



# **BUSINESS PAPER**

## **LOCAL PLANNING PANEL MEETING**

**Wednesday 29 May 2024  
at 2:00pm**



## TABLE OF CONTENTS

### AGENDA AND SUMMARY OF RECOMMENDATIONS

#### GENERAL BUSINESS

##### Local Planning Panel

- Item 1 LPP7/24 DAM/1047/2019/A - Section 4.55(2) Modification of approved alterations and additions to Thornleigh Marketplace Shopping Centre - 17 Bellevue Street, Thornleigh ..... 1
- Item 2 LPP9/24 Reporting Development Applications for Determination by the Hornsby Local Planning Panel over 180 Days ..... 22

#### SUPPLEMENTARY AGENDA

---

## **AGENDA AND SUMMARY OF RECOMMENDATIONS**

### **PRESENT**

#### **ACKNOWLEDGEMENT OF COUNTRY**

Statement by the Chairperson:

*"Council recognises the Traditional Owners of the lands of Hornsby Shire, the Darug and Guringai peoples, and pays respect to their Ancestors and Elders past and present and to their Heritage. We acknowledge and uphold their intrinsic connections and continuing relationships to Country."*

#### **AUDIO RECORDING OF LOCAL PLANNING PANEL MEETING**

Statement by the Chairperson:

*"I advise all present that tonight's meeting is being audio recorded for the purposes of providing a record of public comment at the meeting, supporting the democratic process, broadening knowledge and participation in community affairs, and demonstrating Council's commitment to openness and accountability. The recordings of the non-confidential parts of the meeting will be made available on Council's website once the Minutes have been finalised. All speakers are requested to ensure their comments are relevant to the issue at hand and to refrain from making personal comments or criticisms. No other persons are permitted to record the Meeting, unless specifically authorised by Council to do so."*

#### **APOLOGIES / LEAVE OF ABSENCE**

#### **POLITICAL DONATIONS DISCLOSURE**

Statement by the Chairperson:

*"In accordance with Section 10.4 of the Environmental Planning and Assessment Act 1979, any person or organisation who has made a relevant planning application or a submission in respect of a relevant planning application which is on tonight's agenda, and who has made a reportable political donation or gift to a Councillor or employee of the Council, must make a Political Donations Disclosure Statement."*

*If a Councillor or employee has received a reportable political donation or gift from a person or organisation who has made a relevant planning application or a submission in respect of a relevant planning application which is on tonight's agenda, they must declare a non-pecuniary conflict of interests to the meeting, disclose the nature of the interest and manage the conflict of interests in accordance with Council's Code of Conduct."*

#### **DECLARATIONS OF INTEREST**

---

*Clause 52 of Council's Code of Meeting Practice (Section 451 of the Local Government Act, 1993) requires that a councillor or a member of a Council committee who has a pecuniary interest in a matter which is before the Council or committee and who is present at a meeting of the Council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable. The disclosure is also to be submitted in writing (on the form titled "Declaration of Interest").*

*The Councillor or member of a Council committee must not be present at, or in sight of, the meeting of the Council or committee:*

- (a) at any time during which the matter is being considered or discussed by the Council or committee.*
- (b) at any time during which the Council or committee is voting on any question in relation to the matter.*

*Clause 51A of Council's Code of Meeting Practice provides that a Councillor, Council officer, or a member of a Council committee who has a non pecuniary interest in any matter with which the Council is concerned and who is present at a meeting of the Council or committee at which the matter is being considered must disclose the nature of the interest to the meeting as soon as practicable. The disclosure is also to be submitted in writing (on the form titled "Declaration of Interest").*

*If the non-pecuniary interest is significant, the Councillor must:*

- a) remove the source of conflict, by relinquishing or divesting the interest that creates the conflict, or reallocating the conflicting duties to another Council official.*

*OR*

- b) have no involvement in the matter by absenting themselves from and not taking part in any debate or voting on the issue as if the provisions of Section 451(2) of the Act apply.*

*If the non-pecuniary interest is less than significant, the Councillor must provide an explanation of why they consider that the interest does not require further action in the circumstances.*

## **CONFIRMATION OF MINUTES**

THAT the Minutes of the Local Planning Panel meeting held on 24 April, 2024 be confirmed; a copy having been distributed to all Councillors.

## **GENERAL BUSINESS**

- *Items for which there is a Public Forum Speaker*
- *Balance of General Business items*

## **LOCAL PLANNING PANEL**

**Page Number 1**

**Item 1      LPP7/24 DAM/1047/2019/A - SECTION 4.55(2) MODIFICATION OF APPROVED ALTERATIONS AND ADDITONS TO THORNLEIGH MARKETPLACE SHOPPING CENTRE - 17 BELLEVUE STREET, THORNLEIGH**

**RECOMMENDATION**

THAT pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, Development Application No. DA/1047/2019 for alterations and additions to the Thornleigh Marketplace including the construction of a second-floor level comprising retail floorspace at Lot 100 DP 608646 and Lot 38 DP 263535, No. 17 Bellevue Street, Thornleigh be amended as detailed in Attachment 1 of LPP Report No. LPP7/24.

**Page Number 22**

**Item 2      LPP9/24 REPORTING DEVELOPMENT APPLICATIONS FOR DETERMINATION BY THE HORNSBY LOCAL PLANNING PANEL OVER 180 DAYS**

**RECOMMENDATION**

THAT the contents of LPP Report No. LPP9/24 be received and noted.

**SUPPLEMENTARY AGENDA**

**1 DAM/1047/2019/A - SECTION 4.55(2) MODIFICATION OF APPROVED ALTERATIONS AND ADDITONS TO THORNLEIGH MARKETPLACE SHOPPING CENTRE - 17 BELLEVUE STREET, THORNLEIGH**

---

**DA No:** DAM/1047/2019/A (Lodged on 22 January 2024)

**Description:** Section 4.55(2) application to modify the approved alterations and additions to the Thornleigh Marketplace including a reduction in retail floor space and provision of a 'Direct to Boot' facility

**Property:** Lot 100 DP 608646 and Lot 38 DP 263535, No. 17 Bellevue Street, Thornleigh

**Applicant:** Mr Jonathon Al Dreiby

**Owner:** 357 Thornleigh Place Pty Ltd

**Estimated Value:** \$12,453,524.00 (previously \$16,422,776.00 excl. GST and design fees)

**Ward:** B Ward

**Clause 4.6 Request:** Clause 4.3 Height of Buildings HLEP

**Submissions:** Nil

**LPP Criteria:** Modified proposal contravenes a development standard by more than 10%

**Author:** Katrina Maxwell, Senior Town Planner

**COI Declaration:** No Council staff involved in the assessment of this application have declared a Conflict of Interest.

**RECOMMENDATION**

THAT pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, Development Application No. DA/1047/2019 for alterations and additions to the Thornleigh Marketplace including the construction of a second-floor level comprising retail floorspace at Lot 100 DP 608646 and Lot 38 DP 263535, No. 17 Bellevue Street, Thornleigh be amended as detailed in Attachment 1 of LPP Report No. LPP7/24.

## EXECUTIVE SUMMARY

- The 4.55(2) application proposes to amend DA/1047/2019 for alterations and additions to a shopping centre.
- The proposal does not comply with Height of Buildings Development Standard under Clause 4.3 of Hornsby Local Environmental Plan 2013. As this is a Clause 4.55(2) application, a Clause 4.6 written request is not required.
- The Section 4.55(2) application is required to be determined by the Hornsby Local Planning Panel as the development contravenes the Height of buildings development standard under Clause 4.3 of the Hornsby Local Environmental Plan 2013 by more than 10%.
- No submissions have been received in respect of the application.
- It is recommended that the application be approved.

## BACKGROUND

### Site History

On 23 June 2003, Council received Development Application No. DA/1152/2003 for the refurbishment of the existing Parkway Plaza Shopping Centre including partial demolition, excavation, basement carparking, refurbishment of the centre, fit out of supermarket and liquor store, and the preparation of specialty shops for fit out.

An appeal was lodged by the applicant with the NSW Land and Environment Court against Council's deemed refusal of Development Application No. DA/1152/2003.

On 12 May 2004, the appeal was upheld, and development consent was granted by NSW Land and Environment Court in *Fabcot Pty Ltd v Hornsby Shire Council* [2004] NSWLEC 358. The approved hours of operation for the centre are as follows:

- Monday to Saturday 7.00am to 12.00am Midnight.
- Sunday 8.00am to 10.00pm.

Subsequent modification applications have been approved (DA/1152/2003/A, DA/1152/2003/B and DA/1152/2003/C) for the modification of the approved alterations and additions to the shopping centre comprising the reconfiguration of the carpark, landscaping, access and the extension of work hours.

On 6 August 2020, Development Application No. DA/1047/2019 for alterations and additions to the 'Thornleigh Marketplace' shopping centre including the construction of a second-floor level comprising additional retail floorspace was approved by the Hornsby Local Planning Panel.

### Application History

On 22 January 2024, a Section 4.55(2) application was lodged (DAM/1047/2019/A) to modify the approved alterations and additions to the Thornleigh Marketplace including a reduction in retail floor space and provision of a 'Direct to Boot' facility.

Between 23 January 2024 and 13 February 2024, the Section 4.55(2) application was placed on public notification. No public submissions were received.

On 27 March 2024, Council requested that the Applicant provide amended plans to clarify whether further height contravention occurs because of the proposed amendments.

On 4 April 2024, the Applicant provided amended plans including additional section plans to clarify the areas of height contravention.

## SITE

The site comprises an allotment known as Lot 100 DP 608646 and Lot 38 DP 263535, No. 17 Bellevue Street Thornleigh and has frontages to The Comenarra Parkway, Wood Street and Bellevue Street.

The site has an area of 8,208m<sup>2</sup> and experiences a fall from east to west to the frontage at Wood Street. Consequently, the grade of the site with cross fall from east to west and subsequent development for one large building (shopping centre) results in the existing built form protruding above the maximum building height at the eastern (Wood Street) frontage.

The existing shopping centre comprises a basement carpark with vehicular access from Wood Street. A vehicle access ramp to a rooftop carparking area is also accessed from Wood Street. Travellers provide pedestrian access from both the basement and roof top carparking areas to the main ground floor retail floor area. Several smaller specialty shops are located on the ground floor. Most of the ground floor retail floorspace is occupied by a Woolworths Supermarket and Dan Murphy's liquor store. A small number of specialty shops are located adjacent to the entry point to the traveller from the rooftop carparking area.

The delivery area and truck loading docks for the shopping centre are situated within a partly covered area accessed from Bellevue Street.

The site is burdened by a 3m wide right of carriageway (limited in height), a 5.5m wide easement for car parking (limited in height and depth), variable width right of access (limited in height and depth) and a 5.5m wide easement for electricity substation. The site is not bushfire or flood prone.

The site is located adjacent to a heritage listed 'house' of local significance at No. 14 The Comenarra Parkway, listed as item No. 720 in Schedule 5 of the HLEP.

The site adjoins the 'R4 High density residential' zone to the southern side of Bellevue Street, which was up zoned from 'R2 Low density residential' when the in force HLEP was gazetted in 2013. The HLEP permits a maximum building height of 17.5m within the R4 zone. At present, the up-zoned southern side of Bellevue Street comprises a predominant low density residential built form except for the recently completed residential flat building at No. 14 Bellevue Street and the ALDI supermarket at the corner of Bellevue Street and Pennant Hills Road.

The site is bounded by low density residential development to the eastern side of Wood Street and northern side of The Comenarra Parkway. Fronting Pennant Hills Road to the west of the site are several small-scale commercial tenancies.

The site is located approximately 400m walking distance from Thornleigh Railway Station.

## THE APPROVED DEVELOPMENT

The approved development consisted of alterations and additions to the 'Thornleigh Marketplace' shopping centre, detailed as follows:

- Demolition of existing building elements that project above the first-floor level carparking area including:
  - Small specialty shops.
  - Corner tower elements.



- Various projections on the external façade of the building.
- Construction of a proposed second floor level above the existing first floor level rooftop carpark comprising:
  - An additional 4,584m<sup>2</sup> of retail floorspace.
  - Specialty shops.
  - Food courts.
  - Two rooftop terraces associated with the food courts.
  - Amenities.
  - Travellator for pedestrian access to the carpark.
  - Access to the goods lift from the loading dock.
- Reconfiguration of the existing rooftop carpark resulting in a reduction from 333 to 321 car parking spaces.
- Installation of a goods lift within the existing loading dock.
- Construction of fire stairs and services within the south-east corner of the building.
- Installation of a travellator from the rooftop carpark to the proposed second floor level.
- Recladding of the external façade of the shopping centre.

*Note: The approved application did not propose the fitout and use of the shops within the proposed second floor level.*

## THE MODIFICATION

The Section 4.55(2) application seeks to modify the approved development as follows:

- The removal of a lift shaft
- The conversion of 17 car spaces to a Woolworths 'Direct to Boot' facility on the first floor. The floor level of Level 2 would be slightly raised to accommodate the 'Direct-To-Boot' facility.
- The 'Direct-To-Boot' facility would consist of 6 vehicle spaces as well as the construction of a cool room and staging room on the same level.
- A reduction in floor area and outdoor terrace area at Level 2
- Removal of specified tenancy layout on the approved plan to allow flexibility for future tenancy fit out.
- The roof (in part) would be raised to accommodate new levels. However, no additional height is proposed.

While the approved additional gross floor area under DA/1047/2019 was 4584m<sup>2</sup>, there would be a reduction of this gross floor area by 672.31m<sup>2</sup> under this Section 4.55(2) application.

The below table lists the proposed conditions to be amended.

Condition No.	Title	Proposed changes	Reason for amended wording

1	Approved Plans and Supporting Documentation	Update approved plan set to reflect changes to the plans. Plans were previously prepared by MSK Architects and now prepared by Design Formation Architects	To facilitate minor amendments to the approved design
2	Section 7.11 Development Contributions	Reduction in Section 7.11 Development Contributions fees levied for development	Reduction in gross lettable floor area

**ITEM 1**

## ASSESSMENT

The development application has been assessed having regard to the Greater Sydney Region Plan - A Metropolis of Three Cities, the North District Plan and the matters for consideration prescribed under Section 4.15 of the *Environmental Planning and Assessment Act 1979* (the Act). The following issues have been identified for further consideration.

### 1. STRATEGIC CONTEXT

#### 1.1 Greater Sydney Region Plan - A Metropolis of Three Cities and North District Plan

1. The Greater Sydney Region Plan - A Metropolis of Three Cities has been prepared by the NSW State Government to guide land use planning decisions over the next 40 years (to 2056). The Plan sets a strategy and actions for accommodating Sydney's future population growth and identifies dwelling targets to ensure supply meets demand. The Plan also identifies that the most suitable areas for new housing are in locations close to jobs, public transport, community facilities and services.

The NSW Government will use the subregional planning process to define objectives and set goals for job creation, housing supply and choice in each subregion. Hornsby Shire has been grouped with Hunters Hill, Ku-ring-gai, Lane Cove, Mosman, North Sydney, Ryde, Northern Beaches and Willoughby to form the North District. The Greater Sydney Commission has released the North District Plan which includes priorities and actions for Northern District over the next 20 years.

The proposed development would be consistent with the Greater Sydney Region Plan - A Metropolis of Three Cities and the North District Plan, by providing additional services to support a growing population and generating additional employment options for workers in the locality.

### 2. STATUTORY CONTROLS

Section 4.15(1)(a) requires Council to consider "*any relevant environmental planning instruments, draft environmental planning instruments, development control plans, planning agreements and regulations*".

#### 2.1 Environmental Planning and Assessment Act 1979 - Section 4.55(2)

The proposal constitutes a modification under Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*. Council pursuant to Section 4.55(2), Council may consider an application to amend development consent provided that, inter alia:

- (a) *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 any at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) *it has notified the application in accordance with–*
  - (i) *the regulations, if the regulations so require, or*
  - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.”*

*Subsections (1) and (1A) do not apply to such a modification.*

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

With respect to (a), it is considered that the proposal as amended is substantially the same as the development originally approved.

Section 4.55(2)(b) is not applicable as the development is not an integrated development or a State significant development.

With respect to (c) and (d), the amended application was notified, and no submissions have been received.

In accordance with Section 4.55(3) there would no environmental, social or economic issues arising from the proposed changes. The reasons for approval of the approved development application No. DA/1047/2019 were as follows.

- a) *The request under Clause 4.6 of Hornsby Local Environmental Plan 2013 to vary the ‘Height of Buildings’ and ‘Floor Space Ratio’ Development Standards is well founded. Strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case and there are sufficient environmental planning grounds to justify the variation to the development standards.*
- b) *The proposed development generally complies with the requirements of the relevant environmental planning instruments and the Hornsby Development Control Plan 2013.*
- c) *The proposed development does not create unreasonable environmental impacts to adjoining development with regard to visual bulk, overshadowing, amenity, privacy, noise, traffic and security.*

The proposed height contravention is considered acceptable and would not result in any additional amenity impacts to adjoining properties. Therefore, the additional contravention to Clause 4.3 Height of Buildings of the HLEP is supported in this instance. There is no further contravention to Clause 4.4 Floor Space Ratio of the HLEP.

The amended proposal would be generally in accordance with the HLEP and HDCP. The amended proposal results in a reduction in gross floor area, and therefore there are no additional adverse environmental impacts as a result of the modification including visual bulk, overshadowing, amenity, privacy, noise, traffic and security.

The 'Direct-to-Boot' service provides a valuable social and economic service to the community and future-proofs the shopping centre in the event of another pandemic event.

## **2.2 Hornsby Local Environmental Plan 2013**

The modified development has been assessed having regard to the provisions of the Hornsby Local Environmental Plan 2013 (HLEP). Zoning, permissibility and the HLEP controls relevant to the proposal are discussed below.

### **2.2.1 Zoning of Land and Permissibility**

The subject land is zoned E1 Local Centre under the HLEP. The objectives of the E1 zone are:

- *To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.*
- *To encourage investment in local commercial development that generates employment opportunities and economic growth.*
- *To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To encourage development that is compatible with the centre's position in the hierarchy of centres.*

The proposed development is defined as 'retail premises' and is permissible within the E1 zone with Council's consent. The proposed amendments to the approved development would not alter the proposal's compliance with the objectives of the E1 zone.

### **2.2.2 Floor Space Ratio**

Clause 4.4(2) of the HLEP provides that the floor space ratio (FSR) on any land is not to exceed the maximum shown for the land on the Floor Space Ratio Map. The maximum permissible FSR for the precinct is 1:1.

The approved development has a FSR of 1.38:1, representing a 38% contravention to the development standard. A Clause 4.6 written request prepared by Key Urban Planning (dated 29 May 2020) in support of the contravention accompanied the original development application that was approved.

The original development application consisted of an additional 4584m<sup>2</sup> of gross floor area. Under this Section 4.55(2) a reduction of 672.3m<sup>2</sup> GFA is proposed.

The total gross floor area on the site would decrease as part of this Section 4.55(2) from 11,727.11m<sup>2</sup> to 11,054m<sup>2</sup> which would result in a reduced floor space ratio of 1.34.1. As a reduction in floor space ratio is proposed, there would be no amenity impacts arising from this modification and therefore no further assessment of floor space ratio is required.

### 2.2.3 Height of Buildings

Clause 4.3 of the HLEP provides that the height of a building on any land should not exceed the maximum height shown for the land on the Height of Buildings Map.

The specific objective of Clause 4.3 is:

*To permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

#### Approved Development

The maximum permissible height for the subject site is 12m. The original development was approved with a maximum height of 13.2m, representing a departure of 10% from the development standard.

As part of the approved development under DA/1049/2019, the height contravention predominately occurred to the eastern portion of the site as a response to the local topography. The height contravention was greatest along the shorter Wood Street frontage including signage on the northwestern corner of the site (max. height 13.2m), along the portion of the site with the lowest natural ground level.

A further non-compliance occurred over the second storey retail tenancies and alfresco on the north and northeastern corner of the site which is now substantially reduced in area.

The services above the 'second storey raised tenancy' on the northwestern corner of the site were also non-compliant. An area of height non-compliance was due to the provision of a platform dedicated to services on the roof level.

#### Amended Proposal

The modified development under this section 4.55(2) would not exceed the approved building height of 13.2m along the Wood Street frontage (including signage on northwestern corner of the site) which was the greatest extent of contravention to the height development standard under the approved development application.

However, the roof and services above the 'second storey raised tenancy' at the northwestern corner of the site are now proposed to exceed the previous height contravention and have a height of 12.5m to the roof (4% contravention) and 14.5m to the services (20% contravention).

The height contravention is as a result of increasing the floor to ceiling height of Level 1 which results in an increase in the overall height of the building. The maximum height at this point of the building is 14.5m. The floor to ceiling height of Level 1 has been increased to provide appropriate overhead clearance for services associated with the 'Direct-to-Boot' facility proposed within the Level 1 covered car park.

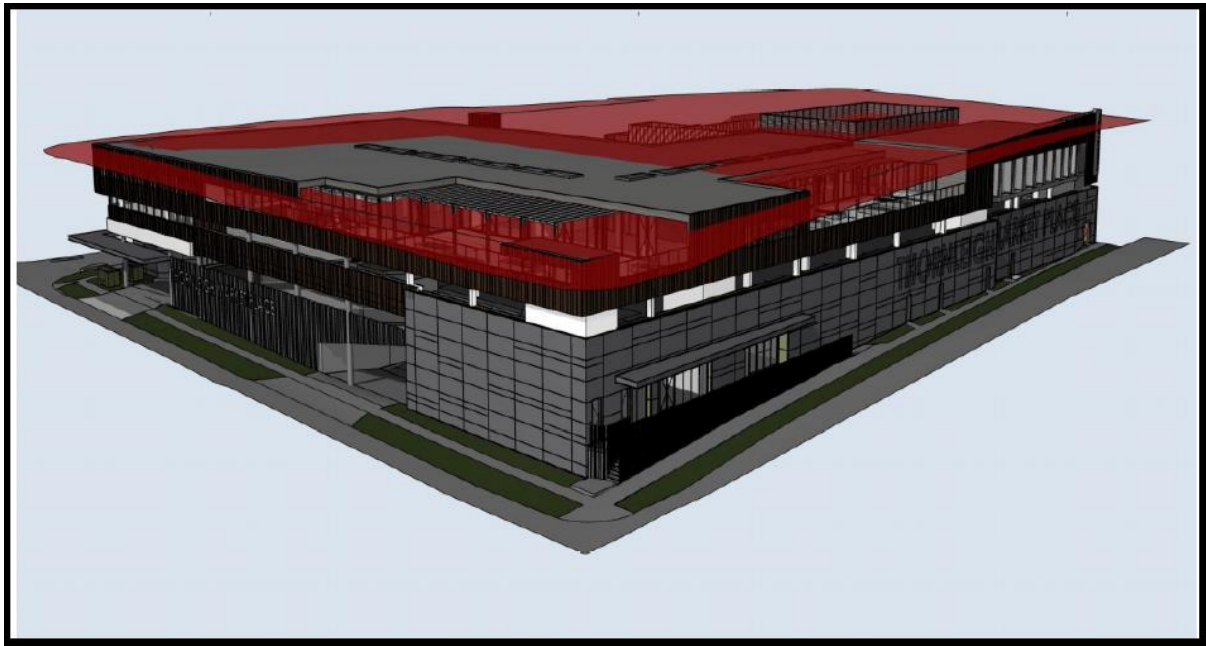


Figure 1: Approved DA Height Plane Diagram

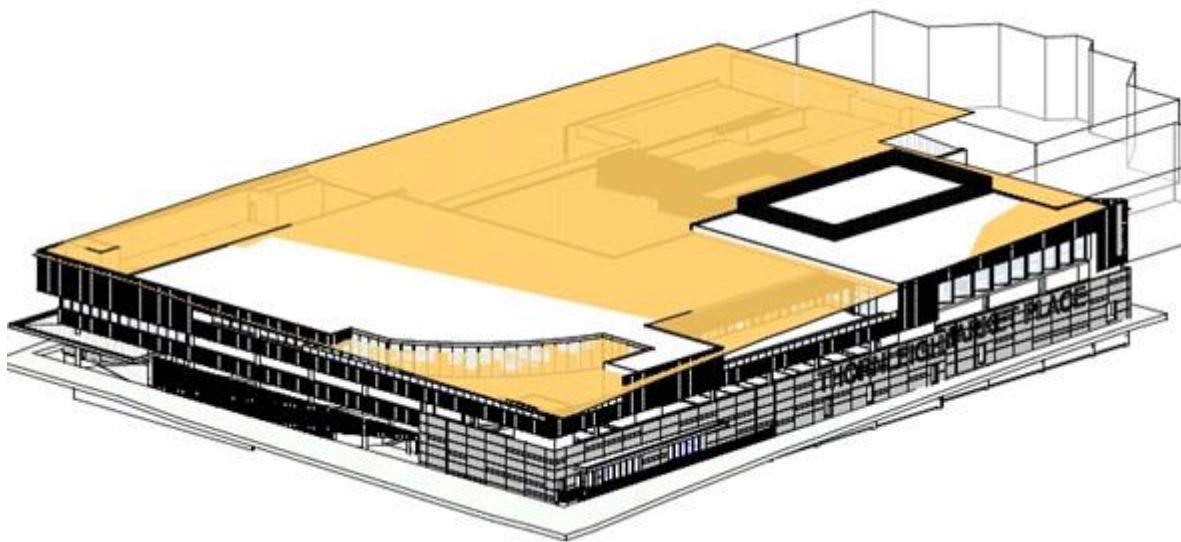


Figure 2: Section 4.55(2) modification Height Plane Diagram

The additional contravention to the building height development standard is supported for the following reasons.

- The development is on a corner allotment bounded by four streets which reduces the visual and amenity impact to adjoining properties.
- Stepping down of the roof form to meet the building height standard would result in the need to step down the floor level, making it more difficult to achieve large retail floorplates for larger retailers.
- The increased roof height would be accommodated and disguised by a parapet wall which would remain at its approved building height.

## 2.2.4 Exceptions to Development Standards

### 2.2.4.1 Application of Clause 4.6 to Section 4.55 Modifications

A Section 4.55 modification application can be approved by a consent authority without a Clause 4.6 variation even though it would contravene a development standard. The relevant judgments (originating with *North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163) say that section 96 (now S4.55) is a 'free-standing provision', meaning that 'a modification application may be approved notwithstanding the development would be in breach of an applicable development standard were it the subject of an original development application'. What this means is that it is Section 4.55 itself which authorises the development to be approved notwithstanding any contravention of a development standard. Section 4.55 is a broad power to approve, subject to its own stand-alone tests (such as the 'substantially the same' test, and a requirement to consider all relevant S4.15 matters). Section 4.55 does not rely upon having any Clause 4.6 contravention to enliven that power to approve.

In *Gann v Sutherland Shire Council* (2008), the Council argued that it would be illogical if a developer could obtain a development consent for a compliant development, and then avoid the need for any a Clause 4.6 contravention by lodging a S4.55 modification to increase the building's bulk to breach the applicable development standard. The Court however cautioned that:

*"This does not mean that development standards count for nothing. Section 96(3) still requires the consent authority to take into consideration the matters referred to in s79C [now s4.15], which in turn include the provision of any environmental planning instrument. That is, any development standard in an environmental planning instrument must be taken into consideration by the consent authority, but the absolute prohibition against the carrying out of development otherwise than in accordance with the instrument in s76A (1) does not apply."*

Section 96 (now S4.55) itself has not been amended since these decisions were given. It still authorises modification-approval to be given even where there is a breach of development standards. As such, Clause 4.6 is not applicable to a Section 4.55 modification - they only arise at DA stage. Indeed, the Courts have stated that Clause 4.6 cannot ever be used at section S4.55 stage as it only applies 'where a development application is made', not when a modification application is made.

Whilst a formal Clause 4.6 written request is not required for the subject Section 4.55 application, the consent authority is still required to assess the merit of any proposed contravention of a development standard, namely:

- Whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.
- Whether there are sufficient environmental planning grounds to justify contravening the development standard.
- Whether the proposed development will be in the public interest.

The maximum height of the approved development is 13.2m, which represented a departure of 10% from the development standard (signage on the corner of the building).

As part of this Section 4.55(2) application, it is proposed to increase the roof height over the northwestern corner of Level 2. The building height at this point is proposed to be 14.5m.

The overall increased height of the amended development from the approved development is 1.3m.

The applicant has provided the following justification for the modification to the height of the development:

- *The tenancy and its roof have been raised to the height of the original raised roof portion of the building, which has allowed for a greater floor to floor in the Woolworths direct to boot facility. The current 3.2m floor to floor on level 1 is incompatible with the proposed Woolworths direct to boot facility use as there is not enough provision for services in the ceiling.*
- *The element of the roof to be increased in height, in the context of the scale of the overall development approved, is negligible and will have no 'material change' to the approved built form. The height increase is minor and will not be discernible due to the overall built form of the shopping centre.*

The proposed height is considered acceptable and would not result in any additional amenity impacts to adjoining properties. Therefore, the contravention to Clause 4.3 of the HLEP is supported in this instance.

Regardless of whether the numerical non-compliance with the height standards is considered from existing ground level, or natural ground level, the contravention to the building height development standard is supported for the following reasons.

- The development is on a corner allotment bounded by four streets which reduces the visual and amenity impact to adjoining properties.
- Stepping down of the roof form to meet the building height standard would result in the need to step down the floor level, making it more difficult to achieve large retail floorplates for larger retailers.
- The increased roof height would be accommodated and disguised by a parapet wall which would remain at its approved building height.

### **2.3 State Environmental Planning Policy (Planning Systems) 2021**

On 6 August 2020, DA/1047/2019 was determined by the Hornsby Local Planning Panel as the proposal contravened the HLEP 'Floor Space Ratio' development standard by more than 10%. The original development application has an estimated value of \$16,422,776 (excluding GST and design costs). One submission was received in response to DA/1047/2019.

During the LPP meeting for DA/1047/2019, the Panel resolved to adopt the officer's recommendation and approve the proposed development subject to the conditions of consent contained in Schedule 1 of the report and the inclusion of an additional condition stating that no signage is approved as part of this development consent. It is not proposed to amend this condition.

This Section 4.55(2) application has been referred to Hornsby Local Planning Panel (HLPP) for determination, due a further height contravention greater than the approved development.

Local planning panels are to determine applications under section 4.55(2) of the Act for the modification of development consents granted by the panel that:

- Propose amendments to a condition of development consent recommended in the council assessment report but which was amended by the panel, or
- Propose amendments to a condition of development consent that was not included in the council assessment report, but which was added by the panel, or meet the criteria for development applications set out in the Schedules to this direction relating to conflict of interest, contentious development or departure from development standards.



There are no conflicts of interest associated with the approved Development Application or this modification application. Only one public submission was received in response to the original development application. No public submissions were received in response to this Section 4.55(2) application. Therefore, this Section 4.55(2) has solely been referred to the HLPP due to the contravention to the Height of Buildings development standard.

#### **2.4 State Environmental Planning Policy (Transport and Infrastructure) 2021**

The original application was assessed against the requirements of State Environmental Planning Policy (Infrastructure) 2007 (ISEPP) which has now been repealed and superseded by State Environmental Planning Policy (Transport and Infrastructure) 2021.

The approved development was classified as a Traffic Generating Development in accordance with Clause 104 and Schedule 3 of ISEPP as it resulted in a development that would have parking accommodation of more than 200 vehicles and a gross floor area greater than 10,000m<sup>2</sup>. The approved development application was supported by a Traffic Impact Assessment (TIA) by TSA dated 23 August 2023.

This Section 4.55(2) application would not increase car parking demand and would have only a negligible increase in traffic movements and as such a revised TIA is not required. Whilst the original proposal was referred to Transport for NSW (formerly RMS), the modified proposal was not required to be referred to TfNSW as the overall traffic and parking demands on the site would not significantly increase as a result of the modified development.

Council's traffic assessment concluded that the proposal as modified would not have any adverse impact on car parking and traffic and is acceptable with respect to the relevant sections of the Transport and Infrastructure SEPP.

Further discussion regarding the changes to vehicle access and parking can be found in Section 2.10.3 of this report.

#### **2.5 State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017**

State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (Vegetation SEPP) was in force at the time of lodgement of DA/1047/2019. This policy has been superseded by State Environmental Planning Policy (Biodiversity and Conservation) 2021.

No trees or vegetation are proposed to be removed or impacted by this development. Conditions imposed on the approved development to support the health of street trees during construction would remain unaltered.

#### **2.6 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005**

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 was in force at the time of lodgement of DA/1047/2019. This policy has been superseded by State Environmental Planning Policy (Biodiversity and Conservation) 2021. No modifications are proposed which would alter compliance with either policy.

#### **2.7 State Environmental Planning Policy No. 55 Remediation of Land**

State Environmental Planning Policy No. 55 Remediation of Land was in force at the time of lodgement of DA/1047/2019. This policy has been superseded by State Environmental Planning Policy (Resilience and Hazards) 2021. No modifications are proposed which would alter compliance with either policy.

## 2.8 Section 3.42 Environmental Planning and Assessment Act 1979 - Purpose and Status of Development Control Plans

Section 3.42 of the *Environmental Planning and Assessment Act 1979* states that a DCP provision will have no effect if it prevents or unreasonably restricts development that is otherwise permitted and complies with the development standards in relevant Local Environmental Plans and State Environmental Planning Policies.

The principal purpose of a development control plan is to provide guidance on the aims of any environmental planning instrument that applies to the development; facilitate development that is permissible under any such instrument; and achieve the objectives of land zones. The provisions contained in a DCP are not statutory requirements and are for guidance purposes only. Consent authorities have flexibility to consider innovative solutions when assessing development proposals, to assist achieve good planning outcomes.

## 2.9 Hornsby Development Control Plan 2013

The proposed development has been assessed having regard to the relevant desired outcomes and prescriptive requirements within the Hornsby Development Control Plan 2013 (HDCP).

Hornsby Development Control Plan 2013				
Control	Approved	Proposed	Requirement	Compliance
Height	13.2m	14.5m	12m	No
Number of Storeys	3 Storeys + Basement	3 Storeys + Basement	3 Storeys + Basement	Yes
Floor Space Ratio (FSR)	1.38:1	1.34:1	1:1	No
Setbacks				
• <i>Bellevue Street</i>	0m	unchanged	0m	Yes
• <i>The Comenarra Parkway</i>	0m	unchanged	0m	Yes
• <i>Wood Street</i>	0.9m	unchanged	0m	Yes
• <i>Side Setback (west)</i>	0m	unchanged	0m	Yes
Car Parking				
• <i>Total Car Parking Spaces</i>	321	310	267	Yes
• <i>Motorcycle Parking Spaces</i>	11	11	7	Yes
• <i>Accessible Spaces</i>	12	12	7	Yes

As detailed in the above table, the proposed development complies with the prescriptive requirements within the HDCP, with the exception of building height and floor space ratio. The matters of non-compliance are detailed below, as well as a brief discussion on compliance with relevant desired outcomes.

### 2.9.1 Commercial Centres Hierarchy

Part 4.1.1 of the HDCP identifies the 'Commercial Centres Hierarchy' for the Hornsby Shire.

The HDCP stipulates that 'Villages and small villages' such as the subject site should be the preferred location for small and medium scale commercial/ retail uses that serve the local community and should only have limited office and bulky good retail functions.

The proposed development is consistent with the Commercial Centres Hierarchy.

### 2.9.2 Scale

The desired outcome of Part 4.2.1 Scale of HDCP is to encourage "*development with a height, scale and intensity compatible with the role and function of the centre under the commercial centres hierarchy*".

The desired outcome is supported by prescriptive controls requiring the development to comply with the height and floor space ratio requirements of HLEP.

The approved development resulted in a 3-storey shopping centre with basement level achieving a maximum height of 13.2m above ground and a floor space ratio (FSR) of 1.38:1, which did not comply with the HLEP requirements.

As part of this Section 4.55(2) application the floor space ratio of the development has been reduced. The overall height of the building has been increased.

Sections 2.2.2, 2.2.3, and 2.2.4 of this report address the contravention for the HLEP development standard for building height and FSR.

Notwithstanding, the proposal generally complies with the desired outcomes of Part 4.2.1 Scale of the HDCP and is considered acceptable.

### 2.9.3 Vehicle Access and Parking

The desired outcomes for Part 1C.2.1 Transport and Parking of the HDCP are *Development that manages transport demand around transit nodes to encourage public transport usage*, *Car parking and bicycle facilities that meet the requirements of future occupants and their visitors*, *Development with simple, safe and direct vehicular access* and *to encourage and support the use of electric vehicles*.

The carparking rates for commercial shops (within 800m from a Railway Station) are calculated at a rate of 1 space per 29m<sup>2</sup>. As the original development contained gross leasable floor area (GLFA) based on an existing retail floor space of 6,330m<sup>2</sup> and a proposed combined specialist retail floor area of 2089.39m<sup>2</sup>, a total of 291 parking spaces were required in accordance with the HDCP.

The approved development provided a total 321 car parking spaces, and 11 motorcycle spaces within the basement car park and first floor level car park. The approved development met the parking rates of the HDCP and was considered acceptable with regard to on-site parking provision.

The amended proposal would result in a reduction of 672.31m<sup>2</sup> of gross leasable floor area, resulting in a reduction in car parking demand of 24 car parking spaces.

The original development application was supported by a Traffic Impact Assessment (TIA) prepared by TSA. This Section 4.55(2) application would result in a reduced car parking demand and would have only negligible increase in traffic movements and as such a revised TIA is not required.

The amended proposal under this Section 4.55(2) application includes the conversion of 17 existing car parking spaces on Level 1 to provide six 'Direct-to-Boot' grocery pick-up spaces and associated facilities. Ten of these spaces would be converted to a packing and storage area for the 'Direct-to-Boot Facility'. Seven unrestricted car parking spaces would be converted to six 'Direct-to-Boot' short term car parking spaces.

As the 'Direct-to-Boot' carparking spaces would still be available for short term car parking they have still been considered as contributing to the car parking provision for the site. Therefore, it is considered that there is a reduction of 11 car parking spaces as a result of the amended proposal (being the spaces occupied by the sorting facility and the space deleted in order to reconfigure the car parking spaces). This would result in a total of 310 car parking spaces being provided on site.

The theoretical car parking demand at the site by one parking space due to the different duration of stay times between a traditional shopper and a drive-up customer. Whilst the proposed 'Direct-To-Boot' area results in reduction of car parking, the car parking turnover is greater with shoppers entering and exiting the carpark in the allotted time slot. Therefore, there may be a negligible increase in traffic movements as a result of the 'Direct-To-Boot' facility.

The modification application includes a Traffic Compliance Statement prepared by Amber Organisation (dated 20 December 2023) certifying that the proposed modified car parking design complies with the requirements of the HDCP and Australian Standards AS2890.1-2004 Off-street car parking.

The modified proposal is supported by Council's Traffic and Road Safety Branch and Council's Development Engineer.

The proposal generally complies with the desired outcomes of Part 1C2.1 Transport and Parking of the HDCP and is considered acceptable.

## **2.10 Section 7.11 Contributions Plan**

Hornsby Shire Council Section 7.11 Contributions Plan 2020-2030 applies to the development as it would result in an additional commercial floor space. Accordingly, the requirement for a monetary Section 7.11 contribution is recommended as a condition of consent.

As part of the original development application \$406,860.45 Section 7.11 Development Contributions were levied on the basis of being for the shopping centre expansion comprising 4584m<sup>2</sup> GFA of additional retail floorspace and based on a PVT rate of 7 PVT per 100m<sup>2</sup> GFA for the roads contribution. As of the date of this report, these contribution fees have not yet been paid.

There would be a reduction of the approved gross floor area by 672.31m<sup>2</sup> under this Section 4.55(2) application. The Applicant has requested a partial refund of developer contribution fees to reflect the reduced gross lettable floor area. Therefore, it is proposed to amend Condition 4 of the development consent.

## **2.11 Housing and Productivity Contribution**

The Housing and Productivity Contribution came into effect on 1 October 2023 with the gazettal of Environmental Planning and Assessment (Housing And Productivity Contribution) Order 2023. The

contribution will help deliver essential state infrastructure like schools, hospitals, major roads, public transport infrastructure and regional open space.

However, as this is a Section 4.55(2) modification application the Housing and Productivity Contribution does not apply.

### **3. ENVIRONMENTAL IMPACTS**

Section 4.15(1)(b) of the Act requires Council to consider *“the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality”*.

#### **3.1 Natural Environment**

The modification would not have any additional impact on the natural environment than that approved under the original consent.

##### **3.1.1 Tree and Vegetation Preservation**

There were no trees removed or impacted by the approved development application. The Section 4.55(2) application would not necessitate the removal of or result in any impact to any trees to facilitate the modified development.

As part of the original consent, conditions were imposed to protect trees along the frontages of The Comenarra Parkway, Wood Street and Bellevue Street frontages. These conditions would remain unchanged.

##### **3.1.2 Stormwater Management**

As part of the original development application, it was proposed to connect the development into the existing stormwater management system for the site which would then connect to the Council street drainage system.

The Section 4.55(2) application would not necessitate any amendments to the approved stormwater system.

#### **3.2 Built Environment**

##### **3.2.1 Built Form**

The modified development would maintain the approved three-storey commercial built form. The additional roof height proposed under this Section 4.55(2) would be indiscernible from the streetscape.

No changes are proposed to the external building materials.

##### **3.2.2 Traffic**

A Traffic Impact Assessment was submitted TSA (dated 23 August 2019) was submitted in support of the original development application. The Traffic Impact Assessment estimated that the approved development would generate 78 additional evening peak hour vehicle trips to and from the site.

This Section 4.55(2) application is likely to result in negligible additional car traffic movements as a result of the 'Direct-to-Boot' facility.

The amended proposal would not modify access to the site and would not have an impact on the local road network.

### **3.2.3 Social Impacts**

The proposal as modified would have a positive social impact within the locality. The 'Direct-to-Boot' facility provides convenience to members of community who are unable to or choose not to enter the shopping centre to shop. The 'Direct-to-Boot' facility would provide a vital service should a pandemic such as Covid 19 or other such event occur in the future.

### **3.3 Economic Impacts**

This proposal as modified would achieve a positive economic impact on the locality via employment generation and an increase in demand for local services.

The direct to boot facility would allow Woolworths to remain economically competitive with other supermarkets in the vicinity by catering for contemporary shopping methods.

## **4. SITE SUITABILITY**

Section 4.15(1)(c) of the Act requires Council to consider "*the suitability of the site for the development*".

The proposal is a permissible use on the site. The proposed development is also consistent with the use and function of the existing development located on the site. The application has adequately demonstrated that variations to the building height and FSR development standards of the HLEP would be appropriate given the circumstances of the case.

The proposed development suitably responds to the additional demand for retail tenancies in the locality as a result of the recent high-density residential rezoning along Bellevue Street.

The scale of the proposed development is consistent with the capability of the site and is considered acceptable. The modified development responds to its context and setting and represents a development that is appropriate for the constraints of the site and the surrounding built environment.

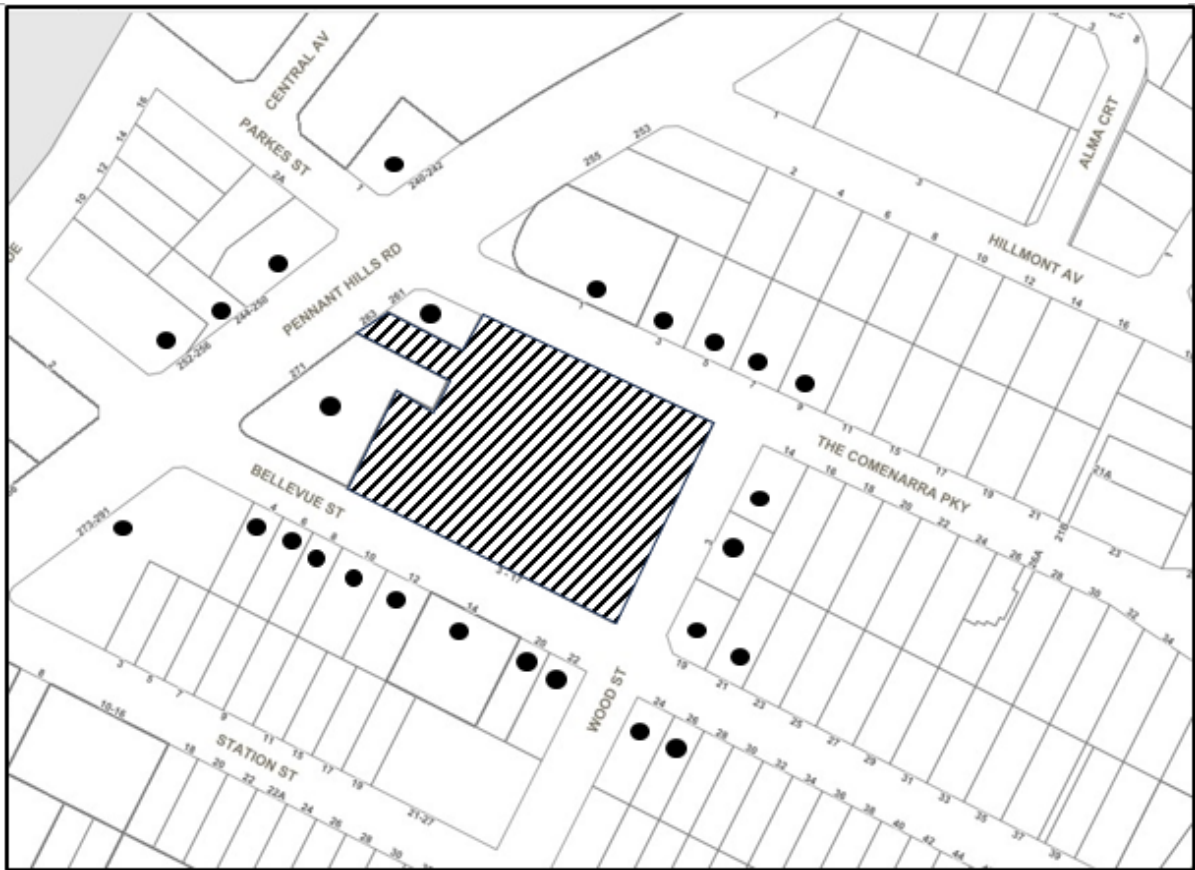
As outlined in this report, the proposed modification would not have any impact with respect to the suitability of the site for the development.

## **5. PUBLIC PARTICIPATION**


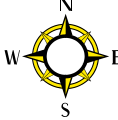
Section 4.15(1)(d) of the Act requires Council to consider "*any submissions made in accordance with this Act*".

### **5.1 Community Consultation**

The Section 4.55(2) development was placed on public exhibition and was notified to adjoining and nearby landowners between 23 January 2024 and 13 February 2024 in accordance with the Hornsby Community Engagement Plan. During this period, Council received no submissions. The map below illustrates the location of those nearby landowners who were notified of the development.



**NOTIFICATION PLAN**

<ul style="list-style-type: none"> <li>• PROPERTIES NOTIFIED</li> </ul>	<ul style="list-style-type: none"> <li>X SUBMISSIONS RECEIVED</li> </ul>	 PROPERTY SUBJECT OF DEVELOPMENT	
---	--	---	---

**5.2 Public Agencies**

The development application was not referred to any Public Agencies for comment.

**6. THE PUBLIC INTEREST**

Section 4.15(1)(e) of the Act requires Council to consider “*the public interest*”.

The public interest is an overarching requirement, which includes the consideration of the matters discussed in this report. Implicit to the public interest is the achievement of future built outcomes adequately responding to and respecting the future desired outcomes expressed in environmental planning instruments and development control plans.

The application is considered to have satisfactorily addressed Council's criteria and would provide a development outcome that, on balance, would result in a positive impact for the community. Accordingly, it is considered that the approval of the proposed modification would be in the public interest. The modified proposal would result in a positive impact for the community and would be in the public interest.

**6.1 Part 5 of the Environmental Planning and Assessment Regulation 2021**

There are a number of matters required to be addressed in an application for modification of development consent pursuant to Division 1, 2 and 3 of Part 5 of the 2021 EP&A Regulation. These matters are considered below.

Consideration of the Requirements under the Regulation		
Matter	Comment	Comply
Clause 100 Application for modification of development consent		
May be made by— (a) the owner of the land to which it relates, or (b) another person, with the consent of the owner of the land (CI 98(1))	The application has been made by Mr Jonathon Al Dreiby with the consent of the owner.	Y
NSW Aboriginal Land Council consent required for land owned by a Local Aboriginal Land Council (CI 98(6)).	The land is not owned by a LALC.	Y
Form approved by Planning Secretary and on portal (CI 99).	The application has been provided in accordance with the Regulation.	Y
Applicant details (CI 100(1)(a))	Provided on the NSW Planning Portal ('the Portal').	Y
Description of the development (CI 100(1)(b))	Provided on the Portal and outlined this Report.	Y
Address and title details (CI 100(1)(c))	Provided on the Portal and outlined in Section this Report.	Y
Description of the proposed modification (CI 100(1)(d))	Provided on the Portal and address in this report.	Y
Whether to correct a minor error, mis-description or miscalculation, or some other effect (CI 100(1)(e))	N/A	Y
Description of the expected impacts of the modification (CI 100(1)(f))	There are unlikely to be any significant impacts resulting from the proposed modification.	Y
Undertaking that modified development will remain substantially same as development originally approved (CI 100(1)(g))	The modified development will remain substantially the same development as that originally approved. Refer to Section 2.1 of this Report.	Y
If accompanied by a Biodiversity development assessment report, the biodiversity credits information (CI 100(1)(h))	N/A	N/A
Owner's consent (CI 100(1)(i))	Written owners consent has been provided.	Y
Whether the application is being made to the Court (under section 4.55) or to the consent authority (under section 4.56) (CI 100(1)(j)).	Application is made to the consent authority pursuant to S4.55(2) of the EP&A Act.	Y



BASIX Certificate (CI 100(3))	N/A	N/A
Penrith Lakes Development Corporation (CI 101)	N/A	N/A
Qualified designer statement for residential apartment development (CI 102)	N/A	N/A
Mining and petroleum development consents (CI 102)	N/A	N/A
Notification and exhibition requirements (CI 105-112)	Refer to Section 5.1 of the report.	Y
Notification of concurrence authorities and approval bodies (CI 109) (to be undertaken by Council)	Not required as outlined in Section 5.2 of the report.	Y

**ITEM 1****CONCLUSION**

The Section 4.55(2) application proposes alterations and additions to a shopping centre.

The development generally meets the desired outcomes of Council's planning controls and is satisfactory having regard to the matters for consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

The application was considered by Council's Development Advisory Panel on 19 April 2024. The panel supported the recommendation that the application be approved.

Having regard to the circumstances of the case, approval of the application is recommended.

The reasons for this decision are:

- The modified development complies with the requirements of the relevant environmental planning instruments and the Hornsby Development Control Plan 2013.
- The modified development does not create unreasonable environmental impacts to adjoining development with regard to visual bulk, solar access, amenity or privacy.

The development is substantially the same development as the development for which consent was originally granted. The proposed modification is assessed as satisfactory with respect to the reasons for approval for DA/1047/2019.

*Note: At the time of the completion of this planning report, no persons have made a Political Donations Disclosure Statement pursuant to Section 10.4 of the Environmental Planning and Assessment Act 1979 in respect of the subject planning application.*

CASSANDRA WILLIAMS  
Major Development Manager - Development Assessments  
Planning and Compliance Division

ROD PICKLES  
Manager - Development Assessments  
Planning and Compliance Division

**Attachments:**

There are no attachments for this report.

File Reference: DAM/1047/2019/A

Document Number: D08866088

**ITEM 1**

**1 REPORTING DEVELOPMENT APPLICATIONS FOR DETERMINATION BY THE HORNSBY LOCAL PLANNING PANEL OVER 180 DAYS**

---

**EXECUTIVE SUMMARY**

- In accordance with the Local Planning Panels Directions - Operational Procedures, Council is required to monitor development applications to be determined by the Panel that may be experiencing unreasonable delays of over 180 days from lodgement.
- A list of out outstanding development applications in excess of 180 calendar days from lodgement is attached for the Hornsby Local Planning Panel's advice.

**RECOMMENDATION**

THAT the contents of LPP Report No. LPP9/24 be received and noted.

## PURPOSE

The purpose of this report is to advise the Hornsby Local Planning Panel of development applications required to be determined by the Panel that are over 180 calendar days from lodgement.

## DISCUSSION

In 2019 the NSW Productivity Commission conducted a review of the Independent Planning Commission (IPC). The review recommended several actions to streamline processes to optimise efficiency, output and performance.

The planning panel changes were implemented on 1 August 2020 to incorporate a number of the NSW Productivity Commission 's recommendations to the way Local Planning Panels work to make them more efficient and to improve the assessment and determination times of development applications and maintain panel oversight of sensitive and contentious applications.

These changes were made as part of the Planning Acceleration Program to support the State's immediate and long-term economic recovery from the COVID-19 crisis.

The changes will speed up panel determinations by:

1. Reducing the need to conduct public panel meetings for non-contentious matters by applying a '10-or-more' objection trigger for public meetings.
2. Reducing the amount of modifications going to panels.
3. Obliging panel chairs to more actively manage development applications (DAs) coming to the panels to reduce panel deferrals and assessment timeframes.
4. Allowing chairs to bring forward determination on DAs that are experiencing unreasonable delays of over 180 days from lodgement.
5. Introducing panel performance measures.

The Local Planning Panels Directions - Operational Procedures has been amended to:

- Require panels to make determinations within two weeks of being provided an assessment report.
- Require panels to hold a public meeting only where the Development Application has attracted 10 or more unique submissions by way of objection.
- Allow, at the Chair's discretion, applicants to attend a briefing, along with council staff, to explain complex matters or present confidential or commercially sensitive material.
- Oblige panel chairs to work with council to ensure key issues are addressed during assessment in order to minimise deferrals by the panels at determination stage.
- Require the panels to provide reasons for deferring a decision and set timeframes in which any additional information must be provided in order to finalise the determination.
- Give panel chairs the ability to require council to report a DA to the panel within four weeks for determination if the application has experienced unreasonable delays in excess of 180 calendar days from lodgement.

In accordance with Point 6 of the Local Planning Panels Directions - Operational Procedures, attached is a list of development applications required to be determined by the Panel that are over 180 calendar days from lodgement.

---

**CONCLUSION**

Council is required to monitor development applications to be determined by the Panel that are over 180 calendar days from lodgement. This report provides advice to the Local Planning Panel on DAs that are experiencing unreasonable delays of over 180 days from lodgement.

**RESPONSIBLE OFFICER**

The officer responsible for the preparation of this report is the Major Development Manager, Cassandra Williams.

JAMES FARRINGTON

Director - Planning and Compliance

Planning and Compliance Division

**Attachments:**

There are no attachments for this report.

File Reference: F2013/00295-004

Document Number: D08877311