

Development Application Committee Meeting



DATE: Tuesday, 16 July 2024

TIME: 6.00pm

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

9 July 2024

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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 18 JUNE 2024

RECOMMENDATION

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

ATTACHMENTS

Attachment A: Public Minutes Development Applications Committee 18 June 2024

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

Minutes

Development Application Committee Meeting

Council Chamber, Level 1, City Administration Centre, 12 Stewart Avenue, Newcastle West, Tuesday, 18 June 2024 at 6.02pm.



1. ATTENDANCE

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

J Bath (Chief Executive Officer), D Clarke (Executive Director Corporate Services and CFO), A Jones (Executive Director Creative and Community Services), M Bisson (Executive Director Planning and Environment), E Kolatchew (Executive Manager Legal and Governance), S Moore (Executive Manager Finance, Property and Performance and Deputy CFO), P Emmett (Interim Executive Manager Planning and Development), L Barnao (Councillor Services/Minutes/Meeting Support), R Williams (AV Support) and A Ingle (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

MOTION

Moved by Cr Barrie, seconded by Cr Duncan

The request submitted by Councillor Winney-Baartz to attend by audio visual link be received and granted.

Carried

MOTION

Moved by Cr Mackenzie, seconded by Cr Richardson

The apology submitted on behalf of Councillor Clausen be received and leave of absence granted.

Carried

5. DISCLOSURES OF INTEREST

Nil.

6. CONFIRMATION OF PREVIOUS MINUTES

6.1. MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE 21 MAY 2024

MOTION

Moved by Cr McCabe, seconded by Cr Mackenzie

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

Carried

7. DEVELOPMENT APPLICATIONS

7.1. 8 PARNELL PLACE, NEWCASTLE EAST - DWELLING HOUSE - ALTERATIONS AND ADDITIONS - DA2023/00520

MOTION

Moved by Cr McCabe, seconded by Cr Mackenzie

- a) That the 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 R3 Medium Density zone in which the development is proposed to be carried out; and
- b) That DA2023/00520 for alterations and additions to dwelling house at 8 Parnell Place Newcastle East 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.

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

Against the Motion: Nil.

Carried

The meeting concluded at 6.08pm.

7. DEVELOPMENT APPLICATIONS

7.1. 11 CHARLOTTE STREET MEREWETHER - DWELLING HOUSE - ALTERATIONS AND ADDITIONS - DA2023/00589

APPLICANT: JW PLANNING PTY LTD
OWNER: E J EVANS
REPORT BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT / INTERIM EXECUTIVE MANAGER PLANNING AND DEVELOPMENT

PART I

PURPOSE

A development application (DA2023/00589) has been received seeking consent for alterations and additions to the existing dwelling house, including demolition at 11 Charlotte Street Merewether.

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 Height of Buildings (HOB) development standard of the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation.

A proposed variation to Clause 4.4 Floor space ratio (FSR) development standard in the NLEP 2012, being less than a 10% variation also forms part of the application.

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

The proposed development was publicly notified in accordance with (CN) Community Participation Plan (CPP), and no submissions were received in response.

Issues

- 1) The proposed development has a maximum building height of 10.75m and does not comply with the maximum HOBs development standard of 8.5m as prescribed under Clause 4.3 of NLEP 2012. The variation equates to an exceedance of 2.25m or 26.5%.



Figure 1 - Subject Land: 11 Charlotte Street Merewether

- 2) The proposed development has a FSR of 0.65:1 and does not comply with the maximum FSR development standard of 0.6:1 as prescribed under Clause 4.4 of NLEP 2012. The variation equates to 49.2m² or 9%.

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 DAC note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.3 HOBs, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.3; and the objectives of the R2 Low Density Residential zone: and
- B) That DAC note the objection under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.4 FSR, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.4; and the objectives of the R2 Low Density residential zone; and
- C) That DA2023/00589 for dwelling house - alterations and additions including demolition at 11 Charlotte Street Merewether 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 EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The subject site is known as 11 Charlotte Street Merewether and has a legal description of Lot 126 in Deposited Plan 39371. The site is located on the western side of Charlotte Street Merewether within an established residential area comprising predominantly large, detached dwelling houses. The site comprises a fan-shaped allotment, with a frontage to Charlotte Street of approximately 13.7m, to the rear of approximately 30.8m and a total site area of 908m².

The site is located on an elevated ridgeline with the site falling away from the street, sloping over approximately 5m to the rear boundary, adjacent to the Charlotte Street Reserve. There are mature trees within the public reserve in close proximity to the rear boundary and extending across the northwestern rear corner of the site.

The property is currently occupied by a two-storey detached dwelling house with a skillion roof and double garage at street level. The remainder of the dwelling sits low on the site with views available out to the east over the ocean, towards Strzelecki headland to the northeast and distant city skyline views to the north. The site is bounded by a two-storey dwelling of a more contemporary design to the north which is downslope of the site and an older style two-storey dwelling to the southern side.

2.0 THE PROPOSAL

The applicant seeks consent for alterations and additions to the existing dwelling on site. The works proposed include partial demolition of the existing dwelling and provision of additional lower ground floor space to accommodate a garage, rumpus room and two bedrooms.

The existing ground floor level is proposed to be reconfigured to comprise living areas, kitchen, two bedrooms and bathroom areas. The new first-floor level would comprise a main bedroom, study, and lounge area with adjacent north and east facing balcony. The existing driveway would also be removed, and a new driveway provided to the northern side of the site frontage to service the garage.

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 CPP. No submissions were received in response to the notification process.

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 below.

5.1 Provisions of any environmental planning instrument State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 - Remediation of Land

Chapter 4 of the State Environmental Planning Policy (SEPP) provides that before 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 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 acceptable having regard to this policy.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 2 - Vegetation in non-rural areas

The application does not propose the removal of any trees or declared vegetation to facilitate the development.

State Environmental Planning Policy (Transport and Infrastructure) 2021

This policy facilitates the effective delivery of infrastructure across the State. The proposal was required to be referred to Ausgrid under the SEPP. The referral to Ausgrid generated no significant concerns in respect of the application. The Ausgrid advice has been forwarded to the applicant for their information and future action.

State Environmental Planning Policy (Sustainable Buildings) 2022

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 is recommended, requiring that the development be carried out in accordance with the BASIX Certificate (**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 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 permissible within the zone with consent.

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 alterations and additions proposed to the dwelling maximise residential amenity in a built form complementary to the low-density residential environment. The proposed development contributes to the diversity of housing forms in the area.

The development is suitably sited and oriented within the site and does not adversely impact adjoining properties. The additions are of a low density and low impact form, complementary to the existing and future desired character of the locality and streetscape. The proposal is consistent with the zone objectives.

Clause 2.7 - Demolition Requires Development Consent

The proposal includes partial demolition to facilitate the alterations and additions to the dwelling. Conditions are recommended to require that demolition works, and the disposal of material are managed appropriately and follow relevant standards (**Attachment B**).

Clause 4.3 - Height of Buildings (HOB)

Under the NLEP 2012 the site has a maximum building height of 8.5m. The proposed development will result in a maximum building height of 10.75m (from the existing excavated lower ground floor level), equating to an exceedance of 2.25m or 26.5% above the prescribed development standard.

The objectives of clause 4.3 in NLEP 2012 are:

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

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

Clause 4.4 - Floor Space Ratio (FSR)

The site has a maximum FSR of 0.6:1 under NLEP 2012. The proposed development will result in a total FSR of 0.65:1, equating to an exceedance of 49.2m² or 9% to the development standard.

The objectives of clause 4.4 in NLEP 2012 are:

- 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.

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

Clause 4.6 - Exceptions to Development Standards

The proposal seeks consent to vary Clause 4.3 HOBs and Clause 4.4 FSR development standards in the NLEP 2012. As such, the application is supported by formal requests to vary the development standards under Clause 4.6 of the NLEP 2012 (**Attachment D**).

Clause 4.6 of NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard.

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

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

In assessing the proposal to vary the HOBs and FSR development standard against the provisions of Clause 4.6, it is noted that:

- a) Clause 4.3 and Clause 4.4 of the NLEP 2012 are not expressly excluded from the operation of this clause; and
- b) The applicant has prepared written requests, requesting that CN vary the development standards demonstrating that:
 - i) Compliance with the development standards is unreasonable or unnecessary in the circumstances of the case, and
 - ii) There are sufficient environmental planning grounds to justify contravening the development standards.

An assessment of the Clause 4.6 variation requests have 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: *Winten Property Group Limited v North Sydney [2001] NSWLEC 46*, *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*, and at Appeal, *Four2Five Pty Ltd v Ashfield Council [2015]* at NSWLEC 90, *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248*, *Moskovich v Waverely Council [2016] NSWLEC 1015*, *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* and *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, 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 standards.

Consideration of the Clause 4.6 variation request is discussed below, as it relates to each development standard to be varied and is discussed separately.

Proposed variation to height of buildings development standard

The proposed development contravenes Clause 4.3 'HOBs' of NLEP 2012. The HOBs map provides for a maximum building height of 8.5m. The development comprises a maximum building height of 10.75m which exceeds the HOBs development standard by 2.25m or 26.5%. Refer to Figure 2 below.

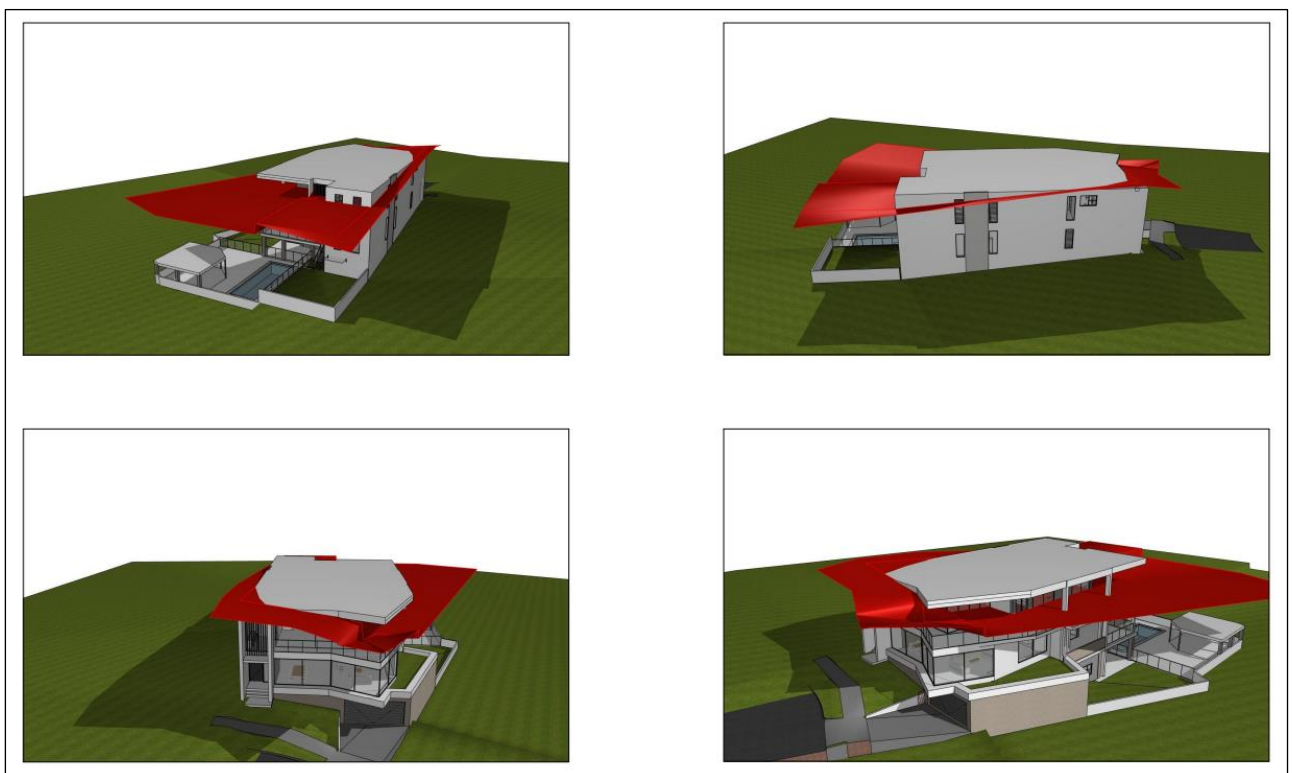


Figure 2: Height plane diagrams illustrating the extent of exceedance (above 'red' height limit)

The application is supported by a formal request to vary the development standard under Clause 4.6 of NLEP 2012, prepared by JW Planning and dated June 2023 (**Attachment D**).

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 HOBs in Clause 4.3 is a development standard in that it is consistent with the definition of development standards under Section 1.4 of the EP&A Act and 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 satisfactorily demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

The submitted written request to 'Contravene Clause 4.3 HOBs Development Standard', prepared by JW Planning, dated June 2023 (**Attachment D**) constitutes a written request for the purposes of Clause 4.6(3).

There are five circumstances or 'tests' established by *Wehbe* in which it could be reasonably argued that the strict application of a development standard would be unreasonable or unnecessary. The written request provided by the applicant seeks to rely on the first of the *Wehbe* tests, namely that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard, to demonstrate that the development standard is unreasonable or unnecessary in the circumstances of the case.

In summary, the request identifies that:

'In this particular case, strict compliance with the development standard is considered both unreasonable and unnecessary in the circumstances of the case, because the objectives of the development standard are achieved notwithstanding compliance with the standard...

The proposed height of the building is appropriate for this location given:

- i) *The proposed development has been informed by extensive review of site context and the built forms in the locality to determine appropriate massing, bulk and scale, and design, and elements relevant to achieving a high quality urban form;*
- ii) *Side setbacks are maintained to the additional proposed height, which ensures the proposal does not result in increased environmental impacts to surrounding properties, in terms of privacy, amenity, or solar access.*
- iii) *When viewed from the streetscape, the setbacks in combination with other design elements will together ensure the building is of an appropriate bulk and scale, notwithstanding the additional building height proposed.*
- iv) *Notwithstanding the proposed additional height, the proposal represents a well-considered development that addresses continuity through architectural design and the relevant objectives of both the standards and the R2 Low Density Residential zone. The proposal will introduce a high level of amenity and seeks to make a positive contribution to the existing streetscape through architectural design in consideration of local character.*

- v) *In light of the above, compliance with the development standard is considered unreasonable and unnecessary in the circumstances of the case.'*

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 (Figure 3 below).



Figure 3: Existing dwellings at 5-13 Charlotte Street Merewether

Furthermore, the proposal retains the existing housing type, consistent with the built form within the street and the low-density objectives of the area and the HOBs development standard.

The proposed variation to the development standard does not result in adverse environmental impacts, including impacts on adjacent properties in terms of bulk, scale, overshadowing, view loss or privacy, indicating the proposed development is suitable for the site.

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.

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 standard, rather than promoting the benefits of the development.

In summary, the applicant's written request addresses Clause 4.6(3)(b), as follows:

'There are sufficient environmental and planning grounds to justify contravening the development standard, and they are as follows:

- i) *the proposed development meets the zone objectives and the height control objectives;*
- ii) *The proposed development will not result in any unreasonable amenity or environmental impacts, as demonstrated in the Statement of Environmental Effects; and*
- iv) *The proposed additional height is setback from the street frontages, and side boundary setbacks. The additional height will not be readily observable or apparent, ensuring the building will maintain a human scale consistent with existing buildings in the street.*

In this case, the proposal displays sufficient environmental planning grounds to warrant the exception sought to the development standard.'

CN Officer Comment

The written request outlines environmental planning grounds that adequately justify the contravention. It is noted the maximum height measurement for the development is taken from the existing excavated lower ground floor level with the site also constituting a sloping topography. The height exceedance proposed is generally consistent with a combination of relevant controls under NLEP 2012 and NDCP 2012 and provides an acceptable environmental planning outcome in relation to bulk and scale, streetscape, established character, solar access, visual privacy and retention of views.

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 satisfactory 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. 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 objectives of the HOBs 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 4.3 Height of buildings

The development is consistent with the objectives of Clause 4.3 as the proposed development is of an appropriate scale which is consistent with existing development in the locality. Further, the proposed density, bulk and scale will not impact on the existing streetscape or adjacent sites. The development is of an appropriate density and built form 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 the 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 HOBs 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

An assessment of the applicant's written request has been undertaken and it is considered that:

- a) It satisfactorily addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) The development is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential Zone.
- c) That there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered that the exceedance proposed is an acceptable planning outcome and strict compliance with the development standard is unnecessary in the case.

The proposal facilitates housing within a residential zone, continuing to provide for the housing needs of the community within a low-density residential environment whilst suitably respecting the amenity, and character of surrounding development and the quality of the environment, in accordance with the objectives of the R2 Low Density Residential zone.

The clause 4.6 variation request is well-founded and should be supported.

Proposed variation to FSR development standard

As outlined above, the proposed development also contravenes Clause 4.4 'FSR' of NLEP 2012. The FSR map provides for a maximum FSR of 0.6:1. The proposed development comprises a maximum FSR of 0.65:1 which exceeds the FSR development standard for the site by 49.2m² or 9%.

The application is supported by a formal written request, prepared by JW Planning, and dated June 2024 (**Attachment D**), to vary the FSR development standard under Clause 4.6 of NLEP 2012.

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 FSR contained in Clause 4.4 is a development standard in that it is consistent with the definition of development standards under Section 1.4 of the EP&A Act and 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 satisfactorily demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

The applicant has submitted written request, prepared by JW Planning dated June 2024, constitutes a written request for the purposes of Clause 4.6(3).

The written request provided by the applicant seek to rely on the first of the *Wehbe* tests, namely that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard, to demonstrate that the development standard is unreasonable or unnecessary in the circumstances of the case.

In summary the request states that:

'In this particular case, strict compliance with the development standard is considered both unreasonable and unnecessary in the circumstances of the case, because the objectives of the development standard are achieved notwithstanding compliance with the standard...

The proposed FSR exceedance is appropriate for this location given:

- i) *Side setbacks are maintained, which ensures the proposal does not result in increased environmental impacts to surrounding properties, in terms of privacy, amenity, or solar access.*
- ii) *The proposed development has been informed by a review of site context and the built forms in the locality to determine appropriate massing, bulk and scale, height and design, and elements relevant to achieving a high quality urban form, such as facade articulation, landscaping zones and a mix of building materials and finishes.*
- iii) *The proposed development is consistent with the surrounding locality and no unreasonable environmental or amenity impacts are associated with the proposed development.*
- iv) *The proposal will provide for the housing needs of the community and by retention of the existing dwelling, modernisation is proposed in a sustainable manner. The proposal adopts modern architectural design elements that will respect the amenity and emerging character of the surrounding, high quality residential area.*

In light of the above, compliance with the development standard is considered unreasonable and unnecessary in the circumstances of the case.'

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, consistent with the built form within the street, and with the low-density objectives of the land and the objectives of the FSR development standard.

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, view loss or privacy, indicating the proposed development is suitable for the site.

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 unnecessary 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 Clause 4.6 Request provided by the applicant addresses Clause 4.6(3)(b), in summary as follows:

'The proposal addresses the site constraints and relevant objectives of both the standards and the zone. The Statement of Environmental Effects demonstrates that the proposal will not result in any unreasonable amenity or environmental impacts.

Notwithstanding the proposed additional floor space, the proposal represents a well-considered development that addresses continuity through architectural design and the relevant objectives of both the standards and the R2 Low Density Residential zone. The proposal will introduce a high level of amenity and seeks to make a positive contribution to the existing streetscape through architectural design in consideration of local character.

There are sufficient environmental and planning grounds to justify contravening the development standard, and they are as follows:

- i) the proposed development meets the zone objectives and the FSR objectives;*
- ii) The proposed development will not result in any unreasonable amenity or environmental impacts, as demonstrated in the Statement of Environmental Effects; and*
- iii) The proposed additional floor space is setback from the street frontages, and side boundary setbacks. The additional floor space will not be readily observable or apparent, ensuring the building will maintain a human scale consistent with existing buildings in the street.*

In this case, the proposal displays sufficient environmental planning grounds to warrant the exception sought to the development standard.'

CN Officer Comment

The written request outlines environmental planning grounds that adequately justify the contravention. The FSR exceedance proposed is generally consistent with a combination of relevant controls under NLEP 2012 and NDCP 2012 and provides an acceptable environmental planning outcome in relation to bulk and scale, streetscape, established character, solar access, visual privacy and retention of views.

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 satisfactory 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 objectives of the FSR 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 'FSR' as it is of an appropriate scale which is consistent with existing development in the locality. Further, the proposed density, bulk and scale would not impact upon 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 HOBs 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

An assessment of the applicant's written request has been undertaken and it is considered that:

- a) It satisfactorily addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) The development is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential Zone.

- c) The proposed FSR exceedance is considered to have minimal impact on neighbouring properties in terms of privacy, overshadowing, view loss, bulk and scale.

The development facilitates housing within a residential zone, continuing to provide for the housing needs of the community within a low-density residential environment whilst suitably respecting the amenity, and character of surrounding development and the quality of the environment, in accordance with relevant R2 Zone objectives.

The exceedance proposed is an acceptable planning outcome and strict compliance with the development standard is unnecessary and the clause 4.6 variation request is well founded and should be supported.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils and given it is unlikely they are present, and the geotechnical management of earthworks required as part of the proposal, an acid sulfate soils management plan is not required. The proposal is considered satisfactory in this regard.

Clause 6.2 - Earthworks

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

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

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023

The Newcastle Development Control Plan 2023 (DCP) provides updated guidelines and development controls for new development in the Newcastle Local Government Area (LGA). The DCP was formally adopted by Council and commenced on 1 March 2024. The DCP requires consideration under Section 4.15(1)(a)(iii) of the EP&A Act 1979.

Section 11 of Part A – Introduction of the 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).'

The savings and transitional provisions apply to this application. The proposed development therefore remains subject to the provisions of the NDCP 2012.

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 proposed development retains the existing street setback of 4.4m to the front wall of the new lower-level garaging, retaining consistency with the front setbacks of adjacent dwellings and the predominant setback along the street.

The streetscape results in a more contemporary design. The new garage (partially excavated into the site) to the lower eastern side of the site is set back behind the angled parapet to the upper levels, with the garaging as proposed sufficiently integrated into the design of the development. The presentation of the dwelling as proposed is compatible with the existing streetscape.

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 to be a minimum of 3m for walls up to 4.5m in height and 6m for walls greater than 4.5m high.

The site comprises a 'fan shaped' allotment with angled lot boundaries. The alterations and additions to the dwelling house on site would retain the alignment of the southern wall of the dwelling proposing a 1.5m setback to all levels, with the dwelling presenting as two-storey to the front portion of the site along this boundary and three-storey to the rear in line with the slope of the site. The upper section of the new third level, which is in line with the levels below, does not achieve the required side setback however the development is consistent with the prevailing built form in the locality.

The setback to the dwelling from the northern boundary ranges from 2.3m to 9.6m due to the angled boundary. This is compliant and provides for generous building separation to the dwelling on the adjacent site to the north.

The new garage is proposed to extend to the side boundary with a resultant wall to the boundary of approximately 10.3m in length and a wall height of approximately 3m. In part this wall adjoins an existing wall to the neighbour's garage with the remainder extending along part of the existing side setback. There are limited openings to the southern elevation of the neighbouring dwelling and subsequently, the proposed garage wall does not result in adverse impacts.

The development extends back further on the site than the existing dwelling, however a generous rear setback of 10m to all levels of the building is maintained.

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, and 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.

The proposed development does not result in overbearing development and is designed and sited to not unreasonably impact the amenity of adjoining dwellings or associated principal areas of private open space. The proposed development does not result in the loss of significant views or outlook of adjoining residents. The development satisfies the performance criteria and the side and rear setbacks as proposed are acceptable.

Landscaping (3.02.05)

There would be a minor reduction in the landscaped area of the site as a result of the development. Notwithstanding, the proposed development results in a compliant landscaped area of 290m² equating to 31% of the site area.

Private open space (3.02.06)

The proposal provides for relatively generous and usable areas of private open space that exceed the minimum dimensions of 3m x 4m required under the DCP.

Privacy (3.02.07)

The design of the proposed development comprises expanses of windows oriented to the north-east, to the rear and over the street at the two upper levels. There is also an additional deck proposed to the new third level in a similar location to an existing deck at the level below.

Limited window openings exist to the southern elevation of the adjacent dwelling to the north (No.13 Charlotte St) and given the private open space for that dwelling comprises a large rear deck primarily oriented to the north-west (views), the proposed development will not result in any unacceptable privacy impacts.

The proposed deck is set back over 6m from the rear deck of the neighbour and will not unreasonably impact the privacy of living room windows or principal areas of private open space of adjoining dwellings.

Solar access (3.02.08)

Shadow diagrams submitted for the proposed development illustrate the additional shadow cast from the proposed development to the site to the south (No.9 Charlotte St). It is identified that part of the additional shadow falls to the roof of the neighbouring dwelling, with shadow cast to the front and rear decks not significantly increased from existing between 9am and 3pm at the winter solstice. The proposed development is compliant with the solar access requirements of the DCP.

View sharing (3.02.09)

Existing views from the site are available out to the east over the ocean, towards Strzelecki headland to the northeast and distant city skyline views to the north. Given the siting and location of adjacent dwellings to the rear it is not envisaged any existing view corridors would be obstructed by the proposed development and primary view paths from other dwellings in the vicinity of the site along Charlotte Street are out to the front across the street.

Views toward the north available to the dwelling to the south at (No.9 Charlotte St) are limited by the design of this dwelling, with a largely blank north-facing wall, punctuated by highlight windows that are too high to provide occupants with a view. North-east views from the neighbouring dwelling may be available from a single tall side window toward the front of the north-facing wall, and the adjacent terrace at the front.

An assessment based on existing windows has been undertaken regarding potential view impact. The proposed development will allow view sharing with neighbouring properties, with the retention of existing views from the front of the adjacent site to the south (No.9 Charlotte Street).

Having regard to the planning principles for view sharing established by the NSW Land and Environment Court - *Tenacity Consulting vs Warringah Council [2004]*, it has been assessed that the proposed development will maintain a reasonable level of view sharing with adjoining properties.

Car parking and vehicular access (3.02.10)

Carparking on site is currently provided as an attached double garage at street level, accessed via a driveway to the southern side of the frontage. The proposed garaging would comprise an expanded lower ground floor level, with a new driveway provided to the opposite side of the frontage, incorporated into the overall design of the dwelling, and does not dominate the streetscape.

The proposed vehicular access and car parking is capable of complying with the provisions of Australian Standard AS2890 Parking Facilities and CN's standard drawing A1300 Driveway Crossing Standard Design Details.

Bush Fire Protection - Section 4.02

The site is identified as being bushfire prone land and conditional approval for the proposed development has been granted by NSW Rural Fire Service.

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.

Soil Management - Section 5.01

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

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 on the site.

Traffic, Parking and Access - Section 7.03

The garaging proposed for the development satisfies the parking requirements of this section. A condition of consent is recommended requiring the development to provide electric circuitry to accommodate future electric vehicle charging points.

Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The proposed stormwater management plan complies with the aims and objectives of the NDCP 2012. A condition of consent is recommended requiring that stormwater runoff captured by the new roof areas be directed to the proposed 4,000L water harvesting tank with overflow to the street.

Waste Management - Section 7.08

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

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 Section 7.12 Development Contributions Plan.

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 under 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

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.

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 development 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 within a Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW. The site is also bushfire prone; however, risks can be sufficiently managed through the relevant conditions of consent. 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 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 proposed development is in the public interest as it provides for modernised low-impact residential accommodation within an established residential area 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 - 11 Charlotte Street Merewether
- Attachment B:** Draft Schedule of Conditions - 11 Charlotte Street Merewether
- Attachment C:** Processing Chronology - 11 Charlotte Street Merewether
- Attachment D:** Clause 4.6 Exception to FSR Development Standard - 11 Charlotte Street Merewether
- Attachment E:** Clause 4.6 Exception to HOB Development Standard - 11 Charlotte Street Merewether

Attachments A - E distributed under separate cover

7.2. 27 HARGRAVE STREET CARRINGTON - DWELLING HOUSE - ALTERATIONS AND ADDITIONS INCLUDING DEMOLITION - DA2024/00143

APPLICANT: YOUR HOME DESIGNS
OWNER: B SAWERS AND K N SAWERS
NOTE BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT /
INTERIM EXECUTIVE MANAGER PLANNING AND
DEVELOPMENT

PART I

PURPOSE

A development application (DA2024/00143) has been received seeking consent to carry out alterations and additions to an existing dwelling house, including partial demolition, on land known as 27 Hargrave Street Carrington.

The submitted application was assigned to Development Officer Tegan Bruce, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination, due to the proposed variation to the Floor Space Ratio (FSR) development standard under Clause 4.4 of the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation. A variation of 83.14% (63.1m²) is proposed, noting the existing dwelling currently has a variation of 55.5% (42.1 m²)

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) for 14 days between 11 March to 25 March 2024 and no submissions were received.

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



Figure 1 - Subject Land: 27 Hargrave Street Carrington

Issues

- 1) The proposed development has a maximum FSR of 1.099:1 and does not comply with the prescribed FSR of 0.6:1, which equates to an 83.14% (63.1m²) variation to the FSR development standard. It is noted that the existing building currently has an FSR of 0.94:1 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 as the consent authority note the objection under Clause 4.6 *Exceptions to Development Standards* of the NLEP 2012, against the development standard at Clause 4.4 *FSR*, 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 DA2024/00143 for alterations and additions to an existing dwelling house 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 EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The subject site consists of a single allotment located at 27 Hargrave Street Carrington and is legally described as Lot 4 DP 17621. The site is rectangular in shape and is located on the north west intersection of Hargrave Street and Mathieson Street. The primary frontage to Hargrave Street has a width of 7.2m (Figure 2), while the secondary frontage to Mathieson Street is 18.83m (Figure 3), the total site area is 126.5m². The topography of the site is flat and contains a two storey dwelling. There is no existing vehicle access to the site.

Development in the immediate area predominantly consists of two storey attached terraces and single storey dwellings and older warehouse buildings.

Prior to lodgement of the application, a Pre DA meeting was held with CN staff on 16 November 2023 for alterations and additions to the existing dwelling, which included additions on the ground and first floor.



Figure 2 - Site frontage from Hargrave Street Carrington



Figure 3 - Secondary frontage and rear of dwelling from Mathieson Street Carrington

2.0 THE PROPOSAL

The applicant seeks consent for alterations and additions to the ground floor of the existing dwelling house, consisting of:

- i) Demolition of the existing rear single storey structure including the laundry/bathroom, kitchen, northern wall of the living room and the covered alfresco area.
- ii) Alterations and extension to an existing living room to allow for open plan kitchen and lounge room. Laundry facilities will be included in the kitchen.
- iii) Alterations to internal walls between existing dining and rumpus room and proposed kitchen and lounge.

A copy of the current 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 proposed development was publicly notified in accordance with CN's CPP for 14 days between, 11 March to 25 March 2024 and no submissions were received.

Amended plans have been submitted during the assessment of the application in response to matters raised by CN officers and changes requested by the applicant. This included the deletion of a first-floor extension, reducing the proposed FSR from 1.16:1 to 1.099:1.

The amended plans were not renotified given the nature of amendments and reduced scope of works. However, the amended plans were made publicly viewable on CN's website.

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 (Resilience and Hazards) 2021

Chapter 2 Coastal Management

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.

Having regard to the relevant aims of the chapter of the State Environmental Planning Policy (SEPP) and the nature of the proposed development the proposal will not detrimentally impact the coastal zone or the environmental assets of the coastal environment area. The proposal is acceptable having regard to this chapter of the policy.

Chapter 4 Remediation of Land

Chapter 4 Remediation of Land, Clause 4.6 of this SEPP 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 site is listed on CN's potentially contaminated lands register due to the possible presence of black glassy slag and ballast, used as a filling material over 100 years ago in the Carrington locality. CN's Environmental Health have reviewed the application and consider the site suitable subject to a condition requiring the removal and disposal of any slag material or contaminating material if unearthed during construction works.

The requirements and provisions of SEPP (Resilience and Hazards) 2021 are considered to have been satisfactorily addressed by the documentation submitted and in the assessment of the application.

State Environmental Planning Policy (Transport and Infrastructure) 2021

Section 2.48(2) of SEPP (Transport and Infrastructure) 2021 requires the consent authority to give written notice to the electricity supply authority seeking concurrence and comments about potential safety risks. The application was referred to Ausgrid in accordance with cl 45 of SEPP (Infrastructure) 2007 (now repealed and replaced with SEPP (Transport and Infrastructure) 2021). Ausgrid issued their advice, and no further assessment was required.

The requirements and provisions of SEPP (Transport and Infrastructure) 2021 are considered to have been satisfactorily addressed by the documentation submitted and in the assessment of the application.

State Environmental Planning Policy (Sustainable buildings) 2021

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 within the R2 Low Density Residential land use zone under the provisions of NLEP 2012, within which residential dwellings are permissible.

The proposed alterations and additions to the existing dwelling house 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.*

The proposal is consistent with these aims, providing for the housing needs of the community respecting the amenity and character of the low-density residential environment.

Clause 2.7 - Demolition Requires Development Consent

The proposal includes the minor demolition of part of the existing structure. Conditions are recommended to require that demolition works and the disposal of material are to be managed appropriately and in accordance with relevant standards.

Clause 4.3 - Height of Buildings

Under the NLEP 2012 the site has a maximum allowable height of 8.5m. The proposed alterations and additions are single storey and do not increase the height of the existing dwelling. The proposed development complies with this requirement.

Clause 4.4 - Floor Space Ratio

Under the NLEP 2012 the site has a maximum FSR under NLEP 2012 of 0.6:1. The existing building currently has an FSR of 0.94:1 which does not comply with the FSR development standard.

The proposed development will result in a total FSR of 1.099:1, equating to an exceedance of 63.1m² or 83.14% above the maximum FSR, or an additional 21m² or 15.9% of floor space.

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 FSR (Clause 4.4) development standard in accordance with Clause 4.6 of NLEP 2012.

Clause 4.6 of NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard.

The objectives of this clause are:

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

It is noted that the existing building currently has an FSR of 0.94:1 which does not comply with the FSR development standard.

The proposed development results in a variation of 63.1m², exceeding the principal development standard for the allotment by 83.14%. As such, the application is supported by a formal request to vary the development standard under Clause 4.6 of NLEP 2012 (**Attachment D**).

An assessment of the Clause 4.6 variation request is included 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 Satisfactory Page 11 of 33 NLEP 2012 Clause Comment Compliance 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 expressly excluded from the operation of the Clause?

The FSR (Clause 4.4) development 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 the EP&A Act.

The FSR (Clause 4.4) 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 purposes of Clause 4.6(3). The applicant's written response provides justification for the non-compliance and adequately demonstrates that compliance with the development standard is unnecessary, stating that the objectives of the development standard (Clause 4.4) are achieved notwithstanding non-compliance.

The objectives outlined in Clauses 4.4 (FSR) 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.*

A summary of the justification provided within the applicant's written request is provided below:

- i) *The local character being row and townhouse development with lot sizes being historically less than modern lot requirements resulting in dwellings being in excess of modern FSRs.*
- ii) *The proposal offers a modern adaptation to the dwelling that appears as a logical and seamless extension of the original structure and contributes in a positive outcome to the public domain, while not appearing as an overbearing, or large structure when viewed from the streetscape or adjoining neighboring properties.*

CN Officer Comment

The proposed development provides for a modernised residential dwelling in a low impact form complementary to the existing and future desired character of the streetscape, noting that the proposed development is partially obscured from the primary public streets due to vegetation on the road reserves. The dwelling is consistent with the established eclectic nature of Mathieson Street. The single dwelling development is consistent with the low-density residential objectives of the land and similar developments in the local area.

It is considered to be unnecessary to require the standard in this circumstance given the proposal would achieve FSR objectives through compatibility with the density, bulk and scale of immediate locality. The proposed variation to the development standard does not cause any undue adverse environmental impacts, including on neighbouring properties in terms of bulk, scale overshadowing and privacy, indicating that the proposed development is suitable for the site.

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.

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

The applicant's justification for contravening the development standard on sufficient environmental planning grounds is as follows:

- i) *For the small and compact site, in order to encourage a modern and well connected floor plan the variation is required and on merit with consideration of the history of the site and past development standards is a reasonable outcome for the site.*
- ii) *The overall floor area of the home totals 139m² being considered a small family home in modern terms. Despite this the proposal is relative to the original development intentions for the lot, its location, adjoining land-uses and the history of the suburb.*
- iii) *The outcome is proposed to suit retention and adaptation of the main home with a high quality built outcome, that encourages the home's ongoing longevity through renovation and extension to meet the modern family requirements*
- iv) *It is considered the variation will not have a significant or adverse impact and achieves the intended land use outcomes of the site. The outcome does not alter the current setbacks, and complies with the current Development Control Plan (DCP) rear setbacks, POS areas and landscaping provisions.*
- v) *The variation is of minor scale - an increase on the existing floor area by 20.5m² - and does not impact in terms of views, shadowing, privacy or the like and is not easily or a discernible variation that would be visible to the human eye at completion. The result of the variation will cater to the modern needs of the family without being out of character of the area.*
- vi) *The variation is not easily visible, and the variation cannot be considered as unreasonable or unsuitable for the function and location and can be supported on merit due to the consistency with the DCP controls applicable and the zones overall objectives being preserved.*

CN Officer Comment

The written request outlines environmental planning grounds which adequately justify the contravention. In particular the additional FSR does not result in inconsistency with the desired built form of the locality and is generally consistent with performance criteria of the Newcastle Development Control Plan (NDCP) 2023. The written request provides sufficient justification to contravene the development standard.

In addition to the applicant's justification, it is considered that the proposed design will facilitate amenity and functionality to future occupants through a combination of a northern aspect and appropriate floor area. The proposal is compliant with the remainder of the principal development standards of the NLEP 2012 and the applicable acceptable solutions and performance criteria of the Newcastle Development Control Plan 2023.

The proposal will not create significant adverse impacts on neighbouring properties and is considered to be an orderly and economic use of the land consistent with the existing predominant built form of the surrounding locality.

Conclusion

It is considered that 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 FSR development standard. The Clause 4.6 variation request has demonstrated that the proposed FSR is acceptable and that strict compliance with the prescribed FSR standard would be unnecessary in this instance. In this regard, the Clause 4.6 variation request is supported.

Clause 5.10 - Heritage

The subject site is within proximity of the Local heritage item 162 *Date Palms of Hargrave Street*. This is an avenue of Canary Island date palms (*Phoenix canariensis*), planted down the central median strip of Hargrave Street and is a dominant visual component of the local streetscape. While the dwelling faces Hargrave Street, the proposed development is located to the rear of the site and is unlikely to affect the significance of the heritage item and it is considered that a heritage management document is not required.

Clause 5.21 Flood Planning

The proposed development is located on flood prone land. An assessment has been completed by CN engineering and it has been assessed the proposed development is satisfactory having regard to the relevant objectives of this clause.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 4 acid sulphate soils and the proposed development is considered satisfactory in this regard.

Clause 6.2 - Earthworks

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

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

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023 (NDCP 2023)

The NDCP provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The NDCP was formally adopted by Council and commenced on 1 March 2024. The NDCP requires consideration under Section 4.15(1)(a)(iii) of the EP&A Act 1979.

The savings and transitional provisions do not apply to this application as it was lodged after the commencement of the NDCP.

The main planning requirements of relevance in the NDCP 2023 are discussed below.

Part B Site Planning Controls

Section B1(a) Flood management - pre 2019 flood studies

This subject site is identified as flood prone land. CN development engineers have reviewed the proposed development and advised the site is affected by flash and ocean flooding during both 1% Annual Exceedance Probability (AEP) and Probable Maximum Flood (PMF) events. No changes to ground floor levels are required due to the minor nature of the work.

Conditions have been recommended to minimise any likely impacts on the development.

Section B3 Mine Subsidence

The site is located within a proclaimed Mine Subsidence District and is within a Guideline 2 area. In accordance with the guidelines produced by Subsidence Advisory NSW, the proposed development is considered satisfactory.

Section B4 Aboriginal heritage

The site is not an item of Aboriginal heritage and is not known to contain an Aboriginal object. Reference to the Aboriginal Heritage Information Management System (AHIMS) search has confirmed that there is no known Aboriginal cultural heritage in or within the vicinity of the allotment.

Section B7 Land Contamination

CN records indicate that the site is potentially contaminated with black glassy slag and ballast, used as a filling material over 100 years ago in the Carrington locality. This has been addressed in section 5.1 of this report.

Part C General Development Controls

Section C1 Traffic parking and access

There is no carparking on the subject site. As a historical deficiency, the proposed development is considered satisfactory with respect to this section.

Section C3 Vegetation Preservation and care

The site is vacant and clear of any trees or declared vegetation. No vegetation on the adjoining properties or street trees will be adversely impacted by the development.

Section C4 Stormwater

The proposed stormwater management plan is in accordance with the relevant objectives and controls of this section. No stormwater management plan is required under this section, and the proposed development will discharge into the existing stormwater system.

Section C5 Soil Management

Soil management will be achieved in accordance with the relevant objectives of this section.

Section C6 Waste Management

A Waste Management Plan (inclusive of Site Waste Minimisation Management Plan) was included as part of the application. Details of management of construction waste materials and operational waste are included in the Plan. Based on the submitted information, the development application is considered acceptable having regard to the requirements of Section C6.

Section C12 Open space and landscaping

The site area is 126.5m², generating a requirement for 10% of the site to be provided with landscaping. The application proposes 32m² of landscaped area, which equates to 25.7% of the site. The proposal achieves the NDCP requirements.

Part D Development controls by land use

Sections D2 Single dwellings and ancillary development

8.0 Street frontage appearance

The proposal does not include any changes to the existing primary and secondary frontages.

9.0 Side/rear setback (building envelope) - lots with a width less than 10.5

The proposed alterations and additions will utilise the existing zero setback to the side boundary, and the rear setback of 4.67m. It is considered that the bulk and scale of the development is consistent with and complementary to the existing built form in the street and the local area. The proposed development will not unreasonably impact the amenity of adjoining dwellings and the associated principal area of private open space, having regard to available views, solar access, and prevailing breezes.

11.0 Building design and layout

The building design and layout of the dwelling house is considered satisfactory in accordance with this Section.

12.0 Private open space

The existing site has a grassed area of 3.9m x 6.9m and 2.9m x 4.7m at the rear of the building, which is accessed from the living room via the covered alfresco area. The proposed new development includes a grassed area directly adjacent to the new kitchen and living area measuring 6.9m x 4.7m. This meets the minimum private open space requirements in NDCP 2023.

13.0 Visual and Acoustic privacy

The proposed development is located on the ground floor and will not unreasonably overlook the living room windows or the principal area of private open space of neighbouring dwellings. Having regard to the relevant provisions of this section, the proposed development as amended is considered satisfactory with respect to privacy and overlooking impacts.

14.0 Solar access

The proposed development has responded to the streetscape with a design that has optimised solar access to the north facing rear yard, and does not significantly overshadow the living area windows, the principal area of private open space, or solar panels of neighbouring dwellings. The proposed single storey development has a similar footprint of the existing dwelling and covered alfresco area. The overshadowing diagrams submitted indicate there will be no adverse overshadowing impacts to the adjoining property, with sunlight remaining available to the living rooms and open space.

The north facing rear yard and openings to the principal living room will meet the minimum solar access requirements of at least 3 hours for the dwelling.

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 2023 considerations. The proposed development will not have any undue adverse impact on the natural or built environment.

The amended plans are acceptable having regard to the proposed height, external appearance, character, bulk, and scale of the proposed development.

The FSR development standard is exceeded by the proposed development. However, the variation has been considered in the context of adjoining and potential future development. The development has minimal impacts on surrounding development and is acceptable.

The proposal achieves adequate visual and acoustic privacy for the proposed residential development and for the surrounding properties and has suitably considered 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 is located on 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.

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 considered suitable for the development, it is located within the R2 Low Density Residential zone, and the proposal is permissible. The alterations to the existing two storey dwelling are consistent with the existing and desired future character of the locality.

The site is located within an established residential suburb and is accessible to key services and amenities. The land is suitably zoned for the development which is permissible.

The variation sought to the FSR development standard is acceptable having regard to the built form and potential impacts.

Furthermore, the site is able to accommodate the proposed development, whilst minimising the impact to neighbouring properties. The site is within an established residential area with good connectivity to a range of services and facilities.

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

The application was publicly notified in accordance with CN's CPP between 11 March to 25 March 2024 and no submissions were received.

5.9 The public interest

A comprehensive and detailed assessment of the matters for consideration under Section 4.15(1) of the EP&A Act, the provisions of the relevant State Environmental Planning Policies, the provisions of the Newcastle Local Environmental 2012 and Newcastle Development Control Plan 2023 has been made.

The proposed development is acceptable having regard to the principles of ecologically sustainable development.

The proposal is consistent with CN's urban consolidation objectives, making more efficient use of the established public infrastructure and services.

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

Development Contributions

The EP&A Act enables CN to levy contributions for public amenities and services. The proposal is exempt from incurring a levy, as the cost of works does not exceed \$200,000 which would trigger a Section 7.12 Payment as detailed in CN's Development Contributions Plans.

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

Attachment B: Draft Schedule of Conditions

Attachment C: Processing Chronology

Attachment D: Clause 4.6 Exception to FSR Development Standard

Attachments A - D distributed under separate cover

7.3. 60 RIVERSIDE DRIVE MAYFIELD WEST - PROPOSED INDUSTRIAL PREMISES AT 60 RIVERSIDE DRIVE, MAYFIELD WEST - DA2022/00463

APPLICANT: DE WITT CONSULTING
OWNER: STEEL RIVER WEST PTY LTD
REPORT BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT/
INTERIM EXECUTIVE MANAGER, PLANNING AND DEVELOPMENT

PART I

BACKGROUND

An application (DA2022/00463) has been received seeking consent for the erection of five industrial buildings, comprising 30 industrial units, to be constructed over three stages at 60 Riverside Drive Mayfield West.

The submitted application was assigned to Senior Development Officer, Ethan Whiteman, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination as the construction value of the proposed development (\$25,083,315) exceeds the staff delegation limit of \$15M.

The application was not publicly notified as it is an industrial development in the industrial zone, and this is consistent with City of Newcastle's (CN) Community Participation Plan(CPP).

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



Figure 1: Subject Land - 60 Riverside Drive Mayfield West

Issues

- 1) Any development consent will be subject to a deferred commencement clause. The lots on which the development is to be carried are not registered; and the development relies upon infrastructure works approved under a separate application, to be established prior to this consent becoming operational.

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 DA2022/00463 for a staged development of Industrial Premises (Five light industrial buildings comprising 30 units and 432 car parking spaces) and associated site works 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 EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The subject property comprises of land described as Lot 22 in Deposited Plan 280028, known as 60 Riverside Drive Mayfield West and is located within the Steel River Business Park. The site is irregular in shape and has a total area of 7.9ha. The site is currently undeveloped and is heavily disturbed due to subdivision works associated with the final stage of the Steel River Business Park. The northern part of the site is generally flat and level and is located on the lower side of a large embankment to the south. The southern most part of the site increases in elevation to the south toward Maitland Road.

The site has existing access from Riverside Drive to the north, which is formed with kerb and gutter up to the boundary and proposes dual frontage to Coal Wash Drive to the east and to Maitland Road to the south. A new intersection between Maitland Road and Riverside Drive has been approved for construction.

The site contains existing vegetation towards the south-eastern corner nearby Maitland Road and the north-western boundary. There are existing power poles and three electricity transmission towers toward the south-western portion of the site.

1.1 Background

The site forms part of the Steel River Business Park, an industrial subdivision comprising 13 stages which was approved under development consent DA2006/2076. The subject application relates to the final stages (11-13) of the subdivision.

DA2006/2076 includes the Riverside Drive access road extension through to Maitland Road. The subdivision work and construction of the access road must be undertaken prior to the registration of any new lots for stages 11-13, being the subject site.

DA2006/2076 approved the overall subdivision layout, with infrastructure works needing to be completed prior to the registration of the individual lots. The subdivision work is to be completed prior to the subject development application (DA2022/00463) commencing if supported.

An application to modify the DA2006/2076 (MA2022/00155) was lodged concurrently with the subject development application (DA). MA2022/00155 sought consent to modify the approved subdivision to enable the consolidation of stages 11-13 into one final stage of the Steel River Business Park development. The modification application has been recently approved, amending the lot configuration as shown below in Figure 1.

Figure 1 below displays the extent of road works approved under MA2022/00155 (with the remainder of the internal road works to be facilitated under the subject application (DA2022/00463)).

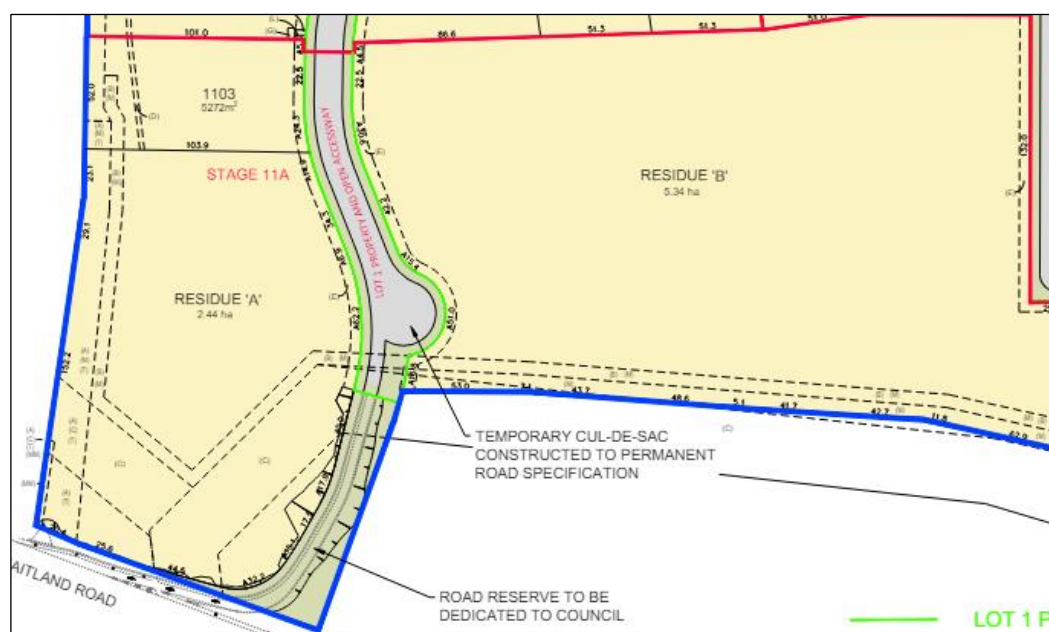


Figure 2: MA2022/00155 plan, displaying road works to be undertaken under a subdivision works certificate.

2.0 THE PROPOSAL

The applicant seeks consent for the erection of five light industrial buildings comprising a total of 31,256m² of gross floor area within 30 separate tenancies and 432 car parking spaces.

The proposed development is to be undertaken over three separate stages. Figures 2 to 6 show the proposal and the locality.

The DA is for the following works:

- 1) Stage 1, located on the western side of Riverside Drive, comprising:
 - i) Single storey light industrial building comprising 5 separate units.
 - ii) Two storey light industrial building.
 - iii) A total of 104 external car parking spaces, 4 motorcycle spaces and 12 class 2 bicycle spaces.
 - iv) Two vehicular access points from Riverside Drive.
 - v) A 2.1m high palisade fencing to all stage 1 boundaries.

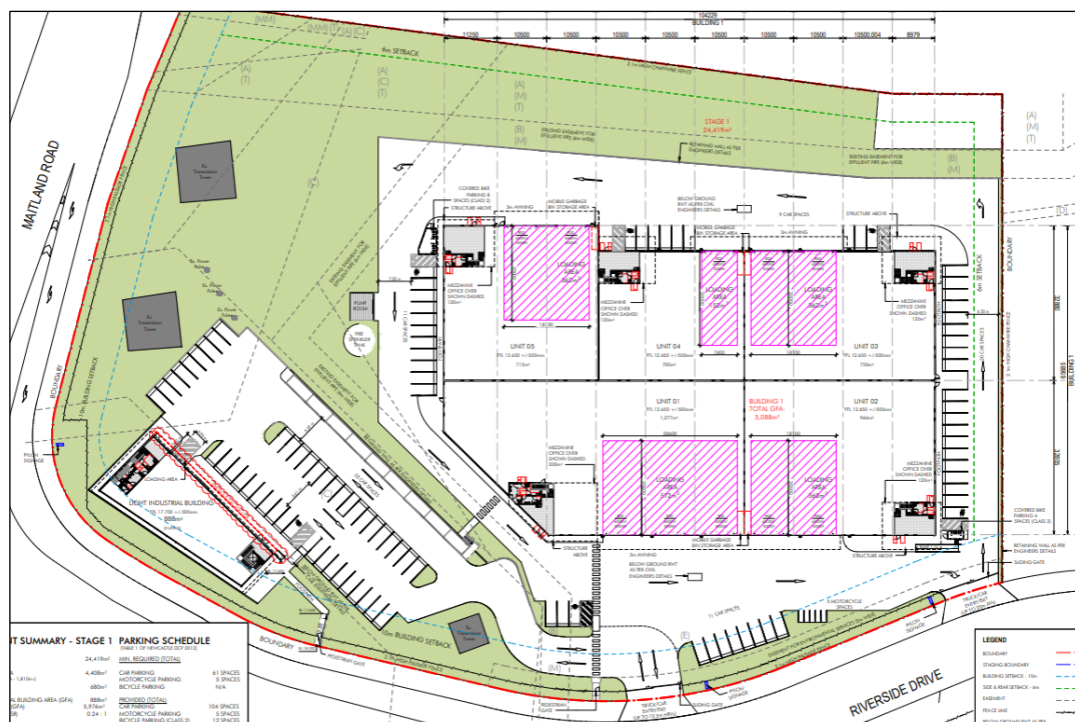


Figure 3: Stage 1 site plan

- 2) Stage 2, located on the eastern side of Riverside Drive and on the southern side of the subject site comprises:
 - i) Light industrial building comprising 17 separate units.
 - ii) Units 8 and 19 are 100m² retail units, with the remaining 15 units being light industrial.

- iii) Vehicle access is proposed off Riverside Drive, Coal Wash Drive and Channel Road.
 - iv) A total of 141 external car parking spaces, 12 motorbike spaces, 15 class 2 bicycle spaces and 4 class 3 bicycle spaces.
 - v) Landscaping and removal of four existing street trees within Coal Wash Drive.
3. Stage 3, located on the eastern side of Riverside Drive and on the northern side of the site comprises:
- i) Two light industrial buildings comprising 7 separate units; with gross floor areas of 6,211m² and 3,803m² for the eastern and western buildings respectively.
 - ii) A total of 187 external car parking spaces, 5 motorbike spaces, 15 class 2 bicycle parking spaces.
 - iii) Vehicle access is proposed from both Riverside Drive and Coal Wash Drive.
 - iv) Landscaping.

A copy of the 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)**.

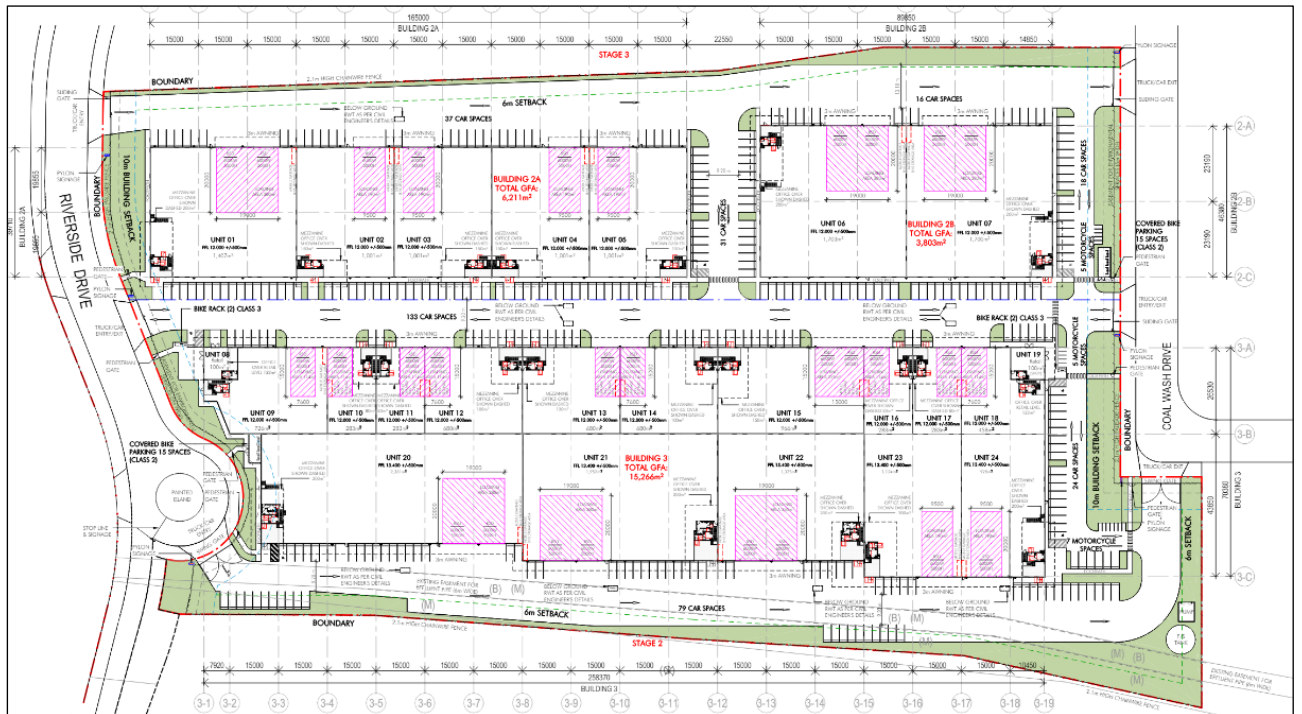


Figure 4: Stage 2 & 3 site plan



Figure 5: Site plan, indicating location of Stages 1, 2 and 3



Figure 6: Staging plan



Figure 7: Maitland Road perspective

3.0 PUBLIC NOTIFICATION

The application is for an industrial development in an industrial estate and was not required to be publicly notified. This is consistent with the requirements under CN's CPP.

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 (Resilience and Hazards) 2021

Chapter 2 Coastal Management

The subject site is located within the Coastal Environment Area and partially within the Coastal Use area as defined under this State Environmental Planning Policy (SEPP).

The proposed development has been suitably designed and sited to avoid causing an adverse impact to any of the following:

- a) The integrity and resilience of the biophysical, hydrological (surface and groundwater) and ecological environment.

- b) Coastal environmental values and natural coastal processes.
- c) The water quality of the marine estate (within the meaning of the [Marine Estate Management Act 2014](#)), in particular, the cumulative impacts of the proposed development on any of the sensitive coastal lakes identified in Schedule 1.
- d) Marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms.
- e) Existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public, including persons with a disability.
- f) Aboriginal cultural heritage, practices and places.
- g) The use of the surf zone.

Regarding the relevant aims of the policy, the proposed development will not detrimentally impact the coastal zone or the environmental assets of the coastal environment area. The proposal is acceptable having regard to this policy.

Chapter 4 Remediation of land

Clause 4.6 contamination and remediation to be considered in determining development application.

Clause 4.6 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.

CN's records identify the site as being contaminated land. The policy and section 5.2 of the Newcastle Development Control Plan 2012 (NDCP 2012) require a preliminary site investigation to be carried out in accordance with the '*Guidelines for Consultants Reporting on Contaminated Sites*'.

CN's Environmental Team has reviewed the contaminated land documentation submitted by the applicant and conditions be imposed on any consent issued requiring a copy of 'Contamination Certificates' be submitted to the Principal Certifier at various stages of the development and the development to be carried out in accordance with the 'site management plan' prepared by RCA Australia in April 2022.

The imposition of the recommended conditions of consent will ensure that the subject land is suitable for the development and is satisfactory in relation to Clause 4.6 of this SEPP.

State Environmental Planning Policy (Biodiversity and conservation) 2021

The subject site contains mature remnant vegetation predominantly contained to nearby the location of the new Maitland Road and Riverside Drive intersection. The works in the area nearby this vegetation were approved under DA2006/2076, with vegetation impacts considered at that time. No further consideration is required.

The development proposes the removal of four street trees that have been assessed against the provisions of the NDCP 2012 and SEPP and is supported. The landscaping plan proposes compensatory planting which is discussed later in this report and conditions of consent have been included for additional street tree planting, four as part of stage 1 and three trees in both stages two and three.

State Environmental Planning Policy (Transport and Infrastructure) 2021

The proposed development is subject to the following requirements of this SEPP:

2.48 Determinations of development applications - other development

The development includes works within an easement for electricity purposes and is within proximity of existing transmission towers.

Ausgrid, the authority having benefit of the easement, have provided a concurrence letter which raised no objection to the proposal, subject to the development being carried out in accordance with the amended plans, the subject of this report.

2.119 Development with frontage to a classified road

The site has frontage to a classified road, Maitland Road. An intersection on the corner of Maitland Road and Riverside Drive, approved previously will be constructed prior to the commencement of this development. The proposed development will be accessed from the Riverside Drive extension and not directly from Maitland Road.

On the basis of the above, Clause 2.119 (2)(a) is satisfied.

2.122 Traffic-generating development

The development is of a size to be defined as traffic-generating development and was referred to Transport for New South Wales (TfNSW) in accordance with Cl 2.122 (4) of the SEPP.

TfNSW have provided comment acknowledging that the Pacific Highway/Maitland Road are classified as "State Roads", and Riverside Drive and Steel River Boulevard are "local roads". TfNSW have identified the development will create additional safety and efficiency impacts to the State Road network. To mitigate these impacts, TfNSW have recommended an upgrade to the existing Steel River Boulevard and Industrial Drive intersection. The details of the recommended upgrade are as follows:

- i) Extension of the existing right turn bay in Industrial Drive (anticipated 95% length is 269m) or duplication of the right turn lane including transitional works in Steel River Boulevard (preferred).
- ii) Linemarking and signage for the Steel River Boulevard/ Channel Road/Murray Dwyer Circuit intersection preventing queuing through the intersection or duplication of the right turn lane including transitional works in Steel River Boulevard (preferred).

In determining the adopted treatment, a revised Signalised Intersection Design and Research Aid (SIDRA) model must be prepared.

The recommendations are included in the proposed conditions of consent. The works will be facilitated through a Works Authorisation Deed (WAD) process with TfNSW that must be completed prior to the issue of an Occupation Certificate for Stage 1 of the subject development.

State Environmental Planning Policy (Industry and Employment) 2021

The applicant seeks consent for nine pylon signs. With respect to the assessment criteria outlined within Schedule 5 of this SEPP, the proposed signs are considered to be acceptable, with the exception of the proposed 'estate entry signage' located nearby the new intersection between Maitland Road and Riverside Drive. The height and location of the sign are inappropriate for the setting. A condition recommending the removal of this sign is included within the draft schedule of conditions. This is discussed further in Section 5.3.1 of the report.

Newcastle Local Environmental Plan 2012 (NLEP 2012)

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

Clause 2.1 - Land Use Zones

At the time of the lodgement of the DA in May 2022, the land parcel was zoned IN1 General Industrial land under the provisions of NLEP 2012. On the 26 April 2023 the parcel was zoned E4 General Industrial, as part of an amendment to Business and Industrial zones across NSW by the State Government. Savings provisions prescribed under the Local Environmental Plan (LEP) amendment at that time ensure that for the purposes of this assessment the parcel must be assessed as though it is in the former IN1 General Industrial Zoning.

The development is defined as **Light Industry**, which is permitted with CN's consent in the IN1 Zone.

The proposed development is consistent with the objectives of the IN1 zone, which are:

- i) To provide a wide range of industrial and warehouse land uses.
- ii) To encourage employment opportunities.
- iii) To minimise any adverse effect of industry on other land uses.
- iv) To support and protect industrial land for industrial uses.
- v) To allow commercial, retail or other development where it is -
 - a) Ancillary to the use of the land in this zone for industrial, research, service or storage purposes

- b) Primarily intended to provide personal services and community facilities to persons occupied or employed in activities otherwise permitted in this zone for the benefit of the local community.
- vi) To ensure that any such commercial, retail or other development is unlikely to be prejudicial -
 - a) To employment-generating activities, or
 - b) To the viability of existing commercial centres.

The development includes the establishment of a substantial light industrial development, forming an extension of an existing large scale industrial estate. The proposal is adequately separated from other land uses, ensuring no adverse impacts are created as a result of any industrial operations.

The development provides substantial employment opportunities in a highly accessible location, supports and protects existing industrial zoned land for industrial land use and includes the provision of a small-scale retail space, which is capable of servicing the day to day needs of workers in the area.

Clause 4.3 - Height of Buildings

The subject site is not afforded a maximum building height under the NLEP 2012.

The Steel River Strategic Impact Assessment Study (SRSIAS) is the relevant assessment criteria for controlling height on the site. The height of the development is 12m, which is consistent with the SRSIAS.

The height of the buildings (HOB) is considered to be appropriate and acceptable.

Clause 4.4 - Floor Space Ratio (FSR)

The subject site is not afforded a maximum floor space ratio (FSR) under the NLEP 2012. The SRSIAS is the relevant assessment criteria for controlling FSR on the site. The FSR of the development is 0.4:1 which is below the permissible 1.5:1.

Clause 5.10 - Heritage Conservation

The subject site is located within the vicinity of a heritage item of local significance - *former migrant camp* - I291 on Schedule 5 of the NLEP 2012 located at 609 Maitland Road Mayfield West.

CN's Development Officer (Heritage) has reviewed the proposal and concludes that the proposed development is unlikely to detract from the setting and significance of the adjacent heritage item and that although the property shares a boundary with the heritage item, the significant elements on that site are located a substantial distance away from the proposed development.

Accordingly, clause 5.10 (4), which requires the consent authority to consider the effect of the development on the heritage significance of the heritage item, has been satisfied.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 and Class 2 acid sulphate soils. A site-specific acid sulfate soils management plan (ASSMP) has been prepared for the development. A requirement to comply with the ASSMP is included as a recommended condition of consent.

Clause 6.2 - Earthworks

The level of earthworks proposed to facilitate the development are considered to be acceptable having regard to this clause. The design minimises the extent of proposed earthworks, having regard to the existing topography.

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

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023

The Newcastle Development Control Plan 2023 (NDCP 2023) came into effect on 1 March 2024.

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

DCP 2023 does not apply to any DA lodged but not finally determined before its commencement. Any DA lodged before its commencement will be assessed in accordance with any previous DCP.

As such, the proposed development remains subject to the provisions of the NDCP 2012, as it was lodged prior to 1 March 2024.

Newcastle Development Control Plan 2012

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

Industrial Development - Section 3.13

3.13.01 Site Coverage

The site coverage of the proposed development is sufficient to allow for adequate landscaping, car parking and manoeuvring within the site whilst allowing for a substantial gross floor area and usable internal spaces suitable for industrial activities. The site coverage is considered to be consistent with the expectations of a new industrial development and maintains a balance between operational requirements and acceptable scale.

3.13.02 Character and amenity

The proposed built form displays suitable articulation and mixture of materials and colours, including substantial fenestration elements, displaying a contemporary design consistent with the prevailing built form throughout the newer areas of the Steel River estate.

Each tenancy is afforded adequate internal amenity consistent with an industrial workspace and the level of landscaping intended throughout the site affords adequate external amenity by way of shaded areas for relaxation.

3.13.03 Open storage and work areas

The development includes designated open storage areas along the northern and southern boundaries of stages 2 and 3, which are adequately screened from view from streets.

3.13.04 Building setbacks

The setback requirements prescribed under the SRSIAS prevail over the setbacks contained within this DCP section. Refer to discussion at 5.3.1 below.

3.13.05 Loading, unloading and servicing areas

Each industrial unit includes an internal loading bay capable of allowing the design vehicle for each tenancy to stand wholly within the loading dock, complying with the requirements of this Section of the DCP.

3.13.06 Parking and vehicle access

Car parking is compliant with the requirements of S7.03 of the DCP. The locations and level of landscape treatment within and around each car parking area, ensure that any potential visual impact is suitably mitigated.

For clarity, car parking areas are predominantly located nearby side boundaries and were located elsewhere include a landscape buffer.

Vehicles over 12.5m will be restricted to the southern access to stage 1 from Riverside Drive.

Heavy and light traffic movements are separated throughout the development where possible, with the signage and line marking plan endorsed by the Newcastle City Traffic Committee (NCTC).

3.13.07 Land in Zone IN1 General Industrial 'Steel River'

The environmental effects of the proposal and compliance with the environmental envelope prescribed by the Strategic Impact Assessment Study (SIAS) are discussed in Section 5.3.1 of this report.

5.3.1 Steel River Estate Strategic Impact Assessment Study

New development within the Steel River Precinct is required to comply with the strict environmental standards set in place at the time of the original industrial subdivision, under the SRSIAS.

Environmental matters such as noise, waste management, social and economic considerations are addressed in various sections elsewhere in this report, and conditions of consent are recommended where appropriate.

SIAS development guidelines - Environmental Envelope Plan

The proposed development responds to the relevant SIAS development guidelines (similar to a site specific DCP prescribed through the environmental envelope plan in the following ways:

S8.9.2 (ii) Site layout

The development has been designed to provide for efficient operation including parking, access loading areas, office space, landscaping and general operation.

S8.9.2 (iii) Site coverage

The development includes 80% site coverage including all buildings and external hard stand spaces, 20% of the site is to be landscaped area and the ground floor area of the buildings does not exceed 70% of the area of the allotment (approx. 35% proposed).

This is consistent with the requirements of the SRSIAS and the surrounding context.

S8.9.2 (iv) Site setbacks

The guidelines require a 10m front setback and 6m side and rear setbacks for buildings.

The plans illustrate the required setbacks as green and blue dashed lines, demonstrating the required envelope and each proposed building's form within that envelope. The development complies with the required setbacks, with the exception of the stage 1 two storey light industrial building, which is setback a minimum 5.9m to Riverside Drive (front setback). When assessing the setback on a merit-based consideration, it is considered that the intended building form is not visually obtrusive as it offers appropriate articulation, and a heavily landscaped area will exist between the building and Riverside Drive. Accordingly, the non-compliance is not considered significant and is acceptable in this instance.

S8.9.2 (vi) Building height

The maximum building height prescribed to the Steel River estate is 12m and not more than two storeys. The proposed development has a maximum height of 12m and does not exceed two storeys.

The height of the proposed buildings is measured from existing ground level at various points of the site.

It is considered that the intended height of the buildings is conservative when considering the surrounding industrial context and not visually prominent, particularly when viewed from Maitland Road.

S8.9.2 (vii) Building address

Each building has entries for vehicles and pedestrians which are well defined through materials and form, meeting the requirement of this clause.

S8.9.2 (viii) FSR

The maximum FSR prescribed within the Steel River Estate is 1.5:1. The FSR of the development is 0.4:1, calculated through a proposed gross floor area of 31,256sqm on a site with an area of 78,007sqm.

It is considered that the gross floor area ensures the scale of the development is conservative within the surrounding industrial context.

The proposed FSR is contextually appropriate and meets the requirements of this clause.

S8.9.2 (xiii) Landscape development

The development includes a 5m landscape strip along the road frontages, only interrupted by driveways and pedestrian pathways. Parking areas are screened using trees, shrubs and ground covers with shade trees providing amenity to car parking areas.

S8.9.2 (xv) Fencing and screening

The 2.1m palisade fencing is proposed along the boundaries to all street frontages (Maitland Road, Riverside Drive, Coal Wash Drive and Channel Road) and is compatible with the building design and remainder of the Steel River estate.

S8.9.2 (xvi) Lighting

It is recommended that a lighting plan be prepared for each stage of the development. The lighting plan is required to demonstrate adequate lighting to pedestrian paths, building entries and driveways, designed in accordance with relevant Australian Standards. A condition reflecting this requirement is recommended, with details to be provided prior to the issue of Construction Certificate.

S8.9.2 (xviii) Signage

The applicant has submitted a signage strategy for pylon signage located throughout the site and categorised into type 1, 2 and 3 signs. All proposed signs are solely for the purposes of identification of the estate and are situated at vehicular entrances, of which there are multiple.

The guidelines state that only one pylon sign to a maximum height of 8m and one identification sign is allowable per site. However, provisions are made in the guidelines for sites, such as these with more than one vehicular entrance. There are nine proposed pylon signs in total.

One pylon sign Type 1 has a height of 9m and is proposed on the Maitland Road frontage. This sign is considered to be inappropriate height for an advertising sign, on Maitland Road. Other signage to the site is available. A condition has been drafted requiring it to be removed from the architectural plans and from the construction certificate plans.

S8.9.3 (i) Parking

The aisle and parking stall dimensions are in accordance with the NDCP 2012.

S8.9.3 (ii) Loading, unloading and servicing areas

All proposed loading zones are internal to the building, located away from adjoining buildings and street frontages and meet the intent of the SRSIAS.

Safety and Security - Section 4.04

The development is consistent with the principles of *crime prevention through environmental design* providing adequate surveillance, access control, territorial reinforcement and space management.

The level of glazing within the building design in addition to the increased patronage throughout the site will increase surveillance, potential entrapment locations are virtually non-existent. Each unit has separate access control, the buildings and adjacent spaces establishes territorial and space management for each tenanted space.

Soil Management - Section 5.01

Earthworks are proposed to facilitate the development and are predominantly limited to creating building platforms and level car parking, vehicular and pedestrian access areas. The civil plans indicate the earthworks intended with the level changes do not exceed 2.9m of either cut or fill across the site and aligns with the building, road and car park footprints.

The proposed development is considered to be acceptable having regard to the intent of this section of the DCP and allows for a suitably site responsive design.

Vegetation Management - Section 5.03

To facilitate the proposed works there are impacts to four trees located within CN's Coal Wash Drive Reserve. The remainder of trees to be removed at the proposed intersection of Maitland Road and Riverside Drive under this DA have already approved under the 2006 subdivision.

Conditions are recommended on the consent requiring replacement of the street trees, and compliance with the submitted landscape plans.

The submitted landscape plans indicate that the overall vegetation coverage over the site will be greater than the existing site conditions.

The proposed development is considered to be acceptable having regard to this Section of the DCP.

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*'.

Landscape Open Space and Visual Amenity - Section 7.02

The development is a 'category 3 development' in accordance with this Section of the DCP and the applicant has submitted a comprehensive landscape plan.

The plan displays landscape treatment and planting all stages of the development and includes landscape buffers between all buildings and public roadways and to all boundaries: and tree planting for every 6 car parking spaces within the car parking areas. The landscape plan also includes 11 street tree plantings, which will be imposed as conditions on any consent issued.

The landscaping includes a suitable mixture of large and medium sized species as well as shrubs and ground coverings, with larger tree species located outside of the large electricity easement burdening the allotment.

Overall, the proposed landscaping is considered to provide adequate visual buffer between the subject site and adjoining sites, from the public domain and provide amenity to occupiers of the site.

Conditions are recommended to be imposed on the development consent requiring at each stage of the development the landscaping treatment is to be completed and certified, prior to the issue of an occupation certificate.

Traffic, Parking and Access - Section 7.03

The proposal includes access from Riverside Drive, Coal Wash Drive and Channel Road and 432 total car parking spaces across the 3 stages, including 7 accessible parking spots.

The parking is surplus to the requirements for light industry under the DCP, which is supported given the location of the site, and CN's Building Assessment Team (BAT) have reviewed the location of accessible spaces with regard to path of travel to building entries and raised no objection in this respect, recommending that a condition be applied to the consent at each stage of the proposed development to ensure compliance with the Commonwealth *Disability (Access to Premises - Buildings) Standards 2010*.

CN's Engineering Assessment Team (EAT) have reviewed the proposal having regard to traffic, parking and access and have recommended conditions be imposed on any consent issued. The conditions have been included in the draft schedule of conditions.

Given that the proposed traffic and access arrangements are unusual, the NCTC also considered and then endorsed the proposed arrangements (signage and line marking plan dated 25.01.2023).

As discussed previously in this report, the Riverside Drive extension and new left slip lane intersection at Riverside Drive and Maitland Road were approved under DA2006/2076 (recently modified by MA2022/00155). This infrastructure must be in place prior to the registration of the new lot (stage 11 of Steel River Estate under MA2022/00155) with New South Wales Land Registry Services. Consequently, any approval of this development would be subject to a deferred commencement consent.

The deferred commencement will ensure the plan of subdivision that provides the framework (road framework and lot configuration) for this application is registered and the required infrastructure is in place (including connection of Riverside Drive to Maitland Road). This requirement has been included in the draft schedule of conditions at (**Attachment B**).

Section 7.05 - Energy Efficiency

The proposal is acceptable having regard to this section.

Stormwater- Section 7.06

CN's Engineering Officers have reviewed the development having regard to stormwater management and consider the proposal to be acceptable, subject to recommended conditions to be placed on the consent.

Waste Management - Section 7.08

Demolition and waste management will be subject to conditions recommended to be included in any development consent to be issued.

All of the proposed units are capable of storing bins away from public view, with collection able to facilitate from the public domain via CN's waste collection services or from each unit via private waste contractors. Adequate space is available to access waste collection from each building and there is significant areas of unfettered space at the kerbside of Riverside Drive, Coal Wash Drive and Channel Road.

Based on the submitted information, the proposal is considered to be acceptable.

Advertising and Signage - Section 7.09

The applicant has submitted a signage strategy indicating that nine pylon signs are proposed and flush wall signs on the two storey building closest to the Maitland Road frontage.

The signage strategy clearly identifies the location and dimensions of the signs.

As discussed within Section 5.1 of this report, the signage proposed is acceptable with the exception of the pylon sign fronting Maitland Road, which is subject to a condition of consent requiring removal from the construction certificate plans.

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 of \$250,883.15, 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. In addition, the following impacts are considered relevant:

Social and economic impact

The proposed development will create a level of noise and dust in the local area and an increase in traffic associated with construction, creating negative impacts. It is however acknowledged that these impacts are temporary and are offset by longer term positive effects including:

- i) Approximate \$25 million investment in the Newcastle economy.
- ii) Substantial employment generation and business investment opportunity both through the construction phase and through the creation of 28 light industrial and two retail units.
- iii) Production of increased trade and economic activity with the Steel River Business Park, supporting the long-term viability of land identified for industrial employment generating activity.

The proposed development will not have any undue adverse impact on the natural or built environment, subject to compliance with recommended conditions of development consent.

The development is compatible with the existing character, bulk, scale and massing of development in the immediate area.

5.7 The suitability of the site for the development

The site is suitable for the proposed development in the Steel River industrial precinct, which is well located in order to achieve its intended purpose with ideal transport links to the greater Hunter and beyond. It is considered that adequate services and waste facilities are available to the development.

The constraints of the site have been considered in the proposed development, which includes contamination, acid sulfate soils and nearby heritage.

The site is not subject to any other known risk or hazard that would render it unsuitable for the development.

5.9 The public interest

The proposed development will allow for the orderly and economic development of the site, making use of industrial land for industrial purposes.

The Greater Newcastle Metropolitan Plan 2036 (GNMP) identifies the Newcastle Port Catalyst Area, which includes the Steel River Business Park, as projected to create demand for an additional 300 jobs by 2036. The proposed development, located within an established industrial precinct that forms part of the Newcastle Port Catalyst Area will establish a substantial industrial development, creating ample opportunity for job creation in a suitable location and contributing to the achievement of the GNMP's prediction for additional generation of employment within this area.

The proposed development is therefore considered to be in the public interest.

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 - 60 Riverside Drive Mayfield West

Attachment B: Draft Schedule of Conditions - 60 Riverside Drive Mayfield West

Attachment C: Processing Chronology - 60 Riverside Drive Mayfield West

Attachments A - C distributed under separate cover

7.4. 1 ALFRED STREET NEWCASTLE EAST - DWELLING HOUSE - ALTERATIONS AND ADDITIONS - DA2023/00692

APPLICANT: M HOLLEBRANDSE
OWNER: S FORWARD AND D FORWARD
REPORT BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT /
INTERIM EXECUTIVE MANAGER PLANNING AND
DEVELOPMENT

PART I

PURPOSE

A Development Application (DA2023/00692) has been received seeking consent for alterations and additions to a dwelling house at 1 Alfred Street Newcastle East.

The proposed development includes minor internal demolition works and construction works seeking to expand the ground and first floor of the existing dwelling.

The submitted application was assigned to Development Officer, Oliver King, for assessment.

The application is referred to the Development Applications Committee (DAC) for determination, due to the proposed variation to the Floor Space Ratio (FSR) development standard of the (NLEP 2012) exceeding a 10% variation. A variation of 27.85% is proposed.

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and six submissions were received objecting to the development.

Amended plans were received and re-notified and five submissions were received objecting to the development. A final set of amended plans were received in May 2024 and re-notified. In response, four submissions were received objecting to the development.

The issues raised by the objectors in response final set of amended plans included:

- i) FSR
- ii) Bulk & Scale
- iii) Building height



Figure 1 - Subject Land: 1 Alfred Street Newcastle East

- iv) Overshadowing and daylight access
- v) Construction works disrupting residents and laneway access
- vi) Heritage Character
- vii) Visual privacy
- viii) View loss
- ix) Existing retained boundary fence
- x) Impact on property values

Details of the submissions received are 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**.

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

Issues

- 1) The proposed development has a maximum FSR of 1.278:1 and does not comply with the FSR development standard of 1:1 as prescribed under Clause 4.4 of the NLEP 2012. The variation equates to an exceedance of 21.35m² (27.84%) to the FSR development standard. It is noted that the existing building currently has an FSR of 0.94:1.

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 DAC note the objection under Clause 4.6 Exceptions to development standards of the NLEP 2012, relating to Clause 4.4 (FSR) and considers the objection to be justified and consistent with the objectives of Clause 4.6(3) of NLEP 2012 and the R3 Medium Density Residential zone in which the development is proposed to be carried out; and
- B) That DA2023/00692 for alterations and additions to a dwelling house at 1 Alfred Street Newcastle East 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 EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The site consists of a single allotment known as 1 Alfred Street Newcastle East and is legally described as Lot 1, DP104090. The site is zoned R3 Medium Density Residential. The site is rectangular in shape and has an approximate area of 76.7m², with a frontage of 3.81m to Alfred Street with a secondary frontage of the same width to the rear unnamed laneway.

Constructed on the site is a two storey dwelling, which forms part of terrace housing along Alfred Street. The existing dwelling shares a party wall with the dwelling located on the adjoining north-western property, 3 Alfred Street, Newcastle East. The site is devoid of significant vegetation and the existing rear setback of the dwelling is fully paved. The site is relatively flat, with a total topographical difference of approximately 500mm across a site length of 20.13m, sloping from the northern frontage to Alfred Street (RL10.00) to the rear southern boundary to the unnamed laneway (RL9.50).

The existing dwelling has a gross floor area (GFA) of approximately 44.86m² on the ground floor and 27.77m² on the first floor, totalling 72.63m², or an FSR of 0.94:1.

Located within the Newcastle East Heritage Conservation Area (HCA), the site is bordered to the south and east with other similar residential dwellings of varying sizes. The general built form of the subject property and surrounding terrace houses comprises of painted masonry and weatherboard construction with elevated timber balconies and metal roof sheeting. Figures 2 – 3 below show the existing site.



Figure 2 - View of existing dwelling as seen from Alfred Street.



Figure 3 - View of existing dwelling as seen from the rear yard.

2.0 THE PROPOSAL

The applicant seeks consent for internal and external demolition works and alterations and additions to the existing two storey dwelling. The proposed works are described in detail as follows:

Demolition Works

- i) Demolition of internal walls, doorways and rear-facing window.
- ii) Demolition of existing fence and rear yard outbuilding.

Construction Works (Ground Floor)

- iii) Open plan kitchen and living room with rear-facing sliding door.
- iv) Rear yard concrete landing.
- v) Rear yard landscaped area.
- vi) AC, gas and bin storage adjacent to rear lane.
- vii) Gate access to rear lane.
- viii) New 1.8m high block wall with privacy screen.

Construction Works (First Floor)

- ix) Reinstatement of street-facing balcony.
- x) New bedroom 3 with 2.9m² skylight above.

- xi) Master bedroom with rear-facing sliding door.
- xii) Stormwater management works.
- xiii) New roofing above.

The proposed development will result in a GFA of 98.05m², with a total FSR of 1.278:1, exceeding the prescribed maximum FSR of 1:1, by 21.35m² of GFA or 27.84%. A clause 4.6 request for variation to the maximum FSR has been provided in support of this application.

Amended plans have been submitted during the assessment of the application in response to the issues raised within the submissions and matters raised by CN officers. The amended architectural plans include the removal of the rear yard pool and hard paving, removal of architectural features encroaching onto adjoining land, reduction of the height of the western side boundary brick wall and amendment of the roof design to a skillion.

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 original application was publicly notified from 10 August to 24 August 2023 in accordance with CN's CPP. A total of six submissions were received. Amendments to the plan and additional information were requested by CN, in response. The proposal was amended, and additional information was provided in November 2023.

The plans were publicly notified from 2 January to 25 January 2024 and four submissions were received. In response, CN officers again requested further amendments and additional information. A final set of amended plans, the subject of this report were received and publicly notified from 21 May to 4 June 2024. A total of four submissions were received. The concerns raised to the amended proposal include the following:

- i) FSR - Concern is raised regarding the 27.84% exceedance of the FSR control.
- ii) Building Height - Concern is raised regarding the height and overall size of the development, with associated impacts including:
 - a) Bulk and scale of the additions.
 - b) Overshadowing and daylight access to rear yards and windows.
 - c) Loss of views.
 - d) Impact of design on heritage character of Newcastle East HCA.
- iii) Amenity - Concern is raised regarding the impact on neighbouring amenity resulting from the development, namely the following:
 - a) Bulk and scale of the additions.
 - b) Visual privacy impacts resulting from two new doors.

- c) Construction works disrupting residents and laneway access.
- iv) Matters pertaining to:
 - a) The eastern boundary fence to be retained.
 - b) The impact of the development on surrounding property values.
 - c) Architectural features (sunshade on first floor).

The objector's concerns are addressed under the relevant matters for consideration in the following section of this report.

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 (Resilience and Hazards) 2021

Chapter 2 - Coastal Management

Chapter 2 of SEPP (Resilience and Hazards) 2021 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 and coastal environment area. The proposed development is not inconsistent with the provisions of this chapter of the SEPP.

Chapter 4 - Remediation of land

The Resilience and Hazards SEPP 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 land-use history, including applicable planning instruments since 1960 and development consents granted, were reviewed to establish if any land contaminating activities occurred on the site. Given the continued historical residential land use, no land contaminating activities are considered to have occurred on the site.

It is considered that the proposal has met the provisions of Chapter 4 Remediation of Land, Clause 4.6 of State Environmental Planning Policy (Resilience & Hazards) 2021 and is acceptable in terms of land contamination.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

The existing site does not contain any vegetation. The development will not expand the dwelling footprint in such a way to impact trees on adjoining sites. The development is therefore considered acceptable with regards to the above policy.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2021

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 R3 Medium Density Residential Zone under the provisions of NLEP 2012, within which the alterations and additions to the existing residential accommodation (dwelling house) are permissible with CN's consent.

The proposed development is consistent with the objectives of the R3 Medium Density Residential Zone, which are:

- i) *To provide for the housing needs of the community within a medium density residential environment.*
- ii) *To provide a variety of housing types within a medium density residential environment.*
- iii) *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- iv) *To allow some diversity of activities and densities if-*
 - a) *The scale and height of proposed buildings is compatible with the character of the locality, and*
 - b) *There will be no significant adverse impact on the amenity of any existing nearby development.*
- v) *To encourage increased population levels in locations that will support the commercial viability of centres provided that the associated new development-*
 - a) *Has regard to the desired future character of residential streets, and*

- b) *Does not significantly detract from the amenity of any existing nearby development.*

The alterations and additions to the existing dwelling house maximises residential amenity in an appropriate form, complementary to the medium density zone, within Newcastle East and the Newcastle East HCA, without significant amenity impacts to surrounding properties.

Clause 2.7 - Demolition Requires Development Consent

The proposal includes the demolition of internal structures (non-load bearing walls and windows) 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

Under the NLEP 2012 the site has a maximum height of 10m. The existing dwelling has a ridge height of approximately 8.19m, with the roof line of the proposed rear addition below the ridge line of the existing roof. The proposed extension has a maximum height of 7.19m which complies with this requirement.

Clause 4.4 - Floor Space Ratio (FSR)

Under the NLEP 2012 the site has a maximum 1:1 FSR. The existing dwelling has a total GFA of 72.63m². This equates to an existing FSR of 0.94:1, based on a site area of 76.7m².

The proposed development will result in a GFA of 98.05m² or a total FSR of 1.278:1, exceeding the prescribed maximum FSR by 21.35m² or 27.84%.

The applicant has submitted a request for a variation to this development standard, as per Clause 4.6 of NLEP 2012. Refer to the discussion under Clause 4.6 - Exceptions to Development Standards below.

Clause 4.6 - Exceptions to Development Standards

The proposal seeks consent to vary Clause 4.4 FSR of the NLEP 2012. The FSR Map of the NLEP 2012 provides for a maximum FSR of 1:1 on the site. The existing dwelling has a total GFA of approximately 72.63m², or an FSR of 0.94:1.

The GFA for the development is 98.05m², increasing the existing GFA by 25.42m² and resulting in an FSR of 1.278:1. This exceeds the maximum FSR for the site by 21.35m² or 27.84%. The application is supported by a formal request to vary the development standard under Clause 4.6 of the NLEP 2012 (**Attachment D**).

Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even through the development would contravene a development standard.

In assessing the proposal to vary the FSR development standard against the provisions of Clause 4.6, it is noted that:

- 1) *Clause 4.4 of the NLEP2012 is not expressly excluded from the operation of this clause; and*
- 2) *The applicant has prepared a written request, requesting that CN vary the development standard demonstrating that:*
 - a) *Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - b) *There are sufficient environmental planning grounds to justify contravening the development standard.*

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

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

An assessment of the Clause 4.6 variation request has been undertaken below, the assessment has considered 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 FSR (Clause 4.4) 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 FSR (Clause 4.4) 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 submitted 'Exception to Development Standard', prepared by Resolve Urban Planning, constitutes a written request for the purposes of Clause 4.6(3), and seeks to demonstrate that strict compliance would be unreasonable in the circumstances of this application. A summary of the justification provided within the applicant's written request is provided below:

"The objectives of Clause 4.4 are as follows:

- a) to provide an appropriate density of development consistent with the established centres hierarchy,

The proposed non-compliance, in light of the existing non-compliance and the scale of development within the context, is considered to have no impact on the perceived density achieved within the site.

- 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 proposed non-compliance results in a development form that reflects the bulk and scale of development within the context and has demonstrated it will not impact on the amenity provided to adjoining allotments.

The streetscape is not altered by this application, further mitigating any perception of the dwelling being inconsistent with the character of the area.

The non-compliant FSR is deemed to provide a better planning outcome for the site, facilitating alterations and additions that will provide living spaces that reflect the requirements for the modern home.

The existing floor area was insufficient in providing suitable amenity for future occupants. In particular the room sizes were small with spaces that are difficult to furnish and utilise for the occupants.

The additional floor area provides opportunity to have a functional kitchen and dining space, with substantially increased sunlight via a large sliding door along with internal amenities on both the ground and first floor.

The non-compliance will therefore provide improved liveability and functionality of the dwelling. The application achieves this without impacting on the character of the site and its context as detailed below."

CN Officer Comment

It is considered that the development, specifically the first-floor addition, is a form complementary to the existing and future desired character of the Newcastle East HCA. The rectification of the balcony and reinstatement of a lacework balustrade are positive contributions to the Alfred Streetscape. The new roofline will likewise not protrude above the existing ridge height as seen from Alfred Street and will be hidden behind the existing facade.

Living areas have been placed on the ground floor to reduce their elevation above the natural ground level. The rear concrete patio area attached to the living room is elevated approximately 500mm above the natural ground level, however this space is minimal in size (900mm in width with a total area of 3.46m²) and will provide 800mm privacy screening, on top of the 1.8m high masonry fence, to limit overlooking to adjoining properties. No side boundary windows are proposed on either elevation, with skylights placed in the roof form to provide light and ventilation to the habitable areas. Given the density of the surrounding locality and small allotment size, the design of the dwelling is considered acceptable in terms of visual and acoustic privacy impacts.

The development allows for suitable daylight and sunlight access to the subject and adjoining properties principle private open space and living room windows. The proposed first floor locates the building towards the rear laneway with no additional built mass towards the Alfred Street frontage. No significant views of the city or water views will be impacted.

Considering the minimal lot size, existing FSR, recent nearby developments on Parnell Place and Alfred Street and positive design amendments, it is considered that the proposed variation to the development standard does not cause undue adverse environmental impacts. The proposal is considered acceptable in terms of bulk and scale, overshadowing and 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.

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 applicant's response to Clause 4.6(3)(b) is addressed, and provides the following specific environmental planning grounds to justify the breach of the standard:

"It has been demonstrated that there are sufficient environmental planning grounds to justify the non-compliance.

Further, as per the Initial Action judgement (Paragraph 23), in the absence of a definition of environmental planning it is accepted that response to the objectives of the EP&A Act provide a suitable demonstration of sufficient environmental grounds to justify the non-compliance:

- a) To promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources.

The proposed non-compliance can be accommodated within the site without influence on the social and economic welfare of the community in the context, given the noncompliance will not impact on the amenity provided to any adjoining allotments.

- b) To facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment

The development, and non-compliance, is to be subject to detailed assessment to determine the proposals response to economic, environmental and social considerations.

These matters are in no way impacted by the non-compliance.

- c) To promote the orderly and economic use and development of land

The additional floor area is considered to be an orderly and economic use of the land, where it has been demonstrated the additional area will have no impact on the amenity of the site's context.

- d) To promote the delivery and maintenance of affordable housing
It is beyond the scope of this development, notwithstanding the non-compliance, to promote the delivery of affordable housing given the scale of the proposal.
- e) To protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats
The proposal will have no impact on any threatened species or ecological communities.
- f) To promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage) The proposal will have no impact on any item of built or cultural heritage.
The works have been reviewed and can be supported by CN's Heritage Planner.
- g) To promote good design and amenity of the built environment
The non-compliance promotes good design by responding to the existing site conditions in a manner that will not detract from the amenity provided to any adjoining allotment. Further, it will not alter the streetscape provided by the dwelling, all works being obscured by the existing structures as outlined in detail above.
- h) To promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants
The proper construction and maintenance of the building will be confirmed via the Construction Certificate process, responding to any conditions imposed by CN.
- i) To promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State.
Not considered to be relevant to the application.
- j) To provide increased opportunity for community participation in environmental planning and assessment.
The application will be subject of community participation via notification by CN. Any items raised during consultation will be addressed as required."

CN Officer Comment

The written request outlines environmental planning grounds which adequately justify the contravention. In particular the first-floor addition and ground floor extension does not result in any inconsistency with the desired built form of the locality and is generally consistent with the performance criteria of the NDCP 2023. 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(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 objects 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 FSR standard was considered under the Clause 4.6(3)(a) discussed 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 ‘FSR’

The development is consistent with the objectives of Clause 4.4 ‘FSR’ as the proposed development is of an appropriate density which is consistent with the established centres hierarchy. The resultant dwelling house is of an appropriate bulk and scale which is responsive to the streetscape and Newcastle East HCA. The development will result in acceptable impact to the built and natural environment and has implemented various design measures to limit the impacts of overlooking, bulk, scale, and overshadowing. The proposal is therefore considered consistent with the built form as identified by the centre’s hierarchy.

Objectives of the R3 Medium Density Zone

The development is consistent with the objectives of the R3 Medium Density Zone as the proposed development maximises residential amenity in an appropriate dwelling house form complementary to the medium density residential environment and Newcastle East HCA.

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, Industry and Environment) concurrence to the exception to the FSR 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.

Conclusion

An assessment of the request has been undertaken and it is considered that:

- a) It adequately addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) 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 R3 Medium Density Residential Zone in which development is proposed to be carried out.
- c) The Secretary's concurrence to the exception to the FSR development standard, as required by clause 4.6(4)(b) of the NLEP 2012, is assumed, as per NSW Planning and Environment Circular PS 20-002 of May 2020.
- d) The proposed FSR exceedance is considered to have minimal impact on neighbouring properties in terms of privacy, overshadowing, view loss, bulk and scale. The FSR exceedance is consistent with similar development in the area.

It is considered that the exceedance proposed is an acceptable planning outcome and strict compliance with the development standard is unreasonable in the case.

The proposal facilitates additional housing within a residential zone, providing for the housing needs of the community within a medium density residential environment whilst suitably respecting the amenity, and character of surrounding development and the quality of the environment, in accordance with relevant R3 Zone objectives. The proposal provides for an improvement to functionality, liveability, and amenity for building occupants, consistent with current living expectations.

Further, it is considered the clause 4.6 variation request is well founded. The request for the FSR to exceed 1:1 is supported.

Clause 5.10 - Heritage Conservation

The site is part of the Newcastle East HCA. The application is supported by a Statement of Heritage Impact (SOHI), prepared by Zeil Building & Interior Design. The proposed development is considered to satisfy the objectives of Clause 5.10 for the following reasons:

The design amendments result in a less assertive character for the rear addition. The exterior of the addition has been articulated using different materials for the lower and upper floors. The proposed skillion roof and linking element are lower than the previously proposed design and sit below the main roof ridge height of the main building.

The proposal maintains the prevailing Victorian character of the residential precinct with facade conservation works that positively contribute to the streetscape.

Rectification works to the balcony and reinstatement of the missing lacework balustrade are particularly positive and will enhance the streetscape of Alfred Street.

The addition will be visible from the laneway. Although this will mean a change to the 'lanescape', it is noted that for a property with more than one street frontage it is generally impossible for an addition to be completely concealed from the public domain. The context of rear yards within the immediate area is characterised by additions, of varying forms, age and materiality. The proposal is considered to be an acceptable response, with the rear addition having minimal visibility from Alfred Street, and the presentation of the building to Alfred Street significantly improved.

The materials palette of the addition has been modified from FC sheet cladding to a simplified interpretation of traditional materials prevalent in the local area (weatherboard and painted render). The simple and contemporary detailing distinguishes the extension as new work, consistent with Burra Charter principles, and maintains the simplified character of built forms presenting to the 'lanescape' compared to the more finely detailed character presenting to Alfred Street.

Subject to conditions, the proposal is considered satisfactory in respect to heritage conservation objectives of Clause 5.10 of the NLEP 2012.

Clause 5.21 Flood Planning

The site is not affected by flood prone land.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils. The development does not seek significant excavation which would lower the water table by 1m Australian Height Datum (AHD). The proposed development is considered satisfactory in this regard.

Clause 6.2 - Earthworks

The level of earthworks proposed to facilitate the development is acceptable having regard to this clause. No significant excavation shall take place with this application as the design generally seeks to maintain existing floor and ground levels. The design suitably minimises the extent of proposed earthworks, having regard to the existing topography.

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 proposed development, being alterations and additions to an existing residential allotment, is not applicable to this section.

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)

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023

The Newcastle Development Control Plan 2023 (DCP) provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The DCP was formally adopted by Council and commenced on 1 March 2024. The DCP requires consideration under Section 4.15(1)(a)(iii) of the EP&A Act 1979.

Section 11 of Part A - Introduction of the 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 DCP.'

The savings and transitional provisions apply to this application. The proposed development therefore remains subject to the provisions of the NDCP 2012.

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 proposed development does not alter the existing front setback to Alfred Street. The existing balcony overhanging Alfred Street is sought to be restored which is considered a positive contribution to the streetscape and Newcastle East HCA.

Due to the works to the existing balcony overhanging Alfred Street, a Section 138 (Type 2B) approval will be required prior to the issue of the construction certificate.

Side / rear setbacks (building envelope) (3.02.04)

The existing terrace dwelling contains a two-storey element to the front northern boundary, with a single storey element comprising the southern portion of the dwelling. The existing building structure is built to both side boundaries.

Side setbacks for buildings on lots, such as this, 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 typical pattern of development along Alfred Street, characterised by two-storey boundary walls does not comply with the permissible building envelope in DCP 2012. Similarly, the proposed development does not comply with the permissible building envelope and requires an assessment against the performance criteria of this section of the DCP. The performance criteria requires that 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 site has a 3.81m width, with a zero-side setback and existing wall heights of 3.48m (ground floor) and 6.67m (first floor). The proposed two storey rear setback is 4.39m, which is 1.61m less than the nominated 6m setback as stated in the NDCP 2012 for development over 4.5m in height.

The development will not extend further into the rear setback than the existing single storey building. The maximum building height of the development is proposed at 7.19m, which will result in an additional 3.729m of structure imposed on the rear-view of the Parnell properties.

The proposal (as amended) has reduced the roof form from a higher pitched design with a greater overall height of 7.59m to a skillion roof with a maximum height of 7.19m.

All works (with the exception of the beneficial balcony restoration) shall not be visible from the Alfred Street frontage, and therefore pose no additional bulk and scale on the Alfred Street streetscape.

Given the orientation, size and surrounding built environment, it is considered the building envelope departures are minor and will not adversely impact adjoining development with respect to overshadowing, view loss or privacy. These variations are considered satisfactory and to meet the performance criteria of Section 3.02.04 of the NDCP 2012.

Figures 4 - 5 below depict the proposed works in relation to the existing building footprint.

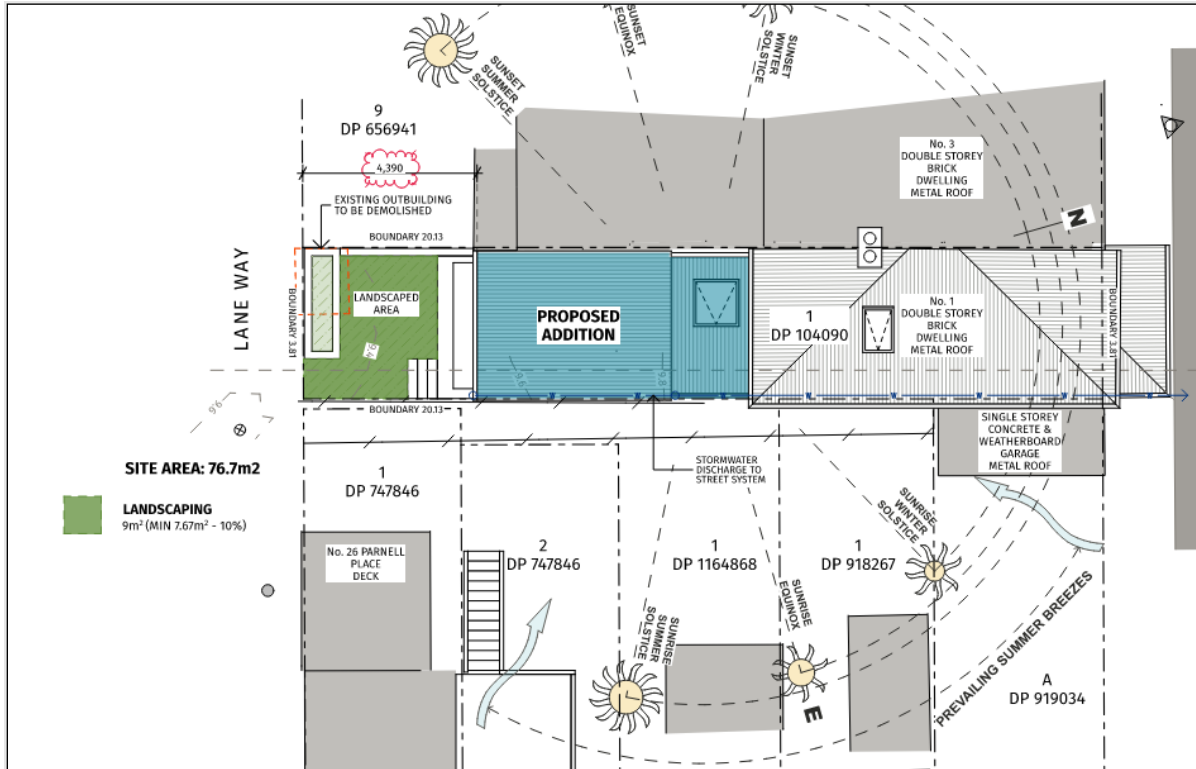


Figure 4 - Proposed site plan demonstrating lot width and existing building setbacks.

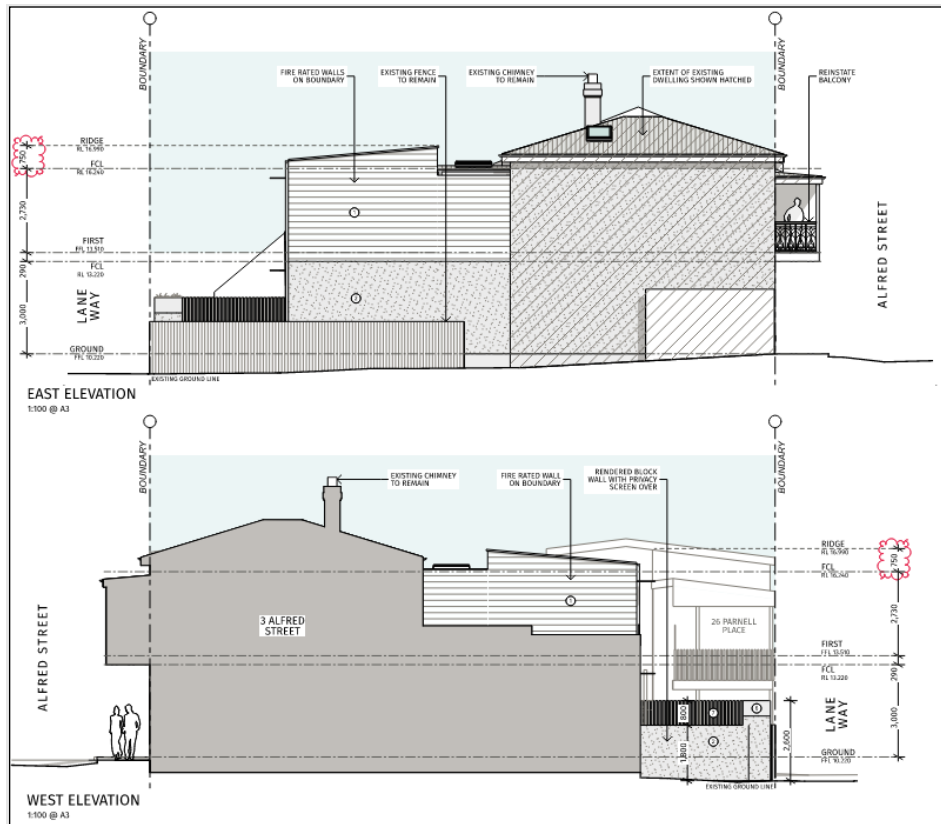


Figure 5 - West & east (side) elevations depicting existing building footprint with proposed additions.

Landscaping (3.02.05)

The existing development does not allow for any landscaped area, as the entirety of the rear yard area is paved.

The proposed development incorporates soft landscaping in the southern rear setback, resulting in a total area of 9m² or 11% of the site that meets the minimum 10% landscaped area requirement for the allotment. The proposal is considered satisfactory with the acceptable solutions for this section.

Private open space (3.02.06)

The development includes a rear landscaped private open space area of 9m². As per the existing arrangement, the proposed private open space is less than the NDCP 2012 required private open space area of 3 x 4m (12m²). The proposed private open space is a more usable space as compared to the existing rear yard, being directly accessible via the living area and landscaped, rather than hard paved.

The proposed private open space is considered satisfactory with the performance criteria of this section, as the rear yard shall allow for a useable private open space area.

Privacy (3.02.07)

The proposal provides for a total of three new windows, including a skylight within the roof. The skylight is required for light and ventilation to bedroom 3 on the first floor and is not considered to raise visual privacy concerns.

The ground floor living glass sliding door (W01) on the south elevation is located at the existing ground level of the dwelling and is setback 4.39m from the rear boundary. Adjacent to the ground floor living room is a concrete patio area. The impact to visual privacy from this ground floor door and associated patio is considered minimal, noting that the living room is not significantly elevated. An 800mm high privacy screen, fixed on top of a 1.8m high masonry brick dividing fence, has been provided to the western side of the concrete patio, which will prevent overlooking from this patio area and indoor living area.

The first floor sliding door (W02) is to the master bedroom and setback 4.39m from the rear boundary. A metal balustrade is proposed along this sliding door, however no balcony is proposed nor is there trafficable access from this sliding door. The door serves the master bedroom and is located approximately 10.11m from the private open space and 12.72m from the building line of the southern property, 10 Scott Street, Newcastle East. Whilst the door is large in size, a rear-facing non-living room door is considered preferable to an elevated living room, or additional side-boundary windows.

With respect to the constraints of the site and existing nearby dwellings, the design (as amended) is considered to not unreasonably overlook living room windows or the principal private open space of neighbouring dwellings. The development is considered satisfactory in terms of the performance criteria of this section.

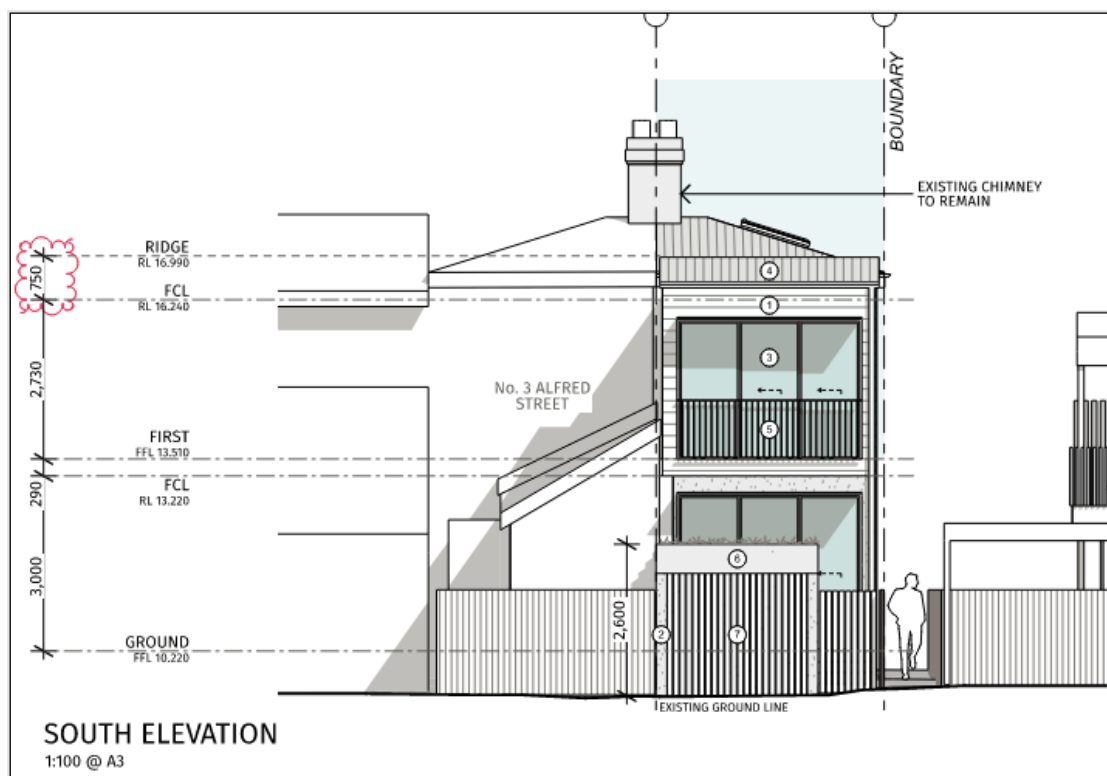


Figure 6 - South (rear) elevation of proposed works as seen from rear laneway.

Solar access 3.02.08)

The site is orientated towards the north, with a south facing rear setback and side boundaries to the east and west. The southern portion of the site adjoins the public laneway, with adjoining dwellings to the west and east. It is noted that the immediate locality features small allotments with attached terrace housing and heavily developed sites.

As per the submitted architectural plans, overshadowing diagrams have been supplied for:

- i) Hourly overshadowing impact of development on Winter Solstice (21 June 9am to 3pm).
- ii) Hourly overshadowing impact of development on Winter Solstice (21 June 9am to 3pm) - with existing and proposed overshadowing contrasted.
- iii) Proposed 9am, 12noon & 3pm overshadowing impact of development on Summer Solstice (21 December 9am to 3pm).
- iv) Hourly 3D elevational overshadowing diagrams to 24 & 26 Parnell Place on Winter Solstice (21 June 9am to 3pm).

The submitted documentation demonstrates that on the Winter Solstice, shadows cast by the proposal fall towards the western property at 3 Alfred Street between 9am and 10am. By 11am the overshadowing is concentrated within the subject premises. By 12pm and 1pm the shadows will fall towards the eastern laneway and property at 26 Parnell Place. Between 2pm and 3pm the eastern properties at 26, 24, 22 & 20 Parnell Place will experience some additional overshadowing from the proposal.

During the Summer Solstice (21 December), the shadows cast during this period will fall towards the west at 9am, with minimal overshadowing to any property at 12pm and shadows cast towards the east at 3pm.

In summary, the proposal will:

- i) Maintain at least three hours of sunlight to the windows of living areas that face north in existing adjacent dwellings between 9am and 3pm on 21 June (Winter Solstice).
- ii) Maintain at least two hours of sunlight to the private open space of adjacent dwellings between 9am and 3pm on 21 June (Winter Solstice).
- iii) Not significantly worsen the existing degree of overshadowing.
- iv) As per CN's latest aerial photography (April 2021) the existing solar panels at no.2, 20 & 22 Scott Street will not have daylight access reduced to less than three hours between 9am and 3pm on 21 June (Winter Solstice).

The proposal is considered satisfactory with the acceptable solutions of the above DCP.

View sharing (3.02.09)

This section requires development to allow view sharing between adjoining neighbours, demonstrate how view sharing is achieved and ensure that development enhances views and vistas through the form and treatment of buildings. The planning principle for assessing view impacts (Tenacity Consulting v Warringah [2004], NSWLEC 140) has been applied in this assessment and the four steps of the planning principle are listed and expanded upon as follows:

- i) *'The first step is the assessment of views to be affected'*

The most significant portion of works relates to the first-floor addition, orientated towards the southern unnamed laneway. The only works proposed on the Alfred streetscape is the rectification of the street balcony, which is not considered to result in significant view impacts to any adjoining properties. The proposed works will not extend beyond the existing ridge line of the dwelling. As such all views impacted by the proposal will be west-facing views from the nearby properties at Nos. 22, 24 & 26 Parnell Street.

The views impacted by the development are western facing views of the existing properties along Alfred Street. These views are of existing dwellings, rear yards, the rear unnamed laneway and partial skyline views.

It has therefore been assessed that development will only impact any views from adjoining residences onto the rear laneway. The development will not affect significant views such as any water, land, cityscape and iconic views over Newcastle. Views across rear laneways and multiple rear yard private open spaces are not considered significant views to be retained.

- ii) *'The second step is to consider from what part of the property the views are obtained'*

The properties that will have existing views impacted upon are No. 22, 24 & 26 Parnell Place. These properties are located to the east of the site and front Parnell Place and are separated from the subject allotment via a small laneway, primarily used for rear-lane access.

Rear boundary views down the unnamed laneway are available from No. 24 & 26 Parnell Place, with an angled view from 22 Parnell Place. The site most impacted by the development in terms of view loss is 24 Parnell Place. The views obtained from this property are one ground floor deck, one upper floor balcony and the lower ground floor rear yard. A kitchen door adjoins the ground floor deck.

Both standing and sitting views are available from the ground floor deck and upper floor balcony at No. 24 Parnell Place, with no views available from the rear yard due to the natural ground level of the space, the existing built environment and existing boundary fencing.

The case law cited in this report makes the following comment in relation to views from a sitting position, which is pertinent to this assessment:

"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."

iii) *'The third step is to assess the extent of the impact'*

The third step requires a qualitative assessment of the impact of the view loss as either negligible, minor, moderate, severe or devastating.

Considering the siting and massing of the existing development that currently obscures most rear-facing views, the orientation of the allotment, requiring an angled view of the laneway to achieve any views, the view impact to No. 22 Parnell Place is considered minor. The loss of view sharing will not be to water, cityscape and iconic views.

It has been assessed view impact to No. 24 Parnell Place, as a qualitative comment, is moderate – this takes into consideration the quality of views available to this property, the massing and form of the development (which has amended the roof design and reduced the overall building height of the development), and the understanding that views over the adjoining allotment are achieved from living spaces across the rear boundaries of the allotment (ground floor deck and upper floor balcony).

The existing view from No. 24 Parnell Place is a rear-facing view of the subject site, associated laneway, further residential properties along the unnamed laneway and partial skyline views. The proposed development will partially obstruct these views.

It has been assessed that rear boundary views across a laneway are difficult to maintain and do not comprise significant views. The loss of view sharing will not be to water, cityscape and iconic views.

The view impact to No. 26 Parnell Place, as a qualitative comment, is minor - noting that the location of the new additions shall not protrude further into the rear setback than the existing ground floor. The extent of the new addition in relation to nearby properties is demonstrated in Figure 7 below. The loss of view sharing to 26 Parnell Place is considered to largely be unchanged from existing.

- iv) *'The fourth step is to assess the reasonableness of the proposed development that is causing the impact'*

The proposed alterations and additions generally comply with CN's relevant planning provisions, including compliance with the building height principal development standard (Clause 4.3 of the NLEP 2012) and the relevant Performance Criteria and Acceptable Solutions of the NDCP 2012 pertaining to front, side and rear boundary setbacks (including building envelope), visual privacy, overshadowing and landscaping.

Given the sympathetic placement, form, massing and scale of the development relative to site constraints (being a small allotment in a densely developed locality), and the compliance of the development with CN's relevant planning provisions, it is considered that the development will not adversely impact views sharing from adjoining development. It has also been assessed views to and from public places will be retained should the subject development proceed.

The proposed development is considered satisfactory having regard to view sharing.



Figure 7 - Overlay of proposed building footprint with rear-facing view lines from 22, 24 & 26 Parnell Place.

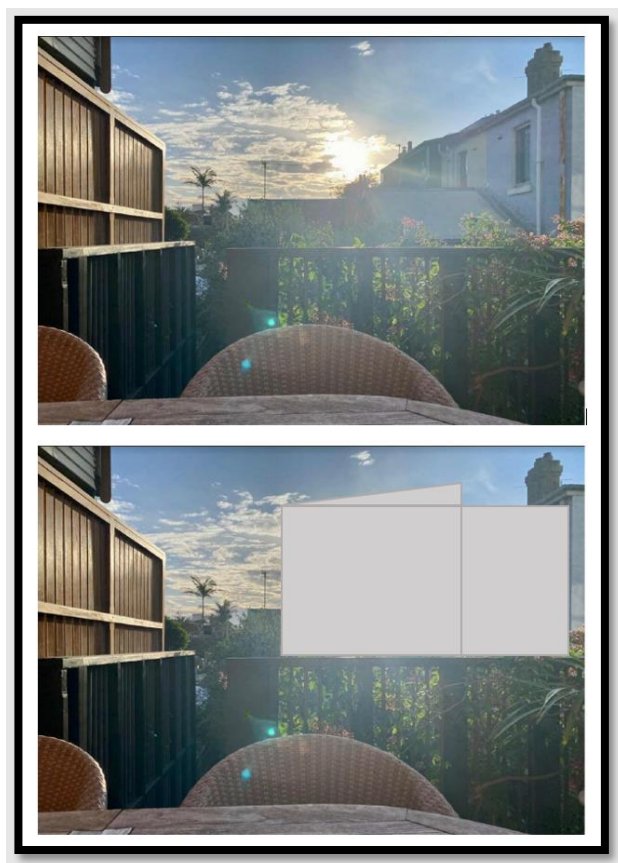


Figure 8 - Comparison of view loss as seen from a sitting position at the ground floor deck of 24 Parnell Place.

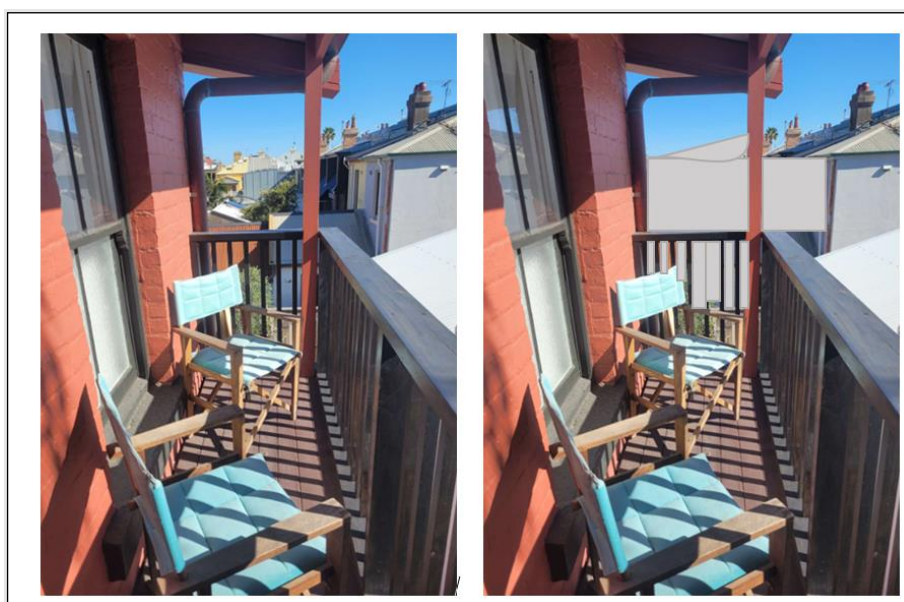


Figure 9- Comparison of view loss as seen from a standing position of upper floor balcony of 24 Parnell Place.

Car parking and vehicular access (3.02.10)

There is no provision for on-site car parking. On-site car parking is considered a historical deficiency, and the proposal is satisfactory.

Development within a Heritage Conservation Areas (3.02.11)

It is considered that the proposed alterations and additions to the dwelling will not adversely impact upon the established streetscape in this section of the Newcastle East HCA or diminish its cultural heritage significance. The design respects the heritage context of the site and locality and results in an improvement to the functionality, liveability and amenity for building occupants.

In summary the development is considered acceptable in relation to the abovementioned NDCP 2012 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 maintains good presentation to the street with good residential amenity, while maintaining privacy for adjoining neighbours.

Soil Management - Section 5.01

The earthworks proposed as part of this application are minimal and consistent with the requirements of the DCP.

The proposed development is satisfactory with respect to the relevant soil management objectives.

Land Contamination - Section 5.02

The site is not listed as contaminated under CN's mapping system and the historical residential land use of the site is not considered have resulted in significant contamination.

Vegetation Management - Section 5.03

The proposal does not involve the removal of any trees and is therefore considered acceptable with the above Section.

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

The site is not listed, nor directly adjacent to any heritage items.

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 6.02

The existing terrace building is a contributory building in the Newcastle East HCA. The proposed alterations and additions will not detrimentally affect the existing or desired amenity, streetscape and character of the Newcastle East HCA.

The proposed development is consistent with the principles for development in a HCA, in accordance with the provided SOHI and the relevant objectives of this section.

Traffic, Parking & Access - Section 7.03

Given the historical subdivision pattern, no onsite car parking is available. In this instance, car parking is considered a historical deficiency in accordance with this section.

Stormwater- Section 7.06 & Water Efficiency - Section 7.07

CN's Senior Development Officer (Engineering) has reviewed the application. The resultant stormwater will drain to CN's infrastructure via the street gutter in Alfred Street in accordance with the submitted drainage plan. The proposed development is in accordance with the relevant aims and objectives of this section and considered satisfactory subject to conditions of consent.

Waste Management - Section 7.08

Demolition and waste management will be subject to conditions recommended to be included in any development consent to be issued.

Street Awnings and Balconies - Section 7.10

The existing dwelling contains a balcony over Alfred Street. No significant change is sought to this arrangement; however, the proposal shall add balustrading to the existing balcony which is considered beneficial for the Newcastle East HCA. The proposal is considered satisfactory with this section.

Development Adjoining Laneways - Section 7.11

The site adjoins a rear unnamed pedestrian laneway. The development shall not encroach on the rear laneway nor is vehicular access sought from the rear lane. The proposal shall collect all stormwater and drain via the subfloor to Alfred Street and not impact the rear laneway.

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 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 amended plans are acceptable having regard to the proposed height, external appearance, character, bulk, and scale of the proposed development.

In summary, the development is consistent with the aims and design parameters contained in the NLEP 2012 and NDCP 2012 and other relevant environmental planning instruments. The proposal is consistent with CN's objectives, making efficient use of the established public infrastructure and services.

5.7 The suitability of the site for the development

The site is considered to be suitable for the development as it is Zone R3 Medium Density Residential, and dwellings are permissible within the zone. Furthermore, the site is of a sufficient land size to enable the proposed development, as per the requirements of the NLEP 2012 and NDCP2012.

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, subject to the conditions of consent.

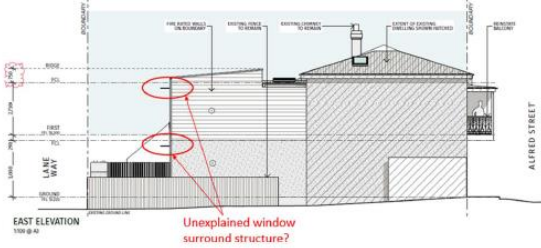
5.8 Any submissions made in accordance with this Act or the regulations

The application was notified three times in accordance with CN's CPP. The first notification period resulted in six submissions, the second resulted in five submissions and the final notification period received four submissions objecting to the development.

The following table provides a summary of the issues raised during the final round of notification, and a response to those issues.

Issue	Comment
FSR Variance <i>Concern is raised regarding the FSR exceedance of 27.84% and ensuing impacts resulting from the variance.</i>	The proposed FSR variance, being 1.278:1 (exceedance of 27.84% or 21.35m ²) has been discussed in Section 5.1 of this report. The non-compliance is considered supportable.
Bulk and Scale	With respect to the bulk and scale of the development (building height, building envelope

<p><i>Concern has been raised regarding the bulk and scale of the development on adjoining properties and within the wider context of the locality.</i></p>	<p>and associated impacts), it is considered that the proposed built form is consistent with the development within the locality, being predominantly boundary to boundary terrace housing.</p> <p>The setbacks, height and building envelope have been discussed in Section 5.3 of this report.</p> <p>The proposal is considered acceptable in terms of bulk and scale.</p>
<p>Building height</p> <p><i>Concern has been raised regarding the maximum height of the first-floor addition.</i></p>	<p>The proposed building height of 7.19m complies with the 10m maximum and has been discussed in Section 5.3 of this report and is considered acceptable.</p>
<p>Overshadowing and daylight access</p> <p><i>Concern has been raised regarding the overshadowing and daylight access impact of the development on adjoining properties principal private open space (PPOS) and living room areas.</i></p>	<p>The proposed overshadowing has been discussed in Section 5.3 of this report and is considered acceptable.</p> <p>A condition has also been recommended on the consent to reduce the length of the privacy screen on the western boundary, to reduce overshadowing impacts on the neighbouring property.</p>
<p>Construction works disrupting residents and laneway access</p>	<p>Conditions of consent are recommended in this report. The conditions include a requirement to obtain a Roads Act approval for works on Council roadways, limits on noise and the completion of any required rectification work to public infrastructure.</p> <p>The conditions are in place to minimise impact on neighbouring residents, while supporting a right to carry out development.</p>
<p>Visual Privacy</p> <p><i>Concern has been raised regarding the impact of the two large glass sliding doors as shown on the rear southern elevation.</i></p>	<p>Privacy impacts have been discussed in 5.3 of this report.</p> <p>The proposal was considered acceptable with regards to privacy impacts on the adjoining properties.</p>
<p>Heritage character</p> <p><i>Concern has been raised regarding the impact of the development on the</i></p>	<p>Heritage impacts have been discussed in Section 5.10 of this report. Specific concerns have been raised in relation to the balcony posts and roof sheeting.</p>

<p><i>Newcastle East HCA and general character of the locality.</i></p>	<p>Specific conditions are proposed to address these matters. Furthermore, workers will be required to undergo an induction session delivered by a heritage consultant to ensure all contractors are aware of heritage obligations.</p> <p>The proposal was considered acceptable with regards to heritage impacts.</p>
<p>View loss</p> <p><i>Concern is raised regarding the impact of the development on eastward facing views.</i></p>	<p>View loss is discussed in Section 5.3 of this report and is considered acceptable.</p>
<p>Existing retained boundary fence</p> <p><i>Question has been raised regarding the boundary fence to be retained along the eastern elevation.</i></p>	<p>The retention of the boundary fence raises no planning issues.</p>
<p>Impacts on property values</p> <p><i>Concern has been raised that approval of the application will impact the value of adjoining properties.</i></p>	<p>This concern is not a matter of consideration pursuant to Section 4.15 of the EP&A Act.</p>
<p>Unexplained architectural features</p> <p>Question has been raised regarding the architectural features adjacent to the rear-facing doors (W01 & W02), as demonstrated in the below Figure:</p> 	<p>The architectural features are sought to provide a lightweight and non-obtrusive element to provide shelter from rain and sunlight. The architectural features raise no planning issues.</p>

5.9 The public interest

A comprehensive and detailed assessment of the matters for consideration under Section 4.15(1) of the *EP&A Act*, the provisions of the relevant State Environmental Planning Policies, the provisions of the Newcastle Local Environmental 2012 and NDCP 2012 has been made.

A number of public submissions have been submitted to CN since the initial lodgement of the development application. The submissions have raised a wide variety of issues, all of which have been genuinely considered and evaluated. In response to these concerns and those of CN, many amendments were made to the proposal by the Applicant to respond to the matters raised within the submissions, to reduce the impacts of the proposal, and additional information provided.

After a consideration of the statutory requirements and the public submissions, it has been determined that despite the objections received to the development, the application is in the public interest.

The comprehensive assessment has illustrated that there will be no significant adverse ecological impacts or heritage impacts. It is considered that the development does not cause any significant overshadowing, privacy impacts or unreasonable view loss for surrounding properties.

The proposed development provides for the orderly economic development of the site for the purposes for which it is zoned, and it will not have any significant adverse social or economic impacts.

Development Contributions

The EP&A Act enables CN to levy contributions for public amenities and services. The development is affected by Section 7.12 Contributions Plan (City Centre residential alterations/additions). A contribution of \$2024.12 would be required for the proposed development under the contributions plan. A condition requiring the above contribution to be paid will be imposed on any consent granted.

The application on lodgement stated a lower cost of works at \$96,000. This was reviewed as part of the assessment in accordance with CN's Guide to Estimated Cost of Works, with the proposed works valued at \$202,412. The applicant was advised of the changes to the calculations and the imposition of the conditions of consent for contributions.

6.0 CONCLUSION

The Matters of Consideration under Section 4.15 of the EP&A Act, as are of relevance to the application, have been taken into consideration in the assessment of this application. It is considered that the proposed development is consistent with the relevant planning instruments, the aims of the LEP and objectives of the DCP. The site is considered suitable for the development. No public interest issues are raised by the proposal.

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.

The proposal is supported on the basis that the recommended conditions in **(Attachment B)** are included in any consent issued.

ATTACHMENTS

Attachment A: Submitted Plans -
1 Alfred Street Newcastle East

Attachment B: Draft Schedule of Conditions -
1 Alfred Street Newcastle East

Attachment C: Processing Chronology -
1 Alfred Street Newcastle East

Attachment D: Clause 4.6 Exception to FSR Development Standard -
1 Alfred Street Newcastle East

Attachments A - D distributed under separate cover

7.5. 91-115 TURTON ROAD WARATAH - TELECOMMUNICATIONS FACILITY - DA2023/01079

APPLICANT: CPS TECHNOLOGY AND INFRASTRUCTURE
OWNER: NEKON PTY LIMITED
REPORT BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT / INTERIM MANAGER PLANNING AND DEVELOPMENT

PART I

BACKGROUND

A development application (DA2023/01079) has been received seeking consent to construct a new telecommunications facility comprising a 30m height monopole and installation of infrastructure for co-location and ancillary works/equipment for operational purposes at 91-115 Turton Road Waratah.

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

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

The proposed development was publicly notified in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and one submission was received in response.

The objector's concerns included:

- i) Notification process
- ii) Structure height
- iii) Co-location and Alternative sites
- iv) Power availability
- v) Soil testing
- vi) Existing traffic concerns relating to the operations of existing loading dock



Figure 1: Subject Land - 91-115 Turton Road Waratah

vii) Residential amenity

Details of the submissions received are 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.

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

Issues

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

1. The proposed development has a maximum building height of 33m and does not comply with the maximum HOBs development standard of 14m as prescribed under Clause 4.3 of NLEP 2012. The variation equates to an exceedance of 19m or 135%.

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 HOBs, and considers the objection to be justified in the circumstances and to be consistent with the objectives of Clause 4.3; and
- B. That DA2023/01079 for proposed telecommunications facility - 30m monopole and installation of infrastructure for co-location and ancillary works/equipment for operational purposes at 91-115 Turton Road Waratah 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 a submission be advised of CN's determination.

Political Donation / Gift Declaration

Section 10.4 of the EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The site comprises Lot 1 DP 868313, known as 91-115 Turton Road Waratah. The site has a total area of 3.685ha, eastern frontage to Turton Road, northern frontage to Coolamin Road, western frontage to Wallace Street and shares a southern (common) boundary with residential properties.

The broader site is the location of the existing Waratah Village Shopping Centre. The location for the proposed telecommunication facility is on the north-western corner of the site (corner Coolamin Road and Wallace Street), in the vicinity of the existing loading dock area at the rear of the shopping centre. This area of the site is covered by a hardstand area, with no vegetation on site that would be affected by the proposal.

The area immediately surrounding the site is predominately residential, categorised by detached single dwellings and some residential unit developments, with Waratah Police Station immediately opposite the site in Coolamin Road. There are several existing street trees located within the vicinity of the site in Coolamin Road, which will not be impacted by the proposal.

2.0 THE PROPOSAL

The applicant seeks consent for a new telecommunications facility. The facility will be owned by Optus and host Optus and Vodafone telecommunication equipment. The facility will provide Optus and Vodafone 4G and 5G services to Waratah and surrounding areas.

The proposal involves the installation of:

- a) A 30 metre monopole with one new square headframe mounted atop the monopole supporting the following equipment:
 - i) Eight-panel antennas, each no longer than two metres in length
 - ii) Twelve Active Antenna Units (AAUs), each no longer than a metre in length
 - iii) Provisions for eight future AAUs
- b) Ancillary structures and equipment including: 6-bay outdoor cabinet, Remote Radio Units (RRUs), cable tray ladders, earthing and cooling equipment.
- c) Associated site preparation works, including earthworks.

The facility will be located within a fenced compound measuring 7m x 7m. The monopole and antennas will be finished in a non-reflective pale grey, and the cabinet will be finished in a non-reflective pale eucalypt.

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 CPP between 28 November 2023 to 12 December 2023. One submission of objection was received in response. The concerns raised by the objector in respect of the proposed development are summarised as follows:

- i) Notification process
- ii) Structure height
- iii) Co-location and Alternative sites
- iv) Power availability
- v) Soil testing
- vi) Existing traffic concerns relating to the operations of existing loading dock
- vii) Residential amenity

The objector's concerns are addressed under the relevant matters for consideration in the following section of this report.

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 below.

5.1 Provisions of any environmental planning instrument

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 4 - Remediation of Land

Chapter 4 of the State Environmental Planning Policy (SEPP) provides that before 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 development or whether remediation is required.

The site is identified on CN's planning controls as being potentially contaminated due to engine works having been conducted on the site. There is the potential to encounter some contaminated material during the earthworks.

Given the relatively minor scale of the earthworks, it is recommended that appropriate conditions be imposed on any consent granted, requiring the classification and correct disposal of any material removed from the site, which will be sufficient to satisfy the policy. Refer to Draft Schedule of Conditions in (**Attachment B**).

The proposal will not change the land use at the site and when operational, will not affect any potential exposure to contamination. The 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 policy:

Division 21 Telecommunications and other communication facilities

Clause 2.140 defines a 'Telecommunication Facility' as:

- a) *Any part of the infrastructure of a telecommunication network, or*
- b) *Any line, cable, optical fibre, fibre access node, interconnect point, equipment, apparatus, tower, mast, antenna, dish, tunnel, duct, hole, pit, pole or other structure in connection with a telecommunications network, or*
- c) *Any other thing used in or in connection with a telecommunications network.*

Further, clause 2.143 identifies development permissible with consent and specifies that; '*Development for the purposes of telecommunications facilities...may be carried out by any person with consent on any land.*' The proposal is, therefore, permissible with consent under the provisions of the SEPP.

In determining a development application for a telecommunication facility under Division 2021, clause 2.143(1) provides that: '*the consent authority must take into consideration any guidelines concerning site selection, design, construction, or operating principles for telecommunications facilities that are issued by the Planning Secretary for the purposes of this section and published in the Gazette.*'

Division 21 therefore requires that the consent authority consider the NSW Telecommunications Facilities Guideline, including Broadband (October 2022), ('the Guidelines'). The principles that must be taken into consideration are outlined in Section 2.2 of the Guideline.

Assessment of the proposed development's consistency with the Guideline principles is provided below.

Principle 1: Design and site telecommunications facilities to minimise visual impact

The facility has been located having regard to amenity, particularly visual impact and has been designed to reduce the visual impact of the facility as far as practicable

through its siting against storage sheds with an industrial appearance on a lot used primarily for commercial purposes, use of a monopole and non-reflective and mute finishes.

The associated equipment will be housed in an outdoor cabinet. The equipment cabinet will be a standard pale eucalypt colour. No additional landscaping has been proposed as the site is concreted and the ground level equipment will be screened by the existing retaining wall and roadside vegetation. The proposal does not propose the removal of any tree or other vegetation.

The applicant has demonstrated that consideration and the principles of the 'precautionary approach' have been applied in the design and siting of the proposed infrastructure. This considers the surrounding context, proximity to community-sensitive locations, coverage objectives, and electromagnetic energy (EME) exposure which is well within the guidelines of the Australian standard.

The location and design of the development adequately respond to its surrounding landscape context. The proposal has been located on the site, to not obstruct views or sightlines to any heritage item or place, landmark, streetscape, vista, or panorama, and is therefore acceptable.

Principle 2: Co-locate telecommunications facilities wherever practical

The applicant has demonstrated that co-location opportunities were investigated as part of the site selection process and there is no suitable co-location opportunity to provide effective coverage to the target area. However, the facility will support infrastructure for two carriers Optus and Vodafone and will be a co-located facility once operational. The proposal is satisfactory.

Principle 3: Meet health standards for exposure to radio emissions

The applicant has demonstrated that the proposed installation will comply with the Australian Radiation Protection and Nuclear Safety Agency (ACMA) regulatory arrangements for electromagnetic radiation exposure levels. The applicant has submitted an EME Report, prepared by Radhaz Consulting and dated 6 October 2023.

Principle 4: Minimise disturbance and risk, and maximise compliance

The siting and height of a telecommunications facility must comply with the of the Commonwealth Civil Aviation Regulations 1998 and Airports (Protection of Airspace) Regulations 1996. This includes avoidance of penetrating any obstacle limitation surface (OLS) within 30km of an aerodrome or airport.

The applicant has provided advice from the Civil Aviation Safety Authority (CASA) dated 6 October 2023 which states that '*at 30m AGL and in a built-up area, the tower as proposed will not be a hazard to aircraft operations and will not require aviation marking or lighting. CASA has no objection to the proposal*'.

The base station will be designed to create no electrical interference problems with other radio-based systems and complies with the requirements of relevant Australian

standards. Further, telecommunications facilities are required to be designed and installed in accordance with any relevant manufacturer specifications. Conditions of consent are recommended at (**Attachment B**).

Principle 5: Undertake an alternative site assessment for new mobile phone base stations

A site selection process was undertaken by the applicant as required by the Mobile Base Station Deployment Code. The assessment of each site's suitability for the facility involved several factors, such as compliance with environmental regulations, potential for co-location, engineering and construction feasibility, minimal environmental impact, visual aesthetics preservation, topographical constraints, occupational health and safety, meeting radio frequency coverage goals, and securing property tenure.

It has been demonstrated that site selection had regard to the consideration and principles of the 'precautionary approach'. This has included the surrounding context, co-location opportunities, proximity to community-sensitive locations, coverage objectives, and EME exposure.

It is accepted that as a result of the detailed site selection process the subject site is a suitable site for the development.

Subdivision 2 Development likely to affect an electricity transmission or distribution network

Clause 2.48 of the policy requires the consent authority to give written notice to the electricity supply authority and invite comments about potential safety risks when the proposed development is within five metres of an exposed overhead electricity power line.

The application was referred to Ausgrid and their advice was received dated 17 June 2024 raising no objections to the development and recommendations for the applicant as part of the construction process.

State Environmental Planning Policy (Biodiversity and Conservation) 2022

Chapter 2 - Vegetation in non-rural areas

The application does not propose the removal of any trees or declared vegetation to facilitate the development. Conditions of consent have been imposed to ensure that the proposal will not impact existing street trees (**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 and Clause 2.3 Zone Objectives

The site is included within Zone E1 Local Centre under the NLEP 2012, in which zone a *telecommunications facility* is prohibited land use. However, under clause 2.143 of

SEPP (Transport and Infrastructure) 2021, the proposed development is permitted with consent on any land in accordance with the policy.

Clause 4.3 - Height of Buildings

It has been confirmed through recent case law, see *Denny v Optus Mobile Pty Ltd* [2023] NSWLEC 27, that a *telecommunications tower*, is defined as a building in the EP&A Act. Therefore clause 4.3 applies to the development.

Under the NLEP 2012 the site has a maximum building height of 14m. The proposed development comprises a monopole structure with mounted antennas having a maximum height of 33m. The proposed variation equates to a 19m or 135% variation. The applicant has submitted a clause 4.6 variation request to this standard. Refer to the discussion under Clause 4.6 Exceptions to Development Standards below.

Clause 4.6 - Exceptions to Development Standards

The proposal seeks consent to vary Clause 4.3 HOBs development standards in the NLEP 2012. As such, the application is supported by a formal request to vary the development standard, prepared by CPS Technology and Infrastructure and dated May 2024, under Clause 4.6 of the NLEP 2012 (**Attachment D**).

Clause 4.6 of NLEP 2012 enables consent to be granted to a development event though the development would contravene a development standard.

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

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

An assessment of the written request has been undertaken below, and in undertaking the assessment consideration has been given to both the provisions of Clause 4.6 and relevant Land and Environment Court judgements including *Wehbe v Pittwater Council* (2007) NSWLEC 827, 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 expressly excluded from the operation of the Clause?

The HOBs in Clause 4.3 is a development standard in that it is consistent with the definition of development standards under Section 1.4 of the EP&A Act and is not expressly excluded from the operation of Clause 4.6.

Clause 4.6(3)(a) - Has the applicant demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

The submitted written request to Contravene Clause 4.3 HOBs Development Standard', prepared by CPS Technology and Infrastructure and dated May 2024, (**Attachment D**) constitutes a written request for the purposes of Clause 4.6(3).

There are five circumstances or 'tests' established by *Wehbe* in which it could be reasonably argued that the strict application of a development standard would be unreasonable or unnecessary. The applicant's clause 4.6 variation request seeks to rely on these considerations to demonstrate that compliance with the development standard is unreasonable and unnecessary.

Under *Wehbe* the applicant only needs to satisfy one of the tests to demonstrate satisfaction of cl.4.6. The applicant's written request seeks to rely on tests one, two and three of the five tests. Being as follows:

- i) *First test - establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*
- ii) *Second test - establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.*
- iii) *Third test - establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.*

Assessment against the first and third *Wehbe* tests

In respect to the first test the written request states:

"The desired built form for both the commercial and residential development in the area requires access to necessary infrastructure in order to function. The proposed facility makes a positive contribution in this regard by improving the mobile service coverage in the area and increasing the number of readily available Carriers that can provide this service."

This argument is flawed in considering a public good as a contribution to the built form. Other justifications rely on limiting the impacts rather than being positive in nature. Therefore, the written request has not demonstrated that the objectives of the development standard are achieved.

Similarly, the applicant's argument under the third test has not demonstrated the underlying objective or purpose would be defeated or thwarted if compliance was required. Rather the request states that compliance with the standard would prevent "...effective service coverage to the surrounding residential and commercial land uses" which does not defeat the objectives or purpose of the development standard.

On this basis, the applicants written clause 4.6 variation request is not supported on the grounds of the first or third *Wehbe* tests. In this regard, it is not uncommon for an applicant to submit a cl.4.6 variation request where elements of the argument are not supported by the consent authority. This does not mean that the entirety cl.4.6 fails. In this regard, the applicant has also submitted an argument under the second *Wehbe* test which has been supported as detailed below.

Assessment against the second *Wehbe* test

The written request also relies on the second *Wehbe* test by establishing that the underlying objective or purpose is not relevant to the development, such that compliance is unnecessary. In considering this test the following extract from the written request is relevant:

- i) 'It is difficult for many telecommunication facilities to meet the allowable building height under a Local Environmental Plan, as each facility is required to reach a certain height in order to provide an uninterrupted mobile signal.
- ii) Greater height of radio frequency equipment allows the signal to propagate further, providing more effective coverage to a greater area from the facility.
- iii) Coverage strength diminishes when it encounters obstacles such as trees and buildings. For a site to work effectively, antennas need to be installed higher than these surrounding obstacles.
- iv) This facility has been designed to its lowest possible height to achieve optimal coverage while being sensitive to the character of the area. The facility is also designed to provide antennas for two Carriers on one headframe, rather than two separate headframes installed at different heights, which may have required additional height to ensure the antennas installed on the lower headframe could effectively provide coverage.
- v) While building height can be applied to many buildings and structures in the urban landscape, a height of 14 metres would affect the functionality of this mobile phone base station and therefore cannot be applied in this instance.
- vi) Numerous telecommunications facilities located within shopping centres all around Australia provide effective coverage to surrounding residential areas. Shopping centres and commercial areas are often used to host telecommunications facilities due to the fluctuating and high demand for service coverage by shoppers and other visitors to the area.'

CN Officer Comment

The written request has established that the objectives of the standard are not relevant to the development and therefore compliance is not necessary in the circumstances. The development is for the purpose of a telecommunications facility which is a unique development type that would lose functionality if compliance with the HOB standard was mandated. Further, the benefits of the development would not be realised if the additional height was not supported as telecommunications facilities require height to achieve improvements to mobile service. As such the 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 under the second *Wehbe* test.

Clause 4.6(3)(b) – are there sufficient environmental planning grounds to justify the contravention of the development standard?

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 standard, rather than promoting the benefits of the development.

In summary, the applicant's written request addresses Clause 4.6(3)(b), as follows:

- i) By maintaining and improving the community's connection to mobile network coverage it enables access to many different services and enables certain needs to be met.
- ii) In recent years, it has been shown how disabling poor network coverage can be and how negatively it can impact people's lives in an event of emergencies such as bushfires and floods.
- iii) This development is not proposed to impact on the State's natural and other resources, however by improving the network coverage in this area it will enable the continued protection and enhancement of the local area.
- iv) The facility is a joint venture between Optus and Vodafone. In designing this facility for two Carriers, it is ensuring the reduction of material usage in construction, as well as reducing the need for an additional facility in the area. The cumulative visual impact for the community is lessened as a result of co-location.
- v) The proposal will support and promote the orderly development and economic use of land by improving service coverage to existing commercial land uses and providing an environment where future development will have good access to this necessary infrastructure.
- vi) The telecommunications facility has been designed to have as little impact as possible on the existing environmentally sensitive areas within the surrounding area and does not seek to remove any vegetation.
- vii) The site does not contain any item of heritage significance, nor is it within a heritage conservation area. A basic search of the Aboriginal Heritage Information Management System (AHIMS) returned no recorded Aboriginal sites or places within 200 metres of the site.
- viii) This facility has been designed to achieve network coverage objectives while addressing the characteristics of the surrounding area. It is not unusual to find tall freestanding structures such as light poles and advertising signage within shopping centres and commercial areas, therefore, it is considered that the surrounding built environment will provide a matching visual context for the proposed monopole.
- ix) In the construction and maintenance of the telecommunications facility, the Carriers operate within the operational standards set by the Australian Communications and Media Authority (ACMA), and the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA). While there are no occupants in a telecommunications facility, all precautions are taken to ensure physical safety during construction, and once operation, including an EME Report.

CN Officer Comment

The written request outlines environmental planning grounds that adequately justify the contravention. In particular, the proposed exceedance will not result in unreasonable impacts upon adjoining properties or the public domain.

The height exceedance proposed is generally consistent with a combination of relevant controls under NLEP 2012 and NDCP 2012 and provides an acceptable environmental planning outcome.

The reasons outlined above are considered to provide sufficient justification to contravene the development standard.

Conclusion

An assessment of the applicant's written request has been undertaken and it is considered that:

- a) It satisfactorily addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) The development is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential Zone.
- c) That there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered that the exceedance proposed is an acceptable planning outcome and strict compliance with the development standard is unnecessary in the case.

The clause 4.6 variation request is well-founded and should be supported.

Clause 5.10 - Heritage Conservation

The site is not a listed heritage item, nor located within a Heritage Conservation Area (HCA). The site is within the vicinity of heritage items of local significance, the 'Former Hanbury Public School Group' located at 98 Georgetown Road Waratah and Waratah Police Station at 96 Georgetown Road Waratah, located north-west of the site.

The location of the buildings associated with the Waratah Village Shopping Centre on the subject site, further there is an existing lattice tower and telecommunications facility in the surrounding area, and several rooftop antennas on the existing buildings in the heritage area.

There are no vantage points or views of the heritage items that would be impacted by the proposed telecommunication facility. The development will therefore not significantly detract from the heritage value of the sites.

A basic search of the Aboriginal Heritage Information Management System (AHIMS) returned no recorded Aboriginal sites or places within 200m of the site. This basis search result was submitted with the application.

Given the above circumstances, the development is satisfactory concerning heritage conservation.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 4 and Class 5 acid sulphate soils . The Geotechnical Report provided with the application includes a preliminary acid sulfate soil assessment and concludes that further site investigations for Acid Sulfate Soils (ASS) assessment or preparation of an ASS management plan will not be required. The proposal is considered satisfactory in this regard.

Clause 6.2 - Earthworks

The relatively minor scale of earthworks proposed to facilitate the development is acceptable. An Erosion and Sediment Control plan has been included with the application (**Attachment B**).

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

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023

The Newcastle Development Control Plan 2023 (DCP) provides updated guidelines and development controls for new development in the Newcastle Local Government Area (LGA). The DCP was formally adopted by Council and commenced on 1 March 2024. The DCP requires consideration under Section 4.15(1)(a)(iii) of the EP&A Act 1979.

Section 11 of Part A – Introduction of the 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).'

The savings and transitional provisions apply to this application. The proposed development therefore remains subject to the provisions of the NDCP 2012.

Newcastle Development Control Plan 2012 (NDCP 2012)

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

Soil Management - Section 5.01

Earthworks and soil management have been considered in this assessment report, in accordance with SEPP (Resilience and Hazards) 2021 and Clause 6.1 Acid Sulfate soils of NLEP 2012.

A sediment and erosion control plan has been provided with the application and a condition is recommended to ensure adequate sediment and erosion management will remain place for the construction period. Refer to **Appendix B**.

Land Contamination - Section 5.02

Land contamination has been considered in this assessment report under SEPP (Resilience and Hazards) 2021 - Chapter 4 Remediation of Land. The site is not considered to have any contamination constraints that cannot be managed appropriately, to ensure no impact on the development of the site.

Vegetation Management - Section 5.03

The proposal does not involve the removal of any trees. Standard conditions are recommended within the Draft Schedule of Conditions in (**Attachment B**), relating to retention and protection of existing street trees in this location.

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

The site is not a listed heritage item, nor located within a heritage conservation area. The site is within the vicinity of heritage items, and this is discussed within the report under Clause 5.10 Heritage of NLEP 2012. The proposal remains acceptable.

Archaeological Management - Section 5.06

The proposal does not result in significant excavation or site disturbance. The site is currently fully developed, with concrete hardstand area and Waratah Village Shopping Centre. In addition, the site is not specifically listed in the Newcastle Archaeological Management Plan 1997 or NLEP 2012 as an '*Archaeological Site*'.

Landscape, open space and visual amenity.

Given the nature and scope of the proposed development, the site has limited potential for landscaping, as it is currently entirely concreted within an area operating as part of the loading dock facilities associated with Waratah Village Shopping Centre.

Existing and established street trees in this location within both Coolamin Road and Wallace Street frontages, will not be impacted by the proposal and will provide existing established landscape elements that will assist with visual screening of the telecommunications facility and its associated infrastructure. The proposal remains acceptable in this regard.

Traffic, Parking and Access - Section 7.03

Access to the subject property can be achieved through an existing crossover located on the Wallace Street frontage.

The road network is designed to accommodate the weight and size of heavy construction and maintenance vehicles required for the telecommunication facility.

Stormwater - Section 7.06

The proposal does not involve any buildings within the compound area, located on an existing concrete loading dock area. The proposal will not result in any changes to the existing stormwater management and overland flow onsite. The proposal is considered acceptable.

Waste Management - Section 7.08

Due to the relatively minor nature of the works, the generation of waste resulting from construction of the facility is expected to be minimal.

Standard waste management conditions, including potentially contaminated material are included in the Draft Schedule of Conditions in (**Attachment B**).

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. In addition, the following impacts are considered relevant for further discussion below.

i) Electromagnetic radiation

The Environmental EME Report provides predicted EME levels at 1.5m height for different distances from the base of the pole. The report also provides levels at other "areas of interest" i.e. areas of community concern or where higher levels of EME may be expected on technical grounds (such as elevated positions).

The highest predicted levels are 5.29% of the maximum public exposure limit with this being at St Philip's Christian College, a site approximately 65m to the north of the proposed pole. These predictions are based on a maximum radiation output, worst case scenario.

The report satisfies the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA) requirements and given the low result; the proposal is acceptable.

ii) Visual Impact

To compare the scale, appearance and visible exposure of the proposed telecommunications facility, a series of photomontages were completed by the applicant to demonstrate the potential visual impact associated with the new development.

For example, Image 1 below, illustrates the view from within Waratah Village shopping centre, and demonstrates that the proposed facility will extend above the existing buildings, and that it will to an extent blend with existing tall structures in the landscape, including power poles, light poles, and commercial signage.

The applicant has also provided the following design justification which was utilised to address visual impact concerns:

"The use of a slimline monopole, rather than a lattice tower, was selected to minimise the visual bulk of the telecommunication facility when viewed at a distance. It is considered that having the monopole in a non-reflective, light-grey colour would best help it blend into the background, as it would be seen against the sky in most directions. It would also blend with the existing lattice tower and power poles"

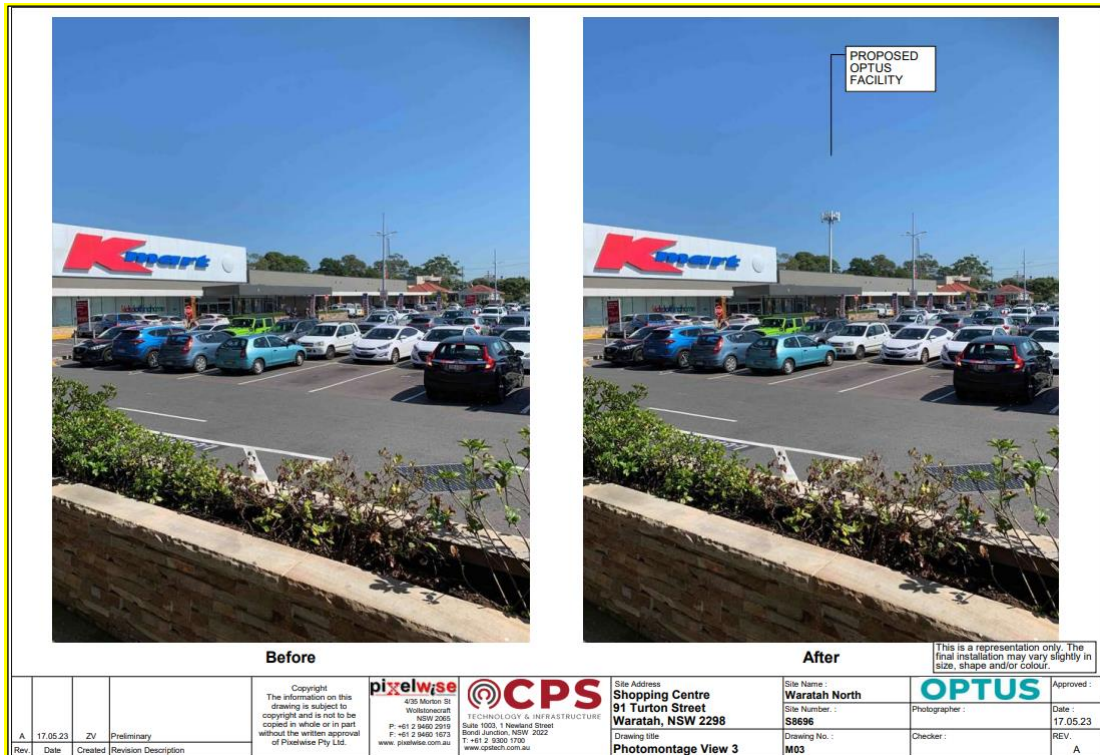


Figure 2: Photomontage view from within Waratah Village shopping centre toward Kmart and north-western corner of site (behind Kmart) where monopole is proposed to be sited. (Source: CPS, dated 17/05/2023)

In considering the existing site and its context, the development does not present any significant unreasonable impacts on the intrinsic character of the wider setting. The commercial area contains several tall structures in close proximity to the site. The proposal is considered acceptable within this location, without significant visual impacts within this area and with the community benefit associated with bringing co-located mobile services to the area and broader community.

iii) Acoustic Impact

The potential for acoustic impacts have been assessed and it has been determined that the potential for adverse noise impacts is low and that a standard condition prohibiting offensive noise is recommended to be included in the conditions of consent.

The potential impacts of the development including social, environmental and economic have been considered in the assessment of the application. On balance, the proposed development is not considered to have any undue adverse impacts on the natural or built environment. The proposal will not have any negative social or economic impacts.

The development has been designed to generally satisfy Council’s NDCP requirements, and where variations are sought, these are considered a reasonable response to the site and surrounding properties.

5.7 The suitability of the site for the development

The site is suitable for the proposed telecommunications facility, and the use is permissible with consent under the SEPP (Transport and Infrastructure) 2021.

The submitted documentation, demonstrates that a site selection process was undertaken by the applicant to inform the selection of the subject site for the new telecommunications facility, for co-location of two service providers being Optus and Vodafone.

The location and height of the monopole meets the radio frequency coverage objectives and network requirements for the current and future demands in the target area where improved coverage and additional network capacity are required for both the Optus and Vodafone mobile networks, which will benefit the community.

The site is a new telecommunications facility, but will co-locate two service providers, considered appropriately placed on a developed commercial site, without significant adverse visual or amenity impacts on surrounding residential properties, balanced against the benefits of mobile service provision in the target area for the community.

The constraints of the site have been considered in the proposed development, which includes, contamination and acid sulfate soils. 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 referred to Ausgrid and their advice was received dated 17 June 2024 with no objections. The advice was provided to the applicant for future action.

The application was notified in accordance CN's CPP. 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
Notification process	<p>Pre-DA community notification was not required to meet the requirements of the Deployment Code. Notwithstanding, the applicant undertook pre-DA community notification for a period of 10 business days, generally in accordance with the process outlined in Section 7 of the Deployment code, including the following:</p> <ul style="list-style-type: none"> - Notification letters were sent to Council and the relevant State and Federal MPs. - An informational flyer/newsletter was sent to approximately 150 properties within proximity of the site. - Three notification signs were placed on the site. Two of these were placed at the entrances to the Waratah Village Shopping Centre facing Coolamin Road and Turton Road.

	<p>The third sign was placed along Wallace Road, near the location of the proposed facility.</p> <ul style="list-style-type: none"> - An online consultation page, with copies of the proposed plans and Environmental EME Report was created at www.rfnsa.com.au/2304009/consultation-page/ <p>Furthermore, once the development application, was lodged it was publicly notified for a period of 14 days in accordance with CN's CPP.</p>
Structure height	<p>The proposal seeks to vary the 14m HOBs development standard as discussed within this report under clause 4.3 and clause 4.6 of the NLEP 2012. As detailed within the clause 4.6 assessment the variation was well founded.</p> <p>Telecommunications facilities must be taller than surrounding buildings and vegetation as they require line-of-sight to the areas they service.</p> <p>The proposed development is not considered to pose a significant impact to the visual amenity of surrounding properties or the locality. The proposal is acceptable in this regard and benefit the community by facilitating a co-located mobile service.</p>
Co-location and Alternative Sites	<p>The applicant demonstrated that a detailed alternative site process was undertaken. The selected site provides co-location to both Optus and Vodafone. Notwithstanding the overall height of the proposal, the facility in this location is somewhat offset by existing mature street trees within the broader area.</p> <p>As detailed elsewhere within this report, the location is within proximity to the existing commercial shopping centre and its associated infrastructure.</p>
Power availability	<p>Power is available to the site. A referral has been undertaken to Ausgrid and their advice has been received raising no objections to the development.</p> <p>The applicant has been advised to work directly with Ausgrid, who has confirmed that all telecommunications facilities are to seek approval from the relevant power authority prior to commencement of any works on site.</p>
Soil testing	<p>A Geotechnical Report has been undertaken at the site and was provided with the application.</p> <p>Refer to discussion within this report under the SEPP (Resilience and Hazards) 2021.</p>

	The proposal is considered acceptable in relation to contamination.
Existing traffic concerns relating to the Operations of existing loading dock.	<p>The submission received, raised concerns regarding traffic, parking and access primarily relating to the existing operations of the Waratah Village Shopping Centre and surrounding properties within the local road network.</p> <p>The proposal is not generating any additional traffic, access or parking impacts, beyond the initial short-term potential for such activities associated with the construction process. During construction, any potential impact to adjoining properties can be mitigated through compliance with the recommended conditions of consent.</p> <p>Operationally, the telecommunications facility is required to have periodic on-site checks however, and operational impacts are unlikely. The proposal is acceptable.</p>
Residential amenity	<p>The proposal provides community benefit to those within proximity and the broader Waratah area in the provisions of improved mobile phone service.</p> <p>The proposal complies with the relevant legislated requirements and is considered acceptable from an EME consideration.</p> <p>Refer elsewhere in this report, for further discussion on aspects such as contamination, acid sulfate soils, acoustics and EME consideration.</p>

5.9 The public interest

The development is consistent with the aims and design parameters contained in the NLEP 2012 and NDCP 2012 and other relevant Environmental Planning Instruments. As discussed through this report, the 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 mobile services for two co-located providers in the Waratah and surrounding areas, where mobile service is not satisfactory.

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 -
91-115 Turton Road Waratah

Attachment B: Draft Schedule of Conditions -
91-115 Turton Road Waratah

Attachment C: Processing Chronology - 91-115 Turton Road
Waratah

Attachment D: Clause 4.6 Exception to HOB Development Standard
- 91-115 Turton Road Waratah

Attachments A - D distributed under separate cover

7.6. 2 GREGORY CRESCENT - MEREWETHER - ALTERATIONS / ADDITIONS TO DWELLING - DA2022/01081

APPLICANT: PERCEPTION PLANNING
OWNER: B F LEWIS AND S G PINKNEY-LEWIS
REPORT BY: PLANNING AND ENVIRONMENT
CONTACT: EXECUTIVE DIRECTOR PLANNING AND ENVIRONMENT / INTERIM EXECUTIVE MANAGER PLANNING AND DEVELOPMENT

PART I

BACKGROUND

A development application (DA2022/01081) has been received seeking consent to undertake alterations and additions to the existing dwelling and swimming pool, including partial demolition and earthworks at 2 Gregory Crescent Merewether.

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 proposed variation to Clause 4.3 Height of buildings (HOB) development standard in the Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation.

A proposed variation to Clause 4.4 Floor space ratio (FSR) development standard in the NLEP 2012, being less than a 10% variation also forms part of the application.

A copy of the current plans for the proposed development are at (**Attachment A**).

The proposed development was publicly notified on lodgement in accordance with City of Newcastle's (CN) Community Participation Plan (CPP) and two submissions were received in response.

The objector's concerns related to bulk and scale, height, FSR, view loss, setbacks, privacy and inadequate information.

Following amendments and additional information, the application was renotified and one submission, that was made on behalf of two properties, was received in response.



Figure 1: Subject Land - 2 Gregory Crescent Merewether

The submitter's concerns remained generally consistent with those originally raised above.

Details of the submissions received are 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 development has a maximum building height of 10.45m and does not comply with the maximum HOBs development standard of 8.5m as prescribed under Clause 4.3 of NLEP 2012. The variation equates to an exceedance of 1.95m or 22.94%.
- 2) The proposed development has a FSR of 0.65:1 and does not comply with the maximum FSR development standard of 0.6:1 as prescribed under Clause 4.4 of NLEP 2012. The variation equates to 35.12m² or 8.33%.

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 DAC note the variation under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.3 HOBs, and considers the variation to be justified in the circumstances and to be consistent with the objectives of Clause 4.3 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 the DAC note the variation under Clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at Clause 4.4 FSR, and considers the variation 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
- C. That DA2022/01081 for alterations and additions to existing dwelling and swimming pool (including partial demolition and earthworks) at 2 Gregory Crescent Merewether be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at (**Attachment B**); and
- D. That those persons who made submissions be advised of CN's determination.

Political Donation / Gift Declaration

Section 10.4 of the EP&A Act 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?*

PART II

1.0 THE SUBJECT SITE

The site comprises Lot 128 DP 615301, known as 2 Gregory Crescent Merewether. The site has a total area of 602.3m², located on the northern side of Gregory Crescent with frontage width to Gregory Crescent of 17.08m, side boundary lengths of 28.72m (western side), 29.01m (eastern side) and rear boundary width of 25.22m (northern boundary). The site is an irregularly shaped quadrilateral lot with its smallest frontage being 17.08m along the southern boundary which provides access onto Gregory Crescent.

The site falls steeply from Gregory Crescent towards the adjoining northern properties which have direct access to Scenic Drive and to the east toward a public reserve. The site and surrounding lots are generally typical of an existing residential subdivision pattern. The surrounding properties are of similar steepness attributing to larger multi-storey dwelling designs within this neighbourhood and views where possible to the ocean and greater Newcastle.

Due to the topography of the site and surrounding sites, dwellings to the rear (southern side of Gregory Crescent) between Hickson Street and Gregory Crescent are positioned at a higher elevation than the proposed dwelling. The majority of dwellings located along Scenic Drive, Hickson Street and Gregory Crescent have views of the Newcastle coastline.

The site contains an existing three-storey dwelling with a swimming pool and associated parking, retaining/fencing and landscaping. Vehicular access is via Gregory Crescent into a double garage. The existing dwelling design is of a stepped nature.

The site and adjoining sites to the north, west and south are zoned R2 Low Density Residential zone in the NLEP 2012. Adjoining the site to the east is recreational land zoned RE1 Public Recreation in the NLEP 2012. Site constraints include bushfire

prone land (vegetation category buffer), acid sulfate soils (Class 5) and mines subsidence (Guideline 2).

2.0 THE PROPOSAL

The applicant seeks consent to undertake alterations and additions to the existing dwelling and swimming pool, including partial demolition and earthworks, and comprises reconfiguration of the floor plan and alterations to the existing dwelling. Proposed works include:

- i) Addition of a fourth level (second storey at street level), above the existing ground floor.
- ii) Reconfiguration of existing swimming pool, increasing in size and layout on Level 1.
- iii) Extension to Level 1 via earthworks (cut) to establish a staircase.
- iv) Reconfiguration of the existing garage to enable access directly from Gregory Crescent.
- v) Reconfiguration of each existing level increasing usability/functionality of the dwelling.

A copy of the current 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 original application was publicly notified in accordance with CN's CPP. Two submissions were received in response. The concerns raised by the submitters in respect of the proposed development are summarised as follows:

- i) Bulk and scale - excessive building envelope
- ii) Height
- iii) FSR
- iv) View loss
- v) Setbacks (mainly the front setback)
- vi) Privacy
- vii) Inadequate information submitted - particularly relating to building height, view loss and non-compliances.

Following amendments and additional information, the application was renotified and one submission, that was made on behalf of two properties, was received in response. The submitter's concerns remained generally consistent with those originally raised above.

Details of the submissions received are summarised and the concerns raised are addressed as part of the Planning Assessment at Section 5.0.

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 below.

5.1 Provisions of any environmental planning instrument

State Environmental Planning Policy (Resilience and Hazards) 2021

Chapter 2 - Coastal Management

Chapter 2 of SEPP R&H seeks to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objectives of the *Coastal Management Act 2016*. The site is located in the '*coastal use area*' and '*littoral rainforest proximity*' under the mapping of coastal management areas.

Clause 2.12 requires that development consent must not be granted to development on land within the coastal zone unless the consent authority is satisfied that the proposed development is not likely to '*...cause increased risk of coastal hazards on that land or other land*'.

The site is identified as being affected by coastline landslip risk, through the rear or northern half of the site. A Slope Stability Assessment, prepared by Douglas Partners, dated 27 April 2023, confirms that the site is suitable from a geotechnical perspective for the proposed alterations and additions subject to conditions of consent (**Attachment B**).

The proposal is not considered likely to impact the integrity and resilience of biophysical, hydrological and ecological environments. The proposed development contributes positively to the overall building form and improves the design aesthetics and functionality of the existing dwelling on the site. The proposal is acceptable having regard to Chapter 2 and an acceptable level of visual amenity and scenic quality is maintained.

Chapter 4 - Remediation of land

Clause 4.6 of the policy provides that before 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 development or whether remediation is required.

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

State Environmental Planning Policy (Biodiversity and Conservation) 2021

Chapter 2 - Vegetation in non-rural areas

The application does not propose the removal of any significant vegetation to facilitate the development and is not considered to present any adverse impacts on vegetation within the adjoining vacant recreational land zoned RE1 - Public Recreation to the east of the site. The proposal is acceptable having regard to this policy.

State Environmental Planning Policy Sustainable Buildings) 2022

A BASIX Certificate was lodged with the application, demonstrating that the development can achieve the required water and energy reduction targets. A condition is recommended, requiring the development to be carried out in accordance with the BASIX Certificate (**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 NLEP 2012 applies to land identified on the 'Land Application Map'. The subject site and development occur on land shown on the map.

Clause 2.3 Zone Objectives and Land Use Table

The site is located within Zone R2 Low Density Residential under the NLEP 2012.

The proposal is characterised as a 'dwelling-house' and includes alterations and additions to the existing dwelling house and ancillary swimming pool, permitted with consent in the R2 zone.

The objectives of the R2 Low Density Residential zone, are as follows:

Objectives of zone

- 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 respect the amenity, heritage and character of surrounding development and the quality of the environment.

The alterations and additions proposed to the dwelling maximise residential amenity in a built form complementary to the low-density residential environment. The proposed development contributes to the diversity of housing forms in the area.

The development is suitably sited and oriented within the site and does not adversely impact adjoining properties. The additions are of a low density and low impact form, complementary to the existing and future desired character of the locality and streetscape. The proposal is consistent with the zone objectives.

Clause 2.7 - Demolition Requires Development Consent

The proposal includes partial demolition of some existing walls and roof structures to each floor to facilitate the proposed alterations and additions. Conditions are recommended to require that demolition works, and the disposal of material are managed appropriately and following relevant standards (**Attachment B**).

Clause 4.3 - Height of Buildings

The site has a maximum HOB development standard of 8.5m under the NLEP 2012. The existing dwelling already exceeds the maximum height in several locations. The proposed alterations and additions will result in a maximum building height of 10.45m (from the existing excavated lower ground floor level), equating to an exceedance of 1.95m or 22.94% above the prescribed development standard.

The objectives of clause 4.3 in NLEP 2012 are:

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

The applicant has submitted a clause 4.6 variation request to this standard (**Attachment D**). Refer to the discussion under Clause 4.6 Exceptions to Development Standards below.

Clause 4.4 - Floor Space Ratio (FSR)

The site has a FSR development standard of 0.6:1 under NLEP 2012. The proposed development will result in a total FSR 0.65:1, equating to an exceedance of 35.12m² or 8.33% to the development standard.

The objectives of clause 4.4 in NLEP 2012 are:

- 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.*

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

Clause 4.6 - Exceptions to Development Standards

The proposal seeks consent to vary Clause 4.3 HOBs and Clause 4.4 FSR development standards in the NLEP 2012. As such, the application is supported by formal requests to vary the development standards under Clause 4.6 of the NLEP 2012.

Clause 4.6 of NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard.

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

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

In assessing the proposal to vary the HOBs and FSR development standard against the provisions of Clause 4.6, it is noted that:

- 1) Clause 4.3 and Clause 4.4 of the NLEP 2012 are not expressly excluded from the operation of this clause; and
- 2) The applicant has prepared written requests, requesting that CN vary the development standards demonstrating that:
 - a) Compliance with the development standards is unreasonable or unnecessary in the circumstances of the case, and
 - b) There are sufficient environmental planning grounds to justify contravening the development standards.

An assessment of the Clause 4.6 variation requests have 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: *Property Group Limited v North Sydney [2001] NSWLEC 46*, *Wehbe v Pittwater Council [2007] NSWLEC 827*, *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009*, and at Appeal, *Four2Five Pty Ltd v Ashfield Council [2015]* at NSWLEC 90,

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248, Moskvich v Waverley Council [2016] NSWLEC 1015, Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7 and Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, 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 standards.

Consideration of the Clause 4.6 variation request is discussed below, as it relates to each development standard to be varied and discussed separately.

Variation to Height of buildings development standard

The proposed development contravenes Clause 4.3 'HOB' development standard in NLEP 2012. The HOBs map of NLEP 2012 provides for a maximum building height of 8.5m for the subject land.

The applicant sets out that in terms of the proposed new work, the maximum exceedance is identified at the north-eastern corner of the proposed new lift (10.45m shown in green area in Figure 1), equating to a variation of approximately 22.94%. The existing dwelling currently exceeds the height by 35.05% in the area in blue as shown in Figure 1 below. The areas shown in green and blue below is the part of the dwelling that exceeds the 8.5m height limit, with green being new work and blue being the existing dwelling. The part of the dwelling that faces Gregory Crescent does not exceed the height limit.

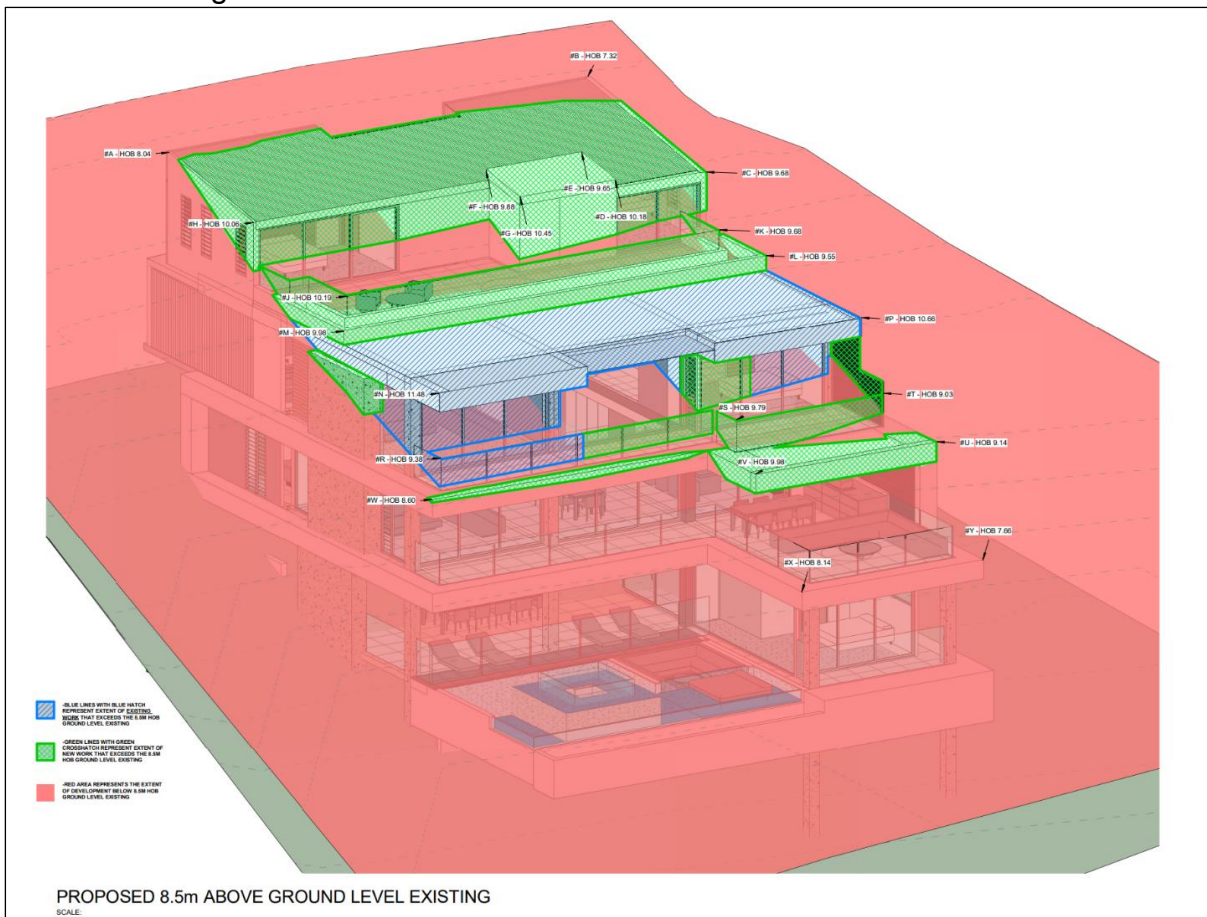


Figure 1: Extract of 3D Height References Plan - Rear elevation (Blue hatch illustrating existing development exceedance and green hatch illustrating new development exceedance)

The height exceedances are setback from Gregory Crescent, mostly located downslope along the overhanging northern edges of the proposed development. The height exceedances do not impact views to surrounding properties. The proposed alterations and additions are largely utilising the floor plate of the existing dwelling; however, the exceedances have occurred to facilitate a reconfigured floor layout to improve functionality and residential amenity and adapting and modernising an older dwelling to meet the needs of the occupants including the ability to age in place. The general locality is undulating with areas of steep topography. Some exceedances to height and setbacks have resulted across this area due to these constraints.

The application is supported by a formal request to vary the development standard under Clause 4.6 of NLEP 2012, prepared by ADW Johnson and dated 27 March 2024 (**Attachment D**).

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 HOBs 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 and 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 submitted 'Clause 4.6 Exception to Development Standards - written request to Contravene Clause 4.3 HOBs Development Standard', prepared by ADW Johnson, dated March 2023 (**Attachment D**) constitutes a written request for the purposes of Clause 4.6(3).

There are five circumstances or 'tests' established by *Wehbe v Pittwater Council [2007] NSW LEC 827* in which it could be reasonably argued that the strict application of a development standard would be unreasonable and/or unnecessary having regard to the circumstances of the case. The written request seeks to rely on the first and second *Wehbe* tests, namely, to establish that:

- a) That compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.
- b) That the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

In summary, the request identifies that:-

- i) The dwelling is of a scale commensurate with the surrounding developments, being within a highly prominent residential area. The proposed alterations and additions are consistent with the character, scale and built form of the existing site development and those within the surrounding area.

- ii) The development demonstrates a high-quality architectural design outcome that is consistent with the height and building typology considering the significant slope of the land within this location, without adversely affecting the character of the existing streets or neighbouring developments.
- iii) The minor height exceedance relates to the reconfiguration of the floor plan for each level and consequent north-ward extension of the balcony/terrace of each level, installation of fireplace alterations and additions including the new level 4 room has no significant impacts on neighbouring dwellings including on any solar access, privacy and views, nor do the exceedance points add detrimentally to the building bulk.
- iv) The proposed lift well and roof exceedance is the result of adapting a new design element into an existing constructed building to enable occupants to age in place. The lift provides access between levels of the building, as an alternative to the use of the staircase between each level. The lift is unable to be relocated elsewhere without significant design implications. The removal of the lift would create mobility restrictions throughout the house. It is considered reasonable and minor to permit the height exceedance.
- v) As identified, the height of the existing dwelling on the site already exceeds the height standard within the mid level of the dwelling, and the proposal is for alterations and additions to improve amenity, modernise the habitable areas of the dwelling and permit occupants to age in place.
- vi) As noted, the existing constructed third level roof had an additional height exceedance which included the skylight that runs the full width of the existing dwelling and is to be removed as part of this development. All the proposed new level 4 building works are still less than the height exceedance of the existing constructed skylight based on 'ground level existing' contour and building height analysis.
- vii) The proposed development is designed to align with, and positively contributes to the desired built form of the Merewether locality. The relatively minor deviation from the height standard does not result in the development being inconsistent with the established centres hierarchy.
- viii) The proposed alterations and additions to the existing dwelling including the extension of the terrace / balconies and construction of the new fourth level, do not impact the two adjoining southern dwelling or any northern dwellings.
- ix) The proposal does not significantly overshadow living area windows and principal areas or private open space of the western dwelling (being the closest adjacent dwelling). Solar access is similar to the present development impacts. It is assumed that the residential development to the west of the site was considered and approved in the context of the existing dwelling.

- x) The extent of variation sought to height makes no greater impact to the solar access of the adjoining buildings. The proposal will therefore not introduce any additional solar impacts to the approved development.

CN Officer comment

The proposed development provides for a built form that is compatible with the existing and desired built form in the area and deals appropriately with the ongoing use of the existing dwelling on site. The proposal maintains reasonable daylight access to adjoining sites and the public domain.

The proposed variation, when taking into account the existing historical departure for this developed site, results in a proposal that is considered acceptable and will not result in any undue adverse environmental impacts, including any significant adverse impacts on adjacent properties in terms of bulk, scale, overshadowing, privacy or view loss, indicating the proposed development is suitable for the site.

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 unnecessary in the circumstances of the case.

Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?

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 standard, rather than promoting the benefits of the development.

The applicant's written request addresses Clause 4.6(3)(b), as follows (summarised):

- i) *The proposed alterations and additions to the existing dwelling will enable the occupants to age in place, maintaining wellbeing and connection with the community they know. The dwelling is within a strategic location close to employment, shops, services, public transport and outdoor public recreational spaces. The proposal is adapting an existing approved dwelling to meet contemporary standards.*
- ii) *The proposed development provides a more efficient use of the existing building within a low-density environment through the alteration of the existing dwelling rather than demolition of the existing dwelling and associated re-build which would have greater impact on the natural environment. The proposed changes are considered appropriate in the context of surrounding built form, and so achieves an improved ecologically sustainable outcome.*
- iii) *The proposed alterations and additions have been architecturally designed to respond to the site's unique infill and sloping characteristics. The*

variations will promote a better built form outcome for the occupants of the site, without adversely impacting the amenity of neighbouring properties.

- iv) *The proposed alterations and additions have been designed to respond to site characteristics and continued maintenance of the building. The reconfiguration of the floor levels and room arrangements will enable the occupants to age in place safely.*

CN Officer comment

The applicant's written request outlines environmental planning grounds that justify the contravention. The site has a historical variance to the HOB standard (being 35.05%) and the proposed height exceedance is below this existing exceedance (being 22.94%). The maximum height measurement for the development has been calculated using the accepted approach known as the extrapolation method due to the existing cut of the building. The steep-sloping topography of the site also presents a reasonable justification for the exceedance.

The height exceedance proposed is generally consistent with a combination of relevant controls under NLEP 2012 and Newcastle Development Control Plan 2012 (NDCP 2012) and provides an acceptable environmental planning outcome in relation to bulk and scale, streetscape, established character, solar access, visual privacy and retention of views.

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 reasons outlined above provide 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. 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 objects 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 HOBs 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 4.3 Height of buildings

The development is consistent with the objectives of Clause 4.3 as the proposed development is of an appropriate density which is consistent with the established centres hierarchy. The proposed development is considered to be of reasonable bulk and scale, consistent within the site's context and the built form as identified by the 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 in an appropriate dwelling house form which is consistent and complementary to the low-density residential environment in this location.

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 concurrence to the exception to the development standard, as required by Clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning Circular PS20-00 of 5 May 2020.

Conclusion

An assessment of the applicant's written request has been undertaken and it is considered that:

- a) It satisfactorily addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) The development is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential Zone.
- c) That there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered that the exceedance proposed is an acceptable planning outcome, a reduction to the existing exceedance and strict compliance with the development standard is unnecessary in the case.

Furthermore, it is considered that approval of the proposed development will be in the public interest because it is consistent with the objectives of the HOB standard and the objectives of the R2 Low Density Residential zone.

The clause 4.6 variation request is well-founded and should be supported.

Proposed variation to floor space ratio development standard

The proposed development contravenes Clause 4.4 'FSR' development standard in NLEP 2012. The FSR map provides for a maximum FSR of 0.6:1. The proposed development will result in a total FSR of 0.65:1, equating to an exceedance of 35.12m² or 8.33% variation above the prescribed maximum FSR for the subject land.

The application is supported by a formal written request, prepared by ADW Johnson and dated 27 March 2024 (**Attachment D**), to vary the FSR development standard under Clause 4.6 of NLEP 2012.

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 FSR contained in Clause 4.4 is a 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 and 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 submitted a written request, prepared by ADW Johnson dated March 2024, which constitutes a written request for the purposes of Clause 4.6(3).

The written request provided by the applicant seek to rely on the first and second of the *Wehbe* tests, namely that the objectives of the development standard are achieved notwithstanding noncompliance with the development standard, to demonstrate that the development standard is unreasonable or unnecessary in the circumstances of the case.

In summary the request states that:

- i) *The proposed density remains consistent with this objective, noting the proposal is consistent with the site's land use zoning. The extent of the variation, which equates to 35.12m², or approximately 8.33% and resulting in a FSR of 0.65:1 does not change the consistency with the centres hierarchy.*
- ii) *The minor variation (35.12m²) does not impact on the ability of the development to make a positive contribution to the desired built form. The proposed building bulk and density is consistent with the character of existing large residential multi-storey dwellings within this Merewether locality. The proposed alterations and addition to the existing dwelling is of a similar bulk and scale and is positioned generally within the existing floor plate of the already approved and constructed dwelling.*

- iii) *The density, bulk, scale and height of the proposed development are consistent with the established development pattern within the Merewether locality and immediate area.*

CN Officer comment

The proposed development provides for an upgrade of an existing dwelling to improve functionality and provide housing for a multi-generational family, which can also age in place. The design is considered to have responded appropriately to the site's characteristics, including elevation, slope and existing streetscape character in this location. The proposal retains an existing dwelling house in a low-density environment and is not considered to present any significant adverse impacts on the site or surrounding properties.

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, view loss or privacy, indicating the proposed development is suitable for the site.

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) - Are there sufficient environmental planning grounds to justify contravening the development standards?

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

The proposed alterations and additions to the existing dwelling will enable the occupants to age in place, maintaining wellbeing and connection with the community they know. The dwelling is within a strategic location close to employment, shops, services, public transport and outdoor public recreational spaces. The proposal is adapting an existing approved dwelling to meet contemporary standards.

The proposed development (including the development standard variations) provides numerous economic and social benefits for the occupants and in turn a minor contribution to the community. The variations do not compromise the environment, nor neighbouring residents or community amenity.

The proposed development provides a more efficient use of the existing building within a low-density environment through the alteration of the existing dwelling rather than demolition of the existing dwelling and associated re-build which would have greater impact on the natural environment. The proposed changes are considered appropriate in the context of surrounding built form, and so achieves an improved ecologically sustainable outcome.

The proposed alterations and additions have been architecturally designed to respond to the site's unique infill and sloping characteristics. The variations will promote a better built form outcome for the occupants of the site, without adversely impacting the amenity of neighbouring properties.

The proposed alterations and additions have been designed to respond to site characteristics and continued maintenance of the building. The reconfiguration of the floor levels and room arrangements will enable the occupants to age in place safely.

CN Officer comment

The written request outlines environmental planning grounds that adequately justify the contravention. The FSR exceedance does not result in any inconsistency with the desired built form of the locality and has demonstrated that through design has maintained a reasonable level of privacy, overshadowing and visual amenity, notwithstanding the variations sought to development standards, within the context of the site and surrounding development.

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 satisfactory 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. Clause 4.6(4)(a)(i) is satisfied in this regard.

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 objects 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 FSR 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 'FSR'

The development is consistent with the objectives of Clause 4.4 'FSR' as the proposed development is of an appropriate density which is consistent with the established centres hierarchy. The proposed alterations and additions to dwelling, whilst increasing the overall built form on site, remains of acceptable bulk and scale in this location and is consistent with the built form as identified by the 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 in an appropriate dwelling house form complementary to the low-density residential environment.

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 concurrence to the exception to the development standard, as required by Clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning Circular PS20-00 of 5 May 2020.

Conclusion

An assessment of the request has been undertaken and it is considered that:

- a) It adequately addresses the matters required to be demonstrated by clause 4.6(3) of the NLEP 2012.
- b) The development is consistent with the objectives of the particular standard and the objectives for development within the R2 Low Density Residential Zone.
- c) The proposed FSR exceedance is not considered to have unreasonable impacts on neighbouring properties in terms of privacy, overshadowing, view loss, bulk and scale. The FSR exceedance is consistent with similar developments in the area.

The proposal facilitates an improved housing form within a residential zone, provides for the housing needs of the community within a low-density residential environment, which adequately respects the amenity, and character of surrounding development and the quality of the environment, in line with the relevant R2 Low Density Residential zone objectives.

The exceedance is an acceptable planning outcome and strict compliance with the development standard is unnecessary and the clause 4.6 variation request is well founded and should be supported.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils and given the presence of acid sulfate soils is unlikely and the geotechnical management of earthworks required as part of the DA, an acid sulfate soils management plan is not required. The proposed development is considered satisfactory in this regard.

Clause 6.2 - Earthworks

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

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

There is no exhibited draft environmental planning instrument relevant to the application.

5.3 Any development control plan

Newcastle Development Control Plan 2023

The Newcastle Development Control Plan 2023 (DCP) provides updated guidelines and development controls for new development in the Newcastle Local Government Area. The DCP was formally adopted by Council and commenced on 1 March 2024. The DCP requires consideration under Section 4.15(1)(a)(iii) of the EP&A Act 1979.

Section 11 of Part A – Introduction of the 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).'

The savings and transitional provisions apply to this application. The proposed development therefore remains subject to the provisions of the Newcastle Development Control Plan 2012.

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 existing setback of the garage on-site is nil with the wall of the garage and additional retaining wall abutting Gregory Crescent. The proposed development seeks to maintain the existing frontage by situating the sliding gates and wall construction of the garages along the front boundary line, which presents a numerical non-compliance with the NDCP 2012. However, this design approach is consistent with the existing streetscape and built form in part for garaging is built to the front boundary.

The proposed additional Level 4 maintains a setback to Gregory Crescent of between 1.307m and 3.136m to this extent a numerical non-compliance of between 3.193m and 1.364m is proposed. This level has been designed to correspond to the structure of the level. However, the level has been setback from the front wall of the garage beneath to reduce any overbearing mass to Gregory Crescent.

The proposed Level 4 introduces additional built form; however, it is viewed as a second storey addition at street level and generally complies with the height limit. Two-storey built form is not unexpected within a residential context. The setback is appropriate within this streetscape context and is not considered to negatively impact the public realm or adversely impact upon the adjoining properties.

On balance the variations sought, some of which relate to existing structures, are considered acceptable in this instance. The proposal is an appropriate response to address the needs of the dwelling site, without significant impact on surrounding properties. The design approach has been dictated by the constraints of slope in this location and adopting a design approach to appropriately respond to adjoining dwellings.

Side / rear setbacks (building envelope) (3.02.04)

The proposal essentially maintains the existing building footprint, with only minor changes in respect to side and rear boundaries, which continues to provide articulation and setbacks appropriate for the overall built form design in this location and as it relates to surrounding properties.

Landscaping (3.02.05)

The proposal does not alter existing landscaping at ground level on-site but provides additional soft landscaping in the form of planter boxes on terrace areas and within the street frontage of the site. This is considered to positively contribute to the softening of overall building form and is consistent with the natural landscape and scenic quality in this location. The proposal is considered acceptable.

Private open space (3.02.06)

Provision is provided on each level of the dwelling for open space terraces, in addition to the swimming pool and spa area. The terrace area proposed on Level 4 increases the private open space available on-site and the reconfiguration of other terrace areas, together with the pool redesign, improves the functionality of the existing open space. Due to the site's topography usable space at ground level is not feasible. The proposal is acceptable.

Privacy (3.02.07)

The proposal does not significantly alter the design, orientation, and glazing, which exists for both the existing dwelling and proposed alterations and additions to the existing dwelling on site.

Large, glazed areas are incorporated within the eastern elevation to maintain prevailing views towards the ocean and to increase light and ventilation within the

dwelling. No significant impacts arise as this elevation adjoins the public reserve. The alterations and additions incorporate privacy screens into the eastern and western elevations to improve privacy and associated overlooking impacts.

The building has been designed to limit the potential for overlooking both in and out of the dwelling on the southern elevation, being the Gregory Crescent Street frontage. The proposal is considered acceptable.

Solar access 3.02.08)

The proposal will achieve the required solar access to adjoining properties between 9am and 3pm on 21 June, as demonstrated within the shadow diagrams provided in the architectural plans. The plans show that the difference in shadows cast between the existing dwelling and proposed alterations are minimal, and that the majority of shadows cast are over the road reserve or public reserve, and not over adjoining residential properties.

View sharing (3.02.09)

The applicant has submitted several visual impact assessments with the application, the current VIAs considered within this assessment are the Visual Impact Assessment, Revision B (the VIA) prepared by October Urban and dated March 2024, together with an Addendum: Visual Impact Assessment, Revision A (Addendum VIA) prepared by October Urban and dated May 2024. The Addendum VIA addresses the amended design and concerns raised by submitters regarding impacts on their private views.

The VIA and Addendum VIA include imagery of the viewpoints in their existing condition and juxtaposed with the proposed development and provide a comprehensive analysis of the visual impact of the proposed development.

The properties located at 46 and 48 Hickson Street, are the most impacted by the development. These properties are located to the south and southwest of the subject site on a higher elevation looking downwards towards the development. Views are enjoyed across the subject site. The proposed development will alter the extent of views currently enjoyed from these properties, therefore an assessment against the planning principle for assessing view impacts has been undertaken.

Tenacity Consulting v Waringah [2004], NSWLEC 140 (*Tenacity*), forms the basis for the LEC planning principle regarding views and outlines four steps to follow in consideration of view impact assessment as extracted below, noting not all four steps are necessary where the extent of view impact is resolved at an earlier step. *Tenacity* has been consistently applied by the LEC to assess the impact of new developments on views of other properties and forms the basis for the view impact assessment of this application.

- i) Assessment of views to be affected and weighting of impacted views.
- ii) Consideration of where views are obtained and weighting of viewing locations.

- iii) Assess extent of impact for the whole of the property, being a qualitative assessment of negligible, minor, moderate, severe or devastating.
- iv) Assess the reasonableness of the proposal causing the impact.

Thirteen viewpoints were analysed within the applicants VIA, and of these viewpoints four of these viewpoints have been assessed as negligible visual impact, four assessed as minor/negligible impact, two assessed as moderate/minor, and three of these viewpoints assessed as having moderate visual impact.

Step 1 - Assessment of views to be affected

Properties within this location have access to broader views of the beach, headland, Newcastle City, and city surrounds, obtained from both public spaces and through private properties (both around and over) private property given the location's more prominent elevation and sloping topography. These views are enjoyed from each dwelling's internal living spaces and external balconies and to an extent from ground-level open space areas.

There is the presence of water views and the presence of whole water views (the interface between land and water is visible), which are considered more valuable and are found to be presently enjoyed by surrounding properties, in particular the properties where submitters have raised concerns of unreasonable view loss at 46 Hickson Street and 48 Hickson Street respectively. These properties also enjoy an elevated outlook of both natural landscape setting, city landscape setting, skyline and ocean beyond.

Whilst there are some instances from both these identified properties, where views will be changed or altered, a complete loss of view will not occur. The impact is dependent on whether you are sitting or standing, or from which orientation views are obtained. It is also noted that views are enjoyed from several vantage points, at various areas within the dwellings and at multiple levels, including ground level. This supports the findings within the VIA and Addendum VIA that a reasonable level of these more valuable views will be maintained for surrounding properties, whilst satisfying the needs of the alterations and additions to dwelling at the subject site.

Step 2 - Viewing locations

All properties in this location have a broad range of views to the north-west, north and north-east and, in relation to the identified properties most affected and that have raised concerns. These properties at 46 and 48 Hickson Street are located south-west and immediately south-east opposite the development site and are situated further upslope in a more elevated position.

Given the topography and elevation of these sites, they obtain views over existing properties on the northern side of Gregory Crescent, including the subject site at 2 Gregory Crescent and the adjoining CN reserve toward the east.

Views will continue to be shared by the proposed development, notwithstanding a change in view, particularly because of the proposed Level 4, looking toward the street level. It has been demonstrated that view sharing is maintained above the proposed

Level 4 and, the existing views around the site remain unchanged. The view outlook from properties, in particular 46 and 48 Hickson Street, will continue to enjoy quite extensive views.

Step 3 - Extent of impact

Having regard to the principles of *Tenacity Step 3 - Extent of impact*

Having regard to the principles of *Tenacity* the extent of view loss is acceptable. There are a range of view aspects that will remain unchanged, from multiple different areas at different levels within the most impacted dwellings being 46 Hickson Street and 48 Hickson.

A view above the proposed Level 4 will be maintained of the broader coastline and in the distance of the natural landscape and skyline. Other views of city landscaping and city skyline and natural landscape characteristic of the coastal area will remain with only partial loss depending on whether you are sitting or standing or from which vantage point the view is obtained.

Step 3 - Reasonableness of proposed development

The proposed non-compliances, particularly height and floor space area, are not considered to be unreasonable. A detailed analysis and merit assessment of the numerical non-compliances has been undertaken elsewhere in this report. Further, given the nature and direction of the affected views (i.e. across boundary), the topography and constraints of the site, along with the extent of the impact the development is not taken to result in significant or unreasonable view impacts.

View sharing conclusion

Having regard to the planning principles for view sharing established by the NSW Land and Environment Court - *Tenacity Consulting vs Warringah Council [2004]*, it has been assessed that the proposed development will maintain a reasonable level of view sharing with adjoining properties.

Car parking and vehicular access (3.02.10)

The existing dwelling has a double garage which will be retained as part of the proposed development. However, the vehicular access/roller door into the garage will be re-orientated to directly face the street frontage. Vehicular access will also be available via a new roller panel door into the forecourt area.

The proposed vehicular access and car parking is capable of complying with the provisions of Australian Standard AS2890 Parking Facilities and CN's standard drawing A1300 Driveway Crossing Standard Design Details.

Ancillary development (3.02.12)

Swimming pools

The existing swimming pool is proposed to be amended as part of this application. The location at the rear north-eastern side of the property will be maintained. The swimming pool location seeks to vary the minimum 1.0m setback from the north-eastern side boundary. This is considered acceptable, as it is designed to be contained within the overall built form and does not present any significant visual or acoustic privacy issues to adjoining properties.

Bush Fire Protection - Section 4.02

The site is identified as being bush fire prone land being mapped as a vegetation buffer. A bushfire assessment report (BAR) has been submitted with the application, prepared by Perception Planning and dated 10 May 2021.

The development is acceptable subject to the recommended conditions of consent (**Attachment B**).

Mine Subsidence - Section 4.03

The site is located within a proclaimed Mine Subsidence District and approval obtained from Subsidence Advisory NSW under Section 22 of the *Coal Mine Subsidence Compensation Act 2017* has been submitted with the development application.

Soil Management - Section 5.01

Soil management will be carried out following the NDCP 2012, informed by the Geotechnical Assessment submitted with the application. The Geotechnical Assessment has recommended conditions including those that relate to soil management related matters (**Attachment B**).

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. The proposal is satisfactory in this regard.

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.

Landscape Open Space and Visual Amenity - Section 7.02

The proposed development includes additional planting within the structure (planter beds) to improve amenity both within the site and when viewed from surrounding properties. The proposal satisfactorily addresses the landscaping requirement of the

NDCP 2012. Standard conditions are recommended with the Draft Schedule of Conditions in (**Attachment B**).

Traffic, Parking and Access - Section 7.03

The existing dwelling has a double garage within the site frontage, and this is proposed to be retained as part of the development. A condition of consent is recommended requiring the development to provide electric circuitry to accommodate future electric vehicle charging points.

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 existing dwelling on site has current stormwater management which will be retained and modified as required to incorporate the alterations and additions to the existing dwelling and ancillary swimming pool.

All new rainwater runoff is to be connected to the existing system and discharged to the existing point of discharge/s. A stormwater management plan is also required to be submitted prior to issue of the first construction certificate (**Attachment B**).

Waste Management - Section 7.08

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

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 Section 7.12 Development Contributions Plan.

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 under 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 compatible with the existing character, bulk, scale and massing of development in the immediate area. The proposal will not have any negative social or economic impacts.

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 development 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 within a Mine Subsidence District and stamped approved plans from Subsidence Advisory NSW have been submitted with the application. The constraints also include, bushfire prone land, acid sulfate soils, coastal management and landslip risk and site suitability for the development. 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 notified in accordance with CN's CPP. Two submissions were received during the notification period.

The application was re-notified following lodgement of amended plans and additional information in response to CN's requests and submissions received. Two submissions were received during the re-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
Bulk and scale - excessive built form particularly, the additional bulk on southern side	<p>In response to the submissions the applicant provided additional information addressing the objectors' concerns regarding bulk and scale. This included additional justification for the location of lift well, which has been positioned in response to site typography and construction constraints associated with retrofitting it within the existing dwelling.</p> <p>The applicant also further demonstrated that the Level 4 building addition is generally below HOB and is below HOB at street frontage, and setback from street level. This setback reduces</p>

	<p>impacts at street level and maintains view sharing for neighbours along the street. Furthermore, the structural floor is solid, the balconies are glass, reducing the bulk and maintaining view sharing.</p> <p>Having regard to the submitted information and the existing site context the bulk and scale is acceptable.</p>
<p>Non-compliance with HOBs development standard under the NLEP 2012</p>	<p>At the street frontage on the southern side of the site, the dwelling is lower than the prescribed maximum building height control of 8.5m (7.32m south-western corner increasing to 8.04m in the south-eastern corner). The upper level has also been setback to reduce any impacts to the public realm and neighbouring properties.</p> <p>Whilst existing departures do not justify any further increase or variations across the site, consideration must be given to the context of the existing dwelling and its location with challenging topography. The bulk of Level 4, particularly at street level complies with the 8.5m building height limit and the proposed additional variation to height resulting from the development is downslope and is acceptable.</p>
<p>Non-compliance with FSR development standard under the NLEP 2012</p>	<p>The application has submitted a comprehensive clause 4.6 variation request, that demonstrates that the variation is minor and compliance with the development standard would be unreasonable. Further, removal of gross floor area from the lower floors would not result in a discernible reduction in bulk and scale when viewed from neighbouring properties.</p>
<p>View loss</p>	<p>In response to the concerns raised by objectors, the applicant submitted a Visual Impact Assessment, an Addendum Visual Impact Assessment, and a written response to submissions. The written response summarises the consideration of view-sharing principles as follows:</p> <p><i>'...view sharing refers to the consideration and regulation of how new developments, such as buildings or structures, impact the view enjoyed by neighbouring properties or the broader public. It involves balancing the rights of property owners to develop their land with the preservation of important views and visual amenity for the community.'</i></p> <p><i>As the submitted VIA and Addendum identifies, depending on your orientation, whether you are sitting or standing and where you are located on the different levels of neighbouring properties or public spaces, the impacts on vision receptors vary. At this stunning location, residents have access to broader views of the beach, headland, Newcastle City, and the city surrounds afforded to them from public spaces and from each of their balconies, living areas and multiple rooms within their dwellings.'</i></p>

	<p>A detailed response to view sharing and view loss has been discussed in detail within this report. It has been determined that view impacts are acceptable having regard to the principles of <i>Tenacity</i>.</p>
Setbacks - particularly the front setback	<p>As detailed within the assessment report the garage currently has a zero setback from the street. This is consistent with the existing streetscape and built form, where garaging is built to the front boundary.</p> <p>The upper level of the development has been setback from the street between 1.307m and 3.136m and has been setback from the front wall of the garage beneath to reduce any overbearing mass to Gregory Crescent.</p> <p>The front setback is appropriate within this streetscape context and is not considered to negatively impact the public realm or adversely impact upon the adjoining properties.</p> <p>In respect to side setbacks, the proposal maintains the existing building footprint, with only minor changes in respect to side and rear boundaries, which provides articulation and setbacks appropriate for the overall built form design in this location.</p>
Privacy	<p>The information submitted with the application has been discussed within this report, as it relates to the design of the site frontage and surrounding properties.</p> <p>Consideration has been given to the context within which the site and surrounding properties sit, including the existing streetscape and built form in this immediate section of Gregory Crescent.</p> <p>The architectural plans incorporate design elements including screening and adequate separation. Further through the varied setbacks across the floor levels and as a result of the sloping nature of the site a reasonable level of privacy can be maintained.</p>
Inadequate information - particularly relating to building height, view loss and non-compliances.	<p>Since lodgement the applicant has submitted further detailed information in response to CN's requests for information and objector concerns.</p> <p>The level and quality of information submitted, is sufficient to enable a comprehensive assessment of the development.</p>

5.9 The public interest

The proposed development is consistent with the aims and design parameters contained in the NLEP 2012 and 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 impacts on the natural or built environments and 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 retention and reasonable upgrade of existing housing within an established residential area. In addition, the proposed redevelopment of the property will make a more efficient use of the existing dwelling and provides the potential for occupants to age in place, close to public infrastructure and services.

The proposed development is in the public interest as it provides for modernised low-impact residential accommodation within an established residential area 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 -
2 Gregory Crescent Merewether

Attachment B: Draft Schedule of Conditions -
2 Gregory Crescent Merewether

Attachment C: Processing Chronology -
2 Gregory Crescent Merewether

Attachment D: Clause 4.6 Exception documents - Height and FSR -
2 Gregory Crescent Merewether

Attachments A - D distributed under separate cover