



Office of Sustainable Development Assessment and Approvals, Urban Assessments

Planning Assessment Report

Application to Modify Development Consent

MOD 72-6-2006 modifying DA 71-3-2004

1 SUMMARY

This report is an assessment of the proposed modification, MOD 72-6-2006 of Development Application DA 71-3-2004 under section 96(1A) of the Act lodged by Kich Constructions Pty Ltd, Planet Homes on 9th June, 2006.

The site is located at 59-61 Shoal Bay Road, Shoal Bay in the Port Stephens Local Government Area.

Under the instrument of delegation dated 5th April, 2006 and having regard to the Guidelines for Delegates, it is considered appropriate that the application be determined under delegation by a the Executive Director, Department of Planning..

It is recommended that the modification application be **approved**.

1.1 *Relevant approvals / modifications:*

The subject of DA71-3-2004, approved on 31 January, 2005, was the demolition of an existing motel and the construction of a mixed commercial/tourist/residential development with basement car parking.

Port Stephens Council filed a Class 4 application in the Land and Environment Court on the 21st April 2005 declaring that the Development Consent was invalid and of no effect and that a restraining order be issued to the applicant from carrying out the development.

The grounds on which Council challenged the development consent were as follows:

The Minister

- Failed to assess the application pursuant to SEPP 65
- Took into consideration an irrelevant consideration, namely the Better Urban Living Guidelines for New South Wales (1998) and failed to take into consideration the Residential Flat Design Code; and
- When assessing the application pursuant to Port Stephens DCP PS4, the Minister used the incorrect height (the DCP containing a different definition of height to SEPP71 and the Hunter REP 1989).

The parties appointed Kerry Gordon of Kerry Gordon Planning Services Pty Ltd to provide a detailed independent assessment of the application.

Kerry Gordon responded that in her opinion the design was generally acceptable and worthy of approval subject to some design changes or conditions.

On 15th August, 2005 The Land and Environment Court dismissed the proceedings with Consent Orders that the applicant had agreed to lodge an application with the Minister to modify consent DA71-03-2004 (**Tag K**) as follows:

'The Court notes the undertaking, inter partes, by the Second Respondent to lodge with the First Respondent an application for modification of development consent 71-3-2004 (the consent) seeking to amend the consent:-

- (a) by providing increased setbacks to the rooftop terraces on the western edge of the building; and*
- (b) reducing the height of the front parapet by 500mm and relocating a balustrade further back from the parapet.'*

This modification is in response to the Court consent orders and the applicant's stated aims to bring the building into compliance with the Building Code of Australia and Australian Standards.

2 THE PROPOSED MODIFICATIONS

The applicant proposes a range of modifications which include issues to bring the development into compliance with the requirements of the Building Code of Australia, the Australian Standards as well as to address the issues raised in the Land and Environment Consent Orders as follows:

Basement:

- Driveway width east from left core was 4.6m: amended to the minimum 5.8m to comply with Australian Standards
- Maximum 39 carparking spaces instead of 40 to comply with fire departments recommendations. Additional space relocated to the ground floor car park.
- Fire escapes amended to comply with Australian Standards.
- Modify basement level FFL to 1.49 (from 1.64) to enable adequate headroom for services in basement.

Ground Floor

- Originally fire stairs from basement level and level 1 not aligned and the fire egress was proposed to entry lobby, which does not comply with the BCA: amended to comply.
- RL to car parking amended to provide sufficient head room for basement carparking to comply with Australian Standards
- Fire stair to south east corner re-configured to accommodate stormwater detention tank.
- Loading parking bay for Retail 2 does not comply with Australian Standards: amended to comply and relocated into service bay within carpark area to service all retail shops, not only Retail 2.
- Retail units reconfigured so that all have street frontage. This has consequently changed the width of the arcade/access to the occupants lobby.
- Garbage room relocated and increased in size to provide adequate space for residential and commercial garbage bins (original area not sufficient).

- Bathroom area for commercial/retail suites did not comply with BCA, therefore amended.
- Awning on Shoal Bay Road deleted as it was proposed to be under the balcony above and was therefore not creating any additional covered space.

Level 01

- Fire exit distance to apartment entry exceeds 6m which results in non-compliance with BCA: amended to comply
- Some wet area layouts have been rationalised to create consistencies between the two residential levels to accommodate for vertical ducting (plumbing and mechanical services).
- Alternative lift + fire stair location as a result of core re-location in basement level.
- Window to Bed 1 (Unit 1 + 3) amended to corner location
- Unit 4 amended to create an accessible unit (as per DA condition).
- Separation of Bed 2 + Study in Unit 2 for privacy reasons and to provide better amenity to the bedroom.

Level 02

- Fire exit distance to apartment entry exceeds 6m which results in non-compliance with BCA: amended to comply.
- Some wet area layouts have been rationalised to create consistencies between the two residential levels to accommodate for vertical ducting (plumbing + mechanical services)
- Alternative lift + fire stair location as a result of core relocation in basement level.
- Window to Bed 1 (Unit 8 + 9) amended to corner location.
- Extended terrace to units 10 + 13 off bedrooms to provide vertical separation between the 2 units for privacy and acoustics
- Roof stair to units 10 + 13 amended to exit in the central part of the roof over.

Roof Level

- Stair to units 10 and 13 amended for roof stair to land in the central part of the building and therefore minimise visible bulk
- Masonry wall to service area to provide noise separation to roof users and adjacent properties.
- Amendments to parapet and balustrade as per court recommendations
- Amended lift and fire stair location as a result of core relocation in basement level
- Deletion of skylights to minimise waterproofing issues and ongoing maintenance for residents and the body corporate. Glass doors to roof stair to replace skylights.

See plans at **Tag B** and requested modifications (as listed above) at **Tag C**. The original approved plans and consent are on the attached file (S04/00736) and Tagged A and C.

3 STATUTORY FRAMEWORK

3.1 *Statement of permissibility*

The land is zoned 3(a) – Business General “A” Zone under Port Stephens Local Environmental Plan (PSLEP) 2000. The proposed uses are permissible within the 3(a) zone. Port Stephens Council Development Control Plan (DCP) – PS2 Car Parking Code, PS10 Building Standards and Notification Procedure and PS4 Commercial & Industrial Development Guidelines also apply to the site.

3.2 *Instrument of consent and other relevant planning instruments*

State Environmental Planning Policy No 71 – Coastal Protection (SEPP71) applies to the site, and under clause 10 of this policy, the Minister is the consent authority. The site is not within a sensitive coastal zone, and a Master Plan will not be required for the site.

Hunter Regional Environmental Plan (REP) 1989, SEPP 65 - Design Quality of Residential Flat Development, The Coastal Protection Act 1979, and the Coastal Policy 1997 are also relevant to the subject site.

3.3 *Legislative context*

The development was assessed by the Minister for Planning under SEPP 71 – Coastal Protection. The proposed modification does not impact on the requirements of the Roads Act.

4 CONSULTATION / PUBLIC EXHIBITION

Due to the contentious nature of the initial development consent the application for modification of consent was notified to the seven (7) landowners who sent submissions to the Department during the initial assessment.

One (1) submission was received regarding the Application. Issues raised in submissions are considered in Section 5 of this report.

The application was referred to the Port Stephens Council on 26 June, 2006. Council responded on 1 August 2006 (**Tag D**). Response is made to the issues raised by Council under Section 5.3 and in greater detail under **tag E**.

5 CONSIDERATION

5.1 *Section 96*

The application is considered to meet the prerequisites of Section 96(1A) of the Act in that the proposed modifications are considered to be of minimal environmental impact, and that the development as modified is considered to be substantially the same development as that to which consent was originally granted.

5.2 *Section 79C*

The application and the likely impacts of the proposed development have been considered in accordance with Section 79C of the Act (**Tag F**). It is considered that the proposed development complies with the statutory controls and the relevant aims and objectives.

5.3 Issues

5.3.1 Setbacks to the Western Edge

Issue: Land and Environment Consent Orders issue (a) 'by providing increased setbacks to the rooftop terraces on the western edge of the building'

Raised by: Land and Environment Court consent orders

Consideration: In order to resolve their differences the parties to the L & E Court matter contracted planning consultant Kerry Gordon to provide a report and recommendations. The report recommends setbacks to the rooftop terraces from the western edge to exclude any overlooking of the neighbouring site as follows:

'The proposed roof terraces give rise to potential visual and acoustic privacy issues for the property to the west. In order to ameliorate these issues (without additional shadow impact), it is appropriate that the planter boxes to be relocated 1m back from the western edge and increased in width to 2m to create a greater separation from the adjoining building.'

The Consent Orders do not specify a setback distance to the western edge of the building nor do they refer to Kerry Gordon's report.

The modified proposal has not setback the planter boxes however has increased the width of the planter boxes to 1.5m.

The planter boxes were setback more than 3m from the boundary in the original consent plans. The planter boxes are 1m high and further constraints to overlooking the adjoining site are provided by the sunshade awnings projecting horizontally from above windows of the floor immediately below the planter boxes. Section BB, drawing number S96 06 issue B, provides a sightline which indicates that the objective of precluding overlooking of the neighbouring site to the west is achieved.

Resolution: The treatment to the western edge of the building are considered to fulfil the objective of Consent Order (a) and provides appropriate visual privacy to the adjoining development. It is recommended that the modification be approved.

5.3.2 Height of front Parapet/Location of Balustrade

Issue: Land and Environment Consent Orders issue (b) 'reducing the height of the front parapet by 500mm and relocating a balustrade further back from the parapet.'

Raised by: Land and Environment Court consent orders

Consideration: The report of consultant planner Kerry Gordon recommended a reduction in the height of the front parapet (planter box) by 500mm (i.e. roof top floor level of RL15.14 less 500mm = RL14.64). The report however further notes that, 'The reduction of the parapet height would result in the need for a balustrade of sufficient height to comply with the BCA. The balustrade would need to be provided further back from the edge of the roof to ensure safety to the roof top terrace whilst not being visible from Shoal Bay Road or the reserve opposite.'

It is considered that Kerry Gordon is suggesting that a 'visual reduction' could be achieved by setting the balustrade back, rather than a physical reduction due to the need to provide the required balustrade height.

The front balustrade has been setback by approximately 1.9m and section AA indicates sightlines which confirm that a visual reduction of 500mm, off the original height of the planter boxes, has been achieved.

It is noted that the parapet height in the modification is proposed to be 200mm higher than the original RL 15.14. Discussions revealed that this was due to the fact that the tiled floor finish and fall to drainage will bring the roof level 200mm higher therefore the balustrade must be raised 200mm to comply with the BCA. A glazed outer edge of 200mm high is to be provided, as shown on Section AA to visually reduce this height and darker visually recessive colours are to be applied to the structures at roof level

Resolution: The Consent Orders do specifically refer to Kerry Gordon's report however it is

considered that the intent of this issue has been fulfilled and the front setback complies with the visual reduction of the front parapet by 500mm and the balustrade has been located further back. It is recommended that the modification be approved.

5.3.3 Safety and Security

Issue: Modification of the entrance arcade proposed a space which could create safety and security issues for future residents.

Raised by: Port Stephens Council

Consideration: The proposed plans provide a modified layout for the retail outlets on the ground floor and consequently a narrow corridor into the access lift to the apartments above. This proposed arrangement decreases visibility and is considered a potential safety and security risk.

The applicant was requested to address this matter. Amended plan S96 02 issue C indicates an after hours security gate at the entrance to the arcade.

Resolution: The security gate is considered adequate and it is recommended that the modification be approved.

5.3.4 Roof top structures

Issue: The prominence of roof top structures, while not being specifically mentioned in the consent orders, was noted to be an issue of some concern during the Land and Environment Court matter. The modification appeared to increase the bulk of some of the structure on the roof top in particular the bulky nature of the stair exits.

Raised by: Department of Planning

Consideration: Discussions were held with the applicant and further plans have been provided which indicate tapering of the stair enclosures as well as the application of darker recessive colours to minimize the visual impact of the roof top structures.

Resolution: The amended plans are considered acceptable and it is recommended that the modification be approved

5.3.5 Awning to Ground Floor Retail Frontage

Issue: Loss of view due to ground floor awning over retail outlets.

Raised by: Submission

Consideration: Correspondence and discussions with a neighbouring objector indicated that the primary concern was the awning proposed at ground level in the original consent plans. (The 4 metre setback is maintained in the modification).

Port Stephens Council, in their response to the Department suggested the need 'to consider the location and construction of balustrading, principally along the Shoal Bay Road frontage to ensure the safety of pedestrians utilising the public street below.'

The awning to the ground level has been removed in the proposed modification of consent. The neighbour is aware that there are first level terraces projection over the walkway however the awning was the structure of concern.

Resolution: There is no specific requirement for an awning in Councils Development Control Plans and safety of pedestrians is not considered compromised by balconies over footpaths. Balustrading will be required to comply with the BCA. The awning has been removed and it is recommended that the modification be approved.

5.3.6 Other changes

Issue: Applicant proposes several internal modifications throughout the building.

Raised by: Department

Consideration: A number of other, mainly internal and related modifications are proposed to comply with BCA requirements, relevant Australian Standards, servicing needs and to improve usage and amenity. Port Stephens Council raises no concern with these.

Resolution: The changes are itemised at Tag G and are acceptable. No unacceptable impacts will arise..

CONCLUSION

The Minister for Planning is consent authority for modifications to consents he has granted.

The proposed development as modified is considered to be substantially the same development as that originally approved and compliance with the Land and Environment Consent Orders has been satisfied.

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

On balance, it is considered that the proposed development as modified is acceptable and should be approved.

6 CONSULTATION WITH APPLICANT – DRAFT CONDITIONS

The applicant was asked to comment on the draft conditions of consent on 23rd August, 2006. The applicant responded on 23 August indicating they are satisfied with the draft conditions.

7 DELEGATION

Under the instrument of delegation dated 5 April, 2006 the Minister has delegated his functions under Section 96 (1A) of the Act relating to modifying development consents to the Executive Director.

8 RECOMMENDATION

It is recommended that Chris Wilson, Executive Director, as delegate of the Minister for Planning, pursuant to Section 96(1A) of the *Environmental Planning and Assessment Act, 1979*.

(A) **approve** the application subject to conditions (tagged “A”)

Prepared by:

Endorsed by

Denise Robertson
Planner, Urban Assessments

David Mutton
Team Leader, Urban Assessments

Heather Warton
A/Director, Urban Assessments