

# Central Coast

## Local Planning Panel

Central Coast  
Local Planning Panel Meeting  
Business Paper  
**31 October 2024**



# Meeting Notice

**The Local Planning Panel Meeting  
of Central Coast  
will be held by Electronic Determination,  
Thursday 31 October 2024 at 9:00am,  
for the transaction of the business listed below:**

**1 Procedural Items**

1.1 Disclosures of Interest.....2

**2 Planning Reports- Outside of Public Meeting**

2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean  
Parade, The Entrance - Residential Flat Building and Demolition of Existing  
Structures (Amended Application) .....4

**Item No:** 1.1  
**Title:** Disclosures of Interest  
**Department:** Governance

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31 October 2024 Local Planning Panel Meeting

Reference: F2020/02502 - D14205789

The NSW Local Planning Panel Code of Conduct states that all panel members must sign a declaration of interest in relation to each matter on the agenda before or at the beginning of each meeting.

### **Recommendation**

***That Panel Members now confirm that they have signed a declaration of interest in relation to each matter on the agenda for this meeting and will take any management measures identified.***

**Item No:** 2.1  
**Title:** Supplementary Report - DA/1849/2005/B - 2-6  
Fairport Avenue & 46-48 Ocean Parade, The  
Entrance - Residential Flat Building and Demolition  
of Existing Structures (Amended Application)  
**Department:** Environment and Planning

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31 October 2024 Local Planning Panel Meeting

Reference: DA/1849/2005/B - D16478646  
Author: Rebecca Samways, Development Planner. Employment and Urban Release  
Unit Manager: Andrew Roach, Unit Manager. Development Assessment

## Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to the matters for consideration detailed in Section 4.15 and Section 4.55 of the *Environmental Planning and Assessment Act 1979* and other statutory requirements.

The Local Planning Panel considered the matter at its meeting of 23 September 2021 (report included as *Attachment 2*). The matter was deferred at the meeting pending the submission of supplementary information regarding:

- a. Physical commencement
- b. Suitability of the proposed species and height, in consideration of potential view loss within the north eastern corner of the lot

A Supplementary Report was provided to the Panel on 18 July 2022 (report included as *Attachment 3*) addressing the matters raised in the meeting minutes from the 23 September 2021 meeting. Upon review of the supplementary report and the submission of further legal correspondence prepared by Mills Oakley on behalf of the applicant, the Chair of the LPP requested a further round of legal advice be obtained in relation to the legal advice received from Mills Oakley, specifically in relation to physical commencement.

A second Supplementary Report was considered at a Panel meeting on 22 August 2024 (report included as *Attachment 4*) which provided further information regarding the correspondence prepared by Mills Oakley which was received since the preparation of the first Supplementary Report and included comments from a Landscape Architect.

**2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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The matter was deferred at the meeting pending further legal advice regarding:

- a. Whether physical commencement of the development consent DA/1849/2005, granted on 19 June 2006, has been established in accordance with section 95(4) (now section 4.53) of the *Environmental Planning and Assessment Act 1979*.
- b. Whether estoppel by representation arises from the letter provided by Council dated 29 September 2009.
- c. Whether the proposed modification will result in substantially the same development as the development for which the consent was originally granted, within the meaning of s4.55(1A) of the *Environmental Planning and Assessment Act 1979*.

This Supplementary Report provides a summary of the legal advice. The legal advice, obtained by Council to address the matters requested by the Panel, is included in full as *Confidential Attachment 1*)

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**Recommendation**

- 1** *That the additional information be considered in the Panel's determination of the application.*
- 2** *In the event that the Local Planning Panel are of the view that sufficient evidence has been provided that Development Consent DA/1849/2005 has physically commenced and is substantially the same, the Panel approve the modifications to*

**2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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***Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE in accordance with the recommendation included in the initial report on the matter (23 September 2021) subject to the amendments detailed in the schedule attached to that report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.***

**3 That Council advise those who made written submissions of the Panel's decision.**

**Precis**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyong Local Environmental Plan 2013 (WLEP)</i> . A residential flat building is permissible in the zone.
<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	<ul style="list-style-type: none"> <li>• 25 submissions original LPP report</li> <li>• 11 submissions latest notification period for the first Supplementary Report</li> </ul>

**Background**

The Panel considered a Supplementary Report on the matter at its meeting on 22 August 2024 and resolved as follows:

- Panel Decision**
- 1 The Council obtain an advice from suitably experienced counsel, within 21 days, as to whether:**
- a. physical commencement of the development consent DA/1849/2005, granted on 19 June 2006, has been established in accordance with section 95(4) (now section 4.53) of the Environmental Planning and Assessment Act 1979,**
  - b. estoppel by representation arises from the letter provided by Council dated 29 September 2009, and**

***c. the proposed modification will result in substantially the same development as the development for which the consent was originally granted, within the meaning of s4.55(1A) of the Environmental Planning and Assessment Act 1979.***

**2 *That the Local Planning Panel defer this matter for electronic determination, pending provision of the advice referred to in item 1.***

**3 *The Council advise those who made written submissions of the Panel's decision***

**Reasons**

1 *The Panel has received conflicting legal advice on the physical commencement and estoppel issues.*

2 *The Panel has not received written legal advice on the question of whether the development as modified is substantially the same as the originally approved development.*

Council sought further legal advice from senior counsel in relation to the matters raised in the Panel's decision. The legal advice is attached in *Confidential Attachment 1* and is summarised below.

**ISSUE A - Physical Commencement**

The legal advice provided in *Confidential Attachment 1*, advises that there is sufficient evidence to demonstrate that partial demolition of the dwellings at 2 and 4 Fairport Avenue were physically commenced on the land prior to the lapse date. However, there is insufficient evidence to demonstrate that the relevant demolition works carried out on the site prior to the lapse date were carried out in accordance with the relevant conditions of the consent.

As the relevant prior to commencement of demolition works conditions are required to be complied with in order to establish physical commencement, it was concluded in this instance that the consent has lapsed and there is no power for the LPP to approve the modification application.

**2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**ISSUE B - Estoppel**

The legal advice provided in *Confidential Attachment 1*, advises that there are substantial obstacles for the applicant to succeed in claiming damages based on estoppel.

Notwithstanding this, it is also noted that this is irrelevant for consideration in the Panels determination of the section 4.55(2) application.

**ISSUE C - Substantially the Same Development**

The legal advice provided in *Confidential Attachment 1*, advises that while the modifications proposed are numerous and, in many cases, not insignificant, the proposed modifications appear to retain the same essential or material features. The changes are not so significant that the proposed development is not substantially the same as the development to which consent was originally granted.

**Other Matters**

*Contributions*

Condition 2 which levied the payment of contributions was recommended to be updated in the original report to the Local Planning Panel on 23 September 2021. Since the application was reported to the Local Planning Panel, contribution rates have been indexed. Accordingly, condition 2 has been updated in the modified conditions of consent in *Attachment 5* in the event the application is approved.

**Conclusion**

This supplementary report and the previous supplementary reports, along with the report considered by the Panel on 23 September 2021, has been prepared and assessed against the matters for consideration of Sections 4.15 and 4.55 of the *Environmental Planning & Assessment Act 1979* and all relevant instruments, plans and policies.

Council has sought its own further legal advice in relation physical commencement, estoppel and substantially the same development per the Panel's decision at its 22 August 2024 meeting.

It is a matter for the LPP to decide whether they are satisfied physical commencement has occurred and whether the proposed modified development is substantially the same. The LPP should have regard to all information included in the attachments to this Report, a number of which are confidential documents and are, therefore, not addressed in detail in this public document.



**2.1 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (cont'd)**

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**Attachments**

<b>1</b>	Confidential Attachment dated 25 September 2024 -	Provided Under Separate Cover	D16478698
<b>2</b>	Original Assessment Report - 23 September 2021 LPP Meeting	Provided Under Separate Cover	D14810016
<b>3</b>	First Supplementary Report distributed to LPP on 18 July 2022		D15327792
<b>4</b>	Third Supplementary Report - 22 August 2024 LPP Meeting		D16288819
<b>5</b>	Updated Modified Conditions of Consent		D15037217
<b>6</b>	DA 1849 2005 B - 2-6 Fairport Avenue & 46-48 ~ Residential Flat Building and Demolition of Existing Structures (Amended Application)_Redacted		D16480099

**Item No:** 0.0  
**Title:** Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application)

**Central Coast**  
Local Planning Panel

**Department:** Environment and Planning

31 December 2022 Supplementary Local Planning Panel

Reference: DA/1849/2005/B - D15327792  
 Author: Rebecca Samways, Development Planner  
 Section Manager: Emily Goodworth, Section Manager Development Assessment North  
 Unit Manager: Andrew Roach, Unit Manager, Development Assessment  
 Executive: Alice Howe, Director Environment and Planning

### Recommendation

- 1 That the additional information be considered in the Panel's determination of the application.**
- 2 That the Local Planning Panel approve the modifications to Development Application 1849/2005/B at Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571, 2-6 Fairport Ave & 56-48 Ocean Parade, THE ENTRANCE subject to the amendments detailed in the schedule attached to the report and having regard for the matters for consideration detailed in Section 4.15 and Section 4.55(2) of the Environmental Planning and Assessment Act 1979.**
- 3 That Council advise those who made written submissions of the Panel's decision.**  
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### Summary

A section 4.55(2) application has been received to modify a consent for a residential flat building (comprising 45 units) and demolition of existing structures. The application has been examined having regard to the matters for consideration detailed in Section 4.15 and Section 4.55 of the *Environmental Planning and Assessment Act 1979* and other statutory requirements.

The Local Planning Panel considered the matter at its meeting of 23 September 2021. The matter was deferred at the meeting pending the submission of supplementary information regarding:

- a. Physical commencement
- b. Suitability of the proposed species and height, in consideration of potential view loss within the north eastern corner of the lot

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

<b>Applicant</b>	Planning Lab
<b>Owner</b>	Fincorp Pty Ltd
<b>Application No</b>	DA/1849/2005/B
<b>Description of Land</b>	Lot 200 DP 1140826, Lot B DP 364571 & Lot C DP 364571 2-6 Fairport Avenue & 46 – 48 Ocean Parade, The Entrance
<b>Approved Development</b>	Residential Flat Building comprising 45 units and Demolition of Existing Structures
<b>Proposed modification</b>	Increase in the number of units from 45 to 56, removal of level 3 basement carpark and reduction of carparking spaces from 84 to 72, internal reconfiguration of apartments, change of rooftop private open space to communal open space, increase in building height and external design changes
<b>Site Area</b>	3258m <sup>2</sup>
<b>Zoning</b>	R3 Medium Density Residential
<b>Existing Use</b>	Multi dwelling housing/vacant lot
<b>Employment Generation</b>	Nil
<b>Estimated Value</b>	\$20,731,286

**Precis:**

<b>Proposed Development</b>	Modification of consent for a residential flat building and demolition of existing structures
<b>Permissibility and Zoning</b>	The site is zoned <i>R3 Medium Density Residential</i> under <i>Wyong Local Environmental Plan 2013</i> (WLEP). A residential flat building is permissible in the zone.
<b>Relevant Legislation</b>	<ul style="list-style-type: none"> <li>• <i>Environmental Planning &amp; Assessment Act 1979</i> (EP&amp;A Act)</li> <li>• <i>Environmental Planning &amp; Assessment Regulation 2000</i> (EP&amp;A Regulation)</li> <li>• <i>State Environmental Planning Policy No. 65</i> (SEPP 65)</li> <li>• Apartment Design Guide (ADG)</li> <li>• <i>State Environmental Planning Policy (Coastal Management) 2018</i></li> <li>• <i>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</i> (BASIX)</li> <li>• <i>State Environmental Planning Policy No.55 – Remediation of Land</i> (SEPP 55)</li> <li>• <i>Wyong Local Environmental Plan 1991</i></li> <li>• <i>Wyong Local Environmental Plan 2013</i></li> <li>• <i>Draft Central Coast Local Environmental Plan 2018</i></li> <li>• <i>Wyong Development Control Plan 2005</i></li> <li>• <i>Wyong Development Control Plan 2013</i></li> </ul>

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

<b>Current Use</b>	Multi dwelling housing/vacant lot
<b>Integrated Development</b>	No
<b>Submissions</b>	<ul style="list-style-type: none"> <li>• 25 submissions original LPP report</li> <li>• 11 submissions latest notification period for supplementary report</li> </ul>

**Background**

The Panel considered a Planning Report on the matter at its meeting on 23 September 2021 and resolved as follows:

- |                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Panel Decision</b> | <p><b>1</b> <i>That the Local Planning Panel defer this matter for electronic determination, pending provision of detailed evidence from the applicant within the next 28 days demonstrating the consent has physical commencement and therefore not lapsed.</i></p> <p><b>2</b> <i>Matters to be addressed as part of the above include, but are not limited to:</i></p> <ul style="list-style-type: none"> <li>• <i>Copy of the deposited plan of the plan of consolidation required.</i></li> <li>• <i>Evidence from surveyor as to any physical work they undertook on site required.</i></li> <li>• <i>Evidence that the demolition took place prior to the lapse of consent, including copies of receipts and dated aerial photos showing demolition before consent lapsed required.</i></li> </ul> <p><b>3</b> <i>That Council's Landscape Officer review the proposed landscaping within the north eastern corner of the lot to confirm the suitability of the proposed species and height, in consideration of potential view loss issue raised by adjoining resident.</i></p> <p><b>4</b> <i>Upon receipt of the additional material requested, that Council make this information available on their website and notify those who previously made submissions.</i></p> |
| <b>Reasons</b>        | <p><b>1</b> The applicant has not adequately demonstrated that the consent has physical commencement. In this regard the Panel</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

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does not rely on the letter provided by Council dated 29 September 2009.

- 2 To minimise any adverse impacts on the amenity of adjoining residents.

**Additional Information**

In response to the outcome of the Panel meeting of 23 September 2021, the following additional information has been submitted:

20 October 2021:

- Received legal advice prepared by Mills Oakley, dated 19 October 2021 demonstrating physical commencement of the consent.

22 October 2021:

- Received amended landscape plans (dated 18 October 2021) and correspondence from the applicant's landscape architect (dated 12 October 2021) prepared by Narelle Sonter Botanica.

23 November 2021

- Received further legal advice prepared by Mills Oakley, dated 23 November 2021 in response to submissions (Attachment 2).

16 December 2021

- Received further legal advice prepared by Mills Oakley, dated 16 December 2021 to provide further information in relation to demolition on site.

**RESPONSE TO PANEL DECISION**

The applicant has addressed the decision of the Panel as follows:

- 1 That the Local Planning Panel defer this matter for electronic determination, pending provision of detailed evidence from the applicant within the next 28 days demonstrating the consent has physical commencement and therefore not lapsed.**

**0.0 Supplementary Report - DA/1849/2005/B - 2-6 Fairport Avenue & 46-48 Ocean Parade, The Entrance - Residential Flat Building and Demolition of Existing Structures (Amended Application) (contd)**

The applicant provided additional legal advice in relation to physical commencement within 28 days from the request of the Panel. Additional information was provided subsequent to the 28 days e.g., amended landscape plan and information from the landscape architect. It is also noted a GIPA request was lodged during this time.

**2 Matters to be addressed as part of the above include, but are not limited to:**

- **Copy of the deposited plan of the plan of consolidation required.**
- **Evidence from surveyor as to any physical work they undertook on site required.**
- **Evidence that the demolition took place prior to the lapse of consent, including copies of receipts and dated aerial photos showing demolition before consent lapsed required.**

The applicant has submitted legal advice providing opinion that the consent has physically commenced. A copy of the applicant's legal advice is provided in **Attachment 1** and a summary provided below:

- *A development consent may be operational, even after its lapse date, if:
 
  - *work is physically commenced before the lapse date;*
  - *that work is 'building, engineering or construction work';*
  - *that work relates to the work that is the subject of the development consent; and*
  - *that work is on the site.**
- *Demolition work was physically commenced on the site sometime between 3 June 2009 and 12 June 2009.*
- *Half of the demolition work was completed by or on 12 June 2009.*
- *This work was carried out before the lapse date of 19 June 2009.*
- *It is plain that the partial demolition of the existing dwellings on the site was 'building, engineering or construction work'.*
- *It is plain that the demolition of the existing structures was authorised and required by the development consent.*
- *The contemporaneous letter of the Council (issued in 2009) indicates that the demolition work was carried out in accordance with the development consent. No construction certificate was required for this work.*
- *The demolition plainly took place on the site.*
- *The development consent was physically commenced before its lapse date and now cannot lapse.*

The original consent was granted on 19 June 2006 and the notice of determination identified the nominated lapse date of the consent was 19 June 2008. On 26 September 2007 the development consent lapse date was extended by Council until 19 June 2009 in accordance























































































































































































































































