

# Development Application Committee Meeting



**DATE:** Tuesday, 21 November 2023

**TIME:** 6:00pm

**VENUE:** Council Chambers  
Level 1, City Administration Centre  
12 Stewart Avenue  
Newcastle West NSW 2302

14 November 2023

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**City of Newcastle**  
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[For documents marked 'Distributed under Separate Cover' refer to Council's website at http://www.newcastle.nsw.gov.au/](http://www.newcastle.nsw.gov.au/)

*Note: Items may not necessarily be dealt with in numerical order*

## **6. CONFIRMATION OF PREVIOUS MINUTES**

### **6.1. MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE 17 OCTOBER 2023**

#### **RECOMMENDATION**

The draft minutes as circulated be taken as read and confirmed.

#### **ATTACHMENTS**

**Attachment A:** 231017 Development Applications Committee Minutes

*Note: The attached minutes are a record of the decisions made by Council at the meeting and are draft until adopted by Council. They may be viewed at [www.newcastle.nsw.gov.au](http://www.newcastle.nsw.gov.au)*

## Minutes

### Development Application Committee Meeting

Council Chamber, Level 1, City Administration Centre, 12 Stewart Avenue, Newcastle West, Tuesday, 17 October 2023 at 8.53pm



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#### 1. ATTENDANCE

The Lord Mayor (Councillor N Nelmes), Councillors E Adamczyk, J Barrie, J Church, D Clausen, C Duncan, J Mackenzie, C McCabe, C Pull, D Richardson, K Wark, P Winney-Baartz and M Wood.

D Clarke (Acting Chief Executive Officer), S Mitchell (Acting Executive Director Corporate Services and CFO), C Thomson (Executive Director City Infrastructure), M Bisson (Executive Director Planning and Environment), J Baker (Acting Executive Manager Legal and Governance), S Moore (Executive Manager Finance, Property and Performance), L Duffy (Executive Manager Community and Recreation), A Ryan (City Significant & Strategic Planning Manager), M Murray (Chief of Staff), L Barnao (Councillor Services/Minutes/Meeting Support), D Silcock (AV/Information Technology Support), and C Urquhart (AV/Information Technology Support).

#### 2. ACKNOWLEDGEMENT OF COUNTRY

The Lord Mayor read the message of acknowledgement to the Awabakal and Worimi peoples.

#### 3. PRAYER

The Lord Mayor read a prayer and a period of silence was observed in memory of those who served and died so that Council might meet in peace.

#### 4. APOLOGIES / LEAVE OF ABSENCE / REQUEST TO ATTEND BY AUDIO VISUAL LINK

Nil.

#### 5. DISCLOSURES OF INTEREST

Nil.

#### 6. CONFIRMATION OF PREVIOUS MINUTES

##### 6.1. MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE 19 SEPTEMBER 2023

**MOTION**

Moved by Cr Mackenzie, seconded by Cr Barrie

The draft minutes be taken as read and confirmed.

**Carried**

**7. DEVELOPMENT APPLICATIONS****7.1. DAC 17/10/23 – 317 WHARF ROAD NEWCASTLE - MA2022/00238 - SEC 4.55(2) MODIFICATION TO DA2013/1236 - DEMOLITION OF BUILDINGS, ERECTION OF EIGHT (8) STOREY HOTEL AND CONFERENCE CENTRE - CHANGES TO DESIGN****MOTION**

Moved by Cr Clausen, seconded by Cr McCabe

1. That MA2022/00238 for Section 4.55(2) modification to DA2013/1236 – Demolition of buildings and erection of eight storey hotel and conference centre at 317 Wharf Road Newcastle be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at Attachment B; and
2. That those persons who made submissions be advised of CN's determination.

**For the Motion:** Lord Mayor, Cr Nelmes and Councillors Adamczyk, Barrie, Clausen, Duncan, Mackenzie, McCabe, Richardson, Winney-Baartz and Wood.

**Against the Motion:** Councillors Church, Pull and Wark.

**Carried**

**7.2. DAC 17/10/23 – 810 HUNTER STREET NEWCASTLE WEST - DEMOLITION OF EXISTING COMMERCIAL BUILDING AND CONSTRUCTION OF AN ELEVEN STOREY COMMERCIAL DEVELOPMENT - DA2022/01424****MOTION**

Moved by Cr Mackenzie, seconded by Cr Barrie

1. That the Development Applications Committee (DAC) note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 7.10A 'Floor Space Ratio for certain other development' in the Newcastle City Centre, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clauses 4.4 & the provisions of Clause 7.1, together with the objectives for development within the B3 Commercial Core zone in which the development is proposed to be carried out; and

2. That DA2022/01424 for Demolition of existing commercial building and construction of an eleven-storey commercial development at Lot 10 Sec B DP 976801 & Lot 12 Sec B DP 976801 & Lot 11 Sec B DP 976801 known as 810 Hunter Street, Newcastle West be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at Attachment B; and
3. That those persons who made submissions be advised of CN's determination

**For the Motion:** Lord Mayor, Cr Nelmes and Councillors Adamczyk, Barrie, Church, Clausen, Duncan, Mackenzie, McCabe, Pull, Richardson, Wark, Winney-Baartz and Wood.

**Against the Motion:** Nil

**Carried**

**The meeting concluded at 9.04pm.**

## 7. DEVELOPMENT APPLICATIONS

### 7.1. 44 YOUNG STREET CARRINGTON - DWELLING HOUSE - ALTERATIONS AND ADDITIONS - DA2023/00450

**APPLICANT:** HAWKIN ARCHITECTURE  
**OWNER:** L NADALIN  
**REPORT BY:** PLANNING & ENVIRONMENT  
**CONTACT:** EXECUTIVE DIRECTOR PLANNING & ENVIRONMENT /  
ACTING EXECUTIVE MANAGER, PLANNING, TRANSPORT  
& REGULATION

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#### PART I

##### PURPOSE

A development application (DA2023/00450) has been received seeking consent for dwelling house - alterations and additions at 44 Young Street Carrington.

The proposed development includes a rear addition to the existing dwelling, provision of a new double garage with main bedroom, ensuite and study above connected to the dwelling via a bridged hallway, reconfiguration of the existing upper-level balcony and associated internal alterations. The development results in approximately 71m<sup>2</sup> additional floor area.



**Subject Land: 44 Young Street Carrington**

The submitted application was assigned to Development Officer, Fiona Stewart, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination, due to the proposed variation to the maximum Floor Space Ratio development standard of the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation. The development results in a 76.39%, or 78.24m<sup>2</sup> exceedance.

A copy of the plans for the proposed development is at **Attachment A**.

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and no submissions have been received in response.

This report assesses the proposal against State legislation, regional and local environmental planning instruments and policies, in accordance with Section 4.15(1) of the *Environmental Planning and Assessment Act, 1979* (EPA&A 1979).

## Issues

The main issue identified in the assessment of the application is:

- 1) Floor space ratio - The proposed development has a floor space ratio of 1.06:1 and does not comply with the maximum floor space ratio development standard of 0.6:1 as prescribed under Clause 4.4 of Newcastle Local Environmental Plan 2012 (NLEP 2012). The variation equates to an exceedance of 78.24m<sup>2</sup> or 76.39%.

## Conclusion

The proposed development has been assessed having regard to the relevant heads of consideration under section 4.15(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is acceptable subject to compliance with appropriate conditions.

## RECOMMENDATION

- A. That the Development Applications Committee (DAC) note the objection under Clause 4.6 Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012 (NLEP 2012), against the development standard at Clause 4.4 Floor Space Ratio, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.4 and the objectives for development within the R2 Low Density zone in which the development is proposed to be carried out; and
- B. That DA2023/00450 for Dwelling house - alterations and additions at 44 Young Street Carrington be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**.

## Political Donation / Gift Declaration

Section 10.4 of the *Environmental Planning and Assessment Act 1979* requires a person to disclose "*reportable political donations and gifts made by any person with a financial interest*" in the application within the period commencing two years before the application is made and ending when the application is determined. The following information is to be included on the statement:

- a) all reportable political donations made to any local Councillor of Council; and
- b) all gifts made to any local Councillor or employee of that Council.



The applicant has answered **NO** to the following question on the application form: *Have you, or are you aware of any person having a financial interest in the application, made a 'reportable donation' or 'gift' to a Councillor or Council employee within a two-year period before the date of this application?*

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## PART II

### 1.0 THE SUBJECT SITE

The subject site is known as 44 Young Street, Carrington and has a legal description of Lot 1 in Deposited Plan 2692. The site is located on the eastern side of Young Street, corner of Hargrave Street, Carrington within an established residential area comprising predominantly dwelling houses on small lots. The site is regular in shape, has level topography, a frontage of approximately 6.8m to Young Street, a secondary frontage of approximately 25.1m to Hargrave Street and a total area of 170.7m<sup>2</sup>.

The property is currently occupied by a two-storey detached dwelling house built to the boundaries at the street corner, with parking provision to the rear as a hardstand parking area accommodating two vehicles. The site is bounded by a two-storey dwelling to the east (rear) and a single storey dwelling to the northern side. The survey plan identifies the existing dwelling encroaches over the southern boundary by approximately 250mm and the western boundary by approximately 50mm at ground level. It is not proposed to alter the location of these external dwelling walls.

There is a listed heritage item (Former Council Chambers) located on the opposite side of Young Street to the subject site and the central island within the Hargrave Street road reserve comprises a landscape heritage item "Date Palms in Hargrave Street".

### 2.0 THE PROPOSAL

The applicant seeks consent for alterations and additions to the existing dwelling on site comprising a two-storey addition to the rear of the principal building form by 'infilling' the south-eastern corner with new floor area, including demolition of an existing external laundry, relocation of internal stair and replacement of existing roof trusses/framing.

The proposal also includes provision of a new detached double garage over the existing hardstand area to the rear of the site, incorporating an upper level to comprise a new main bedroom, ensuite and study, with connection to the existing dwelling provided via a bridged hallway spanning the new landscaped courtyard at ground level below.

The existing upper floor balcony that wraps around the front corner of the dwelling is to be restored and reconfigured to create two separate balconies to the street frontages instead of the contiguous existing layout. This existing balcony element extends out over the adjacent road reserve on both sides, however the works proposed would not result in greater encroachment than existing.

A copy of the submitted plans is at **Attachment A**.

The various steps in the processing of the application to date are outlined in the Processing Chronology at **Attachment C**.

### **3.0 PUBLIC NOTIFICATION**

The application was publicly notified in accordance with CN's Community Participation Plan (CPP). No submissions were received in response to the notification process.

### **4.0 INTEGRATED DEVELOPMENT**

The proposal is integrated development pursuant to Section 4.46 of the EP&A Act as approval is required from Subsidence Advisory NSW under section 22 of the Coal Mine Subsidence Compensation Act 2017, due to the site being contained within an identified mine subsidence district. Subsidence Advisory NSW granted their '*General Terms of Approval*', on 23 June 2023 at **Attachment D**.

### **5.0 PLANNING ASSESSMENT**

The application has been assessed having regard to the relevant matters for consideration under the provisions of section 4.15(1) of the EP&A Act, as detailed hereunder.

#### **5.1 Provisions of any environmental planning instrument**

##### **State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H)**

###### Chapter 2 Coastal Management

Chapter 2 of SEPP R&H seeks to balance social, economic and environmental interests by promoting a coordinated approach to coastal management, consistent with the objectives of the *Coastal Management Act 2016* (the Act). The 'coastal zone' is defined in the Act as comprising four coastal management areas: coastal wetlands and littoral rainforest, coastal environment, coastal use and coastal vulnerability.

The site is identified as being located within the coastal use area. The proposed development is not inconsistent with the provision of this chapter of the SEPP.

###### Chapter 4 Remediation of Land

Chapter 4 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H) provides that prior to granting consent to the carrying out of any development on land the consent authority is required to consider whether the land is contaminated and, if the land is contaminated, whether the land is suitable for the purpose of the development or whether remediation is required.

The subject site is listed on City of Newcastle's (CN) contaminated lands register due to the presence of a black glassy slag and ballast that was used as filling material over

100 years ago in the Carrington locality. Accordingly, a condition relating to the removal and disposal of slag material from the site is recommended if any slag is unearthed during excavations.

In this application, the land use of the site will continue to be used for residential purposes, and the application is for small scale alterations and additions. The subject site is mapped as being within the coastal use area.

The proposed development is considered to have minimal impact with regard to the general development controls of the SEPP R&H and the specific controls in relation to the coastal use area. It is considered that no additional works are required, and the development proposal is acceptable having regard to this policy.

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

This policy facilitates the effective delivery of infrastructure across the State. The development is subject to the following requirements of the SEPP.

The proposal was required to be referred to Ausgrid in accordance with Division 5 of the SEPP. The referral to Ausgrid generated written advice, dated 3 July 2023 that the existing building is not compliant with network standards for clearance to powerlines and the proposed garage structure may also not be compliant.

The applicant has elected to not amend the proposed development in this regard and is aware it is likely infrastructure will be required to be relocated (at the applicant's expense) to satisfy Ausgrid requirements. Accordingly, a condition stipulating compliance with Ausgrid requirements prior to the issue of a Construction Certificate being issued is recommended.

### **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

A BASIX Certificate was lodged with the application, demonstrating that the development can achieve the required water and energy reduction targets. A condition of consent has been recommended, requiring that the development be carried out in accordance with the BASIX Certificate.

### **Newcastle Local Environmental Plan 2012 (NLEP 2012)**

The following summarises an assessment of the proposal against the provisions of the NLEP 2012 that are primarily relevant to the proposed development:

#### Clause 2.1 - Land Use Zones

The subject property is included within the R2 Low Density Residential zone under the provisions of NLEP 2012.

The proposed development is defined as alterations and additions to a 'dwelling house' which is a type of 'residential accommodation' and is permissible with consent within the R2 Low Density Residential zone under NLEP 2012.

The proposed development is consistent with the objectives of the R2 low Density Residential zone, which are:

- a) *To provide for the housing needs of the community within a low-density residential environment.*
- b) *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- c) *To accommodate a diversity of housing forms that respects the amenity, heritage and character of surrounding development and the quality of the environment.*

The provision of additional floor area for the dwelling maximises residential amenity in an appropriate dwelling form complementary to the low-density residential environment. The proposed single dwelling development does not impede on other land uses.

The proposed development provides for additions to the dwelling, including the provision of additional floor area over the new garage to the rear, whilst retaining the existing landscaped courtyard to the centre of the site. The additions are of a low density and low impact form, complementary to the existing and future desired character of the locality and streetscape.

#### Clause 2.7 - Demolition Requires Development Consent

The proposal includes partial demolition to facilitate the dwelling alterations and additions. Conditions are recommended to require that demolition works, and the disposal of material is managed appropriately and in accordance with relevant standards.

#### Clause 4.3 - Height of Buildings

Under the NLEP 2012 the site has a height of buildings development standard of 8.5m. The existing building reaches a maximum height of approximately 7.6m to the roof ridge, with the additions proposed to be built to a maximum height of 8m. The proposed development is compliant with the maximum building height applicable to the site and the objectives of the control.

#### Clause 4.4 - Floor Space Ratio

Under the NLEP 2012 the site has a FSR development standard of 0.6:1. The proposed development will result in a total FSR of 1.06:1, equating to an exceedance of 78.24m<sup>2</sup> or 76.39% above the prescribed maximum FSR for the subject land. The existing dwelling on site constitutes a non-compliance with the maximum FSR, being approximately 6% over the permissible gross floor area.

The applicant has submitted a clause 4.6 variation request to this standard. Refer to discussion under Clause 4.6 Exceptions to Development Standards below.

### Clause 4.6 - Exceptions to Development Standards

The objectives of Clause 4.6 'Exceptions to development standards', are (subclause (1):

- a) To provide an appropriate degree of flexibility in applying certain development standards to particular development,
- b) To achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The proposed development contravenes Clause 4.4 'Floor Space Ratio' of NLEP 2012. The floor space ratio map provides for a maximum floor space ratio of 0.6:1.

The proposed development comprises a total gross floor area of 180.66m<sup>2</sup> resulting in an FSR of 1.06:1, which exceeds the floor space ratio development standard for the site by 76.39%.

As such, the application is supported by a formal request to vary the development standard under Clause 4.6 of NLEP 2012.

An assessment of the Clause 4.6 variation request has been undertaken below. In undertaking the assessment, consideration has been given to both the provisions of Clause 4.6 and the relevant Land and Environment Court judgements including: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (and appeal at NSWLEC 90)(*Four2Five*), *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ('Initial Action'), and *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), namely that the objection is well founded, that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

### **Clause 4.6(2) – is the provision to be varied a development standard? And is the development standard excluded from the operation of the Clause?**

The floor space ratio development standard in NLEP 2012 is a development standard in that it is consistent with the definition of development standards under Section 1.4 of the EP&A Act.

The floor space ratio development standard is not expressly excluded from the operation of Clause 4.6.

### **Clause 4.6 (3)(a) – has the applicant submitted a written request that seeks to justify contravention of the development standard by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?**

The applicant has prepared a written request for the purpose of Clause 4.6(3).

There are five circumstances established by *Wehbe v Pittwater Council* [2007] NSWLEC 827 in which it could be reasonably argued that the strict application of a development standard would be unreasonable and/or unnecessary.

The submitted 'Variation to a Development Standard – Floor Space Ratio', prepared by Hawkins Architecture (dated 13 October 2023) **Attachment D** constitutes a written request for the purposes of Clause 4.6(3). The document provided by the applicant addresses Clause 4.6 (3)(a), as follows:

*The FSR variation will not constitute an inappropriate density for the site in its context of low scale residential development. The subject site has a historic deficiency in size that would now be considered below the minimum (lot size) standard for this zoning. The FSR of 0.6:1 restricts the allowable GFA to an area that is unreasonably small when considered against the lot size and density objectives for the area and within the existing hierarchy.*

*The GFA of the proposed development will be 180.66m<sup>2</sup> which is still smaller than average for a new home, but it will substantially increase the amenity of the dwelling from that which already exists. To achieve the amenity in a dwelling that can be reasonably expected for contemporary lifestyles, it is unreasonable to restrict the GFA for residential development on the subject site to a maximum of 102.42m<sup>2</sup> as per the requirement of the FSR.*

*The variation will not constitute an inappropriate bulk and scale of development for the site in its context of low scale residential development. The proposed alterations and additions fall within the development standards for building heights shown in the Newcastle LEP 2012 and the setbacks as outlined in the Newcastle Development Control Plan 2012. There are examples of dwellings in the surrounding area which exceed building envelope restrictions and setbacks due to their historical nature of being constructed prior to updated development standards. They do not diminish the local character and amenity of the surrounding residential context.*

*Due to the proposed developments compliance with building heights and setbacks, it is reasonable to conclude that the form will be within acceptable and appropriate bulk and scale as outlined in the objectives for zoning and FSR under Newcastle LEP 2012.*

*The existing context for the street frontages on both Young and Hargrave Streets consists of one and two storey dwellings of various styles with hipped and gable roofs and balconies facing the street at upper storey levels. The existing dwelling on the subject site is of a similar form and scale sympathetic to this context. The form of the proposed development maintains the existing bulk and scale and enhances the positive contribution it has towards the desired built form as identified by the established centres hierarchy referred to in the LEP.*

#### CN Officer Comment

The proposed development provides for a modernised and enlarged residential dwelling in a low density, low impact form complementary to the existing and future

desired character of the locality and streetscape. Furthermore, the proposal retains the existing housing type and predominant built form and is consistent with the low-density objectives of the land.

The proposed variation to the development standard does not result in any undue adverse environmental impacts, including impacts on adjacent properties in terms of bulk, scale, overshadowing or privacy, indicating the proposed development is suitable for the site. The non-compliance does not result in any additional unreasonable impacts compared to a compliant design as the proposal is generally compliant with the relevant planning controls.

As such, the applicant's written request is considered to satisfy the requirements of Clause 4.6(3)(a) in demonstrating that compliance with the development standard is unreasonable in the circumstances of the case.

**Clause 4.6(3)(b) – that there are sufficient environmental planning grounds to justify contravening the development standard.**

The documentation provided by the applicant addresses Clause 4.6(3)(b), as follows:

*This application is made under Clause 4.6 Exceptions to Development Standards of the Newcastle Local Environment Plan 2012 for a variation to the Section 4.4 Floor Space Ratio development standard. It demonstrates in the points outlined above that the variation is considered acceptable in context of the planning development standards and zoning objectives. The proposed building works do not exceed that which can be reasonably expected for the type of development deemed appropriate for this site under the relevant planning instruments.*

*The alterations and additions to the existing dwelling will modestly improve its amenity whilst having no adverse impacts on surrounding dwellings or the general character, bulk, and scale of the existing area. It is considered that the proposed alterations and additions are consistent with the character of the immediate area and will enhance the residential environment in this area, fitting comfortably into the existing streetscape by being sympathetic to the bulk and scale of surrounding dwellings.*

*The proposal is reasonable and appropriate when considered against the objectives of relevant planning instruments outlined in this statement. Compliance with the development standard is unnecessary in the circumstances of the case as the development is consistent with the objectives of the FSR standard and the zone objectives notwithstanding the non-compliance.*

CN Officer Comment

The written request outlines environmental planning grounds which adequately justify the contravention. In particular, the additional floor area proposed does not result in any inconsistency with the desired built form of the locality and is generally consistent having regard to the combination of relevant controls under NLEP 2012 and NDCP 2012. The proposed development provides for the orderly and economic use of the land and will not detract from the existing amenity provided to adjacent development.

The written request provides sufficient justification to contravene the development standard.

**Clause 4.6(4)(a)(i) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).**

As outlined above, the applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) of NLEP 2012. It follows that the test of Clause 4.6(4)(a)(i) is satisfied.

**Clause 4.6(4)(a)(ii) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.**

The applicant's response to the satisfaction of the objectives of the floor space ratio development standard was considered under the Clause 4.6(3)(a) discussion above. However, this provision does not require consideration of whether the objectives have been adequately addressed, rather that, 'the proposed development will be in the public interest because it is consistent', with the relevant objectives.

#### *Objectives of Clause 4.4 'Floor space ratio'*

The development is consistent with the objectives of Clause 4.4 'Floor space ratio' as the proposed development is of an appropriate scale which is consistent with existing development in the locality and the proposed density, bulk and scale would not impact on the existing streetscape or adjacent sites. The development is of an appropriate density consistent with the established centres hierarchy.

#### *Objectives of the R2 Low Density Zone*

The development is consistent with the objectives of the R2 Low Density zone as the proposed development maximises residential amenity of an existing low density housing type in an appropriate form, is compatible with the existing low-density character and does not significantly impact on amenity of nearby development. The development type is also a permissible development within the land use zone.

Based on the above, the proposed development is in the public interest because it is consistent with the objectives of the relevant standard and the objectives for development within the relevant zone. Therefore, the test of Clause 4.6(4)(a)(ii) of NLEP 2012 is satisfied.

**Clause 4.6(4)(b) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the concurrence of the Planning Secretary has been obtained.**



The Secretary's (i.e. of the Department of Planning and Environment) concurrence to the exception to the height of buildings development standard as required by Clause 4.6(4)(b) of NLEP 2012, is assumed, as per Department of Planning Circular PS20-00 of 5 May 2020.

### Conclusion

The states of satisfaction required by Clause 4.6 of the NLEP 2012 have been achieved and there is power to grant development consent to the proposed development notwithstanding the variation from the floor space ratio development standard.

It is considered that the applicant has demonstrated the standard is unreasonable in this instance and that the proposed scale of development is in character with the host building and surrounding locality. It is considered the proposal facilitates the ongoing use of a residential site in an appropriate housing form that respects the amenity and character of surrounding development and the quality of the environment, in accordance with the relevant R2 zone objectives. Further, it is considered the Clause 4.6 variation request is well founded.

The Clause 4.6 variation request has demonstrated that the proposed floor space ratio is acceptable and therefore that strict compliance with the prescribed floor space ratio would be unreasonable. The Clause 4.6 variation request is supported.

### Clause 5.10 - Heritage Conservation

The site does not contain a heritage item and is not contained within a heritage conservation area, however, is in the vicinity of two heritage items, being "Former Council Chambers" (opposite at 1A Hargrave St) and a landscape heritage item comprising the "Date Palms in Hargrave Street" that line the central island within the road reserve along Hargrave Street.

A historical search has revealed the former council chambers opposite was constructed in 1888. The construction date of the subject dwelling is unknown although can be reasonably assumed to be late Victorian period/early Federation period consistent with the development of its immediate surroundings. There is no current heritage listing of the building on site, with buildings in Carrington that are heritage listed predominantly public or commercial buildings and not dwellings. The subject site was not identified as a potential heritage item in the 1997 Heritage Study.

The roof form comprises a 'broken-back' type roof where the roof form changes from a steeper pitch to a lower over the verandah areas. This type of roof form is evident in other dwellings, predominantly single storey cottages, within the broader locality, however, is not considered to be particularly characteristic of the locality. The roof is proposed to be replaced by a new roof form to address existing low floor to ceiling heights to the upper level of the dwelling and to compliment the dwelling design. The existing balconies would be reconstructed and reconfigured under the works proposed, with the balcony materials at present in poor condition.

As the bulk of the additions under the proposed development are located to the rear of the existing dwelling and the existing location for parking provision on site would be utilised for the new garage, it is not considered that there would be any impact with respect to the nearby heritage items and the proposed design of the development is considered reasonable with respect to heritage conservation considerations.

#### Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 2 acid sulphate soils and the proposed development, comprising minor earthworks are not likely to lower the water table. Notwithstanding, a condition has been imposed on the consent requiring an investigation of the presence of acid sulfate soil during excavation.

#### Clause 6.2 - Earthworks

The level of earthworks proposed to facilitate the development is considered to be acceptable having regard to this clause. The design suitably minimises the extent of proposed earthworks.

### **5.2 Any draft environmental planning instrument that is or has been placed on public exhibition.**

A number of draft State Environmental Planning Policies or updates have been exhibited and are/or under consideration by the Department of Planning and Environment. The following is considered relevant to the subject application.

#### **Draft Newcastle Development Control Plan 2023**

The Draft Newcastle Development Control Plan (DCP) 2023 provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The Draft DCP was publicly exhibited from Thursday 28 September to Friday 27 October 2023.

Whilst the Draft DCP has been publicly exhibited, the Plan is yet to be finalised and formally adopted by City of Newcastle. Notwithstanding, the Draft DCP requires consideration in accordance with Section 4.15(1)(a)(ii) of the Environmental Planning & Assessment Act 1979.

Section 11 of Part A – Introduction of the Draft DCP nominates savings and transitional arrangements as follows:

*DCP 2023 does not apply to any development application lodged but not finally determined before its commencement. Any development application lodged before its commencement will be assessed in accordance with any previous development control plan (DCP).*

As such, the proposed development remains subject to the provisions of the Newcastle Development Control Plan 2012.

### 5.3 Any development control plan

#### Newcastle Development Control Plan 2012 (NDCP 2012)

The main planning requirements of relevance in the NDCP 2012, as it applied to the proposal at the time of lodgement, are discussed below.

##### Single Dwellings and Ancillary Development - Section 3.02

The following comments are made concerning the proposed development and the relevant provisions of Section 3.02:

##### *Street frontage appearance (3.02.03)*

There is no change proposed to the street setback (to both street frontages) of the existing dwelling. The addition to the rear of the principal-built form steps in from the Hargrave Street frontage and is contained within the lot boundary. The existing dwelling is built to both street boundaries at the front corner with minor existing encroachment over the boundary as identified in the survey plan. The presentation to the streetscape of the existing dwelling will be enhanced by upgrading works to the existing dwelling facades and balconies.

The new two-storey garage structure to the Hargrave Street frontage is to be built to the boundary for the garage component, with the upper-level set back 200mm from the secondary street boundary. This does not achieve the 2m setback required to a secondary road frontage, however, is consistent with the setback of the dwelling on site as well as adjacent development to the east and given the narrowness of the site is acceptable to allow for adequate depth for parking requirements.

A proposed new front wall (to Hargrave St) adjacent to the landscaped courtyard is consistent in height and materials to other contemporary fencing within the broader locality and is considered to result in an improved streetscape presentation to the existing Colorbond fence in this location.

The streetscape presentation of the dwelling would largely remain as existing in form with more contemporary design details, addressing Young and Hargrave Streets and providing for passive surveillance via windows and balconies to street facades.

##### *Side / rear setbacks (building envelope) (3.02.04)*

Side setbacks are required to be a minimum of 900mm from each side boundary up to a height of 5.5m then at an angle of 4:1. Rear setbacks are required to be a minimum of 3m for walls up to 4.5m in height and 6m for walls greater than 4.5m high. Buildings on lots with a width less than 8m can be built to both side boundaries, with a boundary wall maximum height of 3.3m and length of 20m or 50% of the lot depth (whichever is the lesser).

The site comprises a narrow allotment (approx. 6.8m width) and a corner site, with the boundary to the north comprising a side boundary and the boundary to the east comprising a rear boundary. The addition to the rear of the principal built form on site would not change the alignment of the northern wall of the dwelling to the side boundary which currently ranges from 250mm to 370mm owing to the existing wall not being square. However, it is noted the wall would not comply with the maximum height of 3.3m for a building wall to the boundary.

The rear setback to the ground floor level would be retained at 12.84m as existing, with the upper level extending out to the same alignment as a result of the alterations and additions proposed. The setbacks to the new two-storey garage structure are discussed under 3.02.12 - Ancillary development.

The side and rear setbacks are consistent with those of the existing dwelling on site and other dwellings to the east along Hargrave Street and north along Young Street.

It is noted that NDCP 2012 allows variations to the acceptable solutions where it can be demonstrated that the performance criteria can be achieved. An assessment of the proposed development against the performance criteria of this control has been undertaken, as follows:

*Development is of a bulk and scale that:*

- a) *Is consistent with and complements the built form prevailing in the street and local area;*
- b) *Does not create overbearing development for adjoining dwelling houses and their private open space;*
- c) *Does not impact on the amenity and privacy of residents in adjoining dwelling houses;*
- d) *Does not result in the loss of significant views or outlook of adjoining residents;*
- e) *Provides for natural light, sunlight and breezes.*

The bulk and scale of the proposed development is consistent with and complementary to the built form in the street and the local area, as well as the desired future character. It is considered the proposed development is designed and sited to not unreasonably impact the amenity of adjoining dwellings or associated principal areas of private open space, having regard to privacy, solar access and prevailing breezes, and subsequently the side and rear setbacks as proposed are acceptable.

*Landscaping (3.02.05)*

There would be a minor reduction in landscaped area of the site as a result of the development, with the new garage structure to the rear constructed over an existing

hardstand parking area and the landscaped courtyard to the centre of the site retained, resulting in a compliant landscaped area (10% of site area).

*Private open space (3.02.06)*

Private open space for the development is retained within the central courtyard of the site, with the reconfigured and extended ground floor plan providing for direct access to the private open space from the main living area of the dwelling via bi-fold doors. The proposal provides for a relatively generous and usable area of private open space.

*Privacy (3.02.07)*

The design of the proposed development comprises window and door openings predominantly facing the two street frontages. The eastern (rear) elevation of the upper level comprises new window openings, however owing to the relationship of the adjacent dwelling to the north, overlooking to the private open space of the neighbour is not possible from these windows.

The new two storey garage structure provides two windows to the northern elevation, comprising an ensuite window and a highlight window over the desk area of the study, which would not unreasonably overlook living rooms or the principal area of private open space of neighbouring dwellings within the low-density environment.

*Solar access 3.02.08)*

Shadow diagrams submitted for the proposed development illustrate acceptable resultant overshadowing impact to adjacent sites. Additional shadow cast from the proposed development predominantly falls to Hargrave and Young Streets, with a minor amount of additional shadow also cast to the front setback of the site to the east (No.1 Hargrave St) in the afternoon at June 21.

The development as proposed generally retains existing levels of solar access to adjacent sites, between 9am and 3pm at the winter solstice.

*View sharing (3.02.09)*

There are no existing views or vistas to water, city skyline or iconic views that would be obscured by the proposed development. As such, the proposed development meets the acceptable solutions of this control.

*Car parking and vehicular access (3.02.10)*

Carparking on site is currently provided as a double hardstand parking area to the rear accessed via Hargrave Street. The development includes the construction of a detached double garage in this location, with floor area above, incorporated into the overall design.

The parking provision would remain at the rear of the site and not dominate the streetscape being adjacent to the existing two-storey dwelling at No.1 Hargrave Street.

There would be no net loss of on-site car parking provision resulting from the development.

#### *Ancillary development (3.02.12)*

Garage - There is a new detached double garage proposed to the rear of the site accessed via Hargrave Street. The two-storey garage structure would reach a total height of approximately 7.8m (3.3m for the garage element) and is set back 500mm from the eastern boundary and built to the boundary at the rear (northern) and front (southern) boundaries.

The structure represents a variation to the setback requirements of this clause, however taking into account the site constraints and siting, is considered to be acceptable on merit. The structure is compatible with the scale and bulk of the desired residential development character for the locality and would not result in any adverse impact to the streetscape (secondary frontage to Hargrave St) or adjacent sites.

Fences - There is a new front fence/wall proposed under the application to the Hargrave Street frontage adjacent to the central courtyard area of the site to replace the existing fence in this location that results in a poor presentation to the streetscape. The fencing is proposed to comprise a feature stone wall to a height of 1.8m. Although higher than 1.2m stipulated for front fences under this clause, the proposed front fence/wall would be consistent in height and materials to other fencing to contemporary dwellings within the locality, would harmonise with the overall design for the development and the streetscape and is acceptable.

The proposed development is considered acceptable in relation to the abovementioned DCP section and achieves relevant acceptable solutions and performance criteria for building form, building separation and residential amenity. The development establishes a scale and built form that is appropriate for its location. The proposal provides an appropriate building form with good residential amenity, while maintaining privacy for adjoining neighbours.

#### Flood Management - Section 4.01

The site is identified as flood prone. The proposed development is consistent with a '*minor addition*' under this section, with <50m<sup>2</sup> increase in building footprint and subsequently flood controls are not required in accordance with the relevant provisions.

#### Mine Subsidence - Section 4.03

The site is located within a proclaimed Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW.

#### Social Impact - Section 4.05

It is considered unlikely that a development of the nature proposed would result in

increased anti-social behaviour in the locality. The development provides for increased housing choice within the area, which is considered a positive social outcome.

#### Soil Management - Section 5.01

Any earthworks will be completed in accordance with the relevant objectives of this section. A condition will ensure adequate sediment and erosion management will remain in place for the construction period.

#### Land Contamination - Section 5.02

Land contamination has been considered in this assessment report under *State Environmental Planning Policy (Resilience and Hazards) 2021* – Chapter 4 Remediation of Land.

#### Vegetation Management - Section 5.03

The proposal does not involve the removal of any trees or declared vegetation.

#### Aboriginal Heritage - Section 5.04

Reference to the Aboriginal Heritage Information Management System confirmed that there are no sites of Aboriginal significance recorded in proximity to the site.

#### Heritage Items - Section 5.05

This section relates to development in the vicinity of a heritage item. Two heritage items exist in the vicinity of the development site, being "Former Council Chambers" (opposite at 1A Hargrave St) and a landscape heritage item comprising the "Date Palms in Hargrave Street" that line the central island within the road reserve.

As the bulk of the additions under the proposed development are located to the rear of the existing dwelling and the existing location for parking provision on site would be utilised for the new garage, it is not considered that there would be any impact with respect to the heritage items.

#### Traffic, Parking and Access - Section 7.03

The parking rate requirements under this section are met by the proposed development that provides for two on-site parking spaces within the new double garage.

#### Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The proposed development will result in an increase in roof area, although no increase in impervious areas to the ground level of the site, as the new garage structure is over an existing hardstand area of the site. Stormwater disposal can be addressed by way of recommended conditions of consent to direct overflows to the existing stormwater management system on the site.

Accordingly, the proposal is acceptable in relation to water management.

#### Waste Management - Section 7.08

Demolition and waste management will be subject to recommended conditions of consent.

#### Street Awnings and Balconies - Section 7.10

The existing upper floor balcony that wraps around the front corner of the dwelling is to be restored and reconfigured to create two separate balconies to the street frontages instead of the contiguous existing layout.

This existing balcony element extending out over the adjacent road reserve on both sides, is classified as a 'street balcony' under this section, however the works proposed would not result in greater encroachment than existing. The application proposes upgrading works to the existing balcony that is compatible with the existing streetscape and overall design and will be constructed in accordance with current building codes, ensuring the structural design is adequate for public safety.

CN's Property Services have recommended a condition of consent to require an application under s.138 of the Roads Act, with a user charge applicable for the use of public land in this regard.

#### Development Contributions

The EP&A Act enables CN to levy contributions for public amenities and services. The proposed development would attract a development contribution to CN, as detailed in CN's Development Contributions Plans.

A condition requiring this contribution to be paid has been included in the Draft Schedule of Conditions at **Attachment B**.

#### **5.4 Planning agreements**

No planning agreements are relevant to the proposal.

#### **5.5 The regulations (and other plans and policies)**

The application has been considered pursuant to the provisions of the EP&A Act requirement to comply with *AS2601 – Demolition of Structures* will be included in the conditions of consent for any demolition works.

No Coastal Management Plan applies to the site or the proposed development.

#### **5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality**



Impacts upon the natural and built environment have been discussed in this report in the context of relevant policy, including the NLEP 2012 and the NDCP 2012 considerations.

The proposed development will not have any undue adverse impact on the natural or built environment.

The development is located within a site suitably zoned for residential development and of a size able to cater for such development. The development is compatible with the existing character, bulk, scale and massing of the existing built form in the immediate area and broader locality. The proposal will not result in any negative social or economic impacts.

The development has been designed to generally satisfy the requirements of NDCP 2012 and as a result, the proposed development is unlikely to adversely impact upon the amenity of adjoining properties.

### **5.7 The suitability of the site for the development**

The site is located within an R2 Low Density Residential zone and the proposed development is permitted with consent within the zone. The proposed single dwelling development consists of residential alterations and additions, including an enlarged ground floor addition and minor increase to the upper floor area that is of a bulk and scale consistent with the existing and desired future character of the locality.

Furthermore, the site is of sufficient land size to enable the proposed development, whilst minimising the impact to neighbouring properties.

The site is located within an established residential area with good connectivity to a range of services and facilities. The site is within a Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW. The site is also flood prone, however risks can be sufficiently managed in this regard and the site is not subject to any other known risk or hazard that would render it unsuitable for the proposed development.

### **5.8 Any submissions made in accordance with this Act or the regulations**

The application was publicly notified and no submissions were received.

### **5.9 The public interest**

The proposed development is consistent with the aims and design parameters contained in the NLEP 2012 and the NDCP 2012 and other relevant Environmental Planning Instruments discussed within this report. The development is consistent with the objectives of the R2 Low Density Residential zone.

The proposed development will not have an adverse impact on the natural or built environments and will not result in any significant impacts on the amenity of adjacent properties or the streetscape. The proposed development is in the public interest as it

provides for modernised low-impact residential accommodation within an established residential area.

The development is satisfactory having regard to the principles of ecologically sustainable development and will not result in any disturbance of any endangered flora or fauna habitat or otherwise adversely impact on the natural environment.

The development is in the public interest and will allow for the orderly and economic development of the site.

## **6.0 CONCLUSION**

The proposal is acceptable against the relevant heads of consideration under section 4.15(1) of the EP&A Act and is supported on the basis that the recommended conditions in **Attachment B** are included in any consent issued.

## **ATTACHMENTS**

- |                      |  |
|----------------------|--|
| <b>Attachment A:</b> | Submitted Plans - 44 Young Street, Carrington                                      |
| <b>Attachment B:</b> | Draft Schedule of Conditions - 44 Young Street, Carrington                         |
| <b>Attachment C:</b> | Processing Chronology - 44 Young Street, Carrington                                |
| <b>Attachment D:</b> | Clause 4.6 written exception to development standard - 44 Young Street, Carrington |
| <b>Attachment E:</b> | General Terms of Approval - Subsidence Advisory NSW - 44 Young Street, Carrington  |

**Attachments A - E distributed under separate cover**

## 7.2. 134 KING STREET NEWCASTLE - PARTIAL DEMOLITION AND REFURBISHMENT OF AN EXISTING COMMERCIAL BUILDING, INCLUDING TWO ADDITIONAL LEVELS - DA2023/00082

**APPLICANT:** AUSTRALIAN UNITY LIMITED  
**OWNER:** THE TRUST COMPANY (AUSTRALIA) LIMITED  
**REPORT BY:** PLANNING & ENVIRONMENT  
**CONTACT:** EXECUTIVE DIRECTOR PLANNING & ENVIRONMENT / ACTING EXECUTIVE MANAGER, PLANNING, TRANSPORT & REGULATION

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### PART I

#### PURPOSE

An application has been received seeking consent for partial demolition and refurbishment of an existing commercial building, including two additional levels on land known as 134 King Street, Newcastle. The cost of works is valued at \$2,966,997.

The submitted application was assigned to Principal Development Officer, William Toose for assessment.

The application is referred to the Development Applications Committee (DAC) for determination, due to the proposed variation to the floor space ratio development standard of the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation.



**Subject Land: 134 King Street Newcastle**

A copy of the plans for the proposed development is at **Attachment A**.

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and no submissions have been received in response.

#### Key issues

- 1) The proposed development does not comply with the height of buildings development standard of 24m under NLEP 2012. The proposed height of the building is 24.25m (top of roof) and 25.84m (including lift overrun and plant deck). This equates to a 1% and 7.6% variation, respectively, to the height of buildings development standard.

- 2) The proposed development does not comply with the Floor Space Ratio (FSR) development standard of 3:1 under NLEP 2012. The proposed development has a FSR of 5:1 (2,947m<sup>2</sup>) which equates to a 50% variation to the FSR development standard. It is noted that the existing building has a FSR of 3.6:1 (2,093m<sup>2</sup>), which does not comply with the FSR development standard.

## Conclusion

The proposed development has been assessed having regard to the relevant heads of consideration under section 4.15(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is considered to be acceptable subject to compliance with appropriate conditions.

## RECOMMENDATION

- A. That the DAC note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.3 Height of buildings, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.3 and the objectives for development within the MU1 Mixed Use zone in which the development is proposed to be carried out; and
- B. That the DAC note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.4 Floor Space Ratio, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.4 and the objectives for development within the MU1 Mixed Use zone in which the development is proposed to be carried out; and
- C. That DA2023/00082 for alteration and additions, including two additional floors of commercial floor space to the existing building at 134 King Street, Newcastle be approved, and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**.

## Political Donation / Gift Declaration

Section 10.4 of the *Environmental Planning and Assessment Act 1979* requires a person to disclose "*reportable political donations and gifts made by any person with a financial interest*" in the application within the period commencing two years before the application is made and ending when the application is determined. The following information is to be included on the statement:

- a) all reportable political donations made to any local Councillor of Council; and
- b) all gifts made to any local Councillor or employee of that Council.

The applicant has answered No to the following question on the application form: *Have you, or are you aware of any person having a financial interest in the application, made*

*a 'reportable donation' or 'gift' to a Councillor or Council employee within a two-year period before the date of this application?*

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## **PART II**

### **1.0 THE SUBJECT SITE AND APPLICATION HISTORY**

#### **1.1 Site details**

The subject site has a street address of 134 King Street, Newcastle, comprising Lot 1 DP 798865. The site has a total area of approximately 588m<sup>2</sup> and is a corner lot with an approximate frontage of 27.4m to King Street and 21.4m to Perkins Street.

The site currently contains a four-storey commercial building with several tenancies across a total of 2,093m<sup>2</sup> floor space, a rooftop meeting room / terrace, and basement car parking comprising 19 spaces accessed off Perkins Street.

Prior to the current building on site, the subject site was occupied by the Newcastle RSL Club, which was demolished following the 1989 Newcastle Earthquake.

Adjoining the site to the north and west are two storey commercial buildings (food and drink premises and retail premises). On the opposite side of King Street, to the south of the site, is a four-story commercial building. On the opposite side of Perkins Street, to the east of the site, is a 10-story mixed use development which forms part of Stage 1 of Iris' East End development.

#### **1.2 Relevant development history**

On 29 June 2022, a Pre-Development Application (PR2022/00065) and Urban Design Review Panel meeting (UD2022/00018) was held to seek preliminary comments on the proposal. The architectural design and supporting documentation were amended in response to the minutes from that meeting.

During the assessment process, the development application was formally referred to the UDRP a further two times, at meetings held on 6 April 2023 and 3 August 2023. In response to the advice from the UDRP meetings, an amended application to resolve minor concerns was formally submitted 9 August 2023.

The UDRP reviewed the development proposal for a third time via an electronic referral in response to the advice received via email. As such, the development application has now satisfied the UDRP advice and is considered to achieve design excellence.

### **2.0 THE PROPOSAL**

The proposal is for alterations and additions to the existing commercial building, including the addition of two floors of office space. More specifically, the proposed additions include the following:

FLOOR LEVEL	USE
Basement	Car parking (19 spaces)
Ground floor	Retail premises (165m <sup>2</sup> )
	Retail premises (117m <sup>2</sup> )
	Lobby
	End of trip facilities
Level 1	Commercial premises (Co-working)
Level 2	Commercial premises
Level 3	Commercial premises
Level 4	Commercial premises
	Outdoor terrace area
Level 5	Commercial premises
	Lobby
	Boardroom
	Enclosed communal area
	Outdoor communal area

### 3.0 PUBLIC NOTIFICATION

The application was publicly notified in accordance with CN's Community Participation Plan.

No submissions were received as a result of the notification process.

### 4.0 INTEGRATED DEVELOPMENT

The proposal is integrated development pursuant to Section 4.46 of the *Environmental Planning & Assessment Act 1979* (EP&A Act) as approval is required from the Subsidence Advisory NSW under s.22 *Coal Mine Subsidence Compensation Act 2017*, to erect improvements within a mine subsidence district.

Subsidence Advisory NSW granted General Terms of Approval on 21 February 2023 which included several conditions. The General Terms of Approval have been incorporated into the recommended conditions of consent (refer to **Attachment B**).

## 5.0 PLANNING ASSESSMENT

The application has been assessed having regard to the relevant matters for consideration under the provisions of section 4.15(1) of the EP&A Act, as detailed hereunder.

### 5.1 Provisions of any environmental planning instrument

#### **State Environmental Planning Policy (Resilience and Hazards) 2021**

##### Chapter 2: Coastal Management

The site is located within a mapped Coastal Use Area. Therefore, the SEPP R&H is applicable to the development. Section 2.10(1) & (2) – '*Development on land within the coastal environment area*' of the SEPP includes broad provisions addressing the protection of coastal values within a 500-metre-wide area.

Section 2.10(1) & (2) provides that development consent must not be granted to development on land that is within the coastal environment area unless the consent authority is satisfied that the proposed development will not cause an adverse impact on: the integrity and resilience of the biophysical, ecological and hydrological environment, including surface and groundwater; coastal environmental values and processes; water quality of any sensitive coastal lakes; marine vegetation, native vegetation and fauna and their habitats; existing public open space and access to and along the foreshore; and Aboriginal cultural heritage.

The development is located upon highly disturbed land and has been commercially used for many decades with the entire site covered hardstand and including existing buildings. It is considered that the current proposal will have no likely impacts on the coastal environment area under the SEPP and is acceptable particularly in relation to the biophysical environment and coastal processes and maintaining public access to the foreshore.

The proposal will have no material impact on environmental, coastal, native vegetation, surf zone or access issues listed above. Similarly, the long historic usage of the site for commercial uses, plus its highly disturbed nature, leaves negligible coastal attributes remaining as part of the subject site. The proposal has been assessed in terms of Aboriginal heritage and archaeological aspects and is acceptable. The proposal is acceptable having regard to the requirements of the SEPP.

##### Chapter 4: Remediation of Land

The provisions of Chapter 4 of SEPP R&H have been considered in the assessment of the development application. Section 4.6 requires consent authorities to consider whether the land is contaminated, and if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out.

The site is not identified on the Council's land contamination register and there is no history of past contaminating uses. The site is considered suitable for the proposed development and a contaminated land investigation is not warranted in this instance.

### **Newcastle Local Environmental Plan 2012 (NLEP 2012)**

The following summarises an assessment of the proposal against the provisions of the NLEP 2012 that are primarily relevant to the proposed development:

#### Clause 2.1 - Land Use Zones

The subject property is located within the MU1 Mixed Use zone under NLEP 2012.

The proposal is permitted with consent within the MU1 Mixed Use zone under Clause 2.3 as '*commercial premises*'.

The proposal is consistent with the zone objectives, which are:

- i) *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- ii) *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- iii) *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- iv) *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- v) *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

The proposed development will provide increased commercial floor space in Newcastle City Centre and incorporate active ground floor retail premises accessed from Perkins Street and King Street. The subject site is well located within the city centre, with excellent access to public transport, Hunter Street, and the Honeysuckle precinct which will likely encourage walking and cycling.

The site is located in the Newcastle City Centre, which is identified in both regional and local planning strategies as the major city centre for the Hunter Valley under the established centres hierarchy. The scale of the development is compatible with surrounding developments in the area and is consistent with regional strategies and plans, for higher density buildings around key public transport nodes.

The application is consistent with objectives of the MU1 Mixed use zone and with the desired future character of the area.



### Clause 2.7 - Demolition Requires Development Consent

The proposal includes the partial demolition of the existing commercial building.

Conditions are recommended to require that demolition works, and the disposal of material is managed appropriately and in accordance with relevant standards.

### Clause 4.3 - Height of Buildings

Under the NLEP 2012 the site has a maximum height of 24m.

The proposed development does not comply with the height of buildings development standard of 24m under NLEP 2012.

The proposed development will result in a maximum height of 24.25m (top of roof) and 25.84m (including lift overrun and plant deck), equating to an exceedance of between 0.25m and 1.84m, or 1% to 7.6% variation above the height of buildings development standard for the subject land.

The applicant has submitted a clause 4.6 variation request to this standard. Refer to discussion under Clause 4.6 Exceptions to Development Standards below.

### Clause 4.4 - Floor Space Ratio

Under the NLEP 2012, the site has a FSR development standard of 3:1.

The existing building currently has a FSR of 3.6:1 (i.e., 2,093m<sup>2</sup> of Gross Floor Area), which does not comply with the FSR development standard.

The proposed development has an FSR of 5:1 (i.e., 2,947m<sup>2</sup> of Gross Floor Area) which equates to a 50% variation to the FSR development standard. The proposed development represents an overall increase of 854m<sup>2</sup> of Gross Floor Area for the site.

The applicant has submitted a clause 4.6 variation request to this standard. Refer to discussion under Clause 4.6 Exceptions to Development Standards below.

### Clause 4.6 - Exceptions to Development Standards

Clause 4.6 of the NLEP 2012 allows the consent authority to provide an appropriate degree of flexibility in applying certain development standards, where flexibility would achieve a better outcome.

The proposed development involves two clause 4.6 variation requests:

- i) Clause 4.3 –Height of buildings of NLEP 2012
- ii) Clause 4.4 - Floor Space Ratio of NLEP 2012

An assessment of the Applicant's Clause 4.6 Variation Request to the height of

building and FSR development standards is provided below.

The provisions of Clause 4.6 relevant to the assessment of the Applicant's variation request are as follows:

- 1) *The objectives of this clause are as follows:*
  - a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development,*
  - b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- 2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- 3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
  - a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
  - b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- 4) *Development consent must not be granted for development that contravenes a development standard unless:*
  - a) *the consent authority is satisfied that:*
    - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
    - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
  - b) *the concurrence of the Secretary has been obtained.*
- 5) *In deciding whether to grant concurrence, the Secretary must consider:*
  - a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*

- b) *the public benefit of maintaining the development standard, and*
- c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

Clause 4.6 Variation Request to Clause 4.3 - Height of buildings

**Clause 4.6(2) – is the provision to be varied a development standard? And is the development standard excluded from the operation of the Clause?**

The development application does not seek to vary any of the development standards excluded from the operation of Clause 4.6 of the NLEP 2012. Accordingly, pursuant to Clause 4.6 it is open to the Applicant to make a written request seeking to justify the contravention of the building height development standard by demonstrating that compliance with the standard is unreasonable or unnecessary.

What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012.

What is the zoning of the land?

NLEP 2012 identifies that the site is within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are as follows:

- i) *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- ii) *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- iii) *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- iv) *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- v) *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

Is the standard to be varied a development standard?

The Height of buildings development standard contained in NLEP 2012 is consistent with the definition of development standards under section 1.4 of the *Environmental Planning & Assessment Act, 1979* ('EPA Act') and is not a prohibition.

What are the objectives of the development standard?

The objectives of Clause 4.3 – Height of buildings are as follows:

- a) *to ensure the scale of development makes a positive contribution towards the desired built form, consistent with the established centres hierarchy, and*
- b) *to allow reasonable daylight access to all developments and the public domain.*

What is the proposed numeric value of the variations proposed to the development standard?

The numeric value of the proposed development and percentage variation is detailed in the following table.

LEP Clause	Development Standard	Proposal	Variation
Clause 4.3 – Building Height	24m	25.84 (top of lift overrun)	1.84m, or 7.6%.

Clause 4.6 (3)(a) – has the applicant submitted a written request that seeks to justify contravention of the development standard by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

In the Land and Environment Court Judgement of *Wehbe vs Pittwater Council [2007] NSW LEC 827*, (‘the *Wehbe* judgement’) Chief Justice Preston outlined the rationale for varying development standards and the circumstances under which strict compliance with them may be considered unreasonable or unnecessary.

In this judgment, Preston CJ established five circumstances in which it could be reasonably argued that the strict application of a development standard would be unreasonable and/or unnecessary. These are as follows:

- 1) *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives?*
- 2) *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary?*
- 3) *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?*
- 4) *Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable?*
- 5) *Is the “zoning of particular land” unreasonable or inappropriate so that a*

*development standard appropriate for that zoning also unreasonable or unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.'*

The submitted Clause 4.6 - Exception to a development standard request to vary the height of building development standard seeks to rely on the first *Wehbe* consideration to demonstrate that compliance with the development standard is unreasonable and unnecessary, stating that that the objectives of the development standards are achieved notwithstanding non-compliance.

The Applicant submits that the development is consistent with the objectives of Clause 4.3 for the following reasons:

- a) *"The proposed development, including with minor variation in height, makes a contribution towards the desired built form and is consistent with the established hierarchy.*
- b) *The proposed development including with additional height ensures reasonable daylight access to all developments and the public domain".*

Comment:

The applicant's Clause 4.6 variation request has demonstrated that the proposal meets the objectives of the height of buildings development standard. It is considered that requiring compliance with the development standard is unreasonable and unnecessary in this instance and that the proposed variation, as submitted, is in the public interest in terms of the height of buildings development standard objectives.

Similarly, it is considered that the proposed variation is in the public interest as the applicant's Clause 4.6 variation request has demonstrated that the zone objectives have otherwise been met.

**Clause 4.6(3)(b) – that there are sufficient environmental planning grounds to justify contravening the development standard.**

The Applicant submits that the proposed variation to the building height development standard will not adversely and unreasonably affect the amenity of the surrounding sites and the public domain, regarding the following:

- i) *"The building projection above the height limit mostly relates to the lift overrun / rooftop plant, rather than any additional internal floor space.*
- ii) *The height exceedance above the main roof line encompasses only approximately 17% of the site area.*
- iii) *The exceedance will not result in any adverse or overbearing visual impact, will barely be perceptible (if at all) from a pedestrian perspective, and will have minimal impact on surrounding development or the public domain.*

- iv) *The development is of a built form that reflects the ongoing emergence of a higher-density urban environment and overall urban renewal within Newcastle.*
- v) *The surrounding urban context contains sites with higher design controls as well as recent development that have exceeded controls and will be at similar or higher points in the city scape than is proposed with this development. When considered against the other approved buildings in the vicinity, the variation will not be noticeable, nor will the overall building design look out of place because of the variation.*
- vi) *An urban design review process has been undertaken with CN's Urban design review Panel to inform the overall architectural design, including built form, setbacks, materiality, and massing for the site".*

### Comment

The applicant's Clause 4.6 request is made on several grounds which include the limited extent of the impacts (e.g., overshadowing, amenity, view loss) resulting from the proposal, the design-based outcome achieved in this instance, lack of impacts on adjoining developments and meeting the strategic planning outcomes of the Newcastle City Centre.

In this respect, it has been assessed and determined that the Applicant's written request has demonstrated that the proposed building height variation does not result in significant adverse environmental impacts and that there are sufficient environmental planning grounds to justify a contravention to the development standard.

**Clause 4.6(4)(a)(i) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

It is concluded that the Applicant's Clause.4.6 variation request has satisfied the relevant tests under this clause.

**Clause 4.6(4)(a)(ii) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.**

The consent authority must be satisfied when assessing a Clause 4.6 variation, that the proposed development, and its associated Clause 4.6 variation are in the public interest by being consistent with the objectives of the development standard.

The applicant's Clause 4.6 variation request, as assessed above, has demonstrated that the proposal meets the objectives of the height of buildings development standard.

It is considered that requiring compliance with the development standard is unreasonable and unnecessary in this instance and that the proposed variation, as submitted, is in the public interest in terms of the height of buildings development standard objectives. Similarly, it is considered that the proposed variations are in the public interest as the applicant's Clause 4.6 variation requests have demonstrated that the zone objectives have otherwise been met.

The Clause 4.6 variation request is accepted based on the first limb Wehbe as discussed above in terms of cl4.6(3)(a). As such, the proposed development is in the public interest because it is consistent with the objectives of the relevant standard and the objectives for development within the relevant zone. Therefore, the test of Sub-clause .4.6(4)(a)(ii) of the NLEP 2012 is satisfied.

**Clause 4.6(4)(b) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the concurrence of the Planning Secretary has been obtained.**

The Secretary's concurrence to the exception to the height of buildings development standard, as required by Sub-clause 4.6(4)(b) of NLEP 2012, is assumed, as per Department of Planning Circular PS20-002 of 5 May 2020).

The proposed exception to the Height of buildings development standard of NLEP 2012 is an acceptable planning outcome and, in this instance, requiring strict compliance would be unreasonable and unnecessary. The proposed variation to the development standard does not cause any undue adverse environmental impacts, including impacts on neighbouring properties, in terms of overshadowing and visual privacy.

Given the above, it is concluded that the Applicant has sufficiently demonstrated that requiring strict numerical compliance with the development standard would be unreasonable and unnecessary as the proposal already achieves the underling objectives notwithstanding the numerical non-compliance.

#### Conclusion - Variation to Clause 4.3 Building Height

As demonstrated within the Applicant's written request by the assessment above, compliance with the development standard is considered unreasonable and unnecessary in the circumstances. There are sufficient environmental planning grounds to justify the contravention; and the proposed development will be in the public interest because it is consistent with the objectives of the zone and the Height of buildings development standard.

If made to strictly comply with Clause 4.3, there would be no additional benefit to the streetscape or public domain. Strict compliance with Clause 4.3 of the NLEP 2012 is therefore considered unreasonable and unnecessary.

The proposed height of the development is of a built form and scale that is compatible with the surrounding built environment and recent developments within the area. It is considered that it will have minimal adverse amenity impacts in terms of visual

dominance, overshadowing and view loss. As such, it is considered that the height of the development is acceptable.

Clause 4.6 Variation to Clause 4.4 Floor space ratio

**Clause 4.6(2) – is the provision to be varied a development standard? And is the development standard excluded from the operation of the Clause?**

The development application does not seek to vary any of the development standards excluded from the operation of Clause 4.6 of the NLEP 2012. Accordingly, pursuant to Clause 4.6 it is open to the Applicant to make a written request seeking to justify the contravention of the building height development standard by demonstrating that compliance with the standard is unreasonable or unnecessary.

What is the name of the environmental planning instrument that applies to the land?

Newcastle Local Environmental Plan 2012.

What is the zoning of the land?

NLEP 2012 identifies that the site is within the MU1 Mixed Use zone.

The objectives of the MU1 Mixed Use zone are as follows:

- i) *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- ii) *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- iii) *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- iv) *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- v) *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

Is the standard to be varied a development standard?

The Floor space ratio development standard contained in NLEP 2012 is consistent with the definition of development standards under section 1.4 of EPA Act and is not a prohibition.



What are the objectives of the development standard?

The objectives of Clause 4.4 – Floor Space Ratio are as follows:

- a) *to provide an appropriate density of development consistent with the established centres hierarchy,*
- b) *to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

What is the numeric value of the development standard in the environmental planning instrument?

Under the NLEP 2012, the site has a FSR development standard of 3:1.

What is the proposed numeric value of the development standard in your development application?

The proposed development has a FSR of 5:1 (2,947m<sup>2</sup>) which equates to a 50% variation to the FSR development standard.

**Clause 4.6 (3)(a) – has the applicant submitted a written request that seeks to justify contravention of the development standard by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?**

As outlined above, in the Land and Environment Court Judgement of *Wehbe vs Pittwater Council* [2007] NSW LEC 827, ('the Wehbe judgement') Chief Justice Preston outlined the rationale for varying development standards and the circumstances under which strict compliance with them may be considered unreasonable or unnecessary.

The submitted Clause 4.6 Exception to a development standard request to vary the building separation development standard seeks to rely on the first Wehbe consideration to demonstrate that compliance with the development standard is unreasonable and unnecessary, stating that that the objectives of the development standards are achieved notwithstanding non-compliance.

- a) *"It is intended that FSR's throughout the Newcastle City Centre be to a higher density, consistent with urban consolidation objectives. The proposed additional FSR sought for the subject site is consistent with this objective and is specifically appropriate because it allows a built form more consistent with that nearby.*
- b) *The proposed additional floor space will ensure density, bulk, and scale more consistent with the surrounding locality".*

Comment:

The Applicant's written request is considered to satisfy the requirements of Sub-clause 4.6(3)(a) and the first Wehbe consideration in demonstrating that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case, as the objectives of the development standard are achieved notwithstanding non-compliance.

It is considered that requiring compliance with the development standard is unreasonable and unnecessary in this instance and that the proposed variation, as submitted, is in the public interest in terms of the FSR development standard objectives.

Similarly, it is considered that the proposed variations are in the public interest as the applicants Clause 4.6 variation requests have demonstrated that the zone objectives have otherwise been met.

**Clause 4.6(3)(b) – that there are sufficient environmental planning grounds to justify contravening the development standard.**

The Applicant submits that the proposed variation to the FSR development standard will not adversely and unreasonably affect the amenity of the surrounding sites and the public domain, with regard to the following:

*"The proposed commercial premises including with additional floor space represents an opportunity to make a significant improvement to the public realm and contribution to the revitalisation of the city centre. The development will satisfy the desired, co-ordinated and integrated transformation of the east end of the Newcastle City Centre.*

*The proposed commercial premises, inclusive of the increased FSR, will provide considerable employment opportunities throughout both the construction and operational phases of the development.*

*The proposed building, in particular with the proposed additional floor space, will contribute to building design excellence appropriate to a regional city by providing a form and density of development that is consistent with the character of the locality.*

*The proposed development including with additional FSR is not inconsistent with this objective. In particular, the commercial premises contributes to the economic and social sustainability of the Newcastle City Centre through the provision of employment opportunities.*

*It is intended that FSR's throughout the Newcastle City Centre be to a higher density, consistent with urban consolidation objectives. The proposed additional FSR sought for the subject site is consistent with this objective and is specifically appropriate because it allows a built form more consistent with that nearby.*

*The proposed additional floor space will ensure density, bulk, and scale more consistent with the surrounding locality".*

Comment:

The Applicant's written request is considered to satisfy the requirements of Sub-clause 4.6(3)(b). In this respect, it has been assessed and determined that the Applicant's written request has demonstrated that the proposed FSR variation does not result in significant adverse environmental impacts and that there are sufficient environmental planning grounds to justify a contravention to the development standard.

**Clause 4.6(4)(a)(i) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

It is concluded that the Applicant's Clause.4.6 variation request has satisfied the relevant tests under this clause.

**Clause 4.6(4)(a)(ii) – Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.**

The Applicant's clause 4.6 variation request, as assessed above, has demonstrated that the proposal meets the objectives of Clause 4.4 of the NLEP 2012.

Requiring compliance with the FSR development standard is unnecessary in this instance and that the proposed variations, as submitted, are considered to be in the public interest in terms of the objectives of the Newcastle City Centre under which development standard operates. Similarly, it is considered that the proposed variations are in the public interest as the applicant's clause 4.6 variation requests have demonstrated that the zone objectives have otherwise been met.

The clause 4.6 variation request is accepted on the basis of the first limb Wehbe as discussed above in terms of Clause 4.6(3)(a). The design has responded to the UDRP advice and is considered consistent with the objectives and design guidance provided in the relevant planning controls.

Conclusion - Variation to Clause 4.4 Floor Space Ratio

As demonstrated within the Applicant's written request by the assessment above, compliance with the development standard is considered unreasonable and unnecessary in the circumstances. There are sufficient environmental planning grounds to justify the contravention; and the proposed development will be in the public interest because it is consistent with the objectives of the zone and the Floor Space Ratio development standard.

If made to strictly comply with Clause 4.4, there would be no additional benefit to the streetscape or public domain. Strict compliance with Clause 4.4 of the NLEP 2012 is therefore considered unreasonable and unnecessary.

The proposed density of the development is of a built form and scale that is compatible with the surrounding built environment and recent developments within the area. It is considered that it will have minimal adverse amenity impacts in terms of visual dominance and overshadowing. As such, it is considered that the FSR of the development is acceptable.

#### Clause 5.10 - Heritage Conservation

The subject site is identified as being located in the Newcastle City Centre Heritage Conservation Area on the Newcastle LEP 2012. The site is also identified as a 'neutral building' within the Newcastle City Centre Heritage Conservation Area.

The site is in the vicinity of a State Heritage Register item, Victoria Theatre (former), located at 8-10 Perkins Street, and a number of other local heritage items including the Crown & Anchor Hotel (item I410), Former David Jones (commercial building) (item I407), Retaining Walls with Sandstone Steps (item I477), Former Volunteer Fire Station (item I424), Ireland Bond Store (item I425), Former Primitive Methodist Manse (item I445), Central Hall (item I426), and Former Wool Exchange (item I427).

The existing building is built to the site boundaries on all sides, which is commonplace for commercial buildings within the inner city. The proposed upper storey additions are set back from the existing facade to articulate and differentiate the 'old' from 'new', reduce visual impact, bulk and scale and obtain views across to the Hunter River and Stockton.

Materials consisting of natural and warm colours have been selected which will sit comfortably with the nearby heritage items. The materials themselves are still modern, so that the building may be interpreted appropriately in its context.

The proposed works will not encroach any further towards the curtilage of nearby listed heritage items, than that which currently exists. The heritage significance of those items will not be further reduced or impacted by the proposed alterations and additions.

Furthermore, given the highly disturbed nature of the site, it is unlikely that the site contains any items of Aboriginal heritage significance.

#### Clause 6.1 – Acid Sulfate Soils

No works are required below the natural ground surface to accommodate the proposed alterations and additions. As such, the proposal will have no impact on acid sulfate soils.

### Clause 6.2 - Earthworks

No earthworks are required to accommodate the proposed alterations and additions.

### Part 7 Additional Local Provisions—Newcastle City Centre

The site is located within the Newcastle City Centre. There are a number of requirements and objectives for development within the City Centre, which includes promoting the economic revitalisation of the City Centre, facilitating design excellence and protecting the natural and cultural heritage of Newcastle. The proposal is considered to be consistent with the objectives of Part 7 of the NLEP 2012.

### Clause 7.1 – Objectives of Part, and Clause 7.2 Land to which this Part applies:

Part 7 of the NLEP 2012 contains additional locality specific provisions for development on land located within the Newcastle City Centre.

The subject site is included within the Newcastle City Centre as shown on the '*Newcastle City Centre Map*'. In accordance with Clause 7.2, the provisions of Part 7 of the NLEP 2012 therefore apply to the Subject Application.

The proposed development is consistent with the objectives of Part 7, which include promoting the economic revitalisation of the Newcastle City Centre, facilitating design excellence, and protecting the natural and cultural heritage of Newcastle.

The site is located within the Newcastle City Centre. There are a number of requirements and objectives for development within the City Centre, which includes promoting the economic revitalisation of the City Centre, facilitating design excellence and protecting the natural and cultural heritage of Newcastle. The proposal is considered to be consistent with the objectives of Part 7 of the NLEP 2012.

### Clause 7.5 - Design Excellence

Clause 7.5 applies to the erection of a new building or to significant alterations to a building and states that a consent authority must not grant consent to development within the Newcastle City Centre unless the development exhibits design excellence.

The proposal does not generate a requirement to undertake an architectural design competition in accordance with this clause, as the height of the proposed building is not greater than 48m and the site is not identified as a key site.

The subject application seeks development consent for alterations and additions which in the opinion of the consent authority are significant, and therefore the provisions of Clause 7.5 apply. Clause 7.5(3) provides several matters that the consent authority must consider in deciding whether to grant consent on land to which the design excellence provisions apply.

The proposed development is considered to deliver 'design excellence' and is of a high standard of architectural quality, having regard to the design excellence

considerations provided in Clause 7.5(3) of the NLEP 2012. This finding was further confirmed by CN's Urban Design Review Panel (UDRP) who provided full support for the subject application.

On 29 June 2022, a Pre-Development Application (PR2022/00065) and Urban Design Review Panel meeting (UD2022/00018) was held to seek preliminary comments on the proposal. The architectural design and supporting documentation were amended in response to the minutes from that meeting.

The UDRP reviewed the development proposal on three occasions. The plans were subsequently amended in line with the recommendations from the Panel. It is considered that the amended plans have adequately addressed the recommendations of the UDRP and it is considered that the proposal achieves design excellence and therefore satisfies the design excellence criteria.

An assessment of the development under the relevant design principles, including UDRP comments, is provided below.

**Table 1: Consideration of the UDRP advice in relation to design quality principles**

Design Quality Principles
<b>Principle 1. Context and Neighbourhood Character</b>
<p><b><u>UDRP Comment:</u></b></p> <p><i>"The site located at the northwest corner of King and Perkins Streets Newcastle is within a context of substantial urban renewal including Stage 1 of Newcastle East Village to the opposite side of Perkins Street. Adjacent sites in Perkins Street include two small commercial buildings separating the subject site from the currently vacant Victoria Theatre, the subject of planned restoration. To the west in King Street is a two storey Federation period retail building and a Mid- 20th Century three storey office /retail building. Sites to the southern side of King Street have early to Mid- 20th Century buildings adapted largely for retail/office and dining venues. These include notable historic buildings.</i></p> <p><i>The overall setting is of varied two to five storey buildings, some with later setback roof top additions. The 11-storey corner building of Newcastle East Village on the opposite side of Perkins Street has established a substantially increased height regime mitigated by a high standard of articulation. Other aspects of urban renewal make this a well-positioned site, providing office accommodation in a recent but unremarkable structure. The building provides opportunity to provide a positive contribution to the rapidly changing setting".</i></p> <p><b><u>Officer Comment:</u></b></p> <p>Noted. The built-form and scale of the proposed development is consistent with the desired future character and the objectives of NLEP 2012 and NDCP 2012.</p>

**Principle 2. Built Form and Scale****UDRP Comment:**

*"The Panel agreed that the existing building presents a base which is of sufficient scale and form to accommodate the proposed additional two floors, noting that the proposed development has avoided a 50/50 split between new and old which would have provided an uncomfortable and top-heavy visual relationship".*

**Officer Comment:**

The amended design has adopted the Panel's recommendation of integrating Level 4 and 5 into overall building design, while also having a consistent style for both levels. During the assessment process, and subsequent review of precedents, the design of the Level 4 and 5 facade has been amended to provide a consistent design for both levels. This has been achieved through the introduction of aluminum blades to link the window and facade forms of Level 2 and 3 to the new additional levels.

The proposed development results in a minor height exceedance, however, this is considered appropriate in order to achieve suitable floor to floor heights of 3.6m for Level 4, and 4m for Level 5. The floor-to-floor heights are above the required minimum, however, this was supported by the Panel to increase amenity and allow flexibility for future uses.

The overall height of the building represents a transition from the lower buildings to the west of the site, up to the higher buildings within the East End precinct. The proposal provides a built form that helps define the public domain, contribute to the streetscape, and provides a high level of internal amenity and outlook for users.

**Principle 3. Density****UDRP Comment:**

*"The Panel considers the proposed numeric density acceptable".*

**Officer Comment:**

The proposal results in a density that is considered appropriate to the site and its emerging context. The proposed development will result in the provision of additional commercial opportunities within the City Centre with access to public transport, community infrastructure, and services. The amended proposal has addressed the Panel's recommendations and is considered acceptable.

**Principle 4. Sustainability****UDRP Comment:**

*"The Panel acknowledged the provision of solar panels on the roof and the applicant suggested there was potential to accommodate electric scooters and bicycles".*

**Officer Comment:**

In addition to the above, the existing awning is proposed to be retained and refurbished, rather than replaced. While the awning is not to be replaced, the proposed refurbishment includes skylights inserted into the awning roof to improve light to the Perkins Street footpath.

The amended proposal has addressed the UDRP's concerns and is considered acceptable.

**Principle 5. Landscape****UDRP Comment:**

*"No comment".*

**Officer Comment:**

Due to the retention of the existing building, which is built to the site's boundaries, the incorporation of significant landscaping on site is unachievable. However, to accommodate partial landscaping a low-maintenance planter box will be provided to the proposed communal outdoor area located on level 5 of the development.

The proposed alterations and additions will also have no impact on the existing street tree plantings along King Street or Perkins Street in the vicinity of the site.

**Principle 6. Amenity****UDRP Comment:**

*"Users of the refurbished office floors will combine traditional commercial premises and new co-working spaces given the close proximity to other services and the number of nearby apartments where space limits opportunity for working from home. The applicant advised that there is potential to secure a chemist shop and a restaurant (in the future) which would activate the current 'blank' street frontages.*

*In summary the Panel considered the proposed mix of uses a positive contribution to the amenity of the setting and streetscape presentation of the building".*

**Officer Comment:**

Staff facilities include a boardroom and enclosed communal meeting area, plus a north-facing communal outdoor area. The north-south orientation maximises the outlook along Perkins Street and allows for a southern outlook as suggested by the Panel.

End of trip facilities, including bike storage and showers have been provided to the satisfaction of the Panel.

The amended proposal has addressed the UDRP's concerns and is considered acceptable.

**Principle 7. Safety**



**UDRP Comment:**

*"End of trip facilities have good surveillance and limited/ control access".*

**Officer Comment:**

The proposed end of trip facilities will have an external door linking to Perkins Street, and an internal door linked to the entry foyer. Both of these doors will have secure access control, limited to building occupants to maximise security of the area for users.

The amended proposal has addressed the UDRP's concerns and is considered acceptable.

**Principle 8. Housing Diversity and Social Interaction****UDRP Comment:**

*"Social interaction of workers is well provided, particularly on the ground floor and the top floors".*

**Officer Comment:**

Noted. The amended proposal has addressed the UDRP's concerns and is considered acceptable.

**Principle 9. Aesthetics****UDRP Comment:**

*"The upper frame and vertical columns should be recessed from the facade of the existing building. Alternately, the depth of these could be increased to add some 'gravitas' to the new works. The Panel supports removal of the projecting window bay to the corner of the existing top floor at Level 3.*

*The application has now been amended by removing the vertical blades from Levels 1 to 4 and by adding a horizontal capping to the existing parapet above Level 4.*

*The vertical blades on Levels 4 and 5 have now been behind the facade line, which reduces the bulk and roof area".*

**Officer Comment:**

The additional facade details have now been adopted and shown in the amended plans. The amended plans demonstrate a high standard of architectural design, materials and features appropriate to the building type and its location. The amendments included removing the vertical blades on the building base and reinforcing the vertical expression of the upper frame of the additions.

The amended proposal has addressed the UDRP's concerns and is considered acceptable.

**Recommendation****UDRP Comment**

*"The Panel considers the direction that the design had progressed was positive, and that the proposed development is heading in a direction that is capable of achieving Design Excellence*

*The remaining issues identified by the UDRP, have been satisfactorily addressed - and the UDRP is now able to confirm its support for the proposal as exhibiting design excellence."*

Officer comment:

It is considered that the proposed building has been sensitively designed using high quality composition of building elements, textures and materials, and colours, which respond to the setting and will contribute positively to the existing character of the street.

#### Clause 7.10A - Floor Space Ratio for Certain Other Development

Clause 4.4 of the NLEP 2012 prescribes a maximum FSR of 3:1 for the site, however Clause 7.10A of the NLEP 2012 provides additional provisions for certain land under 1,500m<sup>2</sup> in the Newcastle City Centre (which includes the subject site). Clause 7.10A also provides a FSR of 3:1 for the site and as such the prescribed FSR remains unchanged.

The proposed development has a FSR of 5:1, therefore exceeding the FSR prescribed for the site under Clause 7.10A. Refer to previous discussion under Clause 4.6 Exceptions to Development Standards.

#### **5.2 Any draft environmental planning instrument that is or has been placed on public exhibition.**

*Review of Clause 4.6 of the Standard Instrument LEP: Explanation of Intended Effect (EIE)*

The review of Clause 4.6 seeks to ensure that applications to vary development standards have a greater focus on the planning outcomes of the proposed development and are consistent with the strategic context of the site. The EIE was exhibited from the 31 March to 12 May 2021 and outlines those amendments to Clause 4.6 will include new criteria for consideration.

The proposed change would require the Applicant to demonstrate that a variation to a development standard 'is consistent with the objectives of the relevant development standard and land use zone and the contravention will result in an improved planning outcome when compared with what would have been achieved if the development standard was not contravened.'

For the purposes of Council's assessment, the public interest, environmental outcomes, social outcomes, or economic outcomes would need to be considered when assessing the improved planning outcome. The proposed development includes

two Clause 4.6 variation requests and are not inconsistent with the proposed changes to Clause 4.6 of the Standard Instrument and the NLEP 2012.

### **5.3 Any development control plan**

#### **Newcastle Development Control Plan 2012 (NDCP 2012)**

The DCP has been subject to a comprehensive review which has considered the relevance of current development controls, whether they reflect best practice guidelines, adopted land use strategies, and CN's priorities. The Newcastle Draft Development Control Plan 2023 is currently on exhibition from 28 September to 27 October 2023 and once adopted will replace the NDCP 2012.

The draft NDCP 2023 includes savings provisions to the following effect: 'NDCP 2023 does not apply to any development application lodged but not finally determined before its commencement. Any development application lodged before its commencement will be assessed in accordance with any previous development control plan (DCP).

Notwithstanding, as the draft is publicly exhibited, it has been considered within the assessment of this application below as a relevant matter for consideration.

The main planning requirements of relevance in the NDCP 2012, as it applied to the proposal at the time of lodgement, are discussed below.

#### Commercial Uses - Section 3.10

Ground floor retail tenancies are proposed on both frontages, with extensive glazing to provide visual connection with the streets. While the exact uses of these tenancies are not yet known, in combination with the revitalisation of the East End, these tenancies will see increased pedestrian activity which are ideally located to take advantage of public transport, services, retail, and increasing residential uses in the area.

The proposed development is considered to achieve the objectives and controls within this section of the NDCP 2012. These include activation of street frontages, promotion of uses that attract pedestrian traffic along street frontages for commercial and retail premises and compatibility with other development sites in the locality.

#### Mine Subsidence - Section 4.03

The site is located within a Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW.

#### Safety and Security - Section 4.04

The development achieves casual surveillance of the public domain, with limited opportunities for concealment within spaces. The layout includes multiple commercial premises which will encourage activity during business hours and potentially into the evening. Additionally, CCTV will also be utilised within the public domain areas,

driveways, lobbies and lift areas. Access to these areas will be via security swipe passes ensuring appropriate access control.

The proposal is adequate in relation to the provisions of Section 4.04 and Crime Prevention Through Environmental Design (CPTED).

#### Social Impact - Section 4.05

The development is consistent with the intended strategic planning outcomes for the Mixed-Use zone and the Newcastle City Centre. The proposed development will result in the provision of employment opportunities within the City Centre with access to public transport, employment opportunities, community infrastructure, education, and services.

The development will increase the working population in an inner-city location and lead to the activation of an existing underutilised site. The associated public domain improvements also contribute positively to the existing locality.

Redevelopment of this under-utilised site is a positive outcome socially. As such, the proposed development is acceptable in terms of the above section of NDCP 2012.

#### Aboriginal Heritage - Section 5.04

Reference to the Aboriginal Heritage Information Management System confirmed that there are no sites of Aboriginal significance recorded on the site.

#### Heritage Items - Section 5.05

This issue is discussed under Clause 5.10 Heritage of NLEP 2012.

#### Archaeological Management - Section 5.06

The site is not specifically listed in the Newcastle Archaeological Management Plan 1997 or NLEP 2012 as an '*Archaeological Site*'.

#### Heritage Conservation Areas - Section 5.07

This issue is discussed under Clause 5.10 Heritage of NLEP 2012.

#### Newcastle City Centre - Section 6.01

The proposal is consistent with this section of the DCP, having been designed in accordance with the Newcastle City Centre requirements and in consultation with CN's Urban Design Review Panel.

The proposed development is for alterations and additions to an existing commercial building that will maintain the historic fine grain building layout of the City Centre.

The proposed development is consistent with this principle, ensuring the predominant features of the existing building have been retained whilst increasing the scale of the development to be compatible with the emerging character of the East End.

### *General controls (6.01.03)*

#### *A1. Street wall heights*

The proposed development maintains the street wall height of the existing building on site. The proposed upper-level additions are set back from the street to reduce the bulk of the development when viewed from the street and ensure the existing character of the building is retained.

The proposed upper-floor setbacks and the overall proportions of the building are considered appropriate given the site's context and relationship with surrounding development in the City Centre.

#### *A2. Building setbacks*

There is no change to the existing building's setbacks, which are built to all boundaries. The proposed upper-level additions are set back from the street to reduce the bulk of the development when viewed from the street and ensure the existing character of the building is retained. The proposed additions above the existing street wall height are set back a minimum of 1.91m on the site's King Street frontage and a minimum of 1.89m on the site's Perkins Street frontage.

The proposed setbacks are acceptable as there are no adverse impacts in terms of overlooking, overshadowing, or streetscape appearance. The site is located within an area undergoing significant change, and it is considered that the proposed bulk is consistent with the character of the locality.

#### *A3. Building separation*

This part relates to the assessment of more than one building on the same site and does not apply to the subject development application.

#### *A4. Building depth and bulk*

This section of the DCP indicates that the maximum GFA per floor for a commercial building above street wall height is 1,200m<sup>2</sup>. Additionally, buildings above street wall height are to have a maximum building length of 50m.

The proposed development complies with the provisions of this section.

#### *A5. Building exteriors*

The material selection presents a high-quality design with materials and finishes that complement the surrounding buildings and the character of the area. A well-articulated built form differentiating between the base, middle and new floors is achieved. The

proposal has been the subject of review by CN's UDRP and the proposal is acceptable in terms of urban design outcomes.

#### *A6. Heritage buildings*

This part relates to the assessment or alteration work of listed heritage items and does not apply to the subject development application.

#### *A7. Awnings*

The proposed development includes the refurbishment of awnings over both King Street and Perkins Street frontages to provide protection for pedestrians from sun and rain. The refurbished awning includes skylights inserted into the awning roof to improve light and amenity to the Perkins Street footpath, which may be used as outdoor dining in the future.

#### *B1. Access networks*

The proposal includes active retail uses at the ground level on the King Street and Perkins Street promoting access and public use of the public footpath fronting the site.

The proposed development aligns with this section of the DCP through the provision of ground floor end of trip cycling infrastructure, which is integrated into the overall design of the development.

#### *B2. Views and vistas*

New development must protect the nominated views within the city centre and achieve equitable view sharing from adjacent development. The proposed development measures 0.25m (top of roof) and 1.84m (including lift overrun and plant deck) above the maximum building height prescribed for the site under the NLEP 2012. In addition, the proposal is also not located within 12m of any dwelling.

The proposed development will not unreasonably obscure any significant views or impact on any of the nominated views identified within this section of the NDCP 2012.

#### *B4. Addressing the street*

The proposal contributes to the safety, amenity, and quality of the public domain through the provision of pedestrian access to ground level commercial tenancies on King Street, whilst a separate vehicular and pedestrian access is provided on Perkins Street. Glazing is provided across a significant part of the street frontages, encouraging passive surveillance and activity.

#### *B5. Public artwork*

Under the NDCP public artwork is required to be provided where development is over 45m in height.

### *B6. Sun access to public spaces*

New development is required to be designed to ensure that reasonable sunlight access is provided to new and existing public spaces. The overshadowing impacts of the proposed development have been assessed and does not result in unreasonable overshadowing impacts to either existing or proposed public spaces. The shadow diagrams demonstrate that the proposed development allows reasonable daylight access to all surrounding developments and the public domain.

### *B7. Infrastructure*

The proposed development will connect to the existing water and sewer network services the subject site. The infrastructure controls specify compliance with the relevant controls under Section 7.06 Stormwater of the NDCP 2012.

### *B8. Site amalgamation*

The subject site is not located on former rail corridor land; accordingly, this section does not apply.

### Heritage Conservation Areas - Section 6.02

These matters were addressed under Clause 5.10 of the NLEP 2012 above. The proposed development is acceptable in terms of the above Section of the NDCP 2012.

### Landscape Open Space and Visual Amenity - Section 7.02

The provision of significant deep soil landscaping is not achievable due to the retention of the existing, which is built to the site's boundaries. However low-maintenance planter box landscaping will be provided to the proposed communal outdoor area on Level 5 of the development.

The proposed alterations and additions will also have no impact on the existing street tree plantings along King Street or Perkins Street in the vicinity of the site.

### Traffic, Parking and Access - Section 7.03

#### *a) Traffic impact*

A Traffic Impact Assessment has been prepared to address traffic impacts of the proposed development on the local and state road network.

The Traffic Impact Assessment confirms that:

- 1) the proposed development will not adversely impact on the local and state road network.

- 2) the proposed access arrangements provide safe and suitable site access to all components of the development and would comply with relevant CN and AS2890.1 requirements.
- 3) the internal circulation arrangement is appropriate and can comply AS2890.1 requirements.

There is no additional vehicular parking proposed under this development application therefore no net increase in traffic generation.

The provision of traffic management measures for the construction phase of the project to minimise adverse impacts on traffic movement, pedestrians, and/or parking can be addressed by the provision of suitable conditions of consent. A condition of consent has been included in the recommended Draft Schedule of Conditions (refer to **Attachment B**) requiring a Construction Traffic Management Plan be submitted to CN for approval prior to commencement of site works.

a) *Parking rates*

The development proposal comprises the adaptive reuse of an existing building and the addition of two new floors. Historically only 19 parking spaces exist on site in a basement level carpark. The existing building's GFA has been estimated at 2093m<sup>2</sup>. This equates to a parking requirement of 35 spaces (i.e., 1 space per 60m<sup>2</sup> of GFA) and an historical parking deficiency for the site of 16 spaces.

An increase in building GFA in the order of 854m<sup>2</sup> is proposed with the addition of two new floor levels. At a rate of 1 space per 60m<sup>2</sup> of GFA, this equates to an additional parking requirement of 14 spaces. It is however noted that Council recently amended parking rates for development in the City Centre to better align with State and Local planning policy to promote the use of alternate transport over that of the private motor vehicle. This has resulted in the removal of the 1 space per 60 GFA parking rate for commercial and the introduction of a merit-based assessment process.

The applicant's traffic consultant has justified the 14-space departure based on the following reasons:

- i) *"Council has historically supported the NSW Government's target of 20% mode share to public transport for commuter trips to and from the Newcastle city centre in the peak periods and also a mode share target for walking being 25% of local trips.*
- ii) *The site is well connected to bus services, light rail and in turn heavy rail services as well as ferry travel to Stockton and beyond to Fern Bay and Nelson Bay. The site is also within walking and cycling distance of the new residential development occurring across the city centre.*
- iii) *The development has introduced the provision of end of trip facilities for 34 bicycles, as well as facilities to support active transport such as secure lockers, change rooms and showers.*



- iv) *A green travel plan has been prepared in support of the application to both promote and facilitate the use of alternate modes of transport.*
- v) *On-street car parking is available along the local roads surrounding the subject site. Most of this parking is time controlled, typically 2P parking with 30-minute time restrictions throughout the shared zone in Hunter Street Mall. Dedicated motorcycle parking is provided on both King Street in front of the subject site and on Perkins Street opposite with no time restrictions noted. A number of public off-street paid parking areas are provided along Wharf Road and the foreshore area. These include all day parking within the Foreshore Car Park (162 spaces), 4P parking within Queens Wharf Car Park (55 spaces) and 4P parking within Boat Harbour Car Park (40 spaces). Hunter Parking also operate a car park located off Bolton Street to the south-east of the Hunter Street Mall (Bolton Street Car Park). This multi-level car park provides for 570 spaces with access available 24 hours per day, 7 days Subject Site P2510 134 King Street Green Travel Plan 4 per week. Fees apply for the use of this parking, with early bird discounts for vehicles which enter before 9:30am and stay on site for 7 hours.*
- vi) *The Covid Pandemic has seen a significant change in the work environment with many employers now supporting 60/40 hybrid work arrangements with staff able to work from home one or two days per week and be in the office for the other three or four days. This sees a 20-40% of staff working from home and not travelling to work. For the subject site a conservative value of 20% hybrid working is being applied. On this basis the balance of travel needs may be met by shared trips as passengers with other motorists or as a driver of a vehicle. This equates to 15% of staff travelling by car to work. The increased number of workers in the city working from home results in less demand for all day parking than prior to Covid".*

Recent inspections of the on-street parking located within the area appear to indicate a reduction in on-street parking demand during normal business hours. This tends to support the findings of the Applicant's traffic assessment in relation to the impacts of Covid and a transition to hybrid work arrangements. Furthermore on-street parking located in the vicinity of the site is predominantly time restricted, promoting the regular turnover of these spaces thereby increasing the availability of kerbside parking.

c) *Green Travel Plan*

A Green Travel Plan has been developed for implementation at the site, with the appointment of a 'Transport Co-ordinator' to oversee the implementation and management of this plan. The development provides end of trip facilities for 34 bicycles, as well as facilities to support active transport such as secure lockers, change rooms and showers. These facilities encourage a shift to more active transport options for the future tenants of the development.

c) *Public Transport*

The site is well serviced by public transport with bus stops and light rail within close proximity to the site.

Conclusion:

Having regard to the above matter of consideration, the proposal is acceptable in terms of traffic and parking and consistent with the planning objectives of this NDCP 2012.

Section 7.05 - Energy Efficiency

The proposal is acceptable having regard to this section.

Stormwater- Section 7.06 and Water Efficiency - Section 7.07

Stormwater drainage is conveyed via the existing stormwater infrastructure on the site.

Accordingly, the proposal is acceptable in relation to water management.

Waste Management - Section 7.08

The applicant has prepared a detailed waste management plan, which addresses waste minimisation and litter management strategies. Demolition and waste management will be subject to conditions recommended to be included in any development consent to be issued.

An Operational Waste Management Plan has been provided with the application. The existing building provides for bulk storage bins within the basement level. The submitted report states that waste is currently collected via kerbside pickup, utilising a wheel-out / wheel-back service. Furthermore, a condition of consent is provided to ensure that bins are returned immediately to the refuse area and not remain on the street. Under no circumstance are bins to be presented to the street for collection.

There will be minimal change to the waste generation requirements for development, when compared to the existing commercial building. Based on the submitted information, the proposal is considered acceptable.

Development Contributions

The EP&A Act enables CN to levy contributions for public amenities and services. The proposed development would attract a development contribution to CN, as detailed in S7.12 of CN's Development Contributions Plans.

The development contribution applicable to the development is \$89,009.91 (subject to indexation). A condition requiring this contribution to be paid has been included in the Draft Schedule of Conditions at **Attachment B**.

#### **5.4 Planning agreements**

No planning agreements are relevant to the proposal.

#### **5.5 The regulations (and other plans and policies)**

The application has been considered pursuant to the provisions of the EP&A Act requirement to comply with AS2601 – Demolition of Structures will be included in the conditions of consent for any demolition works.

#### **5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.**

The amended design is acceptable having regard to the proposed height, external appearance, character, bulk, and scale of the proposed development. The proposal has been assessed by CN's Urban Design Review Panel on several occasions and is acceptable having regard to the provisions of NLEP 2012 and NDCP 2012.

The building height and FSR development standards are exceeded by the proposed development. However, these variations have been considered in the context of adjoining and potential future development. The development also has minimal impacts on surrounding development and is acceptable.

The proposal achieves adequate visual and acoustic privacy for nearby development and has suitably addressed the potential future development of the area.

There are no significant views that will be impacted in this location and the proposal does not have a significant adverse impact on the adjoining properties in terms of view loss. The development will alter the general outlook due to the proposed changes in size and scale, but this is reasonable having regard to the height and scale of adjacent developments and other approved developments in the area.

#### **5.7 The suitability of the site for the development**

The site is in Newcastle City Centre, an area undergoing urban renewal, including Iris' East End development and the approval for the restoration of the former Victorian Theatre located approximately north of the site along Perkins Street.

The proposed development is consistent with the desired character and built form of the Newcastle City Centre, bringing new commercial opportunities that are well placed, highly accessible and functional. The location is well connected by public transport, providing an opportunity for jobs that can be accessed other than by car.

The application has been reviewed and supported by CN's UDRP during assessment and the variations sought to building height and FSR development standards are considered acceptable.

The site is not affected by significant environmental constraints that would preclude development of the site. The site is therefore suitable for the development, as outlined within the detailed assessment contained within this report, and subject to the recommended conditions of consent.

### **5.8 Any submissions made in accordance with this Act or the regulations.**

The application was publicly notified, and no submissions were received.

### **5.9 The public interest**

The proposed development will provide an increased supply of commercial floor space within Newcastle City Centre, while integrating active ground floor uses to support the objectives of the zone and remain consistent with the desired character of the area.

The proposal is in the public interest and facilitates the orderly and economic development of the site for purposes for which it is zoned and will not have any significant adverse social or economic impacts. The development will provide shorter-term construction jobs, and opportunities for employment long term within the proposed commercial tenancies.

The development does not cause any significant overshadowing, privacy impacts or unreasonable view loss for surrounding properties. The proposed development does not raise any other significant public interest issues beyond matters already addressed in this report.

## **6.0 CONCLUSION**

This development application has been considered in accordance with the requirements of the EP&A Act and the Regulation as outlined in this report. Following a thorough assessment of the relevant planning controls and the key issues identified in this report, it is considered that the application can be supported. The proposed development is suitable for the site and adequately responds to environmental, social, and economic impacts from the development and therefore, is within the public interest.

Given the high-quality design outcome for the site and its positive contribution to the locality, consistency with Local Strategies (including the NDCP 2012) and applicable State Environmental Planning Policies, the proposal is appropriate in the context of the site and the locality.

The proposal is acceptable against the relevant heads of consideration under section 4.15(1) of the EP&A Act and is supported on the basis that the recommended conditions in **Attachment B** are included in any consent issued.

## **ATTACHMENTS**

**Attachment A:** Submitted Plans - 134 King Street Newcastle

**Attachment B:** Draft Schedule of Conditions - 134 King Street Newcastle

**Attachment C:** Processing Chronology - 134 King Street Newcastle

**Attachments A - C distributed under separate cover**

### 7.3. 52 HICKSON STREET MEREWETHER - DWELLING HOUSE - ALTERATIONS, ADDITIONS AND ANCILLARY STRUCTURE (SOLAR ENERGY SYSTEM) - DA2023/00569

**APPLICANT:** WEBBER ARCHITECTS  
**OWNER:** J KRSTEVSKI  
**REPORT BY:** PLANNING & ENVIRONMENT  
**CONTACT:** EXECUTIVE DIRECTOR PLANNING & ENVIRONMENT /  
ACTING EXECUTIVE MANAGER, PLANNING, TRANSPORT  
& REGULATION

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## PART I

### PURPOSE

A Development Application has been received seeking consent for alterations and additions to the existing dwelling located at 52 Hickson Street, Merewether.

The submitted application was assigned to Development Officer, Alex Hunter, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination, due to the proposed variation to the Floor Space Ratio development standard of the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation.



**Subject Land: 52 Hickson Street, Merewether**

A copy of the plans for the proposed development is at **Attachment A**.

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) from the 4 July to 18 July 2023, and one submission has been received in response.

The objector's concerns included:

1. The replacement of the gate at the rear of the property and the use of the existing right of way.
2. The construction phase of the project and potential impacts to the accessibility of the adjoining driveways due to the parking of construction vehicles and the delivery of construction materials.

3. A request that ensures that any damage to adjoining driveways be repaired to the landowner's satisfaction.

Details of the submission received is summarised at Section 3.0 of Part II of this report and the concerns raised are addressed as part of the Planning Assessment at Section 5.0.

### Issues

- 1) The proposed variation to the Floor Space Ratio development standard under the NLEP 2012.

### Conclusion

The proposed development has been assessed having regard to the relevant heads of consideration under section 4.15(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is considered to be acceptable subject to compliance with appropriate conditions.

### RECOMMENDATION

- A. That the DAC note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.4 Floor Space Ratio, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.4 and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- B. That DA2023/00569 for alterations and additions at 52 Hickson Street, Merewether, be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**; and
- C. That those persons who made submissions be advised of CN's determination.

### Political Donation / Gift Declaration

Section 10.4 of the *Environmental Planning and Assessment Act 1979* requires a person to disclose "*reportable political donations and gifts made by any person with a financial interest*" in the application within the period commencing two years before the application is made and ending when the application is determined. The following information is to be included on the statement:

- a) all reportable political donations made to any local Councillor of Council; and
- b) all gifts made to any local Councillor or employee of that Council.

The applicant has answered 'no' to the following question on the application form:

*Have you, or are you aware of any person having a financial interest in the application, made a 'reportable donation' or 'gift' to a Councillor or Council employee within a two year period before the date of this application?*

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## **PART II**

### **1.0 THE SUBJECT SITE**

The subject site is known as 52 Hickson Street, Merewether and has a legal description of Lot 53 Section 15 DP38903. The site is generally rectangular in shape and comprises a total area of 670.3m<sup>2</sup>. The site has 15.54m frontage to Hickson Street.

The site is occupied by an existing three-storey, split-level single dwelling (constructed in 2000 under DA1999/2660), an attached double garage, and an ancillary swimming pool. The site has vehicle access to Hickson Street via a 4.2m driveway. An additional access point exists at the rear of the site to Gregory Crescent via a 3.048m wide and variable right of way burdening Lot 52 Section 15 DP38903 (No.50 Hickson Street).

The subject site is located on a visually prominent ridge overlooking Merewether Beach and attains a northeastern aspect. Adjoining the site to the north is a vegetated council reserve which comprises a substantial downslope. Adjoining the site to the east and west are large single dwellings. Existing development on surrounding sites comprise of dwelling houses of varying age and architectural style, designed to suit the topography of the locality.

### **2.0 THE PROPOSAL**

The applicant seeks consent for alterations and additions to the existing three storey dwelling comprising the following components:

- i) Lower ground floor alterations - internal alterations to bathroom to install a sauna; external alterations to windows and glazing, new gated access to existing easement, new external paving and pool paving and new pool fence.
- ii) Ground floor alterations - revised floor layout including new kids playroom, study, pantry, bathroom and storeroom; external alterations to window treatments, new garage door, extension to existing balcony and alterations to front entry and foyer.
- iii) First floor alterations - floor layout revisions, new shared bathroom, new ensuite and WIR for master bedroom, new WIR for bedrooms 3 and 5 and new balustrading
- iv) Installation of spiral staircase and lifts for vertical circulation.



- v) Roof alteration to the entrance and extensions of roof over first floor balcony.
- vi) Installation of new front fence and access gate.
- vii) Installation of solar panels on the roof.

The existing dwelling has a floor space ratio of 0.72:1 which exceeds the relevant standard of 0.6:1 under the NLEP 2012 by 20%. The proposed works will result in an additional 12m<sup>2</sup> of floor area being enclosed, thereby resulting in a proposed floor space ratio of 0.74:1 which constitutes a 23.17% variation to the FSR standard.

A copy of the submitted plans is at **Attachment A**.

The various steps in the processing of the application to date are outlined in the Processing Chronology at **Attachment C**.

### **3.0 PUBLIC NOTIFICATION**

The application was publicly notified in accordance with CN's Community Participation Plan between the 4 July and 18 July 2023. One submission was received in response. The concerns raised by the objector in respect of the proposed development are summarised as follows:

- i) **Replacement of the Rear Gate**  
The submission raised concerns regarding the opening direction of the gate. At the request of CN, the applicant has amended plans to detail that the proposed gate will swing inwards to the site and not outwards into the easement.
- ii) **Use of Easement**  
The submission has objected to their driveway area being used for the temporary standing of vehicles or for the delivery of materials. The submission has noted that access to their driveway should not be impeded at any time during the construction of the development.

At the request of CN, the applicant has provided evidence that demonstrates that 52 Hickson Street is benefited by a 3.048m wide (10 foot) right of way over Lot 52 Section 15 DP 38903. Notwithstanding, the terms of the easement nominate that authorised person may 'pass' over the easement and does not indicate that persons may store materials or stand for long periods of time within the easement. As such, a condition has been recommended that prohibits the storage of materials or the parking of vehicles within the bounds of the easement and within the driveway of the property located at 50 Hickson Street.

- iii) **Management of Potential Damage to Neighbouring Driveway**  
The submission has raised concerns that there will be potential damage to their property and driveway associated with the use of the easement for

construction access, thereby imposing a cost burden on the neighbouring land owner to rectify the damage.

To manage this risk, a condition has been recommended that requires the proponent to undertake a dilapidation report on the current condition of the driveway prior to the commencement of works and prior to issue of and occupation certificate. Any damage identified as a result of proposed construction must be rectified prior to the issue of an occupation certificate.

#### **4.0 INTEGRATED DEVELOPMENT**

The proposal is not '*integrated development*' pursuant to Section 4.46 of the EP&A Act.

#### **5.0 PLANNING ASSESSMENT**

The application has been assessed having regard to the relevant matters for consideration under the provisions of section 4.15(1) of the EP&A Act, as detailed hereunder.

##### **5.1 Provisions of any environmental planning instrument**

###### **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

An updated BASIX Certificate was lodged with the application, demonstrating that the dwelling as proposed to be altered can achieve the required water and energy reduction targets. A condition of consent has been recommended, requiring that the development be carried out in accordance with the BASIX Certificate.

###### **State Environmental Planning Policy (Resilience & Hazards) 2021 (SEPP RH)**

###### **Chapter 2 - Coastal Management**

Chapter 2 of SEPP RH seeks to balance social, economic and environmental interests by promoting a coordinated approach to coastal management, consistent with the objectives of the *Coastal Management Act 2016* (the Act).

The 'coastal zone' is defined in the Act as comprising four coastal management areas; coastal wetlands and littoral rainforest, coastal environment, coastal use and coastal vulnerability. Note: the Newcastle Local Government Area (LGA) has no areas identified in the coastal vulnerability map.

The proposed development is located in the 'Coastal Use' area and in the 'Littoral Rainforest Proximity Area' due to vegetation within the Council reserve located directly northeast of the site.

The proposed development comprises predominately internal works or works to the existing structure which will not increase the overall footprint of the existing dwelling.

As such, the proposed development will not have a significant impact on the integrity of the adjacent littoral rainforest.

#### Chapter 4 - Remediation of Land

Chapter 4 of SEPP RH provides that prior to granting consent to the carrying out of any development on land the consent authority is required to give consideration to whether the land is contaminated and, if the land is contaminated, whether the land is suitable for the purpose of the development or whether remediation is required.

The subject land is currently being used for residential purposes and CN's records do not identify any past contaminating activities on the site. The proposal is considered to be acceptable having regard to this policy.

#### **Newcastle Local Environmental Plan 2012 (NLEP 2012)**

The following summarises an assessment of the proposal against the provisions of the NLEP 2012 that are primarily relevant to the proposed development:

#### Clause 2.1 - Land Use Zones

The subject property is included within the R2 Low Density Residential zone under the provisions of NLEP 2012. The proposed development for alterations and additions to an existing dwelling is permitted with consent.

The proposed development is consistent with the objectives of the R2 zone, which are:

- i) To provide for the housing needs of the community within a low density residential environment.*
- ii) To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- iii) To accommodate a diversity of housing forms that respects the amenity, heritage and character of surrounding development and the quality of the environment.*

#### Clause 2.7 - Demolition Requires Development Consent

The proposal includes the partial demolition of the structures on the site. Conditions are recommended to require that demolition works, and the disposal of material is managed appropriately and in accordance with relevant standards.

#### Clause 4.3 - Height of Buildings

The proposed development will not alter the overall height of the existing approved dwelling. The maximum height of the proposal will remain unchanged at 9.39m. The maximum height under the LEP is 8.5m and the existing dwelling currently exceeds

the height limit. Due to the topography of the site, the dwelling is two storey facing Hickson Street and appears to be three storeys at the rear.

Notwithstanding the above, the development proposes the installation of a cladding box hood over the foyer along the southern facade which will have a maximum height of 7.51m. In addition, a new roof will be installed over the extended balcony area at a maximum height of 6.7m. These are minor changes to roof form which do not exceed the building height standard and therefore are supported.

#### Clause 4.4 - Floor Space Ratio (FSR)

Under the NLEP 2012 the site has a FSR development standard of 0.6:1. The subject site has an overall site area of 670.3m<sup>2</sup> and the existing dwelling has an approved gross floor area (GFA) of 483.9m<sup>2</sup> which establishes an FSR of 0.72:1 or 20% in excess of the standard. The proposed development will result in a 12m<sup>2</sup> increase to the GFA to a total of 495.9m<sup>2</sup>. This will result in a proposed FSR of 0.74:1 which constitutes a 23.71% exceedance of the FSR standard.

The applicant has submitted a Clause 4.6 variation request to this standard. Refer to discussion under Clause 4.6 Exceptions to Development Standards below.

#### Clause 4.6 - Exceptions to Development Standards

The applicant has submitted a written request that seeks to vary the Floor Space Ratio (Clause 4.4) development standard in accordance with Clause 4.6 of the NLEP 2012. Clause 4.6 of NLEP 2023 enables consent to be granted to a development even though the development would contravene a development standard.

The proposed development will result in an increase to the total GFA of the dwelling and will thereby increase the existing exceedance to the FSR standard from 0.72:1 (20%) to 0.74:10 (23.71%).

The objectives of Clause 4.6 'Exceptions to development standards', are (subclause (1):

- a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The proposed development contravenes Clause 4.4 'Floor Space Ratio' of NLEP 2012. The FSR map provides for a maximum FSR of 0.6:1. The development proposes a maximum FSR of 0.74:1, which exceeds the maximum FSR standard by 23.71%. It is noted that the existing approved dwelling has a FSR of 0.72:1 and exceeds the FSR standard by 20%.

The applicant has submitted a formal Clause 4.6 Request to vary a development standard in relation to Clause 4.4 Floor Space Ratio of the NLEP 2012.

An assessment of the Clause 4.6 variation requests has been undertaken below. In undertaking the assessment, consideration has been given to both the provisions of Clause 4.6 and the relevant Land and Environment Court judgements including: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (and appeal at NSWLEC 90)(*Four2Five*), *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 ('*Initial Action*'), and *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*), namely that the objection is well founded, that compliance with the standard is unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

**Table 3** below assesses the proposed development and the provided variation request against the relevant provisions of Clause 4.6 of the NLEP.

Clause	Provision
<b>4.6(2)</b>	<p><i>Is the provision to be varied a development standard? And is the development standard excluded from the operation of the clause</i></p> <p>The floor space ratio standard in the NLEP 2012 is a development standard in that it is consistent with the definition of development standards under Section 1.4 of EP&amp;A Act and is not expressly excluded from the operation of Clause 4.6.</p>
<b>4.6(3)</b> <b>(a)</b>	<p><i>Has the applicant submitted a written request that seeks to justify contravention of the development standard by demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.</i></p> <p>The applicants have submitted the following report to support the development application:</p> <p><i>'Clause 4.6 Variation Request: Clause 4.4 Floor Space Ratio - Alterations and Additions to a Dwelling House, 52 Hickson Street, Merewether NSW 2291 (Lot 53 Sec 15 DP38903)' prepared by de Witt Consulting and dated 8<sup>th</sup> September 2023 (refer to Attachment A) constitutes a written request for the purposes of Clause 4.6(3)(a).</i></p> <p>In <i>Wehbe</i> Chief Justice Preston outlined the rationale for varying development standards and the circumstances under which strict compliance with them may be considered unreasonable or unnecessary. Preston CJ established five circumstances in which it could be reasonably argued that the strict application of a development standard would be unreasonable and/or unnecessary, as follows:</p>

- 1) *Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives?*
- 2) *Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard unnecessary?*
- 3) *Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable?*
- 4) *Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable?*
- 5) *Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning also unreasonable or unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.*

The applicants' Clause 4.6 Variation Request written response seeks to rely on the first *Wehbe* consideration to demonstrate that compliance with the development standard is unreasonable or unnecessary; namely that the objectives of the standard have been met notwithstanding noncompliance with the standard.

An extract from the applicant's Clause 4.6 Request is provided as follows:

*"It is submitted that the variation of the development standard produces a similar built form outcome to the existing situation, particularly as the*

*proposed GFA on the site is only 12m<sup>2</sup> more than the existing GFA, and that the exceedance will be inconsequential when the development is viewed as a whole. The proposed changes will be minimal and relate to internal areas only, being the pantry and walk-in-robe. The variation is with merit and the claims are well founded as shown in this assessment, particularly considering the historic nature of the variation.*

*It is our submission that the breach will not impact the amenity of the development or the surrounding properties, nor will the variation compromise the character of the area. As such, a degree of flexibility is considered reasonable in this instance and anticipated under the LEP where justification is made."*

*"This variation determines compliance is unnecessary and unreasonable considering the first [Webhe] test in particular."*

Further to the above, the applicant has demonstrated that the proposed development is consistent with the objectives of Clause 4.4 Floor Space Ratio under the NLEP 2012.

Relevant extracts of the applicant's Clause 4.6 Request are provided below:

*"(a) to provide an appropriate density of development consistent with the established centres hierarchy.*

*The immediate locality is not located within an established "Centre" pursuant to the Local Strategic Planning Statement (LSPS). The closest is the Merewether Neighbourhood Centre approximately 1.5km north, which is a smaller centre that meets the daily and weekly needs of local residents and workers (LSPS, 2040). True to this, the surrounding area around this neighbourhood centre supports a variety of low to medium density residential land uses. In the immediate area, there are generally low-density residential land uses. The proposal is entirely consistent with the existing density of the site, being only an additional 12m<sup>2</sup> of GFA from that which has existed for an extended period of time. The proposed works do not alter the density of the site in terms of unreasonable intensification – the building will remain as a single dwelling. Therefore, as the proposal represents minor alterations and additions to an existing building and does not seek to intensify the existing land use. Therefore,*

*the development provides for the continued appropriate density of residential use that is compatible and consistent with the established centers hierarchy.*

*(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

*The desired built form as identified by the established centers hierarchy is a cumulation of several elements, but most significantly it is achieved*

*through maintaining, protecting and enhancing heritage buildings, streetscapes, views and key features. The proposed alterations and additions do not change the fact that the existing dwelling is a form of low-density development, which is consistent with the desired built form of the area. The scale and use therefore does not interfere with the established centres hierarchy (as above).*

*Much of the alterations to the building do not affect the FSR – i.e., they are design related (changes to facades, front fences, roof extension, materials and shading devices) or relate to external elements such as the deck or extended roof patio which are not included in the GFA calculation. The additional FSR is from internal additions being the walk-in wardrobe and pantry, which extend off the existing areas to minimise new impacts.*

*So, while the proposal sits above the allowable FSR for the site, the actual additional FSR resulting from this DA does not have the ability to create additional or adverse impacts to density, bulk and scale. It is considered that the overall works represent a significant improvement to the site, particularly for residents. The additional 12m<sup>2</sup> of floor area (from the existing) does not result in an increased bulk or scale."*

CN Officer Comment:

The proposed development comprises of minor alterations and additions to the existing dwelling. The proposed variation to the development standard does not result in any undue adverse environmental impacts, including impacts on



	<p>adjacent properties in terms of bulk, scale, overshadowing or privacy, indicating that the proposed development is suitable for the site.</p> <p>The additional 12m<sup>2</sup> of GFA does not result in any additional unreasonable impacts compared to a compliant design as the proposal is generally compliant with the relevant planning controls. The additional floor space is attributed to the pantry and walk in robe.</p> <p>Therefore, the Applicant’s written request is considered to satisfy the requirements of Clause 4.6(3)(a) in demonstrating that compliance with the development standard is unnecessary in the circumstances of the case.</p>
<p><b>4.6(3)</b> <b>(b)</b></p>	<p><i>That there are sufficient environmental planning grounds to justify contravening the development standard.</i></p> <p>In Initial Action, Preston CJ identified that for there to be ‘sufficient’ environmental planning grounds to justify a written request under Clause 4.6, focus must be on the element of the development that contravenes the development standard and that the environmental planning grounds provided in the written request must justify contravening the development, rather than promoting the benefits of the development as a whole.</p> <p>An extract from the applicant's Clause 4.6 Request is provided as follows:</p> <p><i>"There are sufficient environmental and planning grounds to justify contravening the development standard and are as follows:</i></p> <ul style="list-style-type: none"> <li>• <i><u>Standards achieved notwithstanding:</u> As demonstrated above, the proposed development generally meets the objectives of the land use zone, by providing a dwelling that suits the existing character of the surrounding area. The proposed development also meets the floor space ratio objectives, as discussed above.</i></li> <li>• <i><u>Other planning controls:</u> The exceedance is not a direct result of any breach of other DCP planning controls for the site (site coverage, landscaping, height of buildings, setbacks etc.).</i></li> <li>• <i><u>Existing state of the site:</u> The proposed alterations and additions will not make significant changes to the existing site. The variation is attributed to an existing building with an existing historic variation. The proposed</i></li> </ul>

*development will provide a significant improvement to the building and provide a better use of the space / property.*

- *Compatibility with surrounding area: The proposed alterations and additions are compatible with the surrounding area, with a built form that reflects existing architectural designs in the surrounding area. Additionally, the scale of the development is not considered to be out of place.*
- *Visual impact: As previously discussed in this report, the proposed alterations and additions are unlikely to have a substantial visual impact. The largest change, as outlined previously, backs onto a public reserve, and in turn does not present unsuitable bulk and scale to an adjacent property. It is noted that at the street level, the proposed built form is similar to the existing development.*
- *Solar Access: As shown by Figure 2, the proposed alterations and additions does change the solar access characteristics of the lot and surrounding development. This impact however is limited to one property and one part of the day. The solar access is of neighbouring properties is not impacted due to the breach in the floor space ratio standard, noting that if the development were to strictly comply with the development standard, the overshadowing on neighbouring properties would remain largely unchanged.*
- *Privacy: As noted in the submitted Statement of Environmental Effects (SEE), there are no changes to fenestration on the western and eastern sides of the dwelling. To this end, the privacy impacts of the development as a whole, and the variation specifically, are inconsequential.*
- *Views: The proposed alterations do not block any views, to any significant view corridors. The most significant view for this property is to the south, to Glenrock State Conservation Area and the ocean. The additional GFA does not impact the building footprint to a degree that impacts views.*

*In this case, we submit that the proposal displays sufficient environmental planning grounds to warrant variation to the development standard."*

CN Officer Comment:

The written request outlines the environmental planning grounds which adequately justify the contravention. In particular, the additional floor space does not result in any inconsistency with the desired built form of the locality and is generally consistent having regard to the combination of relevant controls under the NLEP 2012 and NDCP 2012. The proposed development will facilitate minor alterations and additions to an existing dwelling and will thereby provide for the housing needs of the community in accordance with the zone objectives for the R2 Low Density Residential zone. The written request

	outlines environmental planning grounds which adequately justify the contravention.
<b>4.6(4)</b> <b>(a)(i)</b>	<p><i>Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).</i></p> <p>As outlined above the Applicant's written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) of the NLEP 2012. It follows that the test of Clause 4.6(a)(i) is satisfied.</p>
<b>4.6(4)</b> <b>(a)(ii)</b>	<p><i>Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objects for development within the zone in which the development is proposed to be carried out.</i></p> <p>The applicant's response to the objectives of Clause 4.4 is assessed above and is satisfactory in regards to this subclause. In consideration of the public interest, the applicant has noted the following:</p> <p><i>"The public interest is best served by the orderly and economic use of land for purposes permissible under the relevant regime and predominantly in accordance with the prevailing planning controls. The development is a permissible form of development, consistent with the objectives of the R2 Low Density Residential zone and is therefore considered to be in the public interest."</i></p> <p>The development is consistent with the objectives of Clause 4.4 'Floor space ratio' as the development is an appropriate bulk and scale which is consistent with the desired built form within the established centres hierarchy. The proposed alterations and additions complement the existing topography and allows for continued daylight access to adjacent development within the locality or public domain. The proposal seeks to maximise residential amenity in a low-density residential environment. The development type is also permissible within the land use zone.</p> <p>Based on the above, the proposed development is in the public interest because it is consistent with the objectives of the relevant standard and the objectives for development within Zone R2 Low Density.</p>

<b>4.6(4)</b> <b>(b)</b>	<i>Development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the concurrence of the Planning Secretary has been obtained.</i>
	<p>The Secretary's concurrence to the exception to the minimum floor space ratio development standard, as required by clause 4.6(4)(b) of NLEP 2012, is assumed, as per Department of Planning Circular PS20-002 of 5 May 2020).</p> <p>The requirements of Clause 4.6 of the NLEP 2012 have been achieved and there is power to grant development consent to the proposed development notwithstanding the variation from the floor space ratio development standard. The Clause 4.6 variation request has demonstrated that the proposed floor space ratio is acceptable and therefore that strict compliance with the prescribed floor space ratio would be unnecessary in this instance. The Clause 4.6 variation request is supported.</p>

#### Clause 6.1 Acid Sulfate Soils

The subject site is mapped as Class 5 Acid Sulfate Soils. The proposed development does not require any earthworks that are likely to lower the water table and as such the development is unlikely to impact acid sulfate soils. As such, the proposed development is considered acceptable in regard to this clause.

#### Clause 6.2 Earthworks

The proposed development does not involve any earthworks likely to impact existing drainage patterns, disturb potential relics or likely to adversely effect the subject site and surrounding lands. As such, the proposed development is considered acceptable in regard to this clause.

### **5.2 Any draft environmental planning instrument that is or has been placed on public exhibition.**

#### **Draft Newcastle Development Control Plan 2023**

The Draft Newcastle Development Control Plan (DCP) 2023 provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The Draft DCP was publicly exhibited from Thursday 28 September to Friday 27 October 2023.

Whilst the Draft DCP has been publicly exhibited, the Plan is yet to be finalised and formally adopted by City of Newcastle. Notwithstanding, the Draft DCP requires consideration in accordance with Section 4.15(1)(a)(ii) of the Environmental Planning & Assessment Act 1979.

Section 11 of Part A – Introduction of the Draft DCP nominates savings and transitional arrangements as follows:

*DCP 2023 does not apply to any development application lodged but not finally determined before its commencement. Any development application lodged before its commencement will be assessed in accordance with any previous development control plan (DCP).*

As such, the proposed development remains subject to the provisions of the Newcastle Development Control Plan 2012.

### **5.3 Any development control plan**

#### **Newcastle Development Control Plan 2012 (NDCP 2012)**

The main planning requirements of relevance in the NDCP 2012 are discussed below.

##### Single Dwellings and Ancillary Development - Section 3.02

The following comments are made concerning the proposed development and the relevant provisions of Section 3.02.

##### *Street frontage appearance (3.02.03)*

There is no change to the existing front setback to the existing dwelling. The proposed additions are predominantly toward the rear of the site, with minor works proposed to the existing front gate and garage door as well as minor alterations to some external windows on the street fronting elevation. The proposed street fronting alterations are consistent with the existing character of the area and would not present as dominant to the streetscape.

The streetscape presentation of the dwelling would become more contemporary as a result of the works proposed, which includes upgrading of existing finishes/detailing to the dwelling and garage.

##### *Side / rear setbacks (building envelope) (3.02.04)*

There are no proposed changes to the minimum side setback distances of the existing dwelling. The extension of the deck will not exceed the existing building footprint and will maintain a 3.6m offset from the western side boundary and a 6.5m offset from the rear boundary.

The alterations to the rear of the dwelling will replace the existing rear wall of the ground floor plan and will thereby maintain the existing setbacks to the rear boundary.

##### *Landscaping (3.02.05)*

The proposal comprises a reduction of approximately 15m<sup>2</sup> of soft landscaping across the site through the installation of new paving around the pool. The existing dwelling

achieves approximately 20% of the site area as landscaping. The resulting dwelling will achieve 18% of the overall site area in landscaping.

The proposed reduction in landscaping is considered minor in scale and will not result in any adverse impacts to adjoining land users. Furthermore, installation of the proposed paving could be undertaken as exempt development under the *State Environmental Planning Policy (Exempt & Complying Development Codes) 2008* without the need for any formal approval from Council. As such, the proposed level of landscaping is supported.

#### *Private open space (3.02.06)*

The proposal involves the extension of the mid-level balcony to the west. This will result in an additional 12m<sup>2</sup> of private open space.

#### *Privacy (3.02.07)*

The extension of the proposed balcony on the first floor may result in a minor degree of overlooking to the dwelling to the west. This area is in line with the driveway of the adjacent property and is not expected to result in adverse privacy impacts.

The development as proposed will not unreasonably overlook the living room windows or principal areas of open space of neighbouring dwellings, given the siting of the development, existing site topography, and the relationship to dwellings on adjacent sites.

#### *Solar access (3.02.08)*

The proposed development will not significantly impact the solar access of the subject site or adjoining dwellings as shadows will predominately fall to the south of the site over the front yard area and the Hickson Street road reserve.

#### *View sharing (3.02.09)*

The proposed development will not significantly alter the existing built form in terms of the existing bulk and scale. There are no existing views or vistas to water, city skyline or iconic views that would be obscured by the proposed alterations and additions.

#### *Car parking and vehicular access (3.02.10)*

The existing double garage and access arrangements for the site are retained and are satisfactory.

#### *Ancillary development (3.02.12)*

The proposed development involves amendments to the front fence and access gate that will increase its overall height in order to provide increased privacy to the front yard of the dwelling. The resulting fence will vary in height from 1.08m to 2m from ground level to account for the slope of the front elevation.

It is noted that the adjoining dwelling to the east of the site has a front fence height that varies in height between 1m and 2m (approx.) to account for the sloping nature of the topography.

Under the NDCP 2012, front fences are to be a maximum of 1.2m high, and as such, the proposed fence treatment will exceed the numerical requirement of the control. Notwithstanding, the proposed exceedance will remain in character with surrounding development and will reflect the sloping nature of the topography.

As such, the proposed fence treatment meets the performance requirements of the control and is acceptable.

#### Bush Fire Protection - Section 4.02

The site is identified as being bush fire prone land. The proposed development will not significantly alter the external walls or building footprint of the existing dwelling. The minor extensions to the existing dwelling are located on the opposite side of the building to the bushfire threat vegetation and therefore are unlikely to significantly increase the bushfire risk of the existing dwelling.

Further to the above, the applicant has provided a Bushfire Risk Self-Assessment prepared in accordance with the NSW Rural Fire Service's (RFS) 'Building in Bushfire Prone Areas' Single Dwelling Application Kit 2020'. This assessment found that the proposed works will be subject to a BAL-12.5 construction standard. A condition of consent has been recommended that requires the proposed new works to be constructed in accordance with BAL-12.5 construction standard and that the property be maintained in perpetuity in accordance with the requirements of the NSW RFS's 'Planning for Bushfire Protection 2019'. The proposed development is satisfactory in this regard subject to the imposition of relevant conditions recommended.

#### Mine Subsidence - Section 4.03

The site is located within a proclaimed Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW.

#### Land Contamination - Section 5.02

Land contamination has been considered in this assessment report, in accordance with State Environmental Planning Policy (Resilience and Hazards) 2012 – Chapter 4 Remediation of land. The site is not considered to have any contamination constraints that will impact on the development of the site.

#### Section 7.05 - Energy Efficiency

The proposal is acceptable having regard to this section.

### Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The proposed development involves a minor increase to roof area which will have a corresponding increase to captured rainwater. A condition of consent has been recommended that any new impervious areas will drain to the existing stormwater system.

### Development Contributions

The EP&A Act enables CN to levy contributions for public amenities and services. The proposed development would attract a development contribution fee as detailed in CN's Development Contributions Plans.

A condition requiring this contribution to be paid has been included in the Draft Schedule of Conditions at **Attachment B**.

#### **5.4 Planning agreements**

No planning agreements are relevant to the proposal.

#### **5.5 The regulations (and other plans and policies)**

The application has been considered pursuant to the provisions of the EP&A Act requirement to comply with AS2601 – Demolition of Structures will be included in the conditions of consent for any demolition works.

#### **5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality**

Impacts upon the natural and built environment have been discussed in this report in the context of relevant policy, including the NLEP 2012 and the NDCP 2012 considerations. The proposed development will not result in any undue adverse impact on the natural or built environment. The development is located within a site suitably zoned for residential development and of a size able to cater for such development. The development is compatible with the existing character, bulk, scale and massing of the existing built form in the immediate area and broader locality. The proposal will not result in any negative social or economic impacts. The development has been designed to generally satisfy the requirements of NDCP 2012 and as a result, the proposed development is unlikely to adversely impact upon the amenity of adjoining properties.

It is considered that the proposal will not have any negative social or economic impacts.

#### **5.7 The suitability of the site for the development**

The site is suitable for the proposed development as it is residentially zoned land located in close proximity to urban services. Furthermore, the site has existing



connection to relevant urban utilities including water, sewer, electricity and telecommunications.

The constraints of the site can be readily overcome through minor design amendments that can be conditioned. The site is not subject to any other known risk or hazard that would render it unsuitable for the proposed development.

Accordingly, the subject site is suitable for the proposed development.

## 5.8 Any submissions made in accordance with this Act or the regulations

The application was notified in accordance with CN's Community Participation Plan. One submission was received during the notification period.

The key issues raised within the submissions have been discussed previously in this report. The following table provides a summary of the other issues raised and a response to those issues.

Issue	Comment
Replacement of the Rear Gate	The submission raised concern regarding the opening direction of the gate. At the request of Council, the applicant has amended plans to detail that the proposed gate will swing inwards to the site and not outwards into the easement.
Use of Easement	<p>The submission has objected to their driveway area being used for the temporary standing of vehicles or for the delivery of materials. The submission has noted that access to their driveway should not be impeded at any time during the construction of the development.</p> <p>At the request of CN, the applicant has provided evidence that demonstrates that 52 Hickson Street is benefited by a 3.048m wide (10 foot) right of way over Lot 52 Section 15 DP 38903. Notwithstanding, the terms of the easement nominate that authorised person may 'pass' over the easement and does not indicate that persons may store materials or stand for long periods of time within the easement. As such, a condition has been recommended that prohibits the storage of materials or the parking of vehicles within the bounds of the easement and within the driveway of the property located at 50 Hickson Street.</p>
Management of Potential Damage to Neighbouring Driveway	<p>The submission has raised concerns that there will be potential damage to their property and driveway associated with the use of the easement for construction access, thereby imposing a cost burden on the neighbouring land owner to rectify the damage.</p> <p>To manage this risk, a condition has been recommended that requires the proponent to prepare a dilapidation report of the condition of the driveway prior to the commencement of works.</p>

## 5.9 The public interest

The proposed development is considered to be satisfactory having regard to the principles of ecologically sustainable development. The development will not have a significant adverse impact on adjoining land users or on the public domain.

The development is in the public interest and will allow for the orderly and economic development of the site.

## 6.0 CONCLUSION

The proposal is acceptable against the relevant heads of consideration under section 4.15(1) of the EP&A Act and is supported on the basis that the recommended conditions in **Attachment B** are included in any consent issued.

## ATTACHMENTS

**Attachment A:** Submitted Plans - 52 Hickson Street, Merewether

**Attachment B:** Draft Schedule of Conditions - 52 Hickson Street, Merewether

**Attachment C:** Processing Chronology - 52 Hickson Street, Merewether

**Attachments A - C distributed under separate cover**

**7.4. 61 GRINSELL STREET KOTARA - SEC 4.55(1A) MODIFICATION TO DA2021/00662 - DWELLING HOUSE INCLUDING SECONDARY DWELLING, ANCILLARY STRUCTURES (POOL AND RETAINING WALLS) AND DEMOLITION OF EXISTING STRUCTURES - CHANGES TO DESIGN - MA2022/00336**

**APPLICANT:** TONER DESIGN PTY LTD  
**OWNER:** W J WATSON & A WATSON  
**REPORT BY:** PLANNING & ENVIRONMENT  
**CONTACT:** EXECUTIVE DIRECTOR PLANNING & ENVIRONMENT / ACTING EXECUTIVE MANAGER, PLANNING, TRANSPORT & REGULATION

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## PART I

### PURPOSE

A Modification application (MA2022/00336) has been received seeking to modify the original development consent (DA2021/00662) for approved Dwelling House – including secondary dwelling, ancillary structures (pool and retaining walls) and demolition of existing structures at 61 Grinsell Street Kotara.

The Section 4.55(1A) modification application seeks various changes to the approved buildings, including an amended pool design, changes to retaining walls, addition of eave to one side of the main dwelling house, amended floor level and end wall/screening to the alfresco area of the main dwelling house, amendments to window/doors, increased floor level and overall height of the secondary dwelling and amendments to landscaping and stormwater drainage.



**Subject Land: 61 Grinsell Street Kotara**

The submitted application was assigned to Senior Development Officer (Planning), Amanda Gale for assessment.

The application is referred to the Development Applications Committee (DAC) for determination due to the application being called in by Councillors.

A copy of the current plans for the proposed development is appended at **Attachment A**.

The original application was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and 11 submissions were received (10 unique) submissions.

Amendments to the application were also publicly notified and eight submissions were received (seven unique submissions).

Plans and documentation received during the assessment process have also been made available on CN's DA Tracker.

The key concerns raised by the objectors in respect to the amended development include:

- i) Issues arising from the construction of the secondary dwelling at an increased height, including views, privacy, floor area, ground stability and structural soundness.
- ii) The extent of cut and fill on the site and the provision of retaining walls along the side boundaries.
- iii) Privacy from the main dwelling house, particularly associated with the raising of the floor level of the alfresco area and door / window changes on southern elevation.
- iv) Overshadowing impacts.
- v) Changes to the pool design.
- vi) Stormwater management, inclusive of location of rainwater tank associated with secondary dwelling and potential impact on tree on neighbouring property.
- vii) Other works carried out without approval, including the addition of eaves to the garage of the main dwelling house.

The proposal was considered at the Public Voice Committee Meeting held on 17 October 2023. Issues raised were generally consistent with the original concerns raised during assessment and are addressed as part of the Planning Assessment at Section 5.0.

## **Issues**

The main issues identified in the assessment of the application and raised in the submissions are as follows:

- 1) Amendments to secondary dwelling, main dwelling, swimming pool and landscaping redesign and associated earthworks, retaining and stormwater management.

- 2) Impacts on the amenity of neighbouring residential properties by way of visual privacy, view loss, solar access and overall built form, bulk and scale of the development.

## Conclusion

The proposed development has been assessed having regard to the relevant heads of consideration under section 4.55(1A) – Modifications involving minimal environmental impact of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and is considered to be acceptable subject to compliance with appropriate conditions.

The relevant conditions to be amended and new conditions recommended to be imposed on the modified development consent include:

Condition 1, amend to include the current plans and documentation, in the Approved documentation - schedule.

Condition 11, amend to read as follows:

11. All stormwater runoff from the proposed development is to be managed in accordance with the requirements of Section 7.06 Stormwater of Newcastle Development Control Plan 2012, the associated Technical Manual and AS/NZS 3500.3 Plumbing and drainage Part 3 Stormwater drainage, as indicated on the stormwater management concept plans prepared by Skelton Consulting Engineers (Job No. 21-227, Issue J and G, Dwg SW1 and SW2) and dated 31.10.23 and 18.09.23. Details are to be included in documentation for a Construction Certificate application.

Condition 11a - new condition to read as follows:

- 11a. A suitably qualified and practicing structural engineer shall certify the adequacy of proposed footings and structures in close proximity (<3.0pm) to the proposed dispersion trench. Full details are to be included with documentation for a Construction Certificate application.

Condition 11b. - new condition to read as follows:

- 11b. A report is to be prepared by a suitably qualified and practicing geotechnical engineer and include recommendations for:
  - a) The proposed dispersion trench with regards to its location, proximity to proposed structures, and capacity to dispose stormwater.
  - b) Remediation of the existing site to resolve any identified drainage issues, particularly with regards to previous unauthorised works at the site.

Full details are to be included with documentation for a Construction Certificate application.

Condition 11c. - new condition to read as follows:

- 11c. Before the issue of a construction certificate, details are to be provided demonstrating all alterations to natural surface levels on the site are undertaken in such a manner as to ensure that there is no increase in surface water runoff to adjoining properties or that runoff is impounded on adjoining properties, as a result of the development.

Condition 15a. - new condition to read as follows:

- 15a. Before the issue of a construction certificate, an amended landscaping plan is to be provided to the principal certifier and Newcastle City Council, which provides for a change in plant species selection and pot size, otherwise shown on the approved landscape plans (Job No.2055, Issue D, Sheets L01 & L02), prepared by Michael White Landscape Architecture and dated 31 October 2023.

The required amendment relates to the plantings within the garden bed along the western boundary (ie. Callistemon Slim (19) - 300mm pot size), are to be changed to either Murraya or Photinia Red Robin with pot size of minimum 450mm.

In addition, a change to finished surfaces is required, changing the section of 'Pavement to Client's details' within the section of the site adjacent to the eastern end of deck (previous location of rainwater tank), to 'Gravel' finish.

Full details are to be include in the documentation for a construction certificate.

Condition 37a. - new condition to read as follows:

- 37a. Before the issue of any occupation certificate, structural adequacy certification of all retaining walls approved under this consent, is to be prepared by a suitably qualified engineer and submitted to the principal certifier.

Condition 42a. - new condition to read as follows:

- 42a. Before the issue of any occupation certificate, a 1.8m high colourbond fence, or equivalent as indicated on the approved plans is to be erected along the common boundaries of the site (eastern, western and southern boundaries) in consultation with the adjoining owners involved.

Note: Any disputation which may arise between the developer and the adjoining property owners in respect of this matter is to be resolved in accordance with the provisions the *Dividing Fences Act 1991*.

## RECOMMENDATION

- A. That MA2022/00336 for Section 4.55(1A) modification to DA2021/00662 – Dwelling house – including secondary dwelling, ancillary structures (pool and retaining walls) and demolition of existing structures at 61 Grinsell Street Kotara be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**; and
- B. That those persons who made submissions be advised of CN's determination.

## Political Donation / Gift Declaration

Section 10.4 of the *Environmental Planning and Assessment Act 1979* requires a person to disclose "*reportable political donations and gifts made by any person with a financial interest*" in the application within the period commencing two years before the application is made and ending when the application is determined. The following information is to be included on the statement:

- a) all reportable political donations made to any local Councillor of Council; and
- b) all gifts made to any local Councillor or employee of that Council.

The applicant has answered NO to the following question on the application form: *Have you, or are you aware of any person having a financial interest in the application, made a 'reportable donation' or 'gift' to a Councillor or Council employee within a two year period before the date of this application?*

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## PART II

### 1.0 THE SUBJECT SITE

The site is known as 61 Grinsell Street Kotara (Lot 5 DP 18121). The site is rectangular in shape, with a 15.24m frontage to Grinsell Street and an area of 841m<sup>2</sup>. The land has an overall fall in level of 5m, from Grinsell Street to the rear boundary, which adjoins the Main Northern Railway Line.

Dwelling houses are the primary development type in the locality of the site, consisting of both single and two-storey dwellings within this location. Some dwellings present to Grinsell Street as single storey and are two storey at the rear given the sloping nature of sites. There is light industrial development to the south-east of the site, on the other side of the heavy rail corridor.

The site originally contained a single storey dwelling house (roof ridgeline RL50.37) and detached garage (roof ridgeline RL46.18), as per Survey Plan, Issue B prepared by de Witt Consulting and dated 16/06/19. Refer to Figures 1 and 2.



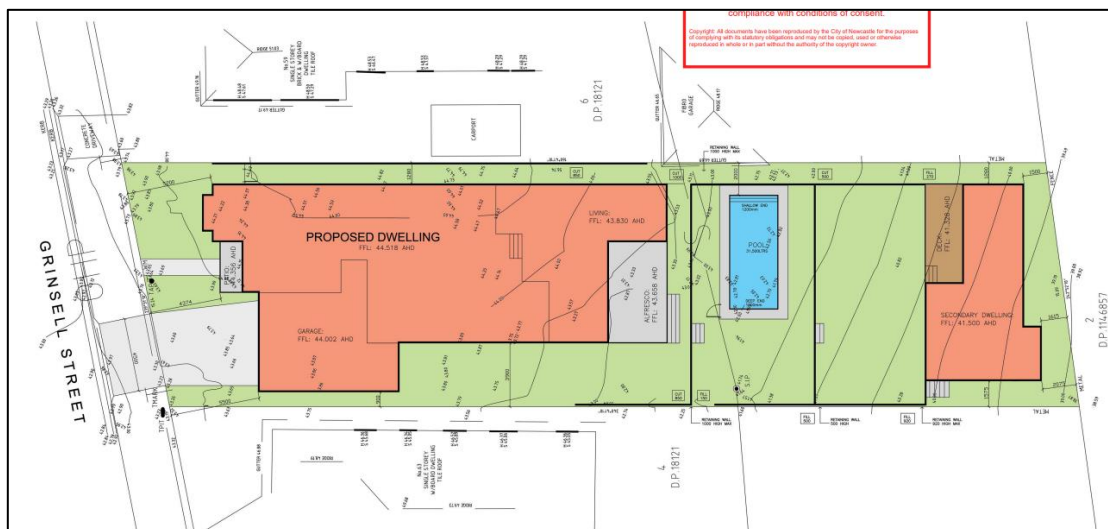
**Figures 1 & 2:** View of original dwelling house and detached garage at 61 Grinsell Street Kotara (Photo 2 - right hand side - view of 63 Grinsell Street dwelling and rear yard)

Under the Newcastle Local Environmental Plan 2012, the site is zoned R2 Low Density Residential, has a maximum height of buildings limit of 8.5m and a maximum floor space ratio limit of 0.75:1.

A small portion of the site, adjacent to the Grinsell Street frontage, is identified as Bushfire Prone Land, with a sub-category of Vegetation Buffer. The development as proposed is permissible within the R2 Low Density Residential zone with consent.

**2.0 DEVELOPMENT HISTORY**

Development consent (DA2021/00662) was granted on 13 October 2021 for a dwelling house and secondary dwelling, including ancillary structures (pool and retaining walls) and demolition of structures. A construction certificate (CC2022-038) for the development was issued by a registered certifier on 8 June 2022. A Driveway Crossing Approval (RA2022/00218) under Section 138 of the *Roads Act 1993* was issued on 5 May 2022 by CN. Refer to Figure 3.



**Figure 3:** Extract from Stamped Plans – Site Plan & Sediment Control (DA2021/00662).



Works have commenced on site and the existing dwelling and detached garage have been demolished. During construction, MA2022/00336 was lodged seeking to modify the development consent, for a number of changes, some of which have been partially constructed.

Following regulatory investigation and compliance action, works were permitted to continue under the original consent (DA2021/00662), on the approved main dwelling, other than the alfresco floor area and screening which had not been constructed, which form part of the current modification MA2022/00336. A Stop Work Order remains in place for the remainder of the development. Refer to Figures 4 and 5 for views of the site.



**Figure 4** - View of constructed main dwelling house at 61 Grinsell Street (left side of photo view of 59 to the east - right side of photo view of 63 to the west)

**Figure 5** - View of partially constructed secondary dwelling at the rear of the site.

A separate MA2023/00250 was lodged under s4.55(1A) to stage works approved under DA2021/00662 to enable the opportunity for the Principal Certifier (PC) to issue a partial occupation certificate, before the resolution of matters related to and determination of MA2022/00336. A staging plan was lodged and amended during assessment, which identified two stages:

- 1) Stage 1: main dwelling house
- 2) Stage 2: remainder of development comprising the secondary dwelling, swimming pool, associated stormwater drainage, landscaping, retaining walls along western and eastern boundaries, fencing and alfresco area associated with the main dwelling house.

MA2023/00250, sought to amend Conditions 38, 40 and 41 of DA2021/00662, relating to BASIX, works within the road reserve and water management measures. Assessment concluded that both access and on-site carparking and stormwater management associated with the main dwelling needed to be standalone, which required installation of the above-ground rainwater tank (originally sought under MA2022/00336, rather than under garage slab cells).

Following assessment and consideration of submissions received, the modification (DA2023/00250) was determined under delegation, with a modified development consent granted on 13 September 2023 subject to the amended conditions of consent and approved staging plan.

An amended construction certificate (CC2022-038-A) was issued by the PC dated 19 September 2023, with respect to - amended development consent conditions, staging of works and relocation of primary dwelling rainwater tank.

A partial occupation certificate (POC2022-038) was issued by the PC dated 22 September 2023, with respect to -

Partial OC - Stage 1 Only - main dwelling house

Excluding: All Stage 2 Works - rear alfresco area, secondary dwelling and ancillary structures (pool and retaining walls) and eaves on the western wall of the garage.

It is noted that whilst some of the proposed amendments being considered under MA2022/00336, relate to non-compliant construction works, any regulatory inspection and compliance aspects have been handled by CN's Regulatory Services, and are not matters for consideration under the assessment of this MA2022/00336.

The consideration of proposed modifications to this development consent are considered on the basis of the planning merits associated with the modifications put forward, not on the basis of works having already been constructed. These are matters that the PC is required by legislation to address in an appropriate manner in line with relevant legislation and during the construction certificate and occupation certificate process. From an assessment perspective CN has no powers to be involved in the construction and occupation certificate process, once a PC is appointed.

Submissions raise concern about the notion of seeking retrospective approval for works that are inconsistent with the development consent. However, planning law requires that the merits of a modification application involving such matters be assessed objectively, without regard to the retrospective nature of aspects of the proposal.

### 3.0 THE PROPOSAL

The subject application seeks approval for a number of modifications to the originally approved design of the development, including:

- 1) Resolve inconsistencies on the approved plans for the main dwelling house.
- 2) Resolve works undertaken inconsistent with the approved plans - increased floor level and overall height, of the secondary dwelling (under construction), several window and door design changes and the addition of a 450mm wide eave to the western elevation of the garage of the main dwelling house.
- 3) Design changes to swimming pool and landscaping, associated retaining walls and stormwater management.

Additional information and design amendments have been made during the assessment process, to address issues raised in submissions and to ensure the secondary dwelling remains, as characterised and approved as a '*secondary dwelling*'.

The key amendments that have been put forward by the applicant, to assist in resolving concerns are summarised in the following table:

Approved - DA2021/00662	Original Modification Plan	Current Modification Plan
<p><u>Pool</u></p> <p>Rectangular in shape, running across the site and parallel to side boundaries - 31,500L (3m W x 7m L)</p> <p>Side setbacks - 2m (east) &amp; 5.5m (west)</p>	<p>Rectangular - 48,000L</p> <p>Side setbacks - 3m (east) &amp; 3.87m (west)</p>	<p>Irregular shape - more centrally located - 36,000L</p> <p>Side setbacks - min 3.28m (east) &amp; min 5m (west)</p>
<p><u>Retaining Walls (RW)</u></p> <p><u>Eastern</u></p> <p>1 x excavation RW (eastern side) - Cut 850</p>	<p><u>Eastern</u></p> <p>Remains as approved on plan.</p>	<p><u>Eastern</u></p> <p>Located as approved on plan, with a change in height (max. 1.2m) and construction type (partially built) and an extension (additional 2m not yet built) to the wall length (toward</p>

<p><u>Western side</u></p> <p>3 x fill RWs (along western side boundary)</p> <ul style="list-style-type: none"> <li>- 850mm high (Fill 850)</li> <li>- 500mm high (Cut 150 &amp; Fill 500)</li> <li>- 900mm high (Fill 920)</li> </ul> <p>Proposed 1.8m high fencing (on top of retaining)</p>	<p><u>Western side</u></p> <p>3 x fill RWs (along western side boundary)</p> <ul style="list-style-type: none"> <li>- 1000mm high</li> <li>- 1200mm high</li> <li>- 1200mm high</li> </ul> <p>Proposed 1.8m high fencing (on top of retaining).</p>	<p>southern end of the main dwelling).</p> <p>Note: The extension will maintain a setback of 1280mm from existing encroaching garage on adjoining property (59 Grinsell Street).</p> <p><u>Western side</u></p> <p>1 x RW (setback 500mm from western side boundary)</p> <ul style="list-style-type: none"> <li>- Remove 850mm high 745mm high (Fill 745mm)</li> <li>- 900mm high (Fill 900mm)</li> </ul> <p>Proposed 1.8m high common boundary fence at natural ground level.</p>
<p><u>Landscaping</u></p> <p>No landscaping requirement / plan provided with DA</p>	<p>No landscaping plan provided</p>	<p>Landscaping Concept Design</p> <p>Landscaping Plan - Planting schedule</p>
<p><u>Secondary dwelling</u></p>		

<p>16m<sup>2</sup> storage area within sub-floor area (access via 1.8m high roller door)</p> <p>Remainder of area identified as sub-floor.</p>	<p>Entire sub-floor proposed as storage (access via 2.1m high roller door)</p> <p>Note: 2.1m high roller door resulting from finished floor level of secondary dwelling being 470mm above approved level</p>	<p>16m<sup>2</sup> storage area within sub-floor area (access via 2.1m high roller door).</p> <p>Internal walls proposed, to separate 16m<sup>2</sup> approved storage space off from remainder of sub-floor, and previous access door for maintenance purposes removed.</p>
<p><u>Rainwater Tank -secondary dwelling</u></p> <p>Above ground 3,000kL rainwater tank located adjoining the western elevation.</p>	<p>Above ground 3,000kL rainwater tank relocated further along western boundary away from secondary dwelling.</p>	<p>Above ground 3,000kL rainwater tank relocated to a more central position (underneath the bedroom window) - southern elevation.</p>

Other details of proposed modifications to the approved design are outlined below:

- i) Increase in the finished floor level (FFL) and overall height of the secondary dwelling, as constructed.

The application seeks approval for the constructed floor level and overall height of the secondary dwelling to be 470mm higher than the approved heights. The FFL of the secondary dwelling is at RL41.975m AHD and overall height takes the maximum height of the secondary dwelling to 5.61m or RL45.24m AHD. It is noted that the deck of the secondary dwelling is set down 150mm lower than the internal FFL (ie. RL41.825m AHD).

The stairs leading down from the deck of the secondary dwelling to the adjacent yard space have also been relocated following the Public Voice Committee Meeting as part of the applicant's response to concerns raised. The stair location is now more central to the site and at the western end of the deck (in proximity to the relocated rainwater tank) further from the east side, with the privacy screen at the eastern end of the deck, to be maintained with a height of 1.7m above deck floor level.

- i) Modification to finished floor level of alfresco area to align with internal floor area of main dwelling house.

The height of the floor of the alfresco area at the rear of the main dwelling is proposed to be raised by 172mm to match the internal floor level at RL43.830m AHD.

- i) Modification to end wall / screening treatments of alfresco area to main dwelling house.

The privacy screen at the eastern end of the alfresco area of the main dwelling, approved as a 25% open slatted screen to a height of 1.7m, is now proposed to be a solid wall to a height of 1.7m, with louvres above that height, extending up to eave level.

The privacy screen is proposed to be returned along the southern edge of the alfresco area, in the form of a 690mm long full-height solid wall. A post that was located near the centre of the southern edge of the alfresco area (ie on the approved plans) is proposed to be deleted.

- i) Addition of an eave to the garage side of main dwelling house.

The roof layout of the main dwelling is proposed to be adjusted so that a 450mm wide eave is provided along the side of the garage, matching the other eaves of the main dwelling house.

- i) Modifications to windows and doors.

Proposed modifications to approved windows and doors including:

- 1) Deletion of a south facing lounge room window from the main dwelling house.
- 2) Changes from double hung and horizontal sliding type windows to awning type windows, louvred windows and fixed windows.
- 3) Increased sill height to a lounge room window and a family room window of the main dwelling house that are otherwise reduced in overall height.
- 4) Reduced height to a kitchen window of the main dwelling house.
- 5) Increased overall height to windows/doors adjoining the alfresco area of the main dwelling house and a family room window of the main dwelling house, all with no change to the sill height above the internal floor level.
- 6) Reduced width to the front door of the main dwelling house and the addition of a sidelight window at that door.
- 7) The kitchen window on the southern elevation facing the railway line in the secondary dwelling, reduced in window height and increased in length, with increase in sill height.

- i) Modification to stormwater drainage for the main dwelling house

Stormwater drainage from the main dwelling house was originally proposed under the subject modifications to be managed via an above ground tank located adjacent to the

side wall of the garage, in lieu of equivalent tanking that was approved to be located under the garage floor slab in DA2021/00662.

It is noted that consideration of the above ground water tank for drainage associated with the main dwelling, was assessed under MA2023/00250 for staging of the development and was considered acceptable. The amendments to stormwater management for the remainder of the site remain a consideration under the current Modification Application.

- i) Eastern concrete panel retaining wall

The approved eastern retaining wall is proposed to be modified with respect to overall height, materials design and includes an extension in length of two metres (southern end), remaining 1280mm off-set back from the existing garage on 59 Grinsell Street (currently encroaching over the common boundary with 61 Grinsell Street).

### Public Voice

The proposal was considered at the Public Voice Committee Meeting held on 17 October 2023. Issues raised by the main objectors were generally consistent with original objections, summarised as follows and are addressed in Section 3.0 and as part of the Planning Assessment at Section 5.0:

- i) retaining wall issues
- ii) stormwater management
- iii) location of water tank and impact on existing tree
- iv) location of footings encroaching on property
- v) privacy impacts - due to topography and fill
- vi) lack of Council willingness to enforce compliance matters
- vii) height of secondary dwelling - should be reduced

In response to the Public Voice meeting on 17 October 2023, the applicant has provided further modified plans, and these are the current plans provided in **Attachment A**.

In addition, the applicant has submitted a response to questions and issues raised at PV, prepared by the owners of the subject site and this response is provided in **Attachment C**.

The areas where the plans were further modified by the applicant include in summary:

- a) Relocation of the rainwater tank (from eastern side of secondary dwelling deck), to a more central location outside the bathroom window on northern elevation.
- b) Retention of the 1.7m high privacy screen at the end of the secondary dwelling deck.
- c) Relocation of the stairs onto deck of secondary dwelling - moved to other end of deck more centrally located and away from eastern end.

In addition, further information regarding location and the structural adequacy of the eastern retaining wall was submitted.

The various steps in the processing of the application to date are outlined in the Processing Chronology at **Attachment D**.

#### **4.0 PUBLIC NOTIFICATION**

The original modification application was publicly notified in accordance with CN's CPP, with the notification period closing on 27 October 2022, other than an individual request for extension to 4 November 2022 that was agreed to. In response, 11 submissions were received (10 unique submissions).

Amendments to the modification application were also publicly notified, with the notification period closing on 3 April 2023. In response, eight submissions were received (seven unique submissions), plus five late submissions from, or on behalf of, one of the original submitters.

Further amendments during assessment were not considered to warrant re-notification in accordance with CN's CPP and all information was available on CN's DA Tracker.

The concerns raised by the objectors are summarised below and outlined within the Public Voice report considered at the Public Voice Committee Meeting on 17 October 2023:

##### **1. Statutory and Policy Issues**

- a) Secondary dwelling - height increase, view and privacy impacts, maximum floor area, ground stability and structural soundness.
- b) Extent of cut and fill on the site and the provision of retaining walls along the side boundaries - retaining wall heights and locations, fences above retaining walls.
- c) Development not substantially the same as originally approved - the raising of secondary dwelling floor level has increased floor area - no longer characterised as a secondary dwelling.



2. Works carried out without approval - including the addition of eaves to the garage of the main dwelling.
3. Amenity Issues
  - a) Privacy from the main dwelling house, particularly associated with the raising of the floor level of the alfresco area, and doors / windows changes particularly on the southern elevation.
  - b) Privacy from the secondary dwelling, particularly associated with the raising of the floor level of the dwelling - floor level of deck and windows from bedroom and living area.
  - c) Overshadowing impacts - inaccurate shadow diagrams due to significant discrepancies between preliminary plans and amended plans of application.
  - d) Changes to pool design - propose to raise finished floor level of pool area with 1200mm high pool fence would be higher than 1800mm fence and cause overlooking. Suggest lowering the pool and landscape areas.
4. Stormwater management
  - a) Increased hard surfaces impact the surface water runoff to dispersion trench and rail corridor.
  - b) Lack of suitable method for dispersal of stormwater since dispersion trench is suitable for single dwellings. Amended plans show dispersion trench significantly smaller than the previous one.
  - c) Proposed swale drain (10cm deep) inadequate for the volume of stormwater experienced this year since the current temporary swale drain (30cm deep) is grossly inadequate. Suggest a concrete gutter as an appropriate solution.
  - d) No drainage detail to demonstrate how stormwater from concrete slab behind garage would be directed to the kerb as neighbouring property is experiencing ongoing water issues.
  - e) Request Council to seek engineering details for the proposed locations of cleanout point of the charged systems and a hydraulic plan of the site.
5. Design and Aesthetic Issues
  - a) Overbearing nature of the development, its built form, bulk and scale, in particular resulting from the secondary dwelling, cut and fill and need for excessive retaining walls, raising of the main dwelling alfresco floor level and pool / fencing level.

## 6. Miscellaneous

- a) Reprehensible building practice will set precedence.

### 4.0 INTEGRATED DEVELOPMENT

The proposal is not '*integrated development*' pursuant to Section 4.46 of the EP&A Act.

### 5.0 PLANNING ASSESSMENT

The application has been assessed having regard to the relevant matters for consideration under the provisions of Section 4.55 of the EP&A Act, as detailed below.

Pursuant to Section 4.55(1A) - Modifications involving minimal environmental impact, under the EP&A Act, the consent authority, when considering a request to modify a determination under the clause, must:

- (a) be satisfied that the development as modified is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all)
- (b) consult with any relevant authority or approval body
- (c) notify the application in accordance with the regulations
- (d) consider any submissions made
- (e) take into consideration the matters referred to in Section 4.15 as are of relevance to the development the subject of the application.

In consideration of the current s4.55(1A) application to modify consent DA2021/00662, the assessment is limited to only those matters that are relevant to the proposed changes to the approved development. Other aspects of the approved development, which do not form a part of the proposed modification were considered as part of the original assessment.

In addition, those matters relating to regulatory, and compliance do not form part of the planning assessment undertaken for this modification application.

The relevant matters relating to clause 4.55 are discussed below:

#### **Section 4.55(1A)(a) – Substantially the same development**

The applicant states that '*to address Section 4.55(1A) it is necessary to consider whether the proposed modified development would be essentially or materially having the same essence as that which has been originally approved. This comparison involves an appreciation, qualitative, as well as quantitative, of the development being compared in their proper contexts.*

The applicant provided a quantitative comparison of the differences and some associated assessment within their written response. Key components of amendment within the modification were discussed and are summarised as follows:

- i) principal dwelling - approved alfresco floor height at RL 43.65 and raising to RL43.83, equating to a 172mm increase.
- ii) secondary dwelling - approved height of 4.875m and increase to 5.335m, equating to an increase of 470mm. Steps to deck approved for location on left-hand side of deck, proposed to be relocated to right-hand side of deck.
- iii) Western retaining walls (RW) - three RWs approved, and modification includes reduction in RWs now two, with the removal of an 850mm high RW.
- iv) Swimming pool - approved setbacks on eastern side 2m and western side approximately 6m and modification sees an increased setback to 3.28m on eastern side (increase of 1.28m) and overall increase on western side ranging from 5m, 6.235, up to 7.280m due to the change in pool design, configuration and location more centrally on site.

The applicant states in their assessment of the modifications, *that in relation to the alfresco floor level that the assessment considers the difference is inconsequential as the height of the dwelling as approved does not change. The amendment in turn enables improved functionality and practical use of the indoor and outdoor space at one level with a slight step removed.*

In relation to the secondary dwelling the applicant states *the qualitative increase of 470mm is considered minor in comparison to the original approval and will not result in any noticeable change to overshadowing or bulk of the development. The overall height remains less than the prescribed LEP height limit of 8.5m and maintains compliance with the DCP requirements for shadows cast to adjoining sites. This is qualified on the proposed modification plans.* In relation to the relocation of steps, the applicant considers the modification an *'inconsequential amendment to development as originally approved.*

The applicant draws the following conclusion that *'the quantitative changes are minor and insubstantial when compared to the original approval. From a quantitative perspective, the proposed modification does not propose any amendment to the following elements, as originally approved and the development remains consistent with the consent as originally granted from a quantitative perspective:*

- i) *Setbacks of all built elements (dwelling - except for the garage eave and secondary dwelling)*
- ii) *Gross floor area of each dwelling*
- iii) *Number of total dwellings (ie. principal and secondary will remain)*

- iv) *Floor space ratio (ie. remains at 0.33:1, below the prescribed 0.75:1)*
- v) *Parking spaces*
- vi) *Solar access*

The applicant provided a qualitative comparison of the differences and some associated assessment within their written response. Key components of amendment within the modification were discussed as follows:

- a) Principal dwelling - windows (eastern, western and southern elevations) - sliding windows approved and awning/louvre windows in slightly amended positions (with greater sill height or larger sizing).
- b) Privacy screening on western elevation to alfresco area - approved privacy slats - modified to solid wall 1.7m high and opening louvres above.
- c) Eave - nil eave originally approved and modified to add a 450mm eave to western side of the garage of main dwelling.
- d) Landscaping and swimming pool - approved rectangular pool positioned close to western side boundary - redesigned to irregular shaped pool, centrally located on slight diagonal, increasing landscaped area and functionality.
- e) Stormwater system - originally aligned with location of swimming pool - proposed to realign location of system to match the direction of the swimming pool and landscaping location, with the size of system confirmed by an appropriately qualified engineer as compliant and adequate to support the development.

The applicant draws the following conclusion that *'from a qualitative perspective the amendments do not radically change the development when compared to the original approval. The development as modified will continue to reflect a dwelling house and secondary dwelling, a residential land use that does not depart from the approved development definition and use of the site. The proposed modification aims to improve the outdoor open space areas and enhance its functionality. All conditions (other than those proposed to be modified) will be complied with and the proposed modifications are substantially the same development as that which was originally approved.*

Having considered the information submitted and undertaking an assessment of the extent and nature of modifications proposed, it is considered that the site continues to provide for the development of a single storey dwelling house and secondary dwelling, with these main elements in the same location and configuration on site as originally approved. The extent and nature of amendments are considered to be within the scope of a s4.55(1A) modification application and the development being modified is considered to be substantially the same development as the development for which consent was originally granted.

The proposed amendments are not considered to present any significant impacts on the natural or built environment or the amenity of surrounding properties and remains substantially the same as originally approved.

#### **Section 4.55(1A)(b) - Consultation**

No public authority or approval bodies were required to be consulted.

The proposal as originally approved was not considered '*integrated development*' pursuant to Section 4.46 of the Environmental Planning & Assessment Act, therefore this subsection does not apply.

#### **Section 4.55(1A)(c) - Notification**

The original application was publicly notified in accordance with CN's Community Participation Plan. Amendments to the application were also publicly notified.

Plans and documentation received during the assessment process have also been made available on CN's DA Tracker.

#### **Section 4.55(1A)(d) - Submissions**

The original application was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and 11 submissions were received (10 unique) submissions.

Amendments to the application were also publicly notified and eight submissions were received (seven unique submissions).

#### **Section 4.55(1A)(e) – take into consideration the matters referred to in Section 4.15 as are of relevance to the development the subject of the application**

When determining an application for modification of a consent, the consent authority must take into consideration the matters referred to in Section 4.15(1) that are of relevance to the development the subject of the application, which includes the following:

Section 4.15(1) - the provision of any environmental planning instrument.

Section 4.15(1) - (a)(ii) any proposed instrument that is or has been the subject of public consultation under the Act - Draft environmental planning instruments.

Section 4.15(1) - (a)(iii) any development control plan.

Section 4.15(1) - (a)(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4.

Section 4.15(1) - (a)(iv) any matters prescribed by the regulations.

Section 4.15(1) - (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality.

Section 4.15(1) - (c) The suitability of the site for the development.

Section 4.15(1) - (d) Any submissions made in accordance with this Act or the regulations.

Section 4.15(1) - (e) The public interest.

An assessment of the modifications against the matters for consideration under Section 4.15 of the EP&A Act is provided below.

## 5.1 Provisions of any environmental planning instrument

### State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

A BASIX Certificate was lodged with the application, demonstrating that the development can achieve the required water and energy reduction targets. A condition was imposed on the original development consent requiring that the development be carried out in accordance with the relevant BASIX Certificate.

### State Environmental Planning Policy (Housing) 2021

The original development approved in DA2021/00662 was considered under the provisions of the SEPP (Affordable Rental Housing) 2009 (AHSEPP). The development met the definition of a secondary dwelling and the parameters under the AHSEPP.

Since the original consent, AHSEPP has been replaced with SEPP (Housing) 2021. Essentially the provisions of the current SEPP, remain consistent with the provisions of the AHSEPP, as it relates to secondary dwellings.

The development as modified meets the definition of a secondary dwelling under the Housing SEPP. The assessment of the application has therefore been undertaken in accordance with Clause 50, 52 and 53 of this SEPP (Part 1 – Secondary Dwellings):

Clause 50 – Application of Part	The land is zoned Zone R2 Low Density Residential and secondary dwellings are permissible in this zone.
Clause 52 – Development may be carried out with consent	The development will not result in any dwelling other than the principal dwelling and the secondary dwelling.  The proposed FSR for the site complies with maximum floor area permitted for a dwelling house on the land.

	The proposed total floor area of the secondary dwelling is no more than 60m <sup>2</sup> , or the greater floor area permitted under environmental planning instrument—the greater floor area.
Clause 53 – Non-discretionary development standards—the Act, s 4.15	<p>This section identifies development standards that if complied with, prevent the consent authority from requiring more onerous standards.</p> <p>The following non-discretionary development standards are applicable to the proposed development:</p> <ul style="list-style-type: none"> <li>• For a detached secondary dwelling, a minimum site area of 450m<sup>2</sup> has been achieved.</li> <li>• The number of parking spaces provided on the site is the same as the number of parking spaces provided on the site immediately before the development being carried out.</li> </ul>

As originally assessed under DA2021/00662, the secondary dwelling as modified, maintains a maximum habitable floor area of 60m<sup>2</sup>, with 16m<sup>2</sup> of storage space underneath, externally accessible and therefore, capable of use by either the main principal dwelling and/or secondary dwelling on the site.

The original modified proposal saw the inclusion (formalisation) of the sub-floor space into additional storage space (beyond the 16m<sup>2</sup> storage space immediately located inside the rear roller door). This was seen by the applicant as practicable from a maintenance perspective.

During assessment and in response to submissions, regarding overall useable floor area of the secondary dwelling, definition of land use and potential for unlawful use of the entire sub-floor space (finished sub-floor) as either additional habitable or non-habitable space, the plans were modified to revert back to the approved 16m<sup>2</sup> storage space directly inside the roller door. This was achieved by inclusion of a proposed internal solid wall around the 16m<sup>2</sup> storage space, so as to effectively block off the remaining sub-floor space.

This amendment is considered sufficient to resolve concerns raised.

Notwithstanding, it is noted that this storage space, with access only via external means, is capable of use by the secondary dwelling, but also for storage associated with the main or principal dwelling. Therefore, with independent / external access, it is likely it may be used for the principal dwelling given the secondary dwelling must remain on the same lot as the primary dwelling and a contrary view could have been that the use of the full extent of finished sub-floor space for storage purposes only, was entirely appropriate, as it was not necessarily related to the secondary dwelling, but for use of the main or principal dwelling occupying the site. Therefore, removing any potential need for external light weight structures such as garden sheds and is more appropriate, visually and aesthetically to meet the needs of this residential property. This view, then does not bring into question the floor area associated with the secondary dwelling.

In addition, it is noted that the sub-floor area does not meet the minimum floor to ceiling height requirement of 2.4m under the National Building Code, so could not lawfully be used as additional habitable floor area.

Notwithstanding, the end user of the storage space, the current modifications revert back to the approved 16m<sup>2</sup> storage space and the proposal is considered acceptable and continues to remain consistent with the provisions of the SEPP and the original consent in this regard.

Relevant conditions imposed on the original consent in relation to the definition of a secondary dwelling will remain unchanged. Refer to Draft Schedule of Conditions in **Attachment B**.

### **Newcastle Local Environmental Plan 2012 (NLEP 2012)**

The following summarises an assessment of the proposal against the provisions of the NLEP 2012 that are primarily relevant to the proposed development:

#### Clause 2.1 - Land Use Zones

The site is included within Zone R2 Low Density Residential under the provisions of NLEP 2012, and the proposal is defined as a *dwelling house and secondary dwelling* and remains permissible with CN's consent.

The modified development does not result in any change of use of the approved development and will remain consistent with the zone objectives, as originally assessed under the original consent.

#### Clause 2.7 - Demolition Requires Development Consent

The original DA2021/00662 included demolition of the existing dwelling house and ancillary garage structure and relevant conditions were included in the development consent. The structures on the site have been previously demolished. The modifications do not relate to demolition aspects and no further consideration required in relation to Clause 2.07.

Conditions imposed on the original development consent will remain unchanged.

#### Clause 4.3 - Height of Buildings

Under NLEP 2012 the site has a maximum building height limit of 8.5m. The original approved development for both the main dwelling house and secondary dwelling comply with the building height limit of 8.5m.

The site originally contained a single storey dwelling house with main roof ridgeline of RL50.37 and detached garage with roof ridge height of RL46.18, as per the original site survey, prepared by de Witt Consulting and dated June 2019.



The modification seeks approval for the constructed floor level and overall height of the secondary dwelling to be 470mm higher than the approved heights (roof ridge height of RL45.24). The increase in height takes the maximum height of the secondary dwelling to 5.61m. This modification equates to the secondary dwelling being 9.1% higher than originally approved but remains 2.89m (ie. 34%) below the maximum building height limit for the site under NLEP 2012.

Having regard to the objectives of Clause 4.3 and the relevant zone objectives under NLEP 2012, the scale of the development, with modification to the overall height of the secondary dwelling will continue to contribute towards the desired character. The increase in building height as proposed under this modification will have no significant adverse impacts such as view loss, over shadowing to adjoining developments, allowing for a continued amenity and solar access to these properties.

The potential for adverse impacts such as views loss, overshadowing, privacy and overall residential amenity both on site and for adjoining properties is further discussed within relevant sections of this report.

#### Clause 4.4 - Floor Space Ratio

Under NLEP 2012 the site has a maximum FSR limit of 0.75:1. The modifications do not result in any change to the total FSR originally approved at 0.33:1.

In relation to the maximum floor area of the secondary dwelling, as discussed under the provisions of SEPP (Housing) 2021, it remains limited to 60m<sup>2</sup>. The term *total floor area* is not specifically defined in planning law, which otherwise uses the defined term *gross floor area*. The gross floor area of a building is measured from the internal face of external walls and excludes any basement or storage.

The current modified plans demonstrate compliance with the maximum total floor area for a secondary dwelling and are otherwise considered to be consistent with the original development consent in this regard.

Overall, the modified development remains in compliance with the FSR limit for the site.

#### Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils and the development remains satisfactory in this regard.

*Works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land.*

Conditions imposed on the original development consent will remain unchanged.

## Clause 6.2 - Earthworks

The original development consent included provision for cut and fill that effectively created level terraces in the yard space between the main dwelling house and the secondary dwelling, including a levelled area containing the swimming pool.

The modified plans provide for the deletion of one section of retaining wall adjacent to the western boundary of the site and for another section of wall adjacent to that boundary to increase in height by 245mm. The remaining retained sections, relate to one retaining wall stepped and off-set 500mm from the western boundary. A 1.8m high slat privacy screen is also proposed on top of the off-set retaining wall, proposed for the full length of the retaining wall to provide additional privacy between the subject site and the adjoining western property.

The modified swimming pool design includes retaining walls that are more closely aligned to the perimeter of the swimming pool. It is considered that the modified retaining wall designs do not generate any significant new impacts on adjoining properties, compared to the original consent.

A number of submissions have referred to a concern relating to the overbearing nature of the proposed retaining walls and fences, with reference to a combined height of 4m. It is understood that the reference to 4m involves a location where an existing cut-in retaining wall is located on the adjoining property to the west, however this is also the location where a previously approved wall retaining fill has been deleted from the current modified proposal.

In response to matters raised at the Public Voice Meeting on 17 October 2023 relating to cut and fill and overall height of pool area, the applicant has also provided a further response that -

- i) *the architectural plans show the pool now sits 500mm lower than it did on the DA approved plans. Original pool RL is shown as RL42.200, modified pool RL is shown as RL41.720. This concern would appear to be irrelevant as a result, as it is already providing more privacy and amenity to everyone as a result.*
- ii) *In regard to cut/fill, the only extra over excavation that has been, is on the lead into the stairs on the eastern side as shown on plans.*
- iii) *The house as is shown on the IDEV survey is sitting exactly where it should be.*
- iv) *Earthworks in the backyard remain at a standstill and unfinished due to the DCO in place and do not represent final cut/fill levels.*

The modified plans provide for amendments to the partially constructed eastern retaining wall (running adjacent to the main dwelling house), with respect to both overall height and construction material type, along with a further 2m extension to this wall (yet to be built).

The earthworks and retaining wall along the eastern side boundary, have included submissions alleging that the footings of the constructed retaining wall encroach onto a neighbouring property. While CN has no definitive evidence of an encroachment, previous compliance investigation undertaken, considered there may be potential for a sub-terrain encroachment in the order of 25mm (ie. partial footing). Key issues include:

- i) *That such an issue is principally of a civil law nature and otherwise falls within the role and responsibility of the Registered Certifier that is performing the Principal Certifier role for the development.*
- ii) *Findings of the investigation established, the retaining wall, is constructed with steel vertical posts and horizontal concrete rails. The steel posts are concreted into the ground, the retaining wall is lined with Geotech fabric, drainage has been installed and the wall backfilled.*
- iii) *The original consent included a retaining wall of concrete block construction on a concrete strip footing was approved to be constructed against the eastern boundary alignment. Advice received from the Principal Certifier confirmed an inspection of the retaining wall had been undertaken and considered the retaining wall constructed is not inconsistent with the development consent and no further action was to be undertaken. In addition, a progress Identification Survey report was provided to the Principal Certifier and then CN with respect to the positioning of the retaining wall which indicates 'the main retaining wall structure and sub-soil drainage are located within the subject property'. No subterranean investigation was included in the survey; therefore, no definitive encroachment could be confirmed.*

CN advised that if the owners of 59 Grinsell Street consider there is a potential encroachment that they wished to pursue, then they should seek legal advice, given that CN has no jurisdiction under the provisions of the *Encroachment of Buildings Act 1922*.

Further, and in response to the PV meeting and matters raised, the applicant has provided a further response on the eastern retaining wall, together with the provision of structural adequacy information. The applicant provided the Principal Certifier's inspection report regarding the footings for the eastern retaining wall, confirming all footings were completed to a satisfactory depth. Photographs of footings, show them to be inside of an excavation face. In addition, an extract of information, which relates to the current action plan in further validating the eastern retaining wall provided by the applicant is included below.

*The eastern retaining wall piers were drilled wholly on the property of 61 Grinsell Street. A string line was set up off survey points and we kept that line as the edge of our pier hole.*

*The WAE undertaken by De Witt Consulting confirmed that the back side of the retaining wall was 125mm off the boundary, so the pier post is not exactly in the centre of the pier. We have engaged Will Maher from 5QS Engineering (the same engineer*

*that designed the retaining wall we installed) to certify the structural integrity of the wall as it has been installed. He has conducted a site assessment and is satisfied that there is no issues with the way it has been constructed. Will has also confirmed that the posts used are the correct size in this application and for the height.*

*We are also planning to hopefully engage in communication with the neighbours regarding their other concerns around the backfill, geo fab location and the extra height they would like added to the wall. We feel that we have a solution to the concerns and would like to resolve that directly with them if possible.*

With respect to CN's assessment of the matter of potential encroachment of the eastern retaining wall onto the adjoining property, the following is relevant:

- i) An engineer has identified that the 100mm retaining wall posts are positioned approximately 225mm from the front edge (ie dwelling side) of the circular footings, which were designed to have a diameter of 450mm. Noting that a Registered Surveyor's progress survey identifies the upper parts of the wall to be 125mm from the boundary, a 450mm footing could be expected to just touch the boundary at its closest point, or may be slightly within the subject property boundary as a result of wall design's slight downward slope away from the boundary.

All this is subject to normal construction tolerances and the reliability of the information provided, but the available information does not lead to a conclusion that the structure encroaches over the boundary.

Regarding the allegation that was raised about geofabric being placed in the wrong location, while such an outcome may not be optimal, given that the wall is not of a type that is impervious to water passing through, it is considered that the location of the geofabric is unlikely to compromise the structural integrity of the wall. While incorrect placement of the geofabric may impact on the long-term performance of the agricultural drain behind the wall, it is likely that such an outcome would be more of a nuisance to the subject property owner than it is a structural issue. CN staff consider that there would likely be numerous adequately performing retaining walls across the Local Government Area (LGA) that have no geofabric behind them at all. Ultimately, such matters fall within the responsibility of the Principal Certifier.

The modified proposal is considered to remain substantially the same as originally approved, with changes to earthworks and retaining walls, considered to be positive in terms of minimising impacts on surrounding properties and therefore, not unreasonable in the context of the planning merits associated with this modification application. In addition, further details are provided within the report under section 5.01 Soil Management under NDCP 2012.

Refer to Draft Schedule of Conditions at **Attachment B**.

## **5.2 Any draft environmental planning instrument that is or has been placed on public exhibition.**

## **Draft Newcastle Development Control Plan 2023**

The Draft Newcastle Development Control Plan 2023 (DCP) provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The Draft DCP was publicly exhibited from Thursday, 28<sup>th</sup> September to Friday 27<sup>th</sup> October 2023.

Whilst the Draft DCP has been publicly exhibited, the Plan is yet to be finalised and formally adopted by City of Newcastle. Notwithstanding, the Draft DCP requires consideration in accordance with Section 4.15(1)(a)(ii) of the Environmental Planning & Assessment Act 1979.

Section 11 of Part A - Introduction of the Draft DCP nominates savings and transitional arrangements as follows:

*DCP 2023 does not apply to any development application lodged but not finally determined before its commencement. Any development application lodged before its commencement will be assessed in accordance with any previous development control Plan (DCP).*

As such, the proposed development remains subject to the provisions of the Newcastle Development Control Plan 2012.

### **5.3 Any development control plan**

#### **Newcastle Development Control Plan 2012 (NDCP 2012)**

The main planning requirements of relevance in the NDCP 2012 are discussed below.

##### Single Dwellings and Ancillary Development - Section 3.02

The following comments are made concerning the proposed development and the relevant provisions of Section 3.02:

##### *Street frontage appearance (3.02.03)*

The modification application does not specifically change aspects relating to the street frontage appearance, front setbacks and the like which the development complies with.

However, it is noted that the development with main dwelling house fronting Grinsell Street, has achieved the performance criteria under this section, by providing development that complements and harmonises with the positive elements of existing development in the street, complies with required setbacks, integrates garages into the development without dominating the streetscape and provides for passive surveillance of the street. In addition, the development outcome on this site achieves a balanced approach to cut and fill across the site and adjoining properties, given the existing topography within this location and is consistent with the single storey and streetscape character within this area.

### *Side / rear setbacks (building envelope) (3.02.04)*

The modification includes a 450mm wide eave provided to the main dwelling house along the side of the garage, which has been constructed, however remains part of the modification application.

It is considered that the additional eave, matching the other eaves of the main dwelling house, does not generate any significant additional impacts on neighbouring properties.

### *Landscaping (3.02.05)*

The original development application DA2021/00662 did not require the submission of a landscaping plan for the type and scale of development. When first lodged, the modification application did not include a landscaping plan. During the assessment and in response to submissions received, the applicant engaged a landscape architect to prepare a landscaping proposal, which focused on the alfresco / private open space interface and pool / remaining yard space for the site.

The landscaping proposal has been amended during assessment and in response to submissions received. Concerns were raised in relation to the retaining wall along the western boundary.

In response the retaining wall was off-set 500mm from the western boundary and a garden bed was installed between this wall and the boundary fence. This allowed the retaining wall to be removed from the boundary and to allow for a future boundary fence to be installed. This is considered to address the concerns from the neighbour about the location of the retaining wall.

A condition is recommended requiring an amendment to the planting schedule identified within the garden bed along the western boundary from proposed '*Callistemon Slim*' to either '*Murraya*' or '*Photinia Red Robin*', with an increase in minimum pot size from 300mm to 450mm for these plantings. This resolves the western neighbour's concerns regarding a potential inappropriate species, and potential nuisance in vicinity to an approved pool (yet to be constructed) on their property.

In relation to privacy for the eastern neighbours and any need for additional landscaping, the assessment considers that the setback distance provided by virtue of the location of the secondary dwelling, the topography in this area and the location of the eastern neighbour's dwelling with POS sees the current landscaping proposal as acceptable and appropriate from a landscaping and privacy perspective for both properties.

As expressed by the owner in response to the Public Voice concerns there is also the future opportunity within the yard space between the pool area and secondary dwelling frontage to add more landscaping which can be determined at a later date by the owners. It is also noted that there is a reasonable expectation that each individual property bears responsibility to protect their own privacy (particularly on sloping sites),

and the opportunity exists for 59 and 63 Grinsell Street to also include additional landscaping on their sites.

The current landscaping scheme provides a more considered approach particularly as it relates to the redesigned pool and associated retaining walls on the site and relationship with adjoining properties and provides sufficient landscaped area to achieve a reasonable outcome on the site.

A condition has been recommended to amend the finished surface to gravel within the previous rainwater tank location. This would further assist with any potential impact on the eastern neighbour's tree in proximity to the boundary. Refer to Draft Schedule of Conditions in **Attachment B**.

Additional conditions have also been recommended that reference the landscaping plan to ensure a successful landscaping outcome as proposed on plan. Refer to Draft Schedule of Conditions in **Attachment B**.

The current landscaping plan - Issue D, prepared by Michael White Landscape Architect and dated 31 October 2023 is provided in **Attachment A**.

*Private open space (3.02.06)*

The modification application remains consistent with the original consent in relation to the provision of adequate areas of private open space (POS), both as an extension of the main dwelling with outdoor alfresco space directly accessible from the internal living areas of the dwelling and consistent with NDCP requirements.

The originally approved alfresco area finished floor level is proposed to be increased by 172mm, to provide an improved access to and from the indoor living areas of the dwelling without the need for a step down. The originally approved alfresco area had a privacy screen at the western end of this area, to provide a sufficient level of privacy for the adjoining western neighbours. This privacy mitigation measure is proposed to be modified as part of this application, to a solid wall, with height of 1.7m and louvres above. The privacy screen along the end of the alfresco area, also has a return of 680mm to further enhance privacy between properties.

The modified proposal is considered acceptable in relation to NDCP 2012.

*Privacy (3.02.07)*

Privacy from the main dwelling, particularly related to the raising of the finished floor level (FFL) of the alfresco area has been assessed on merit and the increase 172mm is unlikely to generate any significant additional privacy impact. Any such impact is at least partially offset by the enhanced privacy screening that is proposed for the edge of the alfresco area.

Noting that some privacy concerns relate to an approved (ie yet to be constructed) swimming pool on the western adjoining property, NDCP 2012 notes that privacy cannot be ensured to general open space areas, including pools.

It is also noted that the modifications propose changes to windows and doors of the main dwelling house. The proposed changes do not generate additional privacy impacts and, in the case of increased sill heights to two living room windows, there is additional privacy impact mitigation.

Privacy from the secondary dwelling, particularly relating to the living room / front deck area has been assessed and the plans have been amended to relocate the rainwater tank to a more central point within the site, on ground underneath the bathroom window. In addition, the stairs to the deck, have been relocated to the other end (more central location). The concerns raised in submission and at Public Voice relating to visual privacy impacts into the adjoining property to the east, being 59 Grinsell Street. The proposed amendments to the development, notwithstanding the increase in FFL, remains acceptable and is considered not to have any significant impacts. This is due to the distance between the dwelling and POS on the neighbour's property to the east with location of secondary dwelling at the rear of the site, and the expectations that given the sloping topography within this location, that a degree of overlooking of all properties would be expected.

In relation to privacy impacts toward the western neighbouring property, this would primarily be from the bedroom of the secondary dwelling, which is considered to be of a lesser potential impact, than that of a living area and therefore, the modification to increase the finished floor level of the secondary dwelling is not considered to pose significant privacy impacts to adjoining properties and remains an acceptable outcome for this site consistent with the original approved development.

#### *Solar access 3.02.08)*

As the site and the adjoining properties are generally aligned in a north-south direction, the desirable northern aspect is primarily affected by shadowing generated from the structures on the individual sites. The proposed development and, more specifically the modified proposal, will have no significant overshadowing effect.

#### *View sharing (3.02.09)*

The original development DA2021/00662 had regard to the planning principles set out under *Tenacity vs Warringah NSW LEC 2004* in relation to view sharing. The original assessment concluded that the development will permit view sharing with adjoining properties. It was noted that *view sharing has been enhanced by the form and treatment of the proposed development, including the roofscape. The proposed performance solution is considered satisfactory to the relevant Performance Criteria of this section*, that being s.3.02.09 - view sharing under NDCP 2012.

The current modification application, resulted in submission received from the adjoining neighbour to the west at No.63 Grinsell Street Kotara maintaining the original objection and raising further concerns with potential view loss as caused by the overall built form and scale and increase in finished floor level and overall height of the secondary dwelling, partially constructed inconsistent with the approved plans.



During assessment, CN requested additional information in relation to view loss given the issue was raised in submission. A view analysis was requested, and the applicant advised that to facilitate a full view analysis to be undertaken properly, they were proposing to gather data through the use of a drone. The applicant advised that access and permission for use of a drone was denied by the western adjoining property owners. Therefore, CN accepted a desk top review be prepared for submission with the application. This information was provided as part of the architectural plan set and titled 'View Analysis Plan' (Drawing No. S4.55\_09) and is provided in **Attachment A**.

In addition, during the assessment and prior to any request for a view analysis to be provided, CN's assessment officer and compliance officer, visited the adjoining property to the west (at the western property owners request) to discuss the concerns of this property owner.

CN's assessment officer's photos taken on 20 October 2020 (Figures 8), further assist in demonstrating that views will not be significantly impacted through the increase in overall height of the secondary dwelling under this modification application.



**Figure 8** - Photos taken standing at windows from within Rumpus (enclosed Verandah-Living Area) of 63 Grinsell Street.

Having regard to the planning principles as set out in the Court ruling, the following is provided in regard to the principles in *Tenacity vs Warringah NSW LEC 2004*, which demonstrates the planning merits of the increased building height of the secondary dwelling, and how it is established that the development, as modified continues to provide reasonable view sharing between properties.

- i) *The first step is the assessment of views to be affected. Water views are valued more highly than land vies. Iconic views (eg. Of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole*

*views are valued more highly than partial views, eg. A water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

### Comment

The assessment considers that there is no water view or iconic view to be protected in this instance. However, consideration has been given to the outlook in this instance afforded to all these properties in this location, is an elevated outlook of both natural landscape setting and skyline beyond. It is also noted that these properties share a rear boundary with the Sydney Trains Rail Line and more distantly with built form / use which is primarily of industrial/commercial uses.

On this basis, and as demonstrated both on plan and from photos taken from within the rear living area of the dwelling located on 63 Grinsell Street, a view of both natural landscape and skyline is maintained over the secondary dwelling, without any significant impact resulting from the increase in overall height of the secondary dwelling.

- ii. The second step is to consider from what part of the property the views are obtained. For example the protection of a view across side boundaries is more difficult than the protection of views from the front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

### Comment

All properties in this location have a view south and directly over their rear boundaries. The view to the east from 63 Grinsell Street is primarily only available across a side boundary of the subject site at 61 Grinsell Street. However, when considering this view, there remains a view of both natural landscape and skyline across and over the secondary dwelling, thereby maintaining view sharing across this property for the neighbour at 63 Grinsell Street.

- iii. The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

### Comment

In terms of the Court's criteria, the extent of view loss is considered to be negligible on the grounds that a direct view will be maintained from within and directly over the neighbour's rear boundary, and also that a view above the secondary dwelling's roof

of the natural landscape and skyline will be maintained, without significant impact from the increase in overall building height of the secondary dwelling.

- iv. *The fourth step is to assess the reasonableness of the proposed development that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

### Comment

As the proposed development is considered to have negligible impacts on the existing view as assessed under the original development application and as it relates to the view corridor of 63 Grinsell Street, a more skilful design is not warranted in this case.

It has been assessed that the secondary dwelling, with increased finished floor level and overall height of building, is compliant with CN's planning controls, and given the topography and constraints of the site.

Having regard for the nature and direction (ie. across side boundaries) of the affected views, along with the extent of the impact and ongoing compliance with the height planning control, it is considered that the view impact of the increased height of the secondary dwelling is not unreasonable and on planning merit is supported.

### *Ancillary development (3.02.12)*

### Secondary dwellings

Refer to Section 5.1 of this report, for further discussion in relation to compliance with State Environmental Planning Policy (Housing) 2021 and Newcastle Local Environmental Plan 2012.

In relation to section 3.02 Single Dwellings and ancillary structures under NDCP 2012, the modified proposal remains as defined, a secondary dwelling and to remain on site with the main or principal dwelling house originally approved under DA2021/00662.

The modified proposal has been considered in relation to the performance criteria and acceptable solutions for ancillary development (secondary dwellings) under the NDCP 2012 and is considered acceptable within the context of the amendments and considered unlikely to pose significant impacts, to that originally approved under DA2021/00662.

### Swimming pool

The modified proposal includes a redesign of the approved swimming pool and while the latest amended plans provide for a pool that will contain 14% more water than the swimming pool that was originally consented to, the swimming pool is more centrally located on the site, with increased setbacks from boundaries, than originally approved. In addition, the finished level of the pool area has been lowered 500mm, from that approved originally, which further assists in terms of its context both on site and surrounding properties. It is considered that the modified design of the swimming pool will not generate any significant additional impacts on the adjoining properties and remains consistent with the performance criteria and acceptable solutions in NDCP 2012.

The conditions imposed on the original development consent DA2021/00662 will remain and relate to those matters to be addressed both 'prior to issue of Construction Certificate' and 'prior to issue of Occupation Certificate' regarding compliance with relevant Australian standards for construction, pool plant & equipment acoustics and no pool overflow discharge onto neighbouring properties. Refer to Draft Schedule of Conditions in **Attachment B**.

The modified development is considered to remain acceptable in relation to the abovementioned DCP section and achieves relevant acceptable solutions and performance criteria for building form, building separation and residential amenity. The modified development maintains a scale and built form that is appropriate for its location. The proposal provides good presentation to the street with good residential amenity, while maintaining privacy for adjoining neighbours.

### Soil Management - Section 5.01

The topography of the site has resulted in the need for some extent of cut and fill and retaining of the site. The original development application DA2021/00662 proposed cut and fill across the site, to ensure a balance between the site and both adjoining properties.

The current revised plans provide for fewer retaining walls, and for off-setting retaining walls from the western boundary which, in summary, involves an additional 275mm of fill / retaining wall height in one section of the retaining wall that is now proposed to be off-set 500mm from the western boundary.

In addition, the current plans provide for a lower pool area than that originally approved (lowered by 500mm), which is considered to be positive in terms of minimising cut / fill, improving the relationship of the site to adjoining properties and minimising the potential for adverse amenity impacts.

The proposal is considered acceptable in relation to cut / fill works and is considered an improved outcome, compared to that originally approved.

### Vegetation Management - Section 5.03

The proposal does not remove any existing vegetation on site.

Following the Public Voice Meeting on 17 October 2023, the applicant has responded to concerns raised by the neighbours and has proposed to relocate the rainwater tank to a more central location underneath the bathroom window of the secondary dwelling, so as to remove the concern relating to potential impact on the existing neighbours' tree.

The proposed new location for the rainwater tank, poses no further impacts on existing trees off site, and therefore the proposal remains consistent with the provisions of this section of the NDCP 2012.

The modified proposal remains acceptable in this regard.

### Section 7.05 - Energy Efficiency

The modified proposal remains acceptable having regard to this section.

### Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The original development was approved supported by stormwater management plans, Job No. 21-227 Issue B, prepared by Skelton Consulting Engineers and dated 29 September 2021. A number of conditions were imposed on the original development consent DA2021/00662.

The modified stormwater management plan has been assessed by CN's Senior Development Officer (Engineering) and the following is provided in this regard.

A review of the original proposed modifications to stormwater management first lodged, in comparison to the originally approved plans, provided the following changes outlined below:

- a) The proposed in-slab 4kL Aquacomb rainwater tank array in the garage has been replaced with a conventional 4kL above-ground rainwater tank located in the southwest setback of the main dwelling (adjacent the side wall of garage).
- b) The 3kL rainwater tank at the secondary dwelling has been relocated to the northeast setback.
- c) The proposed 4m dispersion trench has been relocated closer to the southwest boundary due to the increased footprint of the pool terrace tier.

It is noted that the original change from in-slab tank to above ground 4kL rainwater tank and relocation of the 3kL rainwater tank did not effect functional changes to stormwater management for the development.

Drainage relating to the main dwelling house (ie. change from in-slab tank to above ground 4kL rainwater tank) was assessed under MA2023/00250 for staging of works.

This modification application saw consent granted for the staging of works, with Stage 1: main dwelling house and Stage 2: remainder of the development comprising the secondary dwelling, swimming pool, associated stormwater drainage, landscaping, retaining walls on western and eastern boundary, fencing and alfresco area associated with the main dwelling house.

The current modified stormwater management plan has responded to further assessment and concerns raised in submissions and includes:

- a) The stormwater management plan has been amended to include design surface levels demonstrating a clear path of flow to drain runoff to the rear boundary without impacts on adjoining properties. Shaped shallow swales and constructed hobs are proposed along the southwest building setback to contain runoff within the development site.
- b) Skelton Consulting Engineers have provided a letter confirming the proposed dispersion trench has been sufficiently sized for the connected roof catchment and subsoil drainage for the proposed retaining walls.
- c) A response prepared by East Elevation Construction indicates their intent to investigate the unused pier holes as part of the geotechnical investigation for the construction of retaining wall footings. Any unused pier holes that were not appropriately filled will be 'remediated with advice from the Geotech'.

The applicant has previously advised of the intent to remediate all unused pier holes, and this was confirmed by the owner during the Public Voice Committee Meeting on 17 October 2023. In response the owner advised that this work has not been undertaken, given the current Stop Work Order (SWO) in place and that once works on the site can continue, the commitment to progress the work associated with properly remediating these unused pier holes in accordance with geotechnical advice remains. CN considers that this will be for the benefit of both sites in question.

It is noted that the unused pier holes are partially on the subject site and partially within the adjoining property to the west, being 63 Grinsell Street. Ensuring these works are undertaken will ultimately rest with the certifier for the project, however, can also be assisted through CN's regulatory and compliance role if seen as appropriate.

The current modified architectural plans, stormwater management and landscaping plans were submitted to ensure consistency between all plan sets, relating not just to stormwater management and landscaping but to provide adequate details relating to retaining walls.

The current information provides Council with certainty the proposed stormwater design will adequately contain runoff within the development site and provide adequate management of stormwater generated over proposed impervious surfaces. On-site disposal can be accepted considering the topography of the site, small scale of the development, and demonstrated effort to maximise the roof catchment area draining back to Grinsell Street under a charged system.

The current plans were modified to reflect the relocation of the rainwater tank associated with the secondary dwelling, to a more central position on site and stairs to deck relocation. The current stormwater plans Job No. 21-227, Issue J and G, Dwg SW1 and SW2 and dated 31.10.23 and 18.09.23, prepared by Skelton Consulting Engineers.

The current modified proposal is considered acceptable in regard to the provisions under NDCP 2012 and subject to recommended amended conditions of consent. Refer to Draft Schedule of Conditions in **Attachment B**.

#### **5.4 Planning agreements**

No planning agreements are relevant to the proposal.

#### **5.5 The regulations (and other plans and policies)**

The original application under DA2021/00662 included demolition of existing dwelling house and detached garage. In accordance with the provisions of the EP&A Act it is a requirement to comply with AS2601 – Demolition of Structures and appropriate consent conditions were included under DA2021/00662.

These works have previously been undertaken and therefore, no further consideration is required in relation to demolition, other than the conditions imposed on the original consent will remain and will continue to be relevant to any demolition works associated with the development.

No Coastal Management Plan applies to the site or the proposed development.

#### **5.6 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality**

Impacts upon the natural and built environment have been discussed in this report in the context of relevant policy, including the NLEP 2012 and the NDCP 2012 considerations.

The proposed development will remain an acceptable form of development within the context of the site and surrounding properties and will not have significant impact on the natural or built environment.

It is considered that the proposal will not have any negative social or economic impacts.

#### **5.7 The suitability of the site for the development**

The site remains suitable for the proposed development and the areas of modification are considered to have positively contributed to the outcome both on site and as it relates to surrounding properties, particularly relating to cut and fill, reduced retaining wall works, and added privacy measures and landscaping, then that originally approved.

The development continues to have adequate services and waste facilities, consistent with the original development consent.

### 5.8 Any submissions made in accordance with this Act or the regulations

The application was notified in accordance with CN's Community Participation Plan.

The original application was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and 11 submissions were received (10 unique) submissions.

Amendments to the application were also publicly notified and eight submissions were received (seven unique submissions).

Plans and documentation received during the assessment process have also been made available on CN's DA Tracker.

The modifications were considered at the Public Voice Committee Meeting held on 17 October 2023.

The key issues raised within the submissions have been discussed previously in this report. The following table provides a summary of the issues raised and a response to those issues.

Issue	Comment
<p><u>General:</u> Retrospectively seeking approval for building works undertaken without consent.</p> <p>Lack of adherence to the development approval and modification approval processes.</p> <p>Reprehensible building practice will set a precedence.</p>	<p>The proposed modification application lodged under s4.55(1A) - involving minimal environmental impact of the Environmental Planning and Assessment Act 1976(EP&amp;A Act).</p> <p>Planning law requires that the merits of an MA involving such matters be assessed objectively, without regard for the retrospective nature of aspects of the proposal carried out inconsistent with any original consent. Key case law – <i>Windy Dropdown Ltd v Warringah Council (2000) 111 LGERA 299</i>.</p> <p>Such works need to be considered objectively on merit and separate to any compliance or regulatory action that may be taken for breaches of the original approval.</p> <p>The proposed modifications irrespective of unauthorised works taken place is firstly considered substantially the same development as DA2021/00662 and on balance that the outcome is a primary and secondary dwelling similar to the approved bulk and scale with enhanced outdoor area and privacy solutions.</p> <p>The proposed adjustment to the roof layout of the main dwelling, so that a 450mm wide eave is provided along the side</p>



	<p>of the garage, is among the matters for which retrospective approval is sought and is raised in numerous submissions. It is considered that the additional eave, matching other eaves of the main dwelling house, does not generate any significant additional impacts on neighbouring properties.</p> <p>CN has issued a Stop Work Order to cease building work at the property that had been carried out in contravention of the EP&amp;A act. This was later modified to remove the primary dwelling house from the order.</p>
<p><u>Primary dwelling:</u> Eaves added to the roof on the western side of the garage without consent and close to the boundary restricting solar access to the front bedroom and bathroom of 63 Grinsell Street Kotara.</p> <p>Enlarging and raising doors to alfresco area and windows on southern elevation contrary to the approved DA plans.</p> <p>Finished floor level of alfresco raised by 172mm will cause overlooking onto the private open space of 63 Grinsell Street Kotara.</p> <p>Concerned about acoustic privacy from air conditioning unit of primary dwelling due to proximity to main bedroom of 63 Grinsell Street Kotara.</p>	<p>The proposed adjustment to the roof layout of the main dwelling, so that an eave is provided along the side of the garage, is among the matters for which retrospective approval is sought and is raised in numerous submissions. It is considered that the additional eave, matching other eaves of the main dwelling house, does not generate any significant additional impacts on neighbouring properties.</p> <p>As per <i>section 3.02.08 Solar access</i> of the NDCP 2012, Development does not significantly overshadow living area windows and principal areas of private open space of adjacent dwellings. The solar access controls are not applicable to non-habitable rooms (bedrooms, bathrooms etc). Hence, the eaves are considered acceptable in this regard.</p> <p>Privacy solution (1700mm high solid wall with louvres on top) is proposed for the alfresco to ensure privacy for the occupants and residents of the neighbouring property, as discussed within the relevant section of this report.</p> <p>The proposed raising of the alfresco area, by 172mm, to match the floor level of the main dwelling house, is unlikely to generate any significant additional privacy impact. Any privacy impact is partially offset by enhanced privacy screening that is proposed for the edge of the alfresco area and 680mm return around the south edge of the alfresco area.</p> <p>Privacy impacts are further discussed within this report.</p> <p>It is noted that the main bedroom of 63 is assumed to be at the front of the dwelling, and at this point at this section of the western elevation / common boundary, a solid wall of the garage is located 900mm off the boundary and above-ground water tank.</p> <p>An additional submission provides photos of an air conditioning now installed for the main dwelling and raises concern</p>

	<p>regarding the rainwater tank and air conditioning unit not being located below fence line and acoustic concerns.</p> <p>It is noted the fence shown in photos, is the existing boundary fence (lower than the proposed 1.8m high fence) yet to be constructed.</p> <p>It is noted that the adjoining neighbour at 63 has existing air conditioning plant along their dwelling's exterior wall along this side boundary, which may present acoustic impact to bedrooms within their dwelling, if still operational.</p> <p>The original consent provided a condition (ie. Condition 35) relating to pool plant and equipment and mitigation measures relating to offensive noise.</p>
<p><u>Secondary dwelling:</u></p> <p>Objection to secondary dwelling as it is inappropriate in size and scale for R2 Low Density Residential zone.</p> <p>Increase in height by 470mm - 490mm and concreting the entire subfloor area resulting in floor space being significantly over 60 sqm and could potentially be used as habitable/usable floor space making it a two-storey residence.</p> <p>Dispute the justification given for increasing the height of secondary dwelling and suggests alternative methods such as private pump to sewer as a valid option to avoid the increase of height to attain the required fall to sewer.</p>	<p>Refer to relevant sections in this report, relating to overall bulk and scale of the development within a low density residentially zoned environment.</p> <p>Refer to relevant discussion with this report.</p> <p>The applicant has justified the increase in height was required to achieve the necessary fall to the sewer junction (Refer to <i>Plumber Statement</i> by G&amp;M Searant Pty Ltd, dated 16 November 2022). CN has no cause, but to accept the information from a suitably qualified plumber. CN considers that the secondary dwelling as built complies with the NLEP and NDCP and appropriate measures are proposed to ensure residential amenity for the occupants and the resident of the neighbouring property is achieved consistent with the original consent.</p> <p>The term '<i>total floor area</i>' is not specifically defined in planning law, which otherwise uses the defined term '<i>gross floor area</i>'. The gross floor area of a building is measured from the internal face of external walls and excludes any basement or storage. The gross floor area of the secondary dwelling does not exceed 60sqm.</p> <p>Additionally, the height of the concreted subfloor is less than 2.4m.</p> <p>Rainwater tank has been relocated to a more central location on site.</p> <p>As discussed within relevant sections of the report, it would be unreasonable when considering the planning merits associated</p>

<p>Inappropriate location of the rainwater tank on the eastern boundary.</p> <p>Reinstate the secondary dwelling to the approved height/lower to improve the privacy and amenity of the adjoining properties.</p> <p>Proposed manhole shown accessing sub-floor for future unlawful use.</p>	<p>with the assessment of the application which concludes that no significant adverse impact on privacy, solar access, view loss will occur with the raising of the secondary dwelling, to require demolition and rebuilding of the secondary dwelling.</p> <p>The manhole shown on the floor plan of the secondary dwelling, is a manhole to access the ceiling / roof space and does not provide access down / into the subfloor.</p> <p>Original access via a door within the wall around the defined 16m<sup>2</sup> storage space for maintenance purposes, was removed to address concerns of neighbours regarding inappropriate use of this sub-floor area.</p>
<p><u>Eastern retaining walls:</u></p> <p>Eastern retaining wall not clearly identified, nor noted on the approved DA plans.</p> <p>Constructed retaining walls inconsistent with the engineering plans and due to incorrect geofab lining, there is no adequate drainage during rainfall causing ground movement and subsidence for 59 Grinsell Street Kotara.</p> <p>Survey plan indicates retaining wall constructed closer to eastern boundary than approved resulting in subterranean footings encroaching 59 Grinsell Street Kotara.</p> <p>Height indicated on plans is incorrect since wall built in increments of 200mm sleepers with</p>	<p>Original DA2021/00662 did show a retaining wall along the eastern boundary (with minimum offset) and the partially constructed wall was considered to have been approved as part of the original consent, a decision made by the Principal Certifier not CN.</p> <p>Refer to relevant discussion within this report.</p>

<p>a cut of 1400mm at the highest point.</p> <p>Request to issue an order for remediation of eastern retaining wall, repairing the damage to 59 Grinsell Street Kotara and install appropriate backfill.</p>	
<p><u>Western retaining walls:</u></p> <p>No former development consent for the retaining walls.</p> <p>Discrepancy in the DA approved plans and elevations regarding the height of the retaining walls.</p> <p>Suggests proposed retaining walls to be wholly within the site allowing a sufficient setback from the boundary to reinstate the freestanding dividing fence which is a preferred outcome by the owners of 63 Grinsell Street.</p>	<p>Original DA2021/00662 did show retaining walls along the western boundary (with minimum offset).</p> <p>The original MA plans for retaining along the western side, have been amended several times as discussed within this report. The western retaining walls are now proposed to be setback from the side boundary (500mm).</p> <p>The proposal also includes a 1.8m high boundary fence proposed on the common western side boundary line.</p>
<p><u>Overshadowing:</u></p> <p>Challenge the accuracy of shadow diagrams due to significant discrepancies between the preliminary plans and amended plans of this application.</p> <p>Submitter provided their own shadow diagrams.</p>	<p>The proposed amendments under MA2022/00336 do not pose significant changes to shadows cast and remain acceptable as discussed within this report.</p>
<p><u>Privacy:</u></p>	<p>Refer to relevant discussion within this report.</p>

<p>No fixed privacy screening between primary dwelling's alfresco or pool deck area and 63 Grinsell Street Kotara. Proposed planting as a privacy measure not a permanent solution as they take several years to mature and can be easily removed.</p> <p>Suitability of rainwater tank as a privacy measure. Suggests to install an adequate privacy measure and the rainwater tank to be relocated to the rear of the secondary dwelling.</p>	<p>In summary, the modifications do not on planning merit present significant adverse privacy impacts for surrounding properties and contribute toward improvements to privacy provision together with sufficient mitigation measures, such as privacy screening, reduced cut / fill, window size, placement and sill height and a proposed landscaping outcome, notwithstanding the raising of the secondary dwelling FFL without consent.</p> <p>Refer to Draft Schedule of Conditions in <b>Attachment B</b>, which require a change in species to be planted along this western retaining wall / common boundary fence line and increase in pot size for these plantings.</p> <p>The rainwater tank was not intended to be the primary privacy screen at the end of the deck of the secondary dwelling. However, the rainwater tank is proposed to be relocated and the privacy screen retained with height of 1.7m.</p>
<p><u>View sharing:</u> View to expansive greenspace and skyline to the south is further reduced without regard to the amenity of neighbouring properties.</p>	<p>The modified proposal which sees the increase in finished floor level and overall height of the secondary dwelling, is considered to remain acceptable in the context of view sharing as discussed within this report.</p>
<p><u>Pool:</u> Proposed raise in FFL of pool area with a 1200mm high pool fence would be higher than 1800mm high fence and cause overlooking.</p> <p>Suggests lowering the pool and landscaped areas.</p>	<p>The current plans show the height of the pool area has been lowered by 500mm, as discussed within this report.</p>
<p><u>Stormwater:</u></p> <ul style="list-style-type: none"> <li>Increased hard surfaces impact the surface water runoff to dispersion trench and rail corridor.</li> </ul>	<p>The modifications remain acceptable in relation to appropriate stormwater management for this development.</p> <p>Refer to Stormwater management plan, Job No. 21-227, Issue J and G, Dwg SW1 and SW2) and dated 31.10.23 and 18.09.23.</p>

<ul style="list-style-type: none"><li>• Lack of suitable method for dispersal of stormwater since dispersion trench is suitable for single dwellings.</li><li>• Amended plans propose dispersion trench significantly smaller than the previous one.</li><li>• Amended stormwater management plan does little to address the inadequacy of the size of the dispersion trench or the effect of moisture on the adjoining property.</li><li>• Proposed swale drain (10cm deep) inadequate for the volume of stormwater experienced this year since the current temporary swale drain (30cm deep) is grossly inadequate.</li><li>• Suggests a concrete gutter as an appropriate solution.</li><li>• No drainage detail to demonstrate how stormwater from concrete slab</li></ul>	<p>A grass swale has been shown on the stormwater plans to manage runoff from the proposed concrete slab area immediate outside rear garage roller door of the main dwelling.</p> <p>Refer to discussion under Section 7.08 Stormwater management under NDCP 2012 of this report.</p>
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<p>behind garage would be directed to the kerb as neighbouring property is experiencing ongoing water issues.</p> <ul style="list-style-type: none"> <li>Request Council to seek engineering details for the proposed locations of cleanout point of the charged systems and a hydraulic plan of the site.</li> </ul>	
<p><b>Overbearing development:</b></p> <ul style="list-style-type: none"> <li>Overbearing combined height of retaining walls with proposed fencing is overbearing in nature.</li> <li>Suggests pool and fencing follow the natural fall of the land and not positioned above our property in an overbearing manner.</li> <li>Proposed raise of alfresco floor level adds to the already overbearing nature of this development over POS and rear yard.</li> </ul>	<p>As discussed within the report, the extent of modifications under this application are not considered significant changes and therefore are not considered overbearing development.</p>
<p><u>Site Specific - 63 Grinsell Street Kotara:</u></p>	

<p>Deep pier holes dug close to the boundary of 63 Grinsell Street potentially causing a risk for subsidence.</p> <p>Private open space of 63 Grinsell Street Kotara is overlooked from the west facing sliding door of the living area, alfresco area, proposed pool area and window of the secondary dwelling.</p> <p>Combined height of the walls, fences and planting adjoining the property is 3.82m adjacent to the alfresco area, 3.75m adjacent to the proposed pool area and 3.9m adjacent to the secondary dwelling is disproportionately higher.</p> <p>Inappropriate species choice on the western boundary / prolific shedding of flowers and would reduce the solar access to the principal private open space.</p> <p>Only accept freestanding 1.8m fence on survey boundary.</p> <p>Suggests the retaining wall to be setback for 2m with the 1.8 m high Colourbond fence approved by DA allows for softening plants instead of overbearing</p>	<p>The Applicant's stormwater and/or geotechnical engineer provided comment on a concern raised by submitters regarding excess subsurface seepage caused by the retention of water in improperly filled bore holes previously excavated for installation of piers to support retaining structures.</p> <p>A response prepared by East Elevation Construction indicates their intent to investigate the unused pier holes as part of the geotechnical investigation for the construction of retaining wall footings. Any unused pier holes that were not appropriately filled will be "remediated with advice from the Geotech."</p> <p>A condition is recommended that requires a report by a suitably qualified geotechnical engineering regarding drainage matters prior to the issue of a Construction Certificate.</p> <p>Note: This requirement will relate to geotechnical investigation within the boundaries of the site. Any work, that is to extend onto the adjoining property would require their owner's consent. This would be a civil matter moving forward.</p> <p>Alternatively, this could potentially be managed via regulatory and compliance.</p> <p>These aspects have been discussed in more detail within the report. The development is considered to remain acceptable and without significant privacy impacts on adjoining properties. Refer to discussion within this report.</p> <p>Refer to discussion within the report relating to retaining walls. The current plans, provide a reduction in cut and fill and need for retaining walls on the site.</p> <p>A condition is recommended that addresses the concern over inappropriate species. Refer to Draft Schedule of Conditions in <b>Attachment B</b>.</p> <p>Current plans propose a 1.8m high boundary fence to be located on the common western side boundary.</p> <p>Current plans propose the western retaining wall to be setback 500mm from the common side boundary with maximum height of 900mm (as originally proposed at the highest point).</p> <p>Current plans show a slat privacy screen to be located on top of the internal retaining wall.</p>
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<p>fences above retaining walls of 2.5m and 2.7m.</p> <p>Impacts on the DA approved pool of the said property.</p> <p>Rainwater tank adjoining main dwelling garage wall should be off-set 450mm from side boundary - too close will cause water problems for neighbour.</p> <p>Acoustic privacy from air conditioning units</p>	<p>Current proposal includes landscaping between the internal wall and common boundary fencing.</p> <p>The modified proposal is not considered to significantly impact the adjoining property's POS.</p> <p>As discussed within the report, the areas of modification are not considered to unreasonably impact adjoining neighbours. The changes made, improve the relationship of the site to adjoining neighbours, then that originally approved.</p> <p>It is noted that existing development at 65 Grinsell Street, also contains a rear elevated balcony which has complete view across the rear yard of 63 Grinsell Street. Neighbours have ample opportunity to also create privacy on their own properties, as part of their further development, including the future pool and cabana area approved on 63 Grinsell Street.</p> <p>The rainwater tank has been assessed under MA2023/00250, therefore no longer forms part of this current application.</p> <p>Concern in relation to both the rainwater tank and air-conditioning unit adjacent the garage of the main dwelling is above fence height, is due to the fact the proposed 1.8m high fence has yet to be constructed and the photos provided in submission show the existing boundary fence of a lesser height.</p>
<p><u>Site specific - 59 Grinsell Street Kotara:</u></p> <p>Approved side setback for the both the dwelling to the eastern boundary is 1.28m however, the constructed dwelling has a setback of 0.9m.</p> <p>Construction of retaining wall not being backfilled for a long period of time caused minor subsidence for 59 Grinsell Street Kotara.</p> <p>Survey conducted on 59 Grinsell Street indicate the retaining wall footings encroaching due to the</p>	<p>The current modified plans do not propose any changes to the primary setbacks for both dwellings.</p> <p>Main Dwelling</p> <ul style="list-style-type: none"> <li>• Eastern side setback = 1280mm</li> <li>• Western side setback = min. 900mm up to 3900mm</li> </ul> <p>Secondary Dwelling</p> <ul style="list-style-type: none"> <li>• Eastern side setback = 1280mm</li> <li>• Western side setback = 1575mm</li> <li>• Southern rear setback = min. 1500 / 1615mm / 2075m</li> </ul> <p>Progress Identification Survey, prepared by de Witt Consulting dated 2.11.22 identifies the following on plan relating to:</p> <p>Main Dwelling (slab and gutter)</p> <ul style="list-style-type: none"> <li>• Eastern setback (slab) – 1.28m (front cnr) and 1.29m (rear cnr)</li> <li>• (gutter) 0.64</li> </ul>

<p>unauthorised change from 190mm blockwork to 80mm concrete sleepers.</p> <p>Proposed sandstone material for retaining wall raises concern about the structural integrity.</p> <p>Concerned about the deliberate redirection of stormwater overflow into the rail corridor referenced in the stormwater management plan (SMP) which is not compliant with the conditions and associated statement from Sydney Trains.</p>	<ul style="list-style-type: none"> <li>• Western setback (slab) - 0.9m (front cnr) and 0.925m (rear cnr) and 3.88m</li> <li>• (gutter) 0.27m and 0.28 respectively</li> </ul> <p>Secondary Dwelling (concrete block wall / Clad wall) and (eave)</p> <ul style="list-style-type: none"> <li>• Eastern setback (cbw / clad) - 1.28m / 1.25m and (eave) 0.91)</li> <li>• Western setback (cbw / clad) - 1.58m / 1.535m and (eave) 1.21m</li> <li>• Southern rear setback - (cbw) 1.5m to 1.61m and (clad) 1.465m to 1.575m</li> </ul> <p>Refer to discussion within the report regarding retaining walls.</p> <p>The original development has the relevant approval from Sydney Trains. The overall concept for stormwater management has not changed significantly from the original consent.</p> <p>The same could be said about the subject site, as a section of the eastern boundary, cannot be fully completed until the existing garage encroachment from 59 Grinsell Street is rectified.</p>
<p><u>Fence:</u></p> <p>Proposed fence on top of the retaining wall</p> <p>Consent only to free standing fence</p>	<p>The current revised plans show the relocated western retaining walls which are now:</p> <ul style="list-style-type: none"> <li>• setback 500mm from the western boundary.</li> <li>• slat screening is proposed on top of the internal retaining wall</li> <li>• landscaping is proposed between the internal retaining wall and common side boundary</li> <li>• a 1.8m high boundary fence is proposed to be located on the common side boundary.</li> </ul> <p>Common boundary fences are a civil matter and any approval for fences on side boundaries that are common to other private properties, is independent of any consent or agreement which may be required from any adjoining owner under the provisions of the <i>Dividing Fences Act 1991</i>.</p>

## 5.9 The public interest

The assessment of the proposed development under Section 4.15(1) of the Environmental Planning and Assessment Act, 1979 has considered the community views. The development application was notified in accordance with the public participation requirements.

The proposed changes are considered to be acceptable and are positive in the sense, that the amount of cut and fill and retaining has reduced and the offset from property boundaries increased, creating an improved outcome both on and off site.

The development is generally consistent with the aims and design parameters contained in the NLEP 2012 and DCP 2012 and other relevant Environmental Planning Instruments. As discussed throughout this report, the modified development will not result in any significant impacts on the amenity of adjoining properties and the streetscape. The proposed development is in the public interest as it provides for additional housing within a residential area. In addition, the development will allow for the orderly and economic development of the site.

## **6.0 CONCLUSION**

The proposal is acceptable against the relevant heads of consideration under section 4.15(1) of the EP&A Act and is supported on the basis that the recommended conditions in **Attachment B** are included in any consent issued.

## **ATTACHMENTS**

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|----------------------|---|
| <b>Attachment A:</b> | Submitted Plans - 61 Grinsell Street Kotara   |
| <b>Attachment B:</b> | Draft Schedule of Conditions - 61 Grinsell Street Kotara                                |
| <b>Attachment C:</b> | Response to Public Voice Issues, prepared by owners of site - 61 Grinsell Street Kotara |
| <b>Attachment D:</b> | Processing Chronology - 61 Grinsell Street Kotara                                       |

**Attachments A - D distributed under separate cover**