



21 December 2018

**Modification Application – Mixed Use Development
175-177 Cleveland Street and 1-5 Woodburn Street, Redfern (SSD 7064 MOD 1)**

1. INTRODUCTION

1. On 26 November 2018, the NSW Department of Planning and Environment (**Department**) provided to the Independent Planning Commission (**Commission**) a modification application prepared by Sutherland & Associates Planning (**Applicant**) to a Mixed-Use Development at 175-177 Cleveland Street and 1-5 Woodburn Street, Redfern.
2. The Commission is the consent authority in respect of the modification application under section 4.5(a) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and clause 8A of the State Environmental Planning Policy (State and Regional Development) 2011 (**SEPP SRD**). This is because:
 - the application constitutes State significant development (**SSD**) under SEPP SRD because the subject site is located within the Redfern-Waterloo area of the State Significant Development Sites Map, as stipulated within this schedule and the proposed development has an estimated capital investment value greater than \$10 million; and
 - City of Sydney Council (Council) objected to the application.
3. Professor Mary O’Kane AC, Chair of the Commission, nominated Steve O’Connor (Chair) and Wendy Lewin to constitute the Commission determining the modification application.

1.1 Site and locality

4. The site has an area of approximately 1,060 square metres (m²) and is legally described as Lot 10 DP 809537, Lot 1 DP 1093304, Lot 1 DP 724328, Lot 15 DP 57107, Lot 3 and Lot 4 DP 977379 and Lot 5 DP 68798 at 175-177 Cleveland Street and 1-5 Woodburn Street, Redfern in the City of Sydney local government area (**LGA**).
5. The site is located approximately 350 metres (m) north of Redfern train station and is physically bound by Cleveland Street to the north, Woodburn Street to the east and Eveleigh Street to the west.
6. The locality is characterised by a mix of commercial and residential buildings that are generally between two and five storeys in height.
7. The site is identified under Schedule 3 of the State Environmental Planning Policy (State Significant Precincts) (**SEPP SSP**) as a Redfern-Waterloo Authority Site and is envisaged in the Redfern Waterloo Built Environment Plan (Stage One), August 2006 as providing for mixed business, residential and community facilities. **Figure 1** identifies the location of the site.

Figure 1: Site location at 175-177 Cleveland Street and 1-5 Woodburn Street, Redfern
(Source: Department's Modification Report)



1.2 Background to Development Application

8. The Department's State Significant Development Modification Assessment Report (SSD 7064 MOD 1) (**MOD 1 Report**) dated November 2018 outlines the SSD applications that relate to the site. A summary of these applications is provided in paragraphs 9 to 17.
9. On 28 January 2015, the delegate of the Minister for Planning granted development consent for a mixed-use student accommodation and residential development on the site (SSD 6371). Consent was granted for:
 - demolition of existing structures;
 - construction of a five storey building, comprising;
 - student accommodation for 40 students;
 - a residential flat building containing 13 apartments; and
 - a single storey basement.
 - stratum subdivision.

The Commission understands that the development consent for SSD 6371 was never commenced.

10. In September 2015, the Applicant lodged a new SSD application (SSD 7064) proposing a part five and part six storey mixed-use development comprising a hotel, residential flat building and two retail / commercial tenancies.

11. Council objected to SSD 7064 due to the exceedances of the Floor Space Ratio (FSR) and height controls for the site, concerns relating to the separation of the residential and hotel components of the building and inconsistencies with the Apartment Design Guide (2015) (**ADG**). As Council objected to the application it was referred to the Commission for determination.
12. On 20 February 2017, the Commission refused SSD 7064. The reasons for refusal related to:
 - the State Environmental Planning Policy No 1 – Development Standards (**SEPP 1**) objections (in relation to the request to vary the building height and FSR controls) submitted with the application were not well founded;
 - adverse impacts on the streetscape and public domain;
 - impacts on the amenity of residents;
 - insufficient information relating to floor plan elevations and solar access for apartments; and
 - design excellence not being achieved.
13. On 20 March 2017, the Applicant filed Class 1 proceedings with the NSW Land and Environment Court (**LEC**) appealing against the Commission's refusal of SSD 7064.
14. On 22 August 2017, a conciliation conference under section 34 of the *Land and Environment Court Act 1979* was held during which the Commission and the Applicant failed to reach an agreement. Subsequent 'without prejudice' discussions between both parties resulted in the Applicant addressing matters that related to the presentation, layout and impact of the proposed buildings on the streetscape and adjoining properties.
15. On 22 March 2018, the LEC granted development consent to SSD 7064. Consent was granted following a period of mediation between the Commission and the Applicant and subsequent amendments being made to the proposed development design. Consent was granted for:
 - demolition of existing structures;
 - construction of a six storey building, comprising:
 - hotel accommodation for 45 rooms;
 - a residential flat building containing 20 apartments;
 - two retail / commercial units;
 - wine bar; and
 - a double storey basement.
16. On 17 August 2018, the Applicant lodged the subject modification application (SSD 7064 MOD 1) pursuant to section 4.56 of the EP&A Act, seeking to amend the approved development described in paragraph 15. A summary of the application is provided at section 1.3.

1.3 Summary of Modification Application

17. The Department's MOD 1 Report describes the proposed modification as comprising:
 - an additional 280 m² of retail / commercial Gross Floor Area (**GFA**);
 - layout changes to the approved retail / commercial tenancies;
 - provision of a hotel reception; and
 - additional residential communal open space.

1.4 Stated need for modification

18. Condition B4(b) of SSD 7064 requires the Applicant to submit to the Certifying Authority amended architectural plans demonstrating that the door openings between the wine bar and the central courtyard are deleted to ensure the acoustic amenity of future residents of the development.
19. The Applicant's Planning Statement notes that the amended proposal:
"...achieves a better outcome in that it provides an improved resolution of a redundant design of the internal courtyard which rationalises this space and improves the amenity for the residential component of the development."

2. THE DEPARTMENT'S CONSIDERATION OF THE APPLICATION

2.1 Key steps in Department's consideration of the Modification Application

20. The Department publicly exhibited SSD 7064 MOD 1 between 13 September 2018 and 26 September 2018.
21. The Department received a total of nine submissions including five from government agencies, one from Council (objecting to the proposal) and three from the public (all objecting to the proposal). Key issues raised in the submissions are listed at paragraphs 25 and 26.
22. On 15 October 2018, the Applicant provided a Response to Submissions (**RtS**). The RtS provided further justification for the proposed FSR departure and clarified a number of issues raised by Council and in the public submissions.
23. Council provided a further submission in response to the RtS stating that it maintains its objection to the modification application.

2.2 The Department's modification report

24. The Department's MOD 1 Report states that *"the proposed modification seeks approval for internal building changes that would not result in additional adverse impacts on the surrounding area"*. Accordingly, the Department was satisfied the modification application was within the scope of section 4.56(1)(a) of the EP&A Act as it would result in development that is substantially the same as that originally approved.
25. The Department's MOD 1 Report notes that Council's submission objected to any increase in GFA and raised comments in relation to:
 - *any additional commercial floor space must not impact on the amenity of the hotel or residential development;*
 - *the residential communal open space on the podium may result in noise impacts; and*
 - *landscaping and waste storage areas must not be compromised.*
26. The Department's MOD 1 Report states that the concerns raised in the public objections were in relation to:
 - *demolition and construction impacts on adjoining residential amenity;*

- *building height;*
- *overshadowing;*
- *traffic generation; and*
- *waste collection.*

27. The Department's MOD 1 Report assessed the merits of the proposed modification, considered the issues raised in the submissions relating to the increase in GFA and impacts on residential amenity and considered the Applicant's response to these issues in the RtS.
28. The Department's MOD 1 Report concluded that the proposed amendments will be similar to those contemplated in the original approval and that it is considered to achieve the same intent, while being a more efficient use of the space.

3. THE COMMISSION'S MEETINGS

29. As part of its determination, the Commission met with the Department, Council and the Applicant. All meeting and site inspection notes are available on the Commission's website.

3.1 Meeting with the Department

30. On 5 December 2018, the Commission met with the Department. Key points of discussion included the following:
 - the Department provided an overview of previous SSD applications that relate to the site;
 - the Department provided an overview of the proposed modification application including the key issues that were considered in the Department's assessment relating to the additional GFA and impacts on amenity within the building;
 - the Department confirmed that future development applications will be required for the fit out of the commercial/retail components of the development;
 - the Department acknowledged that the proposed modification would increase the overall GFA within the building, however it was noted that this would result in a more efficient use of space and would not add any further bulk or scale to the building;
 - the Department noted that the rationalisation of space required under the LEC approval was not contemplated at the time of the court proceedings and therefore the key issues associated with this modification application were not previously considered;
 - the Department confirmed it would provide further information to the Commission in relation to the Building Code of Australia (**BCA**) design-related issues; and
 - the Department advised that Council had longstanding concerns with the former (approved) development on the site and that their concerns relating to the modification primarily relate to the bulk and scale of the building and the additional GFA.

3.2 Meeting with Council

31. On 5 December 2018, the Commission met with Council. Key points of discussion included the following:
 - Council provided a summary of its submission made on the modification application and advised that the key aspects of their submission related to the proposed increase in floor space (above the FSR controls for the site) and the adequacy of

- the Applicant's justification for the proposed increase;
- Council considers the proposed infilling of voids within the building has not been adequately explained by the Applicant and is of the view that if these areas are no longer required then the overall massing of the development should be reduced, rather than infilled;
- Council considered there to be no rigorous explanation or assessment of the proposed variation to the FSR development standard and that it would be best practice for the equivalent of a SEPP 1 or clause 4.6 variation to be provided as part of the modification application to justify the non-compliance;
- Council advised that a maximum rate of car parking is established for the LGA and that it has no concerns as no additional car parking is proposed as part of the modification;
- Council advised on waste removal procedures, including that the removal of commercial waste is arranged by an independent contractor while Council arranges the removal of residential waste; and
- Council requested amendments be made to Condition A12 and Condition A13 to amend drafting errors.

3.3 Meeting with the Applicant

32. On 5 December 2018, the Commission met with the Applicant. Key points of discussion included the following:
- the Applicant provided a brief overview of the development's history including the Commission's refusal of the original application, the subsequent LEC appeal and section 34 conciliation conference and LEC approval;
 - the Applicant provided an overview of the modification application and justification for the internal amendments proposed to the approved building, including the additional retail GFA, wine bar GFA and filling of certain void areas;
 - the Applicant advised that some of the voids in the approved design of the building were initially included to provide adequate head height in the basement car park below, however, following the approval of SSD 7064 the project architects have determined that the void space is no longer required;
 - the Applicant advised that the modification application restores, to some extent, the ratio of residential to non-residential uses that more closely reflects the FSR planning controls for the site;
 - the Applicant advised that the future fit out and management of the wine bar and the retail space would be subject to future development applications to be lodged with Council; and
 - the Applicant advised there are no fundamental design issues relating to BCA compliance that could not be resolved, however, this would be confirmed with the Commission following further consultation with the project architect.

4. ADDITIONAL INFORMATION

33. On 6 December 2018, the Commission requested additional information from the Department including an explanation of the Department's approach to assessing compliance with the Building Code of Australia (**BCA**) and confirmation of the Department's request that the Applicant remove the proposed fit out and use of the commercial tenancies and wine bar from the modification application (as originally lodged).
34. The Department provided this information to the Commission on 7 December 2018.

35. The Applicant provided additional information on 11 December 2018 including advice from MDC Fire Engineering Pty Ltd in relation to BCA compliance matters.
36. On 13 December 2018, the Commission requested additional information from the Applicant including an updated Capital Investment Value (**CIV**) for the project taking into consideration the internal design amendments proposed as part of the modification application.
37. The Applicant provided this information to the Commission on 17 December 2018.

All of the above information is available to view on the Commission's website.

5. THE COMMISSION'S CONSIDERATION

5.1 Material considered by the Commission

38. In determining the modification application, the Commission has carefully considered the following material (the **Material**):
 - Section 4.56 Planning Statement prepared by Sutherland & Associates Planning and dated August 2018;
 - submission provided by Council on the modification application and dated 27 September 2018;
 - submissions provided by Government agencies on the modification application in September 2018;
 - submissions provided by the public on the modification application in September 2018;
 - Response to Submissions prepared by Sutherland & Associates Planning and dated 3 October 2018;
 - State Significant Development Modification Assessment report prepared by the Department and dated November 2018;
 - the Conditions of Consent for SSD 7064 (Appeal No: 17/85735);
 - additional information received from the Department on 7 December 2018 (refer paragraph 34);
 - additional information received from the Applicant on 11 December 2018 (refer paragraph 35); and
 - additional information received from the Applicant on 17 December 2018 (refer paragraph 37).

5.2 Key issues considered by the Commission

39. The key issues considered by the Commission in determining the modification application relate to the proposed increase in GFA of the retail space and wine bar and compliance with the BCA.

5.2.1 Increase in GFA

40. The modification application proposes an additional 280 m² of retail GFA from infilling of the outdoor terrace and central courtyard and expansion of the ground floor retail tenancy.

41. The Applicant states in its Planning Statement that Condition B4(b) of the conditions of consent for SSD 7064 prevents the use of the outdoor terrace adjacent to the wine bar and that compliance with this condition will result in an unresolved, inactive and unattractive space that is unlikely to be well maintained and offers no amenity to the development.
42. The modification application seeks to resolve these issues by extending both the wine bar and retail tenancy on the ground floor and elevating the courtyard to Level 2. In addition, the wine bar is proposed to be expanded into the void area over the car park which the Applicant has advised is no longer required.

Council's consideration

43. Council objects to an increase in GFA above that approved and considers a more rigorous justification should be provided to demonstrate why the variation is warranted. Further, Council considered the Applicant's justification to be lacking in expertise and imagination and that a redesign that reduces the building bulk should be investigated.

Applicant's response

44. In response to Council's submission, the Applicant advised in its RtS that:
 - Condition B4(b) prohibiting the use of the outdoor terrace results in a redundant space that serves no purpose and also results in a safety issue;
 - the increase in commercial floor space improves the amenity within the development by elevating it to the same level as the residential component and converting this into a communal courtyard for the benefit of the residents;
 - infilling of the void areas does not result in any external changes and improves the functionality of the wine bar;
 - there is no external physical change to the approved development as viewed from the public domain; and
 - the minor variation to the FSR control does not result in any impact to the availability and capacity of local infrastructure, public transport and recreational opportunities.
45. In summary, the Applicant's RtS states that:
"In the absence of any detrimental impacts or external difference to the building when compared to the approved development, strict compliance with the FSR control or the approved FSR would only serve to prevent the achievement of an improved resolution and functionality of the development. Accordingly, the proposed variation to the FSR control is warranted in this instance."

Department's consideration

46. The Department's MOD 1 Report considered that:
"the internal reconfiguration of the building results in an effective use of space, without impacting on the bulk and scale of the approved development or the amenity of the hotel or residential component. The Department considers the changes will have no additional impacts on the surrounding area than contemplated under the approval. Further, the proposed ratio of residential to non-residential development now aligns with the intent of the FSR development standard (being a 2:1 ratio)."
47. The Department's MOD 1 Report concluded that:
"the modification application is consistent with the objectives of the Business Zone –

Mixed Use and the underlining objectives of the FSR development standard. The additional GFA does not result in any external impacts on the character or the amenity of the surrounding area.”

Commission’s consideration

48. The Commission notes that the areas of expansion and increased GFA of the retail space and wine bar would occur wholly within the approved building footprint. Accordingly, while the Commission has considered Council’s concerns about the proposal, it agrees with the Department’s assessment that the modification would not impact on the bulk and scale of the approved development and would not result in any additional impacts to the existing streetscape or public domain areas.
49. The Commission agrees that the requirement of Condition B4(b) to delete the door openings between the wine bar and central courtyard would diminish the usability and amenity of this space. Elevating the central courtyard to Level 2 to correspond with the residential floor level above, provides an improved outcome for future residents of the building in terms of access to the landscaped courtyard/open space area.
50. The Commission notes that approval for the internal fit out and use of the retail tenancy and wine bar does not form part of the modification application. The Department requested the Applicant remove this aspect from the application as it was not approved under SSD 7064. The fit out and use of the retail tenancy and wine bar will therefore be subject to future assessment and approval by Council as the relevant consent authority.
51. The Commission accepts the conclusions made by the Department in its assessment, as outlined in paragraphs 46 and 47, and finds that the increase in GFA would not result in any adverse impact on the character or the amenity of the surrounding area.

5.2.2 Compliance with the Building Code of Australia

52. The Commission raised several matters with the Applicant and the Department regarding the proposed internal design of the building and ability to comply with certain BCA provisions.
53. These matters specifically related to the proposed commercial waste storage area and its access directly from a fire-isolated corridor, the minimum distances between fire stairs and the positioning of roof lights in the proposed courtyard.

Applicant’s response

54. The Applicant provided advice from MCD Fire Engineering (**MCD**) dated 11 December 2018, which reviewed the areas of concern raised by the Commission, including:
 - fire-isolated stairs that discharge into the commercial waste storage area instead of a road or open space;
 - two fire-isolated stairs emerge with the discharge instead of having their own independent egress to a road or open space; and
 - roof lights to the additional retail space and wine bar within 3 m of an external wall of a Class 3 area which have openings within 6 m vertically above the roof lights.
55. MCD confirmed that, as part of the process in obtaining a Construction Certificate, a Fire Engineering Report will be prepared in consultation with the Certifying Authority

demonstrating that the issues raised in paragraph 54 can comply with the performance criteria of the BCA and/or Deemed-to-Satisfy provisions. Further, MCD confirmed that *“the associated fire safety requirements are of minimum intrusion and will not have a significant design that would warrant a need for re-approval.”*

Department’s response

56. The Department advised in its additional information provided to the Commission (refer paragraph 35) that it reviewed the Applicant’s BCA report submitted as part of the modification application, including any non-compliances, and that this is addressed under Condition B10 of the conditions of consent for SSD 7064. Condition B10 reads as follows:

Compliance with the Building Code of Australia (BCA)

B10. Details shall be provided to the satisfaction of the Certifying Authority, with the application for a Construction Certificate, which demonstrate that the proposal complies with the prescribed conditions of consent under Clause 98 of the Environmental Planning and Assessment Regulation in relation to the requirements of the Building Code of Australia (BCA).

57. Further, the Department advised that its general practice is to condition compliance with the BCA where there is a reasonable likelihood an alternative solution can be achieved, consistent with clause 54(4) of the *Environmental Planning and Assessment Regulation 2000 (EP&A Regulation)*.
58. Clause 54(4) of the EP&A Regulation notes that *“The aim of this provision is to ensure that the consent authority does not oblige the applicant to provide these construction details up-front where the applicant may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted.”*

Commission’s consideration

59. The Commission acknowledges that the Applicant’s BCA report, submitted as part of the modification application, identifies several non-compliances with the Deemed-to-Satisfy provisions of the BCA. Notwithstanding, Condition B10 of the conditions of consent requires the Applicant to provide details to the Certifying Authority confirming that the development complies with the prescribed conditions of the BCA, prior to the issue of a Construction Certificate.
60. The Commission finds that the conditions of consent adequately address the Applicant’s obligation to ensure compliance with the prescribed conditions of the BCA.

5.2.3 Other issues

61. Other issues raised in submissions that has been considered by the Commission relate to:
- amenity within the building;
 - landscaping; and
 - waste storage.
62. The Commission finds that the elevation of the central courtyard to Level 2 of the building, subsequently corresponding with the residential floor level above, improves

access to the communal open space area for future residents of the building and would not compromise the amenity for either the hotel or residential component of the building as:

- the communal courtyard would be secondary to the primary communal open space area on the rooftop of the building;
- use of the communal courtyard is restricted (under Condition F22) to residents or guests of the development only, between 7am and 10pm daily; and
- the modified development includes the provision of a landscaped buffer on Level 2 of the building located between the communal courtyard space and hotel component to provide visual privacy and assist in minimising noise impacts.

63. The Commission finds that the modification application would not compromise the types of plantings that may be provided within the communal courtyard space on Level 2 and would result in additional landscaping within the building.
64. The Commission finds that the modification does not propose a reduction to the waste storage capacity of the development and that sufficient waste storage is provided to cater for the increased retail GFA.

5.2.4 Administrative amendments to the conditions of consent

65. The Commission has identified a number of drafting amendments required to the conditions of consent. These amendments relate to minor errors and misdescriptions outlined in paragraphs 66 to 72.
66. Condition A2 includes a list of drawings the project is to be developed in accordance with. The Commission notes that plan number DA2005C – Level 2 Floor Plan (undated and submitted as part of the modification application) is required to be amended to refer to the correct GFA for the Level 2 retail space.
67. Condition A12 references Condition B5 in error. This should refer to Condition B8.
68. Condition A13 references a contribution pursuant to the *Redfern-Waterloo Authority Contributions Plan 2006*. The contribution amount is required to be updated following an updated CIV for the project provided by the Applicant. The updated amount equates to \$272,272.00 which is 2% of the proposed cost of the development. The Commission notes that the contribution amount under Condition A13 is currently based on the CIV for the original development scheme (SSD 7064) which comprised 29 residential apartments and 78 hotel rooms. The development was subsequently amended prior to consent being granted by the LEC and included a reduction in the total number of residential apartments and hotel rooms. The Applicant has advised the Commission that the CIV was not updated throughout the LEC process and has therefore provided a revised CIV.
69. Condition B33 and Condition B34 both refer to Condition B29 in error. These conditions should refer to Condition B31.
70. Condition B38 references Condition B35 in error. This should refer to Condition B37.
71. Condition F22 should be amended to delete reference to the terrace adjoining the wine bar (deleted as part of the modification application) and to make reference to the communal terraces located on Level 2 and Level 6 of the building.

72. Condition F23 includes the wording “...PA systems or the life” and should instead read “...PA systems or the like”.

6. THE COMMISSION'S FINDINGS AND DETERMINATION

73. The Commission has carefully considered the Material before it.
74. The Commission accepts the Department's findings, as indicated at paragraph 24, that the modification application is within the scope of Section 4.56(1)(a) of the EP&A Act and would result in substantially the same development as that originally approved.
75. For the reasons outlined at paragraph 48, the Commission finds that the proposed infilling of the central courtyard and increase in GFA by 280 m² to 3,725 m² would not result in any adverse impact on the character or the amenity of the surrounding area
76. For the reasons outlined in paragraph 59, the Commission finds that the conditions of consent adequately address the Applicant's obligation to ensure compliance with the prescribed conditions of the BCA.
77. For the reasons outlined at paragraph 62, the Commission finds that the modification would not compromise the amenity for the hotel or residential components of the building.
78. For the reasons outlined at paragraph 63, the Commission finds that the modification would not compromise the types and quantum of plantings that may be provided within the communal courtyard space on Level 2.
79. For the reasons outlined at paragraph 64, the Commission finds that the modification provides adequate waste storage capacity.
80. For the reasons outlined at paragraphs 66 to 72, the Commission finds that the drafting errors in the conditions of consent for SSD 7064 can be corrected as part of the SSD 7064 MOD 1 application.
81. For the reasons above at paragraphs 74 to 80, the Commission has determined to approve the modification application, subject to conditions.
82. The reasons for the Decision are given in this Statement of Reasons for Decision dated 21 December 2018.



Steve O'Connor (Chair)
Member of the Commission



Wendy Lewin
Member of the Commission