



**Planning &
Infrastructure**

**MAJOR PROJECT ASSESSMENT:
Section 75W Modification
Staged Works and Affordable Housing
6 -16 Atchison Street, St Leonards
*(09_0187 MOD 1)***



Director-General's
Environmental Assessment Report
Section 75W of the
Environmental Planning and Assessment Act 1979

February 2013

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EXECUTIVE SUMMARY

On 1 May 2012, the Planning Assessment Commission approved Project Application MP09_0187 for a mixed use development at 6 -16 Atchison Street, St Leonards. The Project Application sought to demolish the 3 x 3 and 4 storey commercial buildings and replace them with a 28 storey mixed use building (plus plant). The Project included:

- A 6 level basement, including 168 car parking spaces, storage and associated services;
- A ground floor café, public plaza, public thoroughfare and residential and hotel lobbies;
- 4 stories of serviced apartment accommodation with a gross floor area of 4,445m², including 76 serviced apartments, conference room and gymnasium;
- 21 stories of residential apartments, including 173 apartments comprised of 30 x studio apartments, 64 x 1 bedroom apartments and 66 x 2 bedroom apartments;
- A gross floor area of 20,819m² and a floor space ratio of 12:1; and
- One level of rooftop plant.

As part of the Director-General's Environmental Assessment Report, the Department of Planning and Infrastructure recommended that the Project be amended such that:

- The height of the building is reduced by a further 14 metres (approximately 4 storeys) to a maximum height of RL 167.3 (82.5 metres); and
- Additional privacy screening is provided to the eastern and western facades to prevent overlooking of the neighbouring properties.

In making its decision, the Planning Assessment Commission considered the assessment report and accepted the recommendations of the Department in regard to the use, height and density. Consequently, the Planning Assessment Commission approved the Project Application subject to conditions.

The current modification request seeks to modify Schedule 1 of the Project Approval along with seven conditions in order to permit:

- The staged construction and occupation of the development;
- Provision of affordable housing by condition rather than via a voluntary planning agreement;
- Submission of documents for relevant construction and occupation certificates.

The modification request was placed on the Department's website on 31 October 2012 and comments were requested from North Sydney Council. North Sydney Council objected to the modification for reasons relating to staging, provision of affordable housing and Section 94 contributions. No public submissions were received.

In assessing the modification, the Department considered the Proponent's request and the issues raised in North Sydney Council's submission. Key issues for the assessment are affordable housing provision, and the staging and timing of submission of documents in relation to construction and occupation certificates. The Department recommends that the modification request be approved, subject to conditions.

In accordance with the Minister's delegation of 14 September 2011, the modification is forwarded to the Planning Assessment Commission for determination as North Sydney Council has objected to the modification.

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1. BACKGROUND

The site is known as 6-16 Atchison Street, St Leonards and is located within the St Leonards town centre approximately 150 metres west of St Leonards railway station (**Figure 1**). The site is rectangular in shape with its northern (Atchison Lane) and southern (Atchison Street) boundaries being 50.3m in length, and its eastern and western boundaries being 35.8m and 34.3m in length, respectively. The site has an area of 1740.6m² and slopes from east to west with a fall of 2.7m along Atchison Lane and 3.9m along Atchison Street. The site is located within the North Sydney Local Government Area.



Figure 1: Project Location: 6 – 16 Atchison Street, St Leonards

On 1 May 2012, the Planning Assessment Commission (PAC) approved Project Application MP09_0187 for a mixed use development at 6 -16 Atchison Street, St Leonards. The Project Application sought to demolish the existing 3 x 3 and 4 storey commercial buildings and replace them with a 28 storey mixed use building (plus plant). The Project included:

- A 6 level basement, including 168 car parking spaces, storage and associated services;
- A ground floor café, public plaza, public thoroughfare and residential and hotel lobbies;
- 4 stories of services apartment accommodation with a gross floor area of 4,445m², including 76 serviced apartments, conference room and gymnasium;
- 21 stories of residential apartments, including 173 apartments comprised of 30 x studio apartments, 64 x 1 bedroom apartments and 66 x 2 bedroom apartments;
- A gross floor area of 20,819m² and a floor space ratio of 12:1; and
- One level of rooftop plant.

As part of the Director-General's Environmental Assessment Report, the Department of Planning and Infrastructure recommended that the Project be amended such that:

- The height of the building is reduced by a further 14 metres (approximately 4 storeys) to a maximum height of RL 167.3 (82.5 metres).

- Additional privacy screening is provided to the eastern and western facades to prevent overlooking of the neighbouring properties. The additional privacy screening is to prevent overlooking between the two towers of the proposed building.

In making its decision, the PAC considered the Department's assessment and accepted the Department's recommendations in regard to the use, height and density of the development. Consequently, the PAC approved the project subject to conditions. **Figure 2** below shows an illustration of the approved development.



Figure 2: Approved project

2. PROPOSED MODIFICATION

2.1 Modification Description

The modification request (**Appendix A**) seeks to modify the approved project, as follows:

- 1) **Schedule 1 Project description** - Provide for staged demolition, excavation, construction and occupation by modifying the approved project description.

The proponent seeks to amend the wording of the project description in relation to the proposed timing of activities to be undertaken, namely progressive demolition, construction and occupation of the development.

- 2) **Condition A1 Development in accordance with plans and documentation** - Reference the revised draft statement of commitments (City Plan Strategy and Development Pty Ltd, October 2012) which deletes the voluntary planning agreement (VPA) for affordable housing.

The proponent wishes to revise the draft statement of commitments to delete the draft VPA for affordable housing, as it was not executed and does not reflect the approved development. The proponent contends that Condition B5 requires the provision of affordable housing in agreement with Council, which renders the draft VPA as superfluous.

- 3) **Condition B3 Building height** – Change the timing for submission of amended plans for reduced building height to Director-General for approval.

The proponent requests that the provision of plans and details for the reduced building height be delayed until the Construction Certificate stage for the above ground non-residential and residential components of the development.

- 4) Condition B5 Affordable housing** – Amend the timing and details for the provision of affordable housing.

The proponent requests that prior to the issue of a Construction Certificate for the residential component that an agreement be reached with Council concerning the number, mix and location of the affordable housing units to be provided. The proponent also requests that the provision of the affordable housing units be delayed until the Occupation Certificate for the residential component is issued.

- 5) Condition B11 Section 94 contributions** - Defer payment of Section 94 contributions to the Occupation Certificate stage.

The proponent seeks to tie this condition to the Occupation Certificate instead of the Construction Certificate consistent with the draft revised statement of commitments.

- 6) Condition B38 BASIX commitments** - Relate submission of BASIX details to the residential component Construction Certificate.

The proponent wishes to tie this condition to the Construction Certificate for the residential component of the development.

- 7) Condition E2 Dedication of affordable housing units** - Relate submission of evidence of affordable housing dedication to the residential Occupation Certificate.

The proponent wishes to tie this condition to the Occupation Certificate for the residential component of the development.

3. STATUTORY CONTEXT

3.1 Modification of the Minister's Approval

Part 3A, as in force immediately before its repeal on 1 October 2011, and as modified by Schedule 6A to the Environmental Planning and Assessment Act 1979 (EP&A Act), continues to apply to Section 75W modification applications for Part 3A projects.

The modification application has been lodged with the Director-General pursuant to Section 75W of the EP&A Act. The Minister's approval is not required if the project as modified will be consistent with the original approval. As the subject modification seeks to amend the Project Approval, the modification requires approval.

Consequently, this report has been prepared in accordance with the requirements of Part 3A and associated regulations, and the Minister (or his delegate) may approve or disapprove of the carrying out of the project under Section 75J of the EP&A Act.

3.2 Environmental Assessment Requirements

In this instance, it was not considered necessary to notify the Proponent of environmental assessment requirements pursuant to Section 75W(3) of the EP&A Act as sufficient information was provided to assess the modification.

3.3 Delegated Authority

On 14 September 2011, the Minister for Planning and Infrastructure delegated his functions under Section 75W of the EP&A Act to modify Part 3A approvals to the Planning Assessment Commission (PAC), where:

- The local council has made an objection to the modification;
- A reportable political donation has been made; or
- There are more than 25 submissions by way of objection by members of the public.

The modification meets the above delegation because the Department received an objection from North Sydney Council. Therefore, the modification is referred to the PAC for determination. No reportable political donation was made and no public submissions were received.

4. CONSULTATION AND SUBMISSIONS

4.1 Exhibition

Under section 75W of the EP&A Act, a request for a modification of an approval does not require public exhibition, however, under Section 75X(2)(f) of the EP&A Act, the Director-General is required to make the modification request publicly available. The modification application was made available on the Department's website on 31 October 2012.

North Sydney Council was consulted in relation to the section 75W modification application and objected on the following grounds:

1. Adequate provision already made for staging through the Construction Certification process.
2. Dedication of four affordable housing units is contrary to the Development Control Plan.
3. Deletion of the VPA open to legal challenge or watering down.
4. Dedication of studio units unacceptable given demand for one and two bedroom units.
5. Affordable housing units should be located on levels of the building with better amenity.
6. Payment of section 94 contributions prior to Occupation Certificate is inconsistent with council's section 94 contributions plan.

4.2 Proponent's response to submissions

The Proponent responded to Council's submission, as follows:

1. Staging will reflect the different activities to be undertaken for the development and will not alter the parking requirement or provision.
2. The commitment of 6 residential units in the draft VPA is overridden by the requirement of Condition B5 for the dedication of 4% of dwelling space for affordable housing. Condition B5 is consistent with the Development Control Plan which requires the calculation of affordable housing units based on net dwelling area.
3. The draft VPA was not exhibited or executed, therefore, compliance with Condition B5 will provide greater certainty for the provision of affordable housing.

4. Condition B5 was further amended (after Council's submission) to delete reference to a specific mix of studio and one bedroom units. This has been replaced with a requirement to reach written agreement with Council on the location and mix of units within a reasonable period, and failing that, the proponent is to determine the reasonable mix.
5. The units most likely to be dedicated are located on the two lower residential floors, levels 7 and 8 which are east or west facing. Those units offer a high level of architectural design which will benefit from superior levels of privacy, amenity and solar penetration.
6. The generation of demand for items the subject of section 94 contributions are not actualised until the development is physically occupied and as such, Council's preferred timing for the contributions cannot be justified. Payment of the contributions prior to the issue of the Occupation Certificate will enable the process to occur accurately and relevantly.

The Department notes that in respect of the proponent's response at No. 4 above, the proposed wording of Condition B5 was changed from the original modification request to delete reference to the specific location and unit mix and to provide for the proponent to determine the reasonable mix of units where agreement is not achieved with Council within a reasonable time frame.

The Department has considered the issues raised by Council in its assessment of the modification as detailed in Section 5 below.

5. ASSESSMENT

The Department considers that the key issues for the proposed modification are:

- affordable housing provision; and
- staging and timing of document submission.

5.1 Affordable housing provision

The modification request seeks to modify conditions A1, B5 and E2 which specifically relate to the provision of affordable housing. Condition A1 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Development in accordance with plans and documentation

A1. The Proponent shall carry out the project generally in accordance with the:

- (a) Architectural drawings numbered PA-100-01 to PA-100-18 inclusive, PA-200-01 and 200-02, PA210-01 to PA-210-07 (inclusive), and PA-300-01 to PA-300-04 (inclusive) all dated April 2011 and all drawn by Francis-Jones Morehen Thorp Pty Ltd;
- (b) Preferred Project Report prepared by City Plan Services Pty Ltd, dated April 2011;
- (c) Stormwater drainage concept plans numbered 3532 H-100 to H-117 (inclusive) all issue 01, all dated March 2010, and all drawn by Warren Smith & Partners Pty Ltd; and
- (d) The Draft Statement of Commitments ~~contained in the Preferred Project Report submitted with the Section 75W Modification Application~~ prepared by City Plan Services Pty Ltd, dated ~~October 2012~~ *April 2011*.

except for:

- Any modifications which are 'Exempt and Complying Development' as identified in State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 or as may be necessary for the purpose of

compliance with the BCA and any Australian Standards incorporated in the BCA; and

- Otherwise provided by the conditions of this approval.

North Sydney Council objected to the modification request on the grounds that the VPA represented the owner's binding offer and requiring affordable housing by condition is weaker and open to challenge.

The proponent's justification for the modification and response to Council's objection is that:

- the draft VPA in the PPR was not exhibited or executed;
- the draft VPA does not reflect the approved development as it was predicated on the basis of the proposal as lodged (8 affordable housing units) not as subsequently amended (6 affordable housing); and
- affordable housing is required by Condition B5.

Department's Assessment:

The modification request does not detract from the requirement to provide affordable housing. Condition B5 requires the provision of affordable housing (see below), and due to the wording of Conditions A1 and A2, prevails in the event of any inconsistency between the conditions of the approval, any drawings/documents and the statement of commitments.

As the draft VPA (in the draft statement of commitments) was not exhibited or executed and does not reflect the approved development, it provides no certainty for the provision of affordable housing.

Condition B5 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Affordable Housing

B5. In accordance with the requirements of cl.6 (b)(iv) of the North Sydney Development Control Plan 2002, 4% of dwelling space (net dwelling area, excluding serviced apartments) must be dedicated to North Sydney Council for Affordable Housing *prior to issue of the Occupation Certificate for the residential component of the development.*

Written agreement is to be reached with North Sydney Council ~~over~~ *for* the *general* location and mix of these units prior to issue of ~~any~~ *the* Construction Certificate *for the residential component of the development. If agreement is not achieved within a reasonable time frame, say 4 weeks from request, the proponent is to determine the reasonable mix.*

North Sydney Council objected to the modification request on the following grounds:

- dedication of only 4 units is inadequate;
- a VPA is more binding than a condition;
- studio and lower level units are unacceptable; and
- agreement with Council required prior to the issue of any Construction Certificate.

The proponent's justification for the modification and response to Council's objection is that:

- dedication prior to Occupation Certificate will provide greater flexibility and time to reach agreement with Council;
- agreement on the general location of units reflects the general terms in the draft VPA;
- 4 % of dwelling space (not 4 units as claimed by Council) represents a greater number of affordable housing units given the reduced height required by the project approval, which will result in a smaller development yield; and
- the units intended for affordable housing are on levels 7 and 8 and either, east or west facing with adequate levels of privacy, amenity and solar access.

Department's Assessment:

Condition B5 as proposed to be modified is clear and does not diminish the requirement to provide affordable housing. The modification request seeks greater flexibility in negotiating agreement with Council and does not seek to reduce the number of affordable housing units required.

The proponent has advised that the draft VPA in the Draft Statement of Commitments was not exhibited or executed, and, therefore, is not binding as agreement was not reached between the parties. The proponent contends that given the absence of a VPA, it is better to rely on the requirements of Condition B5.

In accordance with Condition A1, the proponent is required to carry out the project generally in accordance with the draft statement of commitments, except as otherwise provided by the conditions of the approval. Furthermore, Condition A2 provides that, in the event of any inconsistencies between the conditions of approval and drawings/documents, including the statement of commitments, the conditions of approval will prevail.

Council's concern about a condition potentially limiting the enforceability of affordable housing provision is unwarranted as the requirements of Condition B5 provide greater certainty and statutory weight than the draft VPA. The condition as proposed to be modified still requires the provision of 4 % of dwelling area as affordable housing consistent with Council's DCP and furthermore requires the proponent to reach agreement with Council about location and mix.

Therefore, the Department considers the modification request is reasonable and recommends the condition be modified largely as requested. However, the Department recommends the condition be further modified to require the proponent to consult with and obtain the approval of the Director-General to determine the reasonable unit mix if an agreement with Council cannot be reached within a reasonable timeframe (4-6 weeks).

Condition E2 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Dedication of Affordable Housing Units

E2. Prior to the issue of any ~~interim~~ Occupation Certificate *for the residential component of the development*, the Proponent shall provide evidence that the Affordable Housing Units required to be dedicated (condition B5) to North Sydney Council have been dedicated.

North Sydney Council is concerned with the staging of this condition.

The proponent's justification for the modification and response to Council's objection is that:

- it is more flexible and consistent with the relevant stage of development; and
- there is no diminution of requirement to provide affordable housing.

Department's Assessment:

The modification to condition E2 does not compromise the provision of affordable housing for the development. The modification delays the delivery of affordable housing so that it is provided when the residential component of the development is completed. This will mean that an Occupation Certificate for the residential component of the development cannot be issued without satisfactory evidence of dedication of affordable housing. This does not diminish the requirement of the condition or result in a fundamental difference in the finalised product. Accordingly, the modification request is reasonable and the Department recommends that the condition be modified as sought.

5.2 Staging requirements

The modification request seeks to modify the timing of Schedule 1 and three conditions to provide greater flexibility for the staged demolition, excavation, and construction of the development. Schedule 1 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Schedule 1 Project description - Mixed use development at 6 - 16 Atchison Street, St Leonards, including:

- 6 levels of basement, containing 168 car spaces, 4 spaces for disabled drivers, and 16 motor bike spaces;
- a café, residential and hotel lobbies and public plaza at the ground floor level;
- a 4 level hotel (76 serviced apartments);
- 24 levels of apartments (173 apartments); and
- 1 level of roof top plant and equipment; *and*
- *staging of the development with respect to demolition, excavation, construction and occupation.*

Condition B3 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Building Height

B3. The building is to be lowered so that it has a maximum height of RL 167.3 AHD. Amended plans shall be submitted to the Director-General for approval prior to the issue of ~~any the~~ Construction Certificate *for the above-ground non-residential and residential components of the development.*

Condition B11 is to be amended as follows (in ~~strikethrough~~ and *italics*):

Section 94 Contributions

B11. Following receipt of the approval of the Director General for the amended plans required by condition B3, the approved plans must be submitted to Council so that it may calculate the required Section 94 contributions (in accordance with the North Sydney Section 94 Contribution Plan). The contributions are to be paid to Council prior to the determination of any ~~Construction Occupation~~ Certificate *for the building.*

This amount, if not paid within one calendar year of the date of this consent, shall be adjusted for inflation by reference to the Consumer Price (All Ordinaries) Index applicable at the time of the payment of the contribution.

A copy of the North Sydney Section 94 Contribution Plan can be viewed at North Sydney Council's Customer Service Centre, 200 Miller Street, North Sydney or downloaded via Council's website at www.northsydney.nsw.gov.au.

Condition B38 is to be amended as follows (in ~~strikethrough~~ and *italics*):

BASIX Commitments

B38. Under clause 97A(3)(2) of the Environmental Planning & Assessment Regulation 2000, it is a condition of this Project Approval that all the commitments listed in each relevant BASIX Certificate for the development are fulfilled. The Certifying Authority must ensure that the building plans and specifications submitted by the Proponent, referenced on and accompanying the issued Construction Certificate *for the residential component of the development*, fully satisfy the requirements of this condition. In this condition:

- a) relevant BASIX Certificate means:
 - (i) a BASIX Certificate that was applicable to the development when this development consent was granted (or, if the development consent is modified under section 96 of the Act, a BASIX Certificate that is applicable to the development when this development consent is modified); or
 - (ii) if a replacement BASIX Certificate accompanies any subsequent application for a construction certificate, the replacement BASIX Certificate; and
- b) BASIX Certificate has the meaning given to that term in the Environmental Planning & Assessment Regulation 2000.

North Sydney Council objected to the modification request on the following grounds:

- Amendments to Condition B3 will affect excavation, design and number of parking spaces;
- Amendments to Condition B11 are contrary to Council's Section 94 contributions plan; and
- Amendments to Condition B38 will affect the design amendments required for the development.

The proponent's justification for the modification and response to Council's objection is that:

- The amendments provide greater flexibility for staging of the development;
- The amendments provide consistency with the approved draft revised statement of commitments; and
- The amendments enable commitment to detailed floor layout plans for the residential component of the development to which they relate.

Department's Assessment:

The modification requests will allow the development to proceed in an orderly, logical manner commensurate with the intended staging for the construction of the project. This will provide flexibility and will not diminish the requirements of the relevant conditions.

In particular, the modification requests will enable the submission of relevant documents in relation to the component of the development to which they directly relate. The proposed amendment to the project description (Schedule 1) provides for discrete stages and does not affect the amount of car parking, the number of basement levels required for its provision, or the approved height of the development.

The proposed amendment to Condition B3, will not affect the design of the development, as amended plans in relation to the maximum height are required for the Director-General's approval prior to the issue of the construction certificate for the above ground non-residential and residential components of the development.

The proposed amendment to Condition B11 is not considered to affect Council's ability to provide for public services as a result of the proposed development or to recoup funds which have been or will be spent in anticipation of the development. Section 94 contributions will be required to be paid before occupation of the development, ahead of any increase in demand for local services and infrastructure.

The Department has previously imposed conditions on project approvals requiring the payment of contributions prior to issuing an occupation certificate and also staged payment of contributions in relation to relevant occupation certificates.

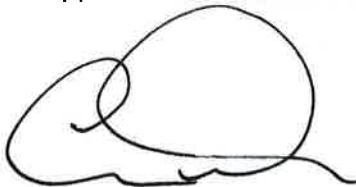
The modification request is considered to be reasonable and the Department recommends the conditions be modified as sought.

6. CONCLUSION AND RECOMMENDATIONS

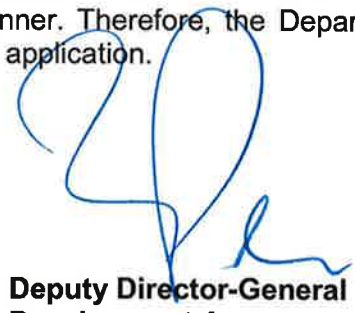
The purpose of the modification request is to clarify details regarding affordable housing provision, to enable staging of the development, and provide for flexibility in submission of relevant documents at Construction Certificate and Occupation Certificate stages. The proposed modifications fall within the scope of section 75W of the Act and do not alter the original assessment as to the site's suitability for this development.

In assessing the modification request, the Department has reviewed the proponent's application and submission dated 16 October 2012, including revised draft statement of commitments, North Sydney Council's submission, and the proponent's response to submissions dated 30 November 2012.

Overall, the Department considers that the modifications does not comprise the delivery of the affordable housing component of the development and enables the submission of relevant documents in a timely and more efficient manner. Therefore, the Department recommends approval of the modifications sought under this application.

 8.2.13

**Executive Director
Major Projects Assessment**

 11/2/13

**Deputy Director-General
Development Assessment and
Systems Performance**

APPENDIX A MODIFICATION REQUEST

See the Department's website at <http://majorprojects.planning.nsw.gov.au/page/>

APPENDIX B SUBMISSIONS

See the Department's website at <http://majorprojects.planning.nsw.gov.au/page/>

APPENDIX C PROJECT APPROVAL MP09_0187

See the Department's website at <http://majorprojects.planning.nsw.gov.au/page/>