



Lot 231 Honeysuckle Drive, Newcastle Proposed by Honeysuckle 231 Pty Ltd

Modification MP 05_0166 MOD 3

Modification of Minister's Approval under
Section 75W of the *Environmental Planning
and Assessment Act 1979*

July 2008



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1. INTRODUCTION

On 16 April 2008, SJB Planning Pty Ltd lodged an application to modify MP05_0166 (**Tag B**) pursuant to Section 75W of the *Environmental Planning and Assessment Act 1979* (the Act), on behalf of Honeysuckle 231 Pty Ltd (the Proponent). The Proponent is seeking to modify Condition F18 and associated Statement of Commitments 1.1.1-1.1.3 and 1.2.2-1.2.4.

Condition F18 currently requires the creation of a Covenant to place certain restrictions on the operation of the Child Care Centre. The relevant parts of Condition F18 require:

- (d) *That the Child Care Centre is to be operated only by a community – based provider;*
- (e) *That the site owner or building owner not charge any rent or lease costs in respect of the operation of the Child Care Centre and the space it occupies; and*
- (f) *That the site owner or building owner to charge no more than 50% of the outgoings associated with the operation of the Child Care Centre tenancy.*

The Statement of Commitments 1.1.1, 1.2.2, 1.2.3 and 1.2.4 reflect the above requirements under Condition F18 (e), (d), (e) and (f) respectively, whilst Statement of Commitment 1.1.2 required that the Child Care Centre accommodate 50 children. Statement of Commitment 1.1.3 required that the Proponent lodge a DA for the Child Care Centre fit-out within 15 months of the date of approval.

The Proponent is seeking approval to modify Condition F18 and the associated Statement of Commitments in order to:

- Permit a commercial operator to operate the Child Care Centre; and
- Permit the site owner or building owner to charge 100% of the rent or lease costs associated with the Child Care Centre operation; and
- Permit the site owner or building owner to charge 100% of the outgoing costs associated with the Child Care Centre operation.

2. THE SITE

The site is owned by Honeysuckle 231 Pty Ltd and is located on land at 20 and 22 Honeysuckle Drive, Newcastle. The site was previously known as Part Lot 231, DP 1072217, however this description has since been amended due to the recent subdivision of the site into 2 separate lots, and the land is now identified as Lot 2311 and Lot 2312 DP 1108096.

The site is located within the local government area of Newcastle City Council, and more specifically the site is located within the Honeysuckle Precinct on the southern side of Newcastle Harbour. The site has a total area of 4,817m².

To the north of the site is Honeysuckle Drive, and vacant land that is zoned for future commercial development and open space purposes pursuant to Newcastle DCP 2005. Further to the north, Newcastle Harbour and the steel works form the backdrop to the HDC precinct.

To the south of the site and forming the sites southern boundary is the Northern Railway Line. Newcastle City buildings form the southern backdrop to the site including commercial buildings which front Hunter Street. To the west of the site is the Price Waterhouse Cooper Centre, and the recently built Hunter Water building. To the east of the site is a vacant future commercial development site.

The subject site is zoned B3 – Commercial Core and the proposed development for a mixed use commercial development with a retail component and Child Care Centre is permissible with the Minister's approval.



Figure 1: Context Map of proposed site



Figure 2: Proposed site in detail.

3. MAJOR PROJECT APPROVAL

3.1 ORIGINAL APPLICATION MP 05_0166

On 25 January 2007, the Minister approved the construction of a 7-level mixed use commercial office development on land owned by the Honeysuckle Development Corporation (HDC) at 20 and 22 Honeysuckle Drive, Newcastle. The approved development comprises 2 commercial office towers, basement parking, ground floor retail space, a Child Care Centre and a 2 Lot Torrens Title subdivision. A copy of the original approval and report is at **Tag C**.

Specifically the approved development comprises:

- 3 levels of car parking (259 spaces);
- 2 towers with a total gross floor area (GFA) of 15,558m² (of which 14,446m² is commercial office space);
- An FSR of 3.23:1 (compliant with the maximum 3.25:1 FSR for the site, incorporating bonus FSR of 0.25:1 for the provision of a Community based Child Care Centre);
- 4 retail tenancies and the use of 1 tenancy for a Child Care Centre comprising an area of 1,112sqm (GFA) (fit-out/operation of the Child Care Centre was not part of this approval);
- Associated site improvements, landscaping and public domain works; and
- Subdivision of the land into 2 Torrens Title allotments with associated easements and rights of use.

The original capital investment value (CIV) of the development was \$40.52 million. The proposal is expected to create 120 full time equivalent construction jobs and 900 full time equivalent operational jobs.

Issues considered in the assessment of MP05_0166 included:

- Easements;

- Floor space ratio;
- Building height;
- Flood management;
- Storm water management;
- Traffic and car parking;
- Contamination and remediation of the site for the proposed use.

These issues were addressed either by way of additional documentation lodged by the Proponent or via conditions of approval.

Construction of the building has commenced and is scheduled to be completed by August 2008.

3.2 MP05_0166 (MOD 1)

On 12 March 2007, SJB Planning submitted a Section 75W modification of the approved building to permit the following changes:

- Modification to Condition B1 to provide additional detail and clarification of the type of works involved at each stage, and also to defer the requirement for resolution of the external façade of the building from Stage 2 to Stage 3.
- Modification to Condition B27 to move the requirement for demonstration of compliance with the Australian Building Greenhouse Rating to Stage 3.

The modifications to conditions B1 and B27 subsequently impacted on the requirements of Conditions B3, B4, B5 and B37. As a result, changes to the wording of these other conditions was also required.

On 3 May 2007, the Minister for Planning approved MP 05_0166 Mod 1 to modify Conditions B1, B3, B4, B5, B27 and B37.

3.3 MP05_0166 (MOD 2)

On 6 July 2007, SJB Planning submitted a Section 75W modification of the approved building, to amend Condition B2. Condition B2 limited the encroachment of the Child Care Centre Terrace to 6 metres into the floodway and view corridor easement at the western end of the site.

The Proponent requested that Condition B2 be amended to allow the Child Care Centre Terrace to encroach an additional 1 metre into the floodway and view corridor easement, a total encroachment of 7 metres. This modification enabled an extension of the outdoor play area. The need for an extension to the outdoor play area was derived from a requirement under Condition F18, to ensure that the Child Care Centre was capable of accommodating a minimum of 50 children. The *Children's Services Regulation 2004* requires a minimum of 7m² of usable outdoor play space per child that is exclusively for the use of children.

In order to satisfy the minimum outdoor play area requirement for 50 children, a total outdoor play area of 350m² was required. However, Condition B2 of the approval limited the outdoor play area to 340m², which was non-compliant with the *Children's Services Regulation 2004*. The wording of Condition B2 was therefore amended as follows:

"The encroachment by the proposed ground floor level child care terrace/ play area into the existing 20m wide floodway and view corridor easement at the western end of the site is not to exceed 7 metres at the northern end and 6 metres at the southern end, as shown on plan Z-1002 Revision E. Details are to be submitted to the Certifying Authority prior to the issue of a Stage 2 Construction Certificate."

The resultant outdoor play area achieved as a result of modifying Condition B2 will be 355m² and therefore will comply with the *Children's Services Regulation 2004*.

On 31 August 2007, the Executive Director – Strategic Sites and Urban Renewal (as delegate of the Minister for Planning) approved MP 05_0166 Mod 2 to modify Condition B2.

4. DESCRIPTION OF PROPOSED MODIFICATION

On 16 April 2008, SJB Planning Pty Ltd (the Proponent) lodged a third application to modify MP05_0166 (**Tag B**) pursuant to Section 75W of the *Environmental Planning and Assessment Act 1979* ("the Act").

The Instrument of Approval for MP05_0166 incorporated **Condition F18 – Child Care Centre**, which placed the following restrictions upon the operation of the Child Care Centre:

- (a) *Prior to occupation of the building a drop off pick up point for three (3) vehicles on Honeysuckle Drive is to be provided.*
- (b) *The Child Care Centre is to provide for a minimum of 50 places.*
- (c) *Prior to the occupation of the building a covenant is to be created benefiting Newcastle City Council or its successor that the tenancy within the building nominated as 'Child Care Centre' on drawing Z-1002 Rev D is to be used only for a Child Care Centre to the satisfaction of Newcastle City Council.*
- (d) *The covenant is to include a requirement that the childcare centre tenancy be leased to a community based child care centre provider to the satisfaction of Newcastle City Council and Department of Community Services.*
- (e) *The covenant is to include a statement requiring the site owner or building owner not to charge any rent or lease costs in respect of the operation of the Child Care Centre and the space it occupies.*
- (f) *The covenant is to include a statement requiring the site owner or building owner to charge no more than 50% of the outgoings associated with the operation of the Child Care Centre tenancy.*
- (g) *The covenant shall provide that, in the event that a Child Care Centre can no longer operate from the premises, a piece of public art be provided to the value of \$200,000 to a standard and in a suitable location to be determined by the Honeysuckle Development Corporation.*

In addition, there were a number of related Statement of Commitment's as part of this approved project, these being 1.1.1, 1.1.2, 1.1.3, 1.2.2, 1.2.3, and 1.2.4, as follows:

	Measure (Commitment)	Timing
1.1.1	<i>The operator of the childcare centre will be charged no rent for the tenancy and no more than 50% of outgoings</i>	Ongoing.
1.1.2	<i>The ground floor tenancy shown on plan shall be used only for the purpose of a child care centre operated by a community based childcare provider accommodating up to 50 children.</i>	Ongoing.
1.1.3	<i>The proponent shall within fifteen (15) months of the date of any approval under Part 3A of the EP&A Act lodge a development application for the fit out of the child care centre.</i>	Within fifteen (15) months of approval of MP05_0166
1.2.2	<i>The covenant include a requirement that the childcare centre tenancy be leased to a community based child care centre provider to the satisfaction of Newcastle City Council and Department of Community Services.</i>	Prior to the occupation of the child care facility.
1.2.3	<i>The covenant include a statement requiring the site owner or building owner not to charge any rent or lease costs in respect of the operation of the child care centre and the space it occupies.</i>	Prior to the occupation of the child care facility.
1.2.4	<i>The covenant include a statement requiring the site owner or building owner to charge no more than 50% of the outgoings associated with the operation of the child care centre tenancy.</i>	Prior to the occupation of the child care facility.

The Proponent is seeking the following amendments to the approved Statement of Commitments:

- **Delete** Commitment 1.1.1 from the Instrument of Approval;
- Commitment 1.1.2 will require modification to delete the words "**operated by a community based Child Care provider**";
- As the Minister's Approval was given on 25 January 2008, Commitment 1.1.3 will require amendment, as the 15-month period specified in this commitment has passed as off 25 April 2008. Commitment 1.1.3 will require modification to delete the words "**fifteen (15) months**" to instead permit lodgement of the DA within **eighteen (18) months**;

- Commitment 1.2.2 will require modification to delete the words “community based” and instead insert the word “commercial”; and
- **Delete** Commitments 1.2.3 and 1.2.4 from the Instrument of Approval.

In summary, Condition F18 (d), (e) and (f), and related Statement of Commitment's 1.1.1, 1.1.2, 1.1.3, 1.2.2, 1.2.3, and 1.2.4, require that the operator of the Child Care Centre:

- Be a community based Child Care Centre operator (not for profit organisation);
- Must not be charged any rent for the tenancy; and
- Must not be charged more than 50% of the outgoings associated with the operation of the Child Care Centre tenancy.

Accordingly, the Proponent is seeking the Minister's approval to remove these restrictions by way of **deletion** of Condition F18 (d), (e) and (f) from the Ministers Approval, and amendments to the Statement of Commitment's 1.1.1, 1.1.2, 1.1.3, 1.2.2, 1.2.3, and 1.2.4 in order to permit the operator of the Child Care Centre to:

- Be a commercially-based operator;
- Be charged 100% rental/lease costs associated with the Child Care Centre operation; and
- Be charged 100% of the outgoing costs associated with the Child Care Centre operation.

4.1 REASONS FOR PROPOSED MODIFICATION

The Proponent advises that the modification is required for the following reasons:

- Due to difficulties associated with securing a community-based Child Care Centre operator with the necessary funds to complete the internal fit out of the Child Care Centre;
- The community-based Child Care Centre was required (as agreed with Council and the Department) as a result of the Proponent's use of bonus FSR provisions contained in the Newcastle Development Control Plan 2005 (DCP 2005). Under these controls, the maximum permissible FSR for the subject site was 3.25:1, taking into account a bonus FSR of 0.25:1 if a material public benefit was provided. As the proposal comprises an FSR of 3.23:1, the proposal was reliant on this additional FSR in order to obtain an approval.
- The recently gazetted Newcastle City Centre Local Environmental Plan 2008 (NCCLEP) permits a maximum FSR for this site of 4.0:1. The proposal is now fully compliant with the FSR control, regardless of whether a material public benefit is provided.

5. STATUTORY CONTEXT

5.1 MODIFICATION OF MINISTER'S APPROVAL

The modification application has been lodged with the Director-General pursuant to Section 75W of the Act. Section 75W provides for the modification of a Minister's approval including revoking or varying a condition of the approval or imposing an additional condition of the approval.

Under Section 75W(2), the Minister's approval for a modification is not required if the project, as modified, will be consistent with the existing approval under this Part. In this instance, it was concluded that the proposed modifications (as listed above) required a formal application to modify the approval as they involved changes to conditions of the development. The power to make such a change therefore lies with the Minister. This is consistent with the definition under Section 75W of the Environmental Planning and Assessment Act 1979.

On 16 April 2008, the Proponent submitted an application, prepared by SJB Planning Pty Ltd, to modify the Minister's approval pursuant to Section 75W(3) of the Act.

5.2 ENVIRONMENTAL ASSESSMENT REQUIREMENTS (DGRS)

Section 75W(3) of the Act provides that the Director-General may notify the Proponent of Director General Environmental Assessment Requirements (DGRs) with respect to the proposed modification that the Proponent must comply with before the matter will be considered by the Minister.

In this instance, following an assessment of the modification request, it was not considered necessary to notify the Proponent of amended DGRs, pursuant to Section 75W(3) with respect to the proposed modification as sufficient information was provided to the Department to consider the application.

6. CONSULTATION AND EXHIBITION

Under Section 75W of the Act, a request for a modification of an approval does not require public exhibition. However, under Section 75X(2)(f) of the Act, the Director-General is to make requests for modifications of approvals given by the Minister publicly available. In accordance with Section 8G of the *Environmental Planning and Assessment Regulation 2000*, the request for the modification was placed on the Department's website.

As Condition F18, in its current form, benefits Newcastle City Council (Council) in that it ensures the provision of a community based Child Care Centre, and Council may wish to be the operator, the Department notified Council of the proposed modification.

On 7 May 2008, Council advised that it had no objection to the deletion of Condition F18, as the recently gazetted Newcastle City Centre LEP 2008 now permits an increased FSR for the site (4.0:1). Therefore, it is Council's view that the requirement to obtain bonus FSR provisions, through provision of a community based Child Care Centre, is negated. Council's correspondence confirming this position is provided in **Tag D**.

Council's views were reiterated in correspondence received on 29 May 2008, in which Council's Urban Planning Strategist advised that Council have no objections to the proposed modification. However, Council have advised that a shortage of Child Care places for the 0-2 year age group currently exists in the Newcastle inner city area, and therefore if the Child Care Centre were to provide a minimum of 20 places for this 0-2 year age group this would assist in alleviating this shortfall. Council's additional correspondence confirming this position is provided in **Tag E**.

7. CONSIDERATION OF PROPOSED MODIFICATIONS

7.1 FSR

MP05_0166 was assessed against the provisions of DCP 2005, which permitted a maximum Floor Space Ratio (FSR) of 3.25:1, including a total bonus FSR of 0.25:1 where significant public benefit is proposed in association with the development project. The proposal has a FSR of 3.23:1, which complies with the maximum FSR as the development incorporated a community-based Child Care Centre (community facility) providing a significant public benefit to the satisfaction of both the Department and Newcastle City Council.

On the basis that bonus FSR was being achieved, and noting the Statement of Commitments, Condition F18 was imposed, requiring that the Child Care Centre be operated by a community-based organisation on a rent-free basis. Condition F18 also required that the community-based organisation be charged only 50% of the outgoing costs associated with the operation of the Child Care Centre.

The *Newcastle City Centre LEP 2008* (NCCLEP) was gazetted on 1 February 2008. The NCCLEP is a part of the Newcastle City Centre Plan - a long term plan to cater for the expected 6,500 extra residents and extra 10,000 jobs in the city centre over the next 25 years. The City Centre Plan also

comprises the *Newcastle City Centre Development Control Plan (NCCDCP)*, which provides more detailed controls for development in the city centre.

The NCCLEP now permits a maximum FSR of 4.0:1 for this site (as opposed to the maximum of 3.25:1 of DCP 2005), and therefore the proposal is now fully compliant with the FSR provisions contained in the NCCLEP. If the subject building were to have been approved after 1 February 2008, the proposal would no longer be reliant on provision of a community-based Child Care Centre as a significant public benefit, in order to comply with the maximum FSR assigned to the site. This is relevant to the consideration of this modification application.

As the Proponent is relying upon the FSR provisions of the NCCLEP for the deletion of the condition it is relevant to ascertain compliance of the approved building with other key provisions of the NCCLEP. A comparison of the proposal subject to the DCP 2005 and the NCCLEP and NCCDCP has been carried out, and is located at Attachment A of this Report. The proposal is compliant with maximum building height, FSR, setbacks and parking under the new provisions.

7.2 LOSS OF COMMUNITY-BASED CHILD CARE CENTRE

Council has advised the Department that they raise no objection to the proposed modification to permit a commercial operator to manage the Child Care Centre, given that the approved development is now wholly consistent with the development standards that apply to the site under the recently gazetted NCCLEP. In light of these changes, the approved development is now no longer reliant on provision of a public benefit to obtain an FSR bonus.

Council's New Communities & Green Corridors team has also confirmed the view that a commercially operated Child Care Centre is acceptable and that Council have no objections to the proposed modification. However, Council have advised that a shortage of Child Care places for the 0-2 year age group currently exists in the Newcastle inner city area, and therefore if the Child Care Centre were to provide a minimum of 20 places for this age group it would assist in alleviating this shortfall.

Whilst final numbers are a matter that will be addressed at fit-out stage by Council and the Department of Community Services (DOCS), it is desirable for a range of ages to be accommodated in the Centre, particularly in the 0-2 year age group given the current lack of places in the Newcastle area. 0-2 year age group spaces tend to be less available due to higher staffing ratio requirements. It is therefore entirely reasonable to require that a portion of the 50 spaces be reserved for this 0-2 year age group, given the history of this application and the modifications being made.

A condition is therefore recommended which requires that a portion of the 50 Child Care places be allocated for the 0-2 year age group. As Child Care Centre's provide services for 0-5 year old olds, and the 0-2 year age group represents 40% of the age spread, the amended Condition F18 will require that 40% of the 50 spaces be allocated for the 0-2 year age group. This will result in Council's requested minimum of 20 spaces for this age group.

Whilst this modification involves the substitution of a commercially-based Child Care Centre for the previously approved community-based Child Care Centre, the retention of a Child Care Centre in general is a desirable overall outcome. Council has acknowledged that there is a shortage of Child Care places in the Newcastle city centre, and therefore it is beneficial to continue to encourage the retention of a Child Care Centre as part of this development. In this regard, allowing a commercially-based Child Care Centre provider to operate from this site will ensure that the Child Care Centre is financially feasible and will be able to provide a minimum of 50 Child Care places, assisting to ease the shortage of Child Care places in the Newcastle inner city area.

7.3 CONCLUSION

No other concerns relating to the proposed modifications are raised by the Department or Council. Therefore, the proposed deletion of Condition F18 (d) (e) and (f), and Statement of Commitments

1.1.1, 1.2.3 and 1.2.4, as well as amendments to Statement of Commitments 1.1.2, 1.1.3 and 1.2 is satisfactory and it is therefore recommended that the proposed modification be approved.

8. MODIFICATION TO CONDITIONS OF APPROVAL

The Department recommends that the relevant conditions of approval be modified (**Tag A**).

9. CONCLUSION

The proposed modifications are minor in detail and do not result in significant changes to the overall design and appearance nor to the conditions of the development as approved. It is considered that the proposal, as modified, achieves the same objectives as assessed for the originally approved under Major Project 05_0166 and does not alter the overall nature or need of the approved project.

However, the modification does alter the justification for the original project. The use of bonus FSR in exchange for the provision of a community-based Child Care Centre was an important component in justifying approval of the original development. However, the above assessment concludes that this modification is acceptable.

10. DELEGATION

Under the instrument of delegation dated 7 June 2007, the Minister has delegated his functions under Section 75W of the Act relating to modifying Part 3A approvals to the Executive Director, Strategic Sites and Urban Renewal. Having regard to the Urban Assessments Guidelines for Delegates, it is considered appropriate that the application be determined under delegation.

11. RECOMMENDATION

It is recommended that the Executive Director, Strategic Sites and Urban Renewal, as delegate of the Minister for Planning:

- (A) **Consider** the findings and recommendations of this report;
- (B) **Approve** the modification under Section 75W of the *Environmental Planning and Assessment Act, 1979*; and **Sign** the attached Instrument of Modification (**Tag A**).

Prepared by:

Endorsed by:

Kathryn Myles
Planner, Urban Assessments

Josephine Wing
Team Leader, Urban Assessments

Michael Woodland
Director, Urban Assessments

Jason Perica
**Executive Director
Strategic Sites and Urban Renewal**

ATTACHMENT A - COMPARISON OF NEW AND REPEALED LEP/DCP

	Newcastle DCP 2005	City Centre DCP 2008 and City Centre LEP 2008	Proposal	Complies
Building Height	30m	30m	30.9m	Yes*
Street Frontage Heights	Street frontage height to 30 metres – anything above 30m to be set back by 8m.	Street frontage heights between 15m and 25m – anything above 25m to be set back 6m minimum.	Street frontage height is 24.85m. Level 6 and Plant setback 6m.	Yes
Building Depth and Bulk	No detail regarding floor plates.	Maximum floor plate size for commercial building in 3(c) zone is 1,350m ² (only applies above max street frontage height).	Office Tower A = Approx 1,403m ² Office Tower B = Approx 1,015m ² floor plate.	Tower A = No** Tower B = Yes
	No detail regarding maximum diagonal plan dimension.	Maximum diagonal plan dimension is 45m	Office Tower A = Approx 63m and Office Tower B = Approx 50m.	Tower A = No** Tower B = No**
	No detail regarding maximum building depth.	Maximum building depth (excluding balconies) of 30m.	Office Tower A = Approx 40m and Office Tower B = Approx 32m.	Tower A = No** Tower B = No**
FSR	3:1 with 0.25:1 bonus for material public benefit.	4:1	3.23:1	Yes***
Setbacks	20m easement for public access and floodway easement.	No detail regarding public access and floodway easement (although this exists on the property title).	20m wide easement for public access and floodway purposes.	Yes****
	6m wide electricity and access easement;	No detail regarding electricity and access easement (although this exists on the property title).	6m wide substation access easement.	Yes
	No detail regarding rail corridor.	6m landscaped setback from the rail corridor.	Approximately 3-4m setback from rail corridor.	Yes
	Aligned with the back edge of the Road Reservation.	Build to street alignment of Honeysuckle Drive.	2-3 metres set back from Honeysuckle Dr.	Yes
Parking	258 spaces	259 spaces	259 spaces	Yes
Zoning	3(c) City Centre	B3 – Commercial Core	Permissible	Yes

* A maximum building height of 30m is permitted, however plant structures may extend up to 3m above the height limits, if such structures complement the overall design of the proposed building. The additional height of 900mm is required for the plant room and is considered acceptable as the rooftop plant is integrated within the overall building design. The proposal meets the intent of the DCP and is acceptable.

** Floor plates, diagonals and building depths above the permitted values are permissible if design the result of an Architectural Design Competition. An Architectural Design Competition process was carried out prior to lodgement of the original application.

*** The FSR complies with the maximum FSR of 3.25:1 allowable under the DCP 2005 including a bonus of 0.25:1 where significant public benefit is proposed, in this case a community based Child Care Centre.

**** Child Care Centre Terrace encroaches by 7m. This variation is acceptable due to the need to raise the children's playground above the flood way, thereby ensuring the safety of the children.