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RE: DA2018/1743 - 402 Sydney Road BALGOWLAH NSW 2093

Manly Council,
1 Belgrave Street,
Manly , NSW 2095
26 April 2019

Objection to Amended Development Application no. DA2018/1743 for Shop Top Housing
Property: 396 to 402 Sydney Road, Balgowlah.
We are the owners of 162A Woodland Street, Balgowlah.
We are the closest dwelling to the proposed development and will be the most affected by it both during and after its construction.
The proposed development is located in the B2 zone and our property is located in an R1 zone. The development occurs on the zone interface and does not respond to that interface.
The need to respond to a zone interface has been recognised by the Court in Seaside Property Developments Pty Ltd v Wyong Shire Council [2004] NSWLEC 117 at 25 where the Court determined as a matter if planning principle that:
"25. As a matter of principle, at a zone interface as exists here, any development proposal in one zone needs to recognise and take into account the form of existing development and/or development likely to occur in an adjoining different zone. In this case residents living in the 2 (b) zone must accept that a higher density and larger scale residential development can happen in the adjoining 2(c) or 2(d) zones and whilst impacts must be within reason they can nevertheless occur. Such impacts may well be greater than might be the case if adjacent development were in and complied with the requirements of the same zone. Conversely any development of this site must take into account its relationship to the 2(b) zoned lands to the east, south-east, south and south-west and the likely future character of those lands must be taken into account. Also in considering the likely future character of development on the other side of the interface it may be that the development of sites such as this may not be able to achieve the full potential otherwise indicated by applicable development standards and the like. "
This planning policy has also been recognised by the NSW state government in the Apartment Design Guide in the design guidance to Objective 3F-1 (Visual Privacy) which states:
"Apartment Buildings should have an increased separation distance of 3m (in addition to the design criteria 1) when adjacent to a different zone that permits lower density development to provide for a transition in scale and increased landscaping."
The B2 zone permits residential development at a density of 2:1. The R1 zone permits development at a density of 0.5:1. The R1 zone permits lower density development.
Having regard to Seaside and the ADG, where one would expect a building to be less than the height limit at the zone interface, the proposed building exceeds the building height standard by more than 3 metres which presents as an additional storey. At the northern boundary the uppermost storey is not setback and the whole of that storey is above the 12.5 metre height

limit. This results in a scale and bulk that is not consistent with a building that complied with the 12.5m height limit. The proposed building will tower above us. The amenity impacts are exacerbated because all of the residential units have balconies facing the interface which will result in unacceptable privacy impacts on our property.
The separation distance also does not comply with the ADG. Lower density development is permissible in the R1 zone so a rear setback of 6m plus an additional 3m is required at the rear boundary. This non-compliance results in unacceptable privacy impacts.
We are aware that the neighbouring 404 Sydney road has recently been approved over height but whilst overbearing at least does not provide balconies overlooking our primary outdoor space.
The applicant's has provided an amended clause 4.6 objection. That objection cannot be upheld because:
(a) it has not established that compliance with the height standard is unreasonable or unnecessary; or
(b) that there are sufficient environmental planning grounds to justify the contravention of the standard and
(c) The Council could also not be satisfied that the development is consistent with objectives (a) and (b) of the standard or with the last objective of the B2 zone objectives.
The Clause 4.6 request relies upon the first test in Wehbe v Pittwater Council [2007] NSWLEC 827 being that notwithstanding non-compliance with the height standard the zone objectives are achieved. The most recent authority on clause 4.6 is Initial Action Pty Limited v Wollahara Council [2018] NSWLEC 118. It is a decision of Chief Justice Preston who was the judge in Wehbe. It was a s56A appeal against the decision of Commissioner Smithson. Relevantly and importantly Preston Cj confirmed in Initial Action at [15] & [16] that the Wehbe tests still apply to establishing whether it was unreasonable or unnecessary to comply with a development standard.
Whebe at [42[identifies the first test as:
"42 An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard"
The applicant relies upon this test in an attempt to make good its clause 4.6 objection. In Wehbe the development standard in issue was minimum lot size for subdivision. One of the objectives of the standard in issue in that case was:
"to….improve residential amenity".
Preston Cj illustrated how Wehbe test 1 applies to that objective at [67] to [70]:
67 The second stated aim of clause 11 is to "improve residential amenity". The original SEPP 1 objection states that the proposed subdivision can reasonably accommodate two new dwellings, one on each of the two allotments to be created by the proposed subdivision, together with necessary associated spaces and car parking. It is said that such new dwellings can provide a high level of amenity to future occupants, without compromising the amenity enjoyed by adjoining owners. The original SEPP 1 objection contrasts this ultimate use of two dwellings on the site with the existing use of dwelling house, restaurant and retail use, and states that the proposed subdivision will result in a less intensive use of the site.

68 I am not satisfied by this ground for two reasons. First, the second aim of clause 11 is to "improve the residential amenity". That aim is to be achieved, according to the clause, by having allotments of the size specified for the locality. Again, the aim is descriptive of the result achieved by the clause fixing varying allotment sizes depending on the locality of the land to be subdivided and the type of allotment created by the subdivision. For land within zone 2(a) or 2 (b) generally north of Mona Vale Road, Mona Vale and east of Chiltern Road, Ingleside, the

locality of relevance in this case, the planning policy embodied in the clause is that residential amenity will be improved by fixing a minimum allotment size of 700 square metres rather than the smaller allotment sizes considered to be appropriate for land in the other locality, being in zone 2(a) or 2(b) generally south of Mona Vale Road, Ingleside and Mona Vale.

69 Viewing the second aim this way, granting consent to the proposed subdivision which creates allotments each of 514 square metres does not achieve the second aim of the clause which is to afford to land within zone 2(a) or 2(b) generally north of Mona Vale Road, Mona Vale and east of Chiltein Road, Ingleside, the improved residential amenity that comes from having a minimum allotment size of 700 square metres, rather than the smaller allotment sizes fixed for land in the other locality, being in zone 2(a) or 2(b) generally south of Mona Vale Road, Ingleside and Mona Vale.

70 Secondly, the original SEPP 1 objection does not establish, as it would need to, that the proposed subdivision will result in the level or degree of improved residential amenity that would be afforded by allotments that complied with the minimum allotment size of 700 square metres. The original SEPP 1 objection asserts that the proposed allotments of 514 square metres could reasonably accommodate new dwellings which would provide a high level of amenity to future occupants, without compromising the amenity enjoyed by adjoining owners. This does not establish that this level of residential amenity for occupants or adjoining owners is equal to or better than the residential amenity to occupants or adjoining owners that would result from an allotment that conforms to the minimum allotment size of 700 square metres. Unless this is established, the applicant cannot discharge the onus of showing that the proposed subdivision achieves the second aim of the clause establishing the development standard to "improve residential amenity".

If you apply the rationale in [67] to [70] of Wehbe to this case the applicant needs to establish that the proposed development at a height of 15.7m metres achieves the objectives of the standard to an equal or better degree than a development that complied with the height standard of 12.5 metres.
Objective (a) of the height standard is:
(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,
The clause 4.6 objection focuses on the existing buildings but ignores the requirement that "building heights…are consistent with the topographic landscape"
The development has no regard to topography. The land falls away towards our building yet the development steps up. The top floor should be removed or be setback to reflect the topographic landscape. The carparking levels which form a wall on the rear boundary should be setback to provide a deep soil landscape zone to provide screening on the carpark structure.
Objective (b) of the height standard is:
(b) to control the bulk and scale of buildings
The applicant needs to establish that the proposed development at a height of 15.7m controls the bulk and scale of buildings to an equal or better degree than a building that was 12m in height.
The planning policy behind the objective is that a building which does not exceed a height of 12.5m will control the bulk and scale of buildings. This development with an additional storey results in a disproportionate bulk and scale at the zone boundary.
The clause 4.6 request has not established sufficient environmental planning grounds to justify a 3 metre height exceedance particularly at the zone interface. In the latest authority of Initial Action v Woollahra Council Preston CJ held:
"23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in

the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.
24. The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].
The relevant aspect of the development is its height non-compliance. The clause 4.6 objection relies upon three arguments to constitute sufficient environmental planning grounds. None of the arguments are in truth environmental planning grounds. The first argument is the topography falling away in 3 directions. This argument does not constitute sufficient environmental planning grounds. The objective of the height standard requires the height of the development to be consistent with the topographic landscape. The applicant’s argument is contrary to the objective. The applicant argues that the height can be breached in order to avoid being consistent with the topographic landscape. The second argument is that there are no adverse amenity impacts. This argument cannot be substantiated as there are visual bulk and privacy impacts caused to our property by the excessive height as well as overshadowing to the property across the road the subject of the objection from Dominic and Lia White. In the circumstances this argument cannot constitute sufficient environmental planning grounds. The third argument is the exceptional design quality of the development. This ground is also not sufficient. A development that exceeds the height limit and is contrary to the objective which requires the development to be consistent with topography and has amenity impacts cannot be regarded as being of "exceptional design quality". To the contrary a well designed building that complied with the height standard could be built on the site and avoid visual bulk and privacy impacts to our property and the property across the road caused by the non-complying proposal. To uphold the clause 4.6 objection would not constitute orderly and economic development which is an object of the EP&A Act and a recognised environmental planning ground.
The last objective of the B2 zone is:
• To minimise conflict between land uses in the zone and adjoining zones and ensure amenity for the people who live in the local centre in relation to noise, odour, delivery of materials and use of machinery.
The failure to acknowledge the zone interface will result in conflict between the uses in the B2 and R1 zones.
If there was to be additional height it should be setback at the rear as it has been on Sydney road. Whilst we maintain that the development should comply with the height limit if the Council was minded to approve a height exceedance then that height and any resultant amenity impacts should not be perceptible. This would require any portion of the building above the height limit to be setback and for balconies to also be recessed so that that portion of building above the height limit cannot be seen or perceived from our property. The setting back of the upper most storey on the Northern side would accomplish this coupled with privacy screens to all rear facing balconies and decks.

The Council must not rely upon the approval on the adjoining site at 404 Sydney Road to justify a breach on this site. Every breach must be assessed on its merits pursuant to clause 4.6. If the Council relies upon the height breach on the adjoining site then it will be abandoning its height control.
Further, in relation to privacy it has been noted that the ground floor has been amended such that outdoor patio access on the Northern side is to be restricted to garden access and maintenance. The use of this area will be difficult to enforce so we would suggest it be re designed to be non-trafficable such as to increase the size of the garden bed itself from the northern boundary southwards leaving only a 1.2 m wide path adjacent to the rear doors.
As regards the proposed plantings, Council should condition a mixed height of plantings to provide improved permanent visual separation.
We are extremely concerned in relation to construction impacts. As previously indicated the basement parking levels should be setback to provide deep soil planting at the zone interface and move the excavation off the boundary. If consent is to be granted then conditions should be imposed requirings:
- Excavation methodology is outlined being so close to our boundary and well below the Thomas Street level.
- Vibration technology to be required and monitored during excavation.
- Dilapidation report requirements prior to and after construction to be enforced such that interim occupation certificates will not be granted until any reparation works are completed.
In summary we believe that this proposed development in its present form will adversely affect the liveability and value of our property by negatively impacting our privacy and creating gross visual impact inconsistent with the zone boundary and desired future character of the area.

David Ferguson
Lorena Monforte