

COUNCIL ASSESSMENT REPORT

HUNTER AND CENTRAL COAST REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	Section 8.2(1) Review of MA2023/00175 (CN application ref. RE2024/00002)
PROPOSAL	Section 8.2(1) Review of MA2023/00175 – Modification to DA2017/00701 - Staged concept development comprising of retail, commercial, residential and shop top housing - changes to approved building envelopes for Stages 3 and 4.
ADDRESS	<p>Lot 31-32 DP 864001 Lots A & B DP 388647</p> <p>Lot 1 DP 77846</p> <p>Lots 96, 98 & 100 DP 1098095</p> <p>Lot 1 & 2 DP331535</p> <p>Lot 1 DP 723967</p> <p>Lot 1 DP 819134</p> <p>105, 109, 111 & 121 Hunter St Newcastle</p> <p>3 Morgan St Newcastle</p> <p>22 Newcomen St Newcastle</p> <p>66-74 King St Newcastle</p>
APPLICANT	East End Stage 4 Pty Ltd
OWNER	East End Stage 3 Pty Ltd & East End Stage 4 Pty Ltd
REVIEW LODGEMENT DATE	7 June 2024
APPLICATION TYPE	Section 8.2(1) - Development Consent Reviews
REGIONALLY SIGNIFICANT CRITERIA	<p>Section 2.19(1) and Clause 2 of Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021 declares the proposal regionally significant development as:</p> <p>Development that has a capital investment value of more than \$30 million.</p>
CIV	\$159,654,715 (excluding GST)
CLAUSE 4.6 REQUESTS	Not applicable
KEY SEPP/LEP/DCP	<ul style="list-style-type: none"> State Environmental Planning Policy (Planning Systems) 2021 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development Newcastle Local Environmental Plan 2012

	<ul style="list-style-type: none"> Newcastle Development Control Plan 2012
TOTAL & UNIQUE SUBMISSIONS KEY ISSUES IN SUBMISSIONS	252 submissions have been received; 116 objections and 136 in support (20 June to 20 September 2024).
DOCUMENTS SUBMITTED FOR CONSIDERATION	Documents submitted for consideration are listed in section 9 of this report.
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)	Not applicable
RECOMMENDATION	Approval, subject to recommended conditions of consent
DRAFT CONDITIONS TO APPLICANT	14 October 2024
SCHEDULED MEETING DATE	21 October 2024
PREPARED BY	Patch Planning (consultant town planners appointed to undertake independent review assessment)
DATE OF REPORT	11 October 2024

EXECUTIVE SUMMARY

Concept Development Application **DA2017/00701** ('Concept DA') was approved on 2 January 2018 by the Joint Regional Planning Panel ('JRPP') (now known as the Hunter and Central Coast Regional Planning Panel ('HCCRPP')) for a staged concept approval for the East End development. This included a four-stage concept approval which set the floor space ratio ('FSR'), building height and envelope, and land use parameters for each stage of development.

The detailed designs for Stage 1 and Stage 2 were approved pursuant to DA2017/00700 and DA2018/00354, on 2 January 2018 and 15 March 2019, respectively. Construction is complete for Stage 1 and nearing completion for Stage 2.

An Architectural Design Competition was undertaken for the detailed design of stages 3 and 4. On 6 July 2022, following three-months of engagement with City of Newcastle ('CN'), the Government Architects Office NSW ('GANSW'), and the Applicant, the Design Competition Brief was endorsed by GANSW and CN. A key criterion within the Brief was the delivery of the 'Harbour to Christ Church Cathedral' view corridor.

Following the design competition process, a detailed development application for Stage 3 and Stage 4 (ref. **DA2023/00419**) was lodged concurrently with the corresponding modification application (ref. **MA2023/00175**), which relates to the Concept DA.

On 15 May 2024, development consent was refused for modification application MA2023/00175 by the HCCRPP for the following reasons:

- 1. The consent authority is not satisfied that the modification application is substantially the same development as the concept approval pursuant to Section 4.55(2)(a) of the Environmental Planning and Assessment Act 1979.*
- 2. The modification application will have unacceptable cumulative impacts on both the public and private views and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.*
- 3. The development will create unacceptable impacts given the deficiency in car parking and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.*
- 4. The development is not in the public interest having regard to impacts on views and the deficiency of car parking spaces pursuant to Section 4.15(1)(e) Environmental Planning and Assessment Act 1979*

DA2023/00419 remains under consideration by CN, noting a determination depends on the outcome of the subject 8.2(1) review application. The HCCRPP is also the determining authority for this application.

A request to review the decision of the Panel was made by the Applicant on 7 June 2024 following the refusal.

To manage any perceived conflict of interest, CN engaged Patch Planning to undertake an independent planning assessment along with Envisage Consulting, who specialised in visual impact assessment and view loss.

MA2023/00175 seeks to modify the building heights and envelopes approved under the Concept DA ref. **DA2017/00701** as well as associated administrative changes to the conditions of consent. The changes are proposed to enable the winning architectural scheme from the Design Competition. In addition, it seeks changes to carparking requirements.

The section 8.2(1) review application was publicly notified between 20 June 2024 and 18 July 2024. 252 submissions were received; 116 in objection and 136 in support.

Following a detailed assessment being undertaken in accordance with the relevant requirements of the EP&A Act 1979, the assessment undertaken finds that the proposal is readily assessable as a modification application under section 4.55(2) of the EP&A Act 1979, as it can be considered substantially the same development as the Concept DA.

In relation to consideration of impacts, it is considered that the modification is supportable on grounds of private view loss, public view loss, heritage and carparking. While it is acknowledged that some impacts will occur beyond those that were envisaged under the original Concept DA, on balance, these are considered acceptable and in the public interest.

The modification is supported as it will enable an enhanced and improved development outcome at the site, which will result in substantial public benefit. The modification takes advantage of the fortuitous demolition of the former CN carpark on King Street, to deliver a DCP defined visual corridor between the Christ Church Cathedral and the Newcastle Harbour. It will deliver a substantially enhanced Market Square and surrounding public domain amenity, and the provision of a well considered architectural development which exhibits design excellence. In addition, it will enable the delivery of much needed new homes, which will assist in tackling the housing crisis, as well as additional employment generating floor space (which will further contribute to the revitalisation of the Newcastle City Centre).

The applicant has provided sufficient information to demonstrate that the modified development is acceptable and has addressed the previous reasons for refusal provided by HCCRPP, issued 15 May 2024. A summary of such is set out below.

Reason for Refusal	Review findings
1. <i>The consent authority is not satisfied that the modification application is substantially the same development as the concept approval pursuant to Section 4.55 (2)(a) of the Environmental Planning and Assessment Act 1979</i>	Satisfactory. The modification is substantially the same development as that originally approved pursuant to DA2017/00701, as discussed in section 4.1 of this report.
2. <i>The modification application will have unacceptable cumulative impacts on both the public and private views and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. The modification is considered to result in acceptable cumulative impacts on public and private views as discussed in section 6.3 of this report.
3. <i>The development will create unacceptable impacts given the deficiency in car parking and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. Car parking has been demonstrated to be sufficiently catered for under the modification as discussed in section 6.4 of this report.
4. <i>The development is not in the public interest having regard to impacts on views and the deficiency of car parking spaces pursuant to Section 4.15(1)(e) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. The modification is considered in the public interest as the Panel's concerns raised regarding views and the deficiency of carparking are sufficiently addressed.

Recommendation

The proposed modification is in the public interest and, is recommended to be approved subject to the conditions contained at **Attachment 1** of this report.

1. THE SITE AND LOCALITY

1.1 The Site

The 'East End' development site comprises various land parcels located between the Hunter Street Mall and Christ Church Cathedral and is bounded by Perkins Street (west), Hunter Street (north), Newcomen Street (east), and King Street (south) as shown in **Figure 1**. The total area of the site is approximately 16,611sqm, and extends approximately 280m in length east to west and 90m north to south.

The East End development site is located centrally within the Newcastle City Centre. Surrounding land uses include a mix of commercial, retail, and residential premises, predominantly two to three storeys in height along Hunter Street, and up to six storeys along Newcomen Street.

The Concept DA provided concept approval for the East End development site, which comprises the major redevelopment of the four city blocks. Block 1 and Block 2 have been completed or are near completion, this development is commonly known as East End Stage 1 and Stage 2 respectively.

The proposed modification is limited to a portion of the East End development site, being the land identified as 'Block 3' which is now known as 'Stage 3', and 'Block 4' which is now known as 'Stage 4' under the Concept DA. This land is known as 105-137 Hunter Street, 3 Morgan Street, 22 Newcomen Street and 66-74 King Street, Newcastle, and has a total area of 6,450sqm. References to the site within this report are a reference to this portion of the East End development.

The site has notable changes in level, with a crossfall of approximately 20m from the south (rear) to the north (front). The site contains limited vegetation, with existing buildings that remain in a relatively dilapidated state.

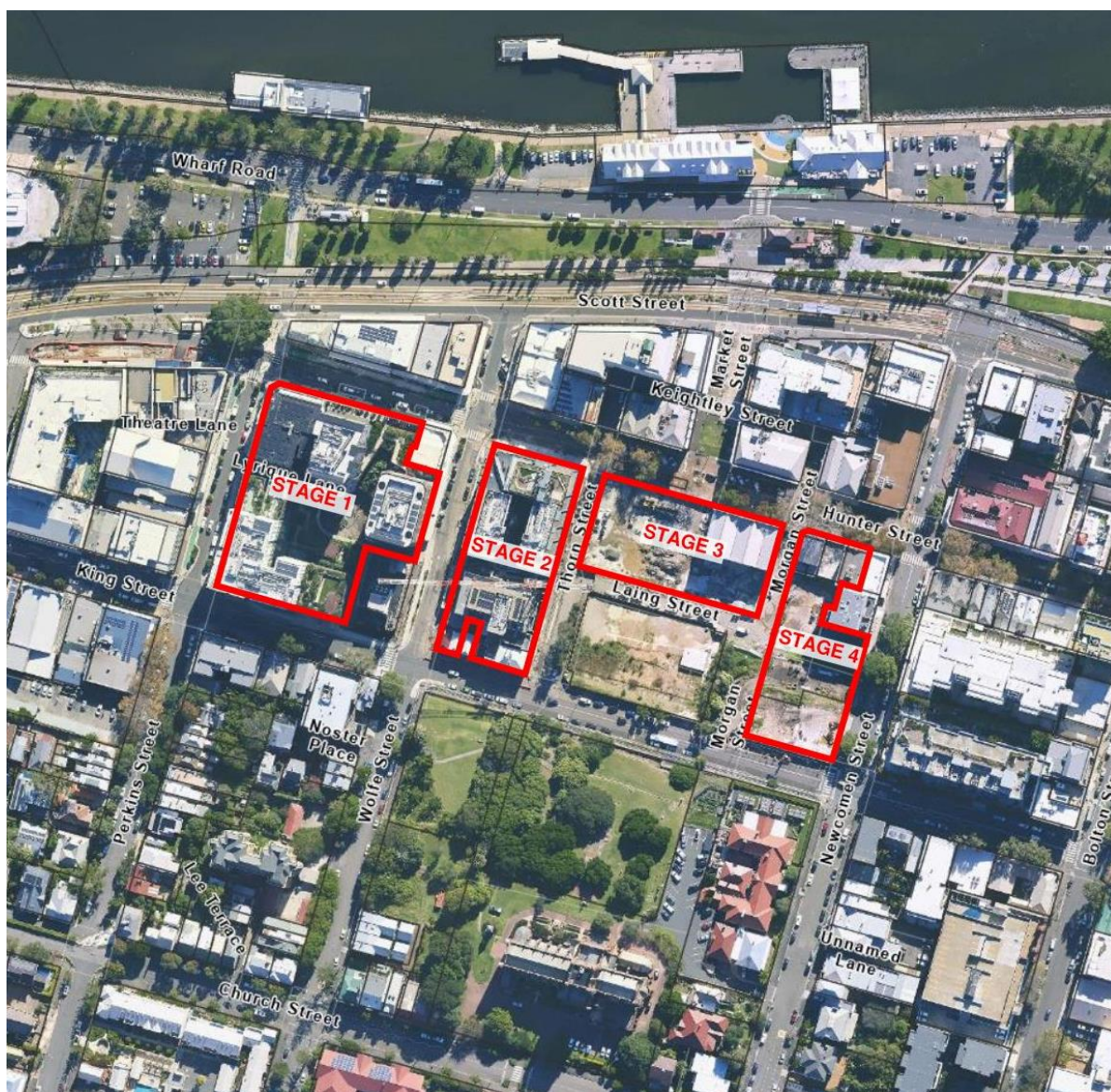


Figure 1: Location aerial map with East End development site shown outlined red. *Source: City of Newcastle, OneMap*

1.2 Site context

The surrounding area comprises a mix of retail, commercial, and residential premises. The proposal is sited in a central position within the heart of Newcastle's eastern portion of the Newcastle City Centre, within the Hunter Mall Precinct (as referred to within *Newcastle Development Control Plan 2012* ('NDCP 2012')).

The site is within the Newcastle City Centre Heritage Conservation Area, and there are local and state listed heritage items within and/or in the vicinity.

The area has been in a state of change for many years, and this is reflected in the varying age and nature of surrounding and nearby developments, including several newer apartment buildings (e.g. East End Stages 1 & 2 – refer to **Figure 2** and **Figure 3** below, and the Herald Apartments at the northeast corner of King and Newcomen Streets).

In addition, a notable change to the surrounding site context is the absence of the CN carpark. The CN carpark formerly occupied land to the south of the site fronting King Street, however under **DA2021/00059** it was demolished in 2021/2022 and is now vacant.

Beyond the former carpark site to the south, Cathedral Park and Cemetery, and the Christ Church Cathedral are located.



Figure 2: Stage 1 of East End development as viewed from Perkins Street, looking north. *Source: CN*



Figure 3: Stage 1 of East End development as viewed from Hunter Street, looking west. *Source: CN*

1.3 Local Planning Context

The site is within the Hunter Street Mall Precinct of the Newcastle City Centre as defined under NDCP 2012. In recent decades the Hunter Street Mall has benefited from urban renewal and has developed from a derelict environment to an environment which caters for a variety of activities including specialty retail, dining, entertainment, nightlife and events.

In relation to the future character of the Hunter Street Mall, the NDCP 2012 states:

“This precinct has the potential to develop as boutique pedestrian-scaled main street shopping, leisure, retail and residential destination. Infill development is encouraged that promotes activity on the street and which responds to heritage items and contributory buildings. Views to and from Christ Church Cathedral and the foreshore are retained and enhanced. Foreshore access is improved.”

Figure 6.01-29 of the NDCP 2012 provides a structure plan for Hunter Street Mall which is of significant relevance to the modification (see **Figure 4** below). As shown in the structure plan, a view corridor is depicted extending from Market Street in the north through to Christ Church Cathedral.

Figure 6.01-29: Hunter Street Mall Precinct

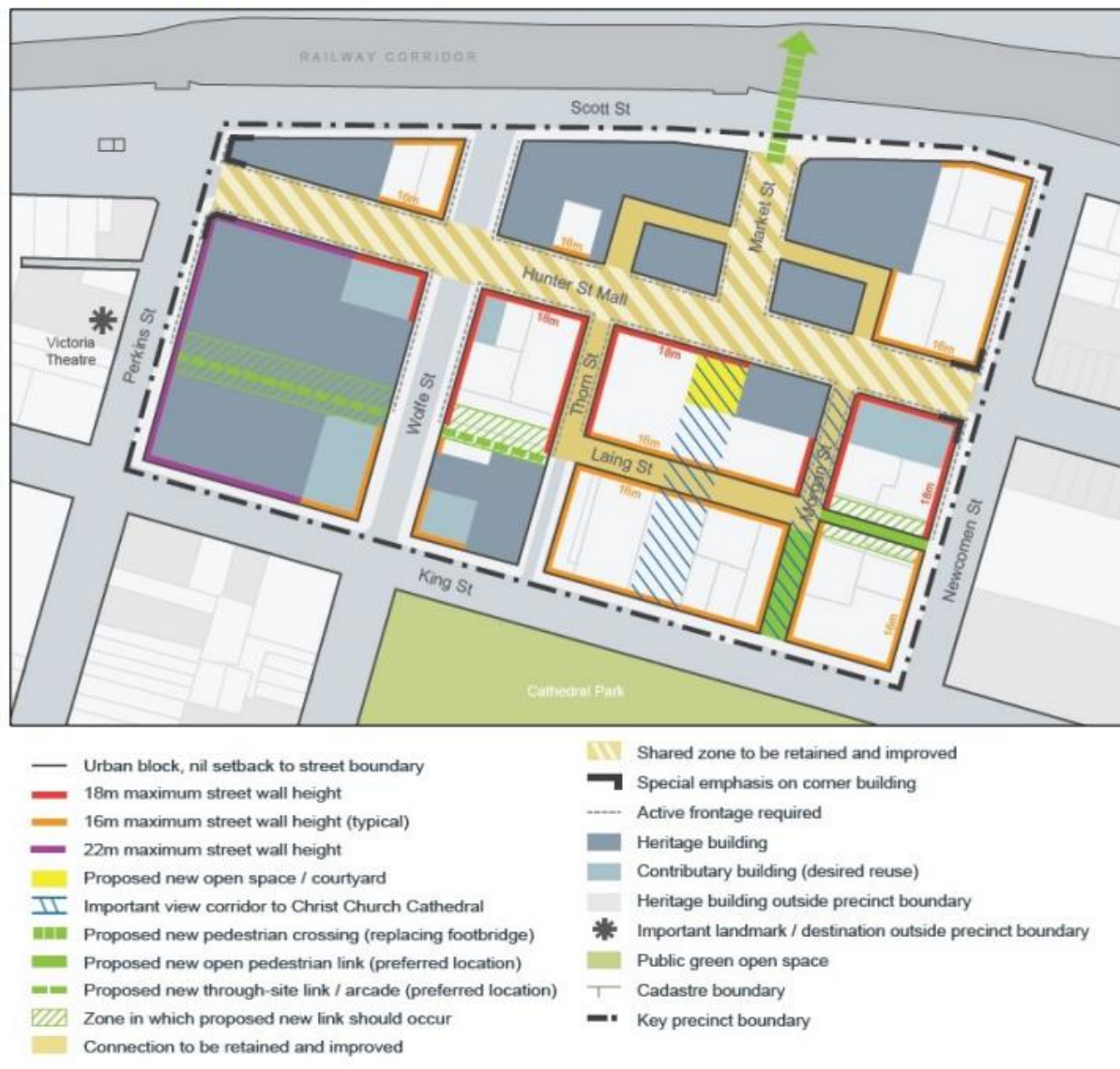


Figure 4: Hunter Street Mall Precinct map from Section 6.01.04 Key Precincts - Newcastle City Centre of NDCP 2012. *Source NDCP 2012*

An opportunity to realise the view corridor identified within Figure 6.01-29 of the NDCP 2012 has arisen due to the demolition of the former CN carpark located to the south. The carpark was demolished in 2021/22 and previously constrained the ability to create a visual corridor between the Cathedral and the Harbour. **Figure 5** and **Figure 6** below provide context of the view corridor prior to demolition of the CN carpark.



Figure 5: CN carpark prior to its demolition in 2021/22 as viewed from Scott Street, looking south.
Source: UDRP



Figure 6: CN carpark prior to its demolition in 2021/22 as view from Cathedral Park, looking north.
Source: UDRP

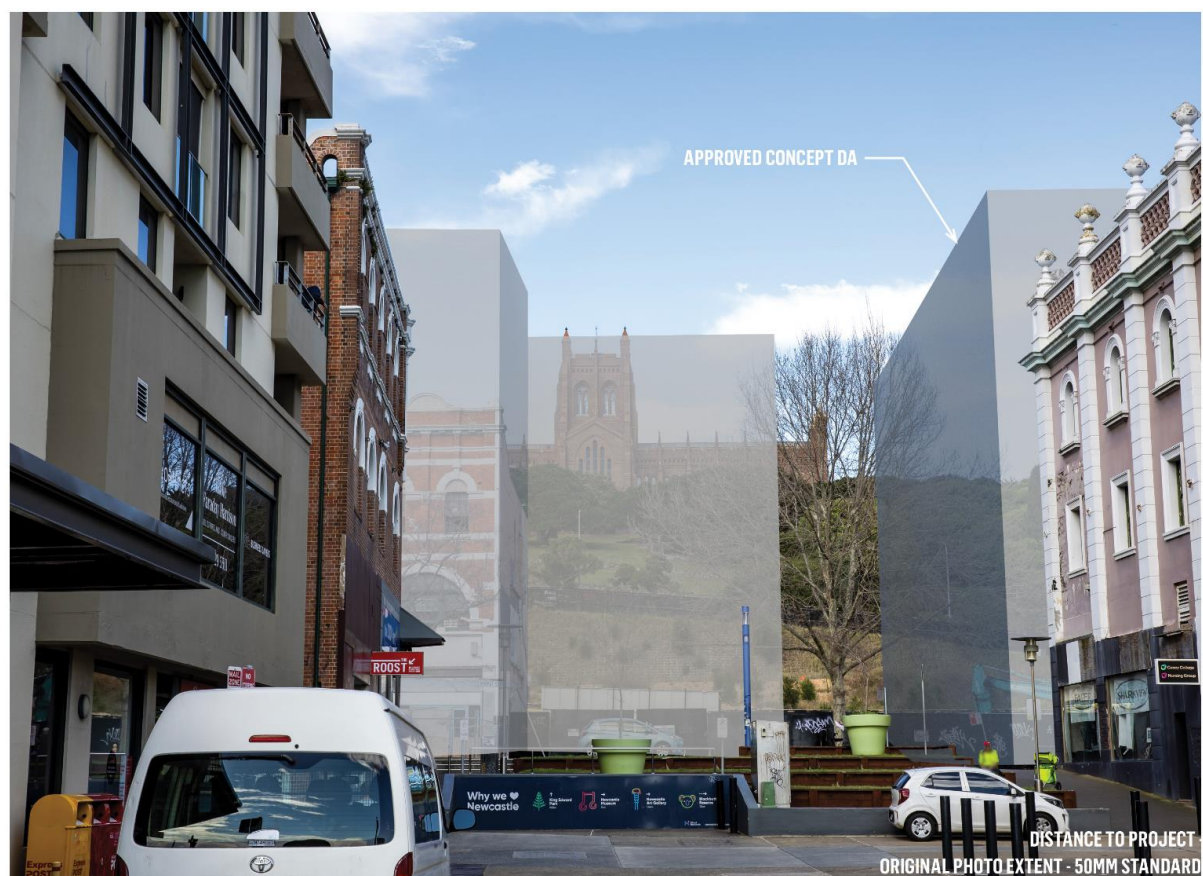


Figure 7: Concept DA approved building envelopes blocking Harbour to Christ Church Cathedral View Corridor, viewed from Market Street. Source: Urbis.

2. PLANNING HISTORY AND BACKGROUND

2.1 Development approved under DA2017/00701 (as modified)

The original Concept DA (ref. **DA2017/00701**) was approved on 2 January 2018, by the then JRPP (now known as HCCRPP). The Concept DA provided concept approval for the site including setting the FSR, height, building envelope, car parking and land use parameters for each stage of development.

A range of comprehensive reasons for the decision to support the Concept DA were provided by the former JRPP. In summary, the Panel were satisfied that:

- a comprehensive design excellence process had been undertaken,
- variances to the height control would not result in unreasonable amenity impacts, within and external to the site,
- appropriate adaptive reuse and retention of heritage buildings was proposed,
- Any departures from the NDCP 2012 had been justified,
- Car parking considerations had been appropriately considered and that car parking provisions for stages 2-4 could be addressed in detail as a part of any detailed application submitted, and
- The development would contribute to CN's vision communicated in the Newcastle Urban Renewal Strategy and NDCP 2012.

Several modifications have been approved since development consent was originally granted to **DA2017/00701**. These are summarised below:

- On 15 March 2019, modified development consent ref **DA2017/00701.01** was granted. The modifications added hotel and motel accommodation and serviced apartments to the approved uses and increased the number of residential apartments from 563 to 582. An increase in gross floor area ('GFA') across the site was supported, resulting in an FSR of 3.75:1 from 3.68:1, as well as changes to the building envelope over the northern part of the site and 61 additional car parking spaces.
- On 24 April 2020, modified development consent ref. **DA2017/00701.02**, was granted. The modifications related to Stage 1 and altered the approved mix of uses by reducing the number of residential apartments from 582 to 566, introduced a hotel use, and increased the GFA resulting in an FSR of 3.83:1 (from 3.75:1).
- On 10 November 2020, modified development consent ref. **DA2017/00701.03**, was granted. The modifications related to the percentage of residential units within each stage of the development that are to be adaptable housing.

2.2 Other related development applications

There have been multiple applications and modification applications over the East End development site. Outlined below are those applications specifically relevant to the Concept DA as they facilitated amendments to the concept approval pursuant to Section 4.17(1)(b) and 4.17(5) of the EP&A Act 1979:

- On 04 May 2021, development consent **DA2019/01150**, pertaining to the adaptive reuse of the heritage-listed former David Jones Building (located on land subject to Stage 1) for the purposes of tourist and visitor accommodation, was modified (ref. **DA2019/01150.04**) to increase the building height by 1 metre to accommodate a lift overrun.
- On 17 February 2022, development consent **DA2018/00354** for the detailed Stage 2 design, was modified (ref. **MA2021/00295**) to facilitate changes to the approved floor plans, elevations and conditions of consent.

- On 28 April 2023, development consent ref. **DA2023/00336** was granted for demolition and removal of existing non-heritage and non-contributory buildings and structures at 137-145 Hunter Street, 3 Morgan Street, and 66-74 King Street; this being land identified as Stage 3 and Stage 4 under the Concept DA. The local heritage item 'Municipal Building' (No. 1403) and the contributory buildings at 105-111 Hunter Street and 22 Newcomen Street (Blackall Hall) were excluded from the approved demolition and removal works. Furthermore, no excavation or groundworks were approved under DA2023/00336.
- On 10 November 2023, development consent DA2018/00354 for the detailed Stage 2 design, was modified (ref. **MA2022/00351**) to facilitate changes to conditions C19 and E22 of DA2018/00354 which both relate to car parking allocations.

2.3 Design competition process

An Architectural Design Competition was undertaken for the detailed design of Stage 3 and Stage 4. On 6 July 2022, following three-months of engagement with CN, the GANSW, and the Applicant, the Design Competition Brief was endorsed by GANSW and CN. A key criterion within the Brief was the delivery of the 'Harbour to Christ Church Cathedral' view corridor, with the brief stating the following:

"CN see the Harbour to Cathedral Park (previously called the Stairway to Heaven) concept as the pathway to achieve the desired future vision.

The Harbour to Cathedral Park was first imagined by EJE Architecture in 2006, but related to a different site and some different sites. The concept was delivered by a group of Novocastrian architects and proposed to link Cathedral Park to the south of the site to Newcastle Harbour to the north of the site. The concept would result in view lines from the Harbour foreshore and Hunter Street Mall to Cathedral Park and the northern transept of the cathedral.

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."

Whilst the competition brief refers to the approved Concept DA, the objectives of the competition brief in relation to the desired public domain outcomes could not have been achieved without varying from the concept envelope parameters in place. This is evidenced by the fact that none of the competitors involved in the process provided a complying development.

In the opinion of the Design Competition Jury, the winning design was the most capable of achieving design excellence, notwithstanding the departures from the approved concept envelope (pursuant to **DA2017/00701**).

The winning scheme underwent further refinement to address the matters outlined by the Jury in their Competition Report. This included 6 Design Integrity Panel ('DIP') meetings, following which, the DIP endorsed the detailed design. To enable the detailed design to come forward, a modification application was required to amend the approved Concept DA. Subsequently, **MA2023/00175** was lodged with CN.

2.4 Submission of MA2023/00175 and DA2023/00419

Following the design competition process being undertaken, a detailed development application for Stages 3 and Stage 4 (ref. **DA2023/00419**) was lodged concurrently with the corresponding modification application (ref. **MA2023/00175**).

On 15 May 2024, development consent was refused for modification application **MA2023/00175** by the HCCRPP for the following reasons:

- 1. The consent authority is not satisfied that the modification application is substantially the same development as the concept approval pursuant to Section 4.55 (2)(a) of the Environmental Planning and Assessment Act 1979.*
- 2. The modification application will have unacceptable cumulative impacts on both the public and private views and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.*
- 3. The development will create unacceptable impacts given the deficiency in car parking and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.*
- 4. The development is not in the public interest having regard to impacts on views and the deficiency of car parking spaces pursuant to Section 4.15(1)(e) Environmental Planning and Assessment Act 1979*

DA2023/00419 remains under consideration by CN, noting a determination depends on the outcome of the subject review application. The HCCRPP is also the determining authority for this application.

2.5 8.2 Review of Determination

Pursuant to section 8.2(1) of the EP&A Act 1979, an application for review of determination was lodged by the applicant on 7 June 2024. No changes have been made to the proposal which remains as proposed pursuant to **MA2023/00175**. Additional information has, however, been provided by the applicant in response to Request for Information's ('RFI's') issued by CN.

A chronology of the current review of determination application since lodgement is outlined in **Table 1** below.

Table 1: Chronology of the Review Application	
Date	Event
7 June 2024	Application lodged
17 June 2024	Application referred to internal and external agencies
20 June 2024	Exhibition of the application
26 June 2024	Proposal reviewed by UDRP
18 July 2024	Extended end date for exhibition

Table 1: Chronology of the Review Application	
Date	Event
23 July 2024	RFI from CN to applicant in relation to Subsidence Authority NSW additional information request
26 July 2024	Applicant submitted response to Subsidence Authority NSW RFI
6 August 2024	RFI from CN to applicant in relation to WaterNSW additional information request
8 August 2024	Preliminary HCCRPP Panel Briefing
20 August 2024	RFI from CN to applicant in relation to planning matters including view loss, heritage consideration, design excellence, and former CN Car Park site (92 King Street)
20 August 2024	Applicant submitted response to WaterNSW RFI
30 August 2024	Applicant submitted response to RFI dated 20 August 2024, aside from view loss matter
2 September 2024	HCCRPP Panel Site Visit with Applicant, CN, and independent consultants including an expert town planner and visual consultant
10 September 2024	Applicant submitted response to view loss matter from RFI dated 20 August 2024
11 September 2024	RFI from CN to applicant in relation to Subsidence Advisory NSW additional information request
11 September 2024	Applicant submitted response to Subsidence Advisory NSW RFI
23 September 2024	RFI from CN to applicant in relation to revised information pack and updates to Section 8.2 Review Planning Report.
26 September 2024	RFI from CN to applicant in relation to visual impact assessment reporting
30 September 2024	Applicant submitted response to RFI dated 26 September 2024
01 October 2024	Applicant submitted response to RFI dated 23 September 2024 which included an updated Section 8.2 Review Planning Report V2 and associated Appendices A to M
08 October 2024	Applicant revised information package to include legal advice regarding cl7.5 of the NLEP 2012 and the former CN car park, and shadow diagrams (Section 8.2 Review Planning Report V3 and associated Appendices A to O)
09 October 2024	Applicant revised information package to include designing with Country endorsement, architectural design statement, and updated view impact assessment information (Section 8.2 Review Planning Report V4 and associated Appendices A to Q)
12 October 2024	Applicant confirmed the revised information package includes the landscape development application design report (Section 8.2 Review Planning Report V4 and associated Appendices A to R)

2.6 Preliminary Panel Briefing and site visit

A preliminary briefing to the HCCRPP was undertaken on 8 August 2024. Key matters discussed included the following:

- The status of the CN carpark under the Local Government Act,
- Yield studies and means of managing outcomes on the CN carpark site,

- The application of clause 7.5 of the *Newcastle Local Environmental Plan 2012* ('NLEP 2012') in relation to the application of the design excellence clause to Concept DA's, and
- The historical significance of the cathedral including its context, setting and curtilage.

Table 2 below outlines responses to the key matters discussed at the HCCRPP and site visit.

Table 2: Key matters raised by the HCCRPP response table	
Matter raised (extracts from HCCRPP Record of Briefing)	Response
<i>The Panel wanted confirmation in relation to the status of the former car park land under the Local Government Act 1993.</i>	<p>The carpark site is 'operational land' as defined under the <i>Local Government Act 1993</i> and remains under CN ownership.</p> <p>A Council resolution was passed on 8 December 2020 which authorised the CEO to undertake feasibility analysis to undertake the 'Stairway to Heaven' concept, including, <i>"Exploring the potential for the Mall Car Park site to be redeveloped to deliver the concept, the protection of public car spaces (estimated at 380) and social infrastructure to ensure these components are provided in any new concept"</i>. A fully copy of the resolution is provided as Attachment 13.</p>
<i>The Panel expect the assessment to deal with the Council car park site, the relationship to the Council's DCP and nominated view corridor and assumptions on how this will be maintained.</i>	<p>The Applicant has provided legal advice (Attachment 3N) that states:</p> <p><i>Pursuant to the Chief Judge of the Land and Environment Court's decision in Tuite v Wingecarribee Shire Council (No 2) [2008] NSWLEC 321 ('Tuite') at [55], the obligation on the HCCRPP is to "determine the particular development application before" it and that task involves "assessing the impacts of the development proposed on the environment existing at the time of determination of the application" (our emphasis).</i></p> <p><i>Accordingly, based on the above principle in Tuite, the HCCRPP must assess the impacts of the Review Application on the environment existing at the time of determination."</i></p> <p>Notwithstanding the above, the view corridor is subject to planning controls within the NDCCP 2012. Any future development of the site would be subject to these planning controls and be required to ensure the view corridor is maintained.</p> <p>Furthermore, as indicated in the resolution passed by Council, any future development of the car park site is intended to maintain the view corridor.</p>
<i>The Panel suggested that there should be some analysis of potential building yield on the Council site if the view corridor is to be maintained.</i>	<p>Yield studies have been prepared at the request of the HCCRPP by the Applicant and are provided as Attachment 3J.</p> <p>The yield studies prepared demonstrate that a development outcome can be achieved at the site generally in line with the prescribed planning controls in the NLEP 2012 and NDCCP 2012.</p>

2.7 Requests for additional information

During the section 8.2 assessment process several requests for additional information were made, as outlined **Table 1** above. In response, a revised collated Section 8.2 Review Planning Report (**Attachment 3**) and documentation package (superseding previous reports and addendums) has been provided as well as additional specialist studies and legal advice set out in **Attachments 3A to 3R**.

3. THE PROPOSAL

3.1 The Proposed Modification

This section 8.2 application relates to modification application ref. **MA2023/00175**, which seeks to amend the building heights and envelopes approved for Stage 3 and Stage 4 under the Concept DA ref. **DA2017/00701** as amended.

The Concept DA does not consent to physical works for Stages 3 and 4 and the undertaking of the proposed modified development is reliant on approval being granted for the concurrently lodged detailed DA (ref. **DA2023/00419**).

The primary purpose of the modification application is to amend the building envelopes approved under the Concept DA to allow for the re-distribution of development massing from the centre, to elsewhere within the Stage 3 and Stage 4 portion of the site. This change is proposed primarily to accommodate a view corridor from the Harbour to the Christ Church Cathedral.

The modification responds to the requirements of an architectural design competition held between 8 July and 31 August 2022. As per the endorsed competition brief, competitor submissions were required to “*facilitate the delivery of this important public domain benefit [the harbour to Christ Church Cathedral view corridor]*”. Competitors were encouraged to examine the current approved building envelope configuration in Stage 3 and prepare “*creative and sensitively designed responses that provide an alternative massing arrangement in the precinct.*”



Figure 8: Approved Concept DA envelopes. *Source: Urbis*



Figure 9: Envelopes as proposed to be modified. Source: Urbis

In summary the modification can be described as follows:

- Redistribution of building envelope massing across the Stage 3 and Stage 4 site to respond to the requirements of the design competition process.
- Amending the height of building envelope within the Stage 3 and Stage 4 site area as follows:
 - Building 3 West: 34.30 RL
 - Building 3 North (Municipal Building): 31.28 RL
 - Building 4 North: 36.92 RL
 - Building 4 South: 51.70 RL
- Amendment to the floor space ratio permitted under the concept approval as follows:
 - Stage 3: 3.29:1
 - Stage 4: 4.42:1

Figure 10 and **Figure 11** show the changes to the Stage 3 and Stage 4 concept envelopes proposed to be modified. **Figure 12** depicts the view corridor enabled by the changes.

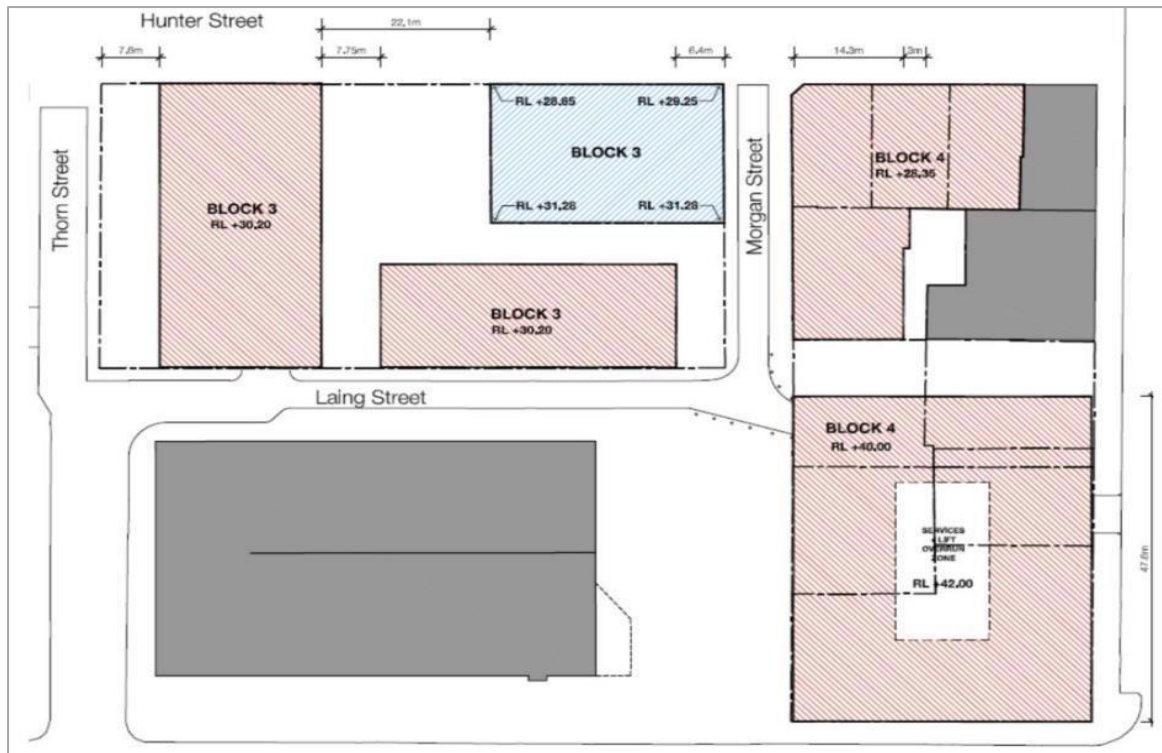


Figure 10: Approved Concept DA 'Envelope/height plan'. *Source: Urbis*

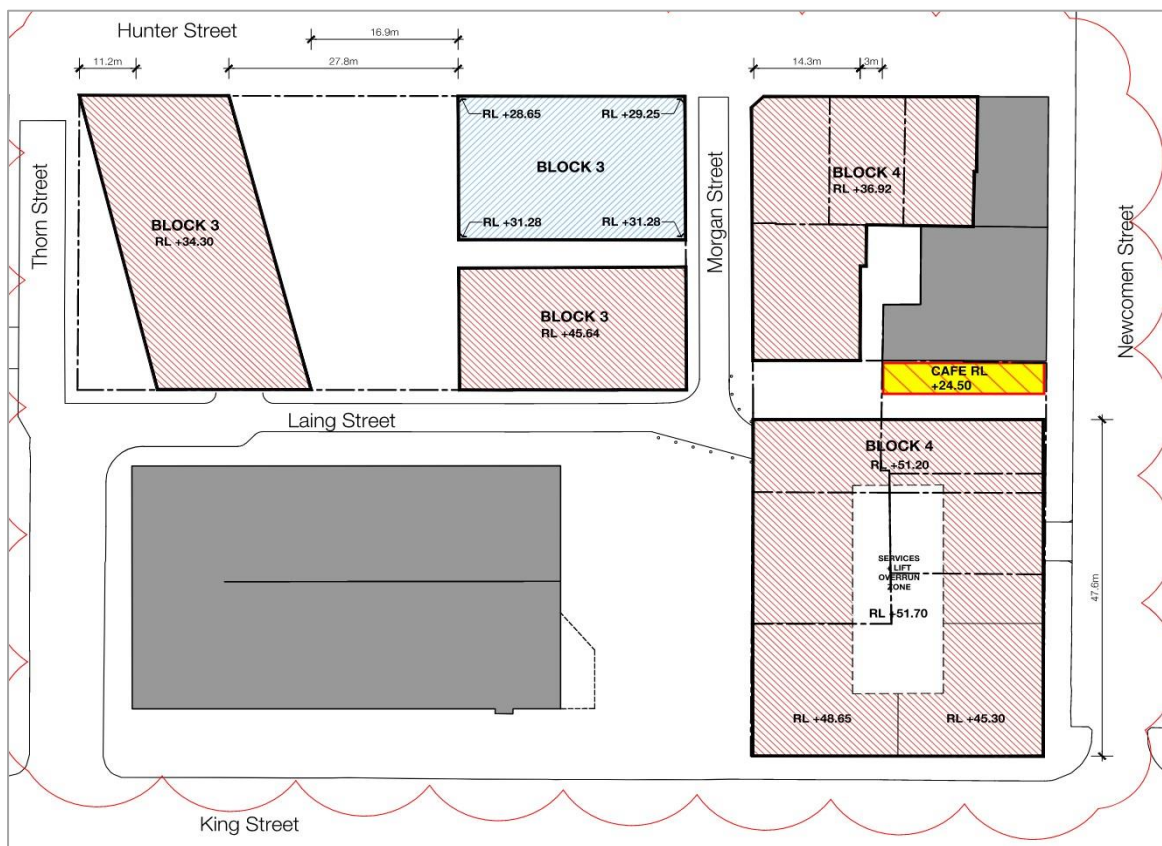


Figure 11: Proposed envelope/height plan. *Source: Urbis*



Figure 12: Harbour to Christ Church Cathedral View Corridor, from Queens Wharf Promenade, enabled by MA2023/00175. *Source: Urbis*

Table 3 and **Table 4** below provide a comparison of the key quantitative differences between the original approval and the modification.

Table 3: Height comparison for Stages 3 and 4 between DA2017/00701 and MA2023/00175			
Maximum Height (RL) – Stages 3 and 4 Only			
	DA2017/00701	MA2023/00175	Variation %
Building 3 West	RL 30.20	RL 34.30	13.6%
Building 3 North (Municipal Building)	RL 31.28	RL 20.43	-34.7%
Building 3 East (South)	RL 30.20	RL 45.65	51.1%
Building 4 North	RL 28.25	RL 36.92	30.7%
Building 4 South	RL 42	RL 51.70	23.1%

Table 4: FSR and GFA comparison across all stages between DA2017/00701 and MA2023/00175

GFA			
	DA2017/00701	MA2023/00175	Variation %
Stage 1	26,244 sqm	27,466 sqm*	4.7%*
Stage 2	11,709 sqm	12,954 sqm*	10.7%*
Stage 3	11,034 sqm	10,916 sqm	-1.07%
Stage 4	12,163 sqm	13,414 sqm	10.29%
Total	61,130 sqm	64,750 sqm	5.92%
FSR			
Stage 1	4.0:1	4.19:1*	4.75%*
Stage 2	3.2:1	3.55:1*	10.94%*
Stage 3	3.3:1	3.24:1	-1.82%
Stage 4	4.0:1	4.35:1	8.75%
Total	3.68:1	3.90:1	5.98%

*DA2017/00701.01, DA2017/00701.02, and DA2017/00701.03 approved increases in the GFA and FSR for Stages 1 and 2. Refer to the FSR/GFA analysis at **Table 13** for further details. MA2023/00175 proposes changes only to Stages 3 and 4.

The proposed modifications result in several associated amendments to the conditions of consent pursuant to **DA2017/00701** (as amended), as outlined in **Table 5** below and set out in **Attachment 1**.

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
Condition 1. Proposed to be amended by applicant.	<p><u>Condition description:</u> Condition 1 lists the approved plans and documentation of the Concept DA as amended.</p> <p><u>Change/ reason provided by applicant:</u> Architectural plans have been prepared by SJB Architects and detail the changes proposed to approved building envelopes for Stage 3 and Stage 4 (refer to Attachment 3B). The applicant proposes to replace the approved plans with the corresponding drawing submitted in support of the proposed modifications.</p> <p><u>Assessment comment:</u> The amendments as proposed by the applicant are limited to the approved plans under part u) of condition 1. However, the architectural plans prepared for the proposed modification contain details limited to Stage 3 and Stage 4 and therefore do not completely override the originally approved or previously modified drawings in relation to Stages 1 and Stage 2.</p> <p>Additionally, parts a) to u) and part v) of condition 1 reference a range of approved written documentation. The written documentation submitted in support of the proposed modification is limited to aspects relevant to Stage 3</p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p>and Stage 4 and do not supersede the originally approved or previously modified documents in relation to other stages.</p> <p>It is therefore recommended that condition 1 remains unchanged. Instead, a new condition should be included requiring the development to be undertaken substantially in accordance with the details and specifications set out in condition 1 expect where amended for Stage 3 and Stage 4 by the plans and supporting documents for the subject modifications. Condition 1A. has been included in the recommended Draft Schedule of Conditions (refer to Attachment 1).</p>
<p>Condition 4</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 4 details the approved maximum GFA for the entire East End development site, and further outlines the allowable distribution across the four stages and uses.</p> <p><u>Change/ reason provided by applicant:</u> The applicant proposes to replace the maximum GFA for the entire East End development, and the maximum GFA for Stage 3 and Stage 4 to reflect proposed modification.</p> <p><u>Assessment comment:</u> Agreed. Condition 4 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) to reflect the total GFA and distribution of GFA as a result of the proposed modifications.</p> <p>Assessment of the changes to approved GFA as a result of the proposed modification is discussed in relation Clause 4.4 of the NLEP 2012 in Section 4.3 of this report below.</p>
<p>Condition 5</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 5 details the approved maximum FSR for the entire East End development, and further outlines the allowable distribution across the four stages.</p> <p><u>Changes/ reason provided by applicant:</u> The applicant proposes to replace the maximum FSR for the entire East End development, and the maximum FSR for Stage 3 and Stage 4 to reflect proposed modification.</p> <p><u>Assessment comment:</u> Agreed. Condition 5 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) to reflect the total FSR and distribution of FSR as a result of the proposed modifications.</p> <p>Refer to the NLEP 2012 Clause 4.4 assessment in Section 4.3 of this report below for detailed assessment of the changes to the approved FSR as a result of the proposed modification.</p>
<p>Condition 6</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 6 addresses maximum building heights. The condition references the specific architectural drawings that provide details of the maximum building heights permitted, including the building envelope plan and elevations.</p> <p><u>Changes/ reason provided by applicant:</u></p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p>The applicant proposes to replace the approved building envelope plan and elevations with the corresponding drawing submitted in support of the proposed modifications.</p> <p><u>Assessment comment:</u> The modifications sought under the subject application are limited to Stage 3 and Stage 4 of the East End development site. Accordingly, the architectural plans prepared in support of the proposed modification contain details limited to Stage 3 and Stage 4, and therefore do not completely override the originally approved or previously modified drawings in relation to Stages 1 and Stage 2.</p> <p>It is therefore recommended that drawings reference in condition 6 remain unchanged, however, clarifying language should be added to specify that these drawings reflect the maximum building heights approved for Stage 1 and Stage 2 only. A new condition should be included, specifying the maximum building heights approved for Stage 3 and Stage 4 are as shown and reference on the architectural drawings for the subject modification.</p> <p>Condition 6 has been amended, and condition 6A. has been included in the recommended Draft Schedule of Conditions (refer to Attachment 1).</p> <p>Refer to the NLEP 2012 Clause 4,3 assessment in Section 4.3 of this report for detailed assessment of the changes to approved maximum building heights as a result of the proposed modification.</p>
<p>Condition 6A</p> <p>New condition proposed by applicant.</p>	<p><u>Changes/ reason provided by applicant:</u> The applicant proposes a new condition which specifies the maximum building height for the 'Laing Lane Café' building envelope, being RL 24.50, as marked in red and yellow highlight on the 'Building Envelope Plan' submitted for the section 8.2 review application (refer to Attachment 3B).</p> <p><u>Assessment comment:</u> The architectural plans (including floor plans and building envelope plan) submitted for the section 8.2 review application illustrate the building mass and building envelope proposed within the through-site connection between Newcomen and Laing Streets ('Laing Lane Café'). However, this building envelope has been excluded from the architectural elevations for the proposed modification. As a result, the addition of a new condition specifying that the consent permits a building envelope with a maximum building height of RL 24.50 for the purposes of the 'Laing Lane Café' is considered necessary to ensure clarity.</p> <p>Condition 6B (as a new condition 6A is already proposed as detailed directly above) has been included in the recommended Draft Schedule of Conditions (refer to Attachment 1).</p>
<p>Condition 10</p> <p>Proposed to be deleted by applicant</p>	<p><u>Condition description:</u> Condition 10 requires the provision of minimum 4m floor to ceiling heights at ground floor level, and minimum 3.3m at first floor level, for all new buildings within Stage 2, Stage 3, and Stage 4.</p> <p><u>Changes/ reason provided by applicant:</u> The applicant's position is that condition 10 is unnecessarily prescriptive in the context of a Concept DA and that minimum ceiling heights for the ground and first floor are more appropriately considered in the assessment of individual</p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p>DA (s) seeking development consent for the physical works where full details will be required.</p> <p><u>Assessment comment:</u> Having regard for the wide-ranging and often conflicting factors which impact the floor-to-floor heights (and thus the floor to ceiling heights) achievable of a building (site topography, building orientation, heritage conservation, street activation, overall building height, etc.), it is accepted that condition 10 is unnecessarily prescriptive given the nature of a Concept DA. The requirement to consider the 4m and 3.3m minimum floor to ceiling heights as part of the assessment of the detailed development application for Stage 3 and Stage 4 (ref. DA2023/00419) are already contained within the provisions of the NDCP 2012 and ADG respectively. Therefore, condition 10 has been deleted in the recommended Draft Schedule of Conditions (refer to Attachment 1).</p>
<p>Condition 18</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 18 specifies the minimum number of on-site car parking spaces to be provided across the four stages of the East End development.</p> <p><u>Changes/reason provided by applicant:</u> The applicant seeks to amend Condition 18 by increasing the minimum number of on-site car parking spaces from 616 vehicles to 735 vehicles.</p> <p><u>Assessment comment:</u> Agreed. Condition 18 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) to reflect the increase in minimum on-site car parking from 616 vehicles to 735 vehicles across the four stages.</p> <p>CN's Development Officer (Engineering) reviewed the modification application in relation to traffic, car parking, and access and these matters are considered in more detail within the Section 6.4 of this report below.</p>
<p>Condition 19</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 19 outlines specific requirements for the allocation of car parking across the four stages to ensure that the development provides adequate car parking spaces for residents, visitors, commercial/retail staff, and hotel guests, in compliance with the NDCP 2012 or the applicable standards at the time of application.</p> <p><u>Changes/reason provided by applicant:</u> Parts b) and c) of condition 19 rely, in part, upon the provision of parking for the development within a third party owned site (the former CN carpark site).</p> <p>The Concept DA (as amended) approved a total car parking deficit of 159 spaces across the four stages (85 residential visitor and 74 commercial /retail). Assessment of the original Concept DA (as modified) accepted that car parking demand associated with this development but not accommodated for by on-site car parking, (being a total of 159 spaces under DA2017/00701.03) could be met by available parking within the CN car park site and on-street carparking. Parts b) and c) of condition 19 currently reflect this requirement.</p> <p>This carpark has since been demolished. Accordingly, the applicant seeks to remove reference to the former CN car park.</p> <p><u>Assessment comment:</u></p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p>The proposed modification involves amendments to the approved parking and its allocation across the various stages and proposed uses. Assessment of the parking provisions has been undertaken by CN's Senior Development Officer (Engineering) having regard for changes to parking provisions and allocations that have occurred with the detailed design of all stages, and the change from minimum to maximum parking rates and a merits based assessment approach to parking under CN's NDCP 2023 reflects its objective to reduce car dependency and promote the utilisation of alternate modes of transport, thereby enabling greater land use efficiency. CN is satisfied that the car parking demand associated with the proposed modified concept DA can be accommodated through a combination of existing on-street time restricted parking and existing off-street publicly available parking in the immediate area in addition to the carparking provided as part of the development.</p> <p>Through the assessment, it was identified that Stage 3 includes a commercial/ retail car parking surplus of 21 spaces. This presents opportunity to offset part of the existing 38 commercial/ retail car parking deficit associated with the former Stage 1 and Stage 2. As a result, in addition to eliminating the requirement for parking to be facilitated by the now-demolished CN car park, the distribution of parking spaces across each stage and by use has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1). The amended condition specifies the number and allocation of car parking for Stage 1 (completed) and Stage 2 (under construction), and the planned car parking for Stage 3 and Stage 4, consistent with the detailed DA currently under assessment (ref. DA2023/00419).</p>
<p>Condition 42</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 42 requires the detailed DA for Stage 4 to include the dedication of land to CN for the creation of a new 'Market Square' between Hunter and Laing Streets, as illustrated on the 'Privately Owned Public Access Plan' prepared by SJB Architects for the approved Concept DA (as modified).</p> <p><u>Changes/reason provided by applicant:</u> The proposed modifications include the re-configuration of the approved 'Market Square' to align with CN's desired public domain outcome and to facilitate the NDCP 2012 view corridor through the site to the Christ Church Cathedral. Changes to the through-site connection between Newcomen and Laing Streets are also proposed to facilitate the activation of this space by the inclusion of cafe addressing Newcomen Street ('Laing Street Café'). Disabled accessible lift access is proposed to mitigate the steep change on level between Newcome and Laing Streets</p> <p>Rather than dedicate the 'Market Square' land to CN, the applicant proposes this land, and the through-site connection between Newcomen and Laing Streets, remain private land and a public right of carriageway be provided. This is consistent with the approach taken for the through-site connections within Stage 1 and Stage 2. Accordingly, the applicant proposed to amend condition 42 to require the provision of a public right of carriageway over the publicly accessible private land in accordance with the 'Privately Owned Public Access Plan' prepared by SJB for the proposed modification, removing the requirement for dedication of land to CN. Amendments are also proposed to ensure the disabled access lift remains publicly accessible by requiring its inclusion in the public right of carriageway.</p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p><u>Assessment comment:</u> Agreed. Condition 42 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1).</p>
<p>Condition 42A</p> <p>New condition proposed by applicant.</p>	<p><u>Changes/reason provided by applicant:</u> The applicant proposes a new condition be imposed to ensure the easement(s) for the public right of carriage way over private land is addressed by an appropriate survey plan and accompanying instrument under Section 88B of the <i>Conveyancing Act 1919</i> setting out the terms. The survey plan and 88B instrument must be lodged with CN for certification and then registered with NSW Land Registry Services. Additionally, the instrument must state that any release, variation, or modification of the public right of carriageway requires CN approval.</p> <p><u>Assessment comment:</u> Agreed. Condition 42A has been included in the recommended Draft Schedule of Conditions (refer to Attachment 1) to ensure that easement(s) are addressed by an appropriate 88B instrument, and these cannot be varied without the consent of CN.</p>
<p>Condition 43.</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 43 requires the detailed development applications for each stage to address the principles and design requirements of the public domain strategy and plan prepared by Aspect Studios in support of the original Concept DA and the relevant CN technical manual for the City Centre.</p> <p><u>Changes/reason provided by applicant:</u> The proposed modifications include the re-configuration of the through-site connection within Stage 3 and Stage 4 as approved under the Concept DA as modified. The public domain strategy prepared by Aspect Studios is now outdated for Stage 3 and 4, and is superseded by Cola Studio's '<i>Newcastle East End Stage 3 - 4 Landscape Development Application Design Report</i>' dated April 2023 (refer to Attachment 3R), and the applicant proposes to amended condition 43 to reference this report.</p> <p><u>Assessment comment:</u> Agreed. Condition 43 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) accordingly.</p>
<p>Condition 44</p> <p>Proposed to be amended by applicant.</p>	<p><u>Condition description:</u> Condition 44 specifies that through-site connections on privately owned land must be at least 5 meters wide and free of obstructions. However, the pedestrian-only link between Newcomen and Laing Streets may be a minimum of 3 meters wide, also free of obstructions. These through-site links must be placed according to the 'Privately Owned Public Access Plan' prepared by SJB Architects for the approved Concept DA (as amended).</p> <p><u>Changes/reason provided by applicant:</u> The proposed modifications include the re-configuration of the through-site connection within Stage 3 and Stage 4 as approved under the Concept DA as modified. Accordingly, the applicant proposes to amend condition 44 to replace the approved 'Privately Owned Public Access Plan' with the corresponding drawing submitted in support of the proposed modifications.</p>

Table 5: Assessment of modified conditions

Condition and change proposed (amended, deleted, or new)	Condition description, Change/ reason provided by applicant, and Assessment comment
	<p>In addition to proposing to replace the approved 'Privately Owned Public Access Plan' with the corresponding drawing submitted in support of the proposed modifications, the applicant proposes amendments to condition 44 to reiterate the requirements for the public right of carriageway, inclusive of the associated public lift, to be registered</p> <p><u>Assessment comment:</u> As discussed above, Condition 42 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) to address the requirements for a public lift to be provided in association with the publicly accessible through-site connections on privately owned land between Newcomen and Laing Streets. Also discussed above, Condition 42B has been inserted in the recommended Draft Schedule of Conditions (refer to Attachment 1) to ensure the required public right of carriageway is registered. As such it is considered unnecessary to reiterate these matters within Condition 42.</p> <p>However, it is agreed that Condition 43 needs to be amended to reference the 'Privately Owned Public Access Plan' prepared for the subject modification. Condition 43 has been amended in the recommended Draft Schedule of Conditions (refer to Attachment 1) accordingly.</p>

It is noted that in addition to the above, the assessment of the section 8.2 review application has identified several additional amendments to the Concept DA conditions of consent (as amended). Amended, deleted, and new conditions as detailed within this assessment report, have been outlined within **Attachment 1: Draft Schedule of Conditions – changes shown in red**. For clarity a 'clean' version of the modified consent conditions is provided at **Attachment 2**.

4. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in sections 4.55(2), 4.55(3), and 4.15(1) of the EP&A Act 1979. In addition to the above, Part 5 of the EP&A Reg 2021 must also be considered. The matters of relevance to the modification application are set out below.

4.1 Section 4.55 of the EP&A Act 1979

The modification application under review (ref. **MA2023/00175**) has been submitted pursuant to section 4.55(2) of the EP&A Act 1979, which enables a consent to be modified in circumstances where it can be demonstrated that the modifications made will result in substantially the same development as originally approved.

Specifically, section 4.55(2) of the EP&A Act 1979 state the following:

*“(2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, **modify the consent if—***

*(a) it is satisfied that the **development** to which the consent **as modified** relates is **substantially the same development** as the development for which consent was **originally granted** and before that consent as originally granted was modified (if at all)...”*

The ‘traditional’ approach to undertaking the relevant comparisons to interpret the ‘substantially the same’ test in section 4.55(2)(a) has included the following:

- Comparing the “quantitative” and “qualitative” differences between a proposed modified development against the approved development (*Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280 (**‘Moto Projects’**) at [56]);
- Comparing the “material and essential features” (*Moto Projects* at [55] and [58] and *Arrage v Inner West Council* [2019] NSWLEC 85 (**‘Arrage’**) at [26]) or “critical elements” (*The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1998] NSWLEC 244 (unreported 2 October 1998) at [29]) of the proposed modified development against the original approved development;
- Comparing the “consequences, such as the environmental impacts” (*Moto Projects* at [62] and **Arrage** at [28]) of carrying out the proposed modified development against the original approved development.

The above approach, whilst helpful in identifying the proposed differences in development, is not mandatory to consider, as confirmed by Chief Judge Preston CJ in *Canterbury Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31 (**‘Realize Architecture 1’**).

Preston CJ confirmed that (at [7]) in determining whether the development as modified is substantially the same development as the development originally approved, three tasks need to be undertaken:

*“(a) **Finding the primary facts**: This involves drawing inferences of fact from the evidence of the respects in which the originally approved development would be modified. These respects include the components or features of the development that would be modified, such as height, bulk, scale, floor space, open space and use, and the impacts of the modification of those components or features of the development.*

*(b) **Interpreting the law**: This involves interpreting the words and phrases of the precondition in s 4.55(2) as to their meaning.*

*(c) **Categorising the facts found**: This involves determining whether the facts found regarding the respects in which the development would be modified fall within or*

without the words and phrases of the precondition in s 4.55(2). The decision-maker's task is to determine whether the facts found fall within or without the statutory description, "according to the relative significance attached to them" by the decision-maker:"

An assessment of the 3-step formula acknowledged by the Chief Judge in **Realize Architecture 1** has been set out below. It is noted that in undertaking this assessment consideration has also been given to the traditional approaches which have been applied in relation to considering whether a proposed development can be considered 'substantially the same development'.

The First Step: Finding the primary facts

The modification application seeks to make changes to Stage 3 and Stage 4 of the Concept DA originally granted under **DA2017/00701**. Stage 1 and Stage 2 of the proposal have either been completed or are under construction and do not form part of this application.

The quantitative aspects of the original Concept DA and the proposed modified Concept DA is set out in **Table 6** below. In addition, **Figure 13** and **Figure 14** below depict the approved and proposed building envelope changes, as viewed from Hunter Street.

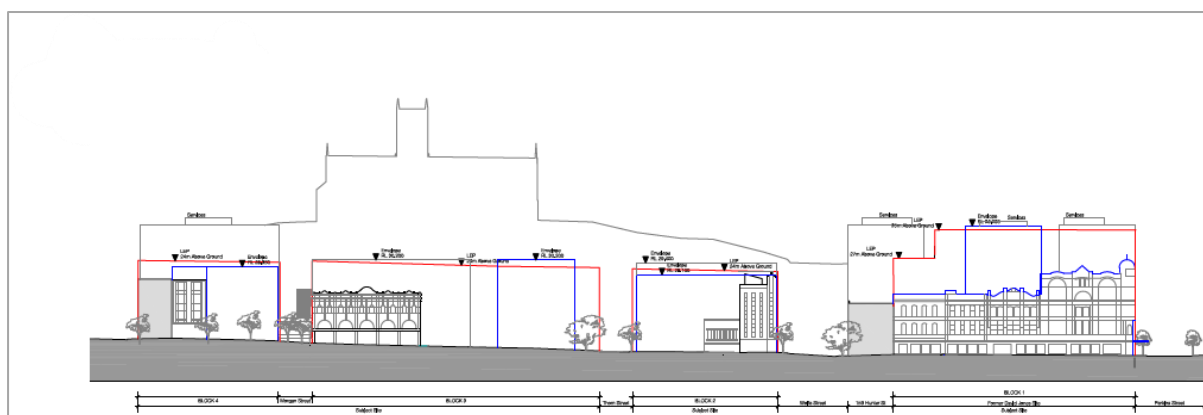


Figure 13: Excerpt of approved building envelopes per DA2017/00701, Hunter Street elevation. Source: SJB

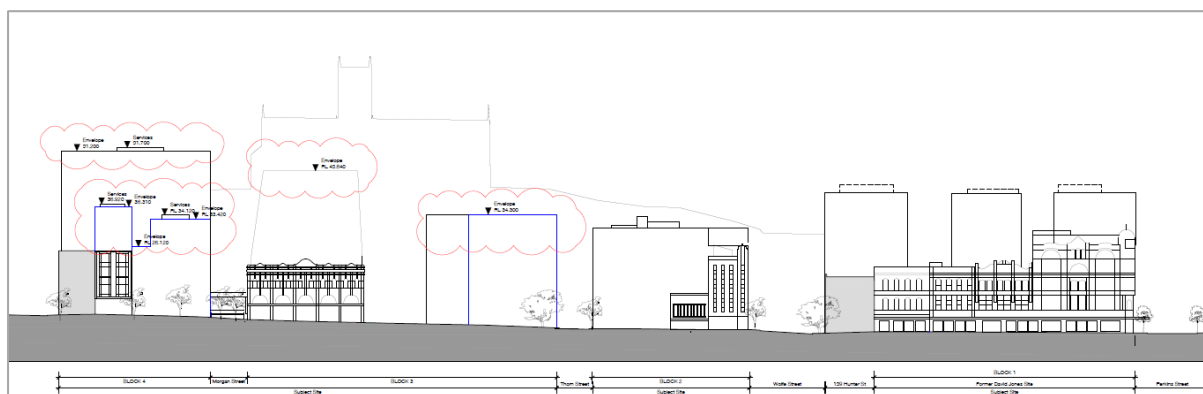


Figure 14: Excerpt of proposed modified building envelopes per MA2023/00175, Hunter Street elevation. Source: SJB

As detailed in **Section 3.1** of this report, the primary purpose of the modification application is to amend the building envelopes approved under the Concept DA to allow for the redistribution of development massing from the centre, to elsewhere within the Stage 3 and Stage 4 portion of the site. This change is proposed primarily to accommodate a view corridor from the Harbour to the Christ Church Cathedral, which would otherwise be blocked under the existing concept approval.

The modification responds to the requirements of an architectural design competition held between 8 July and 31 August 2022. As per the endorsed competition brief, competitor submissions were required to “*facilitate the delivery of this important public domain benefit [the harbour to Christ Church Cathedral view corridor]*”. Competitors were encouraged to 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.*”

Table 6 below provide a quantitative comparison of the GFA across each stage of the proposal as originally approved and as proposed to be modified.

Table 6: GFA (FSR) Comparison between the original Concept DA and modification					
	Original approval DA2017/00701	Latest approval DA2017/00701.03	Proposed Modification	Variation (%) to original approval	Variation (%) to latest approval
Stage 1	26,244 sqm	27, 466 sqm	27,466 sqm	4.7%	0%
Stage 2	11,709 sqm	12,954 sqm	12,954 sqm	10.7%	0%
Stage 3	11,034 sqm	11,034 sqm	10,916 sqm	-1.07%	-1.07%
Stage 4	12,163 sqm	12,163 sqm	13,414 sqm	10.29%	10.29%
Total	61,130 sqm	63,617 sqm	64,750 sqm	5.92%	1.78%

Table 11 and **Table 12** below provide a comparison of building heights across Stage 3 and Stage 4 between the original approval and the modification.

The Second Step: Interpreting the law

The ‘traditional’ approaches to undertaking the relevant comparisons to interpret the ‘substantially the same’ test in section 4.55(2)(a) of the EP&A Act 1979 has been undertaken below to assist in informing the second step of the process outlined by Preston CJ.

Comparing the “quantitative” differences

The tables above concisely set out the *quantitative* differences between the approved Concept DA and the Concept DA as proposed to be modified.

In providing a comparison of the quantitative differences of the proposal, it is also relevant to acknowledge that the proposed modifications relate to Stage 3 and Stage 4 of the Concept DA only, as Stages 1 and 2 of the Precinct have been approved and are either completed, or nearing completion.

Taking this notion further, and as noted by the Applicant, of the 528 apartments to be delivered across the 4 stages, 333 have already been delivered (within Stages 1 and 2), equating to 63% of the residential apartments provisioned for within the Concept DA. Of the commercial and retail premises provision, 4,064sqm has been delivered (within Stages 1 and 2). This equates to 72.8% of the commercial and retail premises provisioned for in the Concept DA. As such, the proposed modification relates to a concept approved portion of the site that will cater for the delivery of less than a third of the GFA to be delivered across the site as a whole.

Taking into consideration the above, the proposal is readily assessable as a modification application under section 4.55(2) of the EP&A Act 1979. The modification would result in substantially the same development as originally approved from a quantitative perspective. This is because the modification relates to a precinct scale, staged, urban renewal project proposed to be undertaken over an extended time period. Whilst there are differences between Stage 3 and Stage 4 of the original and proposed concept approval, the numeric changes proposed are required to be considered with a contextual lens being applied, which

considers the precinct as a whole. Through this lens, the modification is capable of being considered substantially the same development.

Comparing the “qualitative” differences

In terms of *qualitative* differences, the Applicant's Section 8.2 Review Planning Report (**Attachment 3**) provides the following qualitative justification in relation to the proposal being 'substantially the same' development:

“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 change the overall precinct site composition and arrangement, alter the building type, heritage response or road network approach.”

The modified envelope will not change the inherent nature of the Stage 3 and Stage 4 development as the use will remain mixed, comprising residential, commercial, retail, and public spaces as originally approved. Furthermore, it is considered that the envelope changes will have a neutral or improved impact on the internal amenity of the apartments delivered, as well as result in significant improvements to the public domain in the immediate and nearby vicinity of the project extending as far as Queens Wharf.

Importantly, the modification will allow for the delivery of the Harbour to Cathedral view corridor, as well as other key view corridors referred to in the NDCP. However, the Applicant's statement that the modification will improve the visual relationship to the Christ Church Cathedral from the Newcastle Harbour, should be qualified as the modification does result in Cathedral views being obscured in some locations. This includes parts of Stockton foreshore (including Stockton Ferry Terminal).

Comparing the “material and essential features” or “critical elements”

The phrase “material and essential features” or a “material and essential physical element” of the development, which has been adopted in several decisions derives from judicial interpretations of the statutory test that the modified development be “substantially the same” development as the originally approved development.

In terms of *material and essential features* or *critical elements*, the inherent nature of the development, as a mixed-use residential led precinct, will not change because of the modification proposed, with key features of the original proposal retained.

The public benefits of the scheme, including the provision of a revitalised city centre block will continue to be delivered by the modification. In addition, the proposed modification will result in substantial public benefit beyond the original Concept DA through the realisation of the Harbour to Christ Church Cathedral view Corridor identified within the NDCP 2012.

However, a consequence of the modification application is some public and private view

impacts beyond those contemplated by the original proposal will result. The modification will result in Cathedral views being obscured in some locations, such as Stockton foreshore.

Comparing the “consequences such as the environmental impacts”

The consequences and environmental impacts (and assessment response) as detailed in the Applicant’s Section 8.2 Review Planning Report (**Attachment 3**) are provided below:

- **Improved public views to the Christ Church Cathedral:** *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 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.*

Response: The modification results in an improved public view outcome when considered south of Queens Wharf due to the realisation of the Harbour to Cathedral view corridor. As identified in the independent visual impact assessment provided as **Attachment 4** however, it is noted that there are impacts on the NDCP 2012 view corridor from Stockton Ferry terminal, and viewpoints heading east towards the ocean along Stockton Foreshore. Notwithstanding, it is considered that impacts occurring in these isolated locations are acceptable given they can be deemed lower order views when compared to those within the Newcastle City Centre and Queens Wharf. Furthermore, it is considered that isolated views being obscured will have an overall low impact on the landscape character of the surrounds in those impacted locations.

- **Improved compliance with the Newcastle Development Control Plan:** *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 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. The Concept DA is not aligned with the Newcastle Development Control Plan as it blocks the view corridor, therefore the proposal results in improved compliance.*

Response: It is agreed that the current Concept DA is not aligned with the objectives or controls of the DCP 2012 in that it blocks views to the cathedral. Modification of the Concept DA will enable long desired public domain outcomes to be achieved.

- **Improved solar access to the CN’s car park and future public domain:** *The overshadowing impacts are improved with the proposed scheme compared to the Concept DA because of the redistributed building mass. The re massing and inclusion of the view corridor improves solar access between 9am and 1pm. Considering this, the proposed scheme does not impact the developability of this site more than that identified in the Concept DA assessment, and results in an improved outcome.*

Response: Overshadowing generally falls within the approved Concept DA massing with only small increments of shadow falling outside of the approved envelopes as demonstrated in the drawings provided as **Attachment 30**.

- **Improved connectivity and pedestrian experience; and overall community experience:** *The Concept DA and LEP controls allowed for a smaller ‘Market Square.’ In conjunction, with unlocking the view corridor, the reconfiguration improves the public domain experience and improves solar access to the City of Newcastle site to the south which will also be required to contribute to the Harbour to Cathedral link. This “opening up” results in improved connectivity between The Hill and Harbour and will deliver a better community meeting place.*

Response: It is strongly agreed that the modification will enable a vast enhanced public domain outcome. The modification will enable the creation of a unique public plaza visually connected from the Cathedral to Queens Wharf. This is an important public benefit that the modification supports and will be lost under the current concept approval.

- **Improved heritage outcome for the Municipal Building:** *The Concept DA and LEP controls allow for additional built form to be constructed on top of the Municipal Building. The Municipal Building has been retained ‘freestanding’ and unencumbered of additional storeys. This is because of the redistribution of building mass. Given this key move, the building mass above the Municipal Building was distributed and contributed to the height variation of Building 3 East (Bluebell). The adaptive reuse of the Municipal Building will help preserve heritage within the Newcastle’s city centre while also enabling the opportunity to diversify the building’s purpose. The proposal also respects surrounding heritage items and is conscious of their significance.*

Response: The modification will result in an enhanced outcome with respect to heritage considerations in relation to the Municipal Building.

- **Minor overshadowing increases to The Newcastle Club and The Herald Apartments, however, compliance remains with the Apartment Design Guidelines or Newcastle DCP:** *However, the additional shadowing does not prevent these premises receiving adequate solar access primarily in the morning. The increase in overshadowing does not result in any non-compliances to these premises under the Apartment Design Guidelines or Newcastle DCP.*

Response: The majority of overshadowing continues to occur within the originally approved envelope with only small increments of shadow falling outside of the approved envelopes. This is shown in the overshadowing diagrams provided as **Attachment 30**.

- **Minor increase in impacts to private views for Segenhoe, however, the impact on a limited number of private views is acceptable against the combined benefits of the public views achieved:** *In respect to private views, impacts have been determined to be reasonable by Jane Maze-Riley and CN. Iris have undertaken a comprehensive design development process which has been assessed by design experts to have achieved design excellence, to reach the considered balancing of various issues resulting in the design as proposed and would likely require the loss of development/amenity to the overall proposal to further decrease private view impacts. On balance, the impact on a limited number of private views is acceptable against the combined benefits of the public views achieved and the significant renewal proposed within the precinct. Further as outlined by CN, the redevelopment and revitalisation of the Newcastle City Centre as detailed within CNs strategic planning framework cannot reasonably be constrained and limited based on impact to private views.*

Response: The view impacts to Segenhoe are discussed further in **Section 6.3** of this report. View loss created by changes to the Concept DA is considered minor to moderate, and it is agreed that the view loss is reasonable with reference to Tenacity.

The Third Step: Categorising the facts

Legal advice provided by the Applicant (**Attachment 3L**) states the following in relation to undertaking this third and final step in the assessment of whether a development is substantially the same as originally approved:

5.2 This final step is an “evaluative one” that “involves assigning relative significance or weight to the different facts and a balancing of the facts, as weighted.” In this sense, the final step involves a subjective element of opinion.

5.3 In our view, having regard to the factual differences and the comparative assessment set out above and within the Urbis Report (drawing guidance from the traditional ‘ways’ established by longstanding case law), the Concept Modification is readily capable of being considered ‘substantially the same’ development as the development approved by the Original Consent for the following primary reasons:

(a) when answering the ‘substantially the same’ test it is important to consider the development as approved and as proposed in context, on balance and the whole. Conceptually, that exercise is to be undertaken differently for a small-scale development and a large-scale development. In this sense, when dealing with a large-scale residential development (i.e. 11-storeys) in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council* [2023] NSWLEC 1437, the Court acknowledged at [57] and [65] that whilst there may be a number of quantitative differences between 2 developments which on face value alone and without any further consideration may appear to be significant, when a macro (not micro) approach is undertaken, the modified development can still be substantially the same development as the originally approved development;

(b) accordingly, the fact that the Concept Modification proposes to “increase yield, FSR and height”, as commented on by the Panel, is not a sufficient blanket reason to consider it as not being substantially the same development as the Original Consent. In contrast, and as correctly identified by the Council in its assessment report, “the consideration of the ‘substantially the same’ test is not to be limited to a quantitative exercise alone... and, the assessment needs to be undertaken having regard to overall context of the approved development;

(c) when looking at the Concept Modification from a macro ‘precinct perspective’, there are only changes proposed to the Original Consent in respect of Stages 3 and 4 and there are no changes proposed to Stages 1 or 2, at all. As provided on page 20 of the Urbis Report “the argument regarding ‘substantially the same’ is related to approximately 20% of the East End precinct.” This is a compelling reason for the Concept Modification to be considered as ‘substantially the same’ development as the development approved by the Original Consent;

(d) when a finely balanced and instinctive synthesis of the proposed changes to Stages 3 and 4 of the Concept Modification are then considered, which include fundamentally the relocation of building mass to enable the ‘Harbour to Cathedral Park’ link / view corridor and incorporation of the 10% design excellence height bonus achieved by the architectural design competition, those changes are not significant enough to ‘radically transform’ the development approved by the Concept Modification. This is particularly relevant because the power of a consent authority to ‘modify’ an earlier consent is a power to alter without radical transformation the consent (*Scrap Realty Pty Limited v Botany Bay City Council* [2008] NSWLEC 333 at [14];

(e) if one were to conduct a review of the before and after situations by looking at the relevant sets of plans, one can see that the Concept Modification is not substantially different from the Original Consent. The comparison building envelope drawings which are provided at Figures 1 and 5 of the Urbis Report clearly show this. We note that in the ‘substantially the same’ assessment, a consent authority is to look at substance, not form (*Gordon & Valich Pty Ltd v City of Sydney Council* [2007] NSWLEC 780 at [19]). In that respect, the essence of the Original Consent remains the same and the Concept Modification is not so large as to render it something other than ‘substantially

the same' development;

(f) ultimately, the modification power is to be construed broadly and facultatively. In other words, it is generally to be interpreted in a way that is favourable to applicants because the purpose of the provision is to enable development to be modified without the need to completely re-assess a new development application (North Sydney v Michael Standley and Associates Pty Ltd (1998) 97 LGERA 43).

Response: Whilst there are quantitative differences between the original and the proposed Stage 3 and Stage 4 concepts, these changes are not substantive enough to render the development not substantially the same as originally approved. Furthermore, the legal advice is accepted in relation to the position that an increase in yield, FSR and height is not a sufficient blanket reason to consider the development (as modified) as not being substantially the same development as the Concept DA.

More pertinent to the assessment of the modification is whether the changes proposed result in a development which can be considered substantially the same development when an assessment is undertaken against those matters that are of relevance to the development under section 4.15(1) of the EP&A Act 1979, including the likely impacts of the development.

4.2 Section 4.15(1) of the EP&A Act 1979

Section 4.55(3) of the EP&A Act 1979 states that *"In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified."*

Section 4.15(1) of the EP&A Act 1979 states the following:

"...a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

(a) the provisions of—

(i) any environmental planning instrument, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) *the public interest.*”

An assessment against the relevant requirements of section 4.15(1) of the EP&A Act 1979 is provided in the following sections of this report.

4.3 Section 4.15(1)(a) – Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements, and the Regulations

(a) Section 4.15(1)(a)(i) - Provisions of Environmental Planning Instruments

The following Environmental Planning Instruments (EPIs) are relevant to this application:

- *State Environmental Planning Policy (Planning Systems) 2021* ('Planning Systems SEPP')
- *State Environmental Planning Policy (Housing) 2021* ('Housing SEPP')
- *State Environmental Planning Policy (Resilience and Hazards) 2021* ('Resilience and Hazards SEPP')
- *Newcastle Local Environmental Plan 2012* ('NLEP 2012')

A summary of the key matters for consideration arising from these State Environmental Planning Policies are outlined in **Table 7**.

Table 7: Summary of Applicable Environmental Planning Instruments (Preconditions in bold)		
EPI	Matters for Consideration	Compliance
Planning Systems SEPP	<ul style="list-style-type: none">• Clause 2.19(1) and Clause 2 of Schedule 6 declares the proposal regionally significant development, as it has an estimated development cost of more than \$30 million.	Yes
Housing SEPP	<ul style="list-style-type: none">• Clause 146 – Consideration of modifications – The consent authority has considered advice received from the UDRP and agrees that the design quality of the modified development so far as facilitating the detailed Stage 3 and 4 developments, is capable of according with the design quality principles and the Apartment Design Guide.• Clause 147 - Design Quality Principles - The amended concept envelope would enable the proposed detailed Stage 3 and Stage 4 developments to come forward, which has been subject to rigorous design competition and development, concluding that the development exhibits design excellence. <p>Adequate consideration has been given to the extent that the ADG applies to the subject modification application, including building envelope separation, building setbacks, and floor to ceiling heights.</p> <p>A detailed assessment against the ADG requirements would be undertaken as part of the concurrent detailed DA for the Stage 3 and Stage 4 developments (ref. DA2023/00419).</p>	Yes
Resilience and Hazards SEPP	<ul style="list-style-type: none">• Section 2.10(1) & (2) - Development on land within the coastal environment area	Yes

Table 7: Summary of Applicable Environmental Planning Instruments (Preconditions in bold)		
EPI	Matters for Consideration	Compliance
	<ul style="list-style-type: none"> • Section 2.11(1) - Development on land within the coastal use area • Section 4.6 - Contamination and remediation have been considered and the proposal is satisfactory from a contamination perspective. It is noted this is a matter for detailed consideration as part of DA2023/00419. 	
NLEP 2012	<ul style="list-style-type: none"> • Clause 2.3 – Permissibility and zone objectives • Clause 4.3 – Height of buildings • Clause 4.4 – Floor space ratio • Clause 4.6 – Exceptions to development standards • Clause 5.10 – Consideration of aboriginal and non-aboriginal heritage • Clause 7.1 – Objectives Newcastle City Centre • Clause 7.5 – Design Excellence 	Partial

State Environmental Planning Policy (Planning Systems) 2021 ('Planning Systems SEPP')

Chapter 2: State and Regional Development

The proposal is regionally significant development, pursuant to Clause 2.19(1) and Clause 2 of Schedule 6 of the Planning Systems SEPP, as it has an estimated development cost of more than \$30 million. Accordingly, the HCCRPP Panel is the Consent Authority for the application in accordance with relevant instructions issued under the EP&A Reg 2021.

State Environmental Planning Policy (Housing) 2021)

On 14 December 2023, the former SEPP 65 was repealed and replaced by SEPP (Housing) 2021) (the Housing SEPP), which commenced on 23 September 2021.

Clause 146 of the Housing SEPP requires the consent authority to refer a modification application to which this policy applies, to the relevant design review panel for advice to assist in determining as to whether the modifications diminish or detract from the design quality or compromises the design intent of the development for which the consent was granted.

Furthermore, Clause 147 requires the consent authority in determining an application to which this clause applies to take into consideration:

“(a) the quality of the design of the development, evaluated in accordance with the design principles for residential apartment development set out in Schedule 9,

(b) the Apartment Design Guide,

(c) any advice received from a design review panel within 14 days after the consent authority referred the development application or modification application to the panel.”

The proposed modified concept DA was considered by the UDRP during the assessment of modification application **MA2023/00175** at the meeting of the UDRP held 5 July 2023, with the UDRP supporting the proposal.

The UDRP continues to provide unwavering support of the proposed modified concept DA, noting:

“The UDRP offers its wholehearted support of the modification to concept plan... and the UDRP support the application and no further changes are suggested to the concept”.

Considering no changes have been made to the modification application the subject of this review, the detailed UDRP assessment that was undertaken for **MA2023/00175** remains applicable.

In addition, a meeting with the UDRP was convened on 28 June 2024, following which commentary was provided having specific regard to the HCCRPP's reasons for refusal of **MA2023/00175**.

Advice from the UDRP provided in July 2023 and June 2024 forms **Attachment 5** and **Attachment 6** of this advice.

In summary, as is evident from the advice provided, the UDRP remains supportive of the proposed modified concept DA and commends the applicant's collaborative design approach and Designing for Country focus. The UDRP have identified that the modification is strongly in the public interest as the realisation of the 'Harbour to Christ Church Cathedral' an opportunity that *"should not be missed"*.

Further to the above, *"the UDRP considers the relatively minor changes to the approved concept to be entirely consistent with the concept approval and has no doubt that the Modification continues to be substantially the same development as was approved in the Concept, as defined by Section 4.55 (2) (a) of the EP&A Act 1979"*.

Apartment Design Guidelines ('ADG')

The modification is accompanied by a design statement (**Attachment 3Q**) which supports that the proposed building envelopes achieve a development outcome generally consistent with the design criteria and objectives of the ADG.

A further detailed assessment of the applicable ADG provisions will be undertaken as part of the assessment for **DA2023/00419**.

State Environmental Planning Policy (Resilience and Hazards) 2021 ('Resilience and Hazards SEPP')

Considering no physical works are proposed as part of the subject modified concept DA, the applicable provisions of the Resilience and Hazards SEPP, notably Chapter 2 Coastal Management and Chapter 4 Remediation of Land, will be addressed as part of the detailed development application (ref. **DA2023/00419**).

Conditions 59 and 60 of the approved Concept DA (as amended) relate to site contamination and read as follows:

"59. The development application for each stage must provide a detailed contamination investigation in accordance with the Environment Protection Authority's (EPA) 'Guidelines for Consultants Reporting on Contaminated Sites'.

60. If the detailed contamination investigation identifies remediation works that are required, then a Remedial Action Plan prepared in accordance with the Environment Protection Authority's (EPA) 'Guidelines for Consultants Reporting on Contaminated Sites' is to be submitted to the relevant consent authority with the development application for each stage."

Contamination and any required site remediation works will be required to be addressed as part of **DA2023/00419** for Stage 3 and Stage 4. No further consideration is required for the proposed modified concept DA.

Newcastle Local Environmental Plan 2012 ('NLEP 2012')

The relevant Local Environmental Plan applying to the site is NLEP 2012. The NLEP 2012 provides zoning, development standards and provisions in relation to development undertaken within the Newcastle Local Government Area.

An assessment of the modification has been undertaken with the findings summarised below.

Zoning and Permissibility (Part 2)

The site is located within the MU1 - Mixed Use zone pursuant to Clause 2.3 of NLEP 2012. The MU1 zone objectives, prescribed within the Land Use Table are as follows:

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

The proposal continues to comprise a mixed-use development consisting of commercial premises, shop top housing and residential flat buildings. Such uses are permitted with consent in the MU1 zone. In addition, the modification would result in a development outcome which is consistent with the zoning objectives listed above.

Relevant Provisions and Development Standards (Part 2, 4, 5 and 6)

The NLEP 2012 contains development standards, miscellaneous provisions, and local provisions which relate to the proposal. These are considered in **Table 8** and under the relevant headings below.

Table 8: Consideration of the NLEP 2012 Controls		
Clause	Control	Assessment
Height of buildings (Clause 4.3(2))	<p>Blocks 3 and 4 are subject to maximum height of building (HOB) controls as depicted in the below mapping extract. The grey building envelopes are controlled by a maximum RL, as follows:</p> <ul style="list-style-type: none"> • Building 3W – RL 30 • Building 3N – RL 20 • Building 3S – RL 30 • Building 4N – RL 29 • Building 4S – RL 42 <p>Due to the proposed changes to building envelopes within block 3, certain elements of the 3W and 3S buildings fall outside of the grey envelopes shown below. In turn, these areas are subject to a 24m HOB control.</p>	<p>The HOBs proposed are as follows:</p> <ul style="list-style-type: none"> • Building 3W – RL 34.3 • Building 3N – RL 20.43 • Building 3S – RL 45.65 • Building 4N – RL 36.92 • Building 4S – RL 51.70

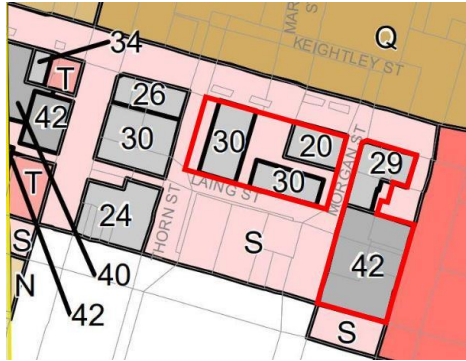
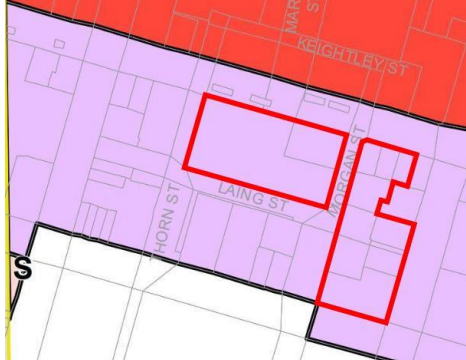

Table 8: Consideration of the NLEP 2012 Controls		
Clause	Control	Assessment
	 <p>Figure 15: Height of Building Map with land subject to Stage 3 and Stage 4 outlined red. <i>Source: NLEP 2012</i></p>	
Floor Space Ratio (Clause 4.4(2))	<p>The site is subject to a maximum FSR control of 4.0:1.</p>  <p>Figure 16: Floor Space Ratio Map with land subject to Stage 3 and Stage 4 outlined red. <i>Source: NLEP 2012</i></p>	<p>The modified proposal would result in an FSR of 3.90:1 across the site, which complies with the development standard. Further discussion in relation to 'Clause 4.4' is provided below.</p>
Heritage (Clause 5.10)	<p>121 Hunter Street is a locally listed heritage item (ref. 'Municipal Building' I403)</p> <p>The existing retaining wall to King Street, near the corner with Newcomen Street, is also a locally listed heritage item (ref. I477).</p> <p>The site also falls within the Newcastle City Centre Heritage Conservation Area.</p> <p>The site is also within the vicinity of state and local listed heritage items.</p>	<p>Heritage is considered further in Section 6.5 of this report.</p>

Table 8: Consideration of the NLEP 2012 Controls		
Clause	Control	Assessment
	 <p>Figure 17: Heritage Map with land subject to Stage 3 and Stage 4 outlined blue. <i>Source: NLEP 2012</i></p>	
Newcastle City Centre objectives (Clause 7.1)	That development is considered to achieve the objectives prescribed for the Newcastle City Centre.	The proposal is consistent with the intended strategic planning outcomes for the Newcastle City Centre as outlined further under the relevant heading below.
Design Excellence (Clause 7.5)	The associated detailed development application (ref. DA2023/00419) for the Stage 3 and Stage 4 developments was subject to a Design Excellence Competition pursuant to Clause 7.5 (4).	The scheme that the modified envelope seeks to facilitate (as proposed under DA2023/00419) is the winning entry of the design competition, which underwent further refinement and scrutiny through six rounds of review by the DIP as well as the URDP. Both panels have endorsed the proposal and celebrate its design excellence.

Clause 4.3 – Height of Buildings

The proposed modification seeks to alter the maximum allowable building height permitted under the Concept DA (ref. **DA2017/00701**, as amended).

Table 9 and **Table 10** below provide a comparative breakdown of the permissible heights pursuant to NLEP 2012, the approved heights pursuant to **DA2017/00701**, and the proposed heights pursuant to **MA2023/00175** (and by virtue **DA2023/00419**).

It is important to set out the differing maximum building height controls that apply across the site. As depicted in the HOB mapping extract above, the building envelopes outlined in grey are subject to a maximum RL building height, rather than a maximum building height measured in metres. For Stage 3, the grey RL envelopes do not follow the boundaries of the site, unlike Stage 4, and therefore due to the proposed modified building envelopes, certain elements of the stage 3 buildings are subject to the 24m HOB control. This is illustrated in **Figure 18** below. The portions numbered 1 – 4 are subject to the 24m HOB control, and the blue-dotted outline indicated the envelopes that are subject to the maximum RL HOB controls.

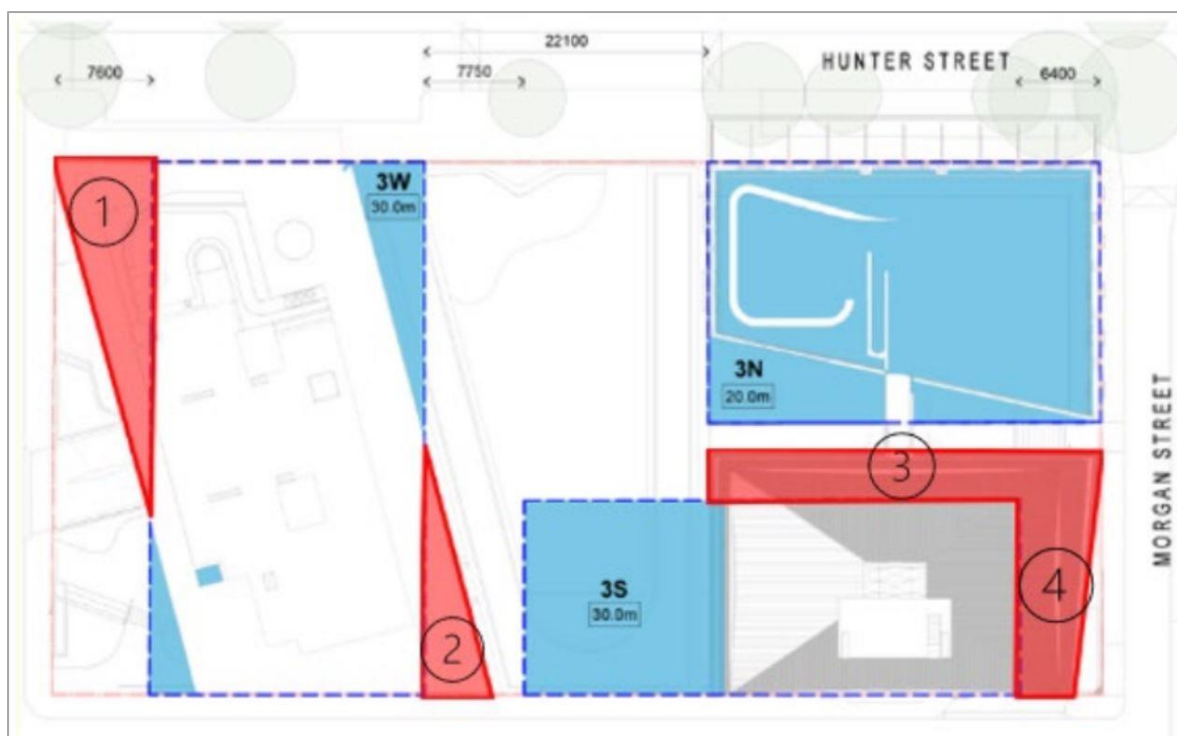


Figure 18: Proposed modified concept DA analysis of HOB controls - portions outlined blue dotted are subject to maximum RL controls and portions shown red are subject to the 24m height of building control. *Source: Urbis*

Table 9: Height of buildings comparison - Maximum height RLs			
	NLEP 2012	DA2017/00701	MA2023/00175
Building 3 West	RL 30	RL 30.20	RL 34.30
Building 3 North (Municipal Building)	RL 20	RL 31.28	RL 20.43
Building 3 South	RL 30	RL 30.20	RL 45.64
Building 4 North	RL 29	RL 28.25	RL 36.92
Building 4 South	RL 42	RL 42	RL 51.70

Table 10: Height of buildings comparison - Maximum height meters		
	NLEP 2012	MA2023/00175
Building 3 West – Point 1	24m	30.35m
Building 3 West – Point 2	24m	27.88m
Building 3 South – Point 3	24m	35.30m
Building 3 South – Point 4	24m	38.28m

Whilst the above details the 'base' height controls in accordance with clause 4.3 of NLEP 2012, it is noted that Clause 7.5(6) of NLEP 2012 prescribes the following:

“(6) The consent authority may grant consent to the erection or alteration of a building to which this clause applies that has a floor space ratio of not more than 10% greater than that allowed by clause 7.10 or a height of not more than 10% greater than that allowed by clause 4.3, but only if the design of the building or alteration has been reviewed by a design review panel.”

Subsequently, the maximum building height applicable for the site may be exceeded by up to 10%, in line with Clause 7.5(6), subject to CN support. On this basis, the revised maximum building heights with the bonus applied would be as detailed below.

Table 11: NLEP 2012 (RL) height of buildings + 10% pursuant to Clause 7.5(6)			
	NLEP 2012 + 10%	MA2023/00175	Variation %
Building 3 West	RL 33	RL 34.30	3.9%
Building 3 North (Municipal Building)	RL 22	RL 20.43	Complies.
Building 3 South	RL 33	RL 45.65	38.3%
Building 4 North	RL 31.9	RL 36.92	15.7%
Building 4 South	RL 46.2	RL 51.70	11.9%

Table 12: NLEP 2012 (M) height of buildings + 10% pursuant to Clause 7.5(6)			
	NLEP 2012 + 10%	MA2023/00175	Variation %
Building 3 West – Point 1	26.4m	30.35m	15%
Building 3 West – Point 2	26.4m	27.88m	5.6%
Building 3 South – Point 3	26.4m	35.30m	33.7%
Building 3 South – Point 4	26.4m	38.28m	45%

The proposed detailed design for Stages 3 and 4 has re-arranged massing elements from the central view corridor and redistributed this massing atop of Buildings 3 West, 3 South, 4 North, and 4 South. Another change to the design from the approved Concept DA is the removal of the massing above the parapet of the Municipal Building (known as 3 North).

While compliance with the height limit is not achieved across the entire Stage 3 and Stage 4 site, the modification provides for an outcome consistent with the objectives of the clause which are as follows:

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

As detailed in the Applicant’s report, the modification will ensure that a ‘flat top’ planning envelope does not characterise the Newcastle City skyline. This aspect of the design was commended by the UDRP during the design competition process as it reinforces the notion of a playful and varied skyline. Furthermore, the variance in height will not undermine the established centres hierarchy.

In relation to objective (b), as discussed in **Section 6.6** of this report, the modification will have negligible additional impacts in relation to solar access. Minor additional overshadowing will result during morning hours over a small portion of Cathedral Park as a result of Building 4S, however this is considered acceptable as it will have negligible impact. It is noted also that areas of Newcomen Street will benefit from increase solar access being received.

Clause 4.4 – Floor Space Ratio

The modification seeks to increase the FSR across the site from 3.68:1 (as approved pursuant to **DA2017/00701**) to 3.90:1. This represents an increase of 5.98%. This is compliant with the prescribed 4.0:1 FSR control, pursuant to Clause 4.4 of NLEP 2012.

In terms of GFA, the Concept DA approved a provision of 61,130sqm split across the 4 stages, whilst the subject modification seeks a provision of 64,750sqm .

The FSR and GFA for the site, under the Concept DA as amended, is 3.83:1 and 63,617sqm, respectively. The proposed additional increase in FSR and GFA equates to 1.82% (0.07) and 1.85% (1,133sqm) respectively.

The above figures are set out in **Table 4** and again in **Table 13** below for reference.

Table 13: FSR and GFA comparison					
	DA2017/00701	DA2017/00701.03 (latest approval)	Proposed Modification	Variation (%) to original approval	Variation (%) to latest approval
GFA					
Stage 1	26,244 sqm	27, 466 sqm	27,466 sqm	4.7%	0%
Stage 2	11,709 sqm	12,954 sqm	12,954 sqm	10.7%	0%
Stage 3	11,034 sqm	11,034 sqm	10,916 sqm	-1.07%	-1.07%
Stage 4	12,163 sqm	12,163 sqm	13,414 sqm	10.29%	10.29%
Total	61,130 sqm	63,617 sqm	64,750 sqm 3.92	5.92%	1.85%
FSR					
Stage 1	4.0:1	4.19:1	4.19:1	4.75%	0%
Stage 2	3.2:1	3.55:1	3.55:1	10.94%	0%
Stage 3	3.3:1	3.3:1	3.24:1	-1.82%	-1.82%
Stage 4	4.0:1	4.0:1	4.35:1	8.75%	8.75%
Total	3.68:1	3.83:1	3.90:1	5.98%	1.82%

The minor increase in GFA is supported. The increase in density will provide for a development outcome in line with the FSR standard which applies to the site, of an appropriate density, which will positively contribute towards the desired built form of the Hunter Street Mall Precinct.

Clause 7.1 – Objectives of the Newcastle City Centre

The objectives of this clause are as follows:

The objectives of this Part are as follows—

(a) to promote the economic revitalisation of Newcastle City Centre,

(b)..the proposed modified development will enable a significant revitalisation of a large city centre block. The development will contribute to the vitality and viability of Newcastle City Centre through provision of commercial and retail premises.to

strengthen the regional position of Newcastle City Centre as a multi-functional and innovative centre that encourages employment and economic growth,

(c) to protect and enhance the positive characteristics, vitality, identity, diversity and sustainability of Newcastle City Centre, and the quality of life of its local population,

(d) to promote the employment, residential, recreational and tourism opportunities in Newcastle City Centre,

(e) to facilitate the development of building design excellence appropriate to a regional city,

(f) to encourage responsible management, development and conservation of natural and man-made resources and to ensure that Newcastle City Centre achieves sustainable social, economic and environmental outcomes,

(g) to protect and enhance the environmentally sensitive areas and natural and cultural heritage of Newcastle City Centre for the benefit of present and future generations,

(h) to help create a mixed use place, with activity during the day and throughout the evening, so Newcastle City Centre is safe, attractive, inclusive and efficient for its local population and visitors alike.

The modification is consistent with the objectives of the NLEP 2012 in relation to the Newcastle City Centre for the following reasons:

- The proposed modified development will enable a significant revitalisation of a large city centre block. The development will contribute to the vitality and viability of Newcastle City Centre through provision of commercial and retail premises.
- The modified development will deliver additional retail and commercial premises to the City Centre, in turn contributing to employment and economic growth opportunities.
- The modified development exhibits design excellence, as commended by the Architectural Design Competition jury, and the DIP and UDRP members. The development will revitalise and activate a significant city centre block and will deliver strong public benefits including new view corridors and public space provisions.
- As noted above, new retail and commercial premises will be delivered as part of the residential-led development, in turn promoting employment and residential opportunities. Recreational opportunities will also be enhanced by way of the public realm offering to be delivered fronting Market Square.
- The detailed design (pursuant to ref. **DA2023/00419**) is the winning entry of the Architectural Design Competition. The jury have commended the high-quality architectural design, which is noted to have undergone further refinement through six DIP meetings. The design was also subject to two UDRP meetings. Each design panel has commended the design excellence of the modified development.
- The proposal will facilitate a residential-led mixed use development, in a central city centre location. The development will contribute to the revitalisation of the city centre and will activate the street frontages through provision of retail and commercial premises. This in turn will create a safe, attractive, and inclusive town centre for residents and visitors alike.

Clause 7.5 – Design Excellence

Legal advice has been provided by the Applicant (**Attachment 3N**) having regard to the application of Clause 7.5 to the subject modified Concept DA at the request of the Panel.

The opinion states that there is a “*well-developed body of case law that has expressly considered this query and confirmed that local design excellence clauses are relevant matters*”

for consideration by consent authorities when undertaking assessments of concept applications which seek consent for concept building envelopes.”

The findings of the legal advice are accepted, and it is agreed that Clause 7.5 of NLEP 2012 has application within the assessment of the subject concept modification. As detailed previously in this report, the detailed design for Stage 3 and Stage 4 (ref. **DA2023/00419**) has undergone significant design testing and development via an Architectural Design Competition and six (6) proceeding DIP meetings. The reason for the subject modification is to facilitate this winning architectural scheme.

Furthermore, it is agreed that the proposal is consistent with the relevant design excellence provisions of NLEP 2012, and it is reasonable to expect that the detailed development application is eligible to be afforded uplift.

The relevant design excellence provisions are detailed below (**bold text for emphasis**):

(3) In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—

(a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,

(b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,

(c) whether the development detrimentally impacts on view corridors identified in the Newcastle City Development Control Plan 2012,

(d) how the development addresses the following matters—

(i) heritage issues and streetscape constraints,

(ii) the location of any tower proposed, having regard to the need to achieve an acceptable relationship with other towers (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,

(iii) bulk, massing and modulation of buildings,

(iv) street frontage heights,

(v) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,

(vi) the achievement of the principles of ecologically sustainable development,

(vii) pedestrian, cycle, vehicular and service access, circulation and requirements,

(viii) the impact on, and any proposed improvements to, the public domain.

The modification will support a development outcome which appropriately responds to the heritage context of the site and can deliver a development which provides buildings of an appropriate bulk and mass.

The modification supports the delivery of a development outcome which will provide a significant public benefit in keeping with the site's historic and originally intended use. Market Square is left open to possibility for community uses and will form part of the visual connection between the Harbour and the Christ Church Cathedral.

In relation to environmental impacts, these are considered to be acceptable, as discussed further **Section 6** of the report.

(b) Section 4.15 (1)(a)(ii) - Provisions of any Proposed Instruments

There are no proposed instruments which have been the subject of public consultation under the EP&A Act 1979 and are relevant to the proposal.

(c) Section 4.15(1)(a)(iii) - Provisions of any Development Control Plan

The *Newcastle Development Control Plan 2023* ('NDCP 2023') was publicly exhibited from 28 September 2023 to 27 October 2023. The NDCP 2023 has since been adopted and became operational on 1 March 2024.

Section 11 of Part A - Introduction of the NDCP 2023 nominates savings and transitional arrangements as follows:

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

Exemptions

The above Savings and transitional arrangements do not apply to the following sections:

- *D4 Commercial*
- *E3 Tighes Hill local Character*
- *E4 Kotara Local Character.*

Development applications to which these sections apply will be assessed in accordance with DCP 2023."

Subsequently, the modification application the subject of this review (ref. **MA2023/00175**) was assessed against the provisions of the NDCP 2012 as it was lodged prior to the 1 March 2024, unless exempted.

The following sections of the NDCP 2012 are relevant to the assessment of this application:

- Section 6.01 – Newcastle City Centre
 - 6.01.02 Character areas
 - 6.01.03 General controls, Chapter A Building form
 - 6.01.02 Character areas
 - 6.01.04 Key Precincts
- Section 7.03 Traffic, Parking and Access

The relevant sections of the NDCP 2012 are addressed below. In addition, it is noted that to avoid duplication, where a more detailed assessment of the NDCP 2012 is required, this has been considered conjunctively with the assessment of impacts contained in **Section 6** of this report.

In addition, the following has been considered under section D4 Commercial of the Newcastle Development Control Plan 2023 ('NDCP 2023'):

- 8.0 Streetscape and front setbacks
- 9.0 Side and rear setbacks
- 10.0 Street activation
- 11.0 Building design and appearance
- 12.0 Amenity – internal and neighbour
- 13.0 Views and visual privacy

Newcastle Development Control Plan 2012 ('NDCP 2012')

Section 6.01 – Newcastle City Centre

6.01.02 Character areas provides principles and aims to ensure developments contribute to the character of distinct areas within the Newcastle City Centre.

In accordance with NDCP 2012, the subject site falls within the 'East End' character area. NDCP 2012 summarises East End as being characterised by *'hilly topography... and containing a mix of heritage listed and historic buildings.. giving this part of Newcastle a unique character and offering interesting and eclectic streetscapes'*.

The modification provides for increased alignment with a number of development principles outlined for the East End including:

- *Significant views to and from Christ Church Cathedral are protected, including views from Market Street and Morgan Street. Views to Hunter River are protected and framed along Market Street, Watt Street and Newcomen Street.*
- *Heritage items and their setting are protected. New buildings respect the setting of heritage buildings.*

Further consideration of the development principles above is provided in sections 6.3 and 6.5 of this report, respectively.

6.01.03, Part A contains a series of built form controls pertaining to matters such as street wall heights, building setbacks, building separation, and building depth or bulk. It is noted that the modification relates to a concept approval, and therefore these controls have limited application in the circumstances. However, as demonstrated in the design report prepared, a development is capable of being delivered which can comply with the relevant requirement of Part A.

6.01.04, Part B (B2) of the NDCP 2012 contains controls pertaining to views and vistas. Of relevance to the modification, B2 states the following:

"Preserving significant views around the city is critical to place-making, wayfinding and for retaining the unique character of Newcastle. Significant views include views from public places towards specific landmarks, heritage items or areas of natural beauty. The most important views in Newcastle tend to be along streets leading to the water or landmark buildings, including Christ Church Cathedral and Nobby's Head. With the redevelopment of the former rail corridor lands, key views and vistas are to be established and will create a visual connection and link the city to the foreshore."

The corresponding performance criteria and acceptable solutions contained within the NDCP 2012 are as follows:

Performance criteria

B2.1 Public views and sight lines to key public spaces, the waterfront, prominent heritage items and landmarks are protected.

Acceptable solutions

- 1. New development protects the views nominated in Figure 6.01-23.*
- 2. New development in the vicinity of views to Christ Church Cathedral nominated on Figure 6.01-23 must ensure that vistas of the Cathedral's tower, roof-scape and pinnacles of the buttresses are preserved.*
- 3. Open space and breaks in the built form align with existing streets and view corridors as identified in Figure 6.01-23.*
- 4. A visual impact assessment accompanies the application and confirms that this performance criteria has been met.*

Extracts of Figure 6.01-23 and Figure 6.01-24 are provided in **Figure 19** and **Figure 20** below.



Figure 19: View axis to Christ Church Cathedral from Section 6.01.03 B2 Views and vistas - Newcastle City Centre of NDCP 2012. *Source NDCP2012.*

Figure 6.01-24: Views and Vistas Map

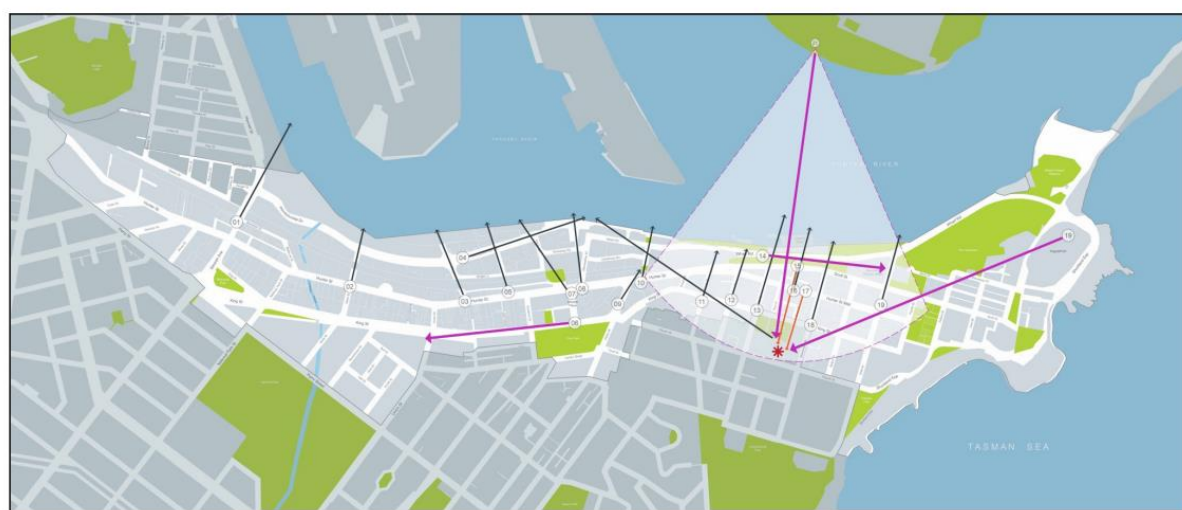


Figure 20: Views and Vistas Map from Section 6.01.03 B2 Views and vistas - Newcastle City Centre of NDCP 2012. *Source NDCP2012.*

In response to the requirements under this part of NDCP 2012, the Applicant has prepared a comprehensive view sharing and view impact assessment, the findings of which are discussed in detail in **Section 6.3** of this report. In addition, an independent visual and view expert has been engaged by CN to peer review the Applicant's analysis undertaken.

Section 6.01.4 – Key Precincts

The site is within the Hunter Street Mall Precinct as defined under 6.01.4 of the NDCP 2012 as discussed in **Section 1.3** of this report.

The objectives of the Precinct are:

1. *Strengthen the sense of place and urban character of the east end as a boutique retail, entertainment and residential destination.*
2. *Diversify the role of Hunter Street Mall precinct as a destination for many activities including retail, dining, entertainment, nightlife and events, additions to regular day-to-day services for local residents.*
3. *Promote active street frontages. Protect heritage items and contributory buildings. Protect views to and from Christ Church Cathedral.*

4. *Promote a permeable street network in Hunter Street Mall precinct with well connected easily accessible streets and lanes.*
5. *To create a space that is safe, comfortable and welcoming for pedestrians.*

The modification will provide for a development outcome which is consistent with the Precinct objectives above as it will strengthen the sense of place and urban character through the creation of an enhanced Market Place. Market Place will benefit from forming part of the visual connection between the Harbour and the Christ Church cathedral, and represent a return to what was first envisaged under early town planning for the Newcastle City Centre.

Section 7.03 – Traffic, Parking, & Access

Section 7.03 provides a range of controls which relate to traffic, parking and access. Under 7.03.02 Parking provision, parking controls specific to centres are provided including the Newcastle City Centre Renewal Corridors, which includes the site. Specifically, NDCP 2012 states the following:

“Car parking is provided in accordance with the rates set out in Table 1 – Parking rates, except for car parking for development in the Newcastle City Centre, Renewal Corridors, The Junction and Hamilton B2 Local Centre zone and Darby Street Mixed Use zone. Council may vary the rates within these areas, subject to merit assessment of the proposal.”

A reason for refusal cited by the HCCRPP was unacceptable impacts given the deficiency in car parking. In response an addendum report has been prepared by the Applicant (**Attachment 3C**). In addition, traffic and carparking is addressed in detail in **Section 6.4** of this report.

Whilst 7.03 of the NDCP 2012 applies to the proposal, condition 19 of the Concept DA requires each stage of the proposal to be provided in accordance with either the NDCP 2012 or the applicable standard at the date of lodgement. As this assessment relates to a review of a decision by the HCCRPP (as the Consent Authority), technically the NDCP 2023 does not have application. Notwithstanding, this is considered an anomaly in the circumstances, and the car justification for residential visitor parking which does not comply with NDCP 2012 rates is considered supportable on merit (as discussed further in **Section 6.4** of this report).

Newcastle Development Control Plan 2023 ('NDCP 2023')

Key controls contained within D4 Commercial of the NDCP 2023 of relevance to the proposal are addressed in the table below.

Table 14: NDCP 2012 Controls summary table – Section 3.10 – Commercial Development		
Section	Controls	Compliance
8.0 Streetscape and front setbacks	<i>C-1. Within established areas the front setback is consistent with those of adjoining development. Some variations to the prevailing setbacks can be considered particularly where such variations are used to create streetscape variety and interest.</i>	The modification will facilitate a development outcome which is consistent with the requirements of the controls.
9.0 Side and rear setbacks	<i>C-1. Design is to:</i> <i>a. ensure adequate natural light, ventilation and privacy between buildings</i> <i>b. protect public tree assets</i>	The modification will not result in a development outcome which would be inconsistent with this clause. However, further assessment will be part

Table 14: NDCP 2012 Controls summary table – Section 3.10 – Commercial Development

Section	Controls	Compliance
	<i>c. consider the impact on solar access and private open space of adjoining dwellings.</i>	of the detailed development application process.
10. Street activation	<ol style="list-style-type: none"> 1. C-1. Activated street edges are to be provided at the interface to the public domain at ground level. 2. C-2. Ground floor retail and business uses provide multiple pedestrian accesses along the street frontage. 	The modification will provide for an outcome which is consistent with the street activation controls.
3.10.07 - Views and privacy	<ol style="list-style-type: none"> 1. C-1. Existing views from dwellings are not substantially affected where it is reasonable to design for the sharing of views. 2. C-2. Grand vistas and views from dwellings which are recognised and valued by the community are not unreasonably obscured by development. 3. C-3. Views to heritage or familiar dominant landmarks from dwellings are not unreasonably obscured. 	<p>In accordance with the explanatory note contained within NDCP 2023, Where views are potentially compromised, an assessment of the view loss must be undertaken having regard to 'Views – General Principles' of the NSW Land and Environment Court (presently <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140) (Tenacity).</p> <p>The Applicant has provided a view loss assessment which has been undertaken in accordance with the 4 steps outlined in Tenacity. In addition, an independent consultant specialising in visual assessment and view loss has been engaged to review the Applicant's reporting and the URDP chair has provide an analysis of the visual impacts of the modification from a landscape character perspective.</p> <p>Refer to Section 6.3 of this report for further discussion in relation to public and private view impacts.</p>

(d) Section 4.15(1)(a)(iii) – Planning agreements under Section 7.4 of the EP&A Act

There have been no planning agreements entered into and there are no draft planning agreements being proposed for the site.

(e) Section 4.15(1)(a)(iv) - Provisions of Regulations

There are no provisions of the EP&A Reg 2021 which are relevant to the consideration of the proposed modification application under review.

4.4 Section 4.15(1)(b) - Likely Impacts of Development

The likely impacts of the modification are considered in **Section 6** of this report.

4.5 Section 4.15(1)(c) - Suitability of the site

The suitability of the site for the modification is considered in **Section 6** of this report.

4.6 Section 4.15(1)(d) - Public Submissions

Submissions received are considered in detailed in **Section 5** of this report below.

4.7 Section 4.15(1)(e) the public interest

The suitability of the site for the modification is considered in **Section 6** of this report.

5. REFERRALS AND SUBMISSIONS

5.1 Agency Referrals and Concurrence

The development application has been referred to various agencies for comment/concurrence/referral as required by the EP&A Act 1979 and outlined below in **Table 15** below. There are no outstanding issues arising from these concurrence and referral requirements, subject to the imposition of the recommended conditions of consent.

Table 15: Concurrence and Referrals to agencies			
Agency	Concurrence/ referral trigger	Comments (Issue, resolution, conditions)	Resolved
Referral/Consultation Agencies			
TfNSW	Section 2.121(4) - Traffic-generating development.	No objection and no recommended conditions.	Yes
Hunter Water Corporation	Section 38 - EP&A Reg 2021	Decision not required.	Yes
Integrated Development (S 4.46 of the EP&A Act 1979)			
Subsidence Advisory NSW	Section 22 Coal Mine Subsidence Compensation Act 2017	<p>The application was referred to Subsidence Advisory NSW for comment. Conditional approval for the modified development has been granted by Subsidence Advisory NSW via 'General Terms of Approval' ('GTA') and stamped approved plans dated 04 October 2024 (Attachment 7 and Attachment 8). This satisfies the requirement for approval of Subsidence Advisory NSW under Section 22 of the <i>Coal Mine Subsidence Compensation Act 2017</i>.</p> <p>An additional condition has been included in the recommended Draft Schedule of Conditions (refer to Attachment 1) requiring the development to comply with the Subsidence Advisory NSW GTA's.</p>	Yes

Table 15: Concurrence and Referrals to agencies

Agency	Concurrence/ referral trigger	Comments (Issue, resolution, conditions)	Resolved
Heritage NSW	No trigger.	<p>State heritage items within the vicinity of the site include the Christ Church Cathedral and the Newcastle Club.</p> <p>Heritage NSW (HNSW) provided its advice in relation to the proposal and matters for CN's consideration.</p> <p>The referral references the comments provided to CN in 2016 in relation to the Concept DA, and that the building envelopes have been increased <i>"such that views from the Market Place and Queens Wharf Promenade to the Cathedral will be diminished."</i> The referral goes on to state that <i>"In addition, increment in the building envelopes further encroaches on the views from the Cathedral Park towards north and northeast, such that the views to the water are significantly lost."</i></p> <p>As discussed in section 6.5 of the report, Heritage NSW has not commented on all aspects of the view opportunities arising and/or the removal of approved built form will provide for a substantial enhanced development.</p> <p>The full referral response received by HNSW is provided as Attachment 9 of this report.</p>	No
Heritage NSW	Section 90 National Park & Wildlife Act 1974	<p>The application was referred to HNSW for comment and advice provided in relation to Aboriginal cultural heritage matters pursuant to Section 90 of the <i>National Parks and Wildlife Act 1974</i> (refer to Attachment 10).</p> <p>No ground works are proposed as part of the modified concept DA, therefore no harm to Aboriginal objects would occur and as such, Heritage NSW doesn't consider the application to be integrated.</p> <p>General Terms of Approval (GTA) cannot be issued, however, the HNSW referral response did recommended conditions be imposed in relation to the protection of aboriginal object(s) and the Applicant's obligations under the</p>	Yes

Table 15: Concurrence and Referrals to agencies			
Agency	Concurrence/ referral trigger	Comments (Issue, resolution, conditions)	Resolved
		<p><i>National Parks and Wildlife Act 1974</i> in the event of unexpected finds.</p> <p>Additional conditions have been included in the recommended Draft Schedule of Conditions (refer to Attachment 1) to satisfy the recommendations raised within the HNSW referral response in this regard</p>	
Department of Planning and Environment - Water	Section 91 Controlled Activity Approval under Water Management Act 2000	A controlled activity approval is not required for the modified concept DA proposed.	Yes

5.2 Internal Referrals

The development application has been referred to various CN officers for technical review as outlined in **Table 16**.

Table 16: Consideration of CN Referrals		
Officer	Comments	Resolved
Engineering (Flooding & Stormwater)	CN's Senior Engineering Officer confirmed that the proposal does not necessitate a review, as it remains the same as that proposed under MA2023/00175 . In the original referral prepared for the Concept DA it was noted that the proposal was able to be supported subject to further review being undertaken in later detailed DA stages of the project.	Yes
Engineering (Traffic & Parking)	<p>CN's Senior Traffic Engineer has provided a further referral (Attachment 13) in relation to the proposal as a part of the division 8.2 review process. In this, they state:</p> <p><i>"A review of traffic engineering and parking related matters under RE 2024/ 00002 has concluded that the nature of these matters remains consistent with that of MA 2023/00175. On this basis the earlier engineering referral for MA 2023/00175 dated 8 September 2023 and subsequent Supplementary Parking Report prepared by CN at the request of the HCCRPP, remain relevant and should be considered with the review of this application."</i></p> <p>Taking into consideration the above, the modification is supported on traffic grounds, including recommended modified wording to the relevant conditions (being Nos 18, and 19).</p>	Yes
Environmental Health	No objection and no recommended conditions. It is noted contamination is to be separately addressed during the detailed assessment of DA2023/00419 .	Yes

Heritage	<p>CN's Heritage Officer has confirmed that the proposed modified concept DA is supported from a heritage perspective.</p> <p>The officer's comments confirm that the proposed decreased height without additional building mass above the Municipal Building is the preferred outcome and better maintains the building's integrity.</p> <p>In relation to the setting of nearby heritage items, specifically the Newcastle Club, the officer goes on to state that <i>"Impacts to the composition of close views to the primary façade of the Newcastle Club from Newcomen and King Streets will be negligible when considered with the approved Concept Plan (i.e. DA2017/00701, as amended)"</i></p> <p>In relation to the Newcastle City Centre Heritage Conservation Area, the officer notes that <i>"while some views are constrained, additional depth is provided to other views which allows observation of the height of the Cathedral and its position on the hill, including its parkland setting. Opening of the view corridor between harbour and the Cathedral is considered to be a significant improvement in comparison to the approved Concept Plan (i.e. DA2017/00701, as amended)"</i>.</p> <p>In conclusion, the proposed modified concept DA is supported from a heritage perspective.</p>	Yes
UDRP	<p>The UDRP provided its unwavering support for the modification. Advice received from the UDRP is provided as Attachment 5 and Attachment 6 of this report.</p>	Yes
Visual impact assessment	<p>An independent visual and view expert has been engaged by CN to peer review the Applicant's analysis of visual impacts and impacts to public and private views. The independent report is provided as Attachment 4 with the findings of the assessment undertaken discussed further in Section 6.3 of this report.</p>	

5.3 Community Consultation

The proposal was notified in accordance with the CN's Community Participation Plan from 20 June 2024 until 4 July 2024. A two-week extension was granted until 18 July 2024 for several community groups upon their request.

CN received a total of 252 submissions, comprising 116 objections and 136 in support of the proposal.

Within the 136 submissions received in support of the proposed modified concept DA, the predominant themes commended related to activation and revitalisation of the east-end city centre, increased safety, economic viability, enhanced vibrancy for the city centre, and increased visitor and tourism draws.

Two other predominant themes with the 136 supportive submissions related to architectural design and housing delivery which are key deliverable outcomes of the modification.

In relation to the objections, the primary issues raised related to those aspects of the modification outlined in **Table 17** below.

Table 17: Community Submissions

Issue	Assessment Comments
Public view impacts (Christ Church Cathedral)	<p>The loss of views from isolated distant locations across the harbour will have an insignificant impact. Furthermore, impact that will result from these is considered acceptable given the substantial public benefit that will result from creating a visually connected view corridor, which extends from the Christ Church Cathedral through to the Queens Wharf.</p> <p>Detailed discussion in relation to public view impacts is provided in Section 6.3 of the report.</p>
Private view impacts	<p>A comprehensive assessment of private view impacts has been undertaken by the Applicant in accordance with established caselaw (Tenacity). In addition, an independent consultant has been engaged by Council to peer review the findings of the applicant.</p> <p>Whilst some view losses resulting from the modification are acknowledged, on balance, they are acceptable. In addition, it is noted that in many instances, the view loss which is objected to is the result of an already approved Concept DA.</p> <p>Detailed discussion in relation to private view impacts is provided in Section 6.3 of the report.</p>
Insufficient car parking	<p>A relatively insignificant shortfall in car parking occurs (as a result of Stage 3 and Stage 4 of the Concept DA) as a legacy of conditions of consent imposed which made assumptions the nearby CN carpark on King Street would cater for 75% of residential visitor parking spaces. At the time of writing the original consent, it was not envisaged that the car park would be demolished. Nevertheless, the parking survey demonstrates and agreed by CN senior traffic engineer and acceptable under this assessment that adequate parking is available in the area to cater for the visitor parking deficit associated with the modification.</p> <p>Car parking is discussed in further detail in Section 6.4 of this report.</p>
Not 'substantially the same'	<p>Whilst there are undoubtedly some quantitative and qualitative differences between the original and the proposed Stage 3 and Stage 4 concepts, these changes are not substantive enough to render the development not substantially the same as originally approved.</p> <p>Legal advice is provided from the applicant that outlines the proposed modification is substantially the same and is supported.</p> <p>When assessing whether development is 'substantially the same' and therefore assessable under a modification process in accordance with the EP&A Act 1979, the change must be considered with a contextual lens applied that considers the site as a whole. At a whole of precinct scale (considering stages 1 – 4) the modification proposed is capable of being considered 'substantially the same' as originally approved and therefore assessable in accordance with section 4.55(2) of the EP&A Act 1979.</p> <p>Discussion in relation to this is discussed in further detail in Section 4.1 of the report.</p>
Heritage impacts	<p>The modification will enable a development outcome which will deliver a vast enhanced heritage response when compared to the original Concept DA.</p> <p>The modification provides for an outcome in line with original town planning schemes for the City of Newcastle envisaged by Dangar in 1823 and will contribute to improving the relationship between the Cathedral and the Newcastle City Centre.</p> <p>Heritage and Aboriginal heritage are discussed in further detail in Sections 6.5 and 6.6 of this report.</p>

Height limit exceedances	<p>The proposed detailed design for Stage 3 and Stage 4 has re-arranged massing elements from the central view corridor and redistributed this massing atop of Buildings 3 West, 3 South, 4 North, and 4 South. Another change to the design from the approved Concept DA is the removal of the massing above the parapet of the Municipal Building (known as 3 North).</p> <p>The height exceedances proposed make possible the realisation of the significant Harbour to Cathedral view corridor. In addition, the variance in heights will reinforce the notion of a playful and varied skyline.</p> <p>Discussion in relation to height is further provided in Section 4.3 and Section 6.1 of this report.</p>
Development of the King Street carpark	<p>Yield studies have been prepared by the Applicant which demonstrate that the former carpark site can be developed without obstructing view corridors to the Cathedral. In addition, planning controls referred to in the NLEP 2012 and enforced via the NDCP 2023 are in place to ensure that any future development does not impede on the view corridor defined.</p> <p>Furthermore, there have been several CN supported resolutions that will ensure adequate carparking be provided and view corridor will be protected.</p> <p>The yield studies prepared form Attachment 3J of this advice.</p>
Council's conflict of interest	<p>To manage any perceived conflict of interest, CN have engaged Patch Planning to undertake an independent planning assessment along with Envisage Consulting, who specialise in visual impact assessment and view loss. In addition, CN expert UDRP have reviewed the proposal and provided further independent comments, including separate comments from the Chair of UDRP (provided as Attachment 11), in support of the proposal.</p>

6. LIKELY IMPACTS OF THE DEVELOPMENT, SITE SUITABILITY, AND THE PUBLIC INTEREST

For the purposes of this assessment the likely impacts of the proposal have been generally themed to be consistent with the Section 8.2 Review Planning Report prepared by the Applicant. This includes:

- Design Excellence
- Public Domain Benefits
- Visual and View Impacts
- Traffic and parking
- Heritage
- Overshadowing and solar access
- Social and economic impacts

In addition, the suitability of the site, and the public interest in relation to the modification is discussed in this section of the report.

6.1 Design Excellence

The modification has been proposed in direct response to a competitive design process held in relation to the site. The design competition process was undertaken in accordance with an endorsed competition brief which clearly encouraged pursuit of the view corridor which was enabled by the fortuitous demolition of the CN carpark.

In addition to the above, as experts in the field of design, the UDRP have continually emphasised their unwavering support for the project, most recently stating in their referral response dated 26 June, 2024 (**Attachment 6**) the following:

“The UDRP is unanimously of the opinion that the Concept Modification is strongly in the public interest.

The Panel, and its predecessor the UDCG, have been closely involved in the Site over two decades, and in providing expert guidance to its redevelopment. This input has been anything but a “rubber stamp” to development proposals, some of which at various times have been strongly criticised when reviewed. The Panel reiterates one of the recommendations coming from the workshop as identified in the Background and items 1 and 2 within this report was that a design competition should be undertaken to inform an amendment to the Concept for Stage 3 and 4.

While the approved Concept plan was considered to be an excellent one, the demolition of Council’s car park presented a fortuitous public opportunity that further strengthens the ability of the East End Stages 3 and 4 to fulfill the objectives of the DCP. This was an opportunity that the Panel considered should not be missed.

Furthermore, it was apparent that this could be achieved while not departing substantively from the approved Concept, and if sensitively undertaken, could make an excellent scheme even better in delivering to the public benefit.

The Design Competition jury was unanimous in its selection of the design that went forward as the winning scheme, and commended its excellence. It was also the scheme that was most faithful to the approved Concept Plan, and was led by the same architectural team (SJB) that were the authors of the Concept. Notwithstanding the quality and resolution of the competition scheme, design development continued across a total of six Design Integrity Panel presentations and reports, each of which represented a further refinement to an already strong design.

As discussed above, the Designing for Country input, clearly embedded into the whole design response further strengthens the positive contribution proposed to the public interest. The Panel recognises the importance of this cross-cultural and Community

work. Both the process and the outcome have spurred the overwhelming support from the First Nations community. Of particular note have been the massing of forms, and sensitive response to the landform of the Hill, embedded into the public benefit.

While there has been some change from the original approved heights, including some reductions – the changes are relatively modest and the result from an urban design perspective is considered a positive one – and one which has been supported by the First Nations community.

The UDRP considers the Concept to be strongly in the Public interest.”

The modification will support the realisation of a bold vision for the Newcastle City Centre. As a result of the modification, future development will be enabled at the site which delivers extensive public benefits, not limited to a visual connection between the Christ Church Cathedral and the Harbour. It will also deliver an enhanced Market Square, which is of historical significance as it represents reinstatement of an element of Dangar’s plan for Newcastle City Centre prepared in 1823 (discussed further in **Section 6.5** of this report).

In addition to the above, the designing with country supported by the local Aboriginal community is supported, along with the notion of a playful skyline. Such elements are representative of a carefully considered architectural proposal, which can only be made possible through amendment of the Concept DA.

With consideration given to both the expertise of the UDRP and the extensive design process which has been undertaken by the Applicant, it is evident that the modification will provide for an outcome which results in design excellence. The modification is therefore supported on design excellence grounds.

6.2 Public Domain Benefits

A new 1,125sqm public open space “Market Square” is provided in Stage 3, oriented in a north-south direction to visually connect the Harbour to Christ Church Cathedral. This also provides opportunity to connect the two points physically in the future.

As described by the Applicant, *“The square will accommodate commercial, and community uses that can spill out into the public realm and will be bordered by tree canopy cover. The landscaped elements contained within this central plaza include themed grasses and civic-scaled tree species which respond to the character and embellish the site with elements supported by First Nations community members.”*

The modified public domain arrangement delivers a significant public benefit. It will improve ground plane activation and permeability through the site. The planning of this space is in keeping with the site’s historic and originally intended use. Market Square is left open to possibility and will be able to adapt to the community needs including community markets, food festivals, open air cinema, small concerts and the list goes on.

Unlike the original Concept DA, this new area of public open space will provide a visual and future physical connection from the Harbour extending to Christ Church Cathedral. The realisation of the view corridor will greatly improve the nature of the public space able to be provided as a part of the development and become a focal meeting point of the precinct and cannot be underestimated. Furthermore, the public domain outcome able to be delivered because of the modification is more closely aligned with Henry Dangar’s original 1823 town plan (as discussed in **Section 6.5** below).

6.3 Visual and View Impacts

The proposed modification is supported by a comprehensive assessment of both public and private view impacts. In addition, to support the assessment of the modification, CN have also engaged an independent visual consultant to review the documentation prepared by the Applicant.

6.3.1 Public view impacts

The visual impact assessment (April 2023) (**Attachment 3E**), View Sharing and Visual Impact Assessment (February 2024) (**Attachment 3F**), and the Visual response to additional information (September 2024) (**Attachment 3G**) have been prepared by the Applicant to assess the impacts of the modification on public views.

To assess public view impacts 12 viewpoint locations were considered in the Applicant's assessment. This included 3 relevant View Corridors from NDCP 2012 and 2 additional viewpoint locations from Stockton foreshore requested as a part of an RFI issued during the section 8.2 review process.

For the original 10 viewpoint locations assessed, an assessment methodology was adopted *"based on a combination of established methods used in NSW. It includes concepts and terminology that included in the Guideline for landscape character and visual impact assessment, Environmental Impact Assessment practice note EIA -NO4 prepared by the Roads and Maritime Services December 2018 (RMS LCIA), and other more bespoke approaches developed over the last 30 years by academics at Sydney University."*

For the additional 2 locations identified for assessment as a part of the RFI response issued in by CN in September 2024, the 'Rose Bay Principle' established in *Rose Bay Marina Pty Limited v Woollahra Municipal Council [2013] NSWLEC 1046* was adopted, with the following justification provided by the Applicant:

"In the absence of any specific controls within the DCP for assessing the extent and importance of visual change from the nominated locations A and B, Urbis considered the intent and guidance set out in Rose Bay Marina Pty Limited v Woollahra Municipal Council [2013] NSWLEC 1046, commonly referred to as the Rosebay Planning Principle.

Rosebay is a widely applied and accepted, method of objectively assessing impacts of development on public domain views. It is the most cited and relevant principle to use and provides further rigour to any assessment of potential impacts on public views.

We consider Rosebay to be the appropriate methodology to use to assess the impact of the proposal from View A and B."

The viewpoint locations assessed by the Applicant include the following:

- View 01 View south towards Newcastle CBD from Stockton Ferry Wharf
- View 02 View south-west towards site from Fort Scratchley Parade Ground
- View 03 View south-west towards site from Nobbys pedestrian walkway
- View 04 View south towards Cathedral from Market Place
- View 05 View south towards Cathedral from Queens Wharf promenade
- View 06 View north-east over site from Cathedral Park
- View 07 View north towards site from north side of the Cathedral
- View 08 View east towards site along Hunter Street
- View 09 View south towards Cathedral from The Station public domain
- View 10 View north over site from Cathedral Park steps
- View A View south towards Newcastle CBD from Pitt Street Reserve (Stockton)
- View B View south towards Newcastle CBD from Lions Park (Stockton)
- Unnumbered view corridor from Morgan Street (View corridor 17)

Of the viewpoint locations considered, V01, V04, V05 and the unnumbered view from Morgan Street looking south west are the only view corridors identified within NDCP 2012.



Figure 21: Map of all viewpoints considered in the original VIA/Visual Addendum. *Source: Urbis*



Figure 22: Additional viewpoints from Stockton requested as a part of an RFI. *Source: Urbis.*

The VIA prepared was peer reviewed by an independent visual consultant engaged (Envisage Consulting) by CN to support the section 8.2 review process (**Attachment 4**).

Figure 23 below is an extract from the independent visual consultant's report, which outlines the Urbis rating applied to each public viewpoint assessed, and whether this rating is agreed with.

Table 2-1: Summary of public viewpoints illustrated by Urbis photomontages and impact levels (including my opinion)

Public view	Description	Urbis rating	My response
NDCP View Corridor 17	Morgan Street, looking south west (from Hunter Street Mall)	Low	Agree
View 01 DCP View Corridor 21	View south towards Newcastle CBD from Stockton Ferry Wharf	Low	Medium (discussion section. 2.4.1)
View 02	View south-west towards site from Fort Scratchley Parade Ground	Low	Agree
View 03	View south-west towards site from Nobbys pedestrian walkway	Low	Agree
View 04 (DCP View Corridor 15)	View south towards Cathedral from Market Place (Cathedral to Harbour Corridor)	Low-medium	Agree
View 05 (DCP View Corridor 15)	View south towards Cathedral from Queens Wharf promenade (Cathedral to Harbour Corridor)	Medium	Agree
View 06	View north-east over site from Cathedral Park	Medium	Agree
View 07	View north towards site from north side of the Cathedral	Low	Agree
View 08	View east towards site along Hunter Street	Low	Agree
View 09	View south towards Cathedral from The Station public domain	Low	Agree
View 10	View north over site from Cathedral Park steps	Medium	Agree
View A	View south towards Newcastle CBD from Pitt Street Reserve (Stockton)	Low	Medium (discussion section. 2.4.2)
View B	View south towards Newcastle CBD from Lions Park (Stockton)	Low	Medium (discussion section. 2.4.2)

Figure 23: Independent visual consultant's summary of public viewpoints illustrated by Urbis photomontages and impact levels. *Source: Envisage Consulting*

Notably, there is a consensus between the Applicant and the independent consultant in relation to the rating which should be applied to 10 of the 13 public viewpoints considered. Furthermore, both the Applicant and the independent consultant engaged by CN acknowledge that the modification will result in substantial benefit when viewed from VP08 (Queens Wharf) and VP04 (Market Square), and the immediate surrounds of the subject development near Market and Hunter Street. This is achieved through the realisation of the view corridor from the Newcastle Harbour to the Cathedral, **Figure 24** and **Figure 25** below compare the approved and proposed envelopes. Specifically, the independent consultant states the following in relation to the positive benefits of the proposal from a view perspective:

“The opportunity for a view corridor to the Cathedral from Newcastle Harbour is the most positive outcome that would occur with the MOD, an opportunity that has arisen due to the demolition of the previous Council car park that blocked that view. That change is the starkest difference between the MOD and the Concept DA in terms of view effects, as the Concept DA was prepared before the car park’s demolition was certain. The public benefit of retaining this new view corridor (DCP View Corridor 15) due to the MOD is substantial, and that location is the only place that such a direct line of sight is possible from the harbour, through the buildings of the city centre, to the Cathedral.”

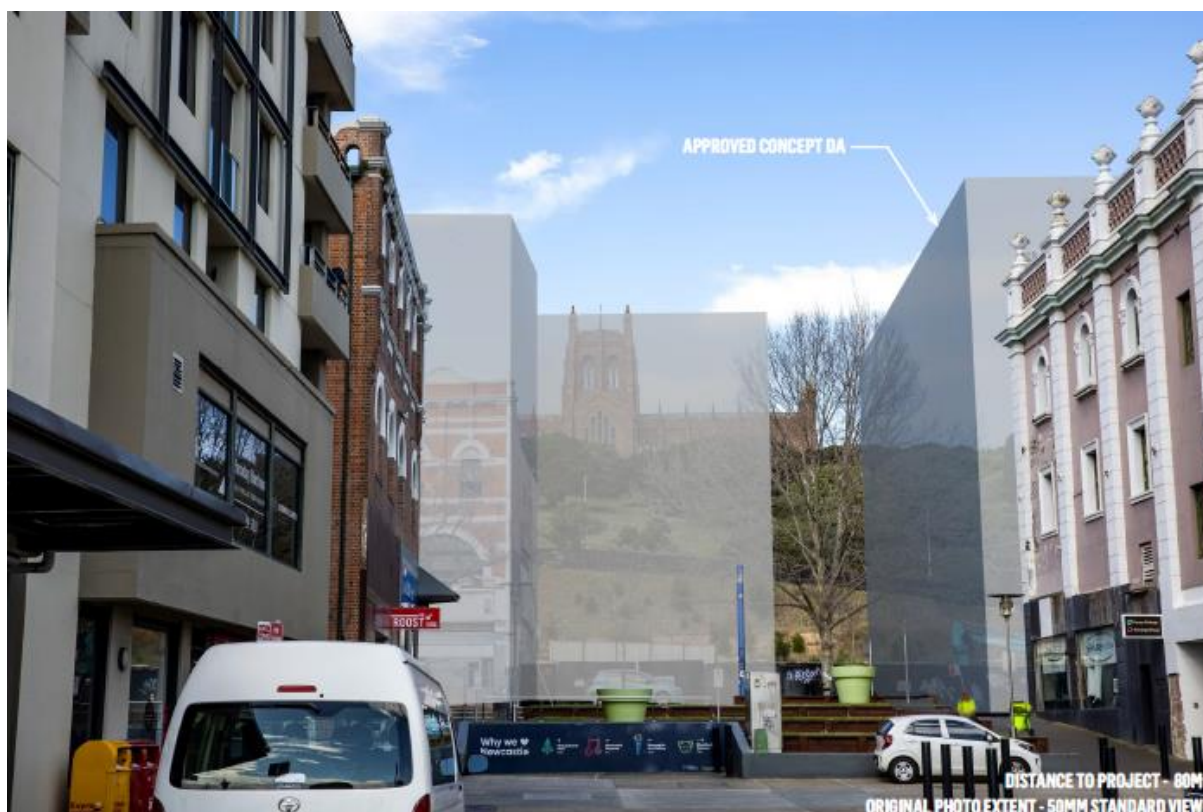


Figure 24: VP4 Montage depicting the approved envelope. *Source: Urbis*

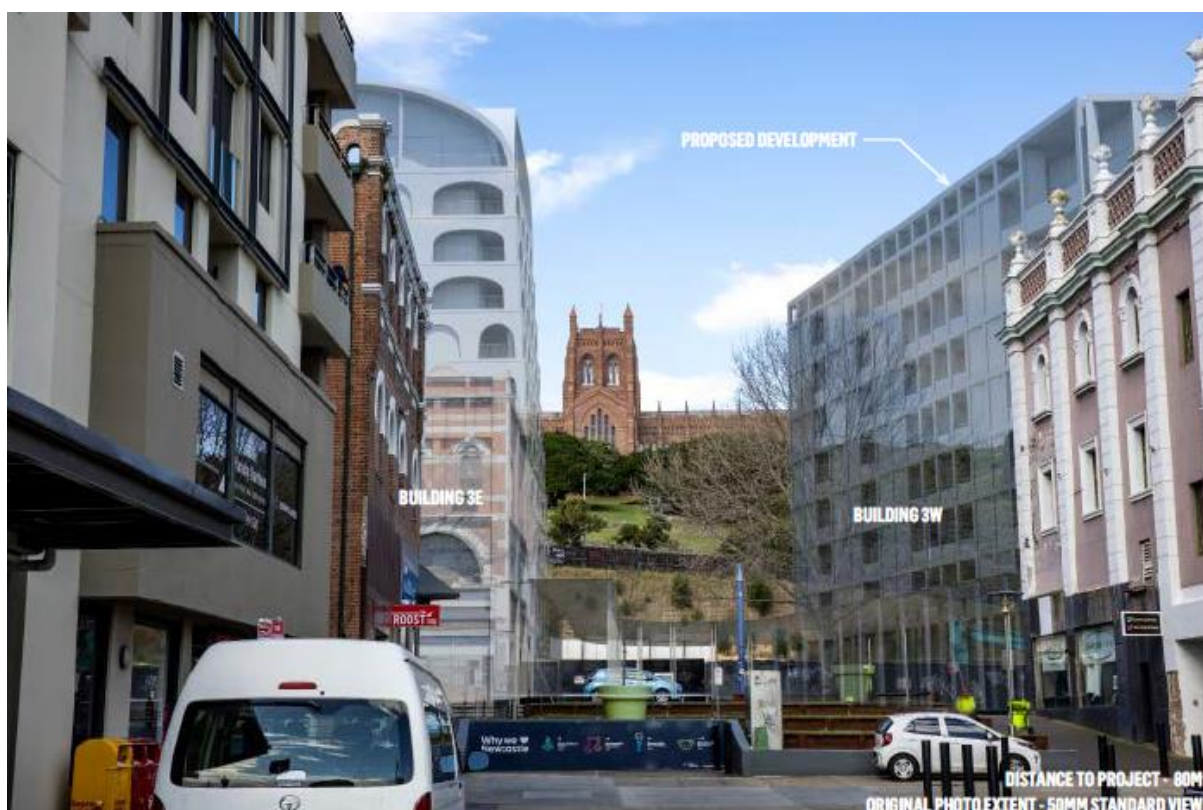


Figure 25: VP4 depicting the proposed detailed design facilitated by the modification. *Source: Urbis*

However, the parties do not concur in relation to VP01, View A and View B assessed in response to the RFI issued as a part of this section 8.2 review process. Specifically, the independent consultant states the following in relation to the additional impacts resulting from the proposed modification from Stockton foreshore:

“...The upper storeys of Building 3S (dome), and to a lesser extent Building 4S, would reduce views of the Cathedral’s silhouette and its historic dominance of Newcastle’s city skyline from Stockton. That image of the Cathedral over the city is a valued view of Newcastle.”

Figure 26 and **Figure 27** below provide extracts of the abovementioned views and are also provided in **Attachment 3E** and **Attachment 3F** of this report.

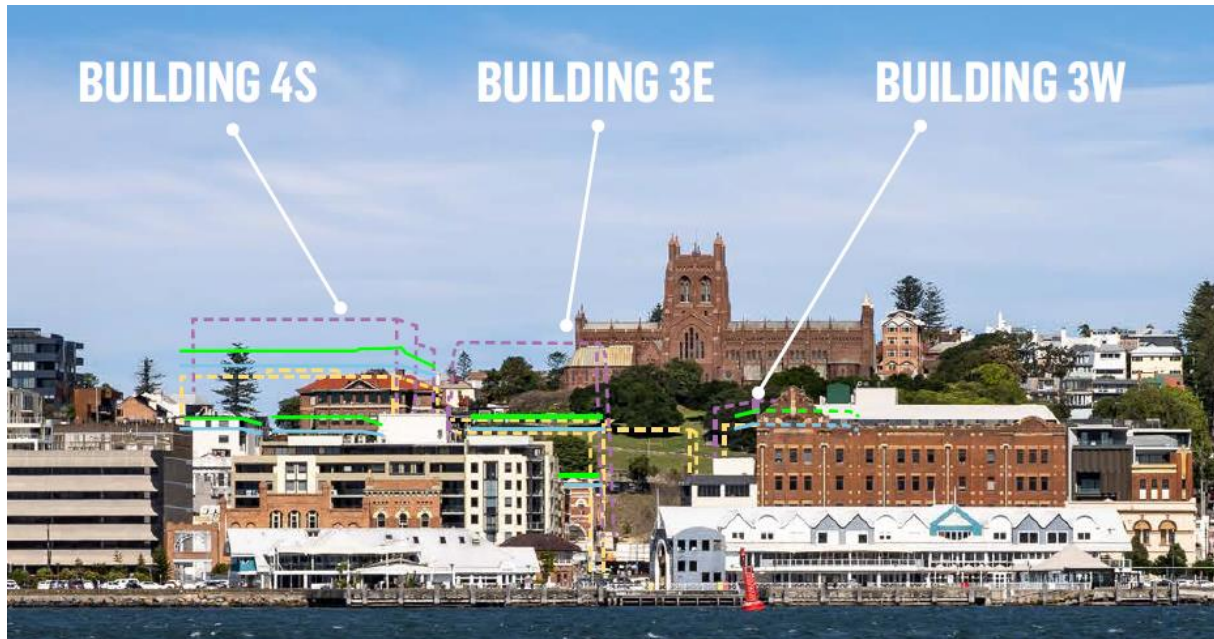


Figure 26: VP1 depicting the approved and proposed concept envelopes (purple proposed under this modification) *Source: Urbis*



Figure 27: VPB depicting the approved and proposed concept envelopes (purple proposed under this modification) *Source: Urbis*

The independent assessment undertaken concludes that the modification allows for a public view corridor from Newcastle Harbour through to the Cathedral, which is the only location that such a direct view could occur. The public benefit of this new view corridor is acknowledged as very positive and desirable.

The independent assessment also outlines that the impacts of the modification will include the loss of views of full silhouette of Cathedral on Newcastle city skyline from parts of Stockton, as referred to in the State Heritage listing under the 'aesthetic significance' criteria ('It has landmark qualities, having dominated and defined the Newcastle skyline for many years'). That loss of view increases from just east of Stockton Ferry Wharf as one moves further east, being caused firstly by the upper storeys of Building 3S and eventually also caused by Building 4S (upper 2-3 storeys) by the time Lions Park Stockton is reached.

Some additional visual and view impacts will occur beyond those foreseen under the original Concept DA along the Stockton foreshore, and it is considered that this resulting visual impact and view loss is acceptable in the circumstances for the following reasons:

- As discussed further in **Section 6.5** of this report, the visual role of the Cathedral referenced in the state heritage listing is primarily of relevance from the Newcastle City Centre as opposed to isolated locations on Stockton Foreshore.
- Whilst the modification will obscure views to the Cathedral from viewpoints A and B on Stockton foreshore and partially reduce views to the Cathedral from VP01, the impact of views in these isolated locations is outweighed by the substantial public benefit of creating a visually connected view corridor, which extends from the Christ Church Cathedral through to the Queens Wharf.
- The modification provides for an outcome in line with original town planning schemes for the City of Newcastle envisaged by Dangar in 1823 and will contribute to improving the visual relationship between the Cathedral and the Newcastle City Centre. This visual relationship between the Newcastle City Centre is what is of primary heritage importance in the circumstances, as opposed to views from isolated locations along the Stockton foreshore.
- The Christ Church Cathedral to Harbour corridor is envisaged within the NDCP 2012 (View corridor 15) and was the primary desired public domain outcome identified within the architectural competition brief endorsed by both CN and the NSWGA.
- The modification provides for an outcome in line with original town planning schemes for the City of Newcastle envisaged by Dangar in 1823 and will contribute to improving the visual relationship between the Cathedral and the Newcastle City Centre. This visual relationship between the Newcastle City Centre is what is of primary heritage importance in the circumstances, as opposed to views from isolated locations along the Stockton foreshore; and
- Full views of the Cathedral will likely continue to be seen from the vast majority of the foreshore heading towards the Carrington Bridge beyond Stockton Ferry Wharf.

In addition to the above, the public view impacts associated with the modification are also considered supportable from a landscape character perspective as assessed by the UDRP Chair, Dr Pollard in **Attachment 11**. The methodology of assessing landscape character facilitates a broader and more holistic consideration of specific geographic areas of high value in respect to its visual, heritage, social and other characteristic attributes.

In the assessment undertaken, Dr Pollard defines two landscape character zones in relation to the modification which are shown in the **Figure 29** below. Dr Pollard describes landscape character zones as areas with a high correlation of similar characteristics.

In relation to the landscape character zone depicted in green, which is where VP01 and viewpoints A and B are located, he notes that this catchment takes in the southern Stockton

foreshore and the harbour, with the Cathedral seen at a distance. The visual changes resulting from the modification will result in views to the cathedral being obscured from a few isolated locations within the green zone, however this is considered to have limited impact as the upper turret structure of the Cathedral remains in sight and when considering the vastness of the visual catchment.

In contrast, within the red zone, the Cathedral is viewed within a much more immediate urban context. The original Concept DA approves a development which completely encloses views to the Cathedral. Originally, this was proposed to block views of the unsightly Council carpark, however with this structure now demolished and commitment to maintain the view corridor with any development to the carpark site, the modification provides an opportunity to greatly improve landscape character within this zone. This will be achieved through the realisation of a visual corridor between the Christ Church Cathedral and Queen Wharf.



Figure 28: Extract from landscape character assessment. *Source: UDRP*

Summary of assessment of public view impacts

There will be some limited impacts resulting from the modification in isolated locations on Stockton foreshore. However, on balance, the impact is considered negligible and justified in the circumstances. This is because the modification will enable the realisation of a visual corridor between the Christ Church Cathedral and Queens Wharf, the public benefit of which is substantial and can only be achieved through the redistribution of massing across the site.

Further, from a landscape character perspective, the modification results in a better outcome when compared to the original Concept DA. Within an immediate urban context, the modification proposed will result in a significant visual improvement, whereas from afar, any associated impact would be low.

The modification will unlock a vital visual corridor between Christ Church Cathedral and Queens Wharf, which is identified in the DCP. This will delivering a substantial public benefit and an outcome that is not envisaged under the original concept DA. The visual corridor created will improve the public domain experience for residents, workers and visitors alike. In

addition, as discussed in section 6.5 of the report in further detail, it will also reinstate aspects of Dangar's 1823 plan which have been lost over time and contribute to improving the relationship between the Cathedral and the Newcastle City Centre.

6.3.2 Private view impacts and view sharing

The assessment of private domain views has been guided by the underlying intent (purpose) and application of the view sharing Planning Principle established in the Land and Environment Court *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140, commonly referred to as *Tenacity*.

A summarised interpretation of the four-step approach established under *Tenacity* is as follows:

- Step 1 – Assessment of views and view values
- Step 2 – Assessing where the views are obtained from
- Step 3 – Assessing the extent of impact
- Step 4 – Assessing the 'reasonableness' of the impact

Private view impacts are assessed by the Applicant in the View Sharing and Visual Impact Assessment provided as **Attachment 3F** and the Applicants Response to RFI View Matters View A and B provided as **Attachment 3G**.

The assessment of private view impacts involved the inspection, surveying and modelling of private views from upper floor locations within the following buildings:

- The Newcastle Club, 40 Newcomen Street, Newcastle
- Segenhoe Apartments, 50 Wolfe Street, Newcastle
- Herald Apartments, 60 King Street, Newcastle, and
- Newcomen Apartments, 16-18 Newcomen Street, Newcastle

Multiple views were inspected, surveyed and modelled from upper floor locations as detailed in **Figure 29** below.

Location	Dwellings/ locations Inspected	Building levels inspected	Surveyed Views	Modelled Views
Newcastle Club, 40 Newcomen Street Newcastle	6	G, 1 & 2	6	3
Segenhoe Apartments, 50 Wolfe Street Newcastle	7	6 & 7	7	3
Herald Apartments, 60 king Street Newcastle	2	5 & 6	2	1
Newcomen Apartments, 16-18 Newcomen Street Newcastle	7	G, 3 & 4	7	2

Figure 29: Extract from View Sharing and Visual Impact Assessment, February 2024 Source: *Urbis*

The Newcastle Club - 40 Newcomen Street, Newcastle

The Newcastle Club is located at the southwest corner of King and Newcomen Streets on sloping land that is elevated above the subject site and is visually prominent. The Newcastle Club site includes a carpark to the south, part-two and part-three storey buildings across the site.

The Newcastle Club is a local and state heritage item, with the statement of heritage significance on the SHI providing that *"The Newcastle Club is of outstanding historical, associative and aesthetic significance to the state. The site, encompassing the former residence, 'Claremont' has been associated with some of the most prominent members of the business, industrial and professional community in the city and state, including former managers of the AA Company, an organisation of utmost importance in the history of Newcastle, NSW and Australia. With its prominent siting, high on the hill overlooking the city, the club is a landmark site and makes an imposing and impressive contribution to the street and townscape."*

The view sharing and visual impact assessment states that the SHI statement of significance does not cite existing or former views, to or from the club as being of any historical significance. Whilst this is acknowledged, it could be interpreted that the significance of maintaining views to the listing is outlined through noting of its *"prominent siting, high on the hill overlooking the city"*.

Three viewpoints from the Newcastle Club were specifically assessed including:

- VP3 Newcastle Club, West End Upper Ground Level Garden Terrace, View North;
- VP4 Newcastle Club, West End Mid-Level Garden Terrace, View North-North-West; and
- VP5 Newcastle Club, Centre of Level 1 Bar (Top Floor) view North

Photomontages for each of the viewpoints listed above are provided in **Attachment 3F** of this report. For each of the views Urbis provided a view impact rating of moderate, which was accepted by the independent consultant engaged by CN. However, in relation to the steps undertaken in accordance with Tenacity, the independent assessment provided the following:

- **Applying Tenacity - Step 1 and Step 2:** The general description of available views from the Newcastle Club is agreed, however the designation of the King Street frontage as a side boundary is not supported, notwithstanding the fact that the Newcastle Club is accessed and oriented towards Newcomen Street. In relation to this, the independent consultant states, *"Although the entrance to the Newcastle Club fronts Newcomen Street, the building sits at the corner of King Street and has been designed so that the building itself and the majority of function rooms, outside terraces and the bar take advantage of the northern views of Newcastle Harbour and the coast."*
- **Applying Tenacity – Step 3:** For all three viewpoints the assessment by the Applicant finds that most windows and formal rooms within the club present to the east, and that south-westerly views towards the Cathedral and surrounding grounds will be unaffected. Only those views from the public use/front of house rooms and the western elevated terraces at ground and upper ground will be affected by the modification. In response, the independent assessment found that the main views are towards the Harbour with the majority of function rooms, terraces and bars being oriented to take advantage of northern views.
- **Applying Tenacity – Step 4:** In applying Tenacity Step 4, the Applicant assesses the view loss associated with the modification as reasonable as below:
 - *The views are fortuitous, gained wholly across the centre of a privately owned site (rather than accessible or created as a result of the application of planning controls which affect views for example setbacks or height controls).*

- *The views are all available via a side boundary of the Newcastle Club site, making an expectation of their retention, unrealistic.*
- *The majority of the loss of scenic and more highly valued parts of the views, is caused by lower and complying built form including below the LEP + 10% bonus and within the existing Concept Approval. As such the majority extent of view loss of such scenic features is contemplated by the Approved Concept and the LEP controls.*
- *Some views include more distant scenic features, the majority of which are blocked by lower and complying parts of the proposal or Approved Concept.*
- *The additional height sought predominantly blocks areas of open sky and creates no significant or material additional view loss to that which is already approved and complying 'view loss' on the view impacts or view sharing outcome for the Newcastle Club.*
- *Northerly views from all three levels at the north end of the Club are not whole views that are predominantly characterised by either a combination of, or individual features of high scenic quality.*
- *The Tenacity assessment also intimates that achieving reasonable development potential across a site is a relevant matter for consideration in the assessment and should be afforded some weight.*

The independent assessment reiterates the opinion that the northern views are not fortuitous and that only sky views would be lost as a product of the modification. Furthermore, the reasonableness of view loss resulting from non-complying built form has also been raised.

In the absence of any information being provided to the contrary by CN, the Applicant, or the independent consultant, the position of the Applicant is accepted and it is deemed that the northern views from the Newcastle Club are gained across a side boundary. This has been determined as the Newcastle Club is clearly oriented towards Newcomen Street, as is evident from the architecture of the club, and the location of the primary access point for patrons.

In relation to the view rating applied, it is also accepted that the impact of the modification is minor to moderate and this is agreed between both the Applicant and independent consultant.

Regarding the reasonableness of the impact, whilst it is acknowledged that some additional view loss will be created to the north as a result of the modification, it is considered that this is acceptable, notwithstanding the fact that it partially results from a non-compliance with the height standard. The resulting additional view loss is not considered substantial, views are not owned, and the club will still continue to benefit from views across the City.

Segenhoe Apartments, 50 Wolfe Street, Newcastle

The Segenhoe Building (also known as Segenhoe Flats) is a State Heritage listed 7 storey Inter-War Art Deco residential flat building constructed c.1937 comprising 25 dwellings. The Segenhoe Building is located opposite and lower relative to Cathedral Park. The Park occupies steeply sloping topography, the western edge of which is retained above the road carriage way and is populated by mature vegetation.

The three viewpoints from the Segenhoe Apartments include the following:

- VP18 Apartment 21, Segenhoe Building (dining),
- VP19 Apartment 20, Segenhoe Building (study),
- VP21 Apartment 17, Segenhoe Building (dining), view north-east.

Photomontages for each of the viewpoints listed above are provided in **Attachment 3F** of this report.

The view impact rating applied by Urbis was minor-moderate for VP18 and VP21 and minor for VP19, which is accepted by the independent consultant. However, the reasonableness of the view loss (Tenacity step 4) is different between the parties.

In relation to the steps undertaken in accordance with Tenacity, the following is provided by the independent consultant:

- **Applying Tenacity Step 1 and Step 2:** The independent assessment agreed with the Applicant in relation to the assessment of views affected stating:
 - *16 units across levels 1, 2, 3 and 4 retain all existing views in all directions and are unaffected by the proposal.*
 - *All 12 units which cover levels 5, 6 and 7 have potential views to the proposal. Based on on-site observations, the rooms mostly affected in all units are not bedrooms, being rooms such as living/dining, kitchen and study areas.*
- **Applying Tenacity Step 3 -** The following view impact ratings were agreed with:
 - *VP18 – Minor – moderate view impact rating*
 - *VP19 – Minor view impact rating*
 - *VP21 – Minor – moderate view impact rating*

It was noted that *“The majority of view loss occurs due to the upper levels of Building 3S (dome), involving the loss in most cases of the highly valued views of Nobbys Head and visually breaks the land/water interface and ocean horizon. There is also some minor view loss of Fort Scratchley due to Building 4S, although as it is on the edge of the view it has far less effect and is therefore of less concern.”*

- **Applying Tenacity – Step 4:** In applying Tenacity Step 4, the Applicant assesses the view loss associated with the modification as reasonable as below:
 - *The view to be lost is fortuitous, gained wholly across a privately owned, underdeveloped site (rather than accessible or created as a result of the application of planning controls which affect views, for example setbacks or height controls).*
 - *Views to a well-known and recognisable local landscape feature, Nobby's Head and in some views a minor section of local heritage item Fort Scratchley, are lost from the north-eastern corner of the northern elevation of this dwelling [NB this comment is common to Urbis assessment for Units 17 and 21], in one view direction (north-east). Complying parts of Building 4S block the scenic features in the north-easterly view.*
 - *The dwellings and flat building enjoy access to an expansive view in a wide arc from the west to the north-east, where the proposal and in particular, the minor extent of additional height sought, occupy only a short and minor extent of the composition.*
 - *The views are all available via a side boundary of the Segenhoe Building site, making an expectation of their retention, unrealistic.*
 - *The majority of view loss is caused by complying built form including below the LEP + 10% bonus and within the existing Approved Concept. The majority of the extent of view loss of scenic features such as Fort Scratchley is therefore contemplated by the Approved Concept and LEP controls.*
 - *The additional height sought in relation to Building 3E (above the green lines) blocks sections of land water interface within the north-east mid-ground composition including to the headland to Nobby's Head. The majority of the composition, which is characterised by all of the most scenic features, and the combinations of those elements which form the scenic and highly valued view are retained.*
 - *All expansive northerly views from this dwelling and other dwellings inspected in the Segenhoe Building will not be affected by the proposal. The dwelling is characterised by several expansive, scenic and highly valued views in multiple directions.*

- *The Tenacity assessment also intimates that achieving reasonable development potential across a site is a relevant matter for consideration and should be afforded some weight.*

The independent assessment agrees that the extent of view loss varies from minor to minor-moderate depending upon the location and orientation of the apartment. It is noted that non-complying built form can be attributed the loss of some high value views of parts of the eastern harbour (including in some cases Nobbys Head) and partly the ocean horizon from the upper three levels (all 12 apartments), in addition to those views lost through the Concept DA.

Whilst some additional view loss is acknowledged as a result of the modification, this is a product of the need to redistribute massing within the Stage 3 and Stage 4 site to enable the realisation of the Harbour to Cathedral view corridor and the enhanced Market Square. Both the view corridor and Market Square will result in substantial public benefit as detailed throughout. In addition, whilst some private view loss is acknowledged to occur, expansive views of the harbour and broader city will continue to be enjoyed notwithstanding the development as is evident from the montages prepared.

Taking into consideration the above, the resulting additional view loss is not considered to be unreasonable or substantially beyond what was already envisaged under the Concept DA.

Herald Apartments, 60 King Street, Newcastle

The Herald Apartments at 60 King Street completed in 2019, is a contemporary residential flat building with ground level commercial uses, including 116 apartments and 3 commercial suites which includes a restored heritage listed building at 28 Bolton Street (Newcastle Herald Building). The building has 9 levels (a basement, ground and 7 storeys) with essentially a rectangular floor plate with a square shaped extension of the site where it adjoins the retained heritage building.

VP15 Unit 701, Herald Apartments (balcony), view north-east was assessed in the view sharing assessment undertaken with a view impact rating of minor applied. Both the Applicant and the Independent consultant agree in relation to this rating applied and it is noted that additional view loss resulting from the modification would be negligible.

Taking into consideration the above, the resulting private view impacts from the Herald Apartments are considered acceptable.

Newcomen Apartments, 16-18 Newcomen Street, Newcastle

16-18 Newcomen Street is a 6-storey contemporary residential flat building with a formal presentation east towards Newcomen Street. The building is located mid-slope between Hunter Street (north) and King Street (south) where the underlying topography falls in elevation to the south.

Two viewpoints from two different apartments were specifically assessed by Urbis and illustrated by photomontages, being:

- View 01 VP8, Apartment 12 (Terrace) view north-west
- View 02 VP11, Apartment 10 (Terrace) view north-east

The view impact rating applied was minor for both views assessed. Both the Applicant and the Independent consultant agreed in relation to this rating with it being concluded that view loss would occur predominantly due to the Concept DA as approved and given the negligible additional view loss created by the modification did not relate to a view of significance in Tenacity terms.

Taking into consideration the above, the resulting private view impacts from the Newcomen Apartments are considered acceptable.

Summary of assessment of private view impacts

The modification is acceptable in relation to private view impacts based on an assessment against the principals in Tenacity. The impact to private views is reasonable. While some private views will be partially obstructed, expansive views of the city and harbour will still be enjoyed, and the overall development brings significant public benefits, including enhanced visual corridors and visual improvements within the public domain.

Furthermore, the substantial benefit that will result from public views must be given determining weight and on balance should be prioritised ahead of private views. In this regard, the modification results in significant public benefit that arises from the realisation of the harbour to cathedral corridor view corridor.

In conclusion, the modification not only maintains reasonable private view impacts but also delivers a substantial public benefit by enhancing key visual corridors, which should be prioritised, ensuring a positive outcome for both the community and urban landscape.

6.4 Traffic, access and carparking

The Concept DA (as amended) approved a total car parking deficit of 159 spaces across the four stages (85 residential visitor and 74 commercial /retail) The shortfall was intended to be serviced by CN's King Street multi -level car park and on-street carparking. This is reflected in conditions 19(b) and 19(c) of the Concept DA which state:

19. The number of car parking spaces shall be provided within each stage in accordance the requirements of Section 7.03 of Newcastle Development Control Plan 2012 (NDCP 2012) or the applicable standard at the date of lodgement of the application for each stage. The submitted plans and Traffic and Parking Impact Assessment for each stage shall detail the number and location of spaces required in accordance with this condition:

b) A minimum of 25% of the required number of residential visitor parking spaces shall be provided for residential visitor parking in each of the car parks for each Block contained in Stages 1-4 inclusive. These spaces are not to be subdivided, leased or controlled by or on behalf of particular unit owners or residents. Spaces cannot be allocated or deferred to different Blocks/stages unless there is a specific condition that allows this and has formed part of a separate development consent. The remaining 75% is to be accommodated by the existing Council carpark at the Corner of King and Thorn Streets and on-street parking.

c) Stages 1 to 4 of the development shall each provide on-site car parking for the parking for commercial and retail staff at the rate of 50% required by Council's DCP for commercial and retail use unless there is a specific condition that allows this and has formed part of a separate development consent. The remaining 50% is to be accommodated by the existing Council carpark at the Corner of King and Thorn Streets and on- street parking.

Assessment of the parking provisions has been undertaken by CN's Senior Development Officer (Engineering) having regard for changes to parking provisions and allocations that have occurred with the detailed design of all stages (being the Stage 1 and Stage 2 approvals, and the Stage 3 and Stage 4 application currently under assessment ref.DA2023/00419), and the change from minimum to maximum parking rates and a merits based assessment approach to parking under CN's NDCP 2023. The revised parking deficit for Stages 1 to 4 has been confirmed at a total of 114 spaces (76 residential visitor and 38 commercial/retail) as discussed below.

Stages 1 & 2 of this development were approved under CN's DCP 2012, and comprise a total parking deficit of 88 spaces (50 residential visitor and 38 commercial/retail). These stages

have been completed or are near completion, and therefore the deficit of parking associated with Stages 1 & 2 cannot be reviewed/modified in context with the Concept DA.

The detailed development application for Stage 3 and Stage 4 (ref. **DA2023/00419**) relies upon the NDCP 2023. A noticeable change from NDCP 2012 to NDCP 2023 is a movement in the Newcastle CBD from a minimum parking requirement to a merits based assessment and maximum parking rates. Stage 3 and Stage 4 as proposed comply with NDCP 2023 parking requirements for both residential and commercial/retail and in doing so also comply with the minimum parking requirements under the former NDCP 2012. In relation to residential visitor parking should the former DCP 2012 minimum parking rate of 1 space per 5 dwellings be applied, Stage 3 and Stage 4 contain a parking deficit of 26 residential visitor parking spaces.

In relation to Stage 3 and Stage 4, the Applicant has provided an addendum traffic report including attachments which include a parking occupancy study (parking survey). Relying on controls within Part C of the NDCP 2023, the Applicant provides a merit-based assessment to justify the shortfall in visitor parking which results from Stage 3 and Stage 4 of the development.

The parking survey was generally based within a 400m radius of the site and identified both short and long term parking vacancies on-street and within existing off-street public car parks. It indicates a total of 845 to 1782 parking spaces are available on and off street during the peak Thursday and Saturday period respectively. Of these 675 and 1058 short term time restricted parking spaces were located on-street, while approximately 170 and 724 long term parking spaces were available off -street in designated public car parks.

Through the assessment, it was identified that Stage 3 includes a commercial/ retail car parking surplus of 21 spaces. This presents opportunity to offset part of the existing 38 commercial/ retail car parking deficit associated with the former Stage 1 and Stage 2. On this basis, the overall commercial/retail parking deficit is reduced from 38 to 17 spaces.

Based on the parking survey undertaken and considering assessment by CN senior traffic engineer, it is concluded that adequate parking is available in the precinct to cater for the residential visitor parking deficit associated with the proposal. To further ensure this, a condition is recommended to be imposed requiring 26 bicycle parking spaces (able to be accessed by visitors) within the Stage 3 and Stage 4 Precinct. This condition (condition 26A) has been included in the recommended Draft Schedule of Conditions (refer to **Attachment 1**).

As a result, in addition to eliminating the requirement for parking to be facilitated by the now-demolished CN car park, the distribution of parking spaces across each stage and by use has been amended in the recommended Draft Schedule of Conditions (refer to **Attachment 1**). The amended condition specifies the number and allocation of car parking for Stage 1 (completed) and Stage 2 (under construction), and the planned car parking for Stage 3 and Stage 4, consistent with the detailed DA currently under assessment (ref. **DA2023/00419**).

6.5 European Heritage

To assess heritage impacts, the original heritage impact statement (**Attachment 3H**), an addendum heritage impact statement (**Attachment 3I**), CN heritage referral advice (**Attachment 12**) and referrals to Heritage NSW (**Attachment 9**) have been considered along with the Applicant's Section 8.2 Review Planning Report. In addition, the Concept DA Heritage Principals report (**Attachment 3K**) has also been considered.

In relation to heritage impacts, the following heritage elements within the site and broader surrounds are pertinent to consider in relation to the assessment of the modification:

- Municipal Building (I403) located at 113-121 Hunter Street, Newcastle;
- Christ Church Cathedral (I562); and

- Newcastle City Centre Heritage Conservation Area (C5).

Municipal Building (I403) located at 113 – 121 Hunter Street, Newcastle

The site contains a locally listed heritage item (NLEP 2012 item 403) referred to as the Municipal Building. The statement of heritage significance provides the following:

“It contributes to the overall architectural character of the Hunter Street Mall and it is an interesting example of an Edwardian commercial building.”

The modification would redistribute massing approved under the original Concept DA away from the Municipal building. The original Concept DA includes a building envelope with a maximum height of RL 31.28; however, this will be reduced under the modification to a maximum height of RL 20.43.

The reduction in the permitted bulk of development above the Municipal Building is a positive heritage response that is supported.

Christ Church Cathedral (I562) located at 52A Church Street, The Hill

A critical consideration in relation to the modification relates to the impacts of the proposed changes to the Concept DA on the Christ Church Cathedral with varied opinions having been provided between the Applicant, CN's heritage officer, and Heritage NSW.

In the most recent Heritage NSW referral received dated 23 July 2024, it states:

“...the building envelopes have been increased such that views from the Market Place and Queens Wharf Promenade to the Cathedral will be diminished. In addition, increment in the building envelopes further encroaches on the views from the Cathedral Park towards north and northeast, such that the views to the water are significantly lost.”

Furthermore, the referral from Heritage NSW also stated that:

“...comments provided to Newcastle City Council on the Concept DA by the Approvals Committee in 2016, the building envelopes have been increased such that views from the Market Place and Queens Wharf Promenade to the Cathedral will be diminished.”

In response to the comments received by Heritage NSW, the UDRP's heritage expert provided that the comments *“...do not relate to the subject Concept modification proposal, and lack specificity. It is simply asserted that an increase in envelopes (heights) from the approved Concept DA envelopes causes additional view loss. The opening up of the Market Place view corridor is not acknowledged or discussed, nor is the reduction in bulk of a number of the buildings, and view opportunities arising between them. Likewise the removal of approved new built form to the top of the locally heritage listed Municipal Building, which the UDRP considers a positive move, is not mentioned.”*

It is therefore concluded that Heritage NSW has not commented on all aspects of the view opportunities arising and/or the removal of approved built form will provide positively.

In the addendum heritage impact statement prepared by the Applicant the statement of significance for both the local and state listings have been examined, which are provided below (with red text identified by the Applicant to be of relevance to visual curtilage).

“The following Statements of Significance have been quoted from the State and local heritage inventory form of the Christ Church Cathedral in order to understand what has been considered being significant in terms of views and vistas as well as the setting of the Cathedral. Sentences relevant to the visual curtilage have been highlighted in red.

State Heritage Register - SHR # 01858

Christ Church Cathedral with its moveable collection, park and cemetery is historically significant because of its origins in early convict history and the establishment of the Anglican Church in New South Wales.

*The Cathedral is associated with a number of prominent architects, churchmen and government officials during the nineteenth century. John Horbury Hunt's 1868 plans exemplify Arts & Crafts principles - using bricks rather than stone for structural and decorative purposes. It is the largest of the cathedrals designed by Horbury Hunt, the largest Anglican cathedral in New South Wales, the largest provincial Anglican cathedral in Australia **and an extraordinary piece of architecture in a most dramatic setting.** Its collection of stained glass is outstanding in both state and nation for its size and quality.*

Technically, the German-developed Cintec system of strengthening masonry by insertion of a combination of an anchor of stainless steel rods and controlled grouting was pioneered in Australia in repairs to the Cathedral after the 1989 earthquake.

The Cathedral's moveable collection contains many unique or rare items memorialising those who served in war, especially World War I. It includes fittings and ecclesiastical items of exceptional quality as well as the state's only Victoria Cross not in private ownership and the nation's only surviving Union Jack flown by Australian soldiers throughout the Gallipoli campaign.

The Cathedral is a place of pilgrimage for veterans, their families, friends and descendants, from all around Australia. The rest park was one of the earliest European burial grounds established in New South Wales, pre-dating Christ Church. It is the site of convict burials and provides significant evidence of changing burial customs during the nineteenth century. Sections of footings from the original Christ Church beneath the Cathedral's floor, were recorded and left undisturbed during the restoration works of 1995-97, to facilitate further investigation.

The Cathedral grounds and former cemetery have retained the same basic size and shape set out in Henry Dangar's original 1823 town plan, providing evidence of early town planning.

...

LEP SHI form (Item no. I562)

*Christ Church Cathedral, Park and Cemetery are historically and aesthetically significant at state level. The Cathedral is the largest of the Cathedrals designed by one of Australia's most influential architects, John Horbury-Hunt. **It visually dominates Newcastle's city centre and defines its skyline. It is situated on top of Church Hill and the city has been mapped out around it.** The story of the construction and development of the Cathedral is interwoven with the establishment and growth of Newcastle into NSW's second largest city. Its level of significance is reflected by the number of prominent individuals who have visited the Cathedral. These have included various Governors of NSW, Bob Hawke when he was Prime Minister, Governor Generals, Archbishops of Sydney as well as Archbishops of Canterbury and York.*

The cemetery, which is now also a rest park, is historically significant at a state level because it was one of the earliest European burial sites to be established in NSW and one of the few that remain undeveloped and accessible. The history of the site reflects the changing social burial customs in NSW during the 19th century. The site itself has a long, continuous association with Australia's religious history, being the site of one of the earliest churches and European burial grounds in Australia.

As provided by the Applicant, none of the identified historical, aesthetic, landscape setting or being the *largest of the cathedrals designed by Horbury Hunt, the largest Anglican cathedral*

in New South Wales, the largest provincial Anglican cathedral in Australia and an extraordinary piece of architecture values will be negatively impacted by the modification. Furthermore, the basic size and shape of the Cathedral and Cathedral grounds will remain unchanged.

Taking into consideration the above, the main consideration in relation to the Christ Church Cathedral is whether the modification will have any adverse impact in relation to visual role the Cathedral has historically played (and continues to play) to the City.

In considering the visual role of the Cathedral, the Applicant's addendum heritage impact statement has analysed historical views and its setting, and how this changed over time. As a part of this analysis, the original layout of Newcastle as envisaged under Henry Dangar's 1823 plan has been provided (see **Figure 29** below).

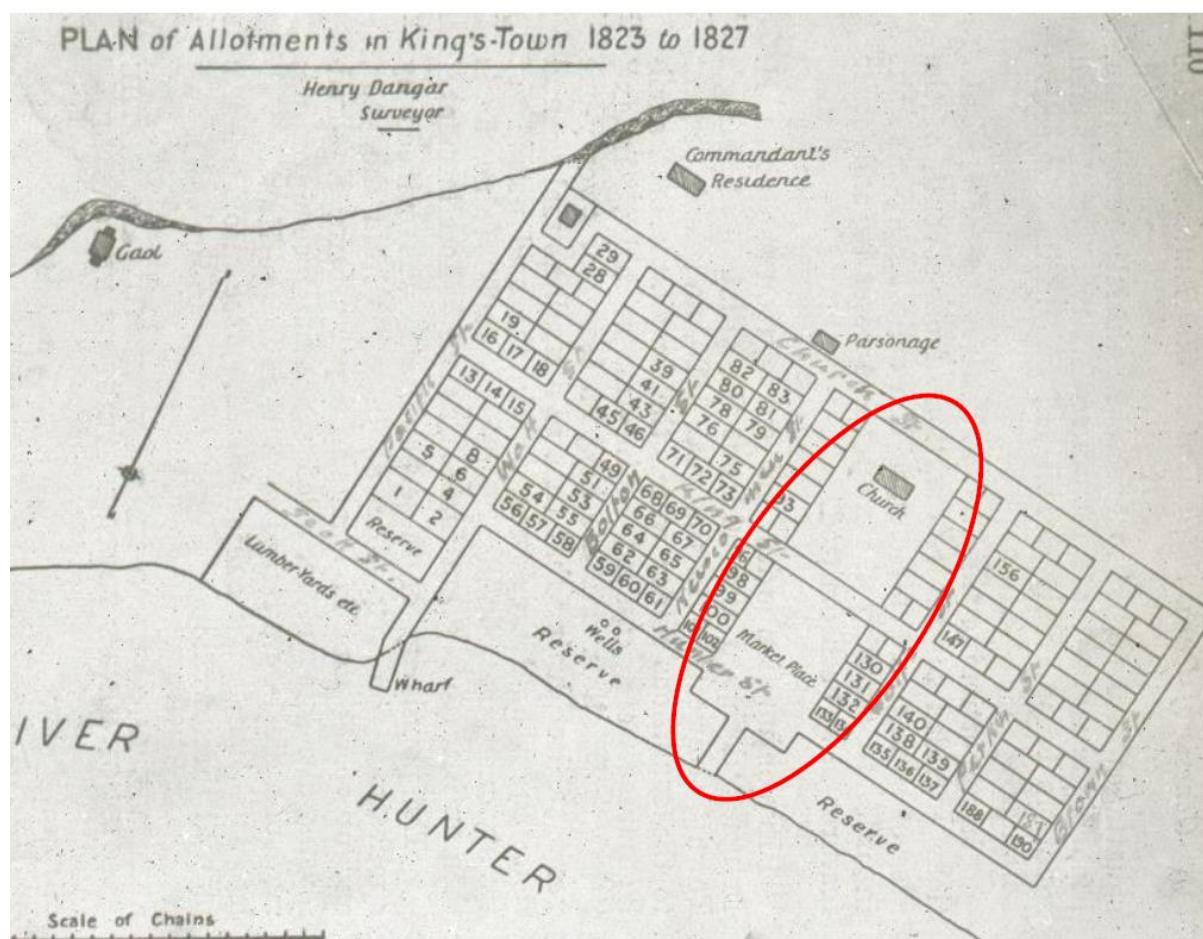


Figure 30: Extract from Figure 4 of the addendum report as shown in Dangar's Plan of Newcastle, 1823
Source: CityPlan

In relation to the above, the Applicant states:

"It is evident from the original layout of Newcastle, the Henry Dangar's 1823 plan, the Church grounds and market place were placed at the central axis of the then King's Town. By 1887 the town centre including the buildings on both sides of Hunter Street were well developed with the allotment allocated for the Market Place being occupied by the Borough Market building, a two-storey Victorian Gothic revival with two turrets at either side and a central decorative pediment (Figure 5)

In 1916 the Borough Market building was demolished to make way for the development of the Strand Theatre (Figure 6), a billiard hall, shops and offices, that were later demolished in 1979 to make way for the redevelopment of the Market Square. The Market Square shopping centre was built on the site of the Strand Theatre in 1980 and was opened by NSW Premier Neville Wran. The works included the construction of a

steel pedestrian bridge between the Hunter Street Mall and Queens Wharf to the north. As can be seen from the images provided below, all taken from the mid-section of the current Market Street towards the Cathedral, visibility of the Cathedral in a south direction was nil until the demolition of the Strand Theatre in 1979 and before it was blocked again by the Market Square shopping centre. Distant views to the top of the nave's pediment and the tower were available depending on how far north the image was taken from.

The proposed 'Harbour to Cathedral' link under the current design of the NEE Stages 3 & 4, the original 1823 plan with a direct visual link from the harbourfront to the Cathedral will be reinstated. This is considered as a significant achievement that could be made possible through the redistribution of the building mass across the site, which was not possible under the Concept Plan."

It is agreed that the modification provides a vast enhanced heritage response when compared to the original Concept DA. The modification provides for an outcome in line with original town planning schemes for the City envisaged by Dangar in 1823 and will contribute to improving the relationship between the Cathedral and the Newcastle City Centre.

In addition, the comparative analysis undertaken by the Applicant under heading 4 of the addendum heritage impact statement is supported and it is considered that negligible impacts will occur because of the modification (see table 1 of **Attachment 3I**). The landmark heritage values and defining the skyline of the Newcastle city centre associated with the Christ Church Cathedral will be maintained and preserved, notwithstanding the modification to the Stage 3 and Stage 4 envelopes proposed.

Newcastle City Centre Heritage Conservation Area

The subject site is within the Newcastle City Centre Heritage Conservation area as defined under the NLEP 2012. As detailed above, it is considered that the modification provides an overall positive heritage response as it reinstates aspects of Dangar's plan for Newcastle City Centre prepared in 1823, and visually reconnects the Cathedral to the Newcastle Mall/Harbour.

6.6 Aboriginal cultural heritage

Meaningful aboriginal engagement was undertaken with the Aboriginal community throughout the detailed design process (of which the modification will support) as indicated in the endorsement report provided as **Attachment 3P**.

In the advice provided by Dr Pollard, it was noted that:

"One of the multiple aspects of the proposal that reflect a carefully considered response to input from Awabakal and Worimi Community representatives, is the re-establishment of the close juxtaposition of the landform of the Hill with the more level foreshore areas of the Site and the foreshore, and beyond that to the waters of the harbour (Coquon) and the Stockton foreshore beyond. This landform was an important meeting place of the Awabakal people (from the southern side of the harbour) and the Worimi, from the northern side. It was a place that enjoyed a very abundant and diverse range of food sources, some of which are evidenced in the enormous middens that were found in the area that were the size of sand dunes. These were exploited by early European settlers for making lime for construction purposes. The extensive consultation with the Community demonstrated a strong desire for a direct visual link between the waters of Coquon and the landform of the Hill – which the proposed Concept Modification achieves well."

The careful consideration of incorporating Aboriginal heritage into the design is evident through the design of the detailed development, and therefore supported.

6.7 Solar access and overshadowing

A shadow analysis has been undertaken by the Applicant and is provided as **Attachment 30** of this report. It includes detailed shadow diagrams and 'view from the sun' solar analysis (based on the Stage 3 and Stage 4 detailed design).

Building 4S will result in a marginal increase in overshadowing of the Newcastle Club and the Cathedral Park and Cemetery. Based on the overshadowing diagrams prepared, this would be limited to between 9am and 10am in mid-winter.

Some improvements in solar access would also occur because of the modification along Newcomen Street and to the carpark site to the south.

Overall, the overshadowing diagrams demonstrate that there is not a substantial variance in terms of overshadowing impacts between the original Concept DA and the proposed modification. Subsequently the modification is acceptable in relation to solar and overshadowing impacts.

6.8 Social and economic benefits

Whilst not addressed in the Applicant's 8.2 Review Report, the modification will enable a development outcome which will have substantial social and economic benefits both locally and regionally.

The modification will enable the delivery of a transformational project for the Hunter Mall Precinct, which will assist in realising the vision for the area and reinstate heritage (visual) connections between the Cathedral and the Newcastle City Centre.

In addition, it will enable the delivery of much needed new homes, which will assist in tackling the housing crisis, as well as additional employment generating floor space which will further contribute to the revitalisation of the CBD.

6.9 Suitability of the site

The modification will continue to result in a development outcome suitable for the site, subject to the recommended changes to the Draft Schedule of Conditions included at **Attachment 1** of this report.

6.10 The Public Interest

The proposed modification remains suitable for the site and is in the public interest.

The modification remains generally consistent with applicable planning controls contained within the relevant SEPPs, NLEP 2012, and NDCP 2012. Where non-compliances occur, these are considered to be justified in the circumstances given the opportunities they allow for.

The modification will enable an enhanced development outcome at the site which is considered to result in substantial public benefit. This will be realised through the realisation of a DCP defined corridor between the Christ Church Cathedral and the Newcastle Harbour, the enhancement of Market Square, and the provision of a considered architectural development which exhibits design excellence.

Where additional impacts occur beyond what was envisaged under the original Concept DA, these have been adequately justified throughout and are considered acceptable in the circumstances.

7. CONCLUSION

The application for review of determination has been assessed having regard to the relevant matters for consideration under the provisions of Section 8.2(1) Reviews – Section 8.2 and 8.3 of the EP&A Act 1979. In addition, the application has been considered in accordance with the requirements of the EP&A Act 1979 and the EP&A Reg 2021 as outlined in this report.

Following a thorough assessment of the relevant planning controls, concerns raised in submissions, and the key issues identified in this report, it is recommended that the modification be supported as it is in the public interest.

The modification is acceptable considering the context of this prominent city centre site, in conjunction with the public benefits that will be enable as a result of the amendments proposed.

The applicant has provided sufficient information to overcome the previous reasons for refusal of 15 May 2024, as summarised below in **Table 18** and within **Attachment 3**.

Table 18: Reasons for refusal of MA2023/00175	
Reason for Refusal	Findings of 8.2 Review
1. <i>The consent authority is not satisfied that the modification application is substantially the same development as the concept approval pursuant to Section 4.55 (2)(a) of the Environmental Planning and Assessment Act 1979</i>	Satisfactory. The modification is substantially the same development as that originally approved pursuant to DA2017/00701 , as discussed in Section 4.1 of this report.
2. <i>The modification application will have unacceptable cumulative impacts on both the public and private views and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. The modification is considered to result in acceptable cumulative impacts on public and private views as discussed in Section 6.3 of this report.
3. <i>The development will create unacceptable impacts given the deficiency in car parking and is therefore unacceptable pursuant to Section 4.15(1)(b) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. Car parking has been demonstrated to be sufficiently catered for under the modification as discussed in Section 6.4 of this report.
4. <i>The development is not in the public interest having regard to impacts on views and the deficiency of car parking spaces pursuant to Section 4.15(1)(e) Environmental Planning and Assessment Act 1979.</i>	Satisfactory. The modification is considered in the public interest as the HCCRPP's concerns raised regarding views and the deficiency of carparking are sufficiently addressed.

8. RECOMMENDATION

It is recommended that the HCCRPP review the determination of MA2023/00175 dated 15 May 2024 and revise this to an approval, subject to the recommended conditions of consent.

Approval is recommended for: *Concept Development Application – Staged development comprising of retail, commercial, residential and shop top housing – change to design (building height)*, pursuant to Section 4.16(1)(a) of the *Environmental Planning and Assessment Act 1979*, subject to the recommended conditions of consent (at **Attachment 1**).

9. ATTACHMENTS

The following attachments are provided:

- Attachment 1: Draft Schedule of Conditions – changes shown in red
- Attachment 2: Draft Schedule of Conditions
- Attachment 3: Section 8.2 Review Planning Report (V5), prepared by Urbis, dated 12 October 2024
- Attachment 3A: Approved Demolition and Retention Plan DA2023/00336, prepared by SJB, dated 21 November 2022
- Attachment 3B: Concept Plans, prepared by SJB
- Attachment 3C: Addendum to Traffic and Parking Studies, prepared by CJP Consulting Engineers, dated 11 June 2024
- Attachment 3D: Applicants Response to Submissions, prepared by Urbis
- Attachment 3E: East End Stage 3 and 4 Visual Impact Assessment, prepared by Urbis, dated April 2023
- Attachment 3F: East End Newcastle View Sharing & Visual Impact Assessment, prepared by Urbis dated February 2024
- Attachment 3G: Response to RFI dated 26 September 2024 View A and View B, prepared by Urbis dated October 2024
- Attachment 3H: Heritage Impact Statement, prepared by City Plan, dated April 2023
- Attachment 3I: Addendum to Heritage Impact Statement, prepared by City Plan, dated September 2024
- Attachment 3J: 92 King Street Massing Study, prepared by SJB, dated 28 August 2024
- Attachment 3K: East End Stages 3 & 4 Planning Panel Additional Information Concept DA Heritage Principles, prepared by SJB, dated August 2024
- Attachment 3L: Applicants Legal Advice on Substantially the Same, prepared by Mills Oakley, dated 12 June 2024
- Attachment 3M: Applicants Legal Advice for HCCRPP, prepared by Mills Oakley, dated 9 September 2024
- Attachment 3N: Applicants Legal Advice on c17-5 NLEP2012 & Former CN Carpark, prepared by Mills Oakley, dated 27 August 2024
- Attachment 3O: Shadow Diagrams, prepared by SJB
- Attachment 3P: Design with Country Endorsement Report and Letter, prepared by Dhiira
- Attachment 3Q: SEPP65 Design Statement, prepared by SJB, dated 20 March 2024
- Attachment 3R: Newcastle East End Stage 3 - 4 Landscape Development Application Design Report, prepared by COLA Studio, dated April 2023
- Attachment 4: Visual Impact Assessment Review, prepared by Envisage Consulting dated 10 October 2024
- Attachment 5: UDRP Report meeting held 05 July 2023
- Attachment 6: UDRP Report meeting held 26 June 2024
- Attachment 7: Subsidence Advisory NSW General Terms of Approval dated 4 October 2024
- Attachment 8: Subsidence Advisory NSW Stamped Plans dated 4 October 2024
- Attachment 9: Agency Advice - Heritage NSW NLEP 5-10 dated 23 July 2024
- Attachment 10: Agency Advice - Heritage NSW NPW Act dated 17 July 2024
- Attachment 11: UDRP Addenda Observations dated 8 October 2024
- Attachment 12: CN Referral Advice - Heritage dated 11 September 2024
- Attachment 13: Council Resolution CCL181220 - Stairway to Heaven Concept