

5 August 2020

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Dear Ms Watson,

**Re: Strategic Planning Submission - Section 75W (Mod 3) under subclause (5) of clause 3BA of Schedule 2 Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017**  
**Property: 21-35 Treacy Street, Hurstville**

## **EXECUTIVE SUMMARY**

This report has been prepared to support an application made pursuant to Section 75W of the Environmental Planning and Assessment Act 1979 (the "Act") to modify Concept Plan Approval MP 10\_0101 for a mixed-use residential and retail development at 21 – 35 Treacy Street, Hurstville granted by the Planning Assessment Commission as delegate for the Minister for Planning on 1 July 2011 and later modified by Section 75W on 4 September 2012.

The application is made by Wynn Constructions Pty Limited.

Notably, Section 75W was repealed with the repeal of Part 3A of the Act, but has continuing effect for any concept plan approved before the repeal date.

The specific modifications sought to the Concept Plan Approval are:

- **Amend** Condition of Approval A1 in Schedule 2 Part A – Terms of Approval to permit a maximum GFA of 29,257m<sup>2</sup>
- **Replace** Concept Plan drawings referenced in Condition of Approval A2 in Schedule 2 Part A – Terms of Approval with the respective concept plan drawings in **Appendix 5** (including a 5% variance to provide flexibility during development assessment).
- **Amend** Condition of Approval A5 in Schedule 2 Part A – Terms of Approval to permit a maximum GFA of 29,257 m<sup>2</sup>.
- **Amend** Condition A8 in Schedule 2 Part A – Terms of Approval to require parking provisions in the West Stage to comply with the minimum required under the Apartment Design Guide Objective 3J-1.
- **Amend** Condition B3 in Schedule 2 Part B – Modifications to permit a zero lot line on the western boundary of the west stage.

The effect of those modifications in summary is:

1. Minor increase in gross floor area (2.7%),
2. Minor changes to the internal design and layout of the residential units, to increase internal amenity and solar access,
3. Changes to total car parking numbers and layout with the deletion of Basement Level 3, and
4. Creation of a zero lot line to replicate existing and proposed character of development in Treacy Street.

The proposed modifications have resulted primarily from:

1. An evolution in the interpretation of GFA under the Standard Instrument LEP since 2011,
2. Additional available assessment information concerning the design of residential units to improve internal amenity and additional solar access,
3. Additional available assessment information concerning the design of parking for the development, and
4. Additional available assessment information concerning Gateway Approval for a NIL boundary setback between No.33-35 and No.37-41 Treacy Street.

Importantly, no **significant** change is proposed to any key element of the Concept Plan Approval. The use of the site, the indicative building envelope and the staging of construction all remain unaltered. The maximum Gross Floor Area is proposed to be amended by 2.7% and no changes are proposed to Schedule 4 Statement of Commitments.

Accordingly, the amended concept proposal is generally in accordance with the approved Concept Plan MP 10\_0101 and there is no significant environmental impacts arising from the proposed changes.

## **1.0 INTRODUCTION**

This application is submitted to the Department of Planning and Infrastructure in support of proposed modifications to Concept Approval MP 10\_0101 pursuant to Section 75W of the Environmental Planning and Assessment Act 1979. Concept Approval MP 10\_0101 permits a mixed-use residential and retail development at 21 – 35 Treacy Street, Hurstville. Daintry Associates Pty Ltd has prepared this application to modify Concept Approval MP 10\_0101 on behalf of Wynn Constructions Pty Ltd. The application provides background information on the concept approval, details of the proposed modifications and an environmental assessment of the proposed modifications.

The environmental assessment in this application is based on the amended concept plan drawings (**Appendix 5**) prepared by Stanisic Associates and accompanying technical information that supports the proposed modifications.

The project team for the proposed modifications is as follows:

Urban Planning  
Architecture & Urban Design  
Traffic and Parking

Daintry Associates Pty Ltd  
Stanisic Associates  
The Transport Planning Partnership

## 2.0 BACKGROUND

On the 1 July 2011, the Planning Assessment Commission (PAC) determined to approve a Concept Plan application to develop 21 – 35 Treacy Street Hurstville for retail and residential development. A copy of the approval notice from the PAC can be found at **Appendix 1**. The PAC determined to approve the Concept Plan subject to:

- terms and modifications;
- the Statement of Commitments;
- further environmental assessment requirements; and
- future stages of the Concept Plan approval to be subject to Part 4 of the EP&A Act.

More recently, MP\_10\_0101 was modified by Section 75W Modification Application (Mod 1) on 4 September 2012. A copy of the approval notice from the Minister can be found at **Appendix 2**. The Central and Eastern stages of the development have been completed and occupied.

## 2.1 APPROVED CONCEPT PLAN

Concept Plan approval MP10\_0101 was granted to the development as described below:

- Use of the sites for retail and residential purposes and associated car parking;
- Indicative building envelope to a maximum height of 55 metres (to a maximum of 114.6 metres AHD);
- Maximum number of 257 dwellings;
- Public domain improvements to Treacy Street; and
- Landscaping areas throughout the site.

The Concept Plan was modified by MP10\_0101 MOD 1 to include:

- An increase in residential floor area to 26,775m<sup>2</sup>;
- A decrease in retail floor area to 1,499m<sup>2</sup>;
- Provision of 200m<sup>2</sup> of community floor area;
- Staging of development; and
- Modification to floor layouts

### 3.0 PROPOSED MODIFICATIONS

The proposed modification detailed in this application is necessary to deliver the final Western Stage with the built form outcomes approved under MP\_10\_0101 as modified by Section 75W Modification Application (Mod 1) (4 Sept 2012). The staging plan highlighting the Western Stage can be found at **Appendix 3**.

The primary issue is the GFA condition is inconsistent with the built form approved by the PAC.

In fact, the PAC in its determination report dated 1 July 2011 signed by Garry Payne AM and Richard Thorp as the presiding PAC members stated:

***“As to architectural design the Commission agreed that it is of critical importance that the architectural integrity of the concept plan should be maintained in future applications.” [p.4].***

What is critical to note is that the plans now submitted to the DPIE **ensure the architectural integrity of the concept plan** and the changes to the conditions reflect these plans.

The proposed modifications will require the following changes to the conditions of approval attached to the Concept Plan:

**i) Condition A1 “Development Description”**

Amend A1(c) to read:

“The maximum GFA for the development shall not exceed 29,257sqm.” This is supported by GFA Compliance Table (**Appendix 4**).

**ii) Condition A2 “Development in accordance with Plans and Documentation”**

Amend A2 to include:

“All previous Plans and documentation relating to the West Stage of the Concept are superseded by the following drawings prepared by Stanistic Associates Architects (**Appendix 5**). A variance of 5% for unit mix and car parking is allowable to provide flexibility for the Local Planning Panel and/or Georges River Council during the assessment of the Development Application for the West Stage.

**iii) Condition A5 “Maximum Gross Floor Area (GFA)”**

Amend A5 to read:

“The maximum GFA for the development shall not exceed 29,257m2.”

This is supported by GFA Compliance Table (**Appendix 4**)

**iv) Condition A8 “Parking Provision”**

Amend A8 to read:”

“Parking provision in the central and east stage of the development has been completed to service those stages. Parking provisions in the west stage of the development shall comply with the minimum required under the Apartment Design Guide (ADG) Objective 3J-1. The final parking numbers, complying with the minimum

required by the ADG, will be dependent upon final unit mix and as such, the submitted plans are subject to a 5% variance to allow for flexibility in delivering the final built form."

Reason: The site is located within 800m of a railway station in the Sydney Metropolitan Area. The drawings prepared by Stanisic Associates Architects provide the minimum parking required by the ADG guidelines. Flexibility is needed depending upon final unit mix.

#### v) Condition B3 "Building Setbacks"

Amend B3 to include:

"The western boundary of the west stage will have a zero lot line."

### 3.1 RELEVANT BACKGROUND TO SUPPORT MODIFICATIONS

Subject to subclause (5) of clause 3BA of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (STOP Reg)*, the applicant seeks that the subject PAC concept approval be amended on the basis that there has been an evolving cumulative error and miscalculation arising over time from changes to the way in which Gross Floor Area has been measured as the result of case law evolving through the Land and Environment Court.

Further, the urban design must eliminate a 1m gap between the site and the NIL boundary setback detailed by Council's Planning Proposal PP\_2017\_GRIVE\_002\_00 at 37-41 Treacy Street, Hurstville.

During the nine (9) years since the PAC Concept approval and during the period of construction of the Eastern and Centre stages, the interpretation of GFA under the Standard Instrument LEP evolved.

It is now well accepted that winter gardens, as designed being fully enclosed to provide ESD outcomes, attenuate railway noise and act as anti-throwing structures (required to attain Sydney Trains concurrence under the Infrastructure SEPP), that were previously excluded from the GFA, are now added to GFA, see: *Haralambis Management Pty Ltd v Council of the City of Sydney [2013] NSWLEC 1009*.

Winter garden areas in the Eastern Stage and Centre Stage were excluded from GFA, however, the winter garden areas within the final Western Stage are included in the GFA. As such, the final Western Stage cannot be constructed to achieve the approved built form without perpetuating a non-compliance with the PAC Approval MP\_10\_0101 as modified by Section 75W Modification Application (Mod 1) (4 Sept 2012) (**Appendix 2**). This is summarised in the GFA Compliance Table (**Appendix 4**).

### 3.2 STATUTORY CONTEXT

The consent authority could not grant consent to Stage 3 in the built form shown in the plans detailed by Condition A2, as development in a modified urban form, would breach the requirement of clause 3B(2)(d) of the STOP Reg, specifically that:

"a consent authority must not grant consent under Part 4 for the development unless it is satisfied that the development is **generally consistent** with the terms of the approval of the concept plan"

The Council as the relevant assessing authority have advised that we must seek, through a modification to the PAC Concept approval, to amend the GFA at Conditions A1 and 5.

It is our understanding that the Council are satisfied that the plans submitted with the DA for Stage 3 (Western Stage) are generally consistent with the plans detailed by Condition A2. The Council are in the process of completing their Part 4 DA assessment on this basis but cannot grant unconditional consent until this issue is resolved.

It is clear that any new development proposal that does not accord with the approved concept plans at Condition A2 would be generally inconsistent with the terms of the PAC approval. Likewise the DA, as submitted to Council, exceeds the GFA under Condition A5 and is also inconsistent.

The difference between the approved form (**Appendix 1**) and a built form adopting condition A5 (GFA), in preference to A2 (the PAC approved plans), is demonstrated by **Appendix 6**.

That is, the terms of the PAC approval are internally inconsistent, between condition A2 and A5 and this must be resolved by modification.

Applying the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017:

“(5) A concept plan may continue to be modified under section 75W pursuant to a request lodged on or after the cut-off date (whether or not the project is or has ceased to be a transitional Part 3A project), but only if the Minister is satisfied that—

- a) the proposed modification is to correct a minor error, misdescription, or miscalculation, or
- b) the proposed modification is of minimal environmental impact, or
- c) the project to which the concept plan as modified relates is substantially the same as the project to which the concept plan currently relates (including any modifications previously made under section 75W).”

We submit that the operative words “or” means that the Minister need only be satisfied that the amendments proposed fall within one or more of the circumstances (a) to (c).

We submit as detailed below that the amendment of condition A5 falls within each of the circumstances (a) to (c). This is addressed in detail below.

### **3.3 STRATEGIC JUSTIFICATION**

There are serious and adverse development and environmental consequences if the Western Stage is not consistent with the approved urban form, as detailed by the approved plans under condition A2:

- The future occupants of all three (3) stages would not have access to the roof of Stage 3, at level 12, that forms Common Open Space (COS) for all 3 Stages.
- The future occupants of the Western Stage would not have access to the common internal space within the Centre Stage also at Level 12.
- The alternative solution of deleting winter gardens does not achieve the best outcome for future occupants in terms of ESD or attenuation of railway noise.

- The urban form and architectural integrity detailed by the approved plans would not be achieved.

We again reiterate the PAC's position that:

***“As to architectural design the Commission agreed that it is of critical importance that the architectural integrity of the concept plan should be maintained in future applications.”***

Applying the GFA, as defined by Mod 1, would cumulatively render the development inconsistent with the approved concept plans and it would not preserve the *architectural integrity of the concept plan*.

### **3.4 CONSIDERATION OF ENVIRONMENTAL EFFECTS**

There are no discernible different environmental effects as a result of these proposed amendments. There is no proposed change to the height, shape, bulk or external configuration as the amendments proposed do not affect the approved plans under condition A2. The reduction in parking is consistent with the Apartment Design Guide.

In the alternative, by retaining condition A5, there would be adverse environmental planning consequence. The amendments that would be required to DA2018/0366 to enable strict compliance with condition A5 are:

1. The winter gardens have to be redesigned (fixed open),
2. Delete the roof above Level 12,
3. Delete the residential GFA at Level 12,
4. Delete the residential GFA of Units 1103 or Unit 1101 at Level 11, and
5. Make consequential changes to achieve the above most significant changes

Adverse effects of these changes are:

1. The Common Open Space (COS), being the roof area above Level 12, would not function as intended. In effect the proposed COS at Level 13 was designed (as per the PAC approval) to align with and be accessible to and from the area of the communal room on Level 13 of the (as built) centre stage. The intended alignment and accessibility of the COS between the buildings would no longer be possible, leaving the existing communal room isolated and underutilised. Likewise the occupants of the centre stage could not access roof top COS in the Western Stage.
2. The form of the western stage (height, shape and bulk) approved under the PAC approval will not be achieved by requiring “absolutely” compliance with the GFA. The built form would have to be reduced by a storey and a half (**Appendix 6**).
3. The proposed winter gardens are required to meet Sydney Trains' newer 20m “Anti-Throwing” requirements, that post-date the PAC approval, and to provide better ESD and Noise attenuation outcome for future occupants.

Having regard to subclause (5) of clause 3BA of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 we submit that:

- a) The evolution of the way in which statutory planners are required to calculate GFA has over the past nine (9) years resulted in a minor error and/or miscalculation in that the GFA, as detailed by the plans approved by Condition A2 is greater than the GFA prescribed by condition A5 (applying the current methods of calculating GFA).
- b) The proposed modification is not only of minimal environmental impact, but the outcomes from completing the Western Stage in accordance with the approved plans detailed by condition A2, delivers a better outcome for and from the development in terms of the urban form and the internal and external amenity for future occupants.
- c) Applying the approach of the Land and Environment Court in *DL Newport Pty Ltd v Northern Beaches Council* [2017] NSWLEC 1661, and cases it references, to the question of substantially the same, "substantially" means "essentially or materially having the same essence" and "modify" means "to alter without radical transformation".

We submit that the proposed modification both qualitatively and quantitatively, by reference to the plans approved by condition A2, rather than to the moving target of GFA as it has evolved, has essentially or materially having the same essence as the concept approval in terms of the plans approved under condition A2 and without radical transformation, having proper regard to proper contexts (including the circumstances in which the development consent was granted).

#### **4.0 CONCLUSION**

As The Hon. Paul Stein AM QC observed in *The Environmental Law Handbook* 4th Edition at p.36, albeit relating to characterisation of development, that:

*"The aim is to give effect to the intentions of the plan-makers, rather than to reach an independent decision."*

#### **Urban Form**

I submit that the modifications seek to give effect to the plans as detailed by condition A2, rather than the GFA under condition A1 and A5, as the plans have not changed over time and it was clearly the intention of the PAC that the approved plans deliver "*architectural integrity*".

In fact, the PAC in its determination report dated 1 July 2011 signed by Garry Payne AM and Richard Thorp as the presiding PAC members stated:

*"As to architectural design the Commission agreed that it is of critical importance that the architectural integrity of the concept plan should be maintained in future applications."* [p.4].

What is critical to note is that the plans now submitted to the DPIE ensure the architectural integrity of the concept plan.

The community benefits have already been realised in the Centre Stage through the provision of 200m<sup>2</sup> of Community Space, provided to Council. The height shape and bulk and the urban form detailed by the approved plans as now proposed is consistent with condition 2.

Acceptable outcomes for the occupants of the first two stages and the future occupants of this third stage can only be achieved by provision of the level 12 COS, enclosed wintergardens that



deliver excellent ESD, railway noise attenuation and anti-throwing measurements required by Sydney Trains and finally that the building is built at a NIL western boundary setback.

### **Parking & Traffic**

With respect to the provision of parking (Condition A8) please find attached Traffic and Parking Engineering justification by TTPP (**Appendix 7**) for the deletion of Basement Level 3. We note that the reduction proposed is consistent with reduced parking in the Hurstville CBD sought by the Council.

We note:

- the site is within the Hurstville CBD
- the site is within short walking distance to the railway station
- previous PAC concerns (Mod 2) were excessive traffic and parking
- the quantum of Parking will comply with objective 3J-1 of the Apartment Design Guide being the amount set by Roads and Maritime Services (RMS) in its Guide to Traffic Generating Developments
- The reduction in parking has a positive effect upon traffic

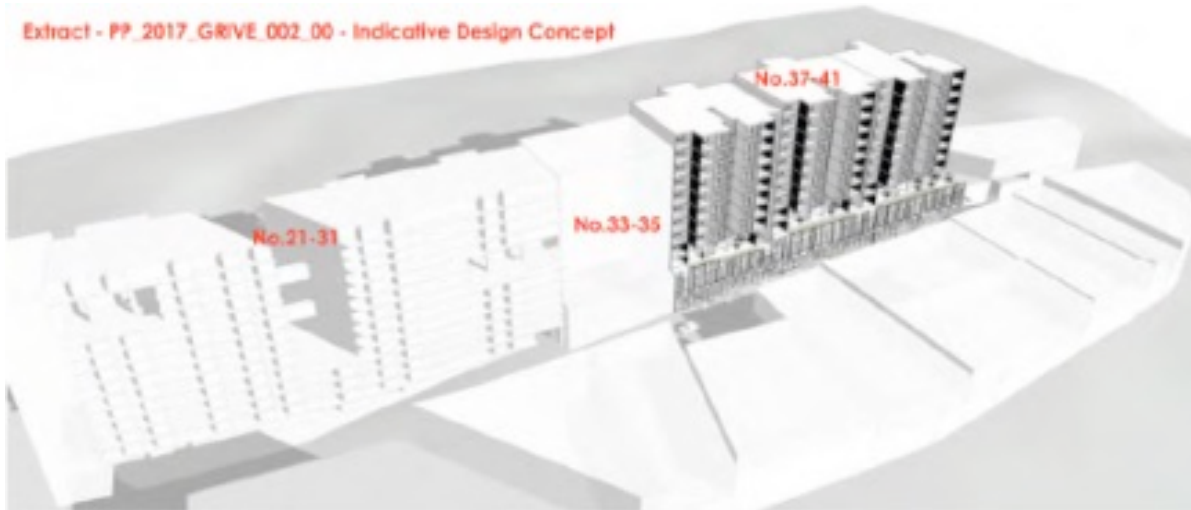
### **NIL Western Boundary Setback**

With respect to the NIL setback (Clause B3), in our Statement of Environmental Effects dated 3 September 2018, we observed the existing and desired future character and specifically the effect of the Council's Planning Proposal PP\_2017\_GRIVE\_002\_00. This planning proposal was approved at the Gateway with RPA for implementation on 8 August 2017 and then, without any public report refused 3 July 2018.

This planning proposal sought to amend the Hurstville Local Environmental Plan (LEP) 2012 in relation to 37-41 Treacy Street, Hurstville. Specifically, the planning proposal sought to rezone 37-41 Treacy Street from 3(b) City Centre Business Zone to B4 Mixed Use, increase the floor space ratio (FSR) from 3:1 to 7:1, increase the maximum building height from 15m to 55m, identify an active street frontage along the Treacy Street boundary and require a minimum 'non-residential' FSR of 1:1 on the site to enable a high-density mixed use development.

The indicative design concept shows a NIL boundary setback between No.35 and No.37 Treacy Street. The proposal is consistent with the PAC approved concept, but seeks to adopt the Gateway Approved NIL boundary setback as it makes no planning sense, nor urban form sense, to create a 1m wide gap between No.33-35 and No.37-41 Treacy Street.

Despite the further Gateway Alteration - 3 July 2018, the adoption of the NIL setback has environmental planning and urban form justification as any future development of 37-41 Treacy Street should replicate the existing character dominated by NIL side setbacks within Treacy Street and those fronting Forest Road with rear setbacks to Treacy Street.



There are no impacts beyond those approved by MP\_10\_0101 as modified by Section 75W Modification Application (Mod 1) (4 Sept 2012) as the result of the proposed amendments to conditions A1, A2, A5 A8 and B3. The modifications fall well within the minister's authority as we have demonstrated that the modification falls well within the statutory requirements of Subclause (5) of clause 3BA of Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*.

Should the Department of Planning, Industry & Environment require any additional information we are happy to provide it as soon as possible.

In conclusion, the modification is beneficial and facultative in the achievement of the PAC approved concept and to the existing and future occupants of all 3 stages.

Please don't hesitate to contact me on 0408 463 714 or by email [brett@daintry.com.au](mailto:brett@daintry.com.au).  
Yours faithfully,

Brett Daintry, MPIA, MAIBS, MEHA, MEPLA  
Director

## Appendix

Appendix 1 – NSW Planning and Assessment Commission (PAC) approval dated 1 July 2011

Appendix 2 - NSW Planning and Assessment Commission (PAC) Mod 1 dated 4 September 2012

Appendix 3 – Staging Plans

Appendix 4 – Stanisic GFA Analysis – Summary

Appendix 5 – Stanisic Architectural Plans 33-35 Treacy Street, Hurstville - MP\_10\_0101 (MOD 3)

Appendix 6 – Stanisic Architects montages representing strict compliance dated 15 May 2020

Appendix 7 – The TTPP – Traffic and Parking Statement dated 20 July 2020