



A D D E N D U M

ADDENDUM TO REPORT FOR ITEM LPP01 NSLPP MEETING OF 1 DECEMBER 2021

SUBJECT: LPP01 –313 Pacific Highway, North Sydney (Construction of a Boarding House)
DA NO: 95/2021
AUTHOR: Lara Huckstepp, Executive Planner
DATE: 30 November 2021

Attachment: 1. Applicant's advice on Condition I14

1. Purpose of the Addendum

The purpose of the Addendum is to provide a consideration against State Environmental Planning Policy (Housing) 2021 (Housing SEPP) that was made on 26 November 2021, after the finalisation of the assessment report for the above-mentioned development application.

This addendum also provides a response to a request by the applicant for a review and deletion of Condition I14.

2. State Environmental Planning Policy (Housing) 2021

2.1 Background

On 26 November 2021, State Environmental Planning Policy (Housing) 2021 was made. The new Housing SEPP consolidates five existing housing-related policies:

- State Environmental Planning Policy (Affordable Rental Housing) 2009 ARH2009
- State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (Seniors SEPP)
- State Environmental Planning Policy No.70 – Affordable Housing (Revised Scheme) (SEPP 70)
- State Environmental Planning Policy No.21 – Caravan Parks; and
- State Environmental Planning Policy No.36 – Manufactured Home Estates.

The SEPP introduces two new housing types to meet changing needs:

- Co-living housing
- Independent living units

The new SEPP also aims to improve the way existing types of homes are delivered including:

- Boarding houses
- Build-to-rent housing
- Retention of existing affordable rental housing
- Secondary dwellings (sometimes known as granny flats)

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- Seniors housing
- Social housing

The new SEPP also includes the planning rules for:

- Short-term rental accommodation

The following instruments were also made with the Housing SEPP as follows:

- Environmental Planning and Assessment Amendment (Housing) Regulation 2021
- Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021

The subject development application was lodged pursuant to SEPP (Affordable Rental Housing) ARH 2009, which is now repealed by the new SEPP. However, importantly, Schedule 7 Savings and transitional provisions of the new SEPP provides general savings provisions as follows:

*The former provisions of a repealed instrument continue to apply to the following -
(a) a development application made, but not yet determined, on or before the commencement date.*

Accordingly, the provisions of the new Housing SEPP do not apply to the subject development application.

Notwithstanding, in accordance with the provisions of Clause 4.15 of the Environmental Planning and Assessment Act, the development application is considered against the provisions of the Housing SEPP, as a relevant consideration.

2.2 Consideration

There are two types of development wherein the subject development application is considered to warrant consideration, being boarding houses and co-living housing. The relevant provisions are considered below. Where relevant, the prevailing provisions of ARHSEPP 2009 have been compared.

Chapter 2, Part 2, Division 2 – Boarding houses		
Relevant provisions	Comment	Complies
23 Boarding houses permitted with consent		
(1) Development for the purposes of boarding houses may be carried out with consent on land which development for the purpose of boarding houses is permitted with consent under another environmental instrument	The proposed development is permissible in the B4 Mixed Use Zone with development consent.	Yes
24. Non-discretionary development standards – the Act, s4.15		
2) The following are non-discretionary development standards in relation to the carrying out of development to which this Division applies -		
2(a) for development in a zone in which residential flat buildings are permitted – a floor space ratio that is not more than –	There is no floor space ratio applicable to the site.	Yes

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<p>(i) the maximum permissible floor space ratio for residential accommodation on the land, and (ii) an additional 25% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of the boarding house,</p>		
<p>2(b) if paragraph (a) does not apply – a floor space ratio that is not more than the maximum permissible floor space ratio for residential accommodation on the land,</p>	<p>There is no floor space ratio applicable to the site.</p>	<p>Yes</p>
<p>2(e) at least 3 hours of direct solar access provided between 9am and 3pm at mid-winter in at least 1 communal living area.</p>	<p>The common area will receive at least 3 hours of sunlight.</p>	<p>Yes</p>
<p>2(g) for a boarding house containing more than 6 boarding rooms – (i) a total of at least 30sqm of communal living area plus at least a further 2sqm for each boarding room in excess of 6 boarding rooms, and (ii) minimum dimensions of 3m for each communal living area.</p>	<p>A communal living area of 80sqm would be required. The proposed communal living area is 71sqm in total resulting in 9sqm non-compliance.</p>	<p>No</p>
<p>2(h) Communal open spaces – (i) with a total area of at least 20% of the site area, and (ii) each with minimum dimensions of 3m</p>	<p>The site area is 438sqm and accordingly, communal open space having an area of 87.6sqm is required. The proposed outdoor terrace is 38sqm. The results in a non-compliance of 49sqm with this provision.</p>	<p>No</p>
<p>2(i) if a relevant planning instrument does not specify a requirement for a lower number of parking spaces – at least the following number of parking spaces - (i) For development on land within an accessible area – 0.2 parking spaces for each boarding room, (ii) Otherwise – 0.5 parking spaces for each boarding room, (j) if a relevant planning instrument specifies a requirement for a lower number of parking spaces – the lower number specified in the relevant planning instrument</p> <p>Note: the dictionary defines relevant planning instrument as: Relevant planning instrument means an environmental planning instrument, other than this Policy, or a development control plan, if any, that applies to the land on which the development will be carried out.</p>	<p>NSDCP 2013 Section 10 sets maximum car parking rates for boarding houses, of 1 car space for every 12 beds, requiring a total of 3 on-site parking spaces. Nocar parking spaces proposed.</p>	<p>No</p>

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25 Standards for boarding houses		
1) Development consent must not be granted under this Division unless the consent authority is satisfied that-		
1(a) no boarding room will have a gross floor area, excluding an area, if any, used for the purpose of private kitchen or bathroom facilities, of more than 25sqm, and	No boarding room will have a floor area of more than 25sqm.	Yes
1(b) no boarding room will be occupied by more than 2 adult residents, and	No boarding room is proposed to be occupied by more than 2 lodgers.	Yes
1(c) adequate bathroom, kitchen and laundry facilities will be available within the boarding house for the use of each resident, and	Each boarding room will be provided with a kitchen and bathroom. A common laundry is provided in the basement and common areas are provided throughout the building.	Yes
1(e) for a boarding house on land in a business zone – no part of the ground floor of the boarding house that fronts a street will be used for residential purposes unless another environmental planning instrument permits the use, and	No boarding rooms are proposed to be located at ground level.	Yes
1(f) for a boarding house containing at least 6 boarding rooms – the boarding house will have at least 1 communal living area, and	2 communal living areas are proposed.	Yes
1(g) the minimum lot size for the boarding house is not less than - (i) for land in Zone R2 Low Density Residential – the minimum lot size requirements for manor houses under a relevant planning instrument, or 600sqm, or (ii) for land in Zone R3 Medium Density Residential – the minimum lot size requirements for multi dwelling housing under a relevant planning instrument, or (iii) otherwise – the minimum lot size requirements for residential flat building under a relevant planning instrument, and	There is no minimum lot size in the B4 Mixed Use Zone	Yes
1(h) each boarding room has a floor area, excluding an area, if any, used for the purposes of private kitchen or bathroom facilities, of at least the following – (i) for a boarding room intended to be used by a single resident – 12sqm. (ii) otherwise – 16sqm.	Each room will be at least 12sqm and all rooms will be single occupants other than 2 double rooms proposed, both of which will be greater than 16sqm.	Yes
2) Development consent must not be granted under this Division unless the consent authority considers whether –		
2(a) the design of the boarding house will be compatible with – (i) the desirable elements of the character of the local area, or	The design is considered to be compatible with the surrounding locality.	Yes

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(ii) for precincts undergoing transition – the desired future character of the precinct, and		
2(c) if the boarding house has at least 3 storeys – the building will comply with the minimum building separation distances specified in the Apartment Design Guide, and	Consideration against the ADG is provided below.	No
2(d) at least 1 motorcycle parking space will be provided for every 5 boarding rooms, and	The proposed development would require 7 motor bike parking spaces and none are proposed.	No
2(e) at least 1 bicycle parking space will be provided for each boarding room.	The proposal provides 1 bicycle parking space for each boarding room, complying with this requirement.	Yes
26 Must be used for affordable housing in perpetuity		
<p>(1) Development consent must not be granted under this Division unless the consent authority is satisfied that from the date of the issue of the occupation certificate and continuing in perpetuity –</p> <p>a) the boarding house will be used for affordable housing, and</p> <p>Note: Affordable housing – the Act, s1.4(1) is defined:</p> <p>(1) In this Policy, a household is taken to be a very low income household, low income household or moderate income household if –</p> <p>(a) the household –</p> <p>(i) has a gross income within the following areas ranges of percentages of the median household income for Greater Sydney or the rest of NSW</p> <p>(A) very low income household – less than 50%.</p> <p>(B) low income household – 50 – less than 80%</p> <p>(C) moderate income household – 80-120%, and</p> <p>(ii) pays no more than 30% of the gross income in rent, or</p> <p>(b) the household -</p> <p>(i) is eligible to occupy rental accommodation under the National Rental Affordability Scheme, and</p> <p>(ii) pays no more rent than the rent that would be charged if the household were to occupy rental accommodation under the Scheme.</p>	A condition can be imposed.	Yes
(1) (b) the boarding house will be managed by a registered community housing provider.	The boarding house is not proposed to be managed by a registered community housing provider.	No
27 Subdivision of boarding houses not permitted		
Subdivision of boarding houses not permitted Development consent must not be granted for the subdivision of a boarding house	A condition can be imposed	Yes

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Chapter 3, Part 3, Co-living Housing		
Relevant provisions	Comment	Complies
67 Co-living may be carried out on certain land with consent		
Development for the purposes of co-living housing may be carried out with consent on land in a zone in which development for the purposes of co-living housing, residential flat buildings or shop top housing is permitted under another environmental planning instrument. Example – Co-living housing may be used as off-campus student accommodation	The development can be carried out in the B4 Mixed Use Zone.	Yes
68 Non-discretionary development standards – the Act s 4.15		
(2) the following are non-discretionary development standards in relation to development for the purposes of co-living housing -		
(2)(a) for development in a zone which residential flat buildings are permitted – a floor space ratio that is not more than – (i) the maximum permissible floor space ratio for residential accommodation on the land, and (ii) an additional 10% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of co-living housing.	There is no floor space ratio applicable to the site.	Yes
(2)(c) for co-living housing containing more than 6 private rooms – (i) a total of at least 30sqm of communal living area plus at least a further 2sqm for each private room in excess of 6 private rooms, and (ii) minimum dimensions of 3m for each communal living area	A communal living area of 80sqm would be required. The proposed communal living area is 71sqm in total resulting in a non-compliance of 9sqm.	No
(2)(d) communal open spaces – (i) with a total of at least 20% of the site area, and (ii) each with minimum dimensions of 3m	The site area is 438sqm and accordingly, communal open space having an area of 87.6sqm is required. The proposed outdoor terrace is 38sqm. The results in a non-compliance of 49sqm with this provision.	No
(2)(e) Unless a relevant planning instrument specifies a lower number – (i) for development on land in an accessible area – 0.2 parking spaces for each private room, or (ii) otherwise – 0.5 parking spaces for each private room. An accessible area is defined as: Accessible area means land within – (a) 800m walking distance of a public entrance to – (i) a railway station, or	0.2 car parking spaces are required per private room given the site is accessible. Accordingly, 6.2 car parking spaces are required and none are proposed.	No

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<p>(ii) a wharf from which a Sydney Ferries ferry service operates, or (b) 400m walking distance of – (i) a public entrance to a light rail station, or (ii) for a light rail station with no entrance- a platform of the light rail station, or (c) 400m walking distance of a bus stop used by a regular bus service, within the meaning of the Passenger Transport Act 1990, that has at least 1 bus per hour servicing the bus stop between – (i) 6am and 9pm each day from Monday to Friday, both days inclusive, and (ii) 8am and 6pm on each Saturday and Sunday</p>		
<p>69 Standards for co-living housing</p>		
<p>Development consent must not be granted for development for the purposes of co-living unless the consent authority is satisfied that -</p>		
<p>1(a) each private room has a floor area, excluding an area, if any, used for the purposes of private kitchen or bathroom facilities, that is not more than 25sqm and not less than – (i) for a private room intended to be used by a single occupant – 12sqm, or (ii) otherwise – 16sqm, and</p>	<p>The proposed development complies. Each private room will be at least 12sqm and all rooms will be single other than 2 double rooms which will have a size greater than 16sqm. No rooms will have a size greater than 25sqm.</p>	<p>Yes</p>
<p>1(b) the minimum lot size for the co-living housing is not less than – (iii) for development on other land – the minimum lot size requirements for residential flat buildings under a relevant planning instrument</p>	<p>There is no minimum lot size for a residential flat building under NSLEP 2013 controls.</p>	<p>Yes</p>
<p>1(d) the co-living housing will contain an appropriate workspace for the manager, either within the communal living area or in a separate space, and</p>	<p>A manager’s office is provided at the entrance adjacent to the ground level communal area</p>	<p>Yes</p>
<p>1(e) for co-living housing on land in a business zone – no part of the ground floor of the co-living housing that fronts a street will be used for residential purposes unless another environmental planning instrument permits the use, and</p>	<p>No private rooms are proposed at the ground level.</p>	<p>Yes</p>
<p>1(f) adequate bathroom, laundry and kitchen facilities will be available within the co-living housing for the use of each occupant, and</p>	<p>Each room will be provided with a kitchen and a bathroom. A common laundry is provided in the basement and common areas are provided throughout the building.</p>	<p>Yes</p>
<p>1(g) each private room will be used by no more than 2 occupants</p>	<p>Complies</p>	<p>Yes</p>

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2. Development consent must not be granted for development for the purposes of co-living housing unless the consent authority considers whether -		
2(b) if the co-living housing has at least 3 storeys – the building will comply with the minimum building separation distances specified in the Apartment Design Guide, and	Consideration against the ADG is provided below.	No
2(c) at least 3 hours of direct solar access will be provided between 9am and 3pm at mid-winter in at least 1 communal living area, and	Complies	Yes
2(d) at least 1 bicycle parking space will be provided for each private room, and	Complies	Yes
2(e) at least 1 motorcycle parking space will be provided for every 5 private rooms, and	The proposed development would require 7 motor bike parking spaces and none are proposed.	No
2(f) the design of the building will be compatible with - (i) the desirable elements of the character of the local area, or (ii) for precincts undergoing transition – the desired future character of the precinct	The design is considered to be compatible with the surrounding locality.	Yes
70 No subdivision		
Development consent must not be granted for the subdivision of co-living housing into separate lots.	A condition can be imposed.	Yes

2.2 (i) Boarding house to be managed by a registered community housing provider

Given that the boarding house is not proposed to be managed by a community housing provider, the proposed development is unlikely to meet the intent of the boarding house controls under the new Housing SEPP.

There is however no requirement for co-living housing developments to be managed by a community housing provider and therefore the proposed development would comply with this component of the new Housing SEPP.

It is noted that under ARH SEPP 2009, there is no requirement for boarding houses to be managed by a community housing provider.

2.2 (ii) Communal living area

The new Housing SEPP would require a minimum 80sqm communal living space be provided for either the development of a boarding house or co-living housing. This requirement in the new Housing SEPP is a non-discretionary development standard pursuant s4.15 of the Act.

It is noted that under ARH SEPP 2009, part 30(1)(a) requires *if a boarding house has 5 or more boarding rooms, at least one communal living room will be provided*. The proposal complies with the current provisions.

Whilst a development application lodged under the new Housing SEPP may be requested to increase the size of the communal living space, on balance, the shortfall proposed of 9sqm is unlikely to be determinative with regards to the subject development application. As proposed, the quantum and configuration of communal living space provided for occupants within the development is considered to provide an adequate level of amenity.

2.2 (ii) Communal open space

The new Housing SEPP requires a minimum of 20% of the site area to be provided as communal open space for either the development of a boarding house or co-living space, equating to 87.6sqm, and a minimum dimension of 3m is required. The proposed terrace is provided with an area of 38sqm, being an under-provision of 49sqm of communal open space. This requirement in the new Housing SEPP is a non-discretionary development standard pursuant s4.15 of the Act.

It is noted that under ARH SEPP 2009, part 29(2)(d) requires:

Private open space

If at least the following private open areas are provided (other than the front setback area) –

(i) one area of at least 20 sqm with a minimum dimension of 3m is provided for the use of the lodgers

(ii) if accommodation is provided on site for a boarding house manager – one area of at least 8sqm with a minimum dimension of 2.5m is provided adjacent to that accommodation.

The proposed development complies with the current provisions.

Whilst a development application lodged under the new Housing SEPP may be requested to increase the size of the communal open space, on balance, the shortfall proposed is unlikely to be determinative with regards to the subject development application. The proposed open space has been carefully located on the Pacific Highway elevation to reduce amenity impacts on the immediately surrounding properties. Given the constrained site, the provision of greater areas of open space need to carefully balance amenity impacts. The open space is provided directly off the communal living area fronting the Pacific Highway where the combined spaces are considered to provide a high level of amenity for occupants. It is noted that the development application originally sought additional open space to be provided at the roof level, which was not supported. In addition, the site is well located within walking distance of high quality open space areas, including parks and ovals.

2.2 (iii) Car parking

The new Housing SEPP calls in the provisions of NSDCP 2013 with regards to car parking requirements for boarding, which allows a maximum of 3 on-site car parking spaces. As the NSDCP 2013 contains no car parking provisions specifically to co-living housing, the provisions of the SEPP prevail which are 0.2 car parking spaces per private room, requiring 6.2 car parking spaces.

ARH2009 requires significantly more, being 0.5 per boarding room, resulting in 16 on-site spaces being required.

Zero car parking is proposed under the current development application which is supported for reasons set out in the assessment report. The application of new controls under the new Housing SEPP further reduces the car parking requirements and the level of non-compliance is improved. The non-compliance would remain acceptable and has been dealt with in detail within the assessment report.

2.2 (iv) Motorbike parking

The new Housing SEPP proposes no change to motorbike parking provisions for boarding house developments and co-living housing, and remains consistent against SEPP ARH 2009. The non-compliance has been dealt with in detail within the assessment report.

2.2 (v) Apartment Design Guide (ADG)

The new Housing SEPP requires that development consent must not be granted for development for the purpose of a boarding house development or co-living housing unless the consent authority considers whether the building will comply with the minimum building separation distances specified in the Apartment Design Guide.

Section 3F ADG sets out building separation criteria for visual privacy (based on the requirements of Section 2F Building Separation) as follows:

Objective 3F-1

Adequate building separation distances are shared equitably between neighbouring sites, to achieve reasonable levels of external and internal visual privacy.

Design criteria

- 1. Separation between windows and balconies is provided to ensure visual privacy is achieved. Minimum required separation distances from buildings to the side and rear boundaries are as follows:*
- 2.*

<i>Building height</i>	<i>Habitable rooms and balconies</i>	<i>Non-habitable rooms</i>
<i>Up to 12m (4 storeys)</i>	<i>6m</i>	<i>3m</i>
<i>Up to 25m (5-8 storeys)</i>	<i>9m</i>	<i>4.5m</i>
<i>Over 25m (9+ storeys)</i>	<i>12m</i>	<i>6m</i>

Note: Separation distances between buildings on the same site should combine required building separations depending on the type of room (see figure 3F.2)

Gallery access circulation should be treated as habitable space when measuring privacy separation distances between neighbouring properties.

Design Guidance

Generally one step in the built form as the height increases due to building separation is desirable. Additional steps should be careful not to cause a 'ziggurat' appearance. For residential buildings next to commercial buildings, separation distances should be measured as follows:

- *For retail, office spaces and commercial balconies use the habitable room distances*
- *For service and plant areas use the non-habitable room distances*

New development should be located and oriented to maximise visual privacy between buildings on site and for neighbouring buildings. Design solutions include:

- *Site layout and building orientation to minimise privacy impacts (see also section 3B orientation)*
- *On sloping sites, apartments on different levels have appropriate visual separation distances (see Figure 3F.5)*

Apartment buildings should have an increased separation distance of 3m (in addition to the requirements set out in design criteria 1) when adjacent to a different zone that permits lower density residential development to provide for a transition in scale and increased landscaping.

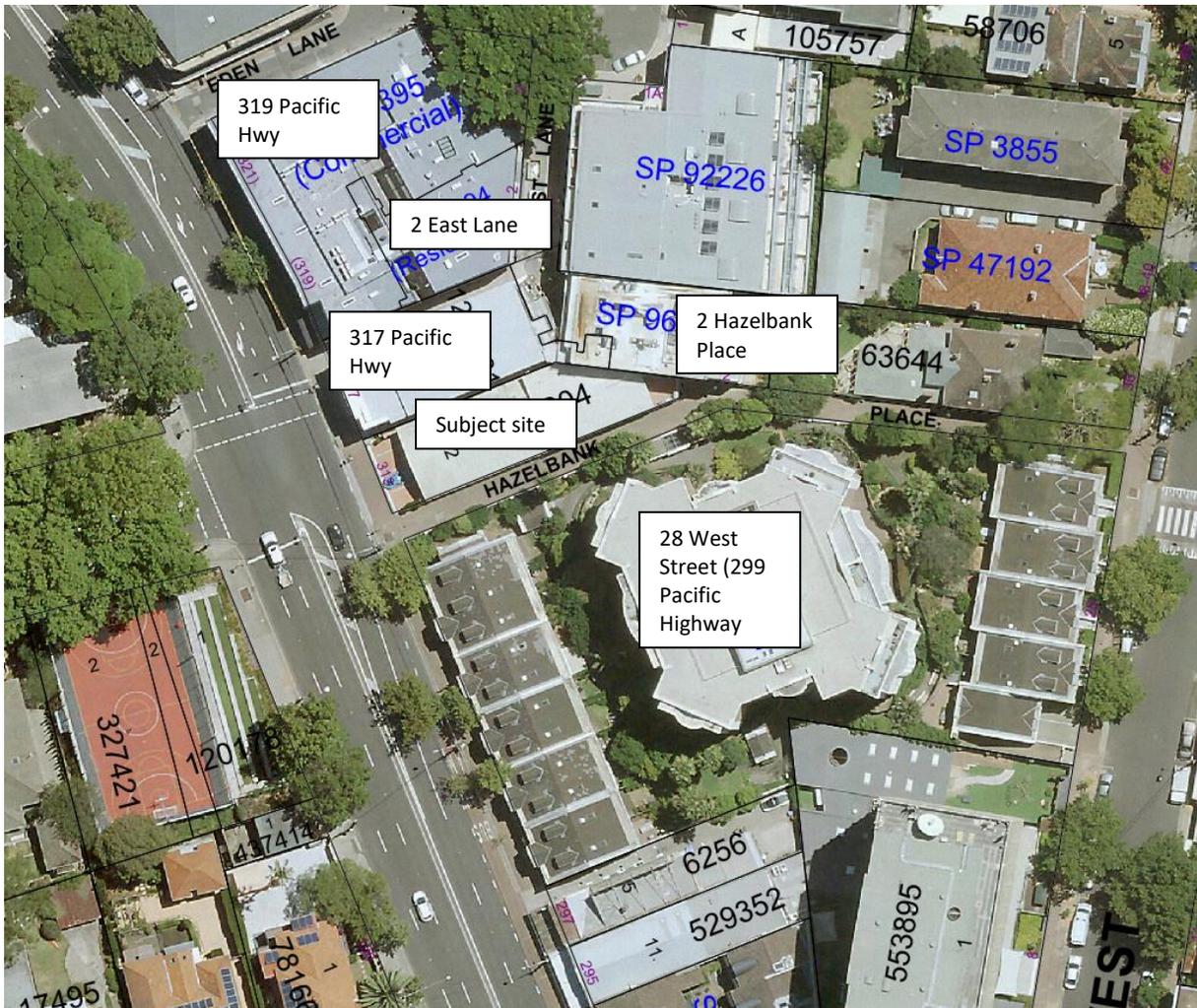
Direct lines of sight should be avoided for windows and balconies across corners

No separation is required between blank walls

The subject site is provided with two road frontages, its western frontage to the Pacific Highway and its southern long frontage to Hazelbank Place, which is a closed laneway providing pedestrian and bicycle access, but not vehicle access. Hazelbank Place has an approximate width of 4m. To the north at No.317 Pacific Highway is the former Masonic Hall, which provides a blank wall presenting to the subject site. To the north-east at No.2 Hazelbank lane (to the rear of the former Masonic Hall) is a 4 level residential development with a boundary wall abutting the subject site. Four windows are existing on the boundary at 2 Hazelbank Place, however these windows have been dealt with in the assessment report.

To the south at No.299 (28 West Street) is a residential development comprising multi-dwelling development on the Pacific Highway and West Street frontages, and a taller 8-10 storey residential tower towards the centre of the site. Living rooms, balconies and bedrooms on this property are oriented towards the subject site.

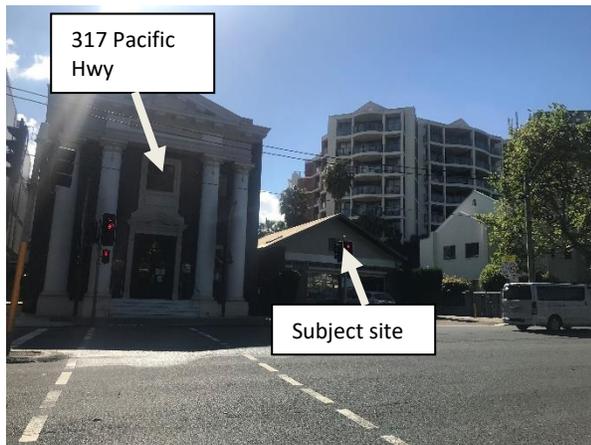
The context and site photos can be seen below.



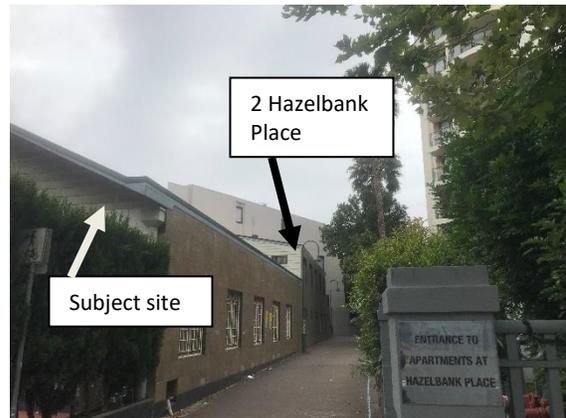
Subject site and its context



28 West Street (299 Pacific Highway)



317 Pacific Highway (former Masonic Hall)



2 Hazelbank Place

South elevation

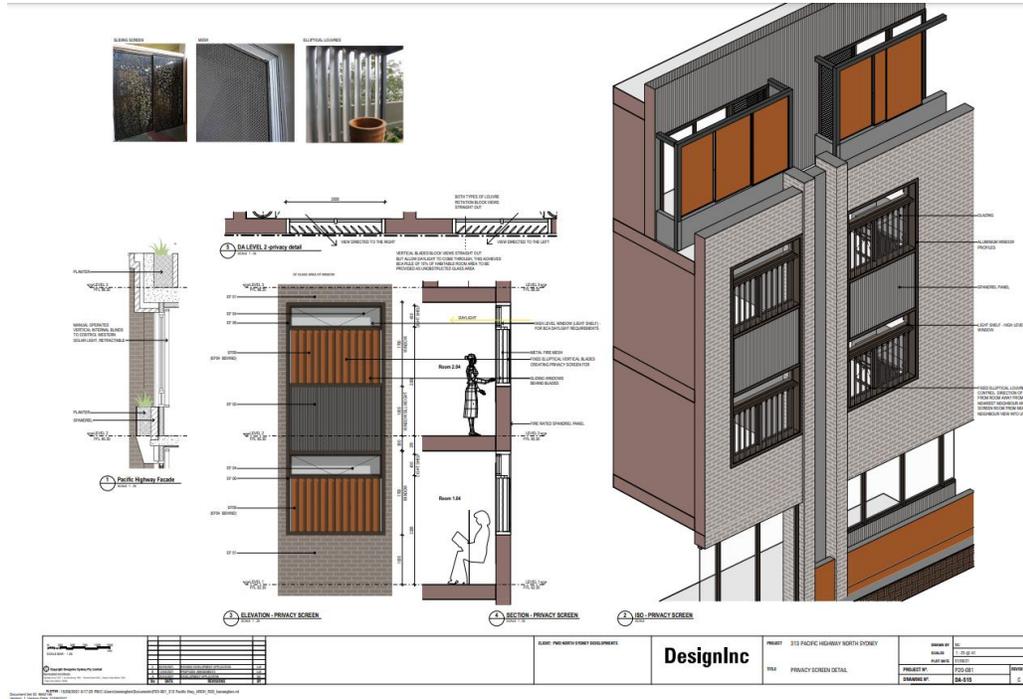
The southern elevation of the proposed development fronts Hazelbank Place, which is a 4m wide closed laneway, providing access only to pedestrians and bicycles. A zero building setback is proposed to this laneway for levels 1 and 2, with a 1.4m setback to level 3. The ADG sets a minimum 6m setback to the centreline of the laneway and the resultant setback would be between 2m and 3.4m, failing to comply with these setback controls.

To address this setback issue, privacy measures have been incorporated. Levels 1 and 2 are provided with fixed privacy screens, which are angled to reduce direct overlooking impacts. The level 3 Juliet balconies are proposed to be fitted with sliding screens, with at least 1 panel being fixed. These can be seen below:

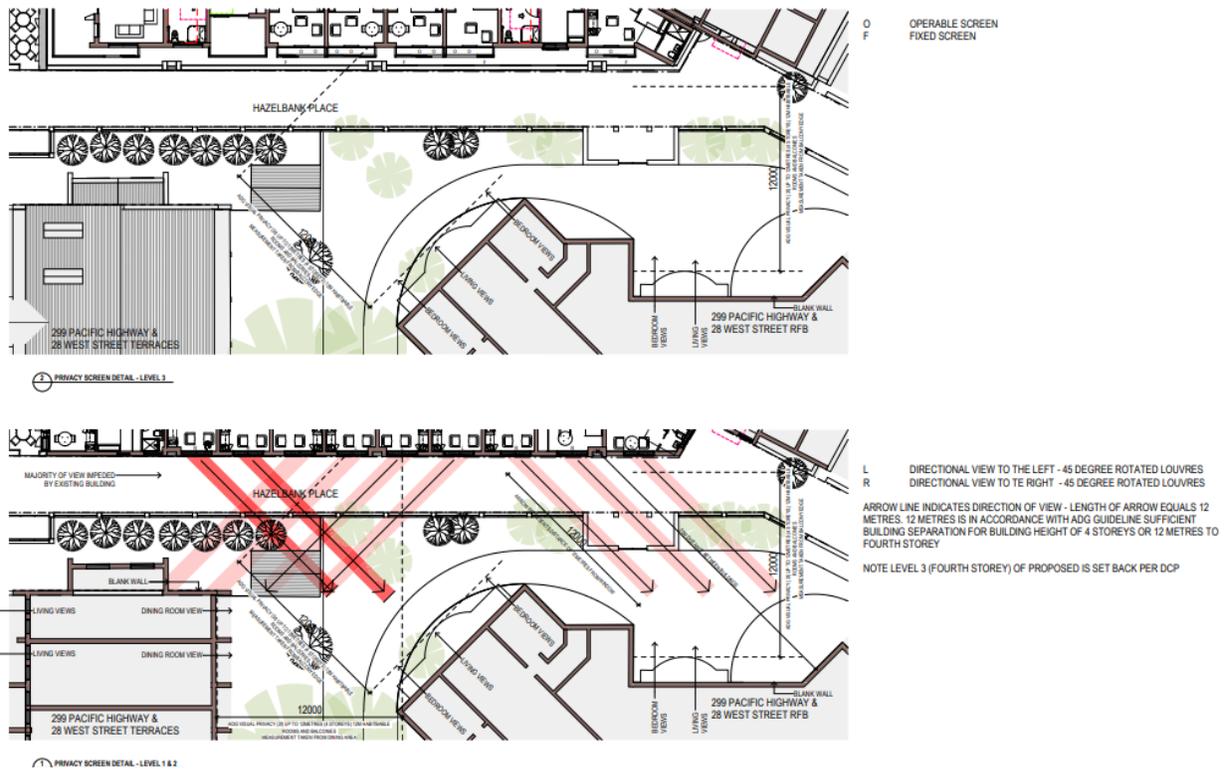


Proposed south elevation

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The louvres on levels 1 and 2 are proposed to be fixed and angled to provide a distance of minimum 12m is provided to adjacent windows and balconies. The intent of the screening angles can be seen below:



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On balance, the proposed privacy measures are designed to reduce direct privacy impacts and are considered to have merit and satisfactorily address the intent of the ADG controls on the southern elevation.

It is noted that there is a precedent across the immediate locality for utilising privacy screening on public laneway elevations where building setback requirements are not met. Examples include No.319 Pacific Highway and 2 Eden Lane, the elevation on each development detailed below:



2 East Lane, North Sydney



319 Pacific Highway, North Sydney

On balance the proposed privacy mitigation measures on the southern elevation are considered to provide a satisfactory response with regards to the Apartment Design Guide.

North-east and north-west elevation

With regards to the north-western boundary and the north-eastern boundary, the ADG sets out that 'no separation is required between blank walls'. As such, these walls are considered to be essentially blank walls for the purpose of the ADG, with only glass bricks and windows set back from the boundary. A condition is recommended to ensure that a covenant is placed on title to clarify that these windows may be built out in the future. No setback is proposed or required under the ADG.

West elevation

The proposed development complies with minimum setback controls of 6m to the centre line of the Pacific Highway on the western elevation.

Apartment Design Guide conclusion

On balance, should the proposed development be required to be considered against ADG controls, it is considered that the proposed development would provide a satisfactory level of compliance, having regard to the above considerations.

2.3. Conclusion of consideration against the new Housing SEPP

It is reiterated that the proposed development is not required to be assessed against these controls, as the savings provision excludes those development applications already lodged.

However, an assessment has been undertaken as the new Housing SEPP is considered to be a relevant consideration. On balance, whilst the SEPP introduces a number of new and altered housing types and requirements, consideration of these provisions raises no new issues which are considered to be determinative of the current development application.

3. Applicant's request to delete draft Condition I14

The applicant advises they seek the deletion of draft Condition I14, which was recommended as follows:

Provision of Affordable Housing

I14. All rooms in the proposed boarding house must only be used for the purpose of affordable housing, as defined in State Environmental Planning Policy (Affordable Rental Housing) 2009 or any SEPP relating to Affordable Housing that may replace this SEPP in the future, for the life of the proposed development.

(Reason: To ensure that the development provides affordable housing and to ensure that the purpose built boarding house is not used for any other purpose)

The applicant has provided justification in the attached advice prepared by Mills Oakley as follows:

'This condition has the onerous effect of attempting to restrict the use of the boarding house for the purposes of affordable housing, in circumstances where the proposed boarding house is not mandated to be affordable housing the State Environmental Planning (Affordable Rental Housing 2009) SEPP.

Refer to the attachment for further justification. On balance, the applicant's justification is able to be supported and it is considered reasonable to delete this condition. It should be noted that for boarding house developments as part of the new Housing SEPP, the following provision applies:

26 Must be used for affordable housing in perpetuity

(1) Development consent must not be granted under this Division unless the consent authority is satisfied that from the date of the issue of the occupation certificate and continuing in perpetuity -

(a) The boarding house will be used for affordable housing, and

(b) The boarding house will be managed by a registered community housing provider

However, there is no similar requirement for co-living housing.

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The intent of the condition is to ensure that the development operates as a boarding house as approved under the ARH SEPP 2009, however it is considered this is appropriately addressed through other conditions including Condition I15 which requires that the minimum occupancy period of the boarding house is not less than 3 months and also Condition I13 which sets out that the boarding house must not be subdivided.

Accordingly, the applicant's justification is accepted and it is recommended that Condition I14 be deleted.

Recommendation:

1. That the Panel note this addendum report.
2. That Condition I14 be deleted.

Signed:

Lara Huckstepp
Executive Planner

Endorsed by:

Robyn Pearson
Acting Manager Development Services

30 November 2021

Mills Oakley
ABN: 51 493 069 734

North Sydney Local Planning Panel
North Sydney Council
200 Miller Street
North Sydney 2060

Your ref:
Our ref: BMSS/AJWS/3523402

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Dear Sir/Madam

Development Application: 95/2021
Property: 313 Pacific Highway, North Sydney (Lot 12 DP 137004)

We act on behalf of the Applicant in relation to Development Application DA 95/2021 for a boarding house at 313 Pacific Highway North Sydney (the 'DA') which is being considered by the North Sydney Local Planning Panel ('Panel') on Wednesday 1 December 2021.

We have reviewed the Assessment Report prepared by North Sydney Council in relation to the DA, including the proposed conditions of consent.

Proposed Condition I14 on Occupants of the Boarding House

Of concern is the proposed condition I14, which provides as follows:

"All rooms in the proposed boarding house must only be used for the purpose of affordable housing, as defined in State Environmental Planning (Affordable Rental Housing 2009) (or any SEPP relating to Affordable Housing that may replace this SEPP in the future) for the life of the proposed development.

(Reason: To ensure that the development provides affordable housing and to ensure that the purpose built boarding house is not used for any other purpose)"

This condition has the onerous effect of attempting to restrict the use of the boarding house for the purposes of affordable housing, in circumstances where the proposed boarding house is not mandated to be affordable housing under the *State Environmental Planning (Affordable Rental Housing 2009)* ('**ARH SEPP**').

Relevance of the State Environmental Planning Policy (Housing) 2021

Whilst it appears to us that the condition is an attempt to incorporate consistency with the much-anticipated *State Environmental Planning Policy (Housing) 2021* ('**Housing SEPP**') which was gazetted on 26 November 2021, the *Housing SEPP* contains a savings provision at Schedule 7 in the following terms:

*The former provisions of a repealed instrument continue to apply to the following—
(a) a development application made, but not yet determined, on or before the commencement date, ...*

The *ARH SEPP* is one of the repealed instruments to which this savings provision applies.

It appears that the Council staff who drafted condition I14 may not have been aware of this important savings provision. Legally, the Panel must have regard to the effect of this savings provision.

We further note that previous forms of savings provisions commonly used required a new environmental plan to be applied as if the new plan had **been exhibited but not made** (see *Terrace Tower Holdings Pty Limited v Sutherland Shire Council* (2003) 129 LGERA 195; *Maygood Australia Pty Limited v Willoughby Council* [2013] NSWLEC 142).

However in contrast, the terms of the savings provision provided in the *Housing SEPP* are a clear and obvious change from the previous savings provisions in that **no regard is to be had to the provisions of the *Housing SEPP*** in circumstances where a development application has been made, but not yet determined before the commencement of the plan.

As the Development Application has been lodged but not yet been determined at the commencement of the *Housing SEPP*, its provisions do not apply to the Development Application and are not to be considered.

Condition I14 on Occupants of the Boarding House Should not be Imposed

In addition to the above, we note that the Court has previously found that it is **not open to a consent authority to impose a condition which would restrict a boarding house to be used only for the purposes of affordable housing**. (see *Lizard Apple Pty Ltd v Inner West Council* [2019] NSWLEC 1146 and *Micro Nest No 1 Pty Ltd on behalf of Micro Nest Ashfield Trust v Inner West Council* [2019] NSWLEC 1320)

In line with this caselaw, there is nothing in the *ARH SEPP* or the definition of “boarding house” in the *North Sydney Local Environmental Plan 2013* (NSW) that requires a boarding house to only provide affordable housing, and the Courts have consistently overruled any such attempts to impose these types of restrictions on boarding houses.

In these circumstances it is our view that if condition I14 is imposed, it would be **subject to challenge**.

Against this background, should the Panel be minded to approve the DA, then we ask that the Panel not impose the proposed condition I14.

If you have any questions or require further information, please do not hesitate to contact Anthony Whealy at awhealy@millssoakley.com.au or on +61 02 8035 7848, or Ben Salon at bsalon@millssoakley.com.au or on +61 02 8035 7867.

Yours sincerely



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