 *Section 79C*

The application and the likely impacts of the proposed development have been considered in accordance with Section 79C of the Act. An assessment against Clause 2, 7 and 8 of State Environmental Planning Policy No. 71 is at **Tag "C"**. Significant issues are discussed below in Section 6.2.

The subject site is considered suitable for the proposed development. No public submissions were received. The proposed development is considered to be in the public interest.

6.2 *Issues*

6.2.1 *Council Opposition to the Proposed Development*

Issue: Port Stephens Council was previously dealing with a development application for this proposal and opposed the development on the grounds of: overdevelopment; loss of privacy/ amenity; loss of views – structure will be above 15 m height restriction and visual impact and loss of amenity.

No detailed assessment has been carried out by Port Stephens Council through this referral process. Council Submission is at **Tag "K"**.

Raised by: Port Stephens Council

Consideration: The proposal cannot be considered as 'overdevelopment' with relevance to scale, bulk and height of the 5 storey existing flat building. Council Notice of Determination and Consent for the Unit Development dated 11 April 2000 is at **Tag "E"**. The development seeks to make use the opportunities available on the roof terrace and maximise utilisation of the space for the residents. The roof terrace is currently used for recreational purposes approved by Council on 4 September 2003 and Notice of Determination is at **Tag "F"**. The pool and Spas are located within a reasonable setback from the edge of the roof terrace. In relation to ergonomics of human scale and built form no adverse impact on the adjoining residents will result in terms of views from streets, external and internal privacy and amenity. The proposed structures are not readily perceivable from the streets, public places or adjoining property and hence will not have negative impact on streetscape or character of the locality. The proposed structures do not contribute significantly to the height of the building. No loss of views can be anticipated from this development proposal as the works will only be on the roof top and the height of the proposal does not exceed the existing height limit.

Resolution: The proposal does not exceed the approved height limit of the existing building structure. Existing height of the roof top structures above roof slab exceeds 2.3m. The maximum height of the proposed development is only 1.2m above roof slab.

The pool and associated structures are considered as horizontal structural components that do not add significant visual height to the existing structure and do not adversely impact on privacy, views and amenity. The proposed development complies with the Coastal Design Guidelines and is consistent with the aims and zone objectives of the Port Stephens LEP 2000 & Hunter REP.

6.2.2 *Concurrence under Hunter REP and SEPP 1*

Issues: An objection under SEPP 1 has been made by the applicant regarding the development exceeding the height limit under the Port Stephens LEP 2000. (**Tag "H"**).

Raised by: DIPNR - Urban assessment

- Consideration:* An objection under SEPP 1 has been made by the applicant regarding the proposed development exceeding the height limit of 15m under the Port Stephens Local Environmental Plan 2000. Under SEPP 1 the concurrence of the Director-General is required for non compliance with PSLEP 2000. However under s.79B (2) the Minister is required only to consent where concurrence is required. Under Hunter REP Concurrence of the Director- General is required for buildings over 14m in height.
- Consultation with the Regional Office was undertaken. No objection was raised by the Hunter Regional Office with respect of the proposal.
- Resolution:* In the circumstances & is considered the objection under SEPP 1 is supported. Refer to minutes at **Tag “I”**.

6.2.3 Structural Integrity

- Issues:* The structural ability of the existing building to accommodate the additional pool and spas has not been demonstrated.
- Raised by:* Body Corporate
- Consideration:* It is considered that an assessment of the structural capability of the existing building to accommodate the additions should be provided.
- Resolution:* A condition of consent is proposed which requires the submission of a compliance certificate certified by an independent and suitably qualified professional, which states that the existing building can structurally accommodate the additional pool and spas.

6.2.4 Previous Condition of Consent

- Issues:* Council’s notice of determination and associated conditions for the previous modification consent dated 4 September 2003 specifically requires that no additional structures are permitted to be constructed on the roof terrace.
- Raised by:* Urban Assessments
- Consideration:* Council’s condition has been considered however deemed to be inappropriate following an assessment of the merits of the current application.
- Resolution:* No further action required.

7 CONCLUSION

The Minister for Planning is the consent authority.

The application has been considered with regard to the matters raised in section 79C of the Act.

The application has been notified in accordance with the Regulations. All submissions received in the period prescribed by the Regulations have been considered.

On balance, it is considered that the proposed development is acceptable and should be determined by **granting consent**.

8 CONSULTATION WITH THE APPLICANT – DRAFT CONDITIONS

The applicant was asked to comment on the draft conditions of consent on 9 June 2005. The applicant responded on 10 June 2005 and commenting on minor changes to the word “fence” to be replaced with “child safe barrier” in condition A3 and requesting Condition C3 to be removed. These comments were taken in to consideration and relevant C3 condition is to be in accordance with Swimming Pools Act and regulations and new A3 condition will be imposed with the minor change.

9 RECOMMENDATION

It is recommended that the Minister for Planning pursuant to section 80 (1) and 80A of the *Environmental Planning and Assessment Act, 1979* (as amended) and clause 10 of the State Environmental Planning policy No.71 – Coastal Protection:

- (A) grant **consent** to the application subject to conditions (**Tagged “A”**), and
- (B) authorise the Department to carry out post-determination notification.

For Ministerial Endorsement

Prepared by:

Endorsed by

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10 Addendum to Planning Report

Section 9 Recommendation has been amended to reflect the Instrument of Delegation dated 12 September 2005.

Recommendation

It is recommended that the Deputy-Director General, Office of Sustainable Development, Assessments and Approvals, as delegate for the Minister for Planning as described by the Instrument of Delegation dated 12 September 2005 and pursuant to Sections 80(1)(a) and 81 of the *Environmental Planning and Assessment Act, 1979*:

- (A) **approve** the application subject to conditions (tagged “**A**”), and
- (B) authorise the Department to carry out notification of determination of the application to modify the consent.

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