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20 February 2024

Dear Damian,

RESPONSE TO REQUEST FOR INFORMATION - MA2023-00175 - 121 HUNTER STREET, NEWCASTLE

1. INTRODUCTION AND OVERVIEW

This letter has been prepared in response to the Request for Information (**RFI**) issued by City of Newcastle (**CN**) by email on 13 February 2024 regarding the modification application (MA) MA2023/00175 relating to Stage 3 and 4 East End of the development at 121 Hunter Street, Newcastle.

The RFI letter relates to substantially the same, and floor to ceiling height. This letter is the applicant's response to the matters raised by CN and is accompanied by the technical documents outlined in **Table 1** to support the RFI response.

All matters have been adequately addressed and CN can continue its assessment and determination of the MA.

Table 1 Amended Technical Documents

Document	Consultant
Architectural Justification on Floor to Ceiling Heights for Level 1	SJB, DBJ and Curious Practice
Revised Substantially the Same Justification	Urbis (contained within this letter)

This RFI is structure as follows:

- **Section 2 – Formal Response to Council's RFI:** Provides a high-level response to matters raised in CN's RFI including identification of where the matters are responded to.

- **Section 3 – detailed substantially the same analysis:** Provides a qualitative and quantitative analysis of the approved concept plan, as originally approved, compared to the proposed modified plan to demonstrate substantially the same.
- **Section 4 – Conclusion.**

The additional information submitted provides a comprehensive response the matters raised by CN in the RFI received in February 2024.

2. FORMAL RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

This section provides a response to the RFI matters. It should be read in conjunction with the attachments.

Table 2 Formal response to RFI

Issue	Response
<p>S4.55(2) - Substantially the Same - Quantitative Assessment</p> <p>It is noted that the Response to RFI document includes a 'Substantially the Same - Qualitative Assessment' response in support of the MA which is inconsistent with the submitted cl.4.6 variation request, e.g. parking numbers are different. It is requested that this be updated to ensure that the details here and in the cl.4.6 variation request align (e.g. parking numbers are different).</p> <p>Additionally, it would be appropriate that the building height details be expanded to include the same details as the cl.4.6 request (e.g. the aspects addressing the height above 24 metres which fall outside the NLEP 'height polygons').</p>	<p>The quantitative assessment has been updated in Section 3 of this RFI. The additional information has been added in blue text for ease of reference.</p> <p>This information does not supersede the RFI response issued to CN on 15 December 2023. It simply provides a consolidated response as per CN's request. The updates requested by CN are administrative to resolve inconsistency which have resulted from various RFI's that have been responded to at various points in time. The incremental information is blue text, but the rest of the information aligns with the previous 15 December 2023 response.</p> <p>The quantitative assessment has been updated to include:</p> <ul style="list-style-type: none"> ▪ revised parking numbers to align with past RFI responses. ▪ additional information regarding building height to align with the cl 4.6 request. ▪ summary of the View Impact Assessment that was prepared and submitted post the quantitative assessment.

Issue	Response
	<p>CN should now have all information to inform their assessment of substantially the same. In our opinion, the proposed modification has been considered both qualitatively and quantitatively, as requested, with reference to Case Law. We noted section 4.55 modifications with a greater degree of change and impact have been approved by other NSW Councils and the Land and Environment Court. The proposed modification is substantially the same as the original approved Concept DA.</p>
<p>Floor to Ceiling Heights</p> <p>Similarly, to the concerns raised within the ADG SEPP 65 comments provided earlier today in respect to DA2023/00419, the proposed modification of the minimum building height condition requires further justification.</p> <p>For CN to finalise the assessment, we still require a written response which clearly identifies the rational that the design criteria cannot be met, and which demonstrates how the ADG objective can be achieved notwithstanding a ceiling height less than 4.0 for the ground floor and 3.3m for the first floor.</p>	<p>It is acknowledged that the ADG requires a floor to ceiling height of 3.3m for the first floor. Compliance with this design objective is not possible for the reasons outlined in the attached supporting design statement.</p> <p>Considering the robust justification to vary the floor to ceiling height for the first floor, Condition 10 is proposed to be modified as follows:</p> <p><i>Elevations submitted with Blocks 2, 3 and 4 shall confirm the provision of minimum 4m 3.3m floor to ceiling heights at ground floor level and minimum 3.3m 2.9m at first floor level for all new buildings.</i></p>

3. SUBSTANTIALLY THE SAME ASSESSMENT UNDER SECTION 4.55

An application can be considered a modification under section 4.55 if it is 'substantially the same' 'qualitatively', 'quantitatively' and 'essentially'. This is in accordance with relevant case law, including:

- Moto Projects (No. 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280;
- Chidiac v Canterbury City Council [2012] NSWLEC 1335;
- Hrsto v Ku-Ring-Gai Council [2011] NSWLEC 1169;
- Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd (No 3) [2015] NSWLEC 75;
- Arrage v Inner West Council [2019] NSWLEC 85;

- Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2022] NSWCA 227; and
- Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2023] NSWLEC 1437.

The development as proposed to be modified is considered 'substantially the same development' for which consent was originally granted for the following reasons:

- The description and nature of the development is relevantly unchanged in that the proposal continues to deliver a "major redevelopment of Hunter Street Mall, a mixed-use development comprising retail, hotel and motel accommodation, serviced apartments and commercial, public spaces, residential (566 apartments), associated car parking & site works".
- The proposal will continue to have a variety of dwelling sizes and types, allowing for diverse housing options.
- The proposal will still deliver an exceptional public benefit improved from the Concept DA. Through a series of modifications, the Design Team have shifted the approved built form massing to accommodate the view corridor along Market Street to Christ Church Cathedral, aligned with CN's desired public domain outcome. These subtle changes allow the built form to embrace the geography of place while delivering more residential dwellings with views to the harbour. The proposal delivers a significantly improved public benefit in the form of the ground plane.
- The proposal will continue to achieve 10% adaptable housing within Stage 3 and Stage 4.
- The realignment of the building envelopes to ensure mass is not situated across the main view corridor will improve the overall public domain and achieve CN's vision within the NDCP 2012. Market Square forms part of Stage 3 and provides further opportunities for activation. Market Square is aligned with CN's desired public domain outcome and opens the view corridor to the Christ Church Cathedral.
- The proposed land uses of retail and residential are consistent with the objectives of the MU1 Mixed use zone as per the NLEP 2012.
- The proposal will continue to deliver high quality landscaped areas and remain consistent with the approved development and overall design concept.
- The FSR specified in the NLEP 2012 will not be exceeded.
- The proposed design as amended will not result in unreasonable impacts on the amenity of adjoining developments, specifically the overshadowing impacts will be improved for CN's carpark site to the south of Stage 3. This was specifically requested to be accommodated by CN.
- The proposed redistribution of massing from the view corridor, results in an improved public view towards the Christ Church Cathedral. If the Concept DA arrangement was retained, key views would be greatly impacted, and the Christ Church Cathedral would be obscured.
- 4 private domain views were assessed by Urbis being, Segenhoe Apartments, the Herald Apartments and Newcomen Apartments (residential views) and the Newcastle Club (commercial view). The conclusions are as follows:
 - The view impact for the Newcastle Club as a whole is **moderate**, such that the view sharing outcome in the context of the relevant controls is reasonable and acceptable.
 - The view impact for the Segenhoe Building as a whole is **minor**. Almost all views from most units are not affected or are affected to a very limited extent, such that the view sharing outcome in the context of the relevant controls is reasonable and acceptable.

- The view impact for the Herald Apartments as a whole is **minor**, such that the view sharing outcome in the context of the relevant controls is reasonable and acceptable.
- The view impact for the Newcomen Apartments as a whole is **minor**, such that the view sharing outcome in the context of the relevant controls is reasonable and acceptable.
- 11 public views were assessed by Urbis in the Visual Impact Assessment which concluded that:
 - 7 views had a low visual impact, 1 view had a low-medium impact and 3 had a medium visual impact.
 - The proposed redistribution of massing from the view corridor, as approved by the Concept DA, results in an improved public view from View 4 and View 5 towards the Christ Church Cathedral. If the Concept DA arrangement was retained, View 4 and View 5 would be greatly impacted and the Christ Church Cathedral would be obscured.
 - The additional building height predominately blocks views to vegetation or open sky beyond, and generally does not block views of scenic or highly valued features. The additional height is not visible from View 7 and does not result in any view loss or impact.
 - The re-massed built forms results in lower visual impacts and a better public domain view sharing outcome. This is achieved by the inclusion of a wide view corridor between the Hunter River and the Cathedral and the protection of NDCP view 21.
- The proposal seeks to maintain and adaptively reuse heritage elements identified in the Concept DA.
- The additional building height (above the Concept DA) will not result in unreasonable impacts to public spaces adjacent residential developments. The majority of overshadowing falls within the approved concept DA massing with only small increments of shadow falling outside of the approved envelopes.
- The proposal engaged heavily with First Nations persons to ensure connection with Country, which has received glowing endorsement from the First Nations community who assisted with evolving the scheme.
- The proposal maintains the laneway network that the Concept DA approved from Perkins Street to Newcomen Street.

Considering the above, in our opinion, the proposed modifications satisfy the qualitative and quantitative tests of being 'substantially the same' as the approved development. Nevertheless, a detailed assessment has been provided below and is structured as follows:

- **Section 4.1: Recap on the history of the Concept DA.** For absolutely clarity of the Planning Panel, CN were not supportive of a competition brief for proposals which would have maintained the building envelope/form of the approved Concept DA. This history is recapped in Section 4.1.
- **Section 4.2: Qualitative and Quantitative Assessment.** A qualitative and quantitative assessment of key components of the proposed modification to demonstrate the proposal is substantially the same as the original consent.
- **Section 4.3: Land and Environment Court Case Rated to 'Substantially the Same.'** Paragraph 173 of *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 summarised the legal principles and has been utilised as a basis for the assessment.

The following sections categorically reinforce the proposed modification is substantially the same as the original application.

3.1. RECAP ON HISTORY

3.1.1. Concept DA

On the 02 January 2018, the Hunter and Central Coast Planning Panel granted consent for a Concept Development Application (DA2017/00701) across the site, for the following:

Concept Development Application for a major redevelopment of Hunter Street Mall, a mixed-use development comprising retail, commercial, public spaces, residential (563 apartments), associated car parking & site works.

The concept application did not approve the precise quantum of floor space per land use the layout and mix of residential units and car parking spaces. Detailed design, including services, shall be contained within the existing building footprint and envelope approved as part of the concept application (with the exception of the height bonuses under the Council's Design Excellence provisions).

The Concept Approval established key parameters for the Competitive Design Process and subsequent detailed design including building mass and height, this is discussed in further detail below.

3.1.2. Pre-Design Excellence Competition

Prior to Urbis' involvement, Iris sought a design excellence waiver from CN for Stage 3 and 4. A design waiver was given for Stage 1 and Stage 2; therefore, Iris sought a consistent approach.

A request for a design waiver was submitted to CN on 18 January 2022. CN advised on 25 January 2022, that a design waiver would not be supported, and a design excellence competition was required.

3.1.3. Design Excellence Competition and Design Integrity Process

Hampton Property Involvement

On 02 March 2022 an Architectural Design Competition Brief that was fully compliant with the Concept DA was submitted to CN for endorsement by Hampton Property on behalf of Iris.

CN, on 31 March 2022, confirmed that for CN to endorse the design excellence competition documentation specific matters must be addressed. Specifically, the primary reason for CN not supporting the Hampton Property Architectural Design Competition Brief was related to the public realm and public domain treatment including the delivery of the Harbour to Cathedral Park link.

Urbis Involvement

On 4 May 2022 an Architectural Design Competition Brief that was fully compliant with the Concept DA was submitted to CN for endorsement by Urbis on behalf of Iris.

CN, on 24 May 2022, confirmed that for CN to endorse the design excellence competition documentation specific matters must be addressed. One of which was "Public realm and view corridors to and from Christ Church Cathedral," CN's comment is extracted below (the final wording of which is that which was approved in the brief by CN):

The importance of a design response which prioritises the public realm and public domain treatment was discussed at length with the Proponent and Hamptons Property Services previously and remains a key requirement of CN. There remains insufficient focus on these elements in the Brief.

In particular, development between Thorn and Morgan Streets (Stage 3) is to provide an opening on the Market Street alignment to preserve views of Christ Church Cathedral in accordance with the locality specific provisions of Section 6.01 Newcastle City Centre of Newcastle Development Control Plan 2012 ('NDCP 2012'). The design response should consider the relocation of the minor portion of 'Block 3 - South' which under the approved Concept DA partially encroaches into the view corridor identified in Section 6.01.04 Key Precincts B. (Hunter Street Mall) of the NDCP 2012 (see extract of Figure 6.01-29).

Figure 6.01-29 provides the most clarity around the position and width of the view corridor intended under the NDCP 2012 and should be referenced specifically within the Brief. The blue hatched area identified as an 'important view corridor to Christ Church Cathedral' extends through the East End Stage 3 site and also the land to the south.

Furthermore, the importance of the visual and physical connection extending Laing Street east-west between Morgan and Newcomen Street is demonstrated in Figure 6.01 and should also be referenced specifically within the Brief. The green area, identified as a 'proposed new open pedestrian link (preferred location)', extends through the East End Stage 4 site and completes the series of through-block links which facilitate long distance visual cues across all four stages of the East End development.

The locality specific Hunter Street Mall Precinct requirements of the NDCP 2012 need to be addressed in 'Table 4 – General Planning Requirements.'

In summary, Iris submitted a Design Excellence Competition Brief that was compliant with the approved Concept Approval. CN advised they would not endorse a compliant Design Excellence Competition Brief. This is fundamental to the reason why the concept is proposed to be modified.

CN articulated they have a desired public domain outcome for the site that is inconsistent with the approved Concept DA even though the approved Concept DA (2015 then replaced by 2017 concept) was subsequent to the Newcastle DCP 2012. This desired public domain outcome is reflected in the Newcastle DCP 2012. This position was respected by Iris and a revised Design Excellence Competition Brief was submitted to CN, which enshrined the Harbour to Cathedral Park link into the Brief.

The following was included in the Architectural Design Competition Brief to guide competitors:

The desired public outcome is currently restricted by a small component of the western end of Building 3 South. For context, Building 3 South was placed and approved in the current location with CN's endorsements to obscure the existing CN carpark to the south of the site. This context for CN has changed since the approval of the Concept DA, and demolition of the car park is currently underway with exploration of redevelopment opportunities being explored by CN.

The Applicant draws to competitors attention that the approved Concept DA has been the subject of a detailed assessment and approval by the Joint Regional Planning Panel, and any future detailed DA needs to be consistent with that approval (or facilitated by a future modification which is 'substantially the same' to support any future changes).

To facilitate the delivery of this important public domain benefit, competitors are encouraged to carefully examine the current approved building envelope configuration in Block 3 and prepare

creative and sensitively designed responses that provide an alternative massing arrangement in the precinct. However, it is fundamentally important to the Proponent that any re-positioning of the built form in Block 3, maintains (or enhances) the current amenity and commercial value enjoyed by the position of future apartments that results from alternative massing arrangements.

In responding positively to the opportunity to unlock the public domain improvements in Block 3, design responses that achieve an equivalency in the provision of ADG compliance, views, aspect and residential amenity. Variation and/or redistribution of the current building envelope massing (such as vertical or horizontal additions) need to be supported by the following analysis:

- *Detailed comparative analysis of the scale of development between the approved and proposed built form – ensuring the scale makes a positive contribution toward the desired built form, consistent with the established centres hierarchy.*
- *Detailed comparative analysis between the approved and proposed built form – ensuring that reasonable or better daylight access to both the public domain, surrounding development and residential apartments are retained.*
- *Detailed comparative analysis between the approved and proposed built form – ensuring both public and private views are retained (or where possible enhanced)*

Competitors need to ensure that any refinement of building height to achieve the above outcomes need to respond positively to the key height objectives relevant to Newcastle City Centre:

- (a) to allow sunlight access to key areas of the public domain by ensuring that further overshadowing of certain parks and community places is avoided or limited during nominated times,*
- (b) to ensure that the built form of Newcastle City Centre develops in a coordinated and cohesive manner,*
- (c) to ensure that taller buildings are appropriately located,*
- (d) to nominate heights that will provide a transition in built form and land use intensity in Newcastle City Centre,*
- (e) to ensure the preservation of view corridors that are significant for historic and urban design reasons.*

The above considerations were taken on board by competitors. A Competitive Design Process was undertaken in July to August 2022. At the conclusion of the Competition, the Selection Panel determined that the scheme by SJB in partnership with Durbach Block Jaggers and Curious Practice as the winner of the Competitive Design Process as it best met the objectives of the Competition Brief and was most capable of achieving design excellence.

Specifically, the Design Competition Report (endorsed by Paulo Macchia FRAIA representing the Government Architect), Dr Philip Pollard FRAIA MPIA (representing CN) and Sandra Furtado (representing the Applicant)) stated the following:

- *The Jury considered the scheme responded to the Design Competition Brief successfully and address the requirements relating to planning, activation, and overall quality of the public domain. Designing for Country was well informed by the input of an Indigenous (Worimi) team member.*
- *The SJB scheme demonstrated alignment with the Concept DA and proposed amendments were well considered and provided benefits in the creation of new view lines towards the Christ Church Cathedral which would otherwise have been obscured if the Concept DA layout was maintained. The Jury acknowledged there was a logic and benefit to the re-distribution of the massing out of*

the view corridor towards other parts of Stage 3 and Stage 4 as it achieves a better urban design outcome while causes minimal additional overshadowing.

- *The Design Team's narrative of the greenery of the Christ Church Cathedral coming down the hill to Market Square was considered a creative response and the design of the Market Square as a plaza rather than a stairway was also commended by the Jury. The Jury appreciated the thought SJB put into how Market Square would be utilised by the public. The Jury could see the diversity of Market Square given it had good width for activation and could easily be used by a variety of public uses such as markets, long-lunches, and an open-air cinema.*

Post the Architectural Design Competition, six Design Integrity Panel (DIP) meetings occurred. At the conclusion of the Design Integrity Process, the DIP endorsed the lodgement of the DA to CN. The Letter of Advice and Endorsement from the DIP dated 10 March 2023 confirms the proposal has *demonstrated alignment with the Concept DA and the re-distribution of the massing out of the central view corridor towards other parts of Stage 3 and Stage 4.*

Notwithstanding Iris respecting CN wishes to accommodate the Harbour to Cathedral link across its land holdings, Iris now finds itself having to prove to CN that the development is substantially the same as the Concept DA in circumstances where CN endorsed an Architectural Design Competition Brief that allowed competitors to shift the minor portion of massing from the corridor to achieve the same amenity as the massing that was moved at their direction.

The proponent, SJB, DBJ and Curious Practice as well as the consultant team met with Council Officers on several occasions throughout 2022 to 2023 to discuss the proposed works.

3.1.4. Post Lodgement

The below provides a summary of the key activities post lodgement:

- Development application lodged on planning portal on 12 May 2023.
- Development application was placed on exhibition between 31 May 2023 to 28 June 2023.
- Council advised 26 June 2023 that re-notification was required until 7 July 2023 because "the incorrect government agencies had been listed on the previous notification letter."
- Urban Design Review Panel (UDRP) Session No. 1 occurred on 5 July 2023 where the UDRP gave the 'green light' endorsement of the Development Application.
- Council advised 7 July 2023 the Development Application was required to be renotified until 14 July 2023 because of issues with the DA tracker. It is noted, that even with the extended notification numerous submissions were lodged late. Considering this, only 11 public submissions of the 23 received were received for this application during the notification period on time.
- The Hunter and Central Coast Regional Planning Panel 'kick off briefing' was held on 2 August 2023. The Planning Panel noted: *The Council's report needs to comprehensively deal with all proposed changes to the concept approval to enable a qualitative and quantitative assessment to be undertaken.*
- Design Integrity Panel (DIP) Session No. 6 was held on 24 February 2023 where the DIP endorsed the lodgement of the Development Application.
- Urbis and City Plan attended a meeting with CN 7 November 2023 to discuss the heritage matters raised within the partial RFI received October 2023.

- Urbis have also attended numerous meetings and discussions with CN's traffic engineering team throughout the course of this project.
- A first and partial RFI for the Detailed DA was received 12 October 2023 (note lodgement of the DA on 12 May 2023), and this was responded to by the Applicant and project team 10 November 2023.
- A complete RFI for the Detailed DA was received on 13 November and subsequently a further RFI on the Detailed DA was received on 23 November 2023. The subsequent RFI related to Apartment Design Guideline matters. A response to detailed RFI was provided to CN on 08 December 2023, and the ADG response [was sent on 22 December 2023](#).
- [A robust View Impact Assessment was completed and issued to CN on 25 January 2024. It was accompanied by an updated Clause 4.6 Variation Statement.](#)

[It is understood that no further RFI's will be received in relation to the s4.55 Modification.](#)

3.1.5. Summary

The purpose of providing the above recap is to highlight that Iris were confident and comfortable in delivering a scheme that was fully compliant with the Concept Approval. It was only at CN's direction that this approach changed considering the comments received on the design competition brief. This history is critically important when considering the below response to the RFI.

3.2. QUALITATIVE AND QUANTITATIVE ASSESSMENT

In both **quantitative** and **qualitative** terms, the proposed development as modified will remain substantially the same as the development for which consent was originally granted. In our opinion, for the reasons outlined above and below, Council can be satisfied that the development as modified is substantially the same.

In our opinion, the proposal will also remain the same 'essentially' or 'materially', being a mixed use precinct. The extent of works that have previously been accepted in the abovementioned Court cases as substantially the same include:

- Changes to the facades and external appearance;
- Changes to the envelope and profile of the development;
- Increases in floor space;
- Increases in height (in metres);
- Increases in number of storeys;
- Additional basement levels; and
- Increases in number of dwellings.

It is acknowledged that the proposed seeks to change the envelopes, increase the floor space ratio (but remain compliant with the prescribed under the Newcastle LEP 2012), and increase the height of the buildings. These changes have been deemed to be within the boundaries of a modification in Court cases, in our opinion the proposed modification can be considered substantially the same.

The proposed modification scope has been reviewed by both the DIP and UDRP. Both knowledge the direction set in the Architectural Design Excellence Brief and the existing planning controls and have provided their endorsement of the winning competition scheme.

3.2.1. Qualitative

In qualitative terms, the land use remains to be a *mixed-use development comprising of retail, commercial, public spaces residential apartments associated car parking & site works.*

The proposed modification will still deliver the vision and objectives established at DA2017/00701. In fact, the modification proposed to improve compliance with the vision and objectives established in the Newcastle DCP 2012 by re massing to deliver the Harbour to Cathedral Park link and view corridor. This link was never contemplated to be delivered when the Concept DA consent was issued. If it had been, it is expected that the Concept DA consent would have reacted with changes to the concept massing similar or same as that sought in the modification before CN for assessment today.

The proposed modification will improve the visual relationship to the Christ Church Cathedral from the Newcastle Harbour.

The refinements improve the public domain experience, improve compliance with the ADG and Newcastle DCP 2012, and will generally improve internal amenity of apartments. The proposed modifications will not substantially changing the overall precinct site composition and arrangement, alter the building type, heritage response or road network approach.

Table 4 provides a detailed qualitative analysis, comparing DA2017/00701 and the proposed modification.

Table 3 Qualitative comparison

Factor	DA2017/00701	Proposal (Detailed DA)	Change
Vision	East End will be the next catalyst in the ongoing revitalisation of Hunter Street and the surrounding CBD. The development is a critically important project with the purpose of rejuvenating the heart of the Newcastle CBD.	East End will be the next catalyst in the ongoing revitalisation of Hunter Street and the surrounding CBD. The development is a critically important project with the purpose of rejuvenating the heart of the Newcastle CBD.	No change – the vision remains the same for East End. Stage 3 and 4 will contribution to the revitalisation of Hunter Street and the surrounding CBD.
Objectives	<ul style="list-style-type: none"> Reinforces Hunter Street Mall as a retail destination with provision of some 7,300m² of retail floor space; 	<ul style="list-style-type: none"> Reinforces Hunter Street Mall as a retail destination with provision of some 7,300m² of retail floor space; 	No change – the redevelopment objectives remain the same. Stage 3 and 4 will contribution to the revitalisation, increase

Factor	DA2017/00701	Proposal (Detailed DA)	Change
	<ul style="list-style-type: none"> Increases housing supply and choice within the city; Protects and reinterprets the heritage character of the area; The building heights maintain the visual prominence of the Christ Church Cathedral in the city skyline. Retains and incorporates heritage elements into the new development. The building envelopes minimise impacts on public views to and from the Cathedral and mitigate any private view loss and potential overshadowing impacts. Complies with the maximum FSR of 4:1 that is applicable to the site under NLEP 2012. Creates employment opportunities within the city; and 	<ul style="list-style-type: none"> Increases housing supply and choice within the city; Protects and reinterprets the heritage character of the area; The building heights maintain the visual prominence of the Christ Church Cathedral in the city skyline. Retains and incorporates heritage elements into the new development. The building envelopes minimise impacts on public views to and from the Cathedral and mitigate any private view loss and potential overshadowing impacts. Complies with the maximum FSR of 4:1 that is applicable to the site under NLEP 2012. Creates employment opportunities within the city; and 	<p>housing supply, protect the heritage character, protect important view corridors, create employment opportunities during construction and on an ongoing basis, and enhance pedestrian permeability and comply with the LEP mapped FSR.</p>

Factor	DA2017/00701	Proposal (Detailed DA)	Change
	<ul style="list-style-type: none"> Enhances pedestrian permeability and circulation within the city by creating a connected laneway network from Perkins to Newcomen Street running parallel to Hunter Street 	<ul style="list-style-type: none"> Enhances pedestrian permeability and circulation within the city by creating a connected laneway network from Perkins to Newcomen Street running parallel to Hunter Street 	
Land Use	mixed-use development comprising of retail, commercial, public spaces residential apartments associated car parking & site works.	mixed-use development comprising of retail, commercial, public spaces residential apartments associated car parking & site works.	No change – the same land use proposed.
Access and Road Network	<p>Vehicular access for car parking from King Street, Perkins Street, Wolfe Street, Thorn Street, Laing Street, Morgan Street, and Newcomen Street.</p> <p>Service vehicular access from Perkins Street, Thorn Street, Laing Street, and Morgan Street.</p>	<p>Vehicular access for car parking from King Street, Perkins Street, Wolfe Street, Thorn Street, Laing Street, Morgan Street, and Newcomen Street.</p> <p>Service vehicular access from Perkins Street, Thorn Street, Laing Street, and Morgan Street.</p>	<p>No change – vehicular access for Stage 3 is from Thorn Street and Laing Street.</p> <p>The road network is unchanged, the site is still bound by Hunter, Laing, Morgan, King and Newcomen streets.</p>
Number of Envelopes	9 envelopes plus the tourist and visitor accommodation within the David Jones building.	9 envelopes plus the tourist and visitor accommodation within the David Jones building.	No change – the number of envelopes remains the same
Heritage Approach	The following buildings are proposed to be	The following buildings are proposed to be	No change (and considered an improvement) – the

Factor	DA2017/00701	Proposal (Detailed DA)	Change
	<p>retained for adaptive reuse:</p> <ul style="list-style-type: none"> ▪ The original north-western portion of the former David Jones' store; ▪ The Municipal Building (121 Hunter Street); ▪ The former Lyrique Theatre/Masonic Hall 98 King Street (Wolfe Street); and ▪ The terrace houses at 104, 108 and 110 King Street. <p>The following buildings are proposed for conservation of the facade and investigation into the potential for adaptive reuse:</p> <ul style="list-style-type: none"> ▪ The former Duke of Kent Hotel, (153 Hunter Street); and ▪ 105 Hunter Street. <p>The retention of the facade of the following buildings, with new vertical additions for residential use:</p> <ul style="list-style-type: none"> ▪ The later additions to the former David 	<p>retained for adaptive reuse:</p> <ul style="list-style-type: none"> ▪ The original north-western portion of the former David Jones' store; ▪ The Municipal Building (121 Hunter Street); ▪ The former Lyrique Theatre/Masonic Hall 98 King Street (Wolfe Street); and ▪ The terrace houses at 104, 108 and 110 King Street. <p>The following buildings are proposed for conservation of the facade and investigation into the potential for adaptive reuse:</p> <ul style="list-style-type: none"> ▪ The former Duke of Kent Hotel, (153 Hunter Street); and ▪ 105 Hunter Street. <p>The retention of the facade of the following buildings, with new vertical additions for residential use:</p> <ul style="list-style-type: none"> ▪ The later additions to the former David 	<p>modification does not change the approved heritage conservation strategy. In fact, it results in an improved heritage conservation strategy.</p> <p>The Municipal Building is proposed to be retained; no addition is proposed atop of the building resulting in an improved heritage response.</p> <p>105 and 111 Hunter Street facades are also proposed to be retained. Conservation of the façade was only envisaged or 105 Hunter Street, however Iris is also retaining the façade of 111 Hunter Street. Therefore, there is an improved heritage response.</p>

Factor	DA2017/00701	Proposal (Detailed DA)	Change
	<p>Jones' store fronting Hunter Street;</p> <ul style="list-style-type: none"> ▪ The section of the former David Jones' store fronting Wolfe Street; ▪ No. 163-167 Hunter Street; and ▪ The Soul Pattinson building (151 Hunter Street) 	<p>Jones' store fronting Hunter Street;</p> <ul style="list-style-type: none"> ▪ The section of the former David Jones' store fronting Wolfe Street; ▪ No. 163-167 Hunter Street; and ▪ The Soul Pattinson building (151 Hunter Street) 	
Through site link	<p>Stage 3: Market Square with connection from Market Street to Laing and Morgan Street.</p> <p>Stage 4: Morgan Street to Newcomen Street.</p>	<p>Stage 3: Market Square with connection from Market Street to Laing and Morgan Street.</p> <p>Stage 4: Morgan Street to Newcomen Street.</p>	<p>No change (and considered an improvement) – redistributing the bulk and mass of the building throughout the precinct, the proposal creates a positive outcome delivering the Harbour to Cathedral through site link, both a physical connection and achieving the view corridor as desired by the NDCP 2012.</p> <p>The Morgan Street to Newcomen Street connection will also be retained.</p>
Solar Access	<p>70% of apartments are capable of achieving a minimum of two (2) hours of sunlight.</p>	<ul style="list-style-type: none"> ▪ Building 3E and Municipal: 79% of apartments receive a minimum of 2 hours 	<p>No change (and considered an improvement) – originally envisaged baseline compliance</p>

Factor	DA2017/00701	Proposal (Detailed DA)	Change
		<p>direct sunlight in mid-winter.</p> <ul style="list-style-type: none"> Building 3W: 71% of apartments receive a minimum of 2 hours direct sunlight in mid-winter. Building 4N: 87.5% of apartments receive a minimum of 2 hours direct sunlight in mid-winter. Building 4S: 72% of apartments receive a minimum of 2 hours direct sunlight in mid-winter. 	with solar access is exceeded in Stage 3 and 4.
Cross Ventilation	Adequate cross ventilation can be achieved.	<ul style="list-style-type: none"> Building 3E and Municipal: 95% of apartments are naturally cross-ventilated. Building 3W: 79% of apartments are naturally cross ventilated. Building 4N: 79% of apartments are naturally cross-ventilated. Building 4S: 88% of apartments are naturally cross-ventilated. 	No change (and considered an improvement) – originally envisaged baseline compliance with cross ventilation is exceeded in Stage 3 and 4.

Factor	DA2017/00701	Proposal (Detailed DA)	Change
Separation Distances	<p>8m between Building 3 West and Building 3 South. Blank façade on Building 3 South proposed.</p> <p>18.5m between Building 3 South and Building 4 North proposed.</p> <p>9m between Building 4 North (and 16-18 Newcomen Street) to Building 4 South).</p>	<p>22.1m between Building 3 West and Building 3 South. Blank façade on Building 3 South proposed.</p> <p>9m (Upper Ground Level) to 17m (Level 02 and above) between Building 4 North to Building 4 South.</p>	No reduction in compliance (and considered an improvement) – increased separation distances proposed.

3.2.2. Quantitative

It is important to remember that this s4.55 modification relates **only to Stage 3 and 4**. No modification is proposed to Stage 1 and 2. Stage 3 and 4 have not been subject to any previous modifications. The proposed modification must be looked at from a precinct perspective.

Considering this, more than 50% of this mixed use precinct is complete or near completion. Stage 1 and Stage 2 have delivered:

- 333 apartments from Stage 1 and 2 combined are complete or near complete, comprising 63% of the total apartments for the precinct (528 apartments).
- 4,064 m² of commercial and retail is complete or near complete, comprising 72.8% of the total commercial and retail GFA for the precinct.
- 4,256 m² of hotel accommodation in Stage 1, comprising 100% of the total hotel accommodation GFA for the precinct.

Considering this, averaging the above numeric, 78.6% of the precinct plan has been delivered. Therefore, the argument regarding 'sustainability the same' is related to approximately 20% of the East End precinct. A quantitative comparison is provided in Table 5.

Table 4 Quantitative assessment

Element	DA2017/00701	DA2017/00701.03 (as modified)	Proposal (Detailed DA)	Degree of Change
Site Area	16,611m ²	16,611m ²	16,611m ²	No change.

Element	DA2017/00701	DA2017/00701.03 (as modified)	Proposal (Detailed DA)	Degree of Change
Apartments	563 apartments		Stage 1: 212 Stage 2: 121 Stage 3: 90 Stage 4: 105 Total: 528 apartments	Decrease of 35 apartments
Gross Floor Area	61,130m ² <i>Design competition bonuses not considered in this number.</i>	63,617m ² <i>Design competition bonuses not considered in this number.</i>	65,134m ²	Increase of 4,004m ² for the originally approved Concept DA. This is a 6.5% degree of change. This is considered 'essentially' or 'materially' the same, The proposed GFA is lower than the FSR control that permits 4:1.
Gross Floor Area allocation across blocks	Block 1: 26,224m ² Block 2: 11,709m ² Block 3: 11,034m ² Block 4: 12,163m ²	Block 1: 27,466m ² Block 2: 12,954m ² Block 3: 11,034m ² Block 4: 12,163m ²	Block 1: 27,466m ² Block 2: 12,954m ² Block 3: 11,099m ² Block 4: 13,635 m ²	Block 1: 1,242m ² increase (4.7%) Block 2: 1,245m ² (10.7%) Block 3: 65m ² (0.60%) Block 4: 1,472m ² (12.1%)

Element	DA2017/00701	DA2017/00701.03 (as modified)	Proposal (Detailed DA)	Degree of Change
Floor Spaces Ratio (gross)	3.68:1*	3.83:1*	3.92:1	This is a 6.5% degree of change. This is considered 'essentially' or 'materially' the same.
Floor Space Ratio allocation across blocks	Stage 1: 4.0:1 Stage 2: 3.2:1 Stage 3: 3.3:1 Stage 4A: 4.0:1	Stage 1: 4.19:1 Stage 2: 3.55:1 Stage 3: 3.3:1 Stage 4: 4.0:1	Stage 1: 4.19:1 Stage 2: 3.55:1 Stage 3: 3.29:1 Stage 4: 4.42:1	Stage 1: 0.19:1 increase (4.7%) Stage 2: 0.35:1 increase (10.7%) Stage 3: 0.01:1 decrease, due to change in known site area. Stage 4: 0.42:1 increase (12.1%)
Maximum Building Height allocation across blocks (Stage 3 and 4 only)	Building 3 West: RL + 30.20* Building 3 North: RL + 28.65 and RL + 31.28* Building 3 East: RL + 30.20* Building 4 North: RL + 28.35* Building 4 South: + 42.00*	Building 3 West: RL + 30.20* Building 3 North: RL + 28.65 and RL + 31.28* Building 3 East: RL + 30.20* Building 4 North: RL + 28.35* Building 4 South: + 42.00*	Building 3 West: +34.30 RL Municipal Building: +20.43 RL Building 3 East: +45.65 RL Building 4 North: +36.92 RL Building 4 South: +51.70 RL <i>As a result of CN requiring the re massing of the Concept DA to</i>	13.5% increase 34.7% decrease 51.2% increase 30.2% increase 23.1% increase <i>Note: this should be read in conjunction with the clause 4.6</i>

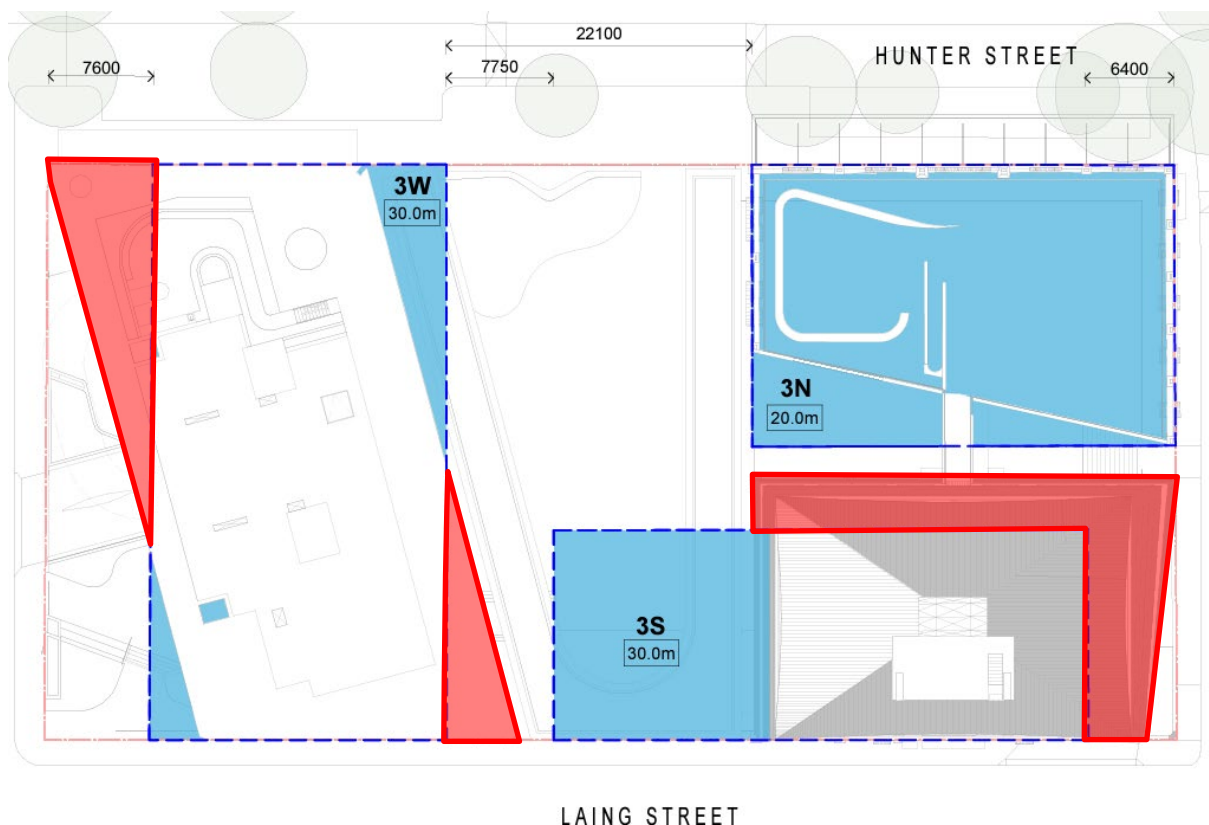
Element	DA2017/00701	DA2017/00701.03 (as modified)	Proposal (Detailed DA)	Degree of Change
			deliver their desired public domain outcome, built form sits outside of the LEP height RL polygons specifically for Building 3 West and Building 3 South. The areas outside of the EP height RL polygons are identified in Figure 1 to 3 and Table 6.	<i>variation statement.</i>
Carparking (all stages)	553 vehicles	616 spaces	<p>Stage 1: 286</p> <p>Stage 2: 157</p> <p>Stage 3 and 4: 293 (excluding EV and car wash bays)</p> <p>Total: 736 spaces</p>	183 space increase. However, this does not consider the change in the DCP rates and the additional net commercial spaces above the DCP that have been provided in Stage 3 from Stage 1 and 2.
Staging	4 stages	4 stages	No changes – 4 stages still proposed. Block 3 and 3 to be	No changes – 4 stages still proposed. Block 3 and 3 to be



Element	DA2017/00701	DA2017/00701.03 (as modified)	Proposal (Detailed DA)	Degree of Change
			completed concurrence.	completed concurrence.

** 10% bonus for Stage 1 and 2 attributed to FSR and Stage 3 and 4 to height.*

Figure 1 – Areas outside of the LEP height RL polygons identified in red



Note: the areas in blue in Figure 1 are either below the polygon height limit or there is not built form within the nominated location.

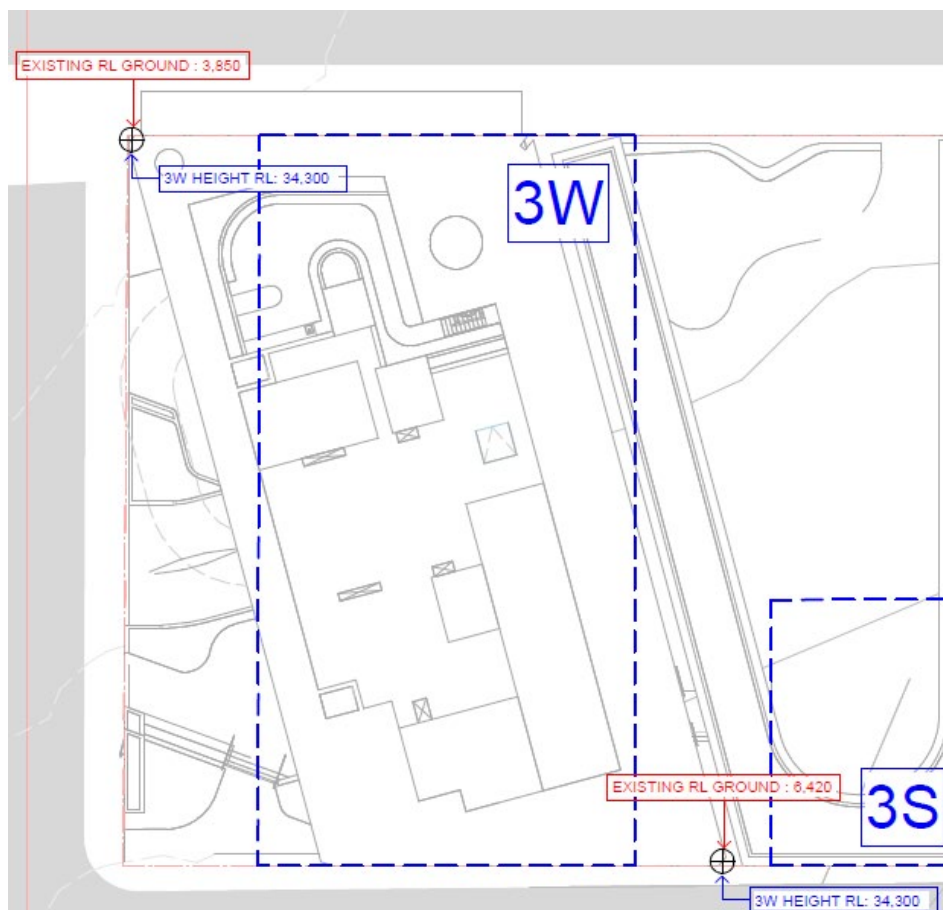
Table 5 – Numeric Overview of Various Height Controls (outside of LEP height RL polygons)

Building	LEP Height	LEP Height + 10%	Proposed Height	Variation in metres	Variation in %
Building 3 West (north west corner)	24 metres	26.4 metres	30.45 metres	4.05 metres	15.34%
Building 3 West (south east corner)	24 metres	26.4 metres	27.88 metres	1.48 metres	5.6%
Building 3 South (south east corner)	24 metres	26.4 metres	35.295 metres	8.895 metres	33.69%

Building	LEP Height	LEP Height + 10%	Proposed Height	Variation in metres	Variation in %
Building 3 South (Point 1)	24 metres	26.4 metres	38.28 metres	11.88 metres	45%

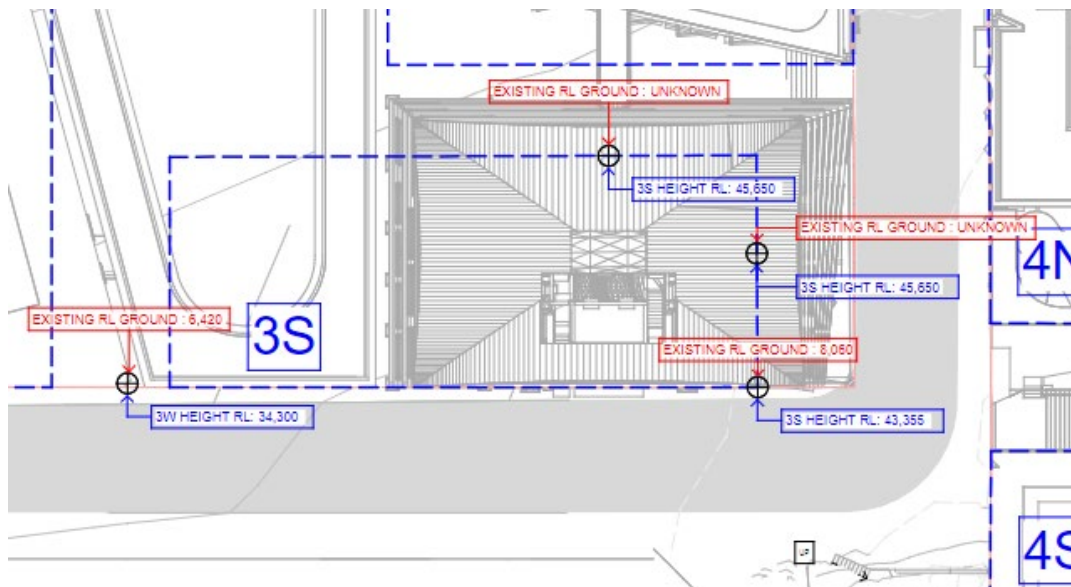
Figure 2 illustrates the heights outside the concept plan massing and LEP height RL polygons for Building 3 West and Figure 3 illustrates the heights outside the concept plan massing and LEP height RL polygons for Building 3 South.

Figure 2 – Areas outside of the LEP height RL polygons for Building 3 West



Source: SJB

Figure 3 – Areas outside of the LEP height RL polygons for Building 3 South



Source: SJB

As outlined above, Iris was confident and comfortable in delivering a scheme that was fully compliant with the Concept Approval. It was at CN's direction that this approach changed.

It is understood that primarily the question of 'substantially the same' relates to height. Almost all the additional height impact is the result of the sum of:

- Relocating the massing to that enabled the Harbour to Cathedral Park link, as required by CN.
- Removal of any built form above the heritage Municipal Building allowing it to present as it was constructed.
- The permitted 10% design excellence height bonus that was not envisaged under the Concept DA.

Considering the above, the below steps out the GFA that was required to be re massed.

In the Concept DA, Building 3 South extended across the corridor by approximately 190m² per level of GFA. Over 8 levels, that is a minor 1,520 m² as referenced in CN correspondence of 4 May 2022 (see 4.1.3 of this response).

In the Concept DA, Building 3 North has an approved height of an average height of RL + 31 across the site (the height at the parapet northeast corner is RL + 20.25) was approved, which would allow for 3 extra levels above the existing Municipal Building. The current non-rectilinear design has a GFA per floor of 444 m² and applying a 20% enlargement factor this results in a loss of circa 1,599m² from the additional 3 floors that need to be accommodated elsewhere.

Total GFA relocated to other parts of the development to accommodate the requested Harbour to Cathedral Park and allow the heritage Municipal Building to stand proud absent any additions above is 3,119 m² (1,520m² + 1,599m²).

The GFA above the 10% bonus in height achieved from the DA comp scheme can be summarised as follows:

- Building 3 West – 1 level over height with design excellence RL 33.00: + 715m²
- Building 3 South – 3 levels over height with design excellence RL33.00: + 696m²
- Building 4 North – 2 levels over height with design excellence RL31.9: +356m²
- Building 4 South – 1 level over height with design excellence RL 46.2: + 399 m²

The total GFA that sits over the LEP height limit + 10% being the new base line is 2,166m² (sum of GFA # above) and this represents 70% of GFA that has been moved around to accommodate CN's desired public domain outcome that was contemplated in the design competition has been redistributed to achieve outcomes that make massed amenity no worse than what the Applicant had approved pursuant to the Concept DA. This is a concept and concession that was articulated in the Architectural Design Competition Brief and endorsed by both CN and the Government Architect. Relocating the GFA has always been contemplated as an outcome of the design competition.

Overall, the majority of the GFA that has been relocated is due to accommodating and opening the corridor. 70% of the additional height can be directly linked to the re-massing to open the view corridor that CN required and acknowledged in the Brief.

3.3. LAND AND ENVIRONMENT COURT CASES RELATED TO 'SUBSTANTIALLY THE SAME'

The proposal is subject to a section 4.55 modification and not a new development application as it is substantially the same as the approved application.

3.3.1. Case Law

In establishing that the proposal is subject to a section 4.55 application, the proposal has been assessed against a set of legal principles governing the power to modify as outlined in the below case law. Table 6 summaries the relevant cases and why they are relevant to MA2023/00175.

Table 6 Summary of relevant case law

Case	Summary of Case
Moto Projects (No. 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280	<p>A decision of Bignold J of LEC outlines principles for determining whether a s4.55 application is 'substantially the same' as an originally issued development consent. The assessment of 'substantially the same' needs to consider qualitative and quantitative matters.</p> <p>Why is this relevant to MA2023/00175?</p> <p>This case reinforces that the assessment of 'substantially the same' needs to consider qualitative and quantitative matters. A qualitative and quantitative assessment has been completed and demonstrates the proposal is 'substantially the same.'</p>

Case	Summary of Case
Chidiac v Canterbury City Council [2012] NSWLEC 1335	<p>A decision of O'Neill C of LEC determined that <i>“the proposal is an appropriate response to the constraints and opportunities of the site and represents a better planning outcome for the development and therefore the Modification Application can be granted approval.”</i></p> <p>Why is this relevant to MA2013/00175?</p> <p>This case reinforces that a better planning outcome can be considered a reason for granting approval of a modification. This is relevant because the Design Team have been driven by delivering a ‘civic response,’ a better public domain outcome. The three buildings on Stage 3 have been combined to form a recognisable civic composition in which the Christ Church Cathedral, remote to the Square, plays a critical role. This outcome is a result of the re massing.</p>
Hrsto v Ku-Ring-Gai Council [2011] NSWLEC 1169	<p>A decision of Brown C of the LEC where the LEC Court determined (for a large multi-building development) the following changes was “substantially the same” as the original development consent:</p> <ul style="list-style-type: none"> ▪ <i>an increase in the number of units from 51 to 66,</i> ▪ <i>a reduction in the number of car parking spaces from 96 to 92,</i> ▪ <i>an increase in floor area from 5304 sq m to 5520 sq m,</i> ▪ <i>an increase in floor space ratio (FSR) from 1.25:1 to 1.3:1,</i> ▪ <i>a decrease in the building footprint from 2114 sq m to 1907 sq m, an increase in deep soil are and;</i> ▪ <i>a reduction in the basement volume by 500 cu m to 11,700 cu m.</i> <p>In this case Brown C undertook a qualitative and quantitative assessment. In respect to the quantitative assessment the following was determined <i>“the increase in the number of units and the subsequent increase in population is not, in my view, materially different. I did not understand the additional units to create any unacceptable increases in loss of privacy or other amenity impacts to adjoining residential properties that were not addressed through a condition requiring additional privacy screens. I do not accept that if there are additional units and an increase in population on</i></p>

Case	Summary of Case
	<p><i>the site, that this automatically suggests additional amenity impacts. If there were additional amenity impacts then these should be specifically identified and ameliorative measures considered."</i></p> <p>Why is this relevant to MA2023/00175?</p> <p>This case demonstrates the extent of works that have previously been accepted by the Court as being substantially the same. The link between increase in floor space and height should not be directly linked to additional amenity impacts. The proposed design as amended will not result in unreasonable impacts on the amenity of adjoining developments, specifically the overshadowing impacts will be improved for CN's carpark site to the south of Stage 3. This was specifically requested to be accommodated by CN.</p>
<p>Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd (No 3) [2015] NSWLEC 75</p>	<p>A decision of Pepper J of LEC summarised the legal principles for assessing if a modification is 'substantially the same.'</p> <p>Why is this relevant to MA2023/00175?</p> <p>This case provides a framework to assess if the modification is 'substantially the same.'</p>
<p>Arrage v Inner West Council [2019] NSWLEC 85</p>	<p>A decision of the Chief Judge of the LEC which acknowledges that the most instructive way to approach the substantially the same test is to consider whether the modified development be "essentially or materially" the same or "having the same essence" as the originally approved development but also notes that this is not the only way to ascertain whether the modified development is substantially (in the sense of essentially or materially) the same development as the originally approved development.</p> <p>For example, "<i>comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development</i>" (at paragraphs [27]-[28])</p> <p>Why is this relevant to MA2023/00175?</p> <p>This case reinforces that "essentially or materially" the same or "having the same essence" is a test to determine substantially the</p>

Case	Summary of Case
	<p>same, but not the only way to ascertain whether the modified development is substantially the same.</p> <p>In our opinion, the proposal will also remain the same ‘essentially’ or ‘materially’, being a mixed-use precinct.</p>
Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2022] NSWCA 22	<p>A decision of the NSW Court of Appeal, where the Chief Judge of the LEC Court (sitting in the Court of Appeal) held that although the historical authorities suggest various ways to undertake the necessary comparison for the substantially the same test, those authorities "<i>do not displace the statutory test in s.4.55(2)(a) or demand that the required comparison be undertaken in those ways</i>" (at [112]). Rather, what is required to correctly approach the substantially the same test is that a consent authority address itself as to "<i>the substance of the question raised</i>" because nothing can replace the express words within the EPA Act (at paragraph [113]).</p> <p>Why is this relevant to MA2023/00175?</p> <p>This case essentially leaves the door open for a consent authority to take into account essentially any ‘way’ to consider whether a s.4.55 is substantially the same as an original development consent (and not just based on a qualitative vs quantitative assessment, even though that is the most common ‘way’ determined by the historical authorities). Considering this, CN have the ability to accept any ‘way’ to consider whether a s.4.55 is substantially the same.</p> <p>Considering the history outlined in this letter, CN should be comfortable the proposal is substantially the same.</p>
Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2023] NSWLEC 1437.	<p>A decision of Commissioner Espinosa of the LEC where the LEC Court determined (for a large multi-building development) the following changes was “substantially the same” as the original development consent:</p> <ul style="list-style-type: none"> ▪ Removal of the ground floor visitor carpark entirely ▪ Complete reconfiguration and relocation of the only driveway serving the 439 space carpark ▪ More than doubling of the size of the communal open space and completely reconfiguring it

Case	Summary of Case
	<ul style="list-style-type: none"> ▪ Adding 2 extra floors to the approved development (over 50% of the floor place) ▪ Adding 2,368m² (9.8%) of additional floor space ▪ Adding an additional 10 units (2.5%), with internal reconfiguration of all units and a significantly different unit mix <p>The Court undertook a 'qualitative' assessment of the s.4.55 modification application compared against the Original Consent (at [59]-[65]) and found that "<i>there are differences, and some of those differences, in isolation, may appear to be significant, but on the whole and on balance</i>" the Applicant's evidence was to be preferred (at [65]). The Court went as far as expressly accepting and adopting the qualitative conclusion of the Applicant's town planning expert (at [62]), which was articulated as follows:</p> <p><i>"the proposal as modified:</i></p> <p>(a) <i>Will not change the nature or the intensity of the use;</i></p> <p>(b) <i>Whilst improving the relationship to the public domain at ground level, this is similar with the intent established in the original approval;</i></p> <p>(c) <i>Will not change the relationship to surrounding developments as the modifications will maintain the character of the original approval;</i></p> <p>(d) <i>Where an increase in floor space and height is proposed on the upper levels, the development is consistent with the original approval as a whole, and the bulk and scale which establishes the streetscape character (from ground levels to levels 7/8) is unchanged per the original approval;"</i></p> <p>Why is this relevant to MA2023/00175?</p> <p>This case demonstrates the extent of works that have previously been accepted by the Court as being substantially the same. The proposed modification is aligned with the extent of works accepted by the Court. The proposed modification is also aligned with points (b) to (d) outlined above. On the whole and on balance, the proposed development is substantially the same.</p>

3.3.2. Assessment Against Case Law

An assessment against the above referenced Case Law is outlined in Table 6 below.

Table 7 LEC case assessment for 'substantially the same'

Principle	Comment
Legal Principles Governing the Power to Modify in s 96 (2) of EPAA – Paragraph 173 of Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd (No 3) [2015] NSWLEC 75.	
<p>first, the power contained in the provision is to “modify the consent”. Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 475 and Scrap Realty Pty Ltd v Botany Bay City Council [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore “chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity” (Michael Standley at 440);</p>	<p>It is noted that modifications may involve ‘beneficial cost savings and/or improvements to amenity’.</p> <p>The proposed modification will allow the delivery of a high quality scheme that has undergone significant testing and assessment through the Design Excellence Competition, Design Integrity Panel process and Urban Design Review Panel process. The proposed modification will improve the public amenity, and ground plane experience through the delivery of the Harbour to Cathedral connection.</p> <p>The improvements of amenity are summarised as:</p> <ul style="list-style-type: none"> ▪ Delivery of the view corridor for the “Harbour to Cathedral Park” connection. ▪ Delivery of a new urban plaza “Market Square” which will improve ground plane activation and permeability through the site. ▪ Increased to Apartment Design Guidelines (ADG) compliance compared to the reference scheme envisaged with the Concept DA. Specifically, regarding solar access and cross ventilation. The Design Review Panel (DIP) were satisfied that the

Principle	Comment
	<p>apartments achieve a high level of amenity.</p> <ul style="list-style-type: none"> Improved heritage response. The built form, façade expression of all buildings carefully considers the context, scale, and appearance, responding to both heritage and design for country, whilst celebrating the public domain. The proposed modification improves the heritage response. The Municipal Building will stand proud with no development atop, and 111 Hunter Street façade is proposed to be retained which was not envisaged in the concept approval. Reduced overshadowing to future public open space. The overshadowing impacts are improved with the proposed scheme compared to the Concept DA for CN's carpark site because of the redistributed building mass. This site will also deliver significant public domain and contribute to the "Harbour to Cathedral Park" connection. <p>The s4.55 Modification Statement submitted with the s4.55 provides a more detailed assessment and should be reviewed in conjunction with these points.</p>
the modification power is beneficial and facultative (Michael Standley at 440);	<p>The proposed modification will deliver a significant public benefit, compared to the original application.</p> <p>The redistribution of floor space from within the identified view corridor for the "Harbour to Cathedral Park" to Building 3 South (DBJ) provides a generous and publicly accessible space. CN have a desired public</p>

Principle	Comment
	<p>domain outcome for the site, which is reflected in the Newcastle DCP 2012. The desired public outcome is currently restricted by a small component of the western end of Building 3 South.</p> <p>The Design Team have been driven by delivering a 'civic response;' a better public domain outcome. The three buildings on Stage 3 have been combined to form a recognisable civic composition in which the Christ Church Cathedral, remote to the Square, plays a critical role.</p> <p>The Market Square and through site link will improve the ground plane activation and permeability through the site.</p>
the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (Scrap Reality at [16]);	<p>Section 4 of this RFI response provides a direct comparison between the approved development and the modifications proposed.</p> <p>Note: the modification has come about to accommodate the request from CN and that request is inconsistent with the Concept DA consent as approved. Iris wanted to lodge a compliant DA consistent with the Concept DA; however, this was not supported by CN in the Architectural Design Excellence Brief. The changes to the Concept DA and the sole reason why the modification is required is to accommodate CN who are fully and wholly complicit to causing modification of the consent. The position Iris finds itself in is unfair, having to justify the modification is substantially the same, given CN's direction at the design competition phase.</p>
the applicant for the modification bears the onus of showing that the modified development is	Noted. The Applicant and Project Team have prepared this response to

Principle	Comment
substantially the same as the original development (Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8);	demonstrate that the modified development is substantially the same as the original development.
the term “substantially” means “essentially or materially having the same essence” (Vacik endorsed in Michael Standley at 440 and Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);	<p>The proposal continues to be a <i>mixed-use development comprising of retail, commercial, public spaces residential apartments associated car parking & site works</i>. The proposed modification does not substantially alter the ‘essence’ of the overall precinct. The precinct will deliver the originally envisage vision and objections.</p> <p>Whilst the design will be refined, the proposal will be similar to what was approved. Accordingly, the works will not change the approved design ‘essentially or materially’.</p>
the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (Scrap Realty at [19]);	In our opinion, the proposal provides CN and the Panel Planning with the requisite facts to determine the application.
the term “modify” means “to alter without radical transformation” (Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42, Michael Standley at 474, Scrap Realty at [13] and Moto Projects at [27]);	<p>The proposal is for modifications which do not ‘radically transform’ the essence of the building. The precinct will deliver the originally envisage vision and objections.</p> <p>As outlined in Section 4.2, the quantitative and qualitative assessment demonstrate that then the modification is broken into components the proposed modification is not a “radical transformation.”</p>
in approaching the comparison exercise “one should not fall into the trap” of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of	Noted. A comprehensive quantitative and qualitative assessment has been completed above in Section 4.2. It steps through various elements and does not simply state that the use remains the same

Principle	Comment
land will be relevant to the assessment made under s 96(2)(a) (Vacik);	therefore it is substantially the same development.
the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their “proper contexts (including the circumstances in which the development consent was granted)” (Moto Projects at [56]); and	The proposal is also considered substantially the same ‘qualitatively and quantitatively’ (as demonstrated above).
a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be “legally flawed” (Moto Projects at [52]).	A quantitative evaluation is provided above and considered substantially the same.
Arrage v Inner West Council [2019] NSWLEC 85	
a decision of the Chief Judge of the LEC which acknowledges that the most instructive way to approach the substantially the same test is to consider whether the modified development be “essentially or materially” the same or “having the same essence” as the originally approved development but also notes that this is not the only way to ascertain whether the modified development is substantially (in the sense of essentially or materially) the same development as the originally approved development. For example, “comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development” (at paragraphs [27]-[28])	As per above, the proposal continues to be a <i>mixed-use development comprising of retail, commercial, public spaces residential apartments associated car parking & site works</i> . The proposed modification does not substantially alter the ‘essence’ of the overall precinct. The precinct will deliver the originally envisage vision and objections. Whilst the design will be refined, the proposal will be similar to what was approved. Accordingly, the works will not change the approved design ‘essentially or materially’.
Feldkirchen Pty Ltd v Development Implementation Pty Ltd [2022] NSWCA 227	
Do not displace the statutory test in s.4.55(2)(a) or demand that the required comparison be undertaken in those ways”.	This case essentially leaves the door open for a consent authority to take into account essentially any ‘way’ to consider whether a s.4.55 is substantially the same as an original development consent (and not just

Principle	Comment
<p>Rather, what is required to correctly approach the substantially the same test is that a consent authority address itself as to "the substance of the question raised" because nothing can replace the express words within the EPA Act.</p>	<p>based on a qualitative vs quantitative assessment, even though that is the most common 'way' determined by the historical authorities). Considering this, CN have the ability to accept any 'way' to consider whether a s.4.55 is substantially the same.</p> <p>Considering the history outlined in this letter, CN should be comfortable the proposal is substantially the same given it was primarily their direction for the re massing of the built form from the view corridor.</p>
Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2023] NSWLEC 143	
<p>"the proposal as modified:</p> <p>(a) Will not change the nature or the intensity of the use;</p> <p>(b) Whilst improving the relationship to the public domain at ground level, this is similar with the intent established in the original approval;</p> <p>(c) Will not change the relationship to surrounding developments as the modifications will maintain the character of the original approval;</p> <p>(d) Where an increase in floor space and height is proposed on the upper levels, the development is consistent with the original approval as a whole, and the bulk and scale which establishes the streetscape character (from ground levels to levels 7/8) is unchanged per the original approval;"</p>	<p>The proposed modification is also aligned with points (b) to (d). On the whole and on balance, the proposed development is substantially the same for the following reasons relevant to this case:</p> <ul style="list-style-type: none"> ▪ The proposal will still deliver an exceptional public benefit improved from the Concept DA. Through a series of modifications, the Design Team have shifted the approved built form massing to accommodate the view corridor along Market Street to Christ Church Cathedral, aligned with CN's desired public domain outcome. These subtle changes allow the built form to embrace the geography of place while delivering more residential dwellings with views to the harbour. The proposal delivers a significantly improved public benefit in the form of the ground plane. ▪ The proposal will not significantly change the relationship to surrounding developments as the modifications will maintain the character of the original

Principle	Comment
	<p>approval. The environment impacts of the proposed development have been considered in the s4.55(2) Modification Report.</p> <ul style="list-style-type: none"> ▪ The increase in the floor space and height is consistent with the original approval as a whole, and the bulk and scale which establishes the streetscape character.

For all of these reasons, in our opinion, the modification to the concept approval is substantially the same as the approval. As the proposal is substantially the same as the approved development quantitatively, qualitatively, and essentially, the proposed modification can be considered under section 4.55 (2).

4. CONCLUSION

We trust the additional information submitted addresses the matters raised by CN in the RFI received 21 November 2023 [and 13 February 2023](#) and enables the DA to progress to a Planning Panel determination meeting.

Iris remind CN that a key driver for the proposed modification was to strategically redistribute height and floor space from the part of the approved Concept DA to deliver the vision CN have established in the Newcastle DCP (noting that the CN approved the Concept DA after the DCP was in place). Indeed, CN were not supportive of a competition brief for proposals which would have maintained the building envelope/form of the approved Concept DA. Further, CN endorsed a competition brief that permitted a redistribution of mass lost to create the corridor that maintained the same amenity of that which was being relocated.

It is understood that primarily the question of 'substantially the same' relates to height. Almost all the additional height impact is the result of the sum of:

- Relocating the massing to that enabled the Harbour to Cathedral Park link, as required by CN.
- Removal of any built form above the heritage Municipal Building allowing it to present as it was constructed.
- The permitted 10% design excellence height bonus that was not envisaged under the Concept DA.

Nevertheless, this RFI response demonstrates the proposal is substantially the same as the approval for the following key reasons:

- The description and nature of the development is relevantly unchanged in that the proposal continues to deliver a "major redevelopment of Hunter Street Mall, a mixed-use development comprising retail, hotel and motel accommodation, serviced apartments and commercial, public spaces, residential (566 apartments), associated car parking & site works".

- The proposal will deliver an exceptional public benefit improved from the Concept DA. The modification significantly improves the future public amenity. The realignment of the building envelopes to ensure mass is not situated across the main view corridor will improve the overall public domain and achieve CN's vision within the NDCP 2012.
- The qualitatively and quantitatively demonstrates that the degree of change is minimal at a precinct level. It is important to remember that this s4.55 modification relates only to Stage 3 and 4. 78.6% of the precinct plan has been delivered. Therefore, the argument regarding 'sustainability the same' is related to approximately 20% of the East End precinct.

The proposed modifications have been considered both qualitatively and quantitatively, as requested, with reference to Case Law. We noted section 4.55 modifications with a greater degree of change and impact have been approved by other NSW Councils and the Land and Environment Court.

Should you wish to discuss any matter further, please do not hesitate to contact the undersigned.

Kind regards,

A handwritten signature in black ink, appearing to be "Naomi Ryan", with a long, sweeping underline.

Naomi Ryan
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