34 Dellview Street, Tamarama – Section 96 modifications to approved townhouses (DA 317/2007).

Report dated 13 August 2010 from the Development & Building Unit.

Recommendation: That the application be approved in accordance with the attached report.

Referred to DCC given the number of submissions received.				
Secti	on 96 Assessment Report			
Development Application No.	DA 317/2007/D			
Address	34 Dellview Avenue, Tamarama			
Section 96 Lodgement Date	26 March 2010			
Proposal	Section 96 for modification to relocate air conditioning units, changes to glazing, internal alterations and enclosure of terrace			
Approved Development	Demolition of existing three storey residential flat building containing six units and erection of new four storey residential flat building containing three attached townhouses with basement level car parking			
Zoning and relevant controls	Residential 2(b) according to the Waverley LEP 1996 Waverley Development Control Plan (WDCP) 2006			
Owner	Mr S Ehrlich and Ms R Lacey and SRSJ Investments Pty Limited			
Applicant	SRSJ Investments Pty Limited			
Submissions	Six submissions received			
Issues	discrepancies on plans, privacy, A/C nuisance			
Recommendation	That the application be APPROVED			
Site Map ST ST ST ST ST ST ST ST ST S				

1. PREAMBLE

1.1 The Site and its Locality

The subject site is located on the eastern side of Dellview Street, Tamarama near the intersection with Gaerloch Avenue. The site is irregular in shape with a frontage of 21.7 metres to Dellview Street, a rear boundary of 25.6 metres and side boundaries of 20.18 metres and 12.635 metres. The site has an area of approximately 379.4sq.m. The steep gradient of the site is significant, with a fall towards the rear of the property of up to 6.4m in variance of R.L's evident.

Existing on the site is a three storey residential flat building with common laundry facilities below at the rear (due to slope of the land), containing six x 2 bedroom units. The development currently provides no off street car parking.

The surrounding locality is characterised by dwellings and residential flat buildings, similar to that existing on the subject site.

The building is not identified as a Heritage Item and is not within a Heritage Conservation Area. It is also not within the vicinity of a Heritage Item or Conservation Area.

1.2 Details of Approved Development

 DA 317/2007 approved by the Land and Environment Court (LEC) on 5 November 2008 to demolish an existing three storey residential flat building on the site and construct a new four storey residential flat building containing three attached townhouses with basement level parking accessed via a car lift and strata subdivision.

Each townhouse will be four storeys, include an internal lift and accommodate three bedrooms. The car park level, accessed via a car lift along the south-western boundary will be located approximately 6m beneath the Dellview Street level, as the site slopes steeply to form a high bank at the street boundary.

Each townhouse is provided with rear balconies at upper levels and a private open space area to the front and to the rear at ground level and a soft landscaping area will be provided within the rear setback area.

- DA 317/2007/A: Withdrawn 16 September 2009.
- DA 317/2007/B approved in part by the Land and Environment Court on 22 January 2010 for Section 96 modifications to approved development including:
 - Internal reconfiguration;
 - Switch level 1 and level 3 floor uses and increase floor levels of level 2, level 3 and level 4 (to provide level 1 with 2700mm floor to ceiling height) resulting in additional 200mm building height (excluding fins). The resultant building height is RL 33.80 (flat roof part) and RL 35.3 (fin roof);
 - Relocate air conditioning units from roof to ground level (2 A/C units at rear of garage and 1 A/C along northern side of building);
 - Enclose rear terrace of Unit 3 at level 1 (part of new Master bedroom layout);
 - Variation to wording of Voluntary Planning Agreement (VPA) outlined within conditions 18 and 19 regarding timing that the VPA be entered into, and its obligations met or secured prior to the issue of an occupation certificate.

71

The decision of the Court was to uphold the appeal in part. The variation to the wording contained within the VPA was considered acceptable and thus approved. All other matters of the appeal were dismissed, not necessarily for their impact or that they were unacceptable, but rather due to the discrepancies on the plans and documentation submitted to the Court as the judgement handed down reads 'it is not appropriate for the Court to approve these changes on the information before it'.

• DA 317/2007/C approved 13 July 2010 for a Section 96 modification of condition 35 in relation to disabled access of building.

1.3 Proposed Section 96 Modifications

The application has been lodged as a Section 96 (1A) application and provides for the following modifications to the approved development: -

- Enclose rear terrace of Unit 3 at level 1 (part of new Master bedroom layout);
- Switch level 1 and level 3 floor uses so Master bedroom is relocated from level 3 to level 1 and Rumpus room from level 1 to level 3;
- Modify glazing on level 2 and 3 rear elevations to increase glazing across entire length of rear and provide floor to ceiling sliding doors with 1m fixed glass balustrade immediately adjacent to the sliding doors. The area between balustrade and louvre screening shall remain non trafficable.
- Relocate air conditioning units from roof to lower levels (2 A/C units at rear of garage on level two and 1 A/C along northern side of building on level one) with acoustic enclosures.

It is also noted that the internal floor layout of each level has been modified since original approval of the development with changes to each level; however these do not form part of the identified proposed works.

2. ASSESSMENT

The following matters are to be considered in the assessment of this development application under Sections 79C and 96 of the Environmental Planning and Assessment Act 1979.

2.1 Section 96 Considerations

Section 96 (1A) applications - the modification(s) are considered to have minimal environmental impact. The application has been compared to the development as originally approved and is considered to be *substantially the same development* and it has been notified and submissions considered.

2.2 Section 79C (1)(a) Planning Instruments.

2.2.1 Waverley Local Environmental Plan 1996

LEP 1996 – Compliance Check		
Control	Compliance	
Clause 3 – Specific Aims	Yes	
Clause 10 – Zone Objectives	Yes	
Clauses 21-26 – Environmental Considerations	Yes	
Clause 30 – Aesthetic Appearance of Development	Yes	
Part 4 – Heritage Provisions	Yes	

Clause 3 – Specific Aims

The proposal satisfies the Specific Aims of the LEP as assessed by the Land and Environment Court in approving the original development. The proposed modifications are considered minor in nature and reduce the modifications sought under the most recent Court appeal (DA 317/2007/B) and are of an acceptable nature.

Clause 10 - Zone Objectives

The proposed modifications align with the Court granted consent for a new residential flat development, permissible in the zone and satisfying the zone objectives given the acceptable impact upon adjoining properties and contribution to the streetscape and surroundings.

Clauses 21-26 – Environmental Considerations

The proposal complies with the environment considerations of the LEP. Environmental issues will be addressed in the conditions of consent.

Clause 30 – Aesthetic Appearance of Development

Clause 30 of the LEP provides that if an application is visible from Tamarama Beach and the South Pacific Ocean (and other beaches) that the Council must make an assessment of the probable aesthetic appearance of the building that will result. The proposal is visible from the coastal walk, Tamarama beach and Marks Park. The proposed modifications predominantly present to the Ocean as originally approved, the physical variance being glazing to the rear elevation, considered acceptable and consistent with the characteristics of this locality, and therefore satisfy this Clause.

Part 4 – Heritage Provisions

The subject site does not fall within a conservation area and it is not a listed item nor is it located within proximity of a listed item.

The application has been assessed having regard to the relevant provisions of the LEP and is acceptable for the reasons discussed.

2.2.2 Waverley Development Control Plan 2006

The following assessment relates only to the parts of Waverley DCP 2006 affected by the proposed modification.

COMPLIANCE CHECK – RESIDENTIAL 2(B) ZONE						
Control	Standard	Existing Building	Approved	Proposed	Compliance	
Maximum Floor Space Ratio (Site Area 379 sqm)	0.6:1 (227 sqm)	1.58:1 (602 sqm)	1.84:1 (701.17sqm) (does not include basement level parking or car lift access)	1.86:1 Additional 5 sqm	No	

Floor Space Ratio

The proposed modifications seek to enclose the approved rear terrace of level 1 of unit 3 (being proposed to alter to Master bedroom level) resulting in an additional 5sq.m of floor area to the building. The additional floor area is minor in size, located at the rear of the building at a low level, whereby the additional bulk is not considered to detrimentally impact

on the adjoining properties nor contribute to additional overshadowing. As such, the additional floor area is considered acceptable in this instance.

2.3 Other Matters

Streetscape

The development's presentation to the street will remain largely unchanged from originally approved. The relocation of the air conditioning units from roof level to lower levels to no longer be visible from the public domain is considered favourable.

Privacy

Rear elevation glazing

Furthermore, the proposal seeks to extend the glazing along the entire rear of the building and also to modify the glazing to include sliding glass doors along the rear which incorporate a 1m high fixed glass balustrade (refer to section drawing for detail). In this case, the balustrade would abut the sliding doors where the distance between balustrade/sliding doors and approved rear louver screening would remain non trafficable (distance of approximately 1m). The intention being to provide sliding doors that open for breeze/ventilation, but do not allow someone to step out beyond the location of the doors (i.e. one would remain indoors at all times).

However, it is important to note the inconsistent plan details as outlined in previous instances (by both Council and Court) where balconies were deleted on levels 2 and 3 due to concerns about privacy. As such, the applicant amended the plans so that on level 2, this area is labelled as 'non trafficable tiles', though on level 3 there is no reference to being non-trafficable. To clarify this element further, the applicant has submitted a section drawing of this element to clarify matters and specify the location of sliding doors, balustrade and louver screen, details previously not provided to Council or the Court.

Importantly, the approved development includes glazing along the rear of the building with deleted balconies from level 2 and 3. The proposed modification now before Council is not to reinstall balconies but rather to provide an opening at the rear of the building (note the louver screen remain setback from this point by 1m) which are sliding doors (rather than window) with glass fixed balustrade abutting the sliding doors, whereby a person standing at the balustrade remains wholly within the building at all times. In this instance, the resultant effect is comparable to the approved scheme which allows one to stand at the window with outlook to ocean, is now a sliding door they cannot step out from, and therefore the same outlook/view.

Furthermore, as the louver screens remain as per approved, the privacy impact/overlooking from sliding doors is akin to the approved development of windows here, specifically as one would stand in the same position with each, and not any further.

Additionally, it is noted that the original approved plans for the development, at the deletion of balconies on level 2 and 3 sought fixed glazing to a height of 1m (to rear of building), therefore this element has in essence been previously approved by the Court. It is also noted that at the time, condition 2(e) was imposed which seeks the 1m high panels to be non transparent panels (i.e. translucent) to reduce privacy impacts, which is recommended to remain on any consent granted.

As such, the proposed modifications are considered to be in accordance with the originally approved intent of the building. The additional glazing to extend the entire length of the rear is considered to have a similar impact to the remaining glazed area of the rear elevation, the extension being minor (less than 1m lengths).

Level 1 and 3 swap

The swapping of domestic uses of level 1 and level 3 allows for an entertaining area (rumpus) to occur at the rear of level 3, where previously low-use activity rooms were approved (master bedroom). The resultant effect has the ability to increase overlooking to adjoining properties, specifically at the rear. Having regard to the recent Court judgement, the discrepancies in the plans and the indication/potential of balconies to the rear, raised concern and as such were not supported by the Court. The Court makes reference that if there is ambiguity of these areas off level 3 being used as balconies then the swap of uses to level 1 and 3 were not supported for their potential privacy impact. Therefore, upon this matter being clarified as non trafficable through the imposition of a condition, and the 1m high fixed glazing being translucent, the swap of these levels uses is considered reasonable.

Air conditioning units

In regards to acoustic privacy impacts, this matter was considered by the Court in the recent hearing, whereby the judgement of Commissioner Tuor in this regard reads;

'The removal of the air conditioning units from the roof is acceptable, however, there is an inconsistency between the description in the summary and the plans. The summary states that the units are to be relocated to ground level (level 1), however, one unit is relocated to Level 1 and the other two units are relocated to the garage and shown on the plans and elevations on level 2.

While I accept the recommendations of the noise report that, if properly enclosed, the noise impacts will be acceptable, it is preferable if these units are located on level 1 as described. This would ensure that the units are below the garage and fence level of the adjoining property and limit their potential visibility from this property'.

As the Court accepted the recommendations of the acoustic report and the relocation of the air conditioning units from the roof to lower levels, it is considered this matter of the proposal is acceptable in this instance. The plans submitted in the current application seek a single unit on level 1 on the northern side of the building, and two units to the southern side of the building, attached to the rear of the garage at level 2, to enable landscaping to occur below.

In order to satisfy the recommendations of the Court, whilst still allowing landscaping to occur, it is recommended conditions be imposed that clearly clarify the relocation of this units, to ensure the discrepancies raised by the Court are overcome. As such, the northern A/C location is acceptable, and the two A/C units to the south, shall be conditioned to remain attached to the garage though at level 1, thereby below the garage and fence level of the adjoining property, whilst still providing scope for some landscaping below.

Upon the recommendations and conditions being imposed, the issues regarding acoustic noise (as units are to be enclosed) and visual impact are considered acceptable.

Internal floor layout changes

The floor plans submitted have been modified since original approval of the development, though are not indicated on the plan as 'proposed works'. Review of the floor layout changes include (though not limited to) dining and kitchen area being swapped on level 4, studies on level 3 where previously bedrooms were, deletion of baths from bedroom 2 on level 2 etc. However, these changes are considered to be in keeping with the overall approval of the building, and do not affect the building envelope or openings and are acceptable in this instance.

75

3. Section 79C (1)(b) and (c) - The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality and the suitability of the site for the development.

The proposal is considered to represent suitable modifications to the approved residential flat development within the Residential 2(b) zone and have a minimal and acceptable impact on the natural and built environment. No further social or economic impacts are expected as a result of the modifications.

4. PUBLIC SUBMISSION

The modification was notified for 14 days in accordance with *Waverley Development Control Plan 2006, Part C3 – Advertised and Notified Development.*

Six submissions were received. The issues raised in the submissions are summarised and discussed below.

Property	Location	Summary of Objections
4/17 Gaerloch Ave	Unit within adjoining property to rear (east)	 Noise from A/C plant; Object to additional FSR / overdevelopment of small site; Loss of privacy
7/17 Gaerloch Ave	Unit within adjoining property to rear (east)	 Noise from A/C plant – request they be relocated into the basement; Loss of privacy / overlooking;
1/19 Gaerloch Ave	Unit within adjoining property to rear (east)	 Loss of privacy / overlooking; Noise from A/C plant; Disregard for previous Court decision;
2/19 Gaerloch Ave	Unit within adjoining property to rear (east)	 Object to additional FSR, bulk and scale; Noise from A/C plant; Applicant attempting to make gains through incremental process; Use of green space for air conditioning units; Loss of privacy / overlooking; Disregard for previous Court decision; Applicant attempting to make gains through incremental process;
20 Gaerloch Ave	Property adjoining to the south	 Modifications seek additional non-compliance to already non compliant development; Applicant attempting to make gains through incremental process; Disregard for previous Court decision; Inadequate information provided/discrepancies; Use of green space for air conditioning units;

Property	Location	Summary of Objections
		Excessive increase in bulk, scale and FSR;Noise from A/C plant;
		 Loss of privacy / overlooking;
32 Dellview St	Adjoining building to north	 Noise from A/C plant – request they be relocated into the basement; Loss of privacy / overlooking;
		 Disregard for previous Court decision;
		 Excessive increase in bulk, scale and FSR;

Issue: Noise from A/C plant, Request they be relocated into the basement;

Comment: This aspect has been discussed above within the report whereby the findings/recommendations of the Acoustic Report were acceptable to the Court. Furthermore, the location of the units, subject to being conditioned to be located on level 1 are acceptable from both an acoustic and also visual point. The location of the units within the basement would again raise the issue for the applicant of a need to increase the basement (and subsequently excavation of the site) to provide scope for the units. As discussed in the previous hearing of the application (DA 317/2007/B), additional excavation of the site is not supported.

Issue: Object to additional FSR, bulk and scale / overdevelopment of small site; Comment: This aspect has been discussed above within the report.

Issue: Loss of privacy / overlooking;

Comment: This aspect has been discussed above within the report.

Issue: Disregard for previous Court decision, discrepancies on plan;

Comment: The assessment of this application has occurred with considerable regard to the previous Court hearing and decision for the site. As noted in the discussion of the report, the discrepancies of the plans appeared to be the issue for the Court in approving the proposed changes, more so than the actual proposed works. As such, it is intended that this application seek to overcome the issues by imposing stringent conditions to ensure that the adjoining properties are not further adversely affected, whilst in keeping with the points raised by the Court in reaching its recent decision. Upon the recommendations being made, the proposal is considered to be acceptable and in accordance with the points made in the recent Court judgement.

Issue: Modifications seek additional non-compliance to already non compliant development / Applicant attempting to make gains through incremental process / Lack of forward planning by applicant to address these matters in original proposal;

Comment: These comments are the opinion of submission writers, however as outlined elsewhere in the report, the proposed modifications are considered minor in nature and unlikely to adversely impact on adjoining properties, subject to the imposition of conditions.

Issue: Use of green space for air conditioning units;

Comment: The area proposed to accommodate the air conditioning units has been deliberately designed to be raised above ground, to ensure landscaping can occur below. However, it is recommended the A/C units be lowered to level 1 to minimise visual and acoustic privacy, a minor variance in landscaping.

Section 79C (1)(e) - The public interest.

It is not considered that the application is against the public interest.

5. DEVELOPMENT AND BUILDING UNIT REVIEW

This development has been controversial since it was originally proposed and strongly opposed by neighbours. However, the NSW Land and Environment Court has now approved the development and this application concerns modification to the consent only.

The modification are the relocation of the air conditioning units, modifications to rear glazing, switching level 1 and 3 uses (i.e. bedroom to living area) and an addition of 5 sqm of floor space to the level 1 master bedroom to unit 3. These changes when assessed do not have unreasonable impacts and can be conditioned.

The Court considered these changes generally acceptable but was not confident to approve them given ambiguities with plans. Like many hard fought Court cases plans were amended during the hearing.

The DBU recommends approval of this Section 96 application.

6. RECOMMENDATION

That the Section 96 modification dated 26 March 2010 to Development Application No. 317/2007/D at 34 Dellview Street, Tamarama to modify Court consent to relocate air conditioning units, changes to glazing, internal alterations and enclosure of terrace be approved by the Council, subject to the following conditions:-

A. Amended/Deleted Conditions

1. APPROVED DEVELOPMENT

The development must be in accordance with:

- (a) Architectural Plan Nos DA A103, DA A200 to DA A202, DA A300 to DA A301, DA A400 to A401 and DA A509 to DA A512, Revision E and DA A513 Revision F dated 13 August 2008 and as amended by Architectural Plan Nos. A000, A100, A200, A201, A202, A300, A301, A400 Revision C of Project No. 703, tables and documentation prepared by 'Tony Owen NDM', dated Jan 2009, and received by Council on 17 September 2009; as amended by Architectural Plan Nos A000, A100, A200, A201, A300, A301 and A400, all Revision D, of Project No. 703 dated March 2010 and received by Council on date 26 March 2010;
- (b) Landscape Plan No. 1, Issue A and documentation prepared by '360', dated June 2007 and received by Council on 18 June 2007;
- (c) BASIX Certificate;
- (d) Schedule of external finishes and colours received by Council on 18 June 2007; and
- (e) The Site Waste and Recycling Management Plan (SWRMP) and Checklist, in accordance with the SWRMP Checklist of Part G1, Waverley DCP 2006;

- (f) Stormwater Plans, Job No. 06/144, drawing no. H-DA-00 to H-DA-03, revision C, received by Council on date 3 February 2009;
- (g) Draft Strata Plan Ref No. 2332SPR1a.dwg prepared by Anthony Guy Mitchell;
- (h) BCA Acoustic Requirements Report prepared by 'Acoustic Logic Consultancy' dated 29 April 2009 and received by Council on date 7 April 2010.

except where amended by the following conditions of consent;

3. GENERAL MODIFICATIONS

The proposal shall be amended as follows:

- (a) The basement level is to be reduced to a maximum internal clearance height (measured from the floor to the lowest point of any beams or services allowing for 300mm for services / structures) of 2500mm, subsequently reducing the amount of excavation for the development.
- (b) The BASIX Certificate is to reflect the approved scheme.
- (c) The roof of the building is to be non-trafficable.
- (d) The depth of soil in the soft landscaped areas (shown on plan A103 revision E) shall be a minimum of 1000mm to provide sufficient depth for landscaping.
- (e) The 1metre high fixed glazing panels to the rear shall be translucent to minimise privacy impacts.
- (f) The former balconies to the rear (eastern elevation) of level 2 and 3 (shown on plan to be the area between the 1m high fixed balustrade and the screen louvers) shall be non-trafficable. In this regard no balcony like structure, such as a tiled concrete slab, is to be provided off the level 3 living areas this area is to be void.
- (g) No new works to the basement (including an increase in size or additional floor to ceiling height) than originally approved is to occur.

The amendments shall be submitted for the approval of Council prior to the issue of a Construction Certificate under the Environmental Planning and Assessment Act 1979.

B. New Conditions

89. INSTALLATION OF AIR CONDITIONING

The relocation of air conditioning units/condensers from the roof to ground level is acceptable subject to:

(a) The two air conditioning units to the southern side of the building shall be attached to the rear of the garage, however at level 1 (rather than level 2). As such, these units shall be located below the garage and fence level of the adjoining property to the south.

- (b) Being located behind the front building line and if visible suitable screened and located in an appropriate location.
- (c) Not being adjacent to neighbouring bedroom windows.
- (d) Not reduce the structural integrity of the building.
- (e) Not emit noise that is audible within a habitable room in any other residential property (regardless of whether any door or window to that room is open):
 - (i) before 8.00am and after 10.00pm on any Saturday, Sunday or public holiday; or
 - (ii) before 7.00am and after 10.00pm on any other day.
- (f) Not provide noise emissions that exceed 5dBA above the ambient background noise level measured at the property boundary at any other time outside of (e).

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