28 October 2022

The General Manager
Port Stephens Council

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Objection: DA 2021-703 - 11-15 Church St, Nelson Bay – further changes to residential apartment building proposal

Tomaree Ratepayers and Residents Association Inc. (TRRA) objects to this DA.

We are happy for this submission to be made public, unredacted.

Not opposed to an apartment building on this site

TRRA shares the common desire to see this site developed, and welcomes the interesting design, but maintains that it should respect the height limits which aim to protect the character of the Town. In this respect, the Nelson Bay Strategy, which was confirmed in 2018, states:

> *'In relation to building heights, it is critical that the wooded ridge and headlands that surround the Bay be visible and not eclipsed by buildings.' (Nelson Bay Town Centre and Foreshore Strategy 2012, p6)*

The latest changes

We note that the revised proposal does not meet the aim of the Council resolution 24 of 13 September 2022, which was '*reducing the building height by one floor so the infraction against the building height limit is negligible*.'

Instead, changes proposed offer only a modest height reduction of 1.39 metres, bringing the height exceedance down from 4.18m to 2.79m – clearly not 'negligible'.

The top level structure, which has a floor area of 625m2 and is 36% private, still exceeds the height limit by between 0.79m (+2.8%) and 2.79m (+9.9%), with an average of 6.35%.

The applicant claims to have the support of Council's Design Panel (UDP). We note that this support has been conditional:

> '*The Panel considered the degree of exceedance of the height control was potentially acceptable, if the area of the development that sits above the height control plane were solely utilised as common space. (May 2021) and*
>
> *'The Panel noted that private enclosed space had been removed from the upper floor, and therefore considered that the moderate exceedance of the height control by the upper floor was acceptable. It was recommended that a condition be considered to the effect that any future proposed enclosure of private open space at this level would not be supported.' (April 2022)'*

We question whether this condition has in fact been met in the latest design. The Panel stated in April 2022 that '*The* proposal *is considered to be within reach of gaining the Panel's support, providing the outlined issues are addressed.*' and offered to review it again electronically. It is not clear if they did so.

The applicant asserts that: '*This element [the architectural roof feature] provides cover to expansive internal and external communal spaces for the occupants, as well as the [private open space] for the four penthouse apartments'* (Applicant response letter, p3). The roof level floor plan (p28) and elevations (Amended Architectural Plans) appear to show the roof structure (which will affect the visual impact) covering both private and communal spaces. If so, the Panel's condition will not have been met?

Visual impact the key issue

We submit that the changes make only a marginal difference to the additional visual impact of the excess height which is the main issue – this impact remains significant.

We understand that there are legitimate differences of opinion on the significance of the visual impact. Despite our repeated requests, we still have not seen independent visual images which could resolve disagreement on this issue.

The applicant has now provided 'block diagrams' which seek to minimise the impact of the development by assuming that all surrounding lots will be fully developed to the height limit. We submit that this is an unlikely scenario given that any other developments would have to meet a variety of different controls, and given the limited likely demand for apartments and supply of investment finance.

It is more likely that for the foreseeable future, this building would remain dominant, towering above the immediately adjacent buildings all of which are relatively modern. It would be highly visible from much of the town centre and surrounding areas. It is in this context that the additional height is significant.

The request for a height variation

A revised Clause 4.6 variation report has been submitted. We maintain that the applicant has once again failed to justify why compliance with the height limit is 'unreasonable or unnecessary' which is a required test under Clause 4.6 of the LEP. (The other tests that the report comments on are in addition, not alternatives, to this primary test).

We submit that the arguments put forward as to why compliance is unreasonable or unnecessary (pp.12-19) are unconvincing – in our September 2021 submission on this DA we provided a detailed analysis of the largely similar arguments made in the previous Variation report. No new arguments have been put forward.

We note that the Assessment Report for the 13 September Council meeting does not specifically pass judgement on the 'unreasonable or unnecessary' test. Instead, it makes a judgement about the height variation which in our view is based on a flawed interpretation of Clause 4.6:

> Clause 4.6 is a mandatory development standard required in all LEPs in NSW. The existence of this clause is to ensure that flexibility can be applied to development standards where the proposed variation can provide a better outcome than remaining compliant with the development standard based on environmental planning grounds.
>
> The proposed design results in a better planning outcome on-site despite the variation, with increased setbacks and improved amenity and urban design impacts, thus the development is appropriate for the context and character of the area. All other design principles and FSR controls have generally been complied with. On these grounds, Council staff and the UDP have recommended approval of the development.

Source: p.46 of the Assessment Report

Conclusion

The modest changes proposed clearly do not meet the aim of the Council resolution. If the applicant wanted to seriously address community concerns the obvious solution is to also remove an entire lower level.

The applicant has failed to justify why compliance with the height limit is 'unreasonable or unnecessary' which is a required test under Clause 4.6 of the LEP.

The DA should be refused.

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