



The General Manager  
Port Stephens Council

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**7 June 2022**

## **Objection: DA 16-2007-42-4 (S96) 53 Magnus St Nelson Bay**

S4.55(1A) Modification to approved residential flat building - additional unit, basement parking and associated works

### ***Introduction***

The Tomaree Ratepayers and Residents Association Inc (TRRA) represents the community on a range of issues which affects the Tomaree Peninsula in Port Stephens LGA, including planning and development, economic development, cultural infrastructure and resources, the built and natural environment, tourism and other grass roots issues.

TRRA objects to this DA on several grounds. We note that the 6.2% height exceedance will not trigger automatic referral to Council for determination, but we will be asking Councillors to 'call-up' this DA, as it clearly involves the contentious issues surrounding building height and scale in the Nelson Bay Town Centre.

### ***Background***

The original consent was granted in 2007 for a 5 storey building with basement car parking (we assume one unit per level). A modification in 2013 approved the conversion of common area and additional carparking, and a further modification was approved in 2016 for a reconfiguration to increase the unit yield to 7, by converting from a single 3 bedroom unit to two 2 bedrooms units on each of two of the levels.

This latest application is for an addition of 'level 5' (note this is actually the 6<sup>th</sup> storey) to consist of a rooftop terrace and an additional 2 bedroom apartment, resulting in a total of eight units, and an expansion of the basement footprint to accommodate increased car parking.



## ***Inappropriate use of Section 4.55(1A) of Environmental Planning and Assessment Act***

The proposed modifications are sought pursuant to subsection 4.55(1A) of the Environmental Planning and Assessment Act.

### **(1A) Modifications involving minimal environmental impact**

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

- (a) it is satisfied that the proposed modification is of **minimal environmental impact**, and
- (b) it is satisfied that the development to which the consent as modified relates is **substantially the same development** as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and ... **(our emphasis)**

On page 12-13 of the Statement of Environmental Effects (SoEE) an argument is presented that the development is 'substantially the same' to that which consent was granted, that the modifications are analogous to those granted in Modification 3 where the yield was increased to 7 units and that the additional unit is not considered to exceed the threshold permitted, in that the changes it 'largely maintain' the setbacks established by the lower levels, and are not considered to substantially alter the presentation or character.

TRRA rejects the assertion that it is 'substantially the same' and the arguments presented, for the following reasons:

- The previous modification was an internal configuration to increase the yield of units which didn't change the FSR, whereas this proposal increases the FSR significantly from 1.62:1 to 1.87:1 (SoEE page 10 & 19).
- The visual appearance from the Magnus Street is significantly different with the top level now very prominent - the additional unit on the NE corner means that the building would now clearly present as a 6 storey building above the carparking level instead of a 5 storey building currently approved for this site (and as existing next door to the west).
- The communal use area is proposed to be located along the western boundary instead of in the centre of the roof area – this will now be visible from the street level and directly overlook adjoining neighbours.

We submit that for these reasons, Council should reject this as a S4.55(1A) application and require instead that a new DA to be submitted.

### **Building height**

The SoEE states (on p.17) that the proposal will exceed the 17.5m height limit by a maximum of 1.085m or 6.2%.

The new 17.5m height limit has recently been introduced with the specific intention of allowing a 5 storey building with each level having a height of 3.5m instead of the previous 3m, to allow a better standard of building and design.

Creative re-design has allowed the proposed 6 residential storeys to be largely fitted into the new height limit. Only the lift shaft exceeds the limit by 1.085 metres, with the new sixth floor unit only appearing to exceed the limit by 400mm along most of the length of the western side of the building. (Architectural Plans p7 - this could have been more clearly illustrated with a 3D image).

While we are disappointed that the proposal involves a further increase in height beyond the new limit, we note that it is relatively minor (40 cm). We therefore do not object on the narrow grounds of a minor height exceedance.

We do however object to the design on the basis of the visual impact of the additional unit on the new additional sixth residential level. We disagree with the statement on P19 that the changed design 'maintains visual interest while avoiding undue visual bulk...'. We submit that if an additional unit is to be allowed on a new sixth level, it should not be visible from Magnus Street.

We submit that the image presented on the cover of the SEPP 65 Apartment Design Guide Compliance Analysis is seriously misleading – any view of the new building from that vantage point would include at least The Magnus building close to the west, obscuring any view of trees as shown, and possibly also the building to the east. Council should require more realistic images to be provided.

We anticipate that Council's Urban Design Review Panel will have a relevant opinion on the visual impact and other design issues, and look forward to seeing the minutes of the relevant Panel meeting before any decision is made on this application.

### **SEPP 65 Apartment Design Guide Compliance Analysis**

We make the following comments on two entries in the compliance table in this supporting document.

**Building height** – we dispute that it is '*consistent with the 17.5m height limit*'. At 6.2% over that limit it is clearly NOT consistent.

The applicant asserts that because the application is made under s.4.55(1A) it is not required to make a case, under Clause 4.6 of the LEP, for why complying with the standards (in this case the height limit) is

‘unreasonable or unnecessary’. Despite this, a number of arguments are presented on pp16-19 of the SoEE which relate to the Clause 4.6 criteria. We submit that none of these arguments are convincing.

In this case there appears to be no good reason to exceed the new height limit apart from financial gain to the developer, which should not be a consideration for the assessment.

**Building separation** – It is stated that ‘*Building separation generally complies with SEPP 65*’ and that ‘*The proposed level (six) has no buildings adjacent as substantially built low rise developments surround the property*’.

This is simply incorrect – the three immediately adjacent buildings are, respectively 4 storey (to the south), 5 storey (to the west) and 3 storey (to the east, but on higher ground) – at least the 4 & 5 storey buildings cannot reasonably be described as ‘low-rise’.

The assertion also does not allow for any future redevelopment – any of these sites would now be entitled to develop to the new 17.5m height limit, and this application should be assessed against the prospect of this in future.

It is unclear if the building separation guidance in SEPP65 could be met by relocating the new unit of the sixth storey further away from the boundary. There is also no discussion in any of the documents on compliance with DCP setback controls - we submit that Council should confirm that these are met, to the extent that they apply alongside SEPP65.

### **Road Network and Parking**

We note that two additional parking spaces will be provided to the requirements of the DCP. TRRA continue to have concerns that in reality residents or short term tourist tenants of two bedroom units require more than one car space.

With the extra vehicles expected to be associated with the proposed extra unit and the two previously approved in 2016, we consider that a review of traffic flows and access in and out of the building needs to be undertaken, especially as the site is very close to the ‘blind’ corner with Donald Street. Several residents of Magnus have expressed concern in the past of the dangerous traffic situation in this vicinity and while Council has carried out some road marking to reduce the risk, it remains high. The figures on page 1 of the Swept Paths appendix show left turn in and left turn out, but it is not clear if this could be made a condition of consent and if so how it would be enforced so as to avoid dangerous vehicle movements.

### ***Increased Basement Footprint***

The Architectural Plans on page 4 show that the basement will be moved to the boundary. We submit that a Geotechnical report should have been provided to confirm that it is safe and technically possible to achieve this design change. If in the future, it is found to not be possible or not financially viable we would not want to see another request to reduce the number of required parking spaces.

It is also unclear if extending to the boundary would reduce the possibility of deep soil planting at ground level, instead providing only smaller plants in a planter box in this location. We note that the proposed deep soil area will be reduced from 19% to 11.7%.

### ***Noise impact of Communal area***

In the pre-lodgement meeting with Council, the issue of noise between the new unit and the communal roof top area was raised. Page 11 of the SoEE states that a solid wall is likely to assist, and then proposes that if noise or amenity concerns are raised that certain conditions on consent could be imposed to offset potential acoustic impacts. We submit that any conditions would not likely be workable. The current approved plan has the rooftop area located away from the edges of the building, providing privacy and some noise reduction. The proposed changes relocate the communal area to the front (northern) and western sides, significantly worsening these issues for the occupiers of the adjoining property to the west.

### ***Conclusion***

We submit that the proposed amendments are not 'substantially the same' and a new DA should be submitted.

Even if Council accepts this as a s.4.55(1A) application, we submit that it should be refused on several grounds.

- The new design exceeds the recently increased height limit for the site of 17.5m by a maximum of 6.2% and the applicant has not demonstrated that compliance with the limit 'unreasonable or unnecessary' – the height exceedance, while only minor, seems to be a consequence of the redesign to accommodate an extra unit, which should not be a relevant consideration for the assessment.
- The redesign would now present to Magnus St as a six storey building – visually intrusive and contrary to the intent of the new 17.5 metre height limit.
- Setbacks may be inadequate
- The relocation of the communal roof space to the edge of the building creates amenity issues for neighbours
- There are outstanding issues regarding the extension of the basement to the boundary, and

- There are unresolved traffic and road safety issues.

We have no objection to this submission being published, in full and unredacted.

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