

Relevant Information for Local Planning Panel

FILE: D/2012/939/K **DATE:** 10 April 2024

TO: Local Planning Panel Members

FROM: Andrew Thomas, Executive Manager Planning & Development

SUBJECT: Information Relevant To Item 3 – Section 4.55(2) Modification Application: 100 Bayswater Road, Rushcutters Bay – D/2012/939/K

For Noting

That the Local Planning Panel note the information contained in this memo.

Background

On 5 April 2024, the City received correspondence from the Marina One strata committee which outlined further objections to the subject application. The Marina One apartment building is adjacent to the proposal's northern boundary. The correspondence raises concerns with the City's assessment of the application and recommended conditions of consent. Council's development assessment planner has briefly discussed these objections with the strata chairperson.

The objector's submission is attached as Attachment A.

The following comments are provided in response to the objector's submission:

Threshold test

The objector's submission asserts that the wintergardens are integral to the design of the building, and that their removal changes the essence of the building to a degree that the development is not substantially the same as the original development and therefore, cannot be determined as a section 4.55(2) modification. The submission maintains that the absence of balconies on the western elevation from the original development was to protect Marina One.

- 1) For modification applications the Act requires that, once amended, the development is to be “substantially the same” as the development for which consent was originally granted. This requires a consideration of both the development as originally approved and as proposed to be amended. Various LEC decisions provide some guidance in respect of such considerations. For example, the phrase “substantially the same” means “essentially or materially having the same essence.” With this modification the development maintains the use, character, appearance, overall built form and general operational characteristics of the original. The three wintergardens previously approved will be replaced with terraces and will not result in additional impacts (refer below). In this regard the amended proposal, notwithstanding the deletion of the wintergardens, is substantially the same as that originally approved.
- 2) It is noted that the original application D/2012/939, which approved three wintergardens, and the following modification D/2012/939/A which approved the three additional wintergardens did not include any to the neighbouring Marina One apartment. The potential acoustic impacts of the proposed terraces were, however, a key consideration of this assessment (D/2012/939/K), and finds no adverse acoustic amenity impacts are likely to be caused by this proposal.
- 3) Further, the proposed terraces are not akin to balconies that might ordinarily be located on the facade of the western elevation facing Marina One as they are not located directly opposite at similar height. The terraces sit below the height of adjacent Marina One balconies and are located on the ground floor behind a 4-5 metre concrete wall and vegetation. Also, they are similar in position, orientation, and function to the approved wintergardens they are to replace.
- 4) With regard to the essence of preserving neighbouring amenity, the proposed modification is considered to be substantially the same as that originally approved.

Acoustic assessment

The objector’s submission challenges the predicted noise levels and the conclusion regarding criteria for maximum noise levels outlined in Council’s conditions and the applicant’s submitted acoustic report.

- 5) For the purposes of referencing Condition 42 as the criterion for noise impacts resulting from the use of the site, (the maximum permissible noise level being the background noise plus 5dB), Council’s Environmental Health unit would need to measure the noise impacts at the affected receiver, and also measure the site’s background noise at later times. Currently both the applicant’s acoustic report and the objector’s acoustic report (submitted with an objection during assessment of the application) can only make assumptions regarding the background noise, because the building remains under construction. The report prepared for the applicant by ELC is not inconsistent with Condition 42, as the condition does not assume a background noise level.
- 6) While both reports vary in their predicted future background noise levels, the ELC report concludes noise resulting from the expected site use, being two people speaking at once, will generate up to 41dB at the nearest residential receiver. This complies with the noise criterion of 50dB assumed under the ELC report (background noise of 45dB plus 5dB), and the noise criterion assumed under the objector’s Acoustic Dynamic report, being a maximum noise criterion of 40-43dB (35-38dB plus 5dB).

Terrace usage

The objector's submission maintains use of the terrace will not be limited to the circumstances set out in the assumptions in the ELC report.

- 7) The ELC report utilises a scenario where 4 people are located on each terrace with two people speaking at any one time. Noting an existing condition of consent prescribes a resident occupancy rate of 4 adults for each of the relevant units, therefore the scenario utilised by ELC is appropriate. It is also considered that variations of this scenario may occur and the acoustic limits imposed by condition 42 would be complied with, for example a gathering of 8 people on terrace for a meal.
- 8) It is considered that due to the conditioned adult occupancy rates, the noise emanating from the use of the proposed terraces is able to comply with the noise criterion established under both ELC Consulting and Acoustic Dynamics. While hypothetical scenarios can be conceived which would exceed the noise criterion, this assessment finds that the assumptions made by ELC Consulting are reasonable, likely, and conform with an existing condition of consent regarding occupancy rates. Further, the proposal is not for a commercial, industrial, or mechanical use which is more likely to present a regular and sustained acoustic impact to neighbouring properties. The proposed terraces relate to the residential use of two-bedroom apartments, the likely impacts of which have been measured, and found to be compliant with relevant acoustic criterion.

If acoustic impacts are experienced by residents of Marina One apartment, a noise complaint can be made to Council, after which City compliance staff would investigate and determine whether the noise is offensive to neighbouring amenity and if enforcement action is necessary.

Prepared by: Thomas Walters, Specialist Planner

Attachments

Attachment A. Objector's email to Council

Approved



ANDREW THOMAS

Executive Manager, Planning & Development

Attachment A

Objector's Email to Council

5 April 2024

City of Sydney Council/Local Planning Panel

By email: TWalters@cityofsydney.nsw.gov.au; secretariat@cityofsydney.nsw.gov.au

**D/2012/939/K – 100 Bayswater Road, Rushcutters Bay, NSW 2011
Representation to Local Planning Panel for 10 April 2024 Meeting**

Introduction

1. The Strata Committee of SP61325 (**Marina One**) represents the Owners Corporation of Marina One, which consists of 78 residential apartments in extremely close proximity to 100 Bayswater Road.
2. The Strata Committee makes the following further representations and comments in connection with the above s4.55(2) Modification Application lodged by 100 Bayswater Road Pty Ltd and the report and recommendations made by Council in the papers for the meeting of the Planning Panel on 10 April 2024.

No power to approve

3. The originally approved wintergardens were integral and fundamental to the design of the building at 100 Bayswater Road and its relationship to Marina One. In particular, application D/2012/939, which followed the refusal of D/2011/1018, made clear that "Significant attention has been paid to minimise the impact of the residential conversion upon Marina One Apartments. Of the proposed apartment window bays facing Marina One, 90% are bedrooms and there will be no balconies." (see Statement of Environmental Effects dated 19 June 2012, pp 19, 70). The absence of balconies (and terraces) was a fundamental element of the design which was intended to protect the amenity of Marina One. The deletion of the wintergardens and replacement of them with open terraces is akin to adding balconies where their absence was previously an important element. This changes the essence of the western elevation from one designed to have no open balconies or terraces off living rooms to one which now does. This changes a fundamental element of the structure as originally approved such that the development is not substantially the same as the original development for which consent was originally granted and so cannot be determined as a s4.55(2) modification (see *Powell v City of Sydney Council* [2012] NSWLEC 1212; *Geluk v Mosman Municipal Council* [2020] NSWLEC 1592).

Noise and Proximity to Marina One

4. In its report, Council relies on an acoustic report prepared by E-Lab Consulting (ELC), which identifies a predicted noise level up to 41 dB(A) at the most affected facade which they maintain is well below the maximum criterion noise level established under the acoustic model of 50 dB(A).
5. We challenge the predicted noise levels and the conclusion regarding criteria for maximum noise level for the following reasons:
 - a. The maximum noise level cited by ELC is not the appropriate criterion, because:

- Within their report, ELC present the criterion for assessment as 50 dB(A) at the balconies of Marina One, which the Council “considers satisfactory”. This nominated criterion is inconsistent with and contradictory to the criterion required in Condition 42 of the consent, which is the background noise level plus 5dB(A).
 - Paragraphs 12 and 13 of the report of Acoustic Dynamics dated 24 March 2024 attached to our prior submission (**AD report**) determined that the background noise levels at the facades and balconies of Marina One were expected to be anywhere between 35-38dB(A)¹ during the quietest period, and so a criterion of 40-43 dB(A) would be conservative and appropriate for the assessment of noise emission to the façade of 1A Clement Place, being the background noise level plus 5dB(A), as required in Condition 42 of the consent.
- b. Actual use of the terraces will not be limited to circumstances set out in the assumptions relied upon by ELC but should also consider alternative scenarios:
- ELC assumes those talking will be at normal speaking level (sound power level of 65dB(A), which would assume some level of control on use of music being played). Consideration should also be given to alternative scenarios where music is being played or if people on the terraces were influenced by alcohol, where a more appropriate assumption would be for people to be speaking with raised voices (a sound power level of 74 dB(A), 9 dB louder than “normal” speaking level).
 - Given the above discussion regarding inconsistent and inappropriately determined criterion, were people to speak with a raised voice, or play music at a volume louder than “background music”, the criterion determined under Condition 42 would quickly be exceeded and the noise would be deemed non-compliant.
 - ELC assumes 4 people per terrace, with only two talking at the same time which is inappropriate given the size of the apartments and the terraces. The terraces will constitute outdoor entertaining areas, where it is reasonable to assume additional guests, particularly in the case of parties, where a 1 person per square metre density would be appropriate, with half of those speaking at once (para 19 of the AD report). The level of noise emission would also quickly increase to non-compliant levels were there to be more than four people on a balcony, which is a more than reasonable assumption given the balconies range from 10 to 25 square metres, even if the density were considerably less than 1 person per square metre.
- c. When these reasonable and conservative assumptions are taken into account, the noise emissions from the use of the proposed terraces result in a significant exceedance of the correctly calculated noise emission criterion.

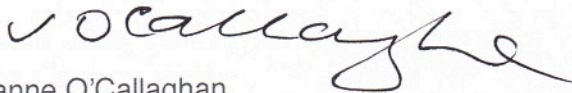
¹ This was derived from actual noise measurements taken by Acoustic Dynamics along the path which separates 100 Bayswater Road from Marina One, adjusted to account for the fact that the facades and internal walls of 100 Bayswater Road that normally shield Marina One from road traffic noise were no longer intact but will reinstated as the building is completed. The only other background noise levels available were in the ARUP report dated 14 June 2012 which had background noise monitoring data taken on a second floor balcony of 100 Bayswater Road that faces Clement Place, which is less protected than the impacted facades of Marina One along the path which separates the two buildings and is expected to experience a higher background noise environment than the impacted facades of Marina One (paras 10-13 of the AD report).

Conclusion

6. For the reasons outlined in this and our prior representation, as well as those in the numerous objections lodged to the Modification Application, the SC on behalf of the Owners Corporation urges the Planning Panel to refuse to determine the application on the basis that it does not have the power to approve it, or if that position is incorrect, to refuse the application on its merits.

Yours Faithfully,

Strata Committee Marina One, SP 61325
1A Clement Place, Rushcutters Bay, by

A handwritten signature in black ink, appearing to read 'J O'Callaghan', written in a cursive style.

Joanne O'Callaghan,
Chairperson and Secretary.