



City of
Newcastle



CITY OF NEWCASTLE

Development Applications Committee

Councillors,

In accordance with section 367 of the Local Government Act, 1993 notice is hereby given that a Development Applications Committee Meeting will be held on:

DATE: Tuesday 20 October 2020

TIME: Following the Public Voice Committee Meeting

VENUE: Council Chambers
1st Floor
City Administration Centre
12 Stewart Avenue
Newcastle West NSW 2302

K Liddell
Acting Chief Executive Officer

**City Administration Centre
12 Stewart Avenue
NEWCASTLE WEST NSW 2302**

13 October 2020

Please note:

Meetings of City of Newcastle (CN) are web cast. CN accepts no liability for any defamatory, discriminatory or offensive remarks or gestures made during the meeting. Opinions expressed or statements made by participants are the opinions or statements of those individuals and do not imply any form of endorsement by CN. Confidential matters will not be web cast.

The electronic transmission is protected by copyright and owned by CN. No part may be copied or recorded or made available to others without the prior written consent of CN. Council may be required to disclose recordings where we are compelled to do so by court order, warrant or subpoena or under any legislation. Only the official minutes constitute an official record of the meeting.

Authorised media representatives are permitted to record meetings provided written notice has been lodged. A person may be expelled from a meeting for recording without notice. Recordings may only be used for the purpose of accuracy of reporting and are not for broadcast, or to be shared publicly. No recordings of any private third party conversations or comments of anyone within the Chamber are permitted.

The location of all meetings will be determined by the CEO in consultation with the Lord Mayor, having regard to any applicable Public Health Orders regarding COVID-19, and will be either via video conferencing platform or at an appropriate CN facility in accordance with the requirements of the Local Government Act 1993.

**DEVELOPMENT APPLICATIONS COMMITTEE
20 October 2020**

CONTENTS

Item	Business	Page
APOLOGIES/LEAVE OF ABSENCE		
DECLARATIONS OF PECUNIARY / NON-PECUNIARY INTEREST		
CONFIRMATION OF PREVIOUS MINUTES		
		5
	MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE 15 SEPTEMBER 2020	5
DEVELOPMENT APPLICATIONS		
		9
ITEM-36	DAC 20/10/20 - DA2019/01352 - 64 FREDERICK STREET, MEREWETHER - DWELLING HOUSE - ALTERATIONS AND ADDITIONS	9
ITEM-37	DAC 20/10/20 - DA2020/00443 - 9 BEACH STREET, NEWCASTLE EAST - DWELLING HOUSE - ALTERATIONS AND ADDITIONS	36
ITEM-38	DAC 20/10/20 - DA2019/00824 - 33 LLOYD STREET, MEREWETHER - RESIDENTIAL ACCOMMODATION - ALTERATIONS AND ADDITIONS, CHANGE OF USE TO DUAL OCCUPANCY AND TWO LOT STRATA SUBDIVISION	53
ITEM-39	DAC 20/10/20 - SUPPLEMENTARY REPORT - DA2017/01376 - 495-501 HUNTER STREET & 364 KING STREET NEWCASTLE - DEMOLITION OF BUILDINGS AND CONSTRUCTION OF MIXED-USE DEVELOPMENT (14 STOREYS) WITH COMMERCIAL / RETAIL TENANCIES AND RESIDENTIAL APARTMENTS (83) AND ASSOCIATED CAR PARKING, SITE WORKS AND LANDSCAPING	76

FOR DOCUMENTS MARKED 'DISTRIBUTED UNDER SEPARATE COVER' REFER TO COUNCIL'S WEBSITE AT www.newcastle.nsw.gov.au

NOTE: ITEMS MAY NOT NECESSARILY BE DEALT WITH IN NUMERICAL ORDER

CONFIRMATION OF PREVIOUS MINUTES

MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE 15 SEPTEMBER 2020

RECOMMENDATION

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

ATTACHMENTS

Attachment A: 200915 Development Applications Committee Minutes

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

CITY OF NEWCASTLE

Development Applications Committee Meeting 20 October 2020

Page 6

CITY OF NEWCASTLE

Minutes of the Development Applications Committee Meeting held via video conferencing platform Zoom on Tuesday 15 September 2020 at 6.03pm.

PRESENT

The Lord Mayor (Councillor N Nelmes), Councillors M Byrne, J Church, D Clausen, C Duncan, K Elliott, B Luke, J Mackenzie, A Rufo, E White and P Winney-Baartz.

IN ATTENDANCE

J Bath (Chief Executive Officer), D Clarke (Director Governance), B Smith (Director Strategy and Engagement), K Liddell (Director Infrastructure and Property), F Leatham (Director People and Culture), A Jones (Interim Director City Wide Services), E Kolatchew (Manager Legal), M Bisson (Manager Regulatory, Planning and Assessment), E Horder (Councillor Services/Minutes), K Sullivan (Councillor Services/Meeting Support), G Axelsson (Information Technology Support), S Ray (Information Technology Support).

MESSAGE OF ACKNOWLEDGEMENT

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

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.

APOLOGIES

MOTION

Moved by Cr Luke, seconded by Cr Rufo

The apologies submitted on behalf of Councillors Dunn and Robinson be received and leave of absence granted.

Carried

DECLARATIONS OF PECUNIARY AND NON-PECUNIARY INTERESTS

Nil.

CONFIRMATION OF PREVIOUS MINUTES

MINUTES - DEVELOPMENT APPLICATIONS COMMITTEE MEETING 18 AUGUST 2020

MOTION

Moved by Cr Mackenzie, seconded by Cr Byrne

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

**Carried
unanimously**

DEVELOPMENT APPLICATIONS

**ITEM-35 DAC 15/09/20 - DA2018/01331 - 15 DUNCAN CLOSE,
ELERMORE VALE - STAGED DEVELOPMENT FOR 51 LOT
COMMUNITY TITLE SUBDIVISION WITH 50 SINGLE
STOREY DWELLINGS ASSOCIATED RETAINING WALLS,
STORM WATER AND LANDSCAPING**

MOTION

Moved by Cr Mackenzie, seconded by Cr Byrne

- A. That DA2018/01331 for the staged residential redevelopment comprising the erection of 49 dwellings and a 50 lot community title subdivision at 15 Duncan Close, Elermore Vale be approved and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**; and
- B. That those persons who made submissions be advised of Council's determination.

PROCEDURAL MOTION

Moved by Lord Mayor, Cr Nelmes, seconded by Cr Byrne

That the item lay on the table to allow the developer to address concerns regarding passive surveillance, recreation outcome, reconfiguration of roads and lack of open space access prior to the application being brought back to Council.

For the Procedural Motion: Lord Mayor, Cr Nelmes, and Councillors Byrne, Church, Clausen, Duncan, Elliott, Luke, Mackenzie, Rufo, White and Winney-Baartz.

Against the Procedural Motion: Nil.

**Carried
unanimously**

CITY OF NEWCASTLE

Development Applications Committee Meeting 20 October 2020

Page 8

**ITEM-34 DAC 15/09/20 - DA2020/00378 - 40C GIPPS STREET,
CARRINGTON - DWELLING HOUSE - ALTERATIONS AND
ADDITIONS**

MOTION

Moved by Cr Mackenzie, seconded by Cr Clausen

- A. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the NLEP 2012, against the development standard at clause 4.4 Floor Space Ratio, and considers the objection to be justified in the circumstances and to be consistent with the objectives of clause 4.4 and the objectives for development in the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- B. That DA2020/00378 for alterations and additions to a dwelling at 40C Gipps Street, Carrington be approved, and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**.

For the Motion:

Lord Mayor, Cr Nelmes, and Councillors M Byrne, J Church, D Clausen, C Duncan, K Elliott, B Luke, J Mackenzie, A Rufo, E White and P Winney-Baartz.

Against the Motion:

Nil.

**Carried
unanimously**

The meeting concluded at 6.20pm.

DEVELOPMENT APPLICATIONS

**ITEM-36 DAC 20/10/20 - DA2019/01352 - 64 FREDERICK STREET,
MEREWETHER - DWELLING HOUSE - ALTERATIONS AND
ADDITIONS**

**APPLICANT: N S SHETTY
OWNER: N S SHETTY & C R NAYAK
NOTE BY: GOVERNANCE
CONTACT: DIRECTOR GOVERNANCE / MANAGER REGULATORY,
PLANNING AND ASSESSMENT**

PART I

PURPOSE

An application has been received seeking consent to undertake alterations and additions to an existing dwelling house located at 64 Frederick Street, Merewether.

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

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



**Subject Land: 64 Frederick Street
Merewether NSW 2291**

The application was publicly notified in accordance with City of Newcastle’s (CN) Community Participation Plan (CPP) and six submissions have been received in response.

The concerns raised by the objectors in respect of the proposed development include building height, FSR, setbacks / building envelopes, landscaping, privacy, overshadowing, car parking, roof materials and view sharing.

The applicant has submitted a response to the issues raised in submissions and revised plans that seek to resolve some of the matters raised.

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 variation to the Height of Buildings development standard, under the NLEP 2012.
- 2) The proposed variation to the FSR Development Standard, under the NLEP 2012.

Conclusion

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

RECOMMENDATION

Vote by division

- A. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012, against the development standard at clause 4.3 Height of Buildings, and consider the objection to be justified in the circumstances and to be consistent with the objectives of clause 4.3 and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- B. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012, against the development standard at clause 4.4 Floor Space Ratio, and consider 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
- C. That DA2019/01352 for alterations and additions to dwelling house at 64 Frederick Street, Merewether be approved, and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**; and
- D. That those persons who made submissions be advised of City of Newcastle's determination.

Political Donation / Gift Declaration

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

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

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

PART II

1.0 THE SUBJECT SITE

The subject property comprises Lot 11 in Deposited Plan 104412 and is a battle-axe allotment located on the eastern side of Frederick Street. The site has frontage to Frederick Street via a battle-axe handle from which vehicular access is obtained and a total area of 250.3m² (excluding axe handle) and 272.1m² overall. The site is relatively flat and contains minimal vegetation.

Existing improvements on the site include a two-storey dwelling house with garage and hard stand spaces designed for the purposes of vehicular movement. The dwelling house has an upper level deck with views over the Merewether Beach carpark, associated foreshore area and ocean beyond.

Existing development on adjoining sites includes three-storey dwelling houses to the north and west and a three-storey residential flat building to the south. The subject allotment is bordered to the east by the Merewether Beach carpark and subsequent RE1 Public Recreation zoned land. The general form of development in the immediate area consists of numerous large scale dwelling houses and a number of multi-unit residential developments presenting as three storey, in addition to buildings associated with the operation of the beachfront precinct including surf lifesaving clubs and the Merewether Surf House development.

2.0 THE PROPOSAL

The applicant seeks consent for:

- i) Minor demolition works.

- ii) Alterations and additions to the existing dwelling house, including internal works to the existing ground and first floors and the addition of a second storey with a floor area of 47.09m². The second storey addition will contain a master bedroom with walk in robe, ensuite, study nook and a deck placed to the rear overlooking the Merewether Beach carpark.

In response to concerns raised by CN officers and objectors regarding the extent of the FSR variation (originally 44%), the original proposal has been amended. The amended plans result in a smaller variation to the maximum FSR of 17%. Key changes to the original proposal include:

- i) Proposed first floor addition located over the driveway / car parking area / garage has been deleted.
- ii) Existing lift retained (replacement lift deleted).
- iii) Existing first floor balcony retained as existing.
- iv) Existing kitchen and living room to remain on first floor (previously this was proposed for the second floor).
- v) Proposed second floor reconfigured resulting in a reduction in floor area from 71.04m² to 47.09m².
- vi) Second floor now accommodating the master bedroom (the original scheme accommodated the kitchen and living room on the second floor).
- vii) Second floor northern boundary setback has been increased.
- viii) A 2100mm high privacy screen is proposed for the new second floor deck at the southern end.
- ix) A raised planter box is proposed for the new second floor deck and the northern end for the purposes of privacy.
- x) The existing entry porch and roof is to be retained.

The revised plans were not notified as the proposal was significantly reduced in size to address the concerns of the neighbours and CN officers.

A copy of the current amended 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 and six submissions were received in response. The concerns raised by the objectors in respect of the proposed development are summarised as follows:

a) Statutory and Policy Issues

- i) Building height - concern raised over exceedance to maximum building height prescribed to the site.
- ii) Floor space ratio - concern raised over the exceedance to the maximum FSR prescribed to the site.
- iii) Setbacks / building envelopes - concern raised over non-compliance with applicable boundary setbacks and building envelope.

b) Amenity Issues

- i) Privacy
- ii) Overshadowing

c) Design and Aesthetic Issues

- i) Landscaping
- ii) Roof Materials

d) Traffic and Parking Issues

- i) Car Parking

e) Miscellaneous

- i) View Sharing - concerns raised over reasonable view sharing with adjoining properties located to the west and south-west.

The objectors' concerns are addressed under the relevant matters for consideration in the following sections of this report.

4.0 INTEGRATED DEVELOPMENT

The application does not require integrated approvals from another public authority as part of the development, noting that plans endorsed by Subsidence Advisory NSW under section 22 of the *Coal Mine Subsidence Compensation Act 2017* were lodged with the development application.

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 No 55 - Remediation of Land (SEPP 55)

SEPP 55 provides that prior to granting consent to the carrying out of any development on land the consent authority is required to give consideration to whether the land is contaminated and, if the land is contaminated, whether the land is suitable for the purpose of the development or whether remediation is required.

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

State Environmental Planning Policy (Coastal Management) 2018 (Coastal Management SEPP)

The subject site is located within both the coastal environment area and coastal use area. The proposed development is not likely to result in an adverse impact upon any of the matters to be considered in clauses 13 (1) and 14(1)(a) of this SEPP.

Further, the proposed development will not increase the risk of coastal hazards and the site is not subject to a coastal management program and is therefore considered to meet the provisions of clauses 15 and 16.

The proposed development is considered acceptable having regard to the applicable provisions of this SEPP.

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

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

Newcastle Local Environmental Plan 2012 (NLEP 2012)

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

Clause 2.1 - Land Use Zones

The subject property is included within the R2 Low Density Residential zone under the provisions of the NLEP 2012, within which zone the proposed development is permissible with CN's consent.

The proposed development is consistent with the objectives of the R2 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 developments and the quality of the environment.

Clause 2.7 - Demolition Requires Development Consent

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

Clause 4.3 - Height of Buildings

Under the NLEP 2012 the site has a height of buildings development standard of 8.5m.

The proposed development will result in a maximum height of 9.325m, equating to an exceedance of 0.825m or 9.7% above the height of buildings development standard for the subject land.

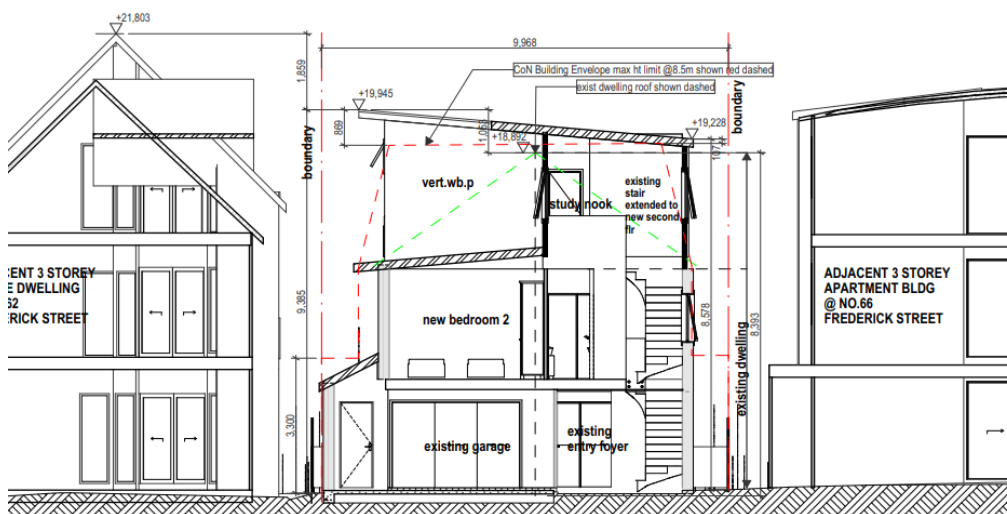


Figure 1: Extent of building height non-compliance. Note that red dashed outline is 8.5m height and green dashed is outline of existing dwelling.

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

Clause 4.4 Floor Space Ratio (FSR)

Under the NLEP 2012 the site has an FSR development standard of 0.75:1.

The proposed development will result in an FSR of 0.88:1, equating to an exceedance of 31.5m² or 17% above the FSR development standard for the subject land.

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

Clause 4.6 - Exceptions to development standards

The proposal includes additions to a building that exceeds the maximum height of buildings under clause 4.3 of the NLEP 2012 and the maximum FSR under clause 4.4 of the NLEP 2012.

The objectives of clause 4.3 of the 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.

Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard. In assessing the proposal against the provisions of clause 4.6, it is noted that:

- i) Clause 4.3 is not expressly excluded from the operation of this clause; and
- ii) The applicant has prepared a written request requesting CN vary the development standard and 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.

An excerpt from the applicant's request to vary the height of building Development Standard is included beneath.

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

Newcastle Local Environmental Plan 2012.

1.2. What is the zoning of the land?

R2 Low Density Residential.

1.3. What are the objectives of the zone?

- i) To provide for the housing needs of the community within a low density residential environment;*
- ii) To enable for 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 proposed development meets the objectives of the zone, as it provides for the housing needs of the existing owners and the design is sympathetic to the scenic and aesthetic qualities of the locality of Merewether.

1.4. What is the development standard being varied? e.g. FSR, height, lot size

Height.

1.5. Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.3 Height of Buildings (HOB).

1.6. What are the objectives of the development standard?

- (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 height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

The proposed development meets the objectives of the HOB development standard, as the scale of development makes a positive contribution to the desired built form within Merewether and the scale of the development allows for reasonable solar access to the proposed and adjoining developments in accordance with Council's controls.

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

8.5 metres.

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

9.325 metres is the maximum building height on the northern side of the roof. The roof slopes down at a 5 degree pitch, reducing the building height over the entire site. The new roof height will be 1.215 metres above existing roof.

1.9. What is the percentage variation (between your proposal and the environmental planning instrument)?

A 9.7% variation to the maximum building height is proposed for the building.

1.10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

Strict compliance with the development standard in this instance is considered to be unreasonable and unnecessary as the proposed addition provides improved design outcomes and future living arrangements for the occupants, with minimal impacts on adjoining properties and the locality.

The proposed height of the addition enables the efficient and effective use of the site and provides a high level of residential amenity for the owners. The additional height is considered minimal in comparison to the two adjoining three storey buildings and the height and scale of houses in the surrounding locality of Merewether. The proposal will result in no real impact to neighbours in terms of privacy, overshadowing or reduction of existing views, given the existing nature of the streetscape and surrounding housing, as demonstrated below.

The design of the addition seeks to maintain privacy to adjoining development through the careful placement of windows to avoid overlooking, the use of highlight windows to obtain sunlight while maintaining privacy to adjoining development and the clever design of the deck areas, which ensure there are no overlooking opportunities to the rear deck of the adjoining dwelling as No.62 Frederick Street.

The existing precedence of tall buildings along Frederick Street and the resulting overshadowing from these buildings has reduced the potential impacts of overshadowing for the proposed additions. The proposed development does not result in unreasonable overshadowing impacts to approved residential properties or potential development in the site's vicinity.

All neighbouring residential properties receive the minimum required 2 hours of continuous sunlight to the principal area of open space and living spaces during the winter solstice. The shadow diagrams show that the difference between the existing and proposed impact on solar access on adjoining developments. The existing conditions and approved development have already reduced the potential solar access for adjoining sites. In this regard the proposal is considered to be in compliance with the NDCP 2012 controls and is unlikely to have significant impacts on the neighbouring properties.

Existing view sharing opportunities from adjoining residential dwellings are unlikely to be impacted, as the height of the existing development along Frederick and Watkins Streets already compromises views of Merewether Beach for dwelling west of the development. The proposal is over 5 metres, approximately (existing height is 8.2m) in height and has views to water (Merewether Beach). The northern and southern dwellings are three storeys in height and have direct views of Merewether Beach, which will not be affected by the proposed development. The dwelling house to the west at No.64a Frederick Street does not currently enjoy direct views of the water and therefore view sharing is not possible. The residential flat building to the south-west at No.66 Frederick Street will retain views of the water from the fourth storey. It is considered that the proposal is unlikely to cause significant impacts on view sharing given the reduced view sharing potential from existing development to the west.

The proposed additions are adequately setback from Frederick Street and will be of a smaller scale to the adjoining dwellings as viewed from the Merewether Beach carpark. Therefore, the resulting scale of the development, as viewed from the public domain is suitable and is in keeping with the existing character of the locality.

The outcomes will not adversely impact on the characteristics of the site or surrounding area that would warrant such a limitation when having regard to the existing and proposed built form, visual impacts, views to and from the site and positive social impacts. Therefore, the standard is unreasonable and unnecessary.

The proposed HOB does not affect the ability to comply with all other relevant standards and controls (except for FSR, which a separate variation is provided). As a result, the proposal retains the amenity of the site and surrounding development.

1.12 Is the development standard a performance based control?

No.

1.14. Are there Sufficient environmental planning grounds to justify contravening the development standard? Give details

Environmental planning grounds that justify contravening the development standard include:

- i) The additional 0.825 metres of height will not result in unreasonable visual impacts;*

- ii) *The additional height will have a negligible effect on shadows resulting from the development;*
- iii) *The additional height will not impact privacy of adjoining residents;*
- iv) *The additional height will not impact on view sharing; and*
- v) *The proposal results in a high quality design that will make a positive contribution to the locality.*

In light of the above, it is suggested that the proposed variation is considered to be reasonable and appropriate in the context of the site and its surroundings and is considered to be worthy of Council's support.



Figure 2: View of proposal from the east in context of existing built form.

Conclusion

The proposal does not comply with the height of building standard prescribed by clause 4.3 of the NLEP 2012. Having evaluated the likely affects arising from this non-compliance, it is considered that the objectives of clause 4.6 of the NLEP 2012 are satisfied as the breach to the maximum building height does not create any adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and use of clause 4.6 of the NLEP 2012 to vary this development control is appropriate in this instance.

Based on the above, it is sensible to conclude that strict compliance with the height of buildings standard is not necessary and that a better outcome is achieved for this development by allowing flexibility in the application.

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).

- 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 R2 Low Density Residential zone in which the development is proposed to be carried out.
- c) The Secretary's concurrence to the exception to the height of buildings development standard, as required by clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning circular PS 20-002 of 5 May 2020.
- d) The proposed development exceeds the maximum building height by 825mm. The proposed building height exceedance is considered to be a minor variation and will have minimal impact on neighbouring properties in terms of privacy, overshadowing and view loss. The proposed height and scale of the development is in character with the surrounding locality. The proposed exception to the height of buildings development standard of the NLEP 2012 is considered to be a minor variation and strict compliance would be unreasonable.

It is considered that the applicant has demonstrated that the application of the standard is both unreasonable and unnecessary in this instance and that the proposed height and scale of development is in character with the host building and surrounding locality. The proposal facilitates the ongoing use of an existing residential site in a single dwelling house capacity, providing for the housing needs of the community within a low density residential environment whilst suitably respecting the amenity, heritage and character of surrounding development and the quality of the environment, in accordance with the relevant R2 zone objectives. Further, it is considered the clause 4.6 variation request is well founded. The request for the maximum building height to exceed 8.5m is supported.

4.6 – Exceptions to development standards

The proposal includes alterations and additions to a building that exceeds the maximum FSR under clause 4.4 of the NLEP 2012.

The objectives of clause 4.4 of the NLEP 2012 are:

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

Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard. In assessing the proposal against the provisions of clause 4.6, it is noted that:

- iii) Clause 4.3 is not expressly excluded from the operation of this clause; and

- iv) The applicant has prepared a written request requesting CN vary the development standard and 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.

An excerpt of the applicant's request to vary the Development Standard is included beneath:

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

Newcastle Local Environmental Plan 2012.

1.2. What is the zoning of the land?

R2 Low Density Residential.

1.3. What are the objectives of the zone?

- i) To provide for the housing needs of the community within a low density residential environment;*
- ii) To enable for 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 proposed development meets the objectives of the zone, as it provided for the housing needs of the existing owners and the design is sympathetic to the scenic and aesthetic qualities of Merewether.

1.4. What is the development standard being varied? e.g. FSR, height, lot size

Floor space ratio.

1.5. Under what clause is the development standard listed in the environmental planning instrument?

Clause 4.4 Floor Space Ratio.

1.6. What are the objectives of the development standard?

1. *The objectives of this clause are as follows:*
 - a) *To provide an appropriate density of development consistent with the established centres hierarchy; and*
 - b) *To ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*
2. *The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.*
- 2A *Despite subclause (2), the maximum floor space ratio for a building on land in any zone in this plan is to be determined as if the area of the access laneway of battle-axe lot were not part of the area of the lot.*

The proposed development meets the objectives of the FSR development standard, as the proposed density is consistent with existing development in Merewether and the proposed density, bulk and scale of the development makes a positive contribution to the locality through its high quality architectural design.

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

0.75:1

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

0.88:1.

1.9. What is the percentage variation (between your proposal and the environmental planning instrument)?

Based on a site area of 250.30m² (excluding battle-axe handle driveway), the maximum floor area permissible in the site is 187.725m².

The dwelling has an existing GFA of 172m². The development proposes an additional 47m² of GFA. The development has a proposed total GFA of 219m². The proposed FSR is 0.88:1 and is therefore inconsistent with the maximum FSR by 17%.

1.10. How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

The proposed FSR enables the efficient and effective use of the site to meet the owner's needs without compromising the privacy or amenity of the site's occupants or those of neighbouring properties. The following matters have been considered during the design stage:

- a) *Overshadowing - the existing precedence of tall building along Frederick Street and the resulting overshadowing from these buildings has reduced the potential impacts of overshadowing for the proposed additions. The proposed development does not result in unreasonable overshadowing impacts to approved residential properties or development within the site's vicinity. All neighbouring residential properties received the minimum required 2 hours of continuous sunlight to the principal area of open space and living spaces during the winter solstice. The shadow diagrams show that the difference between the existing and proposed impact on solar access on adjoining developments is minimal.*
- b) *Privacy - the location of habitable spaces has been revised to minimise potential privacy impacts to adjoining neighbours. Habitable spaces are appropriately oriented and highlight windows included where appropriate, minimising potential impact on privacy of approved or potential residential developments in the site's vicinity.*
- c) *Visual impact - the proposal utilises the existing built form of the retained dwelling and will continue the use of similar materials to bring continuity to the proposal and continue the existing streetscape as seen from Merewether Beach carpark (note: the dwelling is not visible from Frederick Street, as it is located on a battle-axe lot).*

The proposal will utilise the existing dwelling and site conditions at No.64 Frederick Street. The site is small in nature and contains a shared driveway with No.62 and No.64a Frederick Street, which further burdens the site with the need for vehicle manoeuvrability to ensure that vehicles can safely use the shared driveway. This limits the footprint available for the dwelling. Despite this, the bulk and scale of the proposed development is considered to be consistent with the established development patterns within Merewether and will not be out of character in the locality.

The existing building footprint will be retained to ensure that the proposal has minimal impact on adjoining properties. The lot size, (not including the battle-axe handle) constrains the size of any building on the site and the maximum FSR is unreasonable when precedence has been set for large three storey dwellings in Merewether. The resulting built form is considered to be of a smaller scale compared to the two adjoining three storey buildings. The proposal seeks to maximise whilst reducing potential impacts on adjoining properties through its considered design.

1.12. Is the development standard a performance based control?

No.

1.13. Would strict compliance with the Standard be unreasonable or unnecessary? Why?

Compliance with the standard is considered to be unreasonable, based upon the existing precedence of larger scale and density in Merewether. This is seen through recent FSR variations in Merewether and the established development form in Merewether.

Strict compliance with the standard would prevent the site's development in order to meet the owners' needs to accommodate their large family. The proposal has demonstrated that a development of high quality, which maintains existing amenity, can be achieved under the current design, including compliance with setbacks, building separation distances, solar access and natural ventilation. The development is also of high aesthetic quality due to its architectural design. Strict compliance with the standard is unreasonable and unnecessary as it would not result in a better quality development, or a development with less impact on adjoining housing, than is currently proposed.

1.14. Are there Sufficient environmental planning grounds to justify contravening the development standard? Give details.

Environmental planning grounds that justify contravening the development standard include:

- a) The additional floor space will not result in unreasonable visual impacts;*
- b) The additional floor space will have a negligible effect on shadows resulting from the development;*
- c) The additional floor space will not impact privacy of adjoining residents;
and*
- d) Architectural features have been introduced to minimise potential impacts described above. The proposal results in a high quality design that will make a positive contribution to the locality.*

The proposed variation is considered to be reasonable and appropriate and aims to achieve the underlying objectives of the FSR, in the context of the site and its surroundings and is considered to be worthy of Council's support.

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); and*

- 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 R2 Low Density Residential zone in which the development is proposed to be carried out.
- c) The Secretary's concurrence to the exception to the Height of buildings development standard, as required by clause 4.6(4)(b) of the NLEP 2012, is assumed, as per Department of Planning circular PS 20-002 of 5 May 2020.
- d) The proposed development exceeds the maximum FSR by 31m². The proposed FSR exceedance is considered to be a minor variation and will have minimal impact on neighbouring properties in terms of privacy, overshadowing and view loss. The proposed bulk and scale of the development is in character with the surrounding locality. Further, the proposed development fundamentally retains the footprint of an existing building. The proposed exception to the FSR development standard of the NLEP 2012 is considered a minor variation and strict compliance would be unreasonable.

It is considered that the applicant has demonstrated that the standard is unreasonable in this instance and that the proposed scale of development is in character with the host building and surrounding locality. It is considered the proposal facilitates the ongoing use of an existing residential site in a single dwelling house capacity, providing for the housing needs of the community within a low density residential environment whilst suitably respecting the amenity, heritage and character of surrounding development and the quality of the environment, in accordance with the relevant R2 zone objectives. Further, it is considered the clause 4.6 variation request is well founded. The request for the maximum FSR to exceed 0.75:1 is supported.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 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 considered to be 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.

Amendments to the NDCP 2012 was recently on exhibition until 14 September 2020. The NDCP 2012 amendments revise outdated references, in addition to addressing minor issues related to ambiguity in clauses or misalignment with CN's policy or industry standards. Amendments are proposed to the following NDCP 2012 chapters which are considered relevant to this development:

- i) Section 4.02 Bush Fire Protection.
- ii) Section 7.03 Traffic, Parking and Access.
- iii) Section 7.08 Waste Management.
- iv) Section 9.00 Glossary.

These amendments do not alter the assessment criteria of these chapters and consequently do not impact on the acceptability of the development.

5.3 Any development control plan

Newcastle Development Control Plan 2012 (NDCP 2012)

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

Single Dwellings and Ancillary Development - Section 3.02

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

Street frontage appearance (3.02.03)

The proposed development retains the existing front setback of the dwelling house. Further, the placement of the dwelling on a battle-axe allotment shields it from street view.

The proposal is acceptable with regard to this section of the NDCP 2012.

Side / rear setbacks (building envelope) (3.02.04)

The proposed development does not alter existing ground floor setbacks or first floor boundary setbacks.

The proposed second storey is not setback the required 6m for a building height over 4.5m to the rear boundary. However, it is considered to be compatible to the applicable performance criteria and unlikely to create significant adverse impacts upon the amenity, privacy of existing views of adjoining residents particularly due to the rear boundary interface with the Merewether Beach Carpark rather than a common residential property. The non-compliance with the numerical standard is noted, and the applicable performance criteria noted as:

- 1) *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 proposal includes a non-compliance to the southern and northern side boundary building envelopes as demonstrated on the submitted sections. The proposal is considered acceptable when assessed against the applicable performance criteria noting that significant adverse impacts upon the amenity, privacy and views afforded to neighbouring properties are unlikely.

The proposed development is considered to be of an acceptable bulk and scale, does not create overbearing development for adjoining residents, and is therefore satisfactory and compliant with the relevant performance criteria with regard to this section of the NDCP 2012.

Landscaping (3.02.05)

The subject site has an area of 250.3m² and therefore the acceptable solutions require 10% of the site (25m²) to be landscaped.

The existing landscaping strip located along the rear boundary is to be retained and the proposed development includes an additional planter box located on the second floor balcony. An analysis of the existing site conditions concludes that minimal landscaping opportunity is available with the retention of the existing house and as no works are proposed at ground level it is unreasonable to apply the acceptable solution in this instance.

Accordingly, the retention of the rear boundary placed landscaping and additional planter box is considered acceptable in the circumstances of this particular case in accordance with the relevant performance criteria with regard to this section of the NDCP 2012.

Private open space (3.02.06)

The proposal seeks to retain the existing first floor balcony which is suitable to act as private open space. The proposed development is considered satisfactory in this regard.

Privacy (3.02.07)

The design of the proposed development, including suitable privacy mitigation measures through the placement of highlight windows, privacy screening to new deck areas where situated within the minimum separation distances and blank walls ensures the dwelling house does not unreasonably overlook living rooms or principal area of private open space of neighbouring dwellings.

The proposal is acceptable with regard to this section of the NDCP 2012.

Solar access (3.02.08)

The proposed development does not significantly overshadow living area windows and principal areas of private open space of adjacent dwellings. It is noted that a level of overshadowing is already experienced upon adjoining sites from the approved development however the submitted overshadowing analysis demonstrates existing and proposed shadows and accordingly it is concluded that the proposed development is compatible with the performance criteria, which states:

- i) *Development does not significantly overshadow living area windows and principal areas of private open space of adjacent dwellings.*

View sharing (3.02.09)

The proposed development is over 5m in height. Accordingly, the proposed development requires a merit based assessment having regard to the applicable performance criteria and planning principle for view sharing established by the NSW Land and Environment Court in *Tenacity Consulting Vs Warringah Council*.

Firstly, the proposal meets the performance criteria by allowing for view sharing with neighbouring properties where reasonable and by presenting a design consistent to that of existing development in the locality.

Secondly, consideration is given to the applicable planning principle which established a four-step process for considering the impact of a development on views:

- i) An assessment of the value of views to be affected by reference to their nature extent and completeness.
- ii) A consideration of how views are obtained and what part of the property the views are obtained from.
- iii) A qualitative assessment of the extent of the impact in terms of severity particularly as to whether that impact is negligible, minor, moderate, severe or devastating.
- iv) An assessment of the reasonableness of the proposal causing the impact particularly in terms of compliance with applicable planning controls and whether a different or complying design must produce a better result.

Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable.

It is considered the proposal has the ability to impact on existing views from 64a and 1/66 Frederick Street Merewether, which are placed to the west and south-west respectively.

Consideration to the view sharing principles having regard to those properties is addressed below, with the following key points noted:

- i) The existing views from 64a and 1/66 Frederick Street to the north-east are not considered to be iconic views and are partial views. The views are only minor distant views of the ocean beyond Merewether Beach in the case of 64a and only likely to be a land view toward Memorial Drive, Bar Beach from 1/66. These sites do not enjoy views of the interface between land and water and are obscured by existing built form placed closer to the east and north-east in addition to existing topography in the case of north-east views.
- ii) It is considered the view loss to these sites as a result of the proposed development is negligible with due regard to the significance of the existing view in accordance with the applicable planning principle. Further, it is noted that, in the case of 1/66 Frederick Street views to the east and south-eastern quadrant are not impacted by the proposal.
- iii) It is therefore considered that the proposal is reasonable as it would allow for an adequate level of view sharing between properties.

It is considered the proposal achieves the performance objective of this section having due regard to the planning principle.

Car parking and vehicular access (3.02.10)

The proposed development retains the existing car parking and vehicular access arrangements at the site and are considered satisfactory.

In conclusion, when assessed against the relevant provisions of the Single Dwellings and Ancillary Development section of the NDCP 2012, the proposed development is considered acceptable in relation to the abovementioned NDCP 2012 sections and achieves compliance with relevant acceptable solutions and performance criteria for building form, building separation and residential amenity.

The development establishes a scale and built form that is appropriate for its location. The proposal provides good presentation to the street and rear placed public domain with good residential amenity, while maintaining privacy for adjoining neighbours.

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.

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 or within 50m of the site.

Traffic, Parking and Access - Section 7.03

Existing parking and access arrangements at the subject site are retained through this development application. The proposal includes alterations and additions to an existing dwelling house with no additional occupancy proposed and accordingly the development is not considered likely to increase the level of traffic throughout the surrounding locality.

Section 7.05 - Energy efficiency

The proposal is acceptable having regard to this section.

Stormwater- Section 7.06 and Water Efficiency - Section 7.07

The proposed stormwater management is in accordance with the relevant aims and objectives of the NDCP 2012 with the proposal utilising the existing system in place at the site.

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.

Public Participation – Community Participation Plan (CPP)

The proposed development was publicly notified in accordance with CN's CPP and 6 submissions have been received in response.

The key issues raised within the submissions have been discussed previously in this report under the relevant policy section where applicable. Refer also to Part 5.8 of this report for more detailed discussion on remaining issues.

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 detailed in CN's Development Contributions Plans.

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 and the Environmental Planning and Assessment Regulation 2000. In addition, a 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.

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.

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

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 Public Participation Policy and 6 submissions were received during the notification period.

The key issues raised within the submissions have been discussed previously in this report under the relevant policy section where applicable. For the purposes of clarity, the following table provides a summary of the issues raised and a response to those issues.

Issue	Comment
Building Height non-compliance	<p>As discussed within section 5.1 of this report, the proposed height of the development exceeds the maximum allowable for the site under the NLEP 2012 however a written request under clause 4.6 (exceptions to development standards) of the NLEP 2012 has been submitted and is considered to be well founded and sufficient to allow for the exception to be granted as the objectives of clause 4.3 of the NLEP 2012 and the R2 zone are achieved. Accordingly, the proposed building height is considered acceptable.</p>
Floor Space Ratio non-compliance	<p>As discussed within section 5.1 of this report, the proposed FSR of the development exceeds the maximum allowable for the site under the NLEP 2012 however a written request under clause 4.6 (exceptions to development standards) of the NLEP 2012 has been submitted and is considered to be well founded and sufficient to allow for the exception to be granted as the objectives of clause 4.4 of the NLEP 2012 and the R2 zone are achieved.</p> <p>Further, the proposed FSR has been reduced through the submission of amended plans resulting in a reduction of FSR exceedance from 44% to 17%. In addition, the amended proposal effectively retains the existing building footprint. Accordingly, the proposed FSR is considered acceptable.</p>
Boundary setbacks / building envelopes non-compliance	<p>As discussed within section 5.3 of this report the proposed boundary setbacks and relationship to applicable building envelopes are considered acceptable having regard to the performance criteria of the NDCP 2012.</p>
Privacy impacts	<p>As discussed within section 5.3 of this report the proposed development is considered acceptable having regard to</p>

	<p>the acceptable solutions and performance criteria of section 3.02.07 of the NDCP 2012.</p> <p>In addition, a condition has been placed on the consent requiring privacy screening to be included on the southern side of the second storey deck.</p>
<p>Overshadowing impacts</p>	<p>As discussed within section 5.3 of this report the proposed development is considered acceptable having regard to the performance criteria of section 3.02.08 of the NDCP 2012 as it does not significantly overshadow living area windows and principal areas of private open space of adjacent dwellings.</p>
<p>Car Parking</p>	<p>As discussed within section 5.3 of this report the proposed development does not include alteration to existing car parking and access arrangements.</p>
<p>Roof Materials</p>	<p>The applicant has provided the following response having regard to this aspect: <i>'the design of the roof being low pitch will assist in minimising potential glare for adjoining properties. It should be noted that all roof materials are reflective to some extent and if a darker colour was chosen it would not be thermally efficient or BASIX compliant. The low pitch roof is considered the most effective method of reducing glare and ensuring that development is BASIX compliant.'</i></p> <p>Based on the above, the roof materials and form is considered acceptable.</p>
<p>View sharing</p>	<p>As discussed within section 5.3 of this report the proposed development is considered to allow for a reasonable level of view sharing noting that any views to be impacted are not iconic and are partial views and is therefore acceptable having regard to the performance criteria of section 3.02.09 of the NDCP 2012.</p>

5.9 The public interest

The proposed development is considered to be satisfactory having regard to the principles of ecologically sustainable development.

The development is in the public interest as it achieves the objectives of the R2 Low Density Residential land use zone and applicable principal development standards 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

Item 36 Attachment A: Submitted Plans - 64 Frederick Street, Merewether

Item 36 Attachment B: Draft Schedule of Conditions - 64 Frederick Street, Merewether

Item 36 Attachment C: Processing Chronology - 64 Frederick Street, Merewether

Item 36 Attachments A - C distributed under separate cover

ITEM-37 **DAC 20/10/20 - DA2020/00443 - 9 BEACH STREET, NEWCASTLE EAST - DWELLING HOUSE - ALTERATIONS AND ADDITIONS**

APPLICANT: **J P HELLOWELL**
OWNER: **P A COAKES**
NOTE BY: **GOVERNANCE**
CONTACT: **DIRECTOR GOVERNANCE / MANAGER REGULATORY, PLANNING AND ASSESSMENT**

PART I

PURPOSE

An application has been received seeking consent for alterations and additions to dwelling house at 9 Beach Street, Newcastle East.

The submitted application was assigned to Principal Development Officer David Lamb 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 Newcastle Local Environmental Plan 2012 (NLEP 2012) being more than a 10% variation (40% variation proposed).



Subject Land: 9 Beach Street, Newcastle East NSW 2300

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

The proposed development was publicly notified in accordance with the Community Participation Plan (CPP). One submission was received in response, which was subsequently addressed by the applicant during assessment and concerns were withdrawn by the adjoining neighbour.

Issues

- 1) Whether the proposed variation to the FSR development standard of the NLEP 2012 is justified.

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

Vote by division

- A. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of Newcastle Local Environmental Plan 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 Residential zone in which the development is proposed to be carried out;
- B. That DA2020/00443 for alterations and additions at 9 Beach 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 City of Newcastle's determination.

Political Donation / Gift Declaration

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

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

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

PART II

1.0 THE SUBJECT SITE

The subject site comprises Lot 1 DP 104145, being rectangular in shape and located on the southern side of Beach Street. The allotment has front and rear dimensions of 3.81m and side boundary dimensions of 21.945m with a total site area of approximately 83.6m². The site falls to the rear and is occupied by a two storey Victorian Filigree terrace, constructed around circa 1890.

Existing development on adjoining sites comprise of a two and three storey Victorian terrace construction. The general form of development in the immediate area predominantly consists of two-three storey Victorian terraces (southern side of Beach Street) and two-three storey recent and historical developments (northern end of Murray Avenue). Several modern infill three storey dwellings are also present on the northern side of Beach Street.

The site is located in the Newcastle East Heritage Conservation Area and is within the NSW Coastal Zone.

In terms of previous application history for the subject site, a development application (DA2013/0012) for alterations and additions to 9 and 11 Beach Street was approved by the DAC in 2013. The subject application is required to be reported to DAC given the proposed development's exceedance of the FSR principal development standard of 40% (1.40:1).

2.0 THE PROPOSAL

The applicant seeks consent for alterations and additions to a dwelling house which includes:

- i) Demolition of a single storey recent addition to the rear (DA2013/0012).
- ii) Erection of a two-storey attached pavilion addition with rooftop terrace.
- iii) Internal alterations to the existing attached terrace.
- iv) Minor landscaping works.

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 City of Newcastle's (CN) CPP. One submission was received in response. The concerns raised by the adjoining neighbour were addressed by the applicant during assessment and the concerns have been withdrawn by the adjoining neighbour.

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 No 55 - Remediation of Land (SEPP 55)

SEPP 55 requires that where land is contaminated, the consent authority must be satisfied that the land is suitable in its contaminated state or will be suitable after remediation for the purpose for which the development is proposed.

CN records do not identify any past contaminating activities on the site. 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 (Coastal Management) 2018 (SEPP Coastal Management)

SEPP Coastal Management applies to the subject site. Having regard to 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 proposed development will not adversely impact the biophysical, hydrological or ecological environment, nor geological coastal processes and features. The proposed development will not impact the water quality of sensitive coastal areas, and will not impact native flora, fauna or Aboriginal heritage.

A suitable stormwater design has been incorporated into the proposed development and effluent will be conveyed to the mains sewer. The proposed development satisfies the relevant provisions of SEPP Coastal Management.

State Environmental Planning Policy (Infrastructure) 2007 (ISEPP)

This policy facilitates the effective delivery of infrastructure across the State.

The proposal was required to be referred to Ausgrid for comment, in accordance with the ISEPP. The referral to Ausgrid generated no major 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 (Building Sustainability Index: BASIX) 2004

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

Newcastle Local Environmental Plan 2012 (NLEP 2012)

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

The subject property is included within the R3 Medium Density Residential zone under the provisions of the NLEP 2012, within which zone the proposed development is permissible with CN's consent.

The proposed development, for the purpose of a dwelling house, is consistent with the objectives of the R3 Medium Density Residential zone, which are:

- 1) *To provide for the housing needs of the community within a medium density residential environment.*
- 2) *Provide a variety of housing types within a medium density residential environment.*
- 3) *To enable other land uses that provides facilities or services to meet the day to day needs of residents.*
4. *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.*
5. *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.*

Clause 2.7 - Demolition Requires Development Consent

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

Clause 4.3 - Height of Buildings

The objectives of clause 4.3 of the NLEP 2012 are:

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

Under the NLEP 2012 the site has a height of buildings development standard of 10m. The proposed development will result in a total height of 8.96m and complies with this requirement.

Clause 4.4 - Floor Space Ratio

The objectives of clause 4.4 of the NLEP 2012 are:

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

Under the NLEP 2012 the site has an FSR development standard of 1:1.

The existing FSR of the development is 1.40:1 (117m²).

The proposed development will also result in a total FSR of 1.40:1 (117m²), equating to an exceedance of 40% above the prescribed maximum FSR for the subject land.

In this particular instance, the FSR of the proposed development is not being amended from the existing development given that the length of the addition will be reduced, additional vertical circulation (stairs) has been provided and the massing of the development has been reconfigured including a central terrace to the western boundary of the allotment.

The applicant has submitted a clause 4.6 variation request to this development 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 development standard (clause 4.4) in accordance with clause 4.6 of the NLEP 2012.

Clause 4.6 of the 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; and*
- b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

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

1. Clauses 4.4 of the NLEP 2012 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 standards, which demonstrates that:
 - (a) Compliance with the development standard is unreasonable in the circumstances of the case; and
 - (b) There are sufficient environmental planning grounds to justify contravening the development standard.

The applicant's request to vary the development standard relating to FSR makes the following points:

For the proposal, strict compliance is unreasonable due to;

- i) *The limiting area of the site, along with the zoning creates an unreasonable gross floor area for the intention of the structure.*
- ii) *The site was established in the 19th century as a working-class accommodation. It does not suit the needs of a contemporary family accommodation of today.*

Strict compliance would make the site unsustainable for the use as it is intended for.

Not relate to the immediate context to which is existing within strict compliance would compromise the objectives of;

- a) *providing an appropriate density of development consistent with the established Newcastle East hierarchy; and*

- b) *ensuring building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established Newcastle East hierarchy.*

It is our interpretation, given the established built context along with the zoning, medium density, that this numerical control as (sic) relatively low. We could assume that the 1:1 control has been prescribed to ensure that the associated development control provisions are achieved. For example, streetscape appearance, landscape and outdoor areas, privacy, solar access, view sharing, car parking. These related controls have all been addressed and satisfied - refer to the Statement of Environmental Effect, and Heritage Impact Statement for detailed justifications.

- a) *Newcastle East has many examples of its existing dwellings exceeding the prescribed FSR with no adverse impact to the context and its environment, amenity to which the zone applies.*
- b) *Recently approved FSR over runs have been documented by NCC, refer to image 02 for descriptions and mapping.*

Specifically, dwellings along Beach Street which are contributing items, have developed their properties in a scale matching or if not greater in gross floor areas. In detail the developments include #1, 3, 5, 7 and 19. Refer to image 1 Perspective View of Existing Bulk.

All dwellings along Beach Street exceed the prescribed built form envelope – as prescribed by NCC and derived by height and setback controls. While not specifically gross floor, the bulk does establish an alternative rhythm and density to which the proposed works seeks to relate.

As demonstrated in this assessment, the proposed development will be in the public interest as it is consistent with the objectives of the Newcastle City Centre and the objectives of the R3 Zoning in NLEP 2012.

The intent of the Newcastle East zone is to allow for the housing needs of the community within a medium density residential environment. The proposal is of a scale and height compatible with the character of the locality. The proposal's density aligns with the objectives of the zone which allows for a variety of housing types to meet the day to day needs of residents. In addition, the increase in density allows increased population which relates to the owners of #9 and enables them to occupy and support the commercial viability of the East End into the future.

There will be no significant adverse impact on the amenity of any existing nearby development. In turn there has been only one objection received during the notification period - which has been addressed during the assessment period. In addition, it has;

- a) *regard to the desired future character of residential streets as the proposed additions are to the rear of the property,*

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

This clause 4.6 Variation to Development Standard submission has been prepared in response to numerical non-compliance with the development standard for clause 4.4 – Floor Space Ratio as taken from Newcastle City Council's NLEP 2012. The extent of non-compliance is considered acceptable in the context of the site given the existing bulk surrounding the proposal.

As demonstrated within this submission, the overall massing, scale, bulk and height of the proposed development is consistent with the desired future character envisioned by Council for the Newcastle East Precinct - medium density.

The variation allows for the sustained domestic use of the land in an appropriate manner. Further, the proposal will not result in any unreasonable impact on amenity or any significant adverse environmental impacts as a result of the variations, which have been arrived at after a design excellence process that involved testing and amending the design to achieve the most appropriate massing of development for the site.

Refer to Sheet 5d of **Attachment A**.

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).
- 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 the 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 Department of Planning Circular 20-002 dated 5 May 2020.
- d) The proposed development exceeds the maximum FSR of 1:1 by 40%. The proposed development does not propose any additional gross floor area to the previously approved development application (DA2013/0012).

As a contributory building in the Newcastle East Heritage Conservation Area, it is considered that the proposed development will provide a positive contribution to the heritage significance of the Newcastle East Heritage Conservation Area.

There is unlikely to be any further intensification of use arising from the proposed development.

It has been suitably demonstrated the proposed building bulk and scale makes a positive contribution to this area, and the proposed floor space ratio is consistent with adjoining development.

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

Clause 5.10 - Heritage Conservation

The proposed development is located within the Newcastle East Heritage Conservation Area. A Statement of Heritage Impact (SoHI) has been submitted for the proposed development.

The SoHI has addressed the impact of the proposed development on the subject building, the Newcastle East Heritage Conservation Area and on nearby heritage listed items (A5 – Coal River Precinct, I484 – Column from original courthouse, I480 – Fort Scratchley Group, I485 – Coal Memorial).

It is considered that the proposed development preserves the contributory heritage value of the subject building, will not detrimentally affect the heritage significance of the heritage conservation area and on nearby heritage listed items, and is satisfactory with respect to heritage merit.

Clause 6.1 - Acid Sulfate Soils

The site is affected by Class 5 acid sulfate 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 considered to be 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

Amendments to the NDCP 2012 was recently on exhibition until 14 September 2020. The NDCP 2012 amendments revise outdated references, in addition to addressing minor issues related to ambiguity in clauses or misalignment with CN's policy or industry standards. Amendments are proposed to the following NDCP 2012 chapters which are considered relevant to this development:

- i) Section 4.02 Bush Fire Protection.
- ii) Section 7.03 Traffic, Parking and Access.
- iii) Section 7.08 Waste Management.
- iv) Section 9.00 Glossary.

These amendments do not alter the assessment criteria of these chapters and consequently do not impact on the acceptability of the development.

5.3 Any development control plan

Newcastle Development Control Plan 2012 (NDCP 2012)

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

Single Dwellings and Ancillary Development - Section 3.02

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

Street frontage appearance (3.02.03)

The setback of the development from the street frontage boundary remains unchanged under this application.

Side / rear setbacks (building envelope) (3.02.04)

In accordance with section 6.02.01 (Alterations and additions in heritage conservation areas), building envelopes do not apply in heritage conservation areas. As the setbacks to side and rear boundaries remains predominantly unchanged, the proposed development is considered satisfactory in this regard.

Landscaping (3.02.05)

Given the constrained and developed typology of existing site, it does not provide for landscaping in its current form.

The proposed development also does not meet numerical landscaping controls under this section of the NDCP 2012. Notwithstanding, the applicant is proposing two soft planting zones within ground level terraces and three soft planting zones to the roof terrace area. This is considered acceptable in accordance with the relevant performance criteria within this section of the NDCP 2012.

Private open space (3.02.06)

The private open space of the development remains unchanged under this application and is considered to be usable and meets the living needs of the occupants of the dwelling house.

Privacy (3.02.07)

The privacy measures incorporated into the proposed development will not unreasonably overlook adjoining residences.

Any privacy impacts resulting from proposed roof terrace (3.4m x 4m) to the following aspects have been addressed as follows:

- i) West and north – 1800mm privacy screening have been incorporated to prevent privacy and overlooking impacts.
- ii) South-west and east – views are obscured given the plan layout and form of adjoining properties, elevation of the proposed terrace and the setback of the balustrade from the perimeter parapet of the proposed development.
- iii) South and south-east – a 1800mm frosted screen exists to the north elevation of the existing development at 9 Murray Avenue. In addition, fenestration to the north elevation of this development as shown on Sheet 5a of **Attachment A** are non-living room areas, in accordance with the definition in the NDCP 2012. It is considered the proposed development will not result in additional privacy and overlooking impacts to this adjoining development.

Having regard to the relevant provisions of this section, the proposed development is considered satisfactory with respect to privacy and overlooking impacts.

Solar access (3.02.08)

An analysis of the overshadowing diagrams indicates that the development does not significantly overshadow living area windows and principal areas of private open space of adjacent dwellings. The proposed development is considered satisfactory in this regard.

View sharing (3.02.09)

With regard to the planning principle for view sharing (Tenacity Consulting v Warringah [2004] (NSWLEC 140)), it has been assessed that the architect has proposed a design which demonstrates relative compliance with CN's planning controls.

Given the existing, approved development already impedes available views for adjoining properties, the applicant has suitably demonstrated that the proposed development is considered reasonable having regard to the established principles for assessing view sharing. Refer to Sheet 5b of **Attachment A**.

Car parking and vehicular access (3.02.10)

Given the subdivision layout and the historical built form, there is no provision for onsite carparking. This historical deficiency occurs for many properties within the Newcastle East locality and the proposal is satisfactory in its current form.

In conclusion, the proposed 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 provides good presentation to the street with good residential amenity, while maintaining privacy for adjoining neighbours.

Soil Management - Section 5.01

The submitted site plans stipulate that sediment and erosion management will be undertaken in accordance with the best practice guidelines outlined by CN. A condition is recommended to be placed on the consent to ensure adequate sediment and erosion control measures are in place for the construction period.

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 proposed development is located adjacent to local and state heritage items, including A5 – Coal River Precinct, I484 – Column from original courthouse, I480 – Fort Scratchley Group, I485 – Coal Memorial. The following referral response has been received from CN's Heritage Officer:

Section 5.05.06 requires development in the vicinity of heritage items to be designed and located in a way that does not impact on the significance of the heritage item. The proposal will not impact heritage items in the vicinity as it will not be visible in the streetscape. No views to or from heritage items will be impacted...

... In summary, the application is generally consistent with the relevant provisions of section 5.05 (Heritage Items) and 6.02 (Heritage Conservation Areas) of the NDCP 2012, and satisfies the objectives of clause 5.10 (Heritage Conservation) of the NLEP 2012, being to conserve the heritage significance of heritage conservation areas.

The proposed development has been assessed having regard to the provisions of section 5.05.06, with respect to development in the vicinity of heritage items and is considered satisfactory.

Archaeological Management - Section 5.06

The proposed development is located in an archaeological study area (Suters Architects, 1997), but is not nominated as an inventory item. The following referral response has been received from CN's Heritage Officer:

The site is in the vicinity of listed archaeological heritage item, Coal River Precinct (A5). A chance finds procedure is recommended to be included as a condition of consent.

The proposed development is considered satisfactory in this regard, with an advisory condition to be included in any development application to be issued.

Newcastle City Centre - Section 6.01

The proposed development is located in the Newcastle East Heritage Conservation Area and is considered to be satisfactory with respect to the relevant principles of this section.

Heritage Conservation Areas - Section 6.02

The proposed development is located in the Newcastle East Heritage Conservation Area. The following referral response has been received from CN's Heritage Officer:

The proposal is generally consistent with the objectives of section 6.02.01 (Alterations and Additions in HCAs):

- i) The proposed development retains the existing building on the site, and the principal frontage of the building is conserved. Original features such as the bullnose first floor verandah, timber joinery, windows and roof form are retained and made good. Unsympathetic elements at the facade are to be removed.*
- ii) Due to the dense pattern of development on Beach Street, the additions will not be visible in the streetscape. The additions will be visible from the lane at the rear of the property. However, this lane is accessible to pedestrians only, is concealed from the public domain, does not provide access to Shortland Esplanade and is not an established pathway in the area, and is only used by occupants of the adjoining properties to access their backyards. The lane is not considered to be a streetscape in the same manner as Beach Street.*
- iii) The additions are set lower than the ridge height of the existing building. Although the design of the additions are of a contemporary character and are significantly different to the existing character of the host building, this is considered to be an acceptable approach as the additions are not visible from the street, retain the form and profile of the host building in its entirety, and allow for a clear distinction between the old and new phases of development on the site.*
- iv) The additions are generally consistent with the massing, bulk and scale of adjacent rear additions of other contributory dwellings on Beach Street. There is a strong precedent for rear extensions of a similar building envelope at the rear of these contributory dwellings. Several contributory buildings in the subject row of terraces have two-storey additions at the rear built to or near to the rear boundary. The proposed addition does not exceed the height of neighbouring extensions, with the exception of the stairwell, which is located toward the middle of the site, reducing its visual impact.*
- v) Existing doors and windows visible from the street are retained. The two proposed skylights will not be visible from the street due to the nature of surrounding development.*

- vi) *The symmetry of the contiguous row of terraces houses as viewed from Beach Street is maintained.*

The proposal is generally consistent with the objectives of section 6.02.02 (Materials and Details in HCAs). The materials of the proposed addition are contemporary but are considered to be sympathetic to the local character and will not be visible from the street. As stated above, the contemporary character of the addition is considered to be an appropriate design approach in this instance. The use of painted brickwork, sheet metal and timber reference the materiality of the host building and also appear throughout the HCA. The proposed colour scheme is neutral and unobtrusive. Traditional building elements of the host building that are visible from the street are retained and made good in materials that match the existing.

The proposed development is consistent with the desired future character of the Newcastle East HCA, as it preserves the appearance of the contributory building on the site, including its presentation in the existing group of contributory terraces facing Beach Street; maintains the existing subdivision pattern; does not impact significant historical elements of the public domain; is generally consistent with the built form of adjoining properties; and protects the existing appearance of Newcastle East and views from the public realm to the coast.

In summary, the application is generally consistent with the relevant provisions of section 5.05 (Heritage Items) and 6.02 (Heritage Conservation Areas) of the NDCP 2012, and satisfies the objectives of clause 5.10 (Heritage Conservation) of the NLEP 2012, being to conserve the heritage significance of heritage conservation areas.

It is considered that the proposed development is in line with the principles for development in a Heritage Conservation Area, in accordance with the provided Statement of Heritage Impact and the relevant objectives of this section.

Traffic, Parking and Access - Section 7.03

Given the historical subdivision pattern, no on-site car parking is available. In this instance, car parking is considered a historical deficiency in accordance with this section of the NDCP 2012.

Stormwater- Section 7.06 and Water Efficiency - Section 7.07

Stormwater management is considered satisfactory in accordance with the relevant aims and objectives of the NDCP 2012.

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.

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 and the Environmental Planning and Assessment Regulation 2000. In addition, a 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.

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 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. One submission was received during the notification period. The concerns raised by the adjoining neighbour were addressed by the applicant during assessment and the concerns have been withdrawn by the adjoining neighbour.

5.9 The public interest

The proposed development is considered to be satisfactory having regard to the principles of ecologically sustainable development.

The proposed development will not result in the disturbance of any endangered flora or fauna habitat or otherwise adversely impact on the natural environment.

The development is in the public interest as it achieves the objectives of the R3 Medium Density Residential land use zone 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

Item 37 Attachment A: Submitted Plans – 9 Beach Street, Newcastle East

Item 37 Attachment B: Draft Schedule of Conditions – 9 Beach Street, Newcastle East

Item 37 Attachment C: Processing Chronology – 9 Beach Street, Newcastle East

Item 37 Attachments A - C distributed under separate cover

ITEM-38 **DAC 20/10/20 - DA2019/00824 - 33 LLOYD STREET, MEREWETHER - RESIDENTIAL ACCOMMODATION - ALTERATIONS AND ADDITIONS, CHANGE OF USE TO DUAL OCCUPANCY AND TWO LOT STRATA SUBDIVISION**

APPLICANT: **PIPER PLANNING**
OWNER: **D F MCNALLY & D MCNALLY**
REPORT BY: **GOVERNANCE**
CONTACT: **DIRECTOR GOVERNANCE / MANAGER REGULATORY, PLANNING AND ASSESSMENT**

PART I

PURPOSE

An application (DA2019/00824) has been received seeking consent for Residential Accommodation - alterations and additions, change of use to dual occupancy and two lot strata subdivision at 33 Lloyd Street, Merewether.

The submitted application was assigned to Senior Development Officer, Ian Clark for assessment.

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

The additions proposed under the application result in the development being approximately 167m² Gross Floor Area (GFA) above the maximum GFA controlled for the site, resulting in an FSR of 1:1. Under the NLEP 2012 the site has a maximum FSR of 0.6:1.

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

The proposed development was publicly notified in accordance with the Newcastle Development Control Plan 2012 (NDCP 2012) Section 8 'Public Participation' and six submissions of objection and one submission of support have been received in response. It is noted that the development was placed on public exhibition prior to the adoption of City of Newcastle (CN's) Community Participation Plan.



Figure 1 - Subject Land: 33 Lloyd Street Merewether NSW 2291

The objectors' concerns included:

- i) Incompatible with surrounding development
- ii) Floor space ratio exceedance
- iii) Stormwater Management
- iv) Accuracy of reduced level (RL) figures on the submitted plans and proposed height based on past illegally constructed height
- v) Privacy
- vi) Parking and access impacts
- vii) Traffic impacts
- viii) Streetscape impacts

Details of submissions received are summarised at section 3.0 of this report and the concerns raised are addressed as part of the Planning Assessment at section 5.0.

Issues

- 1) Contravention of the principal development standard clause 4.4 FSR, under the NLEP 2012.

Conclusion

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

RECOMMENDATION

Vote by division

- A. That the Development Applications Committee note the objection under clause 4.6 Exceptions to Development Standards of the Newcastle Local Environmental Plan 2012, against the development standard at clause 4.4 Floor Space Ratio, and considers the objection to be justified in the circumstances and to be consistent with the objectives of clause 4.4 and the objectives for development within the R2 Low Density Residential zone in which the development is proposed to be carried out; and
- B. That DA2019/00824 for alterations and additions, change of use to dual occupancy and two lot strata subdivision at 33 Lloyd Street, Merewether be approved, and consent granted, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment B**; and

C. That those persons who made submissions be advised of CN's determination.

Political Donation / Gift Declaration

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

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

The applicant has answered **NO** to the following question on the application form: *Have you, or are you aware of any person having a financial interest in the application, made a 'reportable political 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 DP 38005 Lot 3, 33 Lloyd Street, Merewether and is a rectangular site 401.3m² in area. The site is located on the northside of Lloyd Street, Merewether. The subject site has a street frontage of 14.63 metres to Lloyd Street.

The site consists of an existing three storey single dwelling, which as a function of the topography, displays two substantial sub-floor void spaces. The current building presents to Lloyd Street (south elevation) as a single storey dwelling and due to the significant slope, the rear north elevation presents as three storey. A single driveway crossover exists along with retaining walls through the site mitigating the slope of the site.

The existing development on the surrounding sites includes single dwellings and multi dwelling housing along Scenic Drive. The site is within a coastal environment and benefits views to the north and northeast along Newcastle's coastline.

2.0 BACKGROUND AND THE PROPOSAL

Background DA2000/2398 – Three Storey Single Dwelling

The existing development on the site was given consent on 30 March 2001 (DA2000/2398) by the Development Assessment Committee.

During construction concern was raised regarding the exceedance of building height from the approved development. It was confirmed the constructed building exceeded the approved height with variations to lower, middle and upper floor level RLs. Two modifications to DA2000/2398 were submitted and undetermined.

Subsequently, mediation through the NSW Land and Environment Court occurred, resulting in removal of roof features to decrease the overall height. The construction continued post mediation outcomes and a final occupation certificate was issued by CN. Additionally, a building certificate BC2003/0937 was issued for constructed works in December 2003.

It is to be noted the proposal does not include further alterations or additions that impact the outcomes from the mediation processes of the determination of DA2000/2398 in 2001.

Proposal

The applicant seeks consent for alterations and additions, change of use to attached dual occupancy and two lot strata subdivision. The development comprises of the following works:

- i) Upper floor level changes include:
 - a) Street frontage - new entry ramp to existing front door
 - b) Shade sail over new entry ramp
 - c) New driveway access for new dwelling located to southeast
 - d) Shade sail for upper level rear balcony (space is the allocated private open space for dwelling one)
 - e) Clothes drying area located on upper floor balcony
 - f) All of the upper floor level is allocated to dwelling one
- ii) Middle floor level changes include:
 - a) Additions within the subfloor void space including a garage and entry foyer (vehicle and pedestrian access for dwelling two)
 - b) Removal of several walls to create kitchen / living / dining area and master bedroom for dwelling two
 - c) Enlarge the middle level balcony to replicate upper floor balcony (dwelling two)
- iii) Lower floor level changes include:

- a) Additions within the subfloor void space including alterations of the existing level and the creation of 2 bedrooms and lounge (dwelling two)
- b) Dwelling two is proposed to use the outdoor ground level space as open space

The proposal has been amended during the assessment process, with the following amendments:

- i) Deck extension on the western elevation on the upper floor level has been removed
- ii) Upper floor balcony shade sail revised in height to fit within the required building envelope as per the NDCP 2012 requirements
- iii) Clothes drying area for dwelling one relocated to upper level balcony
- iv) Clothes drying area for dwelling two relocated to lower floor open space
- v) Garbage storage for dwelling one located within store off garage
- vi) Existing stairs on western side preserved
- vii) Eastern side proposed stairs deleted and existing arrangements to remain
- viii) Car parking access has been amended to meet technical requirements regarding gradients and transitions required in AS2890.1 – Off-street car parking facilities

A copy of the current amended plans is at **Attachment A**. The amended plans form the basis of this assessment.

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 the requirements of the *Environmental Planning and Assessment Act 1979* (EP&A Act), the associated Regulation and the NDCP 2012. Seven submissions (six in objection and one in support) were received in response. The concerns raised by the objector in respect of the proposed development are summarised as follows:

- i) Incompatible with surrounding development
- ii) FSR exceedance unacceptable
- iii) Stormwater management

- iv) Accuracy of RL figures on the submitted plans
- v) Proposed height is based on the previously approved dwelling and illegally exceeded the height approved
- vi) Privacy
- vii) Parking and access impacts
- viii) Traffic impacts
- ix) Streetscape impacts

The objectors' concerns are addressed under the relevant matters for consideration in this report.

4.0 INTEGRATED DEVELOPMENT

The proposal is integrated development pursuant to section 4.46 of the EP&A Act, as approval is required from Subsidence Advisory NSW under section 22 of the *Coal Mine Subsidence Act 2017*. The applicant has provided a letter from Subsidence Advisory NSW who granted their 'General Terms of Approval', on 4 June 2019 (copy included at **Attachment D**).

5.0 PLANNING ASSESSMENT

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

5.1 Provisions of any environmental planning instrument

State Environmental Planning Policy No 55 - Remediation of Land (SEPP 55)

This policy applies to the proposed development and contains planning controls for the remediation of contaminated land.

Clause 7 provides that prior to granting consent to the carrying out of any development on land the consent authority is required to give consideration as to whether the land is contaminated and, if the land is contaminated, whether the land is suitable for the purpose of the development or whether remediation is required.

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

State Environmental Planning Policy (Coastal Management) 2018

SEPP Coastal Management applies to the subject site. The site is identified to be within the Coastal use area. Having regard to 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 proposed development will not adversely impact the biophysical, hydrological or ecological environment, nor geological coastal processes and features. The proposed development will not impact the water quality of sensitive coastal areas, and will not impact native flora, fauna or Aboriginal heritage.

A suitable stormwater design has been incorporated into the proposed development and effluent will be conveyed to the mains sewer. The proposed development satisfies the relevant provisions of SEPP Coastal Management.

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

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

Newcastle Local Environmental Plan 2012 (NLEP 2012)

Clause 2.1 Land Use Zones

The subject property is included within the R2 Low Density Residential zone under the provisions of the NLEP 2012, within which zone the proposed development is permissible with CN's consent.

The proposed development is consistent with the objectives of the 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 development will result in a change of use of the existing building to an attached dual occupancy. The proposed use is consistent with the zone objectives of R2 Low Density Residential particularly the third limb.

Clause 2.6 Subdivision — consent requirements

The proposal includes strata subdivision and requires consent. The proposal is satisfactory in this regard.

Clause 4.3 Height of Buildings

Under the NLEP 2012 the site has a maximum height of 8.5m. The proposal does not include additions or alterations to change the existing building height.

Clause 4.4 Floor Space Ratio (FSR)

The proposed development will result in a total FSR of 1:1, equating to a GFA exceedance of 163m² or 68% above the prescribed maximum FSR for the subject land of 0.6:1.

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

Clause 4.6 Exceptions to development standards

Clause 4.6 (Exceptions to development standards) of the NLEP 2012 enables variations to development standards including clause 4.4 FSR.

The proposal includes a building that exceeds the FSR under clause 4.4 of the NLEP 2012. The applicant has submitted a clause 4.6 request to address the variation to FSR development standard.

The objectives of clause 4.6 of the NLEP 2012 are:

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

Under the NLEP 2012 the site has a maximum FSR of 0.6:1. The submitted FSR of 1:1, equating to a GFA exceedance of 163m² or 68% above the prescribed maximum FSR for the subject land. Clause 4.6 of the NLEP 2012 enables consent to be granted to a development even though the development would contravene a development standard.

The area of GFA exceedance is described to encompass existing void space within the existing building footprint (refer to figure 2 below).

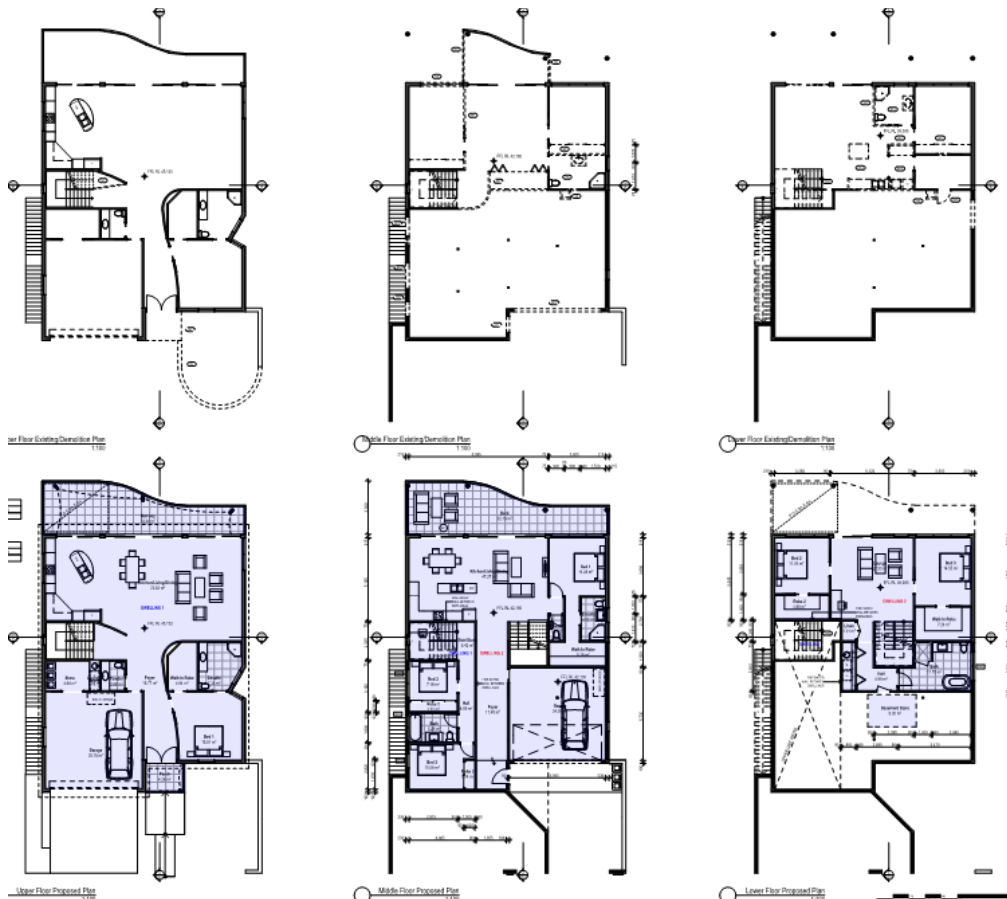


Figure 2 - Existing and proposed floor plans

An assessment of the applicant's clause 4.6 Variation Request to the maximum FSR development standard is provided below.

i) Is the provision to be varied a development standard?

Clause 4.4 FSR 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.

ii) Is the development standard excluded from the operation of Clause 4.6?

The FSR development standard is not expressly excluded from the operation of clause 4.6.

iii) What is the applicable numerical standard and what is the variation proposed?

The applicable maximum FSR is 0.6:1. The proposal has a maximum FSR of 1:1 which represents a 68% variation (163m²) to this development standard.

iv) Has it been demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

In the Land and Environment Court Judgement of *Wehbe vs Pittwater Council* [2007] NSW LEC 827, (the *Wehbe* judgement) Chief Justice Preston outlined the rationale for varying development standards and the circumstances under which strict compliance with them may be considered unreasonable or unnecessary. At paragraph 43 of this judgement, Preston CJ noted:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

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

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

Development Standard and Zone Objectives

The applicant's submitted clause 4.6 variation request to the FSR development standard is relying on the first and the fourth approaches outlined in the *Wehbe* judgement.

The objectives of clause 4.4 FSR are to be considered in accordance with the NLEP 2012 zone objectives (as extracted in this report) and are extracted as follows:

“Clause 4.4 - Floor space ratio

- (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’s clause 4.6 variation request relies on the first approach in the Webbe judgement demonstrating that the underlying planning objectives are satisfied notwithstanding the numerical non-compliance as follows:

‘Strict compliance is considered unreasonable for the following reasons:

The development exists within a diverse built form context of substantial single dwelling houses and dual occupancy forms. The location is arguably the premier streetscape / geographical setting within the City and as such, inherent land values warrant high levels of quality capitalisation.

The existing dwelling is a highly contributive structure within the setting. It is obviously a considered architectural form and whilst slightly aged, maintains a quality visual contribution to its surrounds.

The proposal occurs within the existing dwelling house footprint, utilising sub-floor void space. As such, there is no discernible change to the premise that would give indication to the non-compliance beyond that of the existing structure (beyond the new drive crossing). We therefore submit that the proposal is both contextually appropriate and a unique adaptive approach to preserving and improving a contributory structure. These alterations enable ageing in place for its occupants and potentially, the same for an additional family.

The proposed development derives an architectural form, utilising the full capacity of the existing dwelling footprint. The building form remains, however an additional drive crossing and variation to balcony arrangements are proposed. In optimising the use of the building footprint and sub-floor void space, the development proposes a numerical breach of the FSR provision (being 68%).

Given the surrounding architectural references and preservation of the dwelling footprint, we submit that there is no indication within the development that it exceeds the standard as it appears contextually appropriate and consistent to the existing. In pursuing appropriate utilisation of the existing sub-floor void spaces, an exceedance to the Development Standard has resulted.

We highlight that in the immediate context, numerous buildings would appear to exceed the current Development Standard that applies to the locality. We contend that this is the case as a review of the footprint areas of adjoining premises along Lloyd Street display very similar alignments (front, rear and sides) on relatively uniform lot sizes. Given all display similar responses to topography, these adjoining references would display very similar floor areas.

It is our view that development consistent to the character of the locality enables the objectives underpinning the NLEP 2012 floor space ratio development standard to be satisfied. This is further reinforced by the approach utilising development within the existing footprint.

The non-compliant portion of the development does not impact on the architectural merits of the building. The expansion of the existing floor area within the sub floor areas of the dwelling will not increase the overall bulk and scale of the existing dwelling. The proposal consolidates a significant capital investment and in doing so contributes to the viability of the area. We submit that in view of these matters, the design provides a high-quality outcome with clear and compelling environmental planning benefits.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard through adherence to the objectives of the development standard. As demonstrated, the objectives of the standard have been achieved.

The applicant is considered to have adequately demonstrated that compliance with the development standard is unreasonable in this instance. Particularly given there is no visual change to the building footprint and dual occupancy development is a permitted alternative form of residential accommodation in the zone. The objectives of the standard and zone are considered to be achieved.

v) Has it been demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard?

Given the above discussion, it is considered that there are sufficient environmental planning grounds to justify the proposed variation to the maximum FSR development standard in the circumstances of this case.

vi) Is the development in the public interest because it is consistent with the objectives of the particular standard and, the objectives for development within the zone?

The applicant has considered the public interest and provided the following comments:

'The assessment above and shown throughout the documentation submitted to Council, demonstrates that the resultant environmental impacts of the proposal will be satisfactory.

The proposed variation to the development standard is 163m². Notwithstanding the variation, the proposed works represent a considered development that addresses the site constraints, streetscape and relevant objectives of both the standards and the zone. The proposal enables an adaptive use within an existing footprint, with no discernible impact beyond the building footprint. It enables ageing in place and alternate accommodation options for residents of the locality who would seek to stay in the area but graduate out of their grand residences. On this basis it is considered socially beneficial.

The proposal provides for a better environmental planning outcome as the development responds to the site setting, whilst achieving a quality architectural outcome within the built form context. A compliant outcome would potentially result in residential accommodation inconsistent to the objectives of the established centres hierarchy.

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

Clause 4.6 states that development consent must not be granted for development that contravenes a development standard unless 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 to be carried out.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard under Part 4.

The development as proposed will be in the public interest as it is consistent with the objectives of the development standard (being clause 4.4).

The above assessment and extract provided from the applicant's 4.6 application has demonstrated that the proposed development is consistent with the objectives of the maximum FSR development standard and it is consistent with the objectives of the Zone R2 Low Density Residential. Consequently, the development is considered to be in the public interest.

vii) Has the concurrence of the Secretary been obtained?

Planning Secretary concurrence clause 4.6(4)(b)

It is advised that the proposal requires approval of the Development Applications Committee due to the proposed FSR variation being above the delegation provisions for clause 4.6 variations. This is also in accordance with the provisions of clause 4.6(4)(b) (as extracted below) and the Planning Secretary's assumed concurrence requirements under planning system circular PS2020-002.

- “(4) Development consent must not be granted for development that contravenes a development standard unless —*
- (b) the concurrence of the Planning Secretary has been obtained.”*

The Planning Secretary’s concurrence is assumed based on planning system circular PS 2020-002, and contains the following restrictions:

“The Secretary’s concurrence may not be assumed by a delegate of council if:

- i) The development contravenes a numerical standard by greater than 10%; or*
- ii) The variation is to a non-numerical standard”*

Due to the FSR variation being greater than 10% (ie. 68%) the proposed development requires determination by the Development Applications Committee.

viii) Is this clause 4.6 request to vary a development standard supported?

Yes, it is concluded that the applicant’s clause 4.6 variation request has satisfied the relevant tests under this clause. The clause 4.6 variation request is therefore supported.

Clause 6.1 – Acid Sulfate Soils

The site is affected by Class 5 acid sulphate soils and the proposed development is considered satisfactory in this regard.

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

Draft amendments to the NDCP 2012 are currently on exhibition. The draft Development Control Plan amendments revise outdated references, in addition to addressing minor issues related to ambiguity in clauses or misalignment with CN’s policy or industry standards. Amendments are proposed to the following Development Control Plan chapters which are considered relevant to this development:

- i) Section 4.02 Bush Fire Protection
- ii) Section 7.03 Traffic, Parking and Access
- iii) Section 7.08 Waste Management
- iv) Section 9.00 Glossary

These amendments do not alter the assessment criteria of these chapters and consequently do not impact on the acceptability of the development.

5.3 Any development control plan

Newcastle Development Control Plan (NDCP 2012)

The main planning requirements of relevance in the NDCP2012 are discussed below.

Residential Development - Section 3.03

The objective of this section of the NDCP 2012 is to improve the quality of residential development. This can be achieved through a design that has a positive impact on the streetscape through its built form, maximising the amenity and safety on the site and creating a vibrant place for people to live in a compact and sustainable urban form.

The alterations and additions are within the void spaces that exist within the existing building's footprint.

The proposal is consistent with section 3.03 with comments provided:

Principal controls (3.03.01)

A. Frontage widths

The subject site has a driveway. The frontage to the street is 14.63m. The frontage of the site satisfies the performance criteria of the NDCP 2012.

B. Front setbacks

There is no change proposed.

C. Side and rear setbacks

There is no change proposed.

D. Landscaped Area

The proposal includes a variation to Landscaping. The NDCP 2012 requires the provision of a minimum 30% and the proposal is for 17%. The existing footprint is not proposed to change, and the existing landscaping is considered mature and developed. The original approval for the site (DA2002/2398) provided for satisfactory landscaping within the front and rear setbacks. The proposal is to utilise the existing mature landscape established on the site as part of the proposal. Therefore, the significance of the established landscaping is considered to achieve the objectives and is acceptable.

Siting the development (3.03.01)

There is no change to the scale, siting or form of the development other than an increase in the size of the middle level balcony and shade structures on the upper floor balcony. The additional driveway access is not considered to distract public domain interface. The development provides an appropriate interface with the public domain and allows for clear delineation between the private and public space. Direct visibility is provided to the front door and garage of each dwelling along paths and driveways from the public domain. The proposal is considered acceptable (refer to Figure 3 below).

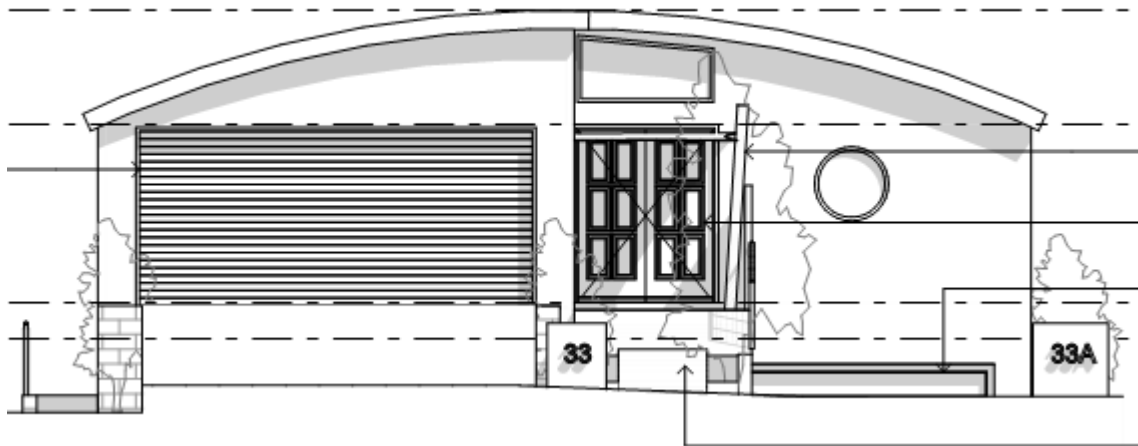


Figure 3: Front elevation

Amenity (3.03.03)

The design and orientation of the dwellings living, and outdoor areas of the development is not likely to unreasonably impact upon the amenity or privacy of adjoining dwellings. The internal amenity is also considered to be satisfactory.

Sufficient solar access is available to habitable rooms and private open space areas within the development to generally satisfy the relevant NDCP 2012 objectives and is considered adequate with respect to the orientation of the site.

The private open space areas provided to each dwelling are considered appropriate having regard to the nature of the development and their intended purpose. They provide reasonable levels of solar access and connectivity and are conducive to passive and active private recreational pursuits. The NDCP 2012 requires dwellings to have a minimum of 16m² of private open space, with a minimum dimension of 3m, adjacent to either a living or dining room or kitchen and 50% of this area is covered to provide shade and protection from rain.

Storage

Adequate storage has been provided for the development in accordance to the NDCP 2012 requirements.

Car and bicycle parking

The development has been designed to include one car space per dwelling, through the provision of a single garage. The driveway within the front setback provides for additional off-street parking for each of the garages. Sufficient area is available on site for secure bicycle storage and parking. The design of the car parking area meets the requirements of the NDCP 2012.

Visual Privacy

The development does not adversely impact on the privacy of adjoining or adjacent neighbours. The development has also been designed to ensure adequate visual privacy between the two dwellings. This is achieved through the mirroring of the dwellings together with provision of fencing. Planting of adequate landscape treatment (as required by recommended conditions of consent) will also assist in ensuring the objective of the control is satisfied.

Acoustic privacy

The development has been designed to ensure the potential transfer of noise between dwellings is minimised. The location of openings, plant and recreational areas have been suitably positioned on site.

Noise and pollution

There is no development or infrastructure within close proximity that generates noise levels that will detrimentally impact upon the use of the living and bedrooms of the dwellings.

Configuration (3.03.04)

The proposed development is not inconsistent with the objectives of achieving universal design features and there is scope to achieve flexibility in the design.

Environment (3.03.05)

A. Energy efficiency

A valid BASIX certificate has been submitted for the development. Conditions requiring compliance with BASIX requirements ensures that the development will incorporate passive environmental design.

B. Water management and conservation

Subject to the inclusion of conditions of consent the proposed development achieves compliance with water management and conservation requirements.

C. Waste management

Suitable waste storage and collection can be achieved for each dwelling. The proposed method of waste storage and collection is discussed further in section 7.08 of this report.

Conclusion

The proposed 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 appropriate for its location. The proposal provides good presentation to the street with good residential amenity, while maintaining privacy for adjoining neighbours.

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.

Safety and Security - Section 4.04

The proposal achieves good surveillance by providing clear sight lines between private and public spaces, effective lighting of public places, suitable landscaping and activation of the Lloyd Street frontage.

Social Impact - Section 4.05

It is considered unlikely that a development of the nature proposed would result in increased anti-social behaviour. The development provides for increased housing choice within the area, which is considered a positive social outcome.

Soil Management - Section 5.01

The submitted site plans stipulates that sediment and erosion management will be undertaken in accordance with the best practice guidelines outlined by CN.

A condition is recommended to be placed on the consent to ensure adequate sediment and erosion control measures are in place for the construction period.

Land Contamination - Section 5.02

Land contamination has been considered in this assessment report, in accordance with SEPP55.

Vegetation Management - Section 5.03

The proposal does not involve the removal of any trees.

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 proposal is considered a 'Category 1' development. Notwithstanding the proposal demonstrates that the development provides a sufficient area for soft landscape, however detailed planting descriptions have not been indicated.

The specific controls relating to subdivision / car parking have been considered and the proposed landscaping is considered acceptable for the proposed development.

Traffic, Parking and Access - Section 7.03

The internal access arrangements of vehicles entering the site are acceptable.

The parking rate requirements have been met on the site which requires that one space per dwelling be provided.

The car parking provision to the site is satisfactory.

Stormwater - Section 7.06

The proposed development has been assessed with respect to stormwater. It is noted that the stormwater management plans indicate that roof waters are directed into the existing stormwater system. The new bathrooms or laundry will also be connected into the existing stormwater system for use of tank water. The hardstand overflows from the proposed driveway are being collected by a pit and directed to the existing absorption trench at the rear of the site. CN's Development Engineer provided comment:

It is assumed there is an existing rubble trench servicing the existing dwelling and that all roof waters are currently directed into the existing system. Conditions have been imposed that will require the removal of any existing rubble trench and replaced with a new dispersion trench suitably sized to accommodate the existing roof area and any proposed additional hardstand area.

This arrangement can be supported. A condition will be provided to check the existing stormwater system for adequacy before construction.

The proposed stormwater management plan is in accordance with the relevant aims and objectives of the NDCP 2012.

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.

Waste collection vehicles will be able to stop along the site frontage for pick-up at the driveway location without affecting traffic.

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

Public Participation - Section 8.0

The proposal was notified to neighbouring properties for fourteen days in accordance with the provisions of the NDCP 2012. A total of eight submissions objecting to the proposal were received.

Comments are provided in section 5.8 below.

Development Contributions

Sections 7.11 and 7.12 of the EP&A Act enables CN to levy contributions for public amenities and services. The proposed development attracts 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 Schedule of Conditions in **Attachment B**.

5.4 Planning agreements

No planning agreements are relevant to the proposal.

5.5 The regulations (and other plans and policies)

The application has been considered pursuant to the provisions of the EP&A Act and Regulation 2000. In addition, compliance 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.

Traffic and Parking

The proposal provides for the provisions of the required car parking. The potential car parking and vehicle movements impacts are considered to be reasonable and relatively minor as discussed above within section 5.3.

Privacy

The development will not have any undue adverse impacts in terms of privacy. The potential privacy impacts are considered to be reasonable and relatively minor as discussed under clause 4.6 and section 5.3 above.

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

The development is compatible with the existing character of development 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 within a Mine Subsidence District and conditional approval for the proposed development has been granted by Subsidence Advisory NSW.

The lot is identified as a current landslide risk under the Newcastle Coastal Zone Management Plan. The proposed development is considered to not increase the risk of landslip in this area, due to its minor nature.

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 the NDCP 2012 for a period of 14 days. Seven submissions were received in response to the notification period including six objections and one in support.

The following table provides a summary of the issues raised and a response to those issues.

Issue	Comment
Incompatible with surrounding development	The proposed attached dual occupancy is a form of low-density residential accommodation. The development does not amend the building's footprint and is compatible with the existing streetscape. The use is permitted within the zone and complements the existing dwellings along Lloyd Street.
Floor space ratio exceedance	The proposal included a clause 4.6 exceptions to development standards application. This has been considered under the assessment of the proposal against the NLEP 2012 within the report and is satisfactory.

<p>Stormwater Management</p>	<p>Concern was raised regarding the use of the existing dispersion trench at the rear of the site and its failure.</p> <p>The submitted proposal and Stormwater Management Plan, prepared by Skelton Consulting Engineers Issue A and dated 15 July 2020 indicates the utilisation of a dispersion trench is satisfactory. CN's Development Engineer considered the proposal with regard to the NDCP 2012 section 7.06 Stormwater and associated technical manual – Stormwater and Water Efficiency for Development and no concerns were raised with the proposed stormwater disposal methods.</p> <p>In addition, a condition of consent is to be included to ensure the existing drains are to be checked for adequacy and cleared of any obstruction.</p>
<p>Accuracy of RL figures on the submitted plans and proposed height based on past illegally constructed height</p>	<p>The shade structure on the upper floor balcony is the only element of the proposal related to a potential height change to the existing building.</p> <p>The applicant submitted survey plans and amended plans indicating the existing RL's for the site and changes to the shade structure to ensure compliance with the required building envelope. The proposal is considered satisfactory in this regard.</p>
<p>Privacy</p>	<p>The development will not have an undue adverse impact in terms of privacy. In addition, the new middle floor level balcony will have aluminium, slat privacy screens on east and west elevations. The proposal is satisfactory with further discussion within section 5.3 and 5.6 of this report.</p>
<p>Parking, access and traffic impacts</p>	<p>The potential car parking and vehicle movements impacts are considered to be reasonable and relatively minor as discussed in section 5.3 and 5.6 of this report.</p>
<p>Streetscape impacts</p>	<p>The proposal is considered compatible with the existing streetscape. As discussed within section 5.3 of this report the proposal maintains positive public domain interface with the addition of car parking access and garage provided at middle level of the building. Figure 3 provides the view from the frontage of the site and location of the new driveway access.</p>

5.9 The public interest

The proposed development is considered to be satisfactory having regard to the principles of ecologically sustainable development.

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

6.0 CONCLUSION

The proposal is acceptable against the relevant heads of consideration under section 4.15 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

Item 38 Attachment A: Submitted Plans - 33 Lloyd Street, Merewether

Item 38 Attachment B: Draft Schedule of Conditions - 33 Lloyd Street, Merewether

Item 38 Attachment C: Processing Chronology - 33 Lloyd Street, Merewether

Item 38 Attachment D: General Terms of Approval – Subsidence Advisory NSW - 33 Lloyd Street, Merewether

Item 38 Attachment E: Clause 4.6 Exception to Development Standard Application - 33 Lloyd Street, Merewether

Item 38 Attachments A – E distributed under separate cover

**ITEM-39 DAC 20/10/20 - SUPPLEMENTARY REPORT -
DA2017/01376 - 495-501 HUNTER STREET & 364 KING
STREET NEWCASTLE - DEMOLITION OF BUILDINGS AND
CONSTRUCTION OF MIXED-USE DEVELOPMENT (14
STOREYS) WITH COMMERCIAL / RETAIL TENANCIES AND
RESIDENTIAL APARTMENTS (83) AND ASSOCIATED CAR
PARKING, SITE WORKS AND LANDSCAPING**

**REPORT BY: GOVERNANCE
CONTACT: DIRECTOR GOVERNANCE / MANAGER REGULATORY
PLANNING AND ASSESSMENT**

PURPOSE

The subject application was considered at the Extraordinary Development Applications Committee (EDAC) Meeting held on 28 July 2020 (Item 23).

The development was refused on the following grounds:

1. *Significant setback non – compliance.*
2. *Significant negative impact on solar access to 36 apartments in the neighbouring development known as Sky Residences including 10 units which will have no direct sunlight at all.*
3. *Significant negative amenity impacts on existing apartments in the neighbouring Worth Place Apartments including the blocking of sunlight, reduction in air movement and loss of privacy to balconies and living spaces.*
4. *Ongoing and unresolved concerns raised by the Urban Design Consultative Group (UDCG), particularly around privacy and the western boundary setback.*
5. *Advice from the UDCG that the proposal is not considered to exhibit design excellence and remains problematic in a number of significant respects.*
6. *Concerns over errors in fact in the traffic report with up to 100 cars per day.*

A Notice of Motion to rescind the Council resolution (Item 23) of the EDAC held on 28 July 2020 was submitted by Councillors and considered at the Ordinary Council Meeting held on 18 August 2020 (Item 17).

The rescission motion included the following background information:

“The refusal was made against the recommendation and advice of Council Officers, and a number of the grounds for refusal cited are factually incorrect.

Inconsistent with protocol, it is understood that the reasons for refusal were not developed in consultation with Council officers. This significantly compromises Council’s ability to defend this matter should it escalate to the Land and Environment Court, which could lead to a costly outcome for ratepayers, and a poor outcome for objectors.

We additionally note that when this matter was previously considered by the elected Council at the Public Voice Meeting on 16 July 2017, a significant pecuniary conflict of interest was declared, and the mover of the refusal motion excused themselves from the discussion.

To be clear, this rescission motion does not seek to approve the development. Rather, this motion seeks for the elected Council to reconsider the matter and refer the development proposal back to the Urban Design Consultative Group for further feedback, and for Council officers to continue discussions with the applicant to resolve outstanding areas of concern.”

The rescission motion was supported. The following was resolved:

- 1. That the resolution of the Extraordinary Development Applications Committee (EDAC) of 28 July 2020 with respect to DA2017/01376 be rescinded under Section L of the adopted Code of Meeting Practice.*
- 2. That DA2017/01376 lay on the table and be referred to the Urban Design Consultative Group for further review, noting concerns raised by Councillors and the community. Council officers continue discussions with the applicant to seek to resolve outstanding areas of concern.*

This supplementary report outlines the consultation undertaken with the Urban Design Consultative Group, an outline of amendments made to the proposal, current recommendation, and an alternative recommendation. A copy of the previous report to Council in respect to this matter remains relevant and is provided at **Attachment A**.

The application was referred to, and advice received from the Urban Design Consultative Group (UDCG) at its meeting of 26 August 2020.

An extract is provided below from the UDCG Minutes of 26 August 2020.

Amendments Required to Achieve Design Quality

The applicant has responded to the five recommendations of 27 May 2020 in a positive manner.

The UDCG acknowledges as stated in the May 2020 UDCG meeting, the eastern setback to Worth Place apartments and Lauers Lane could be accepted when considering the site constraints.

The UDCG considered further design development in relation to separation distances on the western elevation is required to achieve design quality

Recommendation

Whilst response to previous comments has positively addressed the issues involved under the specific headings, concerns raised at the outset of this submission are considered to remain in respect to separation distances from adjoining sites. After some six presentations there remains a 9m shortfall – ie. 75% less than ADG recommendation for boundary separation on the western side of the site for a building of the height proposed.

The applicant has attempted however unsuccessfully to purchase the adjoining site to the west fronting Hunter Street (No.505 and No.507) to integrate into the subject site and as commented in the May 2020 UDCG meeting, this is unfortunate but has to be accepted.

The UDCG considers that an acceptable compromise in view of the low scale of any potential redevelopment on the adjoining undeveloped site would be at least a further 1 metre setback from the western side boundary which would need to be achieved through amendment of floor plans to the northern wing. It would be essential to generally maintain the existing setback of the northern wing from the opposite, eastern side boundary, although it appears that some of the small setback spaces between projecting rooms might be utilised to offset loss of floor space on the western side. It appears that 2 x 2-bedroom apartments to each floor of the northern wing could be retained in an amended layout, although alternate layouts with a three and a one-bedroom apartment to each floor plate may provide a more optimum outcome.

Amended plans have been submitted following the advice of the UDCG at the 26 August 2020 meeting (**Attachment B**).

As outlined within the applicant's response to the UDCG advice the following changes have been undertaken to address concerns relating to the northern section of the northern block from the western boundary.

Changes undertaken include:

- a) Revised Hunter Street building setbacks to the east and west boundaries from Levels 3 to 13.*
- b) Revised Hunter Street building unit layouts to suit revised external walls.*
- c) Revised access to common room and breezeway.*
- d) Revised planter box north of common room to suit revised design.*

- e) *Revised common pathway and extend landscape and planters on the east boundary.*

The revised plans have not resulted in a change in the final unit mix or FSR for the proposal

The UDCG recommended further design revision along the western boundary in this location. It was noted that a further 1 metre setback would need to be achieved through amendment of floor plans to the northern wing. It was also noted that the small setback spaces between projecting rooms along the eastern boundary might be utilised to offset loss of floor space on the western side, provided the setback along the eastern side boundary was generally maintained. This design concept by the UDCG was also provided in a plan.

In response to the UDCG recommendations the architect has completed a number of revisions to achieve the recommendation. Refer to plan DA06 for dimensions. Given the number of revisions undertaken as part of the assessment process, the outline of the current western boundary compared to the previous submission is indicated on plan VS01.

The northern section of the northern block (northern part of the Hunter Building) has now been revised as follows:

- a) *The bedrooms and living / dining rooms (ie. the main western wall line) have been shifted 1.0 metres to the east, as per the request of the UDCG. The kitchen and ensuite rooms have been shifted 1.527 metres to the east, approximately 0.5 metres more than requested by the UDCG.*
- b) *Bedrooms 1 and 2 along the eastern boundary have been reconfigured to better utilise the space adjacent to the breezeway. Bedroom 2 has utilised a splayed wall to maintain privacy between Worth Place Apartments.*

In this regard, the revised design is considered to satisfy the UDCG's request for 'at least a further 1 metre setback from the western side boundary' along with the utilisation of space along the eastern boundary to 'offset loss of floor space on the western side'. The revised design is also consistent with the design concept provided by the UDCG.

Therefore, it is considered that the design revision satisfies the UDCG's request for amendments required to Achieve Design Quality, as outlined within the minutes.

The revised design results in an urban outcome that, on balance, responds to the site constraints and facilitates a development that is consistent with the objectives and aims of the NLEP 2012, the NDCP 2020, SEPP 65, the ADG and relevant State planning instruments.

The amended plans were forwarded to the Chair of the UDCG for information and confirmation that the proposal has now satisfied the UDCG's concerns and the response is now an acceptable design outcome for the site was received. An extract of the Chair's comments provided as follows:

After examining the plans and other documents, I believe that the amended plans respond satisfactorily to the issues raised by the UDCG at the August meeting, and are now acceptable.

Assessment of the amended proposal is now considered to have satisfied the outstanding concerns of UDCG and on balance achieves a suitable design response, consistent with the original assessment and recommendation for approval. Accordingly, the development is satisfactory having regard to the relevant provisions of clause 7.5 of the NLEP 2012 'design excellence'.

With respect to wind tunnelling it is noted that the applicant has advised that:

The rear western edge of 489 Hunter St is built to the boundary. It is proposed to adjoin the proposed development in that section. This reduces the area exposed to wind. The joining of the buildings does not create a "tunnel" per se. It is also noted that the 'clustering' of buildings in this location will reduce the wind effects.

A condition of consent is recommended which requires that a wind tunnelling report be prepared by an appropriate qualified and experienced engineer prior to issue of any Construction Certificate. As such, and subject to the recommended condition, the application is considered to be satisfactory. Refer to **Attachment C** for the Draft Schedule of Conditions, as amended to reflect the amended plans and documentation submitted.

Subsidence Advisory NSW

The amended plans were submitted to Subsidence Advisory NSW on 21 September 2020. Subsidence Advisory NSW provided updated General Terms of Approval on 23 September 2020, and are included in **Attachment D**. The relevant condition of consent has been amended to reflect the revised approval.

RECOMMENDATION

Vote by division

That Council:

1. Approve DA2017/01376 – 495-501 Hunter Street and 364 King Street Newcastle – Demolition of buildings, erection of 14 storey mixed use development with 3 commercial / retail tenancies, 83 residential units, associated car parking and site works and grant consent, subject to compliance with the conditions set out in the Draft Schedule of Conditions at **Attachment C**; and

2. That those persons who made submissions be advised of CN's determination.

KEY ISSUES

Achieving reasonable separation distances in the context of site constraints and adjoining properties to achieve design excellence and support from the Urban Design Consultative Group.

BACKGROUND

Refer to the previous report which went to the EDAC Meeting held on 28 July 2020 (Item 23) (**Attachment A**).

ATTACHMENTS

Item 39 Attachment A: Item 23 – EDAC 28/07/20 – 495-501 Hunter Street and 364 King Street, Newcastle

Item 39 Attachment B: Amended Plans submitted in response to the UDCG Meeting held on 26 August 2020 - 495-501 Hunter Street and 364 King Street, Newcastle

Item 39 Attachment C: Draft Schedule of Conditions - 495-501 Hunter Street and 364 King Street, Newcastle

Item 39 Attachment D: General Terms of Approval issued by Subsidence Advisory NSW - 495-501 Hunter Street and 364 King Street, Newcastle

Item 39 Attachments A - D distributed under separate cover