

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