



6 May 2019

Mixed Use Development at 47-50 The Esplanade, Ettalong Beach (MP 09_0121 MOD 5)

1. INTRODUCTION

1. On 5 April 2019, the NSW Independent Planning Commission (**Commission**) received from the NSW Department of Planning and Environment (**Department**) a State significant development modification application to modify the approved mixed-use development at 47-50 The Esplanade, Ettalong Beach (**modification application**). The modification application was lodged Longbeach Living Pty Ltd (**applicant**) pursuant to section 4.55(1A) of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**). It seeks consent for minor internal and external additions and alterations, including additional and extended balconies to some of the approved apartments.
2. The Commission is the consent authority in respect of the modification application under section 4.5(a) of the EP&A Act and clause 8A of the *State Environmental Planning Policy (State and Regional Development) 2011* (**SEPP SRD**). This is because:
 - the modification application constitutes State significant development under section 4.36 of the EP&A Act as the Application was transitioned under *clause 6 of Schedule 2 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017*; and
 - the Department received a reportable political donations disclosure.
3. Professor Mary O’Kane AC, Chair of the Commission, nominated Chris Wilson (Chair) and Dr Peter Williams to constitute the Commission determining the modification application.

1.1 Site and locality

4. The subject site is located on the southern edge of the Ettalong Beach town centre and comprises two land holdings, separated by a six metre (m) wide Council laneway, legally described as Lots 111,112,113,114,115 and 116 of DP 10650 (**Project site**). The Project site has frontage to The Esplanade to the south and Memorial Avenue to the west (Figure 1).

1.2 Background to Modification Application

5. Project approval for 47-50 The Esplanade, Ettalong Beach (MP 09_0121) was granted on 24 November 2010 for the construction of a mixed-use development over two stages, including the construction of a seven-storey mixed-use building (Stage 1) and a two-storey commercial building (Stage 2) (**the Development**).
6. The Development has since been modified 4 (four) times. These modifications comprise:
 - Modification 1 – added 14 apartments, reduced the building height from 23.5m to 22.85m and made internal and external design changes. Approved 24 March 2016.
 - Modification 2 – an administrative modification. Approved 4 October 2016.
 - Modification 3 – made minor internal and façade changes, minor increase to building height to 23.45 metres and floor space ratio, changes to staging and a reduction in the number of loading bays. Approved 8 October 2017.
 - Modification 4 – reconfigured the plant room and the northern edge of the roof area, created private terraces for two apartments and provided for a masonry wall dividing the two terraces. Approved 19 September 2018.

Figure 1: Aerial view of the subject site. Source: Department's Assessment Report.



1.3 Summary of current Modification Application

7. The modification application originally sought to make minor internal and external additions and alterations, including extended and additional secondary balconies, extending the trafficable areas of existing balconies, provide a rooftop terrace and minor changes to internal layout of the building, including the addition of a ground floor public bathroom.
8. However, following the public exhibition of the modification application the applicant made amendments to the modification application in response to concerns raised in public submissions by:
 - making sections of the balconies on levels 3 and 5 for apartments 307, 308, 506 and 507 non-trafficable;
 - reducing the extent of privacy screens on levels 3 and 5 and making the new glass balustrades on levels 3 and 5 frameless; and
 - removing the proposed changes to the rooftop.
9. The amended modification application as outlined in the Response to Submissions (**RtS**) has been referred to the Commission for determination.

1.4 Stated need for modification

10. The applicant stated in its *Statement of Environmental Effects s4.55(1a) Amendment of Instrument of Approval MP 09_0121 (Statement of Environmental Effects)*, dated 11 October 2018, that the modification application is required:
 - *“To increase the provision of private open space (in the form of larger balconies and a roof top terrace) for residents by making more efficient use of building structures and slabs that are approved as non-trafficable spaces,*
 - *To improve safe accessibility and serviceability of plant and equipment located on the roof areas,*
 - *To improve the use and design of public bathrooms accessed from Memorial Avenue by amending the door location and internal layout, and improving the direct surveillance of the bathroom to and from the public domain,*
 - *Modify the entry doors into the private lobby to modify the approved ‘alcove’ in the facade (which may have raised issues concerning public safety, concealment, gathering*

of rubbish, and general cleanliness). This has been achieved by redesigning the doorway and by reducing the amount of glazing available to the lobby from the public domain to appear that is more private than other lobbies within the building.”

2. THE DEPARTMENT’S CONSIDERATION OF THE APPLICATION

2.1 Key steps in Department’s consideration of the Application

11. On 11 October 2018 the applicant submitted its modification application to the Department for assessment.
12. The Department publically exhibited the modification application from 9 November 2018 to 7 December 2018 and invited public submissions. The Department received a total of 23 submissions, comprising a submission from Central Coast Council (**Council**) and 22 public submissions (including 19 objections).
13. The Department identified that all public submissions were received from owners or occupiers of the adjacent building, the Mantra Ettalong Beach.
14. Council did not object to the modification application and stated that the applicant would need to comply with the Building Code of Australia and that the *“proposal raises no issues in relation to the relevant provisions of Gosford Local Environment Plan 2014 and Gosford Development Control Plan 2013, State Environmental Planning No. 65 – Design Quality of Residential Flat Development and the Apartment Design Guide.”*
15. The key concerns raised in the public submissions included:
 - view impacts and visual privacy impacts, from the extensions to Levels 3 and 5 balconies and proposed rooftop terrace;
 - the extended balconies, particularly on Level 3, detract from the original setback tiered appearance;
 - noise impacts from increased balcony sizes and an associated increase in people and parties;
 - neighbouring properties will be devalued; and
 - the ground floor public bathroom will attract loitering and raises safety concerns.
16. On 20 December 2018, the applicant provided a RtS to address matters raised in the public submissions. The RtS identified amendments to the modification application, as set out in paragraph 8, to address key concerns raised during the exhibition process.
17. On 5 April 2019, the Department finalised its assessment of *47-50 The Esplanade – Ettalong Beach Section 4.55(1A) Modification Assessment (MP09_0121 MOD5)* (the **Department’s assessment report**) and referred it to the Commission.

2.2 The Department’s assessment report

18. The Department’s assessment report, dated 5 April 2019, identified potential visual, privacy and noise as the key impacts associated with the modification application.
19. The Department’s assessment report considered the scope of the modification application with regard to the requirements of Section 4.55(1A) of the EP&A Act. The Department stated it was satisfied that:
 - *“the modification is of minimal environmental impact”* and
 - *“the modification is substantially the same as the originally approved development.”*
20. The Department’s assessment report concluded that the modification application is appropriate as:
 - *“the potential view loss impacts associated with the proposal would be negligible*
 - *the proposal would not result in any significant noise and visual privacy compared to the original approval*
 - *the proposal would largely be undertaken within the approved building envelope and would not increase the height, bulk or scale of the building*

- *the proposal would improve the amenity of some apartments through the provision of additional private open space*
- *appropriate conditions are recommended to increase the safety of the ground floor public bathroom.”*

3. THE COMMISSION'S CONSIDERATION

3.1 The Commission's site inspection

21. On 18 April 2019, the Commission conducted an inspection of the Project site. A summary of the site inspection is available on the Commission's website.

3.2 Material considered by the Commission

22. In making its determination, the Commission has carefully considered the following material (**material**):
- The modification application;
 - the Statement of Environmental Effects, dated 11 October 2018, prepared by Planning Lab, and its accompanying appendices;
 - the RtS, dated 20 December 2018, prepared by Planning Lab, and its accompanying appendices;
 - the Department's assessment report; and
 - the Development and subsequent modifications.

3.3 Mandatory considerations

23. In determining this modification application, the Commission has taken into consideration the following relevant mandatory considerations, as provided in s 4.55(3) and s 4.15(1) of the EP&A Act (**mandatory considerations**):
- the provisions of all:
 - environmental planning instruments; and
 - proposed instruments that are or have been the subject of public consultation under the EP&A Act and that have been notified to the Commission (unless the Secretary has notified the Commission that the making of the proposed instrument has been deferred indefinitely or has not been approved); and
 - development control plans; and
 - the *Environmental Planning and Assessment Regulations 2000* (**Regulations**) to the extent that they prescribe matters for the purposes of s 4.55(1A) of the EP&A Act; that apply to the land to which the modification application relates;
 - the likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
 - the suitability of the site for development;
 - submissions made in accordance with the EP&A Act and Regulations; and
 - the public interest.

3.4 Relevant Environmental Planning Instruments

24. The Department identified the following Environmental Planning Instruments (**EPIs**) as relevant to the modification application:
- *State Environmental Planning Policy (Infrastructure) 2007*;
 - *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*;
 - *State Environmental Planning Policy No. 55 – Remediation of Land*;
 - *State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development*;
 - *Gosford Local Environmental Plan 2014*; and
 - *State Environmental Planning Policy (Coastal Management) 2018* (**Coastal SEPP**).
25. The Department has considered the modification application in relation to the EPIs

identified in paragraph 24 and as considered in the original assessment of the Development. The Department's assessment report stated, "*the modification does not result in any significant changes that would alter the considerations and conclusions made as part of the original assessment*".

26. The Project site is identified as being located within the Coastal Environment Area and therefore clause 13 of the Coastal SEPP applies. The Department's assessment report concluded that "*the proposal is consistent with the Coastal SEPP as it does not seek to change the footprint of the development and would not result in any additional coastal impacts beyond those already assessed and approved in the original assessment.*"
27. The Commission accepts the findings of the Department's consideration of relevant instruments as set out in paragraphs 24 - 26, and finds that the modification application is consistent with the requirements of relevant EPIs because the modification application does not change the footprint of the Development and would not result in any additional coastal impacts.

3.5 Relevant Development Control Plans

28. The Department also identified the *Gosford Development Control Plan 2013 (Gosford DCP)* as relevant to the modification application.
29. The applicant's Statement of Environmental Effects assessed the modification application with regard to the objectives of the Gosford DCP and concluded that the modification application is consistent with the objectives of the Gosford DCP.
30. The applicant's Statement of Environmental Effects concluded the modification application would:
 - "*not result in significant additional shadow impacts*";
 - "*will continue to comply with the objectives of Building Articulation*";
 - use building materials that "*are consistent with the existing approved materials*"; and
 - provide balconies and terraces that "*remain functional and are well integrated into the design of the development*".
31. Whilst noting that DCP's do not govern the determination of State significant development, the Commission accepts the findings of both the applicant and the Department, as set out in paragraph 30, that the modification application is generally consistent with the objectives of Gosford DCP.

3.6 Likely impacts of the development on built environments

32. The Commission agrees with the Department's identification of the key issues relevant to the assessment and determination of the modification application. These are as follows and comprise the potential for:
 - Privacy impacts;
 - View impacts; and
 - Noise impacts.

3.6.1 Potential impacts on visual privacy and views

Public Submissions

33. The public submissions received during the exhibition raised concerns regarding the modification application and potential impacts on privacy and view loss particularly from the proposed extended balconies and proposed rooftop terrace.

Applicant's consideration

34. In response the applicant amended the modification application as part of its RtS. The amendments included:
 - Making sections of the balconies on four (4) apartments (307, 308, 506 and 507) non-trafficable;

- Making the new glass balustrades on levels 3 and 5 as frameless glass balustrades;
 - Reducing the extent of privacy screens on levels 3 and 5; and
 - Removing the proposed rooftop terrace.
35. The applicant concluded in its RtS that:
- *“The site and the Mantra Resort are separated by a distance greater than 18m at all points by Memorial Avenue. Memorial Avenue is a two-lane road with sizable footpaths on either side providing an appropriate level of separation within a town centre. Due to the compliant separation of all habitable rooms and balconies and the negligible additional privacy impacts arising from the proposed modifications, they are acceptable on balance.”*; and
 - *“The proposal’s impact on views from the Mantra Resort, which are achieved in part across the balconies of apartments 307, 308, 506 and 507, is minimal as significant separation exists between the buildings and the revised proposal makes only a minor increase in the length of the 1m high, transparent glass balustrade.”*

Department’s consideration

36. With regard to visual privacy the Department’s assessment report stated that *“the new and extended balconies would not result in any significant privacy impacts beyond those already assessed and approved.”*
37. Specifically, the Department’s assessment report concluded that:
- *“the separation distance between the subject site and the neighbouring Mantra building is at least 18m which is consistent with the requirements outlined in the ADG*
 - *the approved development already contains extensive balconies along its western and southern elevations*
 - *the proposed new balconies are secondary balconies coming off bedrooms and as such are not considered to be high trafficable areas*
 - *the removal of the rooftop terrace and the reduction in the size of the balconies would help minimise potential privacy impacts between the two buildings.”*
38. In relation to view loss, the Department carried out an assessment of the potential loss of views from Mantra Resort apartments as a result of the modification application. The Department followed the four-step assessment process established by *Tenacity Consulting v Warringah [2004] NSWLEC 140*. The assessment against the Tenacity Principles was supported by an inspection of those units in the Mantra Resort expected to be the most affected by view loss.
39. The Department’s assessment report concluded that:
- *“The proposed balconies would interrupt some water views towards the south east. All other views would be retained”*; and
 - *“The proposal does not seek to increase the height, bulk or scale of the building. Rather it seeks to provide additional/extended balconies within the approved building envelope. The proposal has been assessed in detail and the Department is satisfied it would not result in any unacceptable view loss or other amenity impacts. The Department therefore considers the proposal is reasonable.”*

Commission’s consideration

40. The Commission accepts the conclusions of the Department’s assessment report of the modification application, as amended by the RtS. As outlined in paragraph 39, it finds that, given the modification application is not adding significant new balcony areas or changing the approved bulk or scale of the Development, it is acceptable. It also found that the reduction in privacy screens and the proposed frameless glass balustrades would ensure there was no significant view loss from the apartments in the Mantra Resort.

41. The Commission also finds that the changes in the visual privacy and view impacts associated with the modification application are acceptable noting the changes made through the RtS process. Overall, the impacts are not materially different from the Development, as modified.

3.6.2 Potential acoustic impacts

Public submissions

42. The public submissions received during the exhibition of the modification application raised concerns regarding the potential increase in noise impacts associated with the use of the extended balcony areas.

Applicant's consideration

43. The applicant's RtS states that the *"expected occupancy of the apartments is unchanged as a result of the proposal and the approved residential use remains unchanged"*. It further states that *"the proposal has been revised to reduce the proposed trafficable area of the balconies on levels 3 and 5 and to entirely remove the trafficable roof terrace from the proposal"*.
44. Subsequently, the Applicant concludes that the modification application will, *"not increase noise impacts above those of the existing development"*.

Department's consideration

45. In relation to noise impacts, the Department's assessment report stated that likely noise impacts would be acceptable because:
 - *"the Applicant revised the proposal to reduce the size of the balconies for apartments 307, 308, 506 and 507, and remove the proposed rooftop terrace"*
 - *the proposal does not seek approval to change the residential use of the development*
 - *the existing development already includes extensive balconies*
 - *the new balconies are secondary balconies attached to bedrooms and as such are not considered to be highly used spaces."*
46. The Department's assessment report concluded *"that the proposal is acceptable as it will not result in unacceptable noise impacts beyond those already approved"*.

Commission's consideration

47. The Commission accepts the conclusions of the Department outlined in paragraphs 45 - 46 because the modification application is not changing the residential use of the Development. In addition, and as amended in the RtS, the proposed increases to trafficable balcony areas are either secondary balconies or represent minor increases in the size of approved balconies.
48. Noting there would be no change in use, and limited changes to balconies and balcony sizes, the Commission finds that the noise impacts from the modification would be acceptable as the changes are unlikely to result in any unacceptable change in the noise generated by the Development.

3.7 Other relevant issues

49. The Department's assessment report identified other relevant considerations associated with the modification application. These issues, including the Department's assessment of the significance of the associated impacts, are set out in Table 1 below.

| Table 1: Summary of findings by the Department on other issues regarding the modification application. | |
|---|--|
| Issue | Findings |
| <i>Bulk and Scale</i> | <ul style="list-style-type: none"> The Department noted the modification application would be largely contained within the approved building envelope and the development would retain a tiered and stepped appearance. The Department is satisfied the modification application would not result in any significant changes to the approved bulk and scale of the building. |
| <i>Apartment Design Guide (ADG)</i> | <ul style="list-style-type: none"> The Department concluded that the proposed balconies and extensions are generally compliant with the ADG and the new and modified balconies would provide improved amenity to the apartments by further increasing private open space levels, maximizing views towards Brisbane Water and increasing passive surveillance opportunities. Despite these improvements, the Department raised concern about privacy between apartments 601 and 602. The modification application seeks to extend the balconies and replace the approved privacy screening with glass balustrades. These amendments are sought to improve the amenity of the apartments by providing the terraces with water views. In response, the Applicant provided amended plans that add 1.5m high louvred screens with vertical angled blades to the balconies and extend the approved masonry dividing wall between the terraces. The Department considered the modification application to be acceptable as: <ul style="list-style-type: none"> overlooking impacts have been minimised through the revised plans, which now include 1.5m high louvred screens along the balconies and an extended dividing wall between the terraces; the amenity of the apartments will be improved by views towards Brisbane Waters; and the apartments as approved were designed to minimise overlooking by orientating living areas and the primary balconies to the south towards the water. The Department considered that the reduction in internal privacy is offset by the iconic water views, providing an acceptable level of residential amenity. No additional conditions or amendments are necessary. |
| <i>Ground floor public bathroom</i> | <ul style="list-style-type: none"> The modification application seeks to modify the public bathroom door location and internal layout on the basis that it will improve the use, design and surveillance of the public bathroom accessed from Memorial Avenue. Condition requiring the door to the bathroom to contain a self-locking mechanism and to be only accessed by key has been proposed. |
| <i>Property Values</i> | <ul style="list-style-type: none"> The Department noted that impacts on property values are not a planning consideration under the EP&A Act. |
| <i>Development precedent</i> | <ul style="list-style-type: none"> The Department noted that all modification applications are assessed on their merits, having regard to the impacts of the application and the issues raised in submissions. The Department concluded that it is satisfied it would not result in any unreasonable impacts in terms of views, amenity and bulk and scale. The Department did not consider the modification application would set an unacceptable development precedent. |

50. The Commission accepts the conclusions of the Department's assessment report and recommendations relating to other issues as outlined in paragraph 49 above because:
- The modification application would not significantly change the bulk and scale of the Development;
 - The safety concerns relating to the ground floor public bathroom have been adequately addressed through the proposed conditions of consent; and
 - The modification application would provide improved amenity the apartments by further increasing the quantum of private open space, maximizing views towards Brisbane Water.

3.8 The public interest

51. The Commission considers that the benefits of the modification application include a better amenity for the modified apartments, as set out in the Department's assessment of the modification application's compliance with the ADG in paragraph 49. The Commission considers the modification application will result in a better utilisation of the approved

building envelope by providing increased private open space and maximizing views towards Brisbane Water.

52. The Commission considers that the impacts of the modification application are minimal and consistent with the approved impacts for the Development.
53. The Commission finds that the modification application is in the public interest because the proposed amendments will not result in significant additional impacts compared to the Development, while improving the amenity of the approved building and envelope.

4. HOW THE COMMISSION TOOK COMMUNITY VIEWS INTO ACCOUNT IN MAKING DECISION

54. The views of the community were expressed through the public submissions and comments received as part of the Department's exhibition of the modification application.
55. In summary, views expressed by the community raised concerns about the noise impacts from the proposed increase in proposed trafficable balcony area, the loss of views which may be experienced by some residents and occupants of the adjacent Mantra Resort, privacy impacts, safety concerns in relation to the public bathroom and the potential for property devaluation.
56. The Commission has carefully considered all of these views as part of making its decision making process. The way in which these concerns were taken into account by the Commission is set out in **section 3** above.

5. CONCLUSION: THE COMMISSION'S FINDINGS AND DETERMINATION

57. The Commission has carefully considered the Material before it.
58. For the reasons set out in paragraphs 41, 48, 50, and 53 the Commission finds that consent for the modification application as outlined in the RtS should be granted subject to conditions. Specifically, the Commission finds that the changes outlined in the modification application and RtS are acceptable as they would not:
 - change the current approved uses of the Development;
 - result in a significant change to the approved bulk and scale;
 - result in unacceptable privacy impacts or view loss; and
 - result in unacceptable increase in noise generation.
59. As noted above at paragraph 58, the Commission has determined that consent for the modification application should be granted subject to conditions. These conditions are designed to:
 - prevent, minimise and/or offset adverse environmental impacts;
 - set and update standards and performance measures for acceptable environmental performance; and
 - require regular monitoring and reporting.



Chris Wilson (Chair)
Member of the Commission



Dr Peter Williams
Member of the Commission