

## COUNCIL ASSESSMENT REPORT

### HUNTER AND CENTRAL COAST REGIONAL PLANNING PANEL

<b>PANEL REFERENCE &amp; DA NUMBER</b>	PPSHCC-79 – [MA2021/00192]
<b>PROPOSAL</b>	Sec 4.55(2) modification to DA2010/1278 - Community Facility and Retail (Redevelopment of Newcastle Art Gallery) - change to floor plans, elevations and landscape including deletion of Darby Street retail premises.
<b>ADDRESS</b>	Lots 10, 11, 12, 13, 14 & 15, DP 1122031; Lot 1, DP 63100; Lot 1 DP 516670; and Pt Lot 18, Sec G DP 978941 [1 Laman Street, Cooks Hill]
<b>APPLICANT</b>	City of Newcastle (CN)
<b>OWNER</b>	City of Newcastle (Legally known as Newcastle City Council)
<b>DA LODGEMENT DATE</b>	07 May 2021
<b>APPLICATION TYPE</b>	Modification Application (s.4.55(2))
<b>REGIONALLY SIGNIFICANT CRITERIA</b>	<p>The application to modify development consent is made under Section 4.55(2) and is being referred to the Hunter &amp; Central Coast Regional Planning Panel (HCCRPP) for determination under Section 123BA(2) of the <i>Environmental Planning and Assessment Regulation 2000</i> (EP&amp;A Regs) and the <i>Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents</i>.</p> <p>The subject modification application is for development for which council is the landowner, and as such meets the criteria relating to conflict of interest set out in Schedule 1 to the above-mentioned instruction.</p> <p>Development Application DA2010/1278 was determined by the then Joint Regional Planning Panel pursuant to the requirements of the <i>State Environmental Planning Policy (State and Regional Development) 2011</i>, as the application was for council related development with a Capital Investment Value (CIV) of more than \$5 million. The original Development Application had a CIV of \$14.3 million. The subject modification application has nominated an increased CIV of \$38.465 million.</p>
<b>CIV</b>	\$38.465 million (approx.)

<b>CLAUSE 4.6 REQUESTS</b>	Not applicable
<b>KEY SEPP/LEP</b>	<p><b>Environmental planning instruments: s4.15(1)(a)(i)</b></p> <ul style="list-style-type: none"> <li>• State Environmental Planning Policy (State and Regional Development) 2011</li> <li>• State Environmental Planning Policy (Infrastructure) 2007</li> <li>• State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017</li> <li>• State Environmental Planning Policy No. 55 - Remediation of Land</li> <li>• State Environmental Planning Policy (Coastal Management) 2018</li> <li>• Newcastle Local Environmental Plan 2012</li> </ul> <p><b>Development Control Plan: 4.15 (1)(a)(iii)</b></p> <ul style="list-style-type: none"> <li>• Newcastle Development Control Plan 2012</li> <li>• City of Newcastle's Community Participation Plan 2019</li> </ul>
<b>TOTAL &amp; UNIQUE SUBMISSIONS KEY ISSUES IN SUBMISSIONS</b>	Nil
<b>DOCUMENTS SUBMITTED FOR CONSIDERATION</b>	<ul style="list-style-type: none"> <li>• Attachment A: Draft Schedule of Conditions – changes shown in red</li> <li>• Attachment B: Draft Schedule of Conditions</li> <li>• Attachment C: Plans submitted with application</li> <li>• Attachment D: General Terms of Approval – Subsidence Advisory NSW</li> <li>• Attachment E: Agency Advice – Ausgrid letter dated 2 November 2021</li> <li>• Attachment F: Agency Advice – Transport for NSW letter dated 13 July 2021</li> <li>• Attachment G: Report on Groundwater Sampling</li> <li>• Attachment H: Report on Vapour Intrusion Risks for Proposed Rainwater Tank</li> <li>• Attachment I: Arup Technical Note</li> <li>• Attachment J: Historical Archaeological Assessment and Statement of Heritage Impact</li> <li>• Attachment K: Mines Subsidence Parameters Letter</li> <li>• Attachment L: Report on Grouting and Verification Plan for Yard and Dudley Seam Workings</li> <li>• Attachment M: Report on Pillar Stability and Subsidence Modelling</li> <li>• Attachment N: Applicants advice regarding owners consent for mine grouting work</li> <li>• Attachment O: Turning Paths</li> </ul>

	<ul style="list-style-type: none"> <li>• Attachment P: Stormwater Management Plan</li> <li>• Attachment Q: Access Planning Review Report</li> <li>• Attachment R: Conductor Clearance Assessment Report and Model</li> <li>• Attachment S: Architects Design Statement</li> <li>• Attachment T: Applicants advice regarding physical commencement</li> </ul>
<b>SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)</b>	N/A
<b>RECOMMENDATION</b>	Approval
<b>DRAFT CONDITIONS TO APPLICANT</b>	Yes
<b>SCHEDULED MEETING DATE</b>	17 November 2021
<b>PLAN VERSION</b>	Refer to Attachment C
<b>PREPARED BY</b>	City of Newcastle
<b>DATE OF REPORT</b>	8 November 2021

## EXECUTIVE SUMMARY

This report details the City of Newcastle's ('CN's') assessment of a modification application (MA2021/00192) seeking to amend Development Consent No. DA2010/1278. The original application (DA2010/1278) granted consent for alterations and additions to the existing Newcastle Art Gallery (NAG). The modification application seeks consent for amendments including changes to floor plans, elevations, landscape, deletion of Darby Street retail spaces, and associated amendments to conditions. City of Newcastle is the applicant, and the project is known as the Newcastle Art Gallery Extension.

The Newcastle Art Gallery is located within The Civic and Cultural Precinct as defined by CN's strategic planning studies. The precinct includes the City's key cultural infrastructure including the NAG. The Civic Theatre, City Hall, University Conservatorium of Music and Graduate School of Management, a number of heritage listed buildings and Civic Park. The surrounding development also includes a retail/ commercial component.

The proposal as modified is permitted with consent within the B4 Mixed Use Zone of the Newcastle Local Environmental Plan 2012 (NLEP2012). |

There are no concurrence requirements from agencies for the proposal and the application being a modification is not integrated development pursuant to Section 4.46 of the *Environmental Planning and Assessment Act 1979* ('EP&A Act'). However, as the original application required integrated approval from the then NSW Mines Subsidence Board, the modification application was referred to Subsidence Advisory NSW for comment, revised General Terms of Approval were provided. A referral to Ausgrid pursuant to *State Environmental Planning Policy (Infrastructure) 2007* ('Infrastructure SEPP') and Transport for NSW were issued and subject to conditions of consent raised no objection to the modified proposal.

Jurisdictional prerequisites to the grant of consent imposed by the following controls have been satisfied as outlined in Table 3 of this report, including:

- Clause 13, 15, and 16 of *State Environmental Planning Policy (Coastal Management) 2018*,
- Clause 45(2) and 101 of *State Environmental Planning Policy (Infrastructure) 2007*,
- Clause 7(1) of *State Environmental Planning Policy No 55—Remediation of Land*,
- Clause 5.10 'Heritage conservation' of *Newcastle Local Environmental Plan 2012*,
- Clause 5.21 'Flood Planning' of *Newcastle Local Environmental Plan 2012*,
- Clause 6.1 'Acid Sulfate Soils' of *Newcastle Local Environmental Plan 2012*,
- Clause 6.2 'Earthworks' of *Newcastle Local Environmental Plan 2012*, and
- Clause 7.5 'Design excellence' of *Newcastle Local Environmental Plan 2012*.

The proposal was notified in accordance with CN's Community Participation Plan 2019 ('CPP') from 21 June 2021 to 5 July 2021, and no submissions were received. In response to matters raised during the assessment process, several minor amendments to the modification application as originally submitted have been made during the assessment process. After the consideration of the nature and scope of the amendments made, having regard to CN's CPP, renotification of the modification was not required.

The application to modify development consent is made under Section 4.55(2) and is being referred to the Hunter & Central Coast Regional Planning Panel (HCCRPP) for determination under Section 123BA(2) of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regs) and the *Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents*. The subject modification application is for development for which council is the landowner, and as



such meets the criteria relating to conflict of interest set out in Schedule 1 to the above-mentioned instruction.

Development Application DA2010/1278 was determined by the then Joint Regional Planning Panel pursuant to the requirements of the *State Environmental Planning Policy (State and Regional Development) 2011*, as the application was for council related development with a Capital Investment Value (CIV) of more than \$5 million. The original Development Application had a CIV of \$14.3 million. The subject modification application has nominated an increased CIV of \$38.465 million.

A briefing was held with the Panel on 21 July 2021 where key issues were discussed, including:

1. *Physical commencement* - The applicant submitted advice confirming that the demolition and tree removal works undertaken in accordance with the consent has satisfied the test of lawful physical commencement and accordingly the consent has been preserved indefinitely.
2. *Mine grouting works* – The modification application was referred to Subsidence Advisory NSW for comment as the original application was integrated development. Revised General Terms of Approval were provided. Mine grouting works are required within the 'Yard'/Dudley seam at an approximate depth of 25m and the 'Bore Hole' seam at an approximate depth of 80m.
3. *Further information requirements* – It was discussed during the briefing that further information was required to information the assessment, including sections, FSR calculations, street trees and public domain works, this information was provided by the applicant in response to CNs request for information.

Following consideration of the matters for consideration under Section 4.15(1) and Section 4.55 (2) of the EP&A Act, the provisions of the relevant State environmental planning policies, the NLEP 2012 and the NDCP 2012, the modified proposal is supported. The detailed assessment concludes that the impacts of the modified development can be mitigated and/or managed to subject to the recommended conditions of consent. As such, MA2021/00192, is recommended for approval subject to the Draft Conditions contained at **Attachment B** of this report.

## **1. THE SITE AND LOCALITY**

### **1.1 The Site**

The development site is owned by the City of Newcastle ('CN'), legally known as Newcastle City Council. It comprises nine allotments (Lots 10, 11, 12, 13, 14, & 15, DP 1122031; Lot 1, DP 63100; Lot 1 DP 516670, and Pt Lot 18, Sec G DP 978941) and is known as 1 Laman Street Newcastle ('the site'). Refer to **Figure 1**.

The site is irregular in shape and has a northern frontage to Laman Street of 78.85 metres, an eastern frontage to Darby Street of 73.1 metres and a southern frontage to Queen Street of 53.4 metres.

The total area of the allotments which make up the development site is approximately 4,172sqm. A number of mature and semi mature trees are located on the site. The site's surface slopes down to the north-east, west and south at slopes ranging from about 1 to 5 degrees.

Existing development on the site consists of the Newcastle Art Gallery ('NAG') building which has an L-shaped building footprint with a primary frontage to Laman Street. The NAG has a gross floor area of approximately 2,026 sqm and extends over two storeys. It includes a main gallery, offices and amenities. Part of the Newcastle War Memorial Cultural Centre ('NWMCC'), a listed heritage item of local significance, is also located on the site.

Pedestrian access to the existing NAG building is provided primarily from Laman Street. The entry leads to the main gallery. A lift services the upper levels of the building.

The existing NAG building is in a prominent position overlooking Civic Park to the north and is an important component of the cultural precinct. It is part of a line of civic buildings forming the southern edge of Laman Street.

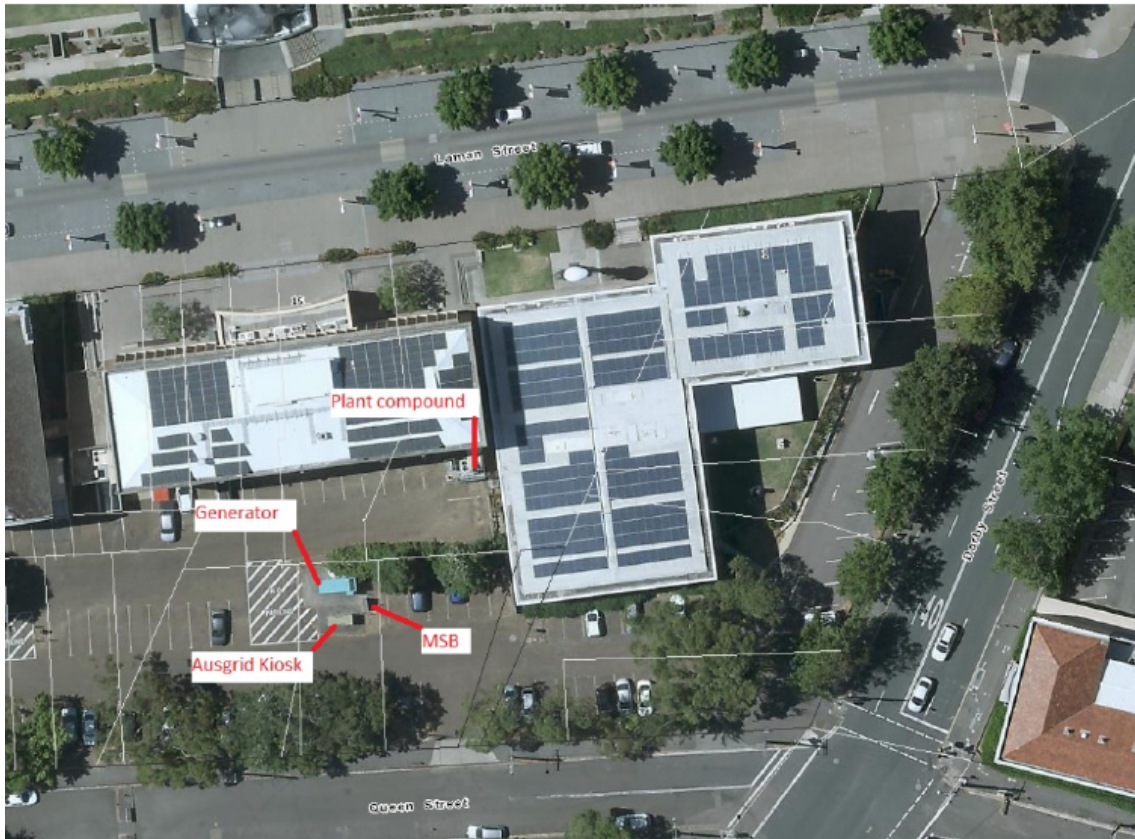
A driveway crossing on Laman Street provides vehicle entry to service car parking on the eastern side of the development site (signposted as 'Art Gallery Public Carpark', and restricted to 2 hours), with vehicles exiting the site from a driveway crossing on Queen Street (i.e. a one-way, 'drive through' arrangement).

An upgrade to some of the NAG's central plant was recently commissioned as part of CN's ongoing maintenance and OPEX plans. This work was carried out under the *State Environmental planning Policy (Infrastructure) 2007* and included an upgrade to the central chillers, boiler and electrical main switchboard. Refer to **Figure 2**.



(Source: City of Newcastle, OneMap)

**Figure 1:** Aerial image - approximate extent of development site outlined in red



(Source: Smith & Tzannes )

**Figure 2:** Location of substation and plant

## 1.2 The Locality

The site is located within The Civic and Cultural Precinct as defined by CN's strategic planning studies. The precinct includes the City's key cultural infrastructure including the NAG. The Civic Theatre, City Hall, University Conservatorium of Music and Graduate School of Management, a number of heritage listed buildings and Civic Park. The surrounding development also includes a retail/ commercial component.

Directly to the north of the site, on the opposite side of Laman Street, is Civic Park. It is bound by Laman, Dawson, King and Darby Streets. To the east of the site along the opposite side of Darby Street is primary office uses. On the south-western corner of the intersection between Queen and Darby Streets is a kitchen appliances store and a auto repairs.

Land uses along Queen Street to the south of the site, transition from residential (towards the western end) to retail (towards the eastern end). On the south-western corner of the intersection of Darby Street with Queen Street is a book store and small retail shop.

To the south of the site, along Darby Street, is a small shopping precinct containing primarily commercial and retail uses. Adjoining the site to the west along Laman Street is the NWMCC, Newcastle Regional Library and Newcastle Baptist Tabernacle Church.

## **2. THE PROPOSAL AND BACKGROUND**

### **2.1 Background**

#### Development Consent DA2010/1278

Development Consent DA2010/1278 was granted with conditions by the (then) Joint Regional Planning Panel on 18 April 2012 for alterations and additions to the existing NAG building at 1 Laman Street Cooks Hill. The approved development consists of the following elements;

- Demolition of an existing structure on Darby Street, the cooling tower and some internal partitions,
- Refurbishment of the existing gallery and associated facilities to link with the new eastern wing,
- Construction of a new eastern wing consisting of a café, amenities, gallery reception, education area gallery, courtyard, theatre and two retail spaces (addressing Darby and Queen Streets) at ground floor level and boardroom, gallery spaces and amenities at first floor level,
- Construction of a new back of house consisting of a loading dock, plant room and lift hoist at ground level, exhibition store, plant room and lift store at first floor level.

The development consent was physically commenced through demolition works and tree removal. CN was advised of the demolition commencement by email 29 November 2012 in accordance with the conditions of consent. The removal of a masonry block wall adjacent to the existing loading dock occurred on 12 December 2012 and the removal of the art pavilion and tree within the existing pavilion courtyard occurred on 6 August 2012.

The applicant submitted advice prepared by HWL Ebsworth Lawyers dated 15 September 2021 which confirmed that the demolition and tree removal work undertaken in accordance with the consent had satisfied the test of lawful physical commencement and accordingly the consent has been preserved indefinitely. On this basis the Modification Application can be considered and determined.

#### S96 Modification DA2010/1278.02

Development Consent DA2010/1278 was modified on 3 September 2012, which amended and added a number of development consent conditions relating to the inclusion of a street awning to Laman, Darby and Queen street frontages. The modification application arose from the requirements of Condition 67b of the original development consent, which was specifically imposed by the Joint Regional Planning Panel (now the HCCRPP).

### **2.2 The Proposal**

The current application to modify Development Consent DA2010/1278 consists of changes to floor plans, elevations and landscape including deletion of Darby Street retail spaces.

Particulars of the modifications proposed are listed below;

- Additional internal demolition – including demolition of ground floor toilets and mezzanine floor (slab, stairs, etc.)
- Additional external demolition – including a Pavilion and Sculpture Garden and associated walls and fences adjacent.

- Additional refurbishment – Conversion of existing first floor office areas as gallery space.
- Alterations to internal configuration – minor alterations to café, amenities, gallery reception, education area. Including removal of theatre space and boardroom.
- Removal of retail spaces which fronted Darby Street. A new education space has windows overlooking Darby Street. Market research has been utilised to identify a lack of demand for retail space in Darby Street.
- Enclosure of central courtyard to create central, two storey, atrium space.
- Amendments to facilitate new staff offices and garden courtyard at Darby Street and Queen Street façade. Additional lower ground level (basement) at Queen Street to accommodate back-of-house and additional storage space.
- Alterations to roof design to including re-sheeting existing roof and the installation of additional photovoltaic panels to improve energy efficiency.
- Removal of approved cooling tower
- Minor external changes.
- Raising the existing kerb on Darby Streets to provide satisfactory site stormwater management
- Condition 67C, 68, 71, 74, 75, 76, 77, 78, and 79 be deleted
- Conditions 2, 3, 18, 20, 66, 67A, 69, and 70 be amended

No pre-lodgement meeting was held prior to the lodgement of the current Section 4.55(2) application to modify development consent.

The development application was lodged on **7 May 2021**. A chronology of the development application since lodgement is outlined below including the Panel's involvement (briefings, deferrals etc) with the application:

**Table 1: Chronology of the Modification Application.**

Date	Event
<b>7 May 2021</b>	Application lodged
<b>20 May 2021</b>	Request for additional information
<b>15 June 2021</b>	Additional information submitted
<b>21 June 2021 to 05 July 2021</b>	Public Notification period
<b>21 July 2021</b>	Panel briefing
<b>20 August 2021</b>	Request for additional information
<b>15 October 2021</b>	Additional information submitted
<b>28 October 2021</b>	Request for additional information
<b>2 November 2021</b>	Additional information submitted



### 3. STATUTORY CONSIDERATIONS

The subject application to modify Development Consent DA2010/1278 has been made under Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act').

Pursuant to Section 4.55(2) of the EP&A Act, the consent authority, when considering a request to modify a Determination under the clause, must:

- (a) *be satisfied that the development as modified is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and;*
- (b) *consult the minister, the public authority, approval body or Minister, as a result of:*
  - *a condition imposed as a requirement of a concurrence to the consent, or*
  - *in accordance with the general terms of an approval proposed to be granted, and*
- (c) *notified the application in accordance with the regulations and Council's Development Control Plan, and*
- (d) *consider any submissions made; and*
- (e) *take into consideration the matters referred to in Section 4.15 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.*

These matters are further considered below.

#### 3.1 Section 4.55(2)(a) – Substantially the same development

Section 4.55(2)(a) requires the consent authority to be “*satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)*”.

The NSW Land and Environment Court has established several precedents as to what may be considered as being ‘*substantially the same development*’, and what should be factored into the consideration of this threshold test.

Principles drawn from the judgment include that:

- (a) *The term ‘substantially’ means ‘essentially or materially having the same essence’.*
- (b) *When a consent authority makes a determination as to whether a development is substantially the same it is a question of fact and degree and is not a question of law.*
- (c) *The term to ‘modify’ means to ‘alter without radical transformation’.*
- (d) *In comparing the approved development and the development as proposed to be modified it is necessary to undertake a qualitative and quantitative assessment of the developments in their proper context, and*
- (e) *To undertake a numeric or quantitative assessment of the modification only in the absence of a qualitative assessment would be flawed.*

These considerations apply to the modification of a development consent through design changes as well as amendments to conditions that impact the nature of the proposal.

The consideration of the substantially the same development test should not only include the physical characteristics of the approved and modified schemes, but also the nature and magnitude of impacts of the developments. In these respects, the modified scheme should be 'essentially or materially' the same as that originally approved.

An assessment of the qualitative and quantitative elements of the development approved and as proposed to be modified has been undertaken, and found the development being modified is substantially the same development as the development for which consent was originally granted. Details are provided below.

#### Qualitative Comparison

The development proposal, as modified, is substantially the same development, in a qualitative sense, as that originally approved as;

- There will be no change to the primary land uses ('community facility – art gallery' and 'retail premises'),
- The architectural quality will not be diminished or significantly altered by the modifications,
- There are no changes which would have a detrimental impact on the heritage significance of the listed heritage item (being the Newcastle War memorial Cultural Centre), or those in the vicinity of the site, nor will it impact the character of the heritage conservation area of which the site is a part (being the Newcastle City Centre Heritage Conservation Area),
- There are only minimal changes building footprint, despite the proposal now incorporating an additional level of basement, the modification does not result in a significant change to the built form. Further, the relationship with the built form and surrounding land is generally unchanged,
- There are only minor changes to the approved material and finishes, including metal to replace timber cladding as required by current statutory requirements related to fire safety compliance, which does not adversely impact on the overall design of the proposal.
- There is only a minor increase in building height, which will not adversely impact on any adjoining properties and shadows cast as a result of the additional height is minimal,
- There is no change in impact or potential impacts to the natural environment as a result of the proposal,
- The changes will not preclude the development from complying with the conditions of consent, except where proposed to be modified under the subject application (as detailed in the 'Assessment of conditions' below).

#### Quantitative Comparison

The following table provides a summary of the key features of the approved development and the modified development to assist with the quantitative assessment of the proposed modification.

**Table 2: Quantitative Comparison**

Component	Approved development (DA2010/1278)	Modified development (MA2021/00192)
Site area	4,172 sqm	4,172 sqm
<b>NWMCC total GFA</b>	<b>520 sqm</b>	<b>520 sqm</b>
NAG existing Ground Floor GFA	890 sqm	890 sqm
NAG existing Mezzanine GFA	36 sqm	0 sqm
NAG existing First Floor GFA	1,100 sqm	1,100 sqm
<b>NAG existing total GFA</b>	<b>2,026 sqm</b>	<b>1990sqm</b>
NAG addition Lower Ground Floor GFA	-	252 sqm
NAG addition Ground Floor GFA	1,388 sqm	1,503 sqm
NAG addition First Floor GFA	1,440 sqm	1,088 sqm
<b>NAG addition total GFA</b>	<b>2,828 sqm</b>	<b>2843 sqm</b>
<b>NWMCC total GFA+ NAG existing total GFA + NAG addition total GFA</b>	<b>5,374 sqm</b>	<b>5,353 sqm</b>
<b>FSR</b>	<b>1.29:1</b>	<b>1.28:1</b>
<b>Maximum height of building</b>	<b>14 m</b>	<b>14.3 m</b>
<b>Number of car parking spaces</b>	<b>Nil</b>	<b>Nil</b>

The development proposal, as modified, is substantially the same development, in a quantitative sense, as the originally approved as it;

- Does not significantly the approved primary land use,
- Does not significantly alter the approved built form,
- Does not significantly alter the GFA, and
- Does not significantly alter the approved height.

#### Assessment of conditions

**Table 3: Assessment of modified conditions**

Condition No. and Change proposed by applicant: amended, deleted, or new	Condition imposed ( <i>shown in italics</i> ), Reason provided by applicant, and Officer comment
Condition 3.	<u>Reason provided by applicant:</u> It is noted that condition 3 of the development consent provides that appropriate street tree planting be provided within Darby Street for the



<p>Proposed to be amended by applicant.</p>	<p>full frontage of the development. Strict compliance with condition 3 would require 9 street trees within Darby Street adjacent the site frontage.</p> <p>The modification application proposes to a reduction in the number of street trees required to account for the existing bus stop on located in Darby Street directly adjacent the site.</p> <p>The plans submitted with the modification application illustrates five street trees along the Darby Street frontage. The applicant proposed the planting of street trees in accordance with CN's standard design detail and to match the Laman Street planting following consideration of several planting options by the Applicant, including planting of street trees in the footpath or provision of planter boxes.</p> <p><u>Officer comment:</u> When the development application was approved and these trees were nominated to be planted within the road reserve, insufficient investigation had been carried out to determine whether planting within the road reserve was feasible, further consideration was not given to the location of the existing bus stop along this frontage.</p> <p>Through the assessment of the modification application, it has been identified that it is not practicable to plant any street trees along this frontage, as detailed in <b>Section 3.5.1</b> of this report below.</p> <p>Whilst is understood that the trees were included as part of the development application to provide compensation for the loss of trees within the site. It is recommended that compensatory planting be required to offset these trees in other locations near the site as required under condition 67A, but not along the Darby Street site frontage. Therefore, condition 3 is proposed to be deleted in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>).</p>
<p>Condition 18 and 66</p> <p>Proposed to be amended by applicant.</p>	<p><u>Reason provided by applicant:</u> Conditions 18 and 66 make reference to the theatrette component (amongst others) approved under the original development consent. The modification application proposes to remove the theatrette component and therefor reference to the theatrette are proposed to be removed within the conditions of consent.</p> <p><u>Officer comment:</u> Agreed. Conditions 18 and 66 has been amended in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>) to remove reference to the theatre.</p>
<p>Condition 20</p> <p>Proposed to be amended by applicant.</p>	<p><u>Reason provided by applicant:</u> The modification application includes a reduction in the vehicle crossover associated with the loading dock. The applicant proposes to reduce the width of the vehicular crossing specified in Condition 20 from 15 meters to 12.5 meters.</p> <p><u>Officer comment:</u></p>

	<p>Turning Paths prepared by Aurp were submitted in support of the modification application (refer to <b>Attachment O</b>). The Turning Paths submitted show a 13.5 wide swept path at the kerb line.</p> <p>Condition 20 has been amended in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>) to reduce the width of the vehicular crossing to 13.5 meters. Additionally, CN's standard drawing has changed since 2012 when the original development consent was granted and the reference to CN's standard drawing has been amended accordingly.</p>
<p>Condition 67A</p> <p>Proposed to be amended by applicant.</p>	<p><u>Reason provided by applicant:</u> Condition 67A requires replacement planting of 17 trees to replace the trees approved to be removed from the site as part of the original development consent.</p> <p>The modification application proposes to a reduction in the number of street trees require within Darby Street (as discussed in relation to condition 3 in this table above) to account for the existing bus stop on located in Darby Street directly adjacent the site. The plans submitted with the modification applications illustrates 4 less trees than the 9 street trees required under condition 3.</p> <p>As such, the Applicant proposes to increase the number of replacement planting required under Condition 67A by 14, making a total of 21 trees.</p> <p><u>Officers Comment:</u> Approved Demolition Plan DA02 dated 30 December 2011 shows a total of 16 trees to be removed.</p> <p>It is understood that condition 67A, which requires replacement planting of 17 trees, was imposed to address the fact that there are a total of six Plane Trees along the Darby Street frontage to be removed, where the Demolition Plan DA02 incorrectly only illustrated 5 trees in location.</p> <p>The plans submitted with the modification application correctly identify all 17 existing trees to be removed which is consistent with the original development consent. The modification application does not propose the removal of any additional trees and as such condition 67A remains a relevant condition of consent. No changes are proposed to condition 67A in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>)</p>
<p>Condition 67C</p> <p>Proposed to be deleted by applicant.</p>	<p><u>Reason provided by applicant:</u> Condition 67C requires a separate development application be submitted for the first/use of each retail tenancy. The modification application proposes to remove two retail tenancy approved under the original development consent and therefor this condition is no longer relevant.</p> <p><u>Officer comment:</u> Agreed. Condition 67C is proposed to be deleted in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>).</p>

<p>Condition 68 and 71</p> <p>Proposed to be deleted by applicant.</p>	<p><u>Reason provided by applicant:</u> Conditions 68 and 71 relates to the theatrette component approved under the original development consent. The modification application proposes to remove the theatrette component and therefor this condition is no longer relevant.</p> <p><u>Officer comment:</u> Agreed. Conditions 68 and 71 are proposed to be deleted in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>).</p>
<p>Condition 69</p> <p>Proposed to be amended by applicant.</p>	<p><u>Reason provided by applicant:</u> Condition 69 imposed on the original development consent restricts the capacity of the approved café and associated terrace to 18 patrons. The modification application seeks to increase the capacity by 12 patrons for a total of 100 patrons.</p> <p><u>Officer comment:</u> The increase in patrons proposed is not anticipated to give rise to any additional impacts than those already addressed as part of the assessment of the original development application. Conditions 69 has been amended to in the recommended Draft Schedule of Conditions (refer to Attachment A) to increase the capacity of the café and associated terrace area to a maximum 100 patrons.</p>
<p>Condition 70</p> <p>Proposed to be amended by applicant.</p>	<p><u>Reason provided by applicant:</u> Condition 69 restricted the hours of operation for the approved development to between 8am to 10pm Monday to Sunday. The modification application seeks to amend the start time from 8am to 6am in order to capture additional morning visitors and remain flexible considering the art gallery could be utilised for morning events.</p> <p><u>Officer comment:</u> The Darby Street precinct is filled with cafes and restaurants and the modified operating hours are considered consistent with the character and context. The increased operational hours is not anticipated to give rise to any additional impacts than those already addressed as part of the original assessment, particularly in respect to noise and amenity issues due to the relative separation of the site from sensitive receivers.</p> <p>Conditions 70 has been amended to in the recommended Draft Schedule of Conditions (refer to Attachment A) to increase the operation hours (start time being 6am).</p>
<p>Conditions 74, 75, 76, 77, 78, and 79</p> <p>Proposed to be deleted by applicant.</p>	<p><u>Reason provided by applicant:</u> Conditions 74, 75, 76, 77, 78, and 79 relate to the water-cooled air handling system approved as part of the original development.</p> <p>An upgrade to the NAG's central plant has been commissioned since the original development consent was granted. This new plant will also serve the NAG expansion once completed. As such, the previously approved cooling tower is no longer required. The modification application proposes to remove the cooling tower component approved as part of the original development consent and therefore these conditions are no longer relevant.</p>

	<p>It is noted that the central plant was assessed and undertaken as a Part 5 application under the <i>State Environmental Planning Policy (Infrastructure) 2007</i> (Infrastructure SEPP) and any required future works to the central plant will be undertaken under the Infrastructure SEPP and do not form part of this modification.</p> <p><u>Officer comment:</u> Noted. Conditions 74, 75, 76, 77, 78, and 79 are proposed to be deleted in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>).</p>
--	--

It is noted that in addition to the above, the assessment of the modification application has identified several additional amendments to the original conditions of consent. Modified, deleted and new conditions, as detailed within this assessment report, have been outlined within **Attachment A: Draft Schedule of Conditions** – changes shown in red. For clarity a 'clean' version of the modified consent is provided at Attachment B.

### 3.2 Section 4.55(2)(b) – Consultation

Consultation with relevant public authorities or approval bodies has occurred in accordance with s.4.55(2)(b), refer to **Section 4** of this report for further detail.

### 3.3 Section 4.55(2)(c)(i) & (ii) – Notification

Notification has occurred in accordance with CN's Community Participation Plan, refer to **Section 4** of this report for further detail.

### 3.4 Section 4.55(2)(d) – Submissions

No submission were received during the public notification period, refer to **Section 4** of this report for further detail.

### 3.5 Section 4.55(3) – relevant matters in Section 4.15(1) and reasons given for the grant of the consent that is sought to be modified

Section 4.15(1) EP&A Act outlines the matters a consent authority is to take into consideration that are of relevance to the development. An assessment of the modification against the matters for consideration under Section 4.15 of the EP&A Act is provided below.

When determining an application for modification of a consent, 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, which includes the following:

- (a) *the provisions of any environmental planning instrument, proposed instrument, development control plan, planning agreement and the regulations*
- (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.*

These matters are further considered in the subsections below.

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

The following Environmental Planning Instruments are relevant to this application:

- *State Environmental Planning Policy (Coastal Management) 2018* ('CM SEPP'),
- *State Environmental Planning Policy (Infrastructure) 2007* ('ISEPP'),
- *State Environmental Planning Policy No. 55 – Remediation of Land* ('SEPP 55'),
- *State Environmental Planning Policy (State and Regional Development) 2011* (SRD SEPP),
- *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* ('Vegetation 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 3** and considered in more detail below.

The original development consent was issued on 19 April 2012 and was subject to the provisions of *Newcastle City Centre Local Environmental Plan 2008* ('NCCLEP 2008'). Since the date of the original determination NCCLEP 2008 has been repealed. The modification application has been assessed against the relevant EPIs in force at the time of assessment, including as outlined above, with consideration given to the repealed EPIs where relevant.

**Table 4: Summary of Applicable Environmental Planning Instruments**  
(Preconditions in **bold**)

EPI	Matters for Consideration	Comply (Y/N)
CM SEPP	<ul style="list-style-type: none"> <li>• <b>Clause 13</b> – Development on land within the coastal environment area  The development proposal, as modified, is considered to be suitably designed, sited, and able to be managed, to avoid causing an adverse impact referred to in Clause 13(1).</li> <li>• <b>Clause 15</b> – Development in coastal zone generally – development not to increase risk of coastal hazards  The development proposal, as modified, is not likely to cause increased risk of coastal hazard on the subject or other land.</li> <li>• <b>Clause 16</b> – Development in coastal zone generally – coastal management programs to be considered  There are no applicable coastal management programs which apply to the site.</li> </ul>	Yes
ISEPP	<ul style="list-style-type: none"> <li>• <b>Clause 45(2)</b> – (Determination of development applications—other development) – development</li> </ul>	Yes

	<p>impacted by an electricity tower, electrical easement, substation, power line</p> <p>Written advice from Ausgrid was received dated 2 November 2021 (refer to <b>Attachment E</b>). Additional conditions have been included in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>) to satisfy the recommendations and requirements raised within the Ausgrid referral response.</p> <ul style="list-style-type: none"> <li>• <b>Clause 101</b> – Development with frontage to classified road</li> </ul> <p>Darby Street (MR188) is a classified (Regional) road. The modification application proposes the loading dock be shifted further from the signalised intersection at the corner of Darby and Queen Streets when compared to the approved development which is considered an improved outcome having regard to the ongoing operations of the classified road network.</p> <p>Written advice from Transport for NSW was received dated 13 July 2021 (refer to <b>Attachment F</b>).</p>	
SEPP 55	<ul style="list-style-type: none"> <li>• <b>Clause 7</b> – Contamination and remediation to be considered in determining development application</li> </ul> <p>Land contamination has been considered in the Report on Groundwater Sampling (refer to <b>Attachment G</b>) and the Report on Vapour Intrusion Risks for Proposed Rainwater Tank (refer to <b>Attachment H</b>) prepared in support of the modification application.</p> <p>Conditions 36-40 and 55, imposed on the original development consent remain appropriate in respect to the management of contamination risks.</p> <p>Additional conditions have been included in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b>) in line with the recommendation of the Report on Groundwater Sampling and the Report on Vapour Intrusion Risks for Proposed Rainwater Tank.</p>	Yes
SRD SEPP	<ul style="list-style-type: none"> <li>• Clause 20(1) declares the proposal as regionally significant development pursuant to Clause 3 of Schedule 7.</li> </ul>	Yes
Vegetation SEPP	<ul style="list-style-type: none"> <li>• Clause 7 provides that a person must not clear vegetation in any non-rural area of the State to which Part 3 of the Vegetation SEPP applies without the authority confirmed by a permit granted by the council under that Part</li> </ul>	Yes

	The approved development includes the removal of a number of mature and semi mature trees located on the site.	
NLEP 2012	<ul style="list-style-type: none"> <li>• Clause 2.2 – Zoning of land to which Plan applies</li> <li>• Clause 2.3 – Zone objectives and Land Use Table</li> <li>• Clause 2.7 – Demolition</li> <li>• Clause 4.3 – Height of buildings</li> <li>• Clause 4.4 – Floor space ratio</li> <li>• <b>Clause 5.10</b> – Heritage conservation</li> <li>• <b>Clause 5.21</b> – Flood planning</li> <li>• <b>Clause 6.1</b> – Acid Sulfate Soils</li> <li>• <b>Clause 6.2</b> – Earthworks</li> <li>• <b>Clause 7.5</b> – Design excellence</li> </ul>	Yes

*State Environmental Planning Policy (Coastal Management) 2018*

*State Environmental Planning Policy (Coastal Management) 2018* (CM SEPP) aims to protect and manage the New South Wales coast and foreshores and requires the consideration of specific criteria based on the type of coastal area affected.

The CM SEPP applies to land the whole or any part of which is within the 'coastal zone'. The site is partially mapped as being within the 'coastal environment area' and accordingly the development site is affected by the following provisions.

*Clause 13 – Development on land within the coastal environment area:*

Clause 13 of the CM SEPP specifies that the consent authority must not grant development consent on land that is within the coastal environment area unless is satisfied in respect to whether the proposed development is likely to cause an adverse impact on; (a) the integrity and resilience of the biophysical, ecological and hydrological environment, including surface and groundwater; (b) coastal environmental values and natural coastal process; (c) water quality of the marine estate in particular any sensitive coastal lakes; (d) marine vegetation, native vegetation and fauna and their habitats, undeveloped headlands and rock platforms; (e) existing public open space and safe access to and along the foreshore, beach, headland or rock platform for members of the public including persons with a disability; (f) Aboriginal cultural heritage, practices and places; and (g) the use of the surf zone.

The site is located within a well-established urban setting, with development existing on the site for many years, there are no likely impacts to this environment, particularly in relation to the biophysical environment and coastal processes and maintaining public access to existing open space and the foreshore.

The proposal would have no material impact on environmental, coastal, native vegetation, surf zone or access issues listed above. Similarly, the long historic usage of the site, and its highly disturbed nature, means that it is highly unlikely that any evidence of Aboriginal cultural heritage, practices and places would remain on the site.

The development proposal, as modified, is considered to be suitably designed, sited, and able to be managed, to avoid causing an adverse impact referred to in Clause 13(1).

*Clause 15 – Development in coastal zone generally – development not to increase risk of coastal hazards:*

Clause 15 of the CM SEPP specifies that the consent authority must not grant development consent on land within the coastal zone unless it is satisfied that the proposed development is not likely to cause increased risk of coastal hazards on that land or other land. The proposed development is located within the city centre and as a result of its siting is not considered likely to cause increased risk of coastal hazards on the subject or other land.

*Clause 16 – Development in coastal zone generally – coastal management programs to be considered:*

Clause 16 of the CM SEPP specifies that the consent authority must not grant development consent on land within the coastal zone unless it has taken into consideration the relevant provisions of any certified coastal management program that applies to the land. There are no applicable coastal management programs which apply to the subject site.

*State Environmental Planning Policy (Infrastructure) 2007*

*State Environmental Planning Policy (Infrastructure) 2007* (ISEPP) was introduced to facilitate the delivery of infrastructure across the State by improving regulatory certainty and efficiency. The ISEPP simplifies the process for providing infrastructure in areas such as education, hospitals, roads, railways, emergency services, water supply and electricity delivery.

*Clause 45(2) – Determination of development applications – other development:*

Clause 45(2) of the ISEPP requires consent authorities to refer an application for modification of a consent for certain development impacted by an electricity tower, electricity easement, substation or power line, as identified in Clause 45(1), to the relevant electricity supply authority (Ausgrid) and any concerns raised by the electricity supply authority are to be considered as part of the assessment.

The application comprises development to be carried out within 5m of an exposed overhead power line located in the Queen Street and Darby Street footpaths and in within proximity to underground power mains. As such, the proposal was required to be referred to Ausgrid in accordance with Clause 45(2) of the ISEPP. Written advice from Ausgrid was received dated 2 November 2021 (refer to **Attachment E**) which provided recommendations to satisfy Ausgrid requirements, including:

- The developer engaged an electrical consultant or contractor to complete an online application to Ausgrid for connection of the approved development to the adjacent electricity network infrastructure prior to issue of any Construction Certificate.
- Workcover Code of Practice 2006 – Work Near Overhead Powerlines minimum safety separation distance requirements between mains/poles to structures within the development must be maintained throughout construction. Ausgrid should be contacted prior to construction to discuss compliance issues.
- Based on the design & the conductor clearance report provided completed by power solutions (23/09/2021), it was identified that the “as constructed” minimum clearances will not be encroached by the development. Ausgrid should be contacted to discuss the construction clearances early in the construction to avoid delays.
- If the existing overhead mains require relocating, should the minimum safety clearances be compromised during construction, this relocation work is generally at the developers cost.



- Prior to commencement of works a DBYD search and ground search should be undertaken to locate electricity assets. Reference should be given to 'Ausgrid Network Standard 156 – Working near or around underground cables'. Any alterations to Ausgrid's underground electricity mains will be Contestable Works and funded by the developer.
- A title search of the development site should be completed to check for existing electricity easements. If easements are present, Ausgrid must assess the proposed activity within the easement. Reference should be given to Ausgrid's "Living with Electricity Easements" brochure.

The development proposal, as modified, is considered consistent with the ISEPP and satisfactory in relation to identified ISEPP matters subject to the inclusion of conditions. Additional conditions has been included in the recommended Draft Schedule of Conditions (refer to **Attachment A**) to satisfy the recommendations and requirements raised within the Ausgrid referral response.

*Clause 101(2) – Development with frontage to classified road:*

Clause 101(2) of the ISEPP specifies that the consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that; (a) where practicable and safe, vehicular access is provided by a road other than the classified road; (b) the safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development; and (c) the development is of a type that is not sensitive to traffic noise or vehicle emissions, or is appropriately located and designed, or includes measures, to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road.

Darby Street (MR188) is a classified (Regional) road. Council is the roads authority for this road and all other public roads in the area, in accordance with Section 7 of the *Roads Act 1993*. The development site has frontage to Darby Street (MR188) being a classified (Regional) road

The approved development was not identified as 'traffic generating development' pursuant to Clause 104 of the ISEPP, however the original development application was referred to the then Roads and Maritime Services (now forming part of Transport for NSW (TfNSW)) for general comment.

Similarly, the development as modified is not as 'traffic generating development' pursuant to Clause 104 of the ISEPP, however general comments were sought from TfNSW on the development proposal. Written advice from TfNSW was received dated 13 July 2021 (refer to **Attachment F**), TfNSW requested that the matters outlined below, be considered during the assessment of the subject application:

- Vehicles are shown to use the incorrect side of the road when entering the loading dock.
- Entry to the loading dock is proposed in a high pedestrian area.
- Access to the loading dock could be restricted by vehicles queuing at the Darby/Queen Street intersection.
- Vehicles utilising the loading dock could adversely affect the operation of the Darby/Queen Street intersection.

CN has considered the above matters during the assessment and have identified that the design and layout of the loading dock has only slightly changed from the layout approved under original development application. The subject modification application shows the

loading dock being shifted further from the signalised intersection when compared to the approved development which is an improved outcome.

Under the original development consent, the loading dock was approved with a condition being imposed on the original development consent requiring a traffic management plan be implemented to manage trucks reversing between Queen Street at the loading dock. The traffic consultant also advised that deliveries to the gallery would be irregular and infrequent. This condition remains unchanged under the subject modification application.

Considering the loading dock has already been approved and the modification does not propose any significant changes to the operation of the loading dock, the modified proposal is satisfactory.

#### *State Environmental Planning Policy No. 55 – Remediation of Land*

The provisions of *State Environmental Planning Policy 55 – Remediation of Land* ('SEPP 55') have been considered in the assessment of the subject modification application.

*Clause 7 – Contamination and remediation to be considered in determining development application:*

Clause 7 of SEPP 55 requires consent authorities to consider whether the land is contaminated, and if the land is contaminated, the consent authority must be satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out.

A contamination assessment of the development site was provided with the original development application. The results of detailed contamination investigations indicated that areas of soil and groundwater are contaminated to a level which exceeds the appropriate landuse criteria and remediation is required to make the site suitable for the intended use. The potential source of the contamination has been identified as fill materials and past landuses of the site.

The primary contaminants of concern identified included asbestos fragments, heavy metals and B(a)P. Some low chained volatile hydrocarbons were identified in one sample however further detailed sampling and a soil vapour intrusion investigation concluded that volatiles in groundwater did not pose an unacceptable vapour inhalation risk to the future occupants of the site. Soil concentrations of volatiles were too low to constitute an explosive risk to buildings. These risk levels assumed that there was to be no basements or groundwater extraction included as part of the approved development.

Whilst the site is contaminated at levels which exceed the commercial/industrial landuse criteria, contamination levels are not extremely high and can be effectively remediated to make the site suitable for the approved development. To satisfy SEPP 55 requirements for the original Development Application, the applicant submitted to Council for assessment and approval a Remediation Action Plan (RAP) prepared by Douglas Partners dated February 2012.

In assessing the original development application, the site was considered suitable for the approved development in relation to site contamination subject to; (1) appropriate management of impacted soils; (2) that there were to be no "basements or similar structures"; and (3) no extraction of groundwater for beneficial use. CN was satisfied that the site had been adequately investigated in accordance with appropriate legislative requirements/guidelines and that the proposed remediation strategy was justified subject to conditions. For example,

condition 36 of the development consent, requires that the proposed remediation works be undertaken in accordance with the RAP.

The modification application includes a 'Lower Ground Floor' (with an internal floor level at RL 7.4 AHD) accessed via Queen Street, which will require excavation of approximately 0.6m below the approved development levels. Additional groundwater sampling and testing to assess the current groundwater condition and confirm the suitability of the site for the modified development with respect to vapour intrusion risks was carried out by Douglas Partners and their report was submitted with the modification application (Report on Groundwater Sampling, refer to **Attachment G**).

The Report on Groundwater Sampling concludes that the development site is suitable for the modified development (i.e. additional excavations of approximately 0.6 meters required for the proposed Lower Ground Floor) and active remediation of groundwater is not necessary provided there is no extraction or beneficial reuse of groundwater. The Report on Groundwater Sampling specifically concluded:

*'The results of monitoring generally indicate that volatile impacts to groundwater are relatively low and appear to be reducing at the locations monitored. It is noted, however, that the source of volatile impacts within the site is unknown. If deeper basement construction is considered at levels of lower than RL7.4AHD, additional direct soil vapour sampling/testing and assessment is recommended to determine site suitability and the potential for adverse human health or environmental.'*

During the assessment of the subject modification application, Douglas Partners confirmed that construction of non-habitable building elements could occur below RL 7.4 AHD provided the internal floor of enclosed habitable areas (rooms) were not below this level.

Amendments made during the assessment of the modification application to address matters raised by CN included the addition of a rainwater tank within the north-east corner of the site. Whilst the additional rainwater tank which would require excavations at a depth below RL 7.4 AHD the addition of the rainwater tank does not involve internal floor levels of habitable area below RL 7.4 AHD and as such appears to comply with the Report on Groundwater Sampling.

Nevertheless, the Applicant has provided further information to address contamination in respect to the proposed water tank (Report on Vapour Intrusion Risks for Proposed Rainwater Tank prepared by Douglas Partners, refer to **Attachment H**). This advice states that rainwater tank should not pose any unreasonable risk to human health and the environment based on existing site investigation information and further assessment of groundwater recently undertaken. The Report on Vapour Intrusion Risks for Proposed Tank concluded:

*'On this basis, the presence of significant volatile impacts or vapour intrusion risks is considered to be low in relation to the proposed tank within the north-east corner of the site with an invert level of RL 6.26 m.'*

*'We note that the source of volatile impacts within the site is unknown. Excavations elsewhere on site should be maintained above RL 7.4 AHD. As a precautionary measure, we recommend that monitoring for volatile gases is conducted during the excavations for the rainwater tank. Additional investigation is recommended if volatile impacts are observed during construction.'*

The monitoring for potential volatile gases during excavation works is a relatively routine practice during construction.

The conditions imposed on the original development consent to address contaminated land are considered to remain appropriate in respect to the management of contamination risks associated with the proposed development, as modified.

Additional conditions have been included in the recommended Draft Schedule of Conditions (refer to **Attachment A**) in line with the recommendation of the Report on Groundwater Sampling and the Report on Vapour Intrusion Risks for Proposed Rainwater Tank.

The development proposal, as modified, satisfies the requirements and SEPP55, in particular Clause 7 'contamination and remediation to be considered in determining development application', which requires the consent authority is satisfied that the development site will be suitable for the proposed development following remediation works.

#### *State Environmental Planning Policy (State and Regional Development) 2011*

*State Environmental Planning Policy (State and Regional Development) 2011* ('SRD SEPP') applies to the proposal as it identifies if development is regionally significant development.

#### *Clause 20 – Declaration of regionally significant development: section 4.5(b):*

The original Development Consent DA2010/1278 was determined by the then Joint Regional Planning Panel as the development was declared to be regional significant development, pursuant to Clause 20(1) of SRD SEPP, as it satisfied the criteria in Clause 3 of Schedule 7 of the SRD SEPP for council related development with a capital investment value of more than \$5 million. The original Development Application had a CIV of \$14.3 million.

The subject application to modify development consent is made under Section 4.55(2) and is being referred to the Hunter and Central Coast Regional Planning Panel for determination under Section 123BA(2) of the *Environmental Planning and Assessment Regulation 2000* (EP&A Regs) and the *Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents*.

The subject modification application is for development for which council is the landowner, and as such meets the criteria relating to conflict of interest set out in Schedule 1 to the above-mentioned instruction. The subject modification application has nominated an increased CIV of \$38.465 million.

#### *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*

*State Environment Planning Policy (Vegetation in Non-Rural Areas) 2017* ('Vegetation SEPP') works together with the *Biodiversity Conservation Act 2016* and the *Local Land Services Amendment Act 2016* to create a framework for the regulation of clearing of native vegetation in NSW. The Vegetation SEPP seeks to protect the biodiversity values of trees and other vegetation in non-rural areas of the state, and to preserve the amenity of non-rural areas of the state through the appropriate preservation of trees and other vegetation.

#### *Clause 7 – Clearing that require permit or approval:*

Clause 7 of the Vegetation SEPP provides that a person must not clear vegetation in any non-rural area of the State to which Part 3 of the Vegetation SEPP applies without the authority confirmed by a permit granted by the council under that Part.

The Vegetation SEPP commenced on 25 August 2017, at the time the original development consent was granted the Vegetation SEPP was not in effect and as such was not considered in the assessment of Development Consent DA2010/12878. At the time the consent was

granted, Clause 45 of the NCCLEP 2008 applied, Part 3 of the Vegetation SEPP contains provisions similar to those contained in Clause 45.

Assessment of the development site regarding vegetation removal was provided with the original development application. At the time development consent was granted, the site contained several trees to be removed as part of the proposal. Approved Demolition Plan DA02 dated 30 December 2011 shows a total of 16 trees to be removed.

Condition 67A required replacement planting of 17 trees to address the fact that there are a total of six Plane Trees along the Darby Street frontage to be removed, where the Demolition Plan DA02 incorrectly only illustrated 5 trees in location. The plans submitted with the modification application correctly identify all 17 existing trees to be removed which is consistent with the original development consent. The modification application does not propose the removal of any additional trees and as such condition 67A remains a relevant condition of consent.

It is noted that condition 3 of the development consent provides that appropriate street tree planting be provided within Darby Street for the full frontage of the development. Condition 3 provided that a street tree was to be provided at a rate of one tree per 8 metres of frontage. However, when the development application was approved and these trees were nominated to be planted within the road reserve, insufficient investigation had been carried out to determine whether planting within the road reserve was feasible, further consideration was not given to the location of the existing bus stop along this frontage.

The plans submitted with the modification application illustrates five street trees along the Darby Street frontage. The applicant proposed the planting of street trees in accordance with CN's standard design detail and to match the Laman Street planting following consideration of several planting options by the Applicant, including planting of street trees in the footpath or provision of planter boxes.

Through the assessment of the modification application, it has been identified that it is not practicable to plant any street trees along this frontage, as planting trees within the roadway is not possible due to existing site constraints including, services, location of bus stop and flooding. In this regard, Keolis Downer (bus service provider) have been contacted and have advised that they would not be in support of reducing the bus stop length from 21.5 to 18.5m to facilitate the proposed street tree plantings.

Further, there are several underground services located within the road and footpath on Darby Street, including underground gas, water and sewer mains which are located directly under the proposed tree locations. Whilst the depths of these services are unknown, it is likely that they are located within depths of 0.5 - 2 meters. Therefore, above ground planters was identified as the only feasible option for planting over services in order to achieve the required soil volumes without impact to services. Unfortunately, the use of above ground planters is not possible in this location, as edging around trees is limited to a maximum height of 150mm in a 40km/hr zone, further Darby Street is a flow path for flood waters and use of planter boxes would interfere with both minor and major flood events.

Consideration was given to an alternative option of planting small trees within the footpath above existing shallow services, however it was determined that this was also not a desirable solution as it is still subject to some of the factors of concern identified above, including flooding impacts, underground services, raised planters being unsuitable for a 40km/hr speed limit, and clashes with doors opening in parking lane or bus stop entry point.

Whilst it is understood that the trees were included as part of the development application to provide compensation for the loss of trees within the site. It is recommended that

compensatory planting be required to offset these trees in other locations near the site as required under condition 67A, but not along the Darby Street site frontage. Therefore, condition 3 is proposed to be deleted in the recommended Draft Schedule of Conditions (refer to **Attachment A**).

The short-term impacts on the amenity of the public domain resulting from the removal of the existing six Plane Trees located along the Darby Street frontage is considered acceptable. Completion of the proposal, as modified, will result in the provision new landscaping within planting beds on the site and a street awning along the majority of the Darby Street frontage which will provide visual amenity and shade respectively to the footpath. It is considered on balance that the modified development will positively contribute to the streetscape and public domain.

#### Newcastle Local Environmental Plan 2012

At the time the Consent was granted, the local environmental plan applying to the site was the *Newcastle City Centre Local Environmental Plan 2008* ('NCCLEP 2008'). The NCCLEP 2008 has since been repealed and the relevant local environmental plan applying to the site is now the *Newcastle Local Environmental Plan 2012* ('NLEP 2012').

As such, the subject modification application has been assessed having regard to the relevant provisions of the NLEP 2012. Reference will be made to the provisions of NCCLEP 2008 where of relevance in the assessment of the modified development below.

It is noted that the below assessment is limited to matters that are relevant to the proposed modifications to the approved development. Other aspects of the approved development which do not form part of the proposed modification were considered as part of the original assessment. These other aspects are not matters for further consideration as part of the Section 4.55(2) modification assessment below.

#### *Clause 2.2 – Zoning of land & Clause 2.3 Zone objectives and Land Use Table:*

The site is included within the B4 Mixed Use Zone under the provisions of Section 2.2 of the NLEP 2012. Refer to **Figure 3**.

The modified development is a mixed-use development satisfying the definitions of '*community facility*' and '*retail premises*' ('*food and drink premises*' (which includes the defined term '*restaurant or cafes*') and '*shops*' fall under the land use subset '*retail premises*') under the NLEP 2012 which are both permissible with consent within the B4 Mixed Use Zone in the Land Use Table in Clause 2.3 of the NLEP 2012.

At the time the original development consent was granted, the site was included within the B4 Mixed Use Zone under the provisions of Section 12 of the NCCLEP 2008. Assessment of Development Application DA2010/1278 found the approved development satisfied the definitions of '*community facility*' and '*retail premises*' under the NCCLEP 2008.

It is noted that while the modification application proposes to remove the two retail premises approved, the approved café and gallery shop remain in the modified development with changes proposed to both. As such, assessment has determined that the modification application is satisfactory in this regard.

The zone objectives include the following (pursuant to the Land Use Table in Clause 2.3 of the NLEP 2012):

- *To provide a mixture of compatible land uses.*

- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

The modified development is consistent with these zone objectives for the following reasons:

- The proposal involves the continuation of a use that have been demonstrated to be compatible with the locality
- The approved development includes retail uses to a site which is well located to main bus routes and within walking distance to the light rail line, providing access to transport options for patrons and minimising reliance on private vehicle use;
- There are existing footpaths in good condition that run along the Darby Street and Laman Street site frontages providing good connectivity to the Darby Street precinct and the Civic and Cultural Precinct.
- The proposal has been designed and sited to be suitable in the context of the locality.
- The site is well located to main bus routes and the light rail line, providing access to transport options for patrons and minimising reliance on private vehicle use
- The proposed use of the building will not negatively impact on the viability of the Newcastle CBD.



(Source: City of Newcastle, OneMap)

**Figure 3:** Extract of Zoning Map – approximate extent of development site outlined in red

#### *Clause 2.7 – Demolition:*

Clause 2.7 of the NLEP 2012 provides that demolition of a building or work may be carried out only with development consent. The approved development included demolition of an existing art pavilion structure on Darby Street, the cooling tower and some internal partitions.

The subject modification application seeks development consent for additional demolition works including demolition of ground floor toilets, the mezzanine level (slab, stairs, toilets ect), first floor office and art store partitions, and the external Pavilion and Sculpture Garden completed in 2015.

Conditions were imposed on the to ensure that demolition works and disposal of material is managed appropriately in accordance with relevant standards. No changes are proposed to these conditions.

*Clause 4.3 – Height of buildings:*

Clause 4.3 of the NLEP 2012 limits building heights to that shown on the current 'Height of Building Map'. The 'Height of Building Map' specifies a permissible building height of 14 meters across the site. Refer to **Figure 4**.

Whilst the height of the main roof, as modified, is generally below 14 metres (vertical height as measured from existing ground level), the modification application seeks to enclose the approved central courtyard by including an atrium roof structure located approximately at the centre of the approved building footprint and extending above the height of the main roof. A minor portion of the atrium roof structure occurs above the 14m height limit, with a maximum height of 14.3 meters, equating to an exceedance 2.14% of the maximum building height prescribed for the development site under Clause 4.3 of the NLEP 2012. Refer to **Figure 5**.

It is noted that the site is located within the Newcastle City Centre and the proposal is a type of development to which '*Clause 7.5 – Design excellence*' applies (as detailed further below). Clause 7.5(6) of the NLEP 2012 operates to vary the height of building development standard by up to 10% if the design has been reviewed by a 'design review panel', as prescribed under the NLEP 2012.

The modification application has been reviewed by CN's Urban Design Review Panel (UDRP), who operate under a charter stating that they undertake the functions of a design review panel for the purposes of Clause 7.6(6) of the NLEP 2012. The modification application was presented to the UDRP at the meeting 30 June 2021. In the circumstances applicable to the modified development, where the design has been so reviewed, the maximum building height is 15.4 meters.

Notwithstanding the above, a merit-based assessment of the modified development with respect to the objectives of the Clause 4.3 height of building development standard of NLEP 2012 has been undertaken and is detailed below.

The objectives of the height of building development standard are:

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

The scale of the proposal, as modified, will continue to contribute towards the desired character in presenting a building of architectural quality appropriate to its significant setting that suitably responds to the site's urban context and heritage significance. The development, as modified, continues to be consistent with the intended future urban form within the area, having regard to the combination of controls under NLEP 2012 and NDCP 2012.

As demonstrated within the submitted documentation, the additional height is setback from the street frontage and will not result in unreasonable shadowing to adjoining development or to the public domain, allowing for continued amenity and solar access to these areas consistent with the approved development. It is considered the proposal as modified will make a positive contribution and will not result in excessive height or scale.

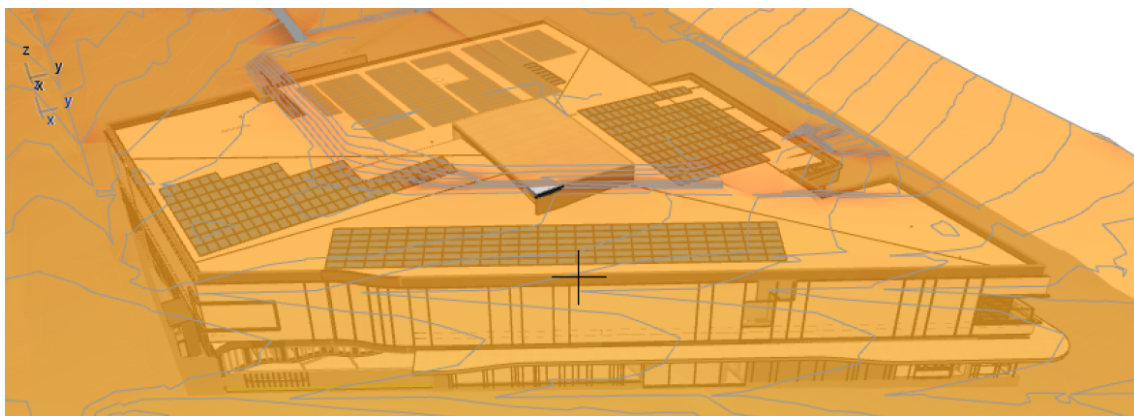


The proposal as modified is considered consistent with the objectives of Clause 4.3 and as a result of the 10% bonus applicable under cl.7.6(6) NLEP2012 is compliant with the maximum height development standard.



(Source: City of Newcastle, OneMap)

**Figure 4:** Height of Buildings Map extract - approximate extent of development site outlined in red



(Source: Smith & Tzannes )

**Figure 5:** 14-meter Height of Buildings Diagram - Darby Street elevation - white triangular area at the corner of the atrium roof line indicates a minor area of the atrium roof which occurs above the 14 meters height plain.

#### *Clause 4.4 – Floor Space Ratio and Clause 4.5 – Calculation of floor space ratio and site area:*

Clause 4.4 of the NLEP 2012 limits floor space ratio (FSR) of development to that shown on the current 'Floor Space Ratio Map'. The 'Floor Space Ratio Map' specifies a maximum FSR of 2:1 is permissible on the site. Refer to **Figure 6**.

At the time the original development consent was granted, a maximum FSR of 2:1 was prescribed for the site under the provisions of Clause 23 of the NCCLEP 2008. Assessment of Development Application DA2010/1278 found the approved development had an FSR of 1.3:1. It is noted that 75 sqm of the NWMCC was accounted for in the calculation of FSR undertaken for the original development application, however during the assessment of the

modification application it has been identified that 520 sqm of gross floor area for the NWMCC building occurs on the site. Additionally, it is noted that the original FSR calculation included elements of the building as GFA which under the current NLEP 2012 would be excluded from the calculation, for example, services. For clarity an FSR calculation for both the approved and proposed modified development in accordance with the current provisions of the NLEP2012 has been undertaken, as detail in **Table 2** above.

Regardless to the anomaly in the original FSR calculations, for the purposes of Clause 4.3 of the NLEP 2012, the modification application seeks to decrease the FSR of development to 1.28:1 (GFA of 5,353 sqm) which complies with the FSR development standard of NLEP 2012.



(Source: City of Newcastle, OneMap)

**Figure 6:** Floor Space Ratio Map extract - approximate extent of development site outlined in red

#### *Clause 5.10 – Heritage conservation:*

Clause 5.10 of the NLEP 2012 specifies, amongst other things, that development consent is required to erect a building on land on which a heritage item is located or that is within a heritage conservation area (Clause 5.10(2)(e)(i)). Further, Clause 5.10(4) specifies that the consent authority must, before granting consent, consider the effect of the proposed development on the heritage significance of the heritage item or heritage conservation area concerned.

The development site contains a listed heritage item of local significance, 'Newcastle War Memorial Cultural Centre' (Item 87) under Schedule 5 of the NLEP 2012. This is because the heritage curtilage of the NWMCC does not align with the extent of the heritage building due to the current subdivision pattern. The heritage curtilage overlaps with part of the NAG building; however the NAG is not included on Schedule 5 of the NLEP 2012 as a listed heritage item. Refer to **Figure 7**.

A search of the Aboriginal Heritage Information Management System found no record of any Aboriginal site or Aboriginal Place within a 200m curtilage of the site. A Historical Archaeological Assessment and Statement of Heritage Impact ('HAASHI') was prepared by Austral Archaeology in support of the modification application (refer to Attachment which, notes that the site has been continuously developed since European settlement and is

considered to be 'disturbed land' within the meaning of the *Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW*.

An additional condition is included in the recommended Draft Schedule of Conditions (refer to **Attachment A**) advising the applicant of their obligations under the *National Parks and Wildlife Act 1974* in the event of unexpected finds.

The site is not a listed archaeological site and is not identified as an indicative archaeological site in the *Newcastle Archaeological Management Plan 1997*.

The HAASHI prepared by Austral Archaeology in support of the subject modification application identified that parts of the study area have moderate archaeological potential to contain archaeological material of local significance. The findings of the assessment are summarised as follows:

- There is a moderate likelihood of structural materials being present within the majority of the study area that relate to a deposit earlier than the NAG building,
- There is a moderate likelihood that 1850s to 1950s structures are preserved in the narrow strip to be excavated along the north-eastern side of the site, and a moderate likelihood that structures are preserved in the western half of the site,
- There are varying degrees of archaeological potential across the site,
- If there are archaeological deposits or features in situ, they will be of local heritage significance,
- There will be some impact across the majority of the ground surface in the eastern half of the study area with some localised disturbance from the insertion of footings and concrete piles, and
- The proposed basement area will affect an area of archaeological potential.

In order to mitigate against the potential impacts documented in the assessment, the HAASHI includes recommends that an excavation permit is required under Section 140 of the *Heritage Act 1977*. It is also recommended that a heritage site induction is provided for all contractors and subcontractors prior to works commencing.

An additional condition has been included in the recommended Draft Schedule of Conditions (refer to **Attachment A**) requiring the development be undertaken in accordance with the recommendations of the submitted HAASHI.

The site is located within the Newcastle City Centre Heritage Conservation Area ('the HCA') which is listed as Conservation Area C4 in Schedule 5 of the NLEP 2012. The NAG is identified as a neutral building within the context of the HCA.

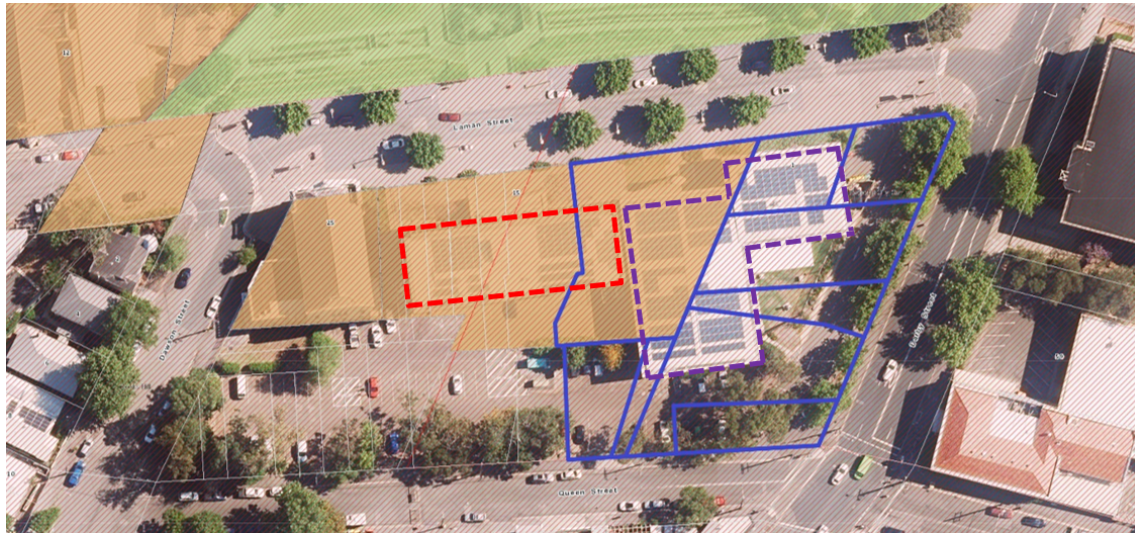
The modification application includes changes to the internal configuration of the approved gallery addition are not considered to have an adverse heritage impact on the character of the HCA. Similarly, internal changes within the NAG building will not impact significant fabric associated with the adjacent heritage item, the NWMCC.

The modification proposes to replace the two retail tenancies with gallery staff offices and back of house functions with glazing to the Darby Street and Queen Street frontages and landscaping within the setback from the street. The inclusion of native planting to the Darby Street and Queen Street frontages softens the appearance of the corner and is supported. These changes achieve a suitable interface between the gallery addition and the public domain having regard for the prominence of this corner. The proposed staff entrance of Queen Street is a more resolved response to the street and provides a link to the Darby Street commercial precinct to the south.



The modification includes changes to the approved roof design to including re-sheeting existing roof, an atrium roof structure, and the installation of additional photovoltaic panels to improve energy efficiency. The proposed atrium roof is set back significantly from Laman Street, the existing gallery façade and the western façade adjacent the NWMCC, such that it does not impact the streetscape. The proposed amendments will not significantly alter the appearance of the approved development in the streetscape and will not impact the character of the development as viewed from the public domain.

Overall the proposal, as modified, is considered to be acceptable with regard to the HCA.



**Key**

- Individual allotments making up the total development site
- War Memorial Cultural Centre building footprint
- Newcastle Art Gallery building footprint
- Heritage Item

(Source: City of Newcastle, OneMap)

**Figure 7:** Heritage Map extract – heritage context of the development site

#### *Clause 5.21 - Flood planning:*

Clause 5.21(2) of the NLEP 2012 provides that development consent must not be granted to development on land the consent authority considers to be within the flow planning area unless the consent authority is satisfied as to the development:

- (a) *is compatible with the flood function and behaviour on the land, and*
- (b) *will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and*
- (c) *will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and*
- (d) *incorporates appropriate measures to manage risk to life in the event of a flood, and*
- (e) *will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.*

In deciding whether to grant development consent on land to which the clause applies, the consent authority must consider:

- (a) *the impact of the development on projected changes to flood behaviour as a result of climate change,*
- (b) *the intended design and scale of buildings resulting from the development,*
- (c) *whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,*
- (d) *the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.*

The subject site is flood prone, with the peak 1% AEP flood level on the corner of Darby and Queen Street is 8.4 m AHD and the corresponding estimated Probable Maximum Flood level is 8.6 meters AHD. These levels are consistent with the flood information that was used to assess the original development application in 2010.

This modification proposes a new "Lower Ground Floor" level at 7.4m AHD which is below the surrounding outdoor ground level and below the 1% AEP flood level. A condition was included in the original development consent, stating that floor levels are to be above the 1% AEP level + 300mm freeboard as a minimum. The applicant proposes to have this condition replaced with a condition that allows for the provision of permanent flood barriers 300mm above the 1% AEP level that will resist flooding.

It is noted that, Section 4.01 Flood Management of *Newcastle Development Control Plan 2012* ('NDCP 2012') states that basement entry points are to be located at the PMF level. All entry points into the Lower Ground Floor area are located at or above the PMF level and are considered acceptable. Further, the entry level to the lift and adjacent stairs is 8.63 meters AHD which is above the PMF level and is acceptable. The sprinkler pump room has a FFL of 8.351AHD which ensures that all electrical fixtures are above the flood planning level.

During the June 2007 "pasha bulker" flood in Newcastle which was recorded as approximately a 1% AEP or 0.5% AEP event, flood waters did not reach the site. Using this recorded flood data as a reference point and considering the proposed floor levels and Lower Ground Floor entry points on the site are located well above the June 2007 flood, as well as being compliant with NDCP 2012, flood risk is appropriately managed for the development.

#### *Clause 6.1 – Acid sulfate soils:*

Clause 6.1 of the NLEP 2012 seeks to ensure that development does not disturb, expose, or drain acid sulfate soils (ASS) and cause environmental damage. Certain works outlined within Clause 6.1(2) are noted as requiring development consent when carried out on land shown on the '*Acid Sulfate Soils Map*'.

The '*Acid Sulfate Soils Map*' identifies the subject site as containing Class 4 ASS. Pursuant to Clause 6.1(2), the following works on Class 4 ASS land require development consent:

- *Works more than 2 metres below the natural ground surface*
- *Works by which the watertable is likely to be lowered more than 2 metres below the natural ground surface*

The proposal, as modified, does not involve works more than 2 metres below the natural ground surface. Furthermore, the works will not lower the watertable. As such, submission of

an ASS Management Plan is not required and the modified development is satisfactory having regard to Clause 6.1 NLEP 2012.

**Clause 6.2 – Earthworks:**

Clause 6.2 of the NLEP 2012 aims to ensure that earthworks will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items, or features of the surrounding land. Clause 6.2(2) specifies that consent is required for earthworks unless the works are exempt development, or ancillary to other development for which development consent has been granted.

Development Consent DA2010/1278 includes earthworks associated with the approved development. Conditions were imposed on the original development consent to ensure all earthworks are executed safely in accordance with appropriate professional standards and excavations are properly guarded and protected to prevent them from being dangerous to life and property.

The modification application includes a 'Lower Ground Floor' (at RL 7.4 AHD) accessed via Queen Street, which will require excavation of approximately 0.6m below the approved development levels.

It will be necessary for additional earthworks to be undertaken to facilitate the modified development. The earthworks proposed are minor and within the approved building footprint. Given the nature, extent and location of the earthworks, the level of earthworks proposed to facilitate the development is considered acceptable having regard to this clause.

Clause 6.3(3) provides several matters that the consent authority must consider prior to granting development consent as outlined below.

**Table 5: Matters for consideration under Clause 6.3(3) of the NLEP 2012**

Matter	Comment
Disruption/detrimental effect on drainage patterns and soil stability.	Detailed stormwater management plans have been provided with the modification application. An Acid Sulfate Soils Management Plan is not required. Subject to conditions of consent the proposed earthworks will not adversely impact drainage patterns and soil stability.
Effect on future use or redevelopment of the land.	The proposed earthworks do not adversely impact the future use or redevelopment of the land and will facilitate the development proposed under the subject application.
The quality of fill and/or soil to be excavated.	The site is identified as contaminated land. A RAP has been submitted with the original development application (refer to SEPP 55 assessment above). Subject to conditions of consent the soil to be excavated from the site can be appropriately managed. Conditions of consent in respect to use of fill material are also recommended.
The effect of the development on the existing	Detailed assessment of the effect of the development on existing and likely amenity of adjoining properties

and likely amenity of adjoining properties.	has been provided elsewhere in this report. The proposed development does not result in unreasonable impacts to the amenity of adjoining properties.
The source and any fill material and destination of any excavated material	The source of fill material and destination of excavated material will be addressed by conditions of consent.
The likelihood of disturbing relics.	Heritage and archaeology have been assessed in detail at Clause 5.10 above. Conditions of consent will be imposed in respect to any unexpected finds discovered during construction.
Impact to any watercourse, drinking water catchment or environmentally sensitive area	The development will not adversely impact any watercourse, drinking water catchment or environmentally sensitive area.
Any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.	Conditions of consent have been recommended to avoid, minimise or mitigate the impacts of the development.

Consideration has been given to the matters prescribed under Clause 6.3(3) and the proposed earthworks are acceptable.

*Clause 7.1 – Objectives of Part (7) and Clause 7.2 – land to which this Part (7) applies:*

The site is located within the Newcastle City Centre. There are a number of requirements and objectives for development within the City Centre, which includes promoting the economic revitalisation of the City Centre, facilitating design excellence and protecting the natural and cultural heritage. The proposed development is considered against the relevant clauses of Part 7 below.

*Clause 7.5 – Design excellence:*

Clause 7.5 of the NLEP 2012 applies to the erection of a new building or to significant alterations to an existing building and states that a consent authority must not grant consent to development within the Newcastle City Centre unless the development exhibits design excellence.

The subject site is located within the Newcastle City Centre therefore the provisions of Clause 7.5 apply. Clause 7.5(3) provides several matters that the consent authority must consider in deciding whether to grant consent on land to which the design excellence provisions apply, as outlined below:

- (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 modified development is considered to deliver 'design excellence', having regard to the design excellence considerations provided in Clause 7.5(3) of the NLEP 2012. This finding was further confirmed via the support of the UDRP who provided full support for the built form of the building as modified (as detailed below).

The proposal does not trigger the requirements of Clause 7.5(4) to undertake an architectural design competition as the height of the proposed building is not greater than 48m and the subject site is not identified as a key site on the Key Sites Map of the NLEP 2012.

As noted under Clause 4.3 above, the modification application is proposing to rely on the 'bonuses' of Clause 7.5(6) of the NLEP 2012 with regard to height of building. Under Clause 7.5(6) consent authorities can grant consent to the erection of a building located within the Newcastle City Centre that has a height of not more than 10% greater than that allowed by Clause 4.3, but only if the design of the building has been reviewed by a design panel.

The modification application was reviewed by the UDRP at the meeting held 30 June 2021. Written advice from the UDRP confirmed the Panels position that the proposal, as modified, continues to demonstrate Design Quality and included some relatively minor recommendations, which in the opinion of the Panel should further enhance the design.

The modified development has been amended during the assessment process in response to the recommendation of the UDRP. The amended architectural drawings and the changes made in response to the UDRP comments were discussed as General Business during the meeting of the UDRP held 27 October 2021. The following was identified;

- That the proposal had been amended in accordance with the recommendations from the June 2021 UDRP advice; and
- That the panel had no further recommendations.

Subsequently, the development application was electronically referred to the UDRP to record their final advice. The final advice of the UDRP, provided via email dated 29 October 2021, confirmed the UDRP's position that *'the amendments to the design fully address the suggested amendments noted by the UDRP'*.

### **3.5.2 Section 4.15 (1)(a)(ii) - Provisions of any Proposed Instruments**

There are several proposed instruments which have been the subject of public consultation under the EP&A Act, and which may be relevant to the proposal, including the following:



- *Proposed Remediation of Land State Environment Planning Policy*

These proposed instruments are considered below:

#### Proposed Remediation of Land State Environmental Planning Policy

A proposed Remediation of Land State Environmental Planning Policy ('Remediation of Land SEPP'), which was exhibited from 31 January to 13 April 2018, is currently under consideration. The proposed Remediation of Land SEPP is intended to repeal and replace SEPP 55 and *Contaminated Land Planning Guidelines*, and seeks to provide a state-wide planning framework to guide the remediation of land, including; outlining provisions that require consent authorities to consider the potential for land to be contaminated when determining development applications; clearly list remediation works that require development consent; and introducing certification and operational requirements for remediation works that may be carried out without development consent.

The Remediation of Land SEPP is aimed at improving the assessment and management of land contamination and its associated remediation practices. The modified proposal is consistent with the draft provisions and is considered to be acceptable subject to conditions of consent having been assessed in detail against the current provisions of SEPP No.55 - Remediation of Land.

#### **3.5.3 Section 4.15(1)(a)(iii) - Provisions of any Development Control Plan**

At the time the Consent was granted, the development control plan applying to the site was the *Newcastle Development Control Plan 2005* ('NDCP 2005'). The NDCP 2005 has since been repealed. The relevant development control plan applying to the site is now the *Newcastle Development Control Plan 2012* ('NDCP 2012').

In the consideration of the subject modification application, it is noted that the NDCP 2012 assessment discussed below is limited to only those matters that are relevant to the changes proposed to the approved development. Other aspects of the approved development, which do not form a part of the proposed modification were considered as part of the original assessment and as such are not included below.

Notwithstanding the above, in assessing the changes proposed to the approved development, reference will be made to the provisions of the NDCP 2008 where relevant to provide clarity to the discussions in this section.

#### Section 3.10 – Commercial Uses & Section 3.11 – Community Services

The modification application proposes to remove the two retail spaces which front Darby Street in the approved development. The architectural drawings include section at the interface with the Darby Street boundary which demonstrate the changes proposed in the modification application (refer to **Attachment C**). The modified development at the Darby Street interface retains suitable visual connection to, and activation of, the street from the administrative offices and staff areas, opposed to the approved retail tenancies. The removal of the retail spaces increases the operational areas for the gallery, which is considered a positive move and was endorsed by the URDP. The modified Darby Street elevation arrangement allows for additional space to provide landscaping to soften built form and improve the pedestrian and public domain experience.

Condition 69 imposed on the original development consent restricts the capacity of the approved café and associated terrace to 88 patrons. The modification application seeks to increase the capacity by 12 patrons for a total of 100 patrons. The increase in patrons

proposed is not anticipated to give rise to any additional impacts than those already addressed as part of the assessment of the original development application and is acceptable.

Condition 70 imposed on the original development consent restricts the hours of operation to between 8am to 10 pm Monday-Sunday. The modification application seeks to amend the start time from 8am to 6am to capture additional morning visitors and remain flexible considering the art gallery could be utilised for morning events.

The Darby Street precinct is filled with cafes and restaurants and the modified operating hours are considered consistent with the character and context. The increased operational hours is not anticipated to give rise to any additional impacts than those already addressed as part of the original assessment, particularly in respect to noise and amenity issues due to the relative separation of the site from sensitive receivers

Amendments to the relevant conditions have been included in the recommended Draft Schedule of Conditions (refer to **Attachment A**).

#### Section 4.01 – Flood Management

Refer to the '*Clause 5.21 – Flood planning*' assessment of the NLEP 2012 in **Section 3.5.1** of this report above.

#### Section 4.03 – Mine Subsidence

At the time the Consent was granted, separate approval was required from the NSW Mines Subsidence Board under Section 15 of the *Mine Subsidence Compensation Act 1961* as the site is located within a proclaimed mine subsidence district. Development Application DA2010/1278 was '*integrated development*' and the application was reviewed by the NSW Mine Subsidence Board which approved the application on 25 August 2010.

The Mine Subsidence Board administered the *Mine Subsidence Compensation Act 1961*. Changes to the mine subsidence system in NSW took effect from 1 January 2018 following a review of the former *Mine Subsidence Compensation Act 1961* and the commencement of the *Coal Mine Subsidence Compensation Act 2017*. The *Coal Mine Subsidence Compensation Act 2017* does not include a Board, rather an agency within the Department of Customer Service named Subsidence Advisory NSW. Subsidence Advisory NSW administers the *Coal Mine Subsidence Compensation Act 2017*.

The subject modification 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 12 October 2021 (Refer to **Attachment D**). This satisfies the requirement for approval of Subsidence Advisory NSW under Section 22 of the *Coal Mine Subsidence Compensation Act 2017*.

To inform the Subsidence Advisory NSW assessment a 'Report on Grouting and Verification Plan for 'Yard' / Dudley Seam Workings' has been prepared by Douglas Partners in support of the modification application (refer to **Attachment L**). The 'Report on Grouting and Verification Plan for 'Yard'/Dudley Seam Workings' identifies that grouting is required to the 'Dudley Seam' at approximate depths of 25m, and that the grouting works will be internal to the development site.

In addition, a 'Report on Pillar Stability and Subsidence Modelling' has been prepared by Douglas Partners (refer to **Attachment M**). The 'Report on Pillar Stability and Subsidence Modelling' identifies grouting is also required to the 'Borehole Seam' which is located at depths of approximately 80m below ground level. It is identified that grouting within the 'Borehole

Seam' may extend beyond the subject site. Grouting work would be contained within the mine void of the discontinued underground mine, and fully completed from within the subject site if required. Further, the Subsidence Advisory NSW GTAs identify that a final grout proposal is to be submitted which will confirm the extent and nature of any required works to the 'Borehole Seam'.

It is noted that the Applicant has provided advice which identifies that the specific issue of whether owners consent for submission of a development application, including grouting works, on neighbouring land has not been resolved by case law (refer to **Attachment N**). The question was briefly considered by *Crescent Newcastle Pty Ltd v Newcastle City Council* [2020] NSWLEC 88, where Moore CJ noted the potential issue but made no decision. Since the proceedings did not proceed to a final determination the question has never been answered nor has it been considered in any other case.

This advice aligns with CNs position (and current practice within NSW) that owner's consent from the owner of the mine void is not required in order to undertake grouting works below the surface of the land, where no work is required to be undertaken on or from the associated private properties in order to complete the grouting works.

On this basis, the application as submitted is considered acceptable subject to the recommend conditions of consent which incorporate the GTA Mines.

#### Section 4.04 Safety and Security

The modified development is satisfactory having regard to Crime Prevention Through Environmental Design (CPTED) principles: surveillance, access control, territorial reinforcement, and space management. Lighting, signage, emergency access, fencing and parking considered to be appropriate to the nature of the proposal has been incorporated into the development.

#### Section 5.01 – Soil Management

Assessment of the soil management impacts of the modified proposal has been undertaken in the 'Clause 6.3 – Earthworks' assessment in **Section 3.5.1** of this report above. The development as modified is acceptable subject to conditions.

#### Section 5.02 – Land Contamination

Assessment of the modified proposal with respect to land contamination has been undertaken under the 'State Environmental Planning Policy No. 55 – Remediation of Land' assessment in **Section 3.5.1** of this report above. The development as modified is acceptable subject to conditions.

#### Section 5.03 – Vegetation Management

The modified development does not result in additional vegetation removal. Refer to the 'State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017' assessment in **Section 3.5.1** of this report for further detail. The development as modified is acceptable.

#### Section 5.05 – Heritage items, Section 5.04 – Aboriginal Heritage & Section 5.05 – Archaeological Management

A detailed heritage assessment is provided within the 'Clause 5.10 – Heritage conservation' assessment in **Section 3.5.1** of this report above. Subject to the recommended modified conditions of consent the modified proposal is satisfactory.

### Section 6.01 – Newcastle City Centre

Given the nature and the scale of the proposed modifications the provisions of Section 6.01 is of limited relevance to the assessment. The original application was assessed under Element 6.2 – City East of the NDCP 2005 which informed the overall siting and built form of the addition.

The modification results in minor external changes which have been assessed in detail within earlier sections of this report and which are considered to result in an overall improved outcome for the development.

### Section 6.02 – Heritage Conservation Areas

A detailed heritage assessment is provided within the '*Clause 5.10 Heritage conservation*' assessment in **Section 3.5.1** of this report above. Subject to the recommended modified conditions of consent the modified proposal is satisfactory.

### Section 7.02 – Landscape, Open Space and Visual Amenity

The modification application introduces additional landscaping on-site towards the corner of Darby Street and Queen Street. Landscape Plans have been prepared in accordance with the requirements of this section in support of the modification application.

The submitted Landscape Plans demonstrates the modified development incorporates sufficient areas of soft landscaping with a detailed planting schedule also provided. The landscaping design is in scale and context with the proposed mixed-use development within a city centre location.

The conditions imposed on the original development consent to require the preparation of a Landscape Practical Completion Report and Landscape Establishment Report after practical completion remain appropriate.

### Section 7.03 – Traffic, Parking and Access

#### *Traffic*

Amendments to the development proposed by this modification are minor in respect to traffic generation are not expected to result in significant changes to traffic on the surrounding road network.

#### *Parking*

Section 7.03 Traffic, Parking and Access of NDCP 2012 states that non-residential development in the Newcastle City Centre is provided at a rate of one space per 60 sqm. When the original development consent was approved, the development resulted in a loss of parking spaces and increase in floor area on the site, however, approval was granted on the basis that nearby residents would be eligible for parking permits and it was argued that people entering the Newcastle CBD are largely accepting of an existing parking deficiency as there was limited availability of kerbside parking within 400m of the CBD at the time the original development consent was granted.

Whilst, a new lower ground floor is included in this modification that was not included in the approved development, with regard to changes in parking demand resulting from this modification, the modification application results in 21 sqm less GFA than the approved

development, so parking demand is not expected to increase and the proposal, as modified, can be supported on parking grounds.

### Access

A loading dock with access from Queen Street was approved in the original development consent with a condition being imposed stating that a traffic management plan must be implemented to manage trucks reversing between Queen Street at the loading dock. The traffic consultant also advised that deliveries to the gallery would be irregular and infrequent. As part of this modification application, the loading dock is proposed to be shifted west. Turn paths have been provided for the layout of the modified development demonstrating that vehicular access to the development does not significantly change from the approved development and access can still be achieved for Heavy Rigid and Medium Rigid vehicles. The vehicular access arrangement is supported.

As detailed elsewhere within this report, the modification application was referred to TfNSW as the original application was referred to Roads and Maritime Services (now forming part of TfNSW). TfNSW raised concerns regarding the proposed loading dock access from Queen Street. The loading dock is proposed to have vehicles up to Heavy Rigid (HRV) reverse into the site and then exit the site in a forward direction.

However, the modification application proposed only minor changes to the design and layout of the loading dock approved under the original development consent. The subject modification application shows the loading dock being shifted further from the signalised intersection when compared to the approved development which is an improved outcome.

Considering the loading dock has already been approved under DA2010/1278 and the modification does not propose any significant changes to the operation of the loading dock, the development as modified is considered acceptable.

### Section 7.06 – Stormwater

Section 7.06 Stormwater of the NDCP 2012 requires a rainwater tank storage of 44kL. A 50kL rainwater tank was approved under DA2010/1278 and a 45kL rainwater tank is proposed for the modification. Based on the area of works proposed by this application being approximately 1750 sqm, a slight reduction in storage volume is considered acceptable and can be supported, noting that the proposal meets the NDCP 2012 requirement for storage.

The stormwater tank is proposed to discharge to a pit within the site boundary and then an existing kerb inlet pit on the corner of Darby Street and Laman Street. This is an acceptable discharge arrangement.

An existing 225mm stormwater pipe exists downstream of the existing kerb inlet pit on the corner of Laman and Darby Streets and this will need to be upgraded to a 375mm pipe to improve capacity of the existing drainage system and take the additional flow from the proposed development. An additional condition has been included in the recommended Draft Schedule of Consent (refer to **Attachment A**) requiring this short section of pipe (approx. 2m) from 225mm to 375mm to be upgraded.

### Section 7.08 – Waste Management

The modification application shows a waste collection area of 10.5 sqm adjacent to the loading dock. The approved development provided a 27.7 sqm waste collection area. Despite the reduction in size, the applicant has demonstrated that the bin area, as modified, is adequate for waste servicing of the development.

Further, the development has been designed to accommodate a Heavy Rigid Vehicle (HRV) to service the development. Turn paths have been provided which illustrate that an HRV can reverse onto the site and exit in a forward direction. The modification does not propose changes to the vehicular access arrangement and as such the waste servicing arrangements are acceptable.

#### Section 7.10 – Street Awnings and Balconies

As detailed in Section 1.1 of this report above, the original development consent was modified on 3 September 2012, which amended and added a number of development consent conditions relating to the inclusion of a street awning to Laman, Darby and Queen street frontages.

The current modification application incorporates a street awning to the Laman, Darby and Queen Street frontages which is generally reflective of the previous modification application, with the exception of minor changes to shape and extent of awning at the Darby and Queen Street corner to allow suitable views from, and light into, the staff officers and landscaped which are proposed to replace retail tenancies approved at this location.

The street awnings, as modified, remains a relatively lightweight, unobtrusive elements, that is consistent with the scale and architecture of the approved development.

The additional conditions and amended conditions from the previous modification application are considered to remain appropriate to the current modification application and have been incorporated into the recommended Draft Schedule of Conditions (see Attachment A).

#### Development Contributions

The following contributions plans are relevant the subject modification application pursuant to Section 7.18 of the EP&A Act (notwithstanding Contributions plans are not DCPs they are required to be considered):

- *Section 7.12 Newcastle Local Infrastructure Contribution Plan 2019.*

As an application made by Newcastle City Council for the provision of public facilities, the development (as modified) is exempt from a contribution levy, in accordance with CN's adopted Section 7.12 Plan.

Further, it is noted that the approved development was exempted from a contribution levy, in accordance with CN's adopted plan (the then Section 94A Plan) at the time the Consent was granted. As such, no condition was imposed on the Consent requiring the payment of a contribution levy and changes are proposed in this regard.

#### **3.5.4 Section 4.15(1)(a)(iia) – 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.

#### **3.5.5 Section 4.15(1)(a)(iv) - Provisions of Regulations**

Clause 92(1) of the EP&A Reg contains matters that must be taken into consideration by a consent authority in determining a development application, of which the following are relevant to the subject modification application:

- If demolition of a building proposed - provisions of AS 2601;
- If on land subject to subdivision order under Schedule 7, provisions of that order and any development plan;
- Dark Sky Planning Guideline if applicable;
- Low Rise Housing Diversity Design Guide for Development Applications (July 2020) if for manor house or multi dwelling housing (terraces).

The modified proposal included demolition, as such this matter is considered below:

#### AS2601 -1991: The Demolition of Structures

The conditions imposed on the original development consent to address the provisions of AS2601 -1991: The Demolition of Structures are considered to remain appropriate for the development proposal, as modified. No changes are included in the recommended Draft Schedule of Conditions (refer to **Attachment A**) as the existing conditions are satisfactory.

#### Section 93 and 94 of the EP&A Reg – Fire safety and other considerations

The regulations require a consent authority to consider additional matters in the assessment of an application, in the follow circumstances:

- (a) *If there is a change of use of an existing building, that does not seek the alteration, enlargement or extension of a building. Consideration of weather the fire safety and structural capacity of the building will be appropriate to the building's proposed use, is to be considered in the assessment of the development application.*
- (b) *If the development involves the rebuilding, alteration, enlargement or extension of an existing building where:*
  - (i) *the proposed building work, together with any other building work completed or authorised within the previous 3 years, represents more than half the total volume of the building, as it was before any such work was commenced, measured over its roof and external walls, or*
  - (ii) *the measures contained in the building are inadequate:*
    - (aa) *to protect persons using the building, and to facilitate their egress from the building, in the event of fire, or*
    - (bb) *to restrict the spread of fire from the building to other buildings nearby.*

The assessment of original development application took into consideration the requirements of Clauses 93 and 94 of the EP&A Reg having regard to whether any upgrading is required for the existing NAG building. It is considered the existing NAG building was satisfactory have regard to these provision. The modifications proposed haver no greater effect on the existing NAG building than the approved proposal and as such the original conditions imposed on the consent remain relevant.

#### **3.5.6 Section 4.15(1)(b) - Likely Impacts of Development**

The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality have been considered during the assessment of the modified proposal. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above.

The modified proposal will not result in any significant adverse impacts in the locality and is considered to be satisfactory.

### **3.5.7 Section 4.15(1)(c) - Suitability of the site**

The site currently accommodates the NAG. The proposal, as modified, would enhance the existing facilities offered by the NAG. The proposed use is permissible with consent in the B4 Mixed Use Zone and the site is considered to be suitable for the expanded NAG facility. The modifications proposed to the approved gallery additions provide increased exhibition space and are considered a positive response to the growing demand for cultural amenity within the location.

The site is located within the Newcastle City Centre, which is well serviced by public transport, pedestrian/ cycle routes, education, recreation, and entertainment. It is considered that adequate services and waste facilities are available to the development.

At-grade access to the site will be available for pedestrians from adjacent roads. Having regard for the City Centre location and the availability of public transport services, it is considered that the proposed use is satisfactory in respect of its accessibility.

The environmental constraints associated with the site, including flooding, coastal management, and historic land contamination, have been considered in the modified development and are able to be readily managed and impacts mitigated.

The modified development will have minimal impact on the natural environment and the proposal will not impact on any natural ecosystems. Conditions imposed on the original development consent require appropriate measures be in place during the proposed building works to minimise any sediments leaving the site or entering waterways.

Assessment of Development Application DA2010/1278 found the site suitable for the approved development. The modified development remains substantially the same as that which has been approved and is considered to continue to align with the development expectations for the surrounding area. The site attributes are considered to be conducive to the development (as modified).

### **3.5.8 Section 4.15(1)(d) - Public Submissions**

These submissions are considered in **Section 4** of this report, below.

### **3.5.9 Section 4.15(1)(e) - Public interest**

The public interest is served by the development of land within its environmental capacity.

Assessment of the original development application found the approved development was in the public interest. The objective of the proposed modification is to respond to the changing requirements of the NAG. The modifications proposed will improve internal layout functionality and respond to anticipated demand for art gallery space, opposed to retail tenancies and theatre space, by providing increased exhibition space and rearranging the back of house facilities. This is considered a positive response to the growing demand for cultural amenity within the location. Further, the applicant notes market research has been utilised to identify a lack of demand for retail tenancies in this part of Darby Street.

The development will have positive social and economic benefits. It will facilitate employment within walking distance to public transport and local services, as well as providing employment during the construction period. The changes proposed to the approved development do not



result in any unreasonable impacts to adjoining properties. It is expected that the modified development will not adversely impact on any public or private views.

The modified development is also generally consistent with the relevant planning controls and is reflective of the anticipated development of the site. Having achieved design excellence, the proposal will positively contribute to the streetscape and public domain.

The development proposal, as modified, would enhance the status of the NAG while at the same time allowing for the most productive use of the site. It is in the public interest that the site be utilised as proposal, as modified, subject to the imposition and compliance with the conditions recommended Draft Schedule of Conditions (refer to **Attachment A**).

It is considered that the proposal, as modified, is satisfactory having regard to climate change.

#### 4. REFERRALS AND SUBMISSIONS

##### 4.1 Agency Referrals and Concurrence

The development application has been referred to various agencies for comment/concurrence/referral as required by the EP&A Act and outlined below in Table 5.

There are no outstanding issues arising from these concurrence and referral requirements subject to the imposition of the recommended conditions of consent being imposed.

**Table 6: Concurrence and Referrals to agencies**

Agency	Concurrence/ referral trigger	Comments (Issue, resolution, conditions)	Resolved
<b>Concurrence Requirements (s4.13 of EP&amp;A Act)</b>			
N/A			
<b>Referral/Consultation Agencies</b>			
Electricity supply authority (Ausgrid)	CI 45 – Infrastructure SEPP Development near electrical infrastructure	<p>The development proposal, as modified, comprises development to be carried out within 5m of an exposed overhead power line located in the Queen Street and Darby Street footpaths and in within proximity to underground power mains.</p> <p>Written advice from Ausgrid was received dated 2 November 2021 (refer to <b>Attachment E</b>) which provided recommendations to satisfy Ausgrid requirements, as detailed under the 'State Environmental Planning Policy (Infrastructure) 2007' assessment in <b>Section 3.5.1</b> of this report above.</p>	Yes

		Additional conditions have been included in the recommended Draft Schedule of Conditions (refer to <b>Attachment A</b> ) to satisfy the recommendations and requirements raised within the Ausgrid referral response.	
Transport for NSW (TfNSW)	No statutory approval role	<p>The modification application was referred to TfNSW as the original application was referred to Roads and Maritime Services (now forming part of TfNSW).</p> <p>Written advice from TfNSW was received dated 13 July 2021 (refer to <b>Attachment F</b>) which raised concerns regarding the loading dock access from Queen Street.</p> <p>As detailed under the '<i>State Environmental Planning Policy (Infrastructure) 2007</i>' assessment in <b>Section 3.5.1</b> of this report above, considering the loading dock has already been approved under DA2010/1278 and the modification does not propose any significant changes to the operation of the loading dock, the development as modified is considered acceptable.</p>	Yes
Urban Design Review Panel (UDRP)	CI 7.5(6) – LNEP 2012	<p>The modification application has been reviewed by the UDRP, who operate under a charter stating that they undertake the functions of a design review panel for the purposes of Clause 7.6(6) of the LNEP 2012.</p> <p>The modification application was reviewed by UDRP at the meeting held 30 June 2021. The advice of the UDRP has been considered in the proposal, as modified. Refer to the '<i>Clause 7.5 – Design excellence</i>' assessment of the LNEP 2012 in Section 3.5.1 of this report above.</p>	Yes
<b>Integrated Development (S 4.46 of the EP&amp;A Act)</b>			
Subsidence Advisory NSW (SA NSW)	Clause 120 – EP&A Reg	<p>Development Application DA2010/1278 was 'integrated development' and the application was reviewed by the NSW Mine Subsidence Board which approved the application on 25 August 2010.</p> <p>The subject modification application was referred to SA NSW for comment. Conditional approval for the modified development has been granted by SA</p>	Yes

		<p>NSW via 'General Terms of Approval' (GTA) and stamped approved plans dated 12 October 2021 (Refer to <b>Attachment D</b>). 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 <b>Attachment A</b>) requiring the development to comply with the GTA's.</p>	
--	--	---	--

#### 4.2 Council Referrals (internal)

The development application has been referred to various Council officers for technical review as outlined **Table 7**.

**Table 7: Consideration of Council Referrals**

Officer	Comments	Resolved
Engineering	CN's Development Officer (Engineering) reviewed the modification application in relation to flood management and stormwater management. These matters are considered in more detail within the ' <i>Clause 5.21 – Flood planning</i> ' assessment of the NLEP 2012 in <b>Section 3.5.1</b> of this report, and ' <i>Section 7.06 – Stormwater</i> ' assessment of the NDCP 2012 in <b>Section 3.5.3</b> of this report respectively.	Yes
Traffic Public Domain Assets	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 ' <i>Section 7.03 - Traffic, Parking and Access</i> ' assessment of the NDCP 2012 in <b>Section 3.5.3</b> of this report above.	Yes
Building	CN's Senior Development Officer (Building) reviewed the modification application in relation to fire safety consideration and these matters are considered in more detail within the ' <i>Section 93 and 94 of the EP&amp;A Reg – Fire safety and other considerations</i> ' assessment in <b>Section 3.5.5</b> of this report above.	Yes
Environmental Health	CN's Senior Environmental Protection Officer reviewed the modification application in relation to land contamination which is considered in more detail within the ' <i>State Environmental Planning Policy No 55 – Remediation of Land</i> ' assessment in <b>Section 3.5.1</b> of this report above.	Yes

Waste	CN's Waste and Commercial Collection Manager has reviewed the modification application in relation to waste servicing, which is considered in more detail within the ' <i>Section 7.08 – Waste Management</i> ' assessment of the NDCP 2012 in <b>Section 3.5.3</b> of this report above.	Yes
Heritage	CN's Development Officer (Heritage) has undertaken a comprehensive assessment of the applicant's heritage reports and these matters are detailed under the ' <i>Clause 5.10 – Heritage conservation</i> ' assessment of the NLEP 2012 in <b>Section 3.5.1</b> of this report above.	Yes

### 4.3 Community Consultation

The proposal was notified in accordance with the CN's Community Participation Plan from 21 June 2021 until 5 July 2021. The notification included the following:

- Notification letters sent to adjoining and adjacent properties (an estimated 60 letters were sent);
- Notification on the Council's website.

No submission were received during the notification period.

In response to matters raised during the assessment process, several minor amendments to the modification application as originally submitted have been made during the assessment process. After consideration of the nature and scope of the amendments made, having regard to CN's Community Participation Plan, re-notification of the modification application was not considered necessary.

## 5. CONCLUSION

This modification application has been considered in accordance with the requirements of the EP&A Act and the EP&A Reg as outlined in this report. Following a thorough assessment of the relevant planning controls and the key issues identified in this report, it is considered that the application can be supported.

## 6. RECOMMENDATION

That the Modification Application MA2021/00192 for 'Sec 4.55(2) modification to DA2010/1278 - Community Facility and Retail (Redevelopment of Newcastle Art Gallery) - change to floor plans, elevations and landscape including deletion of Darby Street retail premises' at 1 Laman Street Cooks Hill be APPROVED pursuant to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* subject to the draft conditions of consent attached to this report at Attachment A.

The following attachments are provided:

- Attachment A: Draft Schedule of Conditions – changes shown in red
- Attachment B: Draft Schedule of Conditions
- Attachment C: Plans submitted with application

- Attachment D: General Terms of Approval – Subsidence Advisory NSW
- Attachment E: Agency Advice – Ausgrid letter dated 2 November 2021
- Attachment F: Agency Advice – Transport for NSW letter dated 13 July 2021
- Attachment G: Report on Groundwater Sampling
- Attachment H: Report on Vapour Intrusion Risks for Proposed Rainwater Tank
- Attachment I: Arup Technical Note
- Attachment J: Historical Archaeological Assessment and Statement of Heritage Impact
- Attachment K: Mines Subsidence Parameters Letter
- Attachment L: Report on Grouting and Verification Plan for Yard and Dudley Seam Workings
- Attachment M: Report on Pillar Stability and Subsidence Modelling
- Attachment N: Applicants advice regarding owners consent for mine grouting work
- Attachment O: Turning Paths
- Attachment P: Stormwater Management Plan
- Attachment Q: Access Planning Review Report
- Attachment R: Conductor Clearance Assessment Report and Model
- Attachment S: Architects Design Statement
- Attachment T: Applicants advice regarding physical commencement