

STATE ENVIRONMENTAL PLANNING POLICY NO. 1 - OBJECTION

This objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) relates to the development standard for FSR in clause 55(4) of the Burwood Planning Scheme Ordinance (BPSO) for the land at 1-17 Elsie Street, Burwood.

1 SEPP 1 Objection

This objection under State Environmental Planning Policy No. 1 – Development Standards (SEPP 1) has been prepared in relation to a proposed development involving three (3) residential apartment buildings at 7-17 Elsie Street and 45-49 George Street, Burwood, pursuant to the provisions of Clause 55(4) of the Burwood Planning Scheme Ordinance 1979 (BPSO). This SEPP 1 objection relates to a non-compliance with BPSO in regard to the floor space ratio.

1.1 The Provisions of SEPP 1

SEPP 1 – Development Standards is a State Policy mechanism available to applicants to seek variation of development standards contained within an environmental planning instrument.

Clause 3 of the Policy details the Aims and Objectives of the Policy and provides as follows:

3 Aims, objectives etc

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

The relevant objects of Clause 5 of the *Environmental Planning and Assessment Act, 1979* are:

5 Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and

artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

...

Clause 6 of SEPP 1 incorporates the mechanism for the making of a SEPP 1 objection and provides as follows:

6 Making of applications

Where development could, but for any development standard, be carried out under the Act (either with or without the necessity for consent under the Act being obtained therefore) the person intending to carry out that development may make a development application in respect of that development, supported by a written objection that compliance with that development standard is unreasonable or unnecessary in the circumstances of the case, and specifying the grounds of that objection.

The SEPP 1 objection is made in accordance with the provisions of Clause 6. Clause 7 of SEPP 1 provides the discretion and power to the Consent Authority to support a SEPP 1 objection and grant development consent and provides:

7 Consent may be granted

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent to that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

1.2 Circular B1 from the Department of Planning

In accordance with the notification given under Clause 12 of Circular B1 from the Department of Planning, the consent authority may assume the Directors concurrence to an objection pursuant to the provisions of SEPP 1 in these particular circumstances.

2 Is the Planning Control in Question a Development Standard?

2.1 Environmental Planning Instrument

The Environmental Planning Instrument to which this objection relates is the BPSO.

2.2 Development Standard to be Varied

The development standard to which this objection relates is Clause 55(4) of the BPSO, which contains provisions relating to the maximum floor space ratio of buildings in the 3(c2) zone.

Floor space ratio

55. (1) In this clause "building" in relation to land within Zone No. 2 (b1), 2 (b2), 2 (c1) or 2 (c2), does not include a dwelling-house or residential flat building.
- (2) Omitted by LEP 35 _ Gazetted 12.4.02
- (4) The ratio of the total floor space of any building or buildings erected or proposed to be erected on land within a zone specified in Column I of the Table to this clause to the site area of the land shall not exceed the ratio set out opposite the zone in Column II of that Table.

Table

| Column I | Column II |
|--------------------------------|-----------|
| Zone No. 2 (b1) | 0.4:1 |
| Zone No. 2 (b2) | 0.55:1 |
| Zone No. 2 (c1) | 0.75:1 |
| Zones No. 2 (c2), 3 (d), 4 (b) | 1:1 |
| Zones No. 3 (a), 3 (b), 3 (c3) | 1.5:1 |
| Zones No 3 (c1), 3 (c2) | 2:1 |

LEP 35-Gazetted 12.4.02

- (4) Omitted by LEP 35 - Gazetted 12.4.04

Clause 55(4) sets a maximum floor space ratio for buildings on land zoned 3(c2) at 2:1. Floor space is defined under the BPSO as follows:

"floor space" includes all wall thicknesses, vents, ducts, staircases and lift wells, but does not include -

(a) any parking space in the building provided to meet the standards required by the responsible authority (but not parking space provided in excess of those standards) or any internal access to the parking space;

(b) space used for the loading or unloading of goods;

(c) lift towers, cooling towers, machinery and plant rooms and any storage space related thereto; and

(d) any shopping mall area available to the public and not generally used for commercial, advertising or entertainment purposes;

The proposed development breaches the floor space ratio as detailed previously, where the overall project will have a total combined floor space of 27,743.1 sqm or FSR 4.93:1 when completed. This excludes the basement car parking levels which are public car parking. This FSR exceeds the maximum permitted FSR of 2:1.

The provisions of SEPP 1 are applicable to development standards prescribed under and Environmental Planning Instrument pursuant to the *Environmental Planning and Assessment Act, 1979*.

2.3 Definition of Development Standards

“Development Standards” has the following definition under Section 4(1) of the *Environmental Planning and Assessment Act (EP&A Act)*:

development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of:

- (a) the area, shape or frontage of any land, the dimensions of any land, buildings or works, or the distance of any land, building or work from any specified point,*
- (b) the proportion or percentage of the area of a site which a building or work may occupy,*
- (c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*
- (d) the cubic content or floor space of a building,*
- (e) the intensity or density of the use of any land, building or work,*
- (f) the provision of public access, open space, landscaped space, tree planting or other treatment for the conservation, protection or enhancement of the environment,*
- (g) the provision of facilities for the standing, movement, parking, servicing, manoeuvring, loading or unloading of vehicles,*
- (h) the volume, nature and type of traffic generated by the development,*
- (i) road patterns,*
- (j) drainage,*
- (k) the carrying out of earthworks,*
- (l) the effects of development on patterns of wind, sunlight, daylight or shadows,*

(m) the provision of services, facilities and amenities demanded by development,

(n) the emission of pollution and means for its prevention or control or mitigation, and

(o) such other matters as may be prescribed.

This SEPP 1 objection relates to a departure from the numerical standard prescribed under Clause 55(4) of the BPSO. It is considered that Clause 55(4) of the BPSO is a development standard and not a 'prohibition' in respect of development.

3 What is the underlying object or purpose of the standard?

There are no stated objectives to clause 55(4), and therefore the underlying objectives of the standard have been taken to be:

(a) to control the bulk and scale of buildings,

(b) to provide for appropriate separation between buildings, and

(c) to provide for appropriate levels of amenity to existing dwellings and new dwellings in terms of shadowing, privacy, views, ventilation and solar access located in the Burwood Town Centre.

4 Is Compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP & A Act?

4.1 Compliance with the Development Standard

The subject site is zoned Business Special (District Centre) under the BPSO and the provisions contained within clause 55(4) apply. This clause provides a building floor space ratio applicable to the proposal. The overall project will have a total combined floor space of 27,743.1 sqm or FSR 4.93:1 when completed. This includes the basement car parking levels which are public car parking. This FSR exceeds the maximum permitted FSR of 2:1.

Therefore, it is requested that the floor space ratio restriction for the apartment buildings in the Business Special (District Centre) 3(c2) zone, pursuant to Clause 55(4) to the BPSO, be varied to permit the proposed development. It is acknowledged that the proposed development seeks a variation to the numerical breach of the floor space ratio applying to the site. Notwithstanding the numerical

breach, it is considered that the proposal satisfies the underlying objectives of the control for the following reasons:

4.2 Justification for Proposed Variations

Subclause 55(4) of the BPSO does not include any stated objectives to the development standard.

The nature of the proposed impacts of the proposed breach of the FSR have been considered specifically in relation to the previous approval which included three tower elements involving a three (3), five (5) and seven (7) storeys with a combined floor space of some 18,916.43 sqm or floor space ratio 3.36:1 which already breached the FSR and was supported based on the same reasons as currently presented:

(a) to control the bulk and scale of buildings,

The proposed development seeks to locate the building bulk in a similar location of the existing approved development. It should also be noted that the building bulk has been shifted towards the eastern boundary so as to mitigate its presence when view from the adjoining properties to the west and along with additional design measures in each façade has overcome issues associated with privacy and amenity of properties to the west. Whilst the overall height of each building will be taller and the usage be for the purposes of residential apartment building instead of the approved commercial floor space essentially the façades presenting to the street and the external walls of the buildings are in a similar location. Therefore, the bulk and scale is similar to that of the approved development and the character envisaged for the site development.

(b) to provide for appropriate separation between buildings, and

Details of building setbacks to the boundaries of the site and internally to buildings within the development are shown on the drawings. Building separation (within the site) complies between Building A and Building B, Building B and external adjoining properties and Building C and external adjoining properties. Building separation between Building A and Building B does not comply with the guide within the NSW RDFC. The proposal does however seek to mitigate the proposed variation based on:

- Building B has been “pushed” towards the Elsie Street frontage so as to provide for a marked improvement in privacy and amenity for the adjoining properties to the west;
- The southern elevation of Building B has been designed to avoid placement of any windows for living areas as the main orientation;

- Windows on the southern elevation of Building B has been reduced in size;
- The windows and angles in the wall of Building B have been off-set from those located on the façade of Building A;
- No balconies are proposed in the southern elevation of Building B; and
- Fixed privacy screens are proposed to the southern elevation of Building B.

It is considered that the mitigation measures proposed and the designed location of Building B are reasonable, and is a vastly more reasonable solution to locate the building in its proposed location so as to mitigate privacy issues of properties to the west, while maintaining minimum apartment sizes.

It is considered that with these measures the proposed development also does not impinge on its “share” of the separation distance which would be envisaged on sites to the west, given the setback to the closest balcony from the boundary is approximately 11.4m, Building A.

Building separation to the adjoining development to the north, east, south and west complies with the requirements of the NSW Residential Flat Design Code under State Environmental Planning Policy No. 65. The towers have been sited so as to enable level 3 to have clear edges and read as a podium base.

The design as prepared by TAA specifically sought to improve amenity between residential properties to the immediate west and the subject site, including:

- Building A set further back from the western boundary.
- Building B setback some 18.3m from the western boundary.
- Screens both fixed and vertical have been added to some of the apartments.
- Balcony balustrades have been designed at the lower levels of each building to include solid elements to prevent downward viewing.
- A pergola structure which will have climbers, is proposed on the podium level along the western boundary to provide for a visual break from the rear yards of the properties to the immediate west when looking upwards.

The landscape design seeks to mitigate overlooking with the use of planter boxes along the western edge of the podium.

It is considered that the development provides for appropriate separation between buildings and an appropriate level of amenity will result.

(c) to provide for appropriate levels of amenity to existing dwellings and new dwellings in terms of shadowing, privacy, views, ventilation and solar access located in the Burwood Town Centre.

The amended design has been accompanied by information which addresses, shadowing, privacy, views, and solar access within the proposed development and to properties surrounding the development which are all located within the Burwood Town Centre.

It has been determined that no significant changes in amenity of existing surrounding dwellings are expected as a result of the proposed development. Overshadowing impact changes are minimal. No significant or iconic views from adjoining properties will be affected by the proposed buildings. Natural ventilation to the subject building and surrounding apartments will be adequately maintained refer to Wind Tunnel Test Report. Privacy will be improved as a result of the amended design. Therefore, the proposal is consistent with the underlying objective, notwithstanding the breach of the FSR control.

5 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Strict application of the standard is considered to be unreasonable and unnecessary in the current circumstance for the following reasons:

- The proposed development does not result in any unreasonable impacts on the amenity of adjoining residential properties in terms of overshadowing, privacy, loss of views or loss of daylight, given the previous approvals for the lower levels and the siting of the amended buildings in relation to the George, Elsie and Victoria Street frontages;
- The proposed amended development does not result in any material impacts in terms of privacy, views, solar access, separation distances, light and ventilation as a result of the breach;
- The inclusion of the basement car parking public car parking as part of the overall floor space does not contribute to the visual bulk and scale of the development, and as such does not have an impact which brings the development into inconsistency with the underlying objectives of the control.

Further, it is considered that the intent of the definition of floor space was not include the public benefit of the public car parking within the FSR given Council's previous assessment approach to the development, the contractual obligation associated with the sale of the land and that the car park is now an asset of Burwood Council;

- The proposal enables a building form to be created on the site which has architectural merit, consistent with the desired future strategic vision for the land expressed in the exhibited Draft Burwood Town Centre Local Environmental Plan and Development Control Plan 2007, the Draft Burwood Town Centre Local Environmental Plan 2008, the Draft Inner West Subregional Strategy and the Sydney Metropolitan Strategy – City of Cities all of which seek to promote mixed use developments and promote Burwood as a Major Centre; and
- The proposed development has been amended to seek greater compliance with the required separation distances required between one apartment building and another apartment building both on the subject site and adjoining properties future development potential and in so doing has mitigated the impacts of the development with the amended design.

For these reasons it is considered that strict application of this standard is unreasonable and unnecessary in this circumstance.

6 Is the objection well founded?

It is further noted that the NSW Land and Environment Court has expanded the considerations of SEPP 1 established by Lloyd J, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89, who posed five questions to be addressed in SEPP 1 objections, as follows:

- 1 Is the planning control in question a development standard?
- 2 What is the underlying object or purpose of the standard?
- 3 Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP & A Act?
- 4
 - (a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?
 - (b) Is a development which complies with the development standard unreasonable or unnecessary?
- 5 Is the objection well founded?

These have been addressed above previously in this SEPP 1 objection.

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, Chief Justice Preston rephrased the test with a new test as follows:

1. The applicant must satisfy the consent authority that “the objection is well founded” and compliance with the development standard is unreasonable and unnecessary in the circumstances of the case;
2. The consent authority must be of the opinion that granting consent to the development application would be consistent with the policy’s aim of providing flexibility in the application of planning controls where strict compliance with those controls would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979; and
3. It is also important to consider:
 - (a) whether non-compliance with the development standard raises any matter of significance for State or regional planning; and
 - (b) the public benefit of maintaining the planning controls adopted by the environmental planning instrument.

Preston CJ then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy:

1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. the development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

These questions are addressed below:

QUESTION 1 *Is the objection well founded?*

For the reasons set out in the following questions 2A, 2B and 3, the proposed departure from the FSR of 2:1 development standard is well founded.

It is considered that the objection is well founded as the stated objective of the control can be achieved despite non-compliance with the standards. This is discussed in detail below. As such, this SEPP 1 is consistent with the first method to demonstrate that the SEPP 1 is well founded as established by Preston CJ above.

QUESTION 2(A) *Is the granting of consistent with the policy's aim of providing flexibility in the application of the planning control where strict compliance with the control would be unreasonable and unnecessary?*

The aims and objectives of SEPP 1 will not be hindered by this proposal. It is noted that Clause 3 provides for flexibility in the application of a planning control where it can be demonstrated that strict compliance is unreasonable and unnecessary. Clause 3 states:

3 *Aims, objectives etc*

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

Compliance with the development standard is unreasonable and unnecessary as:

- The cause of non-compliance with the development standard is as a result of providing for a mixed use development where the current zoning of the land does not promote mixed use development however the draft zoning of the land does promote mixed use development.
- The matters raised in Section 5 of this SEPP 1 establish the reasons why compliance is unreasonable and unnecessary

A development which complies with the development standard is unreasonable and unnecessary as in the circumstances of this case, and in particular its location, it would be uneconomic to comply as, the proponent has undertaken a number of public domain improvements, provided for a public benefit in the construction and provision of a public car parking within his site, sought to provide for appropriate streetscapes/road reserves for pedestrian friendly usage, develop the site as per the envisaged mixed use tower style would permit in the future and therefore the project would not proceed.

QUESTION 2(B) Or hinder the attainment of the objects in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?

Section 5(a)(i) and (ii) of the *Environmental Planning and Assessment Act 1979* provides:

The objects of this Act are:

- (a) *to encourage:*
 - (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
 - (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Compliance with the development standard of FSR would hinder attainment of the EP&A Act's object to promote orderly and economic use and development of the Land.

QUESTION 3 *are the objectives of the standard achieved notwithstanding non-compliance with the standard?*

The provisions of Clause 55 of the BPSO do not include specific objectives. These have been addressed previously in this SEPP 1. Each of the underlying objectives of the control will be achieved by the proposed development.

7 OTHER CONSIDERATIONS

Further, this SEPP 1 objection has also considered the planning principle and the provisions of the DBTCLEP 2008 which enable a variation of a controls.

7.1 The Planning Principle

The following has been prepared in consideration of the provisions based on the “planning principle” to seek a variation to the FSR provision under a. the BPSO and b. the DBTCLEP 2008. The “planning principle” is from *Veloshin v Randwick Council* [2007] NSWLEC 428, in which Senior Commissioner Roseth in his decision, stated in part:

29 Statements of this kind appear in the vast majority of merit appeals that come before the Court. The terms *excessive height, bulk and scale* and *overdevelopment* are probably the most frequently used phrases in councils’ Statements of Contention. While *bulk* and *scale* tend to be used interchangeably, strictly speaking, *bulk* refers to the mass of a building and *scale* is properly used only when referring to the relative size of two or more things. When *scale* is used to mean *apparent size*, it is better to use those words. When *scale* is used to denote the *character* of an area, it is better to use that word. All the above are highly subjective terms, since a building that one person perceives as too big, another person finds appropriately sized. This is the reason why in almost all disputes about height and bulk the Court receives evidence from an expert who thinks that these attributes are excessive and one who thinks that they are appropriate.

30 The debate about height and bulk can be meaningful only against the background of local planning controls, such as maximum height, floor space ratio, site coverage and setbacks. While these controls are usually also based on subjective judgment, they have been through a statutory process involving exhibition and the consideration of public comment. They therefore express the subjective preferences of a local community and should be given greater weight than the subjective preferences of individuals.

31 Some planning instruments and policies include objectives for controls, others do not. Whether such objectives are expressly stated or not, the controls are usually aimed at, on the one hand, constraining the adverse impact on neighbours and surrounding areas and, on the other, achieving a certain urban character. The desired character may be the continuation of the existing or, in areas where redevelopment is envisaged, the creation of a new character.

32 Because of the frequency with which height, bulk and character are matters in contention, it is useful to establish planning principles to guide how they may be assessed.

Planning principle: assessment of height and bulk

The appropriateness of a proposal's height and bulk is most usefully assessed against planning controls related to these attributes, such as maximum height, floor space ratio, site coverage and setbacks. The questions to be asked are:

Are the impacts consistent with impacts that may be reasonably expected under the controls? (For complying proposals this question relates to whether the massing has been distributed so as to reduce impacts, rather than to increase them. For non-complying proposals the question cannot be answered unless the difference between the impacts of a complying and a non-complying development is quantified.)

How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?

Where the planning controls are aimed at preserving the existing character of an area, additional questions to be asked are:

Does the area have a predominant existing character and are the planning controls likely to maintain it? Does the proposal fit into the existing character of the area?

Where the planning controls are aimed at creating a new character, the existing character is of less relevance. The controls then indicate the nature of the new character desired. The question to be asked is:

Is the proposal consistent with the bulk and character intended by the planning controls?

Where there is an absence of planning controls related to bulk and character, the assessment of a proposal should be based on whether the planning intent for the area appears to be the preservation of the existing character or the creation of a new one. In cases where even this question cannot be answered, reliance on subjective opinion cannot be avoided. The question then is:

Does the proposal look appropriate in its context?

Note: the above questions are not exhaustive; other questions may also be asked.

33 The above principles are supplementary to, and consistent with, the principles established in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472.

7.1.1 Burwood Planning Scheme Ordinance

With respect to the relevant questions in relation to the BPSO:

Are the impacts consistent with impacts that may be reasonably expected under the controls?

Comment:

The planning controls for development within the Burwood Town Centre have been undergoing a series of strategic planning changes over a number of years, which makes answering the question as to what may be reasonably expected difficult to answer as it keeps changing.

At the time Development Application No. 379/01 was assessed by the independent planner for Council via report dated 15 March 2002, Council had publicly exhibited the Draft Burwood Local Environmental Plan 2000. This plan sought to change the definition of gross floor area, changed the zone to 3(a), increase the FSR from 2:1 to 3:1 with a qualification that the maximum non-residential component would not exceed 2:1, among other changes.

The original development was considered in relation to both the BPSO and the Draft Burwood LEP 2000. A SEPP 1 objection was submitted and considered worthy of support by the independent assessor as the proposed development comprised a GFA of 18,328 square metres or 3.25:1 (exceeded 2:1) which did not include the public car park. Council based on this assessment granted approval via Development Consent No.379/01 subject to conditions. The SEPP 1 provided the following justifications:

- *The proposal results in a minor non-compliance with the proposed controls under Council's draft LEP;*
- *The height, bulk and scale of the proposed development is consistent with surrounding development;*
- *The proposed development will not create any unreasonable overshadowing, loss of privacy of views, or adverse visual impact upon the streetscape or the environment; and*
- *The development will not generate any adverse traffic impacts.*

The assessment report then states:

In terms of building height, bulk and scale, the proposed development is not significantly different from that which would be permitted for a mixed commercial/residential development under Council's new planning controls for the town centre as reflected in the draft LEP and DCP No. 10. These issues, including the proposal's compliance with the setback and building envelope controls as well as its external appearance, streetscape impact and impact on amenity of neighbouring properties are dealt with in detail in following sections of the report. In essence, the conclusion reached is that the proposed development is satisfactory in all these respects notwithstanding some minor numerical non-compliances.

This Development Consent was the subject of a number of Section 96 modifications, all of which were approved by Council and considered without the inclusion of the basement public car parking spaces as floor space. The history of the site development is provided at Section 2.2 of the Revised Preferred Project Report. The final total floor space approved on the site is detailed as either 3.36:1 (excluding public parking) or 4.03:1 (including public car parking).

The impacts from the development as a result of this floor space are the same in both instances, that is, the development had an assessed and accepted shadow impact on adjoining properties, traffic generation characteristics, visual impact and consideration in relation to heritage significance.

Council publicly exhibited in March 2007 DBTCLEP 2007 in which the draft control was indicated to be 5:1 as a maximum FSR for the site, with maximum height of up to 17 storeys. The development was designed to comply with this requirement. However, a number of changes have been proposed to the ground floor level so as to improvement the streetscape appearance of the development, provide for improved surveillance and street activation by aligning the shop fronts in a uniform manner to each street edge and inclusion of the floor area in accordance with the gross floor area definition which has meant the conversion of the car parking into a commercial tenancy.

The amended design involves a maximum height of 60m and FSR 4.93:1 (excluding the public car parking).

The DBTCLEP 2008 has received a Section 65 Certificate and was publicly exhibited in October 2008, includes draft controls of 60m maximum height and 4.5:1 FSR.

It is considered that the inclusion of the public car parking within the gross floor area does not unreasonably contribute to the bulk and scale of the development as this is located below ground level. Further, the design has been modified since August 2008 to remove floor space both within the residential buildings A and B and at the ground floor level. These elements have removed floor space so that the FSR has decreased from 5:25:1 to 4.93:1 (excluding the public car parking). The following is an assessment of the development in relation to its impacts.

With respect to overshadowing as an impact of the development, shadow diagrams have been prepared by Turner and Associates (TAA) which include a comparison with the approved commercial development on the site against the proposed development at hourly intervals on 22 June and at the equinox, in the drawing set at Appendix B.

Based on this comparison for intervals on 22 June, while the shadows will be cast longer in the morning at 9am over the front yard of the property located at the corner of Gloucester Avenue and George Street, and there is a minor increase in shadowing on the rear yards of the properties immediately to the west, being 2 and 4 Gloucester Avenue at the 10am interval, overall the shadow impact of the proposed development is similar to that cast by the original approved development in terms of solar access to the residential properties to the immediate west.

It should be noted that this shadowing is clear of the rear yards by 10.12am, which is a marginal improvement when compared to the original approved commercial building which is not clear until 10.18am. It is also noted that the terraces at number 53 and 65 George Street are used for residential purposes and will have no greater shadow impact as a result of the amended design. The duration of shadowing to the residential properties to the west is similar to the approved development and well less than 3 hours, as shadowing is clear by 10.12am.

The extent of shadowing of the properties to the south 22 June at the intervals of 11am, 12pm and 1pm is greater as a result of the height of the proposed development when compared to the original approval and affects the building directly opposite in George Street. It is considered that this impact is not unreasonable given these properties are currently used for commercial office purposes and the extent of impact on the building is limited to a three hour duration.

With respect to privacy and amenity, the design has been amended so as to “push” each of the buildings away from the western boundary of the site and included the provision of fixed privacy screens, solid elements in balconies and orientated the locations of balconies so as to mitigate direct overlooking of the adjoining properties at the lower levels which is considered to be an improvement when compared to the original approved commercial development.

It is noted that the proposed amended design does not strictly comply with the guide for building separation under the NSW RFDC.

Details of building setbacks to the boundaries of the site and internally to buildings within the development are shown on the drawings. Building separation (within the site) complies between Building A and Building B, Building B and external adjoining properties and Building C and external adjoining properties. Building separation between Building A and Building B does not strictly comply with the guide within the NSW RFDC. The proposal does however seek to mitigate the proposed variation based on:

- Building B has been “pushed” towards the Elsie Street frontage so as to provide for a marked improvement in privacy and amenity for the adjoining properties to the west;
- The southern elevation of Building B has been designed to avoid placement of any windows for living areas as the main orientation;
- Windows on the southern elevation of Building B has been reduced in size;
- The windows and angles in the wall of Building B have been off-set from those located on the façade of Building A;
- No balconies are proposed in the southern elevation of Building B; and
- Fixed privacy screens are proposed to the southern elevation of Building B.

It is considered that the mitigation measures proposed and the designed location of Building B are reasonable, and is a vastly more reasonable solution to locate the building in its proposed location so as to mitigate privacy issues of properties to the west, while maintaining minimum apartment sizes.

It is considered that with these measures the proposed development also does not impinge on its “share” of the separation distance which would be envisaged on sites to the west, given the setback to the closest balcony from the boundary is approximately 11.4m, Building A.

The overall visual impact of the development has been considered and assessed. A visual analysis has been prepared by TAA with input from Design 5. This has involved Design 5 selecting locations for the view analysis, taking base photographs and TAA then rendering in the proposed design using 3D modelling software and Photoshop.

This information has been used by Design 5 as part of their heritage impact assessment, and their report states in part:

Architecturally, the towers are designed as completely separate elements from the podium. A dominant feature of all three towers are the external balconies which wrap around the corners of the buildings and extend the full length of some elevations. Additional to this, the façade treatment changes as the building rises. The design of the facades of the towers are divided into three main elements:

1. Base - From level 1 to 4 of the towers, the balconies are solid concrete to half height with glass extending to full height.

2. Intermediate - Above level 4 the buildings feature an intermediate section made up of a combination of glass balustrade and fixed or adjustable

aluminium louvre screen depending on which side of the building they are located.

3. Capital - The top three floor of each of the towers contain a solid border, infill with glass balustrade and fixed or adjustable louvres which clearly define another break in design treatment to the lower floors.

The site is easily identifiable in the current landscape of the Burwood Town Centre by the crane which exists on-site. The existing RL to the underside (haulage point) of the crane has been provided within Appendix N and indicates RL 62.45 whereas the maximum height of Building B is proposed to be RL 66.35. As such, the height of the top-side of the crane is equivalent to that of the Building B in the middle of the site being a 15 storey building.

The height of the buildings complies with the maximum height indicated in the Draft BTCLEP map at 60m for the subject site. The bulk and scale of the buildings have been reconsidered in the modified design by TAA by the inclusion of a horizontal band between levels 3 and 7 with variations in the balcony setbacks rather than uniformity. The upper levels of each building then provide for uniformity and symmetry with regular sizing of balconies which create vertical eye lines. With the last three levels of each building being finished with solid boarders and infill glass balconies.

In this way, the bulk and scale of the development has been broken into three distinct elements with materials and finishes to complement each element, a base, a middle and an upper for each building. In redesigning the development TAA have consciously sought to shift the bulk and scale of the buildings away from the residential precinct to the west and create building designs with articulation and variation both horizontally and vertically. The amended design acts as a backdrop to the lower scale development in its surrounds and has been assessed as reasonable in its setting where no other taller buildings are currently located but may occur in the future.

Indeed the bulk and scale of the building has been tiered so that the tallest building is located as close as possible to the centre of the Burwood Town Centre which could be described as the railway station.

The heritage impact of the design has been considered by Design 5 which has included an assessment against each of the items of heritage nominated within the Draft BTC LEP 2008, existing items of heritage within the Burwood Planning Scheme ordinance and the State Heritage Registered items nearby in Burwood. Design 5 have assessed the amended TAA design also in relation to its visual environment. The assessment has concluded that the amended design will not adversely impact on the heritage significance of any item in the vicinity of the site.

In terms of building height, bulk and scale, the proposed development is not significantly different from that which would be permitted for a mixed commercial/residential development under Council's new planning controls for the town centre as reflected in the DBTCLEP 2007 and its variation in DBTCLEP 2008. As such, the development has been designed so as to be consistent with the anticipated controls and the impacts of the development are consistent with what would be reasonably anticipated by those controls.

How does the proposal's height and bulk relate to the height and bulk desired under the relevant controls?

Comment:

With respect to the BPSO, the zoning of the land does not have a specific height restriction. However, the proposed development exceeds the maximum FSR of 2:1 under the provisions of Clause 55 of the BPSO. The variation of this control was previously considered by Council as acceptable with respect to the commercial development.

With respect to the DBTCLEP 2008, the draft zoning of the land does have a specific height restriction, which may enable up to 60m above ground level for future

The proposed development exceeds the maximum envisaged draft FSR of 4.5:1 under the provisions of Clause 4.5.

The inclusion of the basement public car parking spaces as floor space does not appear to be the intention of the definition and the inclusion of this space does not add to the bulk and scale of the development.

It is considered that the proposed bulk and height relate in a reasonable manner to the height and bulk desired by the draft controls, as the impacts are consistent with those of a development which would strictly comply and are not material when compared to the original approval on the site.

Does the area have a predominant existing character and are the planning controls likely to maintain it? Does the proposal fit into the existing character of the area?

Comment:

The existing character of the area is undergoing transition. This has been "flagged" by Council within its strategic documents for a number of years.

It is considered that the proposal fits into the desired future character of the area. It is also considered that the development is consistent with the existing established character of development to its north, east and south. However, when compared directly with the character of the existing development to its west the proposal could be considered out of character. This is not to say that this may change in the future, as the properties to the west are proposed to have the same draft zoning under DBTCLEP 2008 and the same height and FSR controls.

Is the proposal consistent with the bulk and character intended by the planning controls?

Comment:

Based on the above discussion it is considered that the proposal is consistent with the bulk and character intended by the planning controls.

Does the proposal look appropriate in its context?

Comment:

The proposed development's visual impact has been assessed in its current context, and has been concluded as reasonable by the heritage architect based on the design features at various portions of each proposed building.

7.2 EXCEPTIONS TO DEVELOPMENT STANDARDS UNDER DBTCLEP 2008

The provisions of the Draft Burwood Town Centre Local Environmental Plan 2008 include clause 4.6 in order to provide a degree of flexibility to the consent authority in determining whether a variation to a development standard contained within the Draft Plan should be supported. Draft Clause 4.6 states:

4.6 Exceptions to development standards

(1) The objectives of this clause are:

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Director-General has been obtained.

(5) In deciding whether to grant concurrence, the Director-General must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

(6) Not adopted

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4.

It is considered that the proposed development could reasonably be considered for approval based on the provisions of draft Clause 4.6 above as the proposed development is consistent with the objectives of the FSR control at draft Clause 4.4, which state:

(a) To enable development density and intensity of land use to achieve an appropriate urban form consistent with the Major Centre status of the Burwood Town Centre.

Comment:

It is considered that the amended design will achieve the objective of the control and enable development density and intensity of land use to achieve an appropriate urban form consistent with the Major Centre status of the Burwood Town Centre.

(b) To focus the highest development density and intensity of land use in the inner part of the Burwood Town Centre.

Comment:

The site is considered to be sufficiently close to the railway station as to be deemed a focus site and will achieve the objective of focusing the highest development density and intensity of land use in the inner part of the Burwood Town Centre.

(c) To provide a transition in development density and intensity of land use to establish a development hierarchy which reduces density and intensity of land use towards the Burwood Town Centre boundary.

Comment:

The amended design seeks to achieve a transition with the highest density building A located to the south of the site immediately adjacent to land which may allow an FSR of 6:1 to the lower density building C to the north immediately adjacent to land which may allow an FSR of 3:1 and as such is consistent with the objective of the controls to provide a transition in development density and intensity of land use to establish a development hierarchy which reduces density and intensity of land use towards the Burwood Town Centre boundary.

(d) To establish the maximum floor space limits for development.

Comment:

The inclusion of the basement car parking levels associated with the public car park result in a substantially exceeding of the control, which should not be included for the purposes of the consideration of appropriate bulk and scale in light of the provisions of Clause 4.5. It is noted that Clause 4.5 of the DBTCLEP 2008 states:

4.5 Calculation of floor space ratio and site area

(1) Objectives

The objectives of this clause are as follows:

(a) to define floor space ratio,

(b) to set out rules for the calculation of the site area of development for the purpose of applying permitted floor space ratios,

including rules to:

(i) prevent the inclusion in the site area of an area that has no significant development being carried out on it, and

(ii) prevent the inclusion in the site area of an area that has already been included as part of a site area to maximise floor space area in another building, and

(iii) require community land and public places to be dealt with separately.

(2) Definition of "floor space ratio"

The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.

(3) Site area

In determining the site area of proposed development for the purpose of applying a floor space ratio, the site area is taken to be:

(a) if the proposed development is to be carried out on only one lot, the area of that lot, or

(b) if the proposed development is to be carried out on 2 or more lots, the area of any lot on which the development is proposed to be carried out that has at least one common boundary with another lot on which the development is being carried out.

In addition, subclauses (4)–(7) apply to the calculation of site area for the purposes of applying a floor space ratio to proposed development.

(4) Exclusions from site area

The following land must be excluded from the site area:

(a) land on which the proposed development is prohibited, whether under this Plan or any other law,

(b) community land or a public place (except as provided by subclause (7)).

(5) Strata subdivisions

The area of a lot that is wholly or partly on top of another or others in a strata subdivision is to be included in the calculation of the site area only to the extent that it does not overlap with another lot already included in the site area calculation.

(6) Only significant development to be included

The site area for proposed development must not include a lot additional to a lot or lots on which the development is being carried out unless the proposed development includes significant development on that additional lot.

(7) Certain public land to be separately considered

For the purpose of applying a floor space ratio to any proposed development on, above or below community land or a public place, the site area must only include an area that is on, above or below that community land or public place, and is occupied or physically affected by the proposed development, and may not include any other area on which the proposed development is to be carried out.

(8) Existing buildings

The gross floor area of any existing or proposed buildings within the vertical projection (above or below ground) of the boundaries of a site is to be included in the calculation of the total floor space for the purposes of applying a floor space ratio, whether or not the proposed development relates to all of the buildings.

(9) Covenants to prevent “double dipping”

When consent is granted to development on a site comprised of 2 or more lots, a condition of the consent may require a covenant to be registered that prevents the creation of floor area on a lot (the restricted lot) if the consent

authority is satisfied that an equivalent quantity of floor area will be created on another lot only because the site included the restricted lot.

(10) Covenants affect consolidated sites

If:

(a) a covenant of the kind referred to in subclause (9) applies to any land (affected land), and

(b) proposed development relates to the affected land and other land that together comprise the site of the proposed development, the maximum amount of floor area allowed on the other land by the floor space ratio fixed for the site by this Plan is reduced by the quantity of floor space area the covenant prevents being created on the affected land.

(11) Definition

In this clause, public place has the same meaning as it has in the Local Government Act 1993.

It appears that the intention is to enable community land and public places to be dealt with separately in relation to floor space ratio and site area.

It is considered that a variation of the draft control is reasonable based on the following:

- The public domain improvements already implemented surrounding the site by the proponent;
- The public benefit derived from the public car park is now a public place;
- The additional public domain improvements proposed with this concept;
- The proposed development is consistent with the objectives of the control.

It is considered that although the proposal exceeds the FSR for the site the proposed development has included a number of public domain improvements to provide for the occupants of the development and assist in improving the amenity for surrounding users, including:

George Street

- Construction of vehicular crossings (site).
- Paving of footpath.

Elsie Street

- Widening of footpath, kerb and guttering.
- Paving, street trees, tree guards, and smart poles.

Victoria Street

- Widening of street, kerb and guttering, sealing of road.
- Reinstating of vehicular crossings.
- Construction of vehicular crossings (site).
- Paving of footpath.

The proponent has obtained approval from Council previously for these works. A copy of the approved drawings can be found at Appendix Y of the original EA.

The proponent has also proposed additional public domain improvements along the Victoria Street frontage, including the widening of the footpath to a minimum of 1800mm.

Despite not strictly complying with the future FSR envisaged for the site the development provides for a number of public benefits and is in accordance with the objectives of the control.

8 Conclusion

It is considered that the strict application of the development standard in this instance has been demonstrated to be unreasonable and unnecessary given that the development will provide for an adequate level of amenity, the proposed development is consistent with the underlying objectives of the standard and the desired future strategic vision for the Burwood Town Centre. The proposed development will result in economic and social benefits through the promotion of density in an appropriate location which is supported by public transport as envisaged by “City of Cities”.

The proposed development satisfies the SEPP 1 tests established by the Land and Environment Court.

For the reasons set out above, the proposed departure from the development standard is well founded.

Compliance with the development standard is therefore unreasonable in the circumstances of the case, and refusal of the development on this ground is not warranted.