



SYDNEY EASTERN CITY PLANNING PANEL

COUNCIL ASSESSMENT REPORT – MODIFICATION APPLICATION

PANEL REFERENCE & DA NUMBER	PPSSEC-242 – DA/414/2020/A
PROPOSAL	S4.56 Modification Application of approved development to amend the development consent granted by the NSW Land and Environment Court, where the development will remain substantially the same as the development that was originally approved. The modification sought to the approved development comprising increased building height, façade changes and the internal reconfiguration of basement, commercial and residential floor levels.
ADDRESS	172-180 Anzac Parade & 116R Todman Avenue, Kensington 2033 The development site (1,024m²) comprises eight (8) allotments in accordance with the following: • 172 Anzac Parade (Lot A, DP 443852) (189.7m²) • 174 Anzac Parade (Lot B, DP 443852) (196m²) • 176 Anzac Parade (Lot 1, DP101928) ((196m²) • 178 Anzac Parade (Lot 1, DP 939269) (164.4m²) • 180 Anzac Parade (Lot 1, DP 100295) (185.7m²) • 116R Todman Ave (Lot 1, DP 561709, Lots 1 & 2 DP 1131969) (84.69m²)
APPLICANT	Asher Richardson (Willowtree Planning Pty Ltd)
OWNER	Perpetual Trustee Company Limited
MOD LODGEMENT DATE	10 October 2022
ORIGINAL DA (DETERMINATION DATE)	Integrated Development Application for demolition of existing structures and construction of an 18 storey mixed-use development comprising basement, ground / first floor commercial, a boarding house comprising 175 boarding rooms with a manager's room and communal facilities. Application determined 17 June 2021 - LEC.
APPLICATION TYPE	S4.56 Modification Application

REGIONALLY SIGNIFICANT CRITERIA	Clause 2 of Schedule 7 of the SEPP SRD: General Development over \$30million. Clause 2 of Schedule 6 of SEPP Planning Systems 2021: General Development over \$30million.
CIV	\$39,035,700.00 (including GST)
CLAUSE REQUESTS 4.6	N/A
KEY SEPP/LEP	• <i>State Environmental Planning Policy (State and Regional Development) 2011.</i> • <i>State Environmental Planning Policy (Affordable Rental Housing 2009)</i> • <i>State Environmental Planning Policy (Planning Systems) 2021.</i> • <i>Randwick Local Environmental Plan 2012.</i> • <i>Randwick Development Control Plan – Section E6 Kensington and Kingsford Town Centres.</i>
SUBMISSIONS	Four (4)
DOCUMENTS SUBMITTED FOR CONSIDERATION	• Modified Architectural Plans • Revised Cost Report Form • Revised BASIX Certificate • Transport Design Statement • Updated Operational Waste Management Plan
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)	N/A
RECOMMENDATION	Approval
DRAFT CONDITIONS TO APPLICANT	N/A
SCHEDULED MEETING DATE	18 April 2023
PLAN VERSION/S	Combination of Original (Rev. 1) and Amended Plan Set (Rev. 2).
PREPARED BY	Ferdinando Macri
DATE OF REPORT	30 March 2023

1. EXECUTIVE SUMMARY

Council is in receipt of a modification application pursuant to Section 4.56 of the Environmental Planning and Assessment Act (as amended), seeking consent to modify (“A”) Development Consent DA/414/2020.

The original development application was approved on 17 June 2021 by the NSW Land and Environment Court, after an agreement was reached between parties pursuant to s34 of the Land and Environment Court (LEC) Act noting that if the application was not appealed in the LEC, the consent authority would have been the *Sydney Eastern City Planning Panel* (SECPP) as it has a capital investment value over \$30 million and is defined as Regionally Significant Development, pursuant to Section 4.7, of the Environmental Planning and Assessment Act 1979 and Schedule 7 of the State Environmental Planning Policy (State and Regional Development) 2011 (subsequently Schedule 6 of the new State Environmental Planning Policy (Planning Systems) 2021).

The current approval comprises the demolition of existing structures and construction of an 18-storey mixed-use development comprising basement parking, ground and first floor commercial, with a 14 storey (student accommodation) boarding house and communal facilities above. The boarding house comprises 175 rooms, basement parking for 10 car spaces, 36 motorcycle spaces and 36 bicycle spaces. The original consent approved a height of building (HOB) 58.2m below the 60m maximum, an overall FSR of 5.99:1 (6:1 control maximum) and a non-residential FSR of 1:1 that complied with relevant LEP development standards. In addition, the proposal also included a future basement vehicular connection to address potential site isolation concerns for No.’s 118 – 120 Todman Avenue.

This modification application (Section 4.56 of the Act) is referred to Sydney Eastern City Planning Panel for determination in accordance with the *Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents* published on the NSW planning portal on 30 June 2020, which states that Section 4.56 modification applications are to be referred to the Panel for determination.

This modification application seeks to alter the configuration of the basement, ground level access lobbies, retail units, waste management and service areas, along with the first level commercial unit and tower façade facing Anzac Parade and the rear boundary.

The Section 4.56 modification application was publicly notified to surrounding property owners, and previous objectors and advertised on Council’s website with site notification attached to the subject site in accordance with Randwick Council Community Consultation Plan. Four submissions by way of objection were received during the notification process. The application was also referred to Council’s Development Engineer, Environmental Health Officer, Design Excellence Advisory Panel and Heritage Planner for comment and/or recommendation who raised no objection to the proposed modifications subject to design refinements and amended consent conditions.

The key issues associated with the proposed modification application relate to the amended basement vehicular connection to address site isolation of the adjoining property and whether the reduction of non-residential FSR (Clause 6.19 RLEP) from the approved 1:1 minimum to 0.915:1 is acceptable to satisfy control objectives and the intent of the LEC reasons for approval.

In short, the revised vehicular connection has demonstrated a functional design outcome

that will improve accessibility. A Clause 4.6 assessment has also been undertaken in relation to the reduction of non-residential FSR below the 1:1 minimum, which evaluated that the loss of space was predominantly related to commercial lobby and back of house areas, with the lettable or usable areas marginally increasing on the ground floor and facilitating additional façade activation to Anzac Parade in the modification scheme. Further, the reduction to the upper floor commercial unit was related to automated waste servicing requirements and the provision of voids to facilitate improved amenity. The proposed amendments are considered to satisfy the objectives of the control and uphold the intent of the LEC reasons for approval, notwithstanding the variation from the numeric requirement.

The development remains substantially the same as a result of the proposed modification in accordance with Section 4.56 of the Environmental Planning and Assessment Act (as amended), and the proposed amendment shall not alter the intent of the original development.

The proposed changes do not result in any unreasonable adverse impacts upon the built or natural environment, nor unreasonably impact upon the residential amenity of surrounding properties.

In view of the above and assessment of the relevant matters for consideration under Section 4.15(1) and 4.56 of the EP&A Act, it is considered that the proposed modification can be supported, and the application is recommended for approval.

2. THE SITE AND LOCALITY

2.1 The Site

The development site comprises eight (8) allotments across 172-180 Anzac Parade & 116R Todman Avenue, Kensington 2033 and is located on the north-eastern corner of Anzac Parade and Todman Avenue intersection.

The site has an area of 1,024m², with a western front boundary of 27.755m to Anzac Parade, a northern boundary of 36.885m adjoining No. 168-170 Anzac Parade, a southern boundary of 36.885m abutting Todman Avenue, and a rear boundary of 27.72m adjacent to semi-detached dwellings fronting Todman Avenue. The site is relatively flat without a slope of crossfall.

2.2 The Locality

The surrounding development comprises a mixture of medium to high density mixed use and residential development, including shop-top housing along Anzac Parade situated within the B2 Local Centre zone. The Site is located within the Kensington Town Centre which is characterised by commercial uses and a mix of ground floor retail including restaurants and convenience stores with residential above. Redevelopment located along Anzac Parade is in transition due to the light rail infrastructure which has resulted in density uplift. There is no prevailing architectural style within the locality with a mixture of modern and heritage architectural designs.

The site is within the proximity of The University of New South Wales (UNSW) and to the west of the Royal Randwick Racecourse. An aerial photograph displaying the subject site (outlined in green) and surrounding development is provided below at **Figure 1** below.

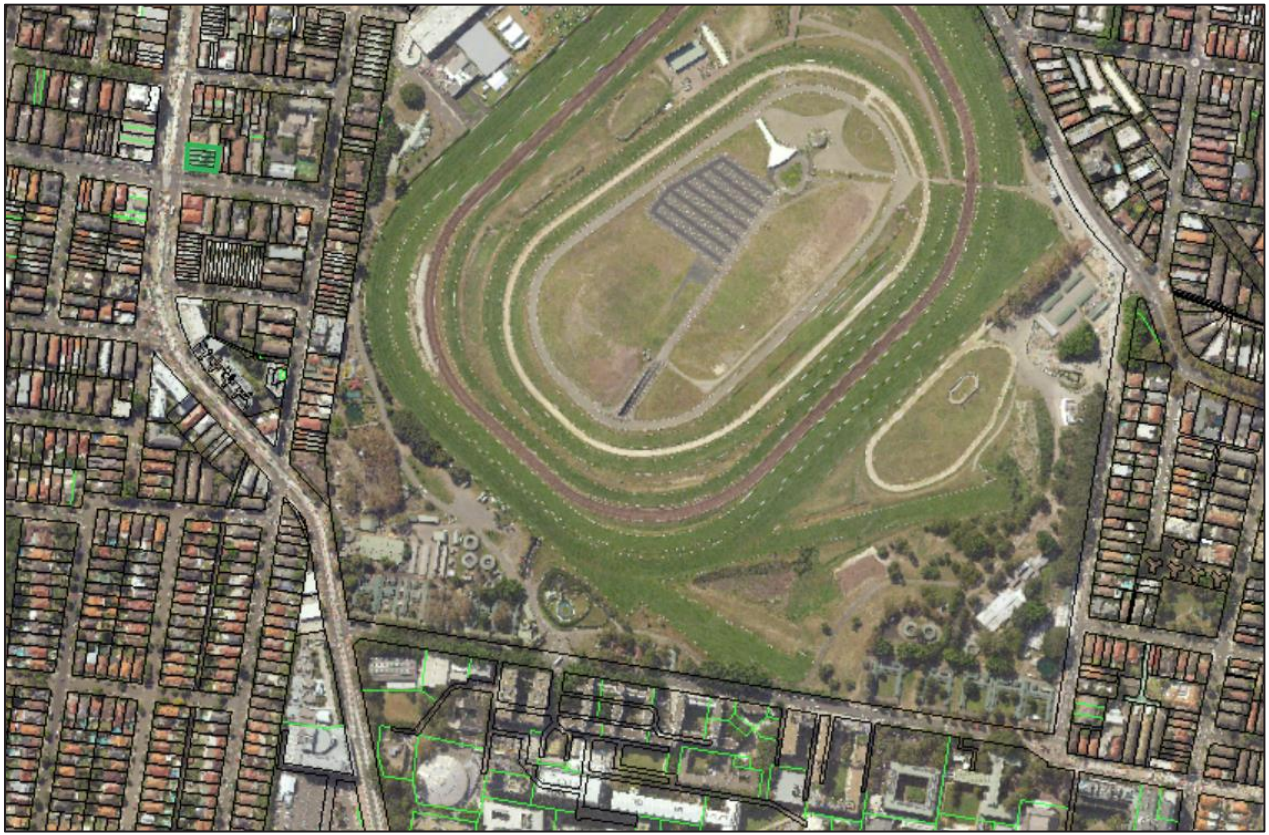


Figure 1: Aerial view of site and surrounding area.

3. THE PROPOSAL AND BACKGROUND

3.1 The Proposed Modification

The applicant seeks to modify the consent in the following way:

Proposed Changes to Built Form

- Building height increased from RL 83.80 to RL 85.60 – 60m (+1.8m) through the increased floor to ceiling heights that facilitate services zones on Levels 1, 2, 8 and 16, along with a minor amendment to Level 17.
- Reconfiguration of basement to reduce the size of the overall envelope and amend the layout of car spaces, car stackers, plant facilities and the future basement connection. The depth of the car stacker excavation has also been increased under the subject modification.
- Revisions to ground floor waste rooms to facilitate an automated waste management system, along with the amendment of retail tenancies and the introduction of a larger residential accommodation lobby and additional plant facilities, including a substation on the secondary Todman Avenue frontage.
- Enclosure of communal roof garden area with glass curtain wall and amended use to internal communal library area.

- Internal reconfiguration of all floor levels to vertical circulation core and layout amendments to boarding room locations, access corridors, voids, plant facilities, waste management system and gross floor area resulting in a minor increase to the approved FSR.
- Amendments to façade curtain wall design and window locations, including additional glazing and an increased façade wall thickness resulting in decreased tower boundary setbacks. The proposed façade amendments are illustrated in **Figure 2** below.



Figure 2: Photomontage from Anzac Parade.

Proposed Changes to Conditions

- **Condition 1** (Approved Plans) of the development consent is amended to reflect the revised floor plans and elevations to the overall building height, façade design and internal layout.
- **Condition 7** (Sydney Airport) Approval amended to reflect revised building height.
- **Condition 13** (Development Contributions) of the development consent is amended to reflect the revised cost estimate.
- **Condition 14** (Community Infrastructure Contributions) of the development consent is amended to reflect the revised residential floor area.
- **Condition 22** (CC Acoustic Compliance) of the development consent to ensure façade revisions are consistent with the original approval.

- **Condition 35** (Future Penetration Zone in Basement Carpark) of the development consent to reference the concept traffic engineering response to support the revised configuration.
- **Condition 50** (Carpark Layout) of the development consent is updated to reflect the proposed basement configuration.
- **Condition 115** (Affordable Housing Contributions) of the development consent is amended to reflect the revised residential floor area.
- **Condition 123** (OC Acoustic Compliance) of the development consent to reference the current NSW Environment Protection Authority Noise Policy for Industry 2017.

Development Data: Approved and proposed are shown in Table 1.

Table 1: Development Data

Feature	Approved Development	Proposed Modifications	Change
Land use	18-storey mixed use development comprising a commercial ground and first level and a 14 storey boarding house (student accommodation) above.	18-storey mixed use development comprising a commercial ground and first level and a 14 storey boarding house (student accommodation) above.	No change
Height of Building (HOB) Clause 6.17 - 54m alternative height Clause 6.21 Design excellence - 60m height	58.2 metres	60 metres (top of skylight) - Rooftop parapet 300mm lower at 59.7m	Increased by 1.8m from original approval.
No. of Storeys	18 storeys	18 storeys	No change
No. of Student Rooms	175	175	No change
Gross Floor Area/FSR 5:1 permitted 6:1 permitted under SEPP ARH.	6,143sqm (5.99:1)	6.146sqm (6:1)	An additional 3sqm within boarding accommodation resulting from internal refiguration.

Non-residential FSR 1:1 required	1024sqm (1:1)	937sqm (0.915:1)	Reduced by 87sqm due to relocation of substation to ground floor, automatic waste system and the provision of commercial voids above building entrances.
Car Parking Spaces	10 car spaces (car stacker)	10 car spaces (car stacker)	No change
Bicycle Parking Spaces – 35 required under SEPP ARH	36 bicycle spaces	40 bicycle spaces	Increase of 4 spaces
Motorbike Parking Spaces – 35 required under SEPP ARH	36 motorcycle spaces	36 motorcycle spaces	No change

Ref: Applicant's statement (Key data has been reviewed).

3.2 Background

Details of Current Approval

Development Application DA/414/2020

The original development application was approved by the NSW Land and Environment Court on 17 June 2021, after an agreement was reached between parties pursuant to s34 of the Land and Environment Court Act. As part of the Court process, the development was required to provide for onsite parking and futureproof a potential north-south laneway along the driveway and a basement connection to prevent the site isolation of 118-120 Todman Avenue adjacent to the rear (eastern) boundary.

The approved development was considered consistent with the relevant provisions of the SEPP ARH, the RLEP 2012 and Part E6 of Randwick Development Control Plan Kensington and Kingsford Town Centres 2020. In compliance with the provisions of Clause 6.17 and 6.18 relating to delivery of community infrastructure and affordable housing, a Planning Agreement has also been executed to satisfy deferred commencement conditions.

Subject Modification Application

The subject modification application (DA/414/2020/A) was lodged on 10 October 2022. The application was externally referred to Water NSW, Transport for NSW, Sydney Airport Corporation and NSW Police. The application was internally referred to Council's Heritage Planner, the Design Excellence Advisory Panel, Environmental Health Officer and Development Engineer for comment and recommendations.

A chronology of the modification application since lodgement is outlined below in **Table 2**.

Table 2: Chronology of the Modification Application

Date	Event
10 October 2022	Modification application lodged
12 October 2022	Referred to internal departments of Council – Development Engineer, Environmental Health, Design Excellence Advisory Panel and Heritage Planner
13 October 2022	Referred to Water NSW, Transport for NSW, Sydney Airport Corporation and NSW Police.
20 October 2022 – 17 November 2022	Exhibition of the application
11 January 2023	RFI issued seeking clarification on the following matters: • Updated cost estimate • Reduced non-residential FSR • Reduced street activation • Automated waste management procedures • Transport for NSW terrace design measures • Commercial void design and acoustic conflict with residential uses • Future basement connection design. • Design excellence refinements
13 March 2023	Response provided by Applicant to RFI, including the submission of an amended plan set, an updated cost estimate, a revised waste report and design certification for the altered basement connection.

4. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in 4.56 of the EP&A Act in relation to modification of consents provisions and Part 5 of the 2021 EP&A Regulation in relation to information requirements and notification (in this instance the EP&A Regs 2000 given the date the application was lodged, and the savings provisions contained within the 2021 Regs). These matters are considered below.

4.1 Section 4.56 of the EP&A Act

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the consent if the below matters are satisfactorily addressed pursuant to Section 4.56 of the EP&A Act. The matters include the following:

- (a) *it is 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) (s4.56(1)(a)), and*

In order to establish if development is substantially the same as what was granted consent, reference is made to the case of *Moto Projects (No.2) v North Sydney Council [1999] NSW LEC 280*, which provides the following judgement:

“The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified.....

....The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development is granted).

The application originally approved an eighteen (18) storey mixed-use development comprising commercial premises and a boarding house with 175 rooms. The current modification application seeks to alter the internal configuration of the basement, lower commercial levels and the student accommodation access core and communal spaces. In addition, the application also includes amendments to façade setbacks.

These predominantly internal modifications and external façade amendments result in minor changes to the approved development, with an indiscernible difference of a 3sqm increase to the overall Gross Floor Area, an increased parapet height of 1.5m and partial tower setback reductions of 220 - 410mm. The proposed amendments do not result in any variations to the Randwick LEP 2012, except for the reduction of the 1:1 non-residential FSR to provide improved amenity through the incorporation of void inter-floor connections and to accommodate the servicing requirements of the automated waste management system and electrical substation. Notwithstanding, the proposal will retain the same number of commercial tenancies on the ground and first floor that were endorsed in the original approval.

Accordingly, the approved built form is being retained, and it is considered that the proposed modifications do not result in a development that will fundamentally alter the originally approved development.

The term “substantially” means “essentially or materially having the same essence”. The intent of the proposed development remains the same as the approved development, providing a mixed-use development comprising commercial premises, and a boarding house used as student accommodation within a built form of up to eighteen (18) storeys in height,

and it is considered that the essence of the use is consistent with that approved. Furthermore, the development as modified continues to fall within the scope of the original description, being construction of a mixed-use development comprising student accommodation, commercial premises and basement parking.

In view of the above, and the judgement in *Moto Projects (No.2) v North Sydney Council [1999] NSW LEC 280*, it is considered in this instance the fundamental characteristics and essence of the development would remain the same and as such the consent authority can be satisfied that the resultant development is considered substantially the same development as originally approved.

- (b) *it has notified the application in accordance with—*
- (i) *the regulations, if the regulations so require, and*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent (s4.56(1)(b)), and*
- (c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person (s4.56(1)(c)), and*

The Section 4.56 modification application was publicly notified to surrounding property owners and to any previous submitters/objectors and advertised on Council's website with site notification attached to the subject site in accordance with Randwick Council Community Consultation Plan. Four (4) submissions by way of objection to the proposal were received during the notification process.

- (d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be (s4.56(1)(d)).*

Submissions have been considered as a part of the assessment. Refer to **Section 5.3** below for the summary of issues raised and Council's response.

- (e) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified (s4.56(1A)).*

The matters required to be considered include:

- Matters for consideration pursuant to Section 4.15(1) of the EP&A Act – these matters are considered below in Section 3.2 of this report; and
- Reasons given by the consent authority for the grant of the consent that is sought to be modified – outlined below.

Reasons for Grant of Consent

The NSW Land and Environment Court granted consent to the original development on 17 June 2021 in response to an agreement between parties, pursuant to section 34 of the Land

and Environment Court Act. During these proceedings, the Applicant was granted leave to rely on amended plans whereby the jurisdictional prerequisites identified by the parties were considered to have been satisfied. The amendments made during the conciliation which are considered key matters and reasons for the approval are identified as follows:

- The proposed development comprising commercial premises and a boarding house for student accommodation are a permissible use within the B2 Local Centre zone.
- The proposal has complied with the community infrastructure preconditions to enable the additional height and FSR permitted under Clause 6.17 of the Randwick LEP 2012. The proposal was considered to reflect the desired character of the localities in which they are allowed and minimises adverse impacts on the amenity of those localities, and where the intensity of development is commensurate with the capacity of existing and planned infrastructure.
- The requirements of Clause 6.21 of the Randwick LEP 2012 were addressed by the submitted statement and the development exhibits design excellence. The proposal will comply with the height and FSR bonuses afforded by Design Excellence provisions and the SEPP ARH.
- The area of non-residential floor space in the development, expressed at 1:1, is consistent with the Non-Residential Floor Space Ratio Map at cl 6.19(2) of the RLEP 2012.
- The effect of the proposed development on the contributory buildings and heritage items was considered acceptable, in accordance with cl 5.10(4) of the RLEP. In particular, the agreement of the heritage experts as to the manner for contributory buildings to be integrated into the development, and the requirement for certain schedules and plans to be prepared in accordance with conditions.
- The proposed earthworks and excavation will not have a detrimental impact on the soil stability or the amenity of the neighbouring uses or the adjacent light rail infrastructure, and it was considered those matters at cl 6.2(3) of the RLEP to be appropriately addressed.
- Flood hazards satisfied in accordance with the matters at subcl. 6.3(3)(a)-(e) of the RLEP.
- The proposed development will incorporate appropriate measures to manage stormwater in accordance with cl 6.4 of the RLEP.
- The agreed conditions of consent at Condition 7, being conditions advised by Sydney Airport, to satisfy the requirements of cl 6.8 of the RLEP in respect of airspace operations.
- Adequate arrangements have been made to make essential services available for the site when required in accordance with cl 6.10 of the RLEP.
- A contribution equivalent to the affordable housing levy contribution is imposed and is calculated in accordance with the Kensington and Kingsford Town Centres Affordable Housing Plan (subcl. (5)).
- As per the Active Frontages provision at cl 6.20 of the RLEP, the overwhelming proportion of the street frontage is active, and that the frontage otherwise allocated to building services and fire egress should not preclude the grant of consent.
- The proposal was consistent with the provisions of SEPP ARH noting the built form remained largely consistent with the provisions of RLEP 2012 and the Kensington and Kingsford DCP 2020 (K2 Site) and therefore is consistent with the desired character of the area in accordance with clause 30A of the SEPP ARH.

The modification application does not appreciably alter any external elements of the scheme that would hinder the ongoing attainment of the relevant objectives or standards achieved by the orders issued by the LEC. Noting that the proposed amendments will predominantly retain compliance with LEP and DCP requirements, except for the reduction of the non-residential FSR. This is discussed in detail within the key issues section of this report.

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

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.56(1)(a), which are of relevance to the application.

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

The relevant provisions under s4.15(1)(a) are considered below.

(a) Environmental planning instruments (s4.15(1)(a)(i))

The following Environmental Planning Instruments are relevant to this application:

- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX)*
- *State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH)*
- *State Environmental Planning Policy (Planning Systems) 2021*
- *Randwick Local Environmental Plan 2012 (LEP)*

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.

Table 3: Summary of Applicable State Environmental Planning Policies

EPI	Matters for Consideration	Comply (Y/N)
BASIX SEPP	An amended BASIX Certificate was provided noting the amendments proposed to the residential component of the development. Conditions of consent in relation to compliance with the BASIX provisions and required documentation are to be maintained within the development consent, subject to the inclusion of the revised certificate being referenced in condition 1.	Y
State Environmental Planning Policy (Affordable Rental Housing) 2009	Division 3 – Boarding Houses 30 Standards for boarding houses (1) A consent authority must not consent to development to which this Division applies unless it is satisfied of each of the following— (a) if a boarding house has 5 or more boarding rooms, at least one communal living room will be provided... ...(h) at least one parking space will be provided for a bicycle, and one will be provided for a motorcycle, for every 5	Y, consistent with original approval or improved compliance demonstrated. Rooftop communal space reconfigured from terrace to library with no reduction to communal floor area. 36 motorcycle spaces retained in basement and bicycle parking increased from 36 to 40 (+4).

EPI	Matters for Consideration	Comply (Y/N)
(State Environmental Planning Policy (Housing) 2021)	boarding rooms.” Schedule 7A Transitional and savings provisions does not apply SEPP Housing 2021 to a development consent made but not determined prior to commencement date (26 November 2021). Applicable policy is therefore the <i>State Environmental Planning Policy (Affordable Rental Housing) 2009</i>.	NA
State Environmental Planning Policy (State and Regional Development) 2011 State Environmental Planning Policy (Planning Systems) 2021	Clause 2 of Schedule 7 of State Environmental Planning Policy (State and Regional Development) 2011: The original development is defined as General Development with a capital investment value over \$30million. Clause 2 of Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021: The original development is defined as General Development with a capital investment value over \$30million.	Y Y
LEP	• Clause 2.3 – Permissibility and zone objectives • Clause 4.3 – Height of Buildings • Clause 4.4 – Floor Space Ratio • Clause 6.11 – Design Excellence • Clause 6.17 – Community infrastructure height of buildings and floor space at Kensington and Kingsford town centres • Clause 6.18 - Affordable housing at Kensington and Kingsford town centres • Clause 6.19 - Non-residential floor space ratios at Kensington and Kingsford town centres • Clause 6.20 – Active Street frontages at Kensington and Kingsford town centres • Clause 6.21 – Design excellence at Kensington and Kingsford town centres	N (partial), compliance retained with building height, FSR, community infrastructure provisions and active frontages were increased to the Anzac Parade frontage through the additional sleeving of the fire control room and the Todman Ave substation incorporating a glass façade treatment that orientates all access from the internal driveway. However, previous compliance with non-residential FSR (Clause 6.19) altered due to servicing requirements and internal layout revisions. Amendment considered acceptable on merit, refer to key issues

EPI	Matters for Consideration	Comply (Y/N)
		discussion below. Application referred to Randwick Design excellence advisory panel and supported subject to plan amendments for the satisfaction of Clause 6.21.
DCP	Randwick Development Control Plan Part E6 - Kensington and Kingsford Town Centres The proposed modifications do not result in any significant changes to the approved architectural form other than the partial 410mm tower setback reduction to Anzac Parade and 220mm to the rear driveway boundary. However, the setback has also been increased by 900mm to the north-eastern corner of the floor plate and by 400mm to Todman Avenue. On balance, the proposed changes are indiscernible, and the minor amendment would not result in adverse amenity impacts to surrounding development. Landscaping remains generally consistent with the original approval and has provided additional soft planting zones at-grade along the driveway and to the communal open space on level 2 to offset the façade landscape slots on levels 3 to 9, which were removed due to obstructed access and waterproofing concerns. The proposal retains 10 car parking spaces to support business uses and the amendment to the car stacker excavation depth will not impact onsite parking availability.	Y

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

State Environmental Planning Policy – Building Sustainability Index BASIX– 2004 ('BASIX SEPP') applies to the proposal. The objectives of this Policy are to ensure that the performance of the development satisfies the requirements to achieve water and thermal comfort standards that will promote a more sustainable development for residential

components of the scheme.

The subject modification application was accompanied by an amended BASIX Certificate committing to environmentally sustainable measures and the proposal will secure the revised commitments in an updated approved document list.

- *State Environmental Planning Policy (Affordable Rental Housing) 2009 (Replaced by State Environmental Planning Policy (Housing) 2021 on 26 November 2021)*

The subject application is made pursuant to the SEPP (Affordable Rental Housing) 2009 (SEPP ARH). Clause 29 provides – Standards that cannot be used to refuse consent and Clause 30 provides - Standards for boarding houses.

The current SEPP applying to boarding house development in NSW is the SEPP Housing 2021 which came into force on 26 November 2021. An assessment is not carried out against the current SEPP Housing due to Savings and transitional provisions pursuant to Clause 7A (1)(a) which state that this policy does not apply to (a) a development application made, but not yet determined, on or before the commencement date. Therefore, the provisions under SEPP ARH apply to this DA.

The development as modified will remain generally consistent with the provisions of the SEPP ARH and retains compliance with the development standards of the SEPP.

- *State Environmental Planning Policy (State and Regional Development) 2011 (Replaced by State Environmental Planning Policy (Planning Systems) 2021 on 1 March 2022)*

The original development is Regionally Significant Development with a capital investment value over \$30 million pursuant to Section 4.7, of the Environmental Planning and Assessment Act 1979 and Schedule 7 of the State Environmental Planning Policy (State and Regional Development) 2011 (or subsequently Schedule 6 of the new State Environmental Planning Policy (Planning Systems) 2021).

The consent authority for the original Development Application would have been Sydney Eastern City Planning Panel (SECPP) were the application not appealed in the Land and Environment Court.

For this S4.56 modification application, the SECPP is the determining authority in accordance with the *Instruction on Functions Exercisable by Council on Behalf of Sydney District or Regional Planning Panels—Applications to Modify Development Consents* published on the NSW planning portal on 30 June 2020.

- *State Environmental Planning Policy (Infrastructure) 2007 (Replaced by State Environmental Planning Policy (Transport and Infrastructure) 2021 on 1 March 2022)*

The original development application was referred to Transport for NSW for concurrence pursuant to section 138 of the Roads Act 1993, and clause 86 of the ISEPP.

The proposed modification was referred to TfNSW pursuant to S138 of the Roads Act and Clause 101 of the SEPP Infrastructure. The proposed modifications do not seek any changes to the conditions of consent imposed by the authority noting that original concerns for the design of terraces facing the light rail corridor were reiterated and the applicant has provided a 2m high glass barrier within the final amended plan set to satisfy these design

requirements through a material treatment that does not detract from the retention of the contributory building facades along this same interface.

- *Randwick Local Environmental Plan 2012*

The relevant local environmental plan applying to the site is the Randwick Local Environmental Plan 2012 ('the RLEP 2012'). The proposed development as modified remains consistent with the relevant aims and provisions of RLEP 2012, noting that the proposal for mixed use development (student housing) is maintained and that the built form is not appreciably altered, noting that compliance is retained with the building height and FSR development standards. A merit assessment of the non-residential FSR reduction has been undertaken in the key issues section below.

The site is located within the B2 Local Centre Zone pursuant to Clause 2.2 of RLEP 2012. As noted above, the subject modification application does not seek to change the approved use of the development which is permissible within the B2 zone.

The proposed development as modified also remains consistent with the objectives of the B2 zone serving the needs of people who live in, work and visit the local area; encourage employment opportunities; maximise public transport, provides residential development that is well-integrated with, and supports the primary business function of, the zone; provides a high standard of urban design; and protects the amenity of surrounding residents. The proposal as modified is considered compatible with the desired future character of the Kingsford Town Centre.

The matters outlined in Section 4.15(1) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') are considered in **Table 4**.

Table 4: S4.15 Matters for Consideration

Section 4.15 'Matters for Consideration'	Comments
Section 4.15(1)(a)(i) – Provisions of any environmental planning instrument	The proposed modifications comprise minor façade changes and internal reconfigurations to the approved development, which will remain substantially the same. The development remains consistent with the general aims, objectives, and applicable development standards of the RLEP 2012 and ARH SEPP. An assessment of the non-residential FSR reduction has been undertaken and is considered acceptable on merit. Refer to detailed assessment in key issues section below.
Section 4.15(1)(a)(ii) – Provisions of any draft environmental planning instrument	Nil.
Section 4.15(1)(a)(iii) – Provisions of any development control plan	The proposal generally satisfies the objectives and controls of the Randwick Comprehensive K2K DCP 2020, as outlined in the above sections.
Section 4.15(1)(a)(iiia) – Provisions of any Planning Agreement or draft Planning Agreement	The proposed amendment increases the residential floor area by 3sqm and as such the K2K Community Infrastructure

Section 4.15 Consideration'	'Matters for	Comments
		Contribution and Affordable Housing Contribution have been amended accordingly.
Section 4.15(1)(a)(iv) – Provisions of the Regulations		The relevant clauses of the Regulations have been satisfied, including the amendment of the Contribution Levy under condition 14 to reflect the revised cost estimate.
Section 4.15(1)(b) – The likely impacts of the development, including environmental impacts on the natural and built environment and social and economic impacts in the locality		The proposed modifications have responded appropriately to the relevant planning controls and will not result in any significant adverse environmental, social or economic impacts on the locality.
Section 4.15(1)(c) – The suitability of the site for the development		The site has been assessed as being suitable for the development in the original development consent. The modified development will remain substantially the same as the originally approved development and is considered to meet the relevant objectives and performance requirements in the RDCP 2013, K2K RDCP 2020 and RLEP 2012. Accordingly, the site remains suitable for the modified development.
Section 4.15(1)(d) – Any submissions made in accordance with the EP&A Act or EP&A Regulation		Submission have considered as a part of the assessment in Section 5.3 below.
Section 4.15(1)(e) – The public interest		The proposal promotes the objectives of the zone and will not result in any significant adverse environmental, social or economic impacts on the locality. Accordingly, the proposal is considered the public interest.

3.3 Part 5 of the 2021 EP&A Regulation

The subject application was lodged on 19 November 2021. In accordance with the saving provisions under Schedule 6 of the EP&A Regs 2021, the 2000 Regulation continues to apply to the application not the provisions of the EP&A Regs 2021. The subject application is consistent with the relevant provisions of the Environmental Planning and Assessment Regulations 2000.

5. REFERRALS AND SUBMISSIONS

5.1 Agency Referrals and Concurrence

The original development application was classified as:

- Integrated Development (pursuant to s4.46 of the EP&A Act)

- Requiring concurrence/referral (pursuant to s4.13 of the EP&A Act)

Accordingly, the modification application was referred to various agencies for concurrence as required by the EP&A Act and Clause 109 of the 2021 EP&A Regulation and outlined in **Table 5**.

The relevant authorities did not raise any objection to the proposed modifications, and the original conditions of consent imposed are to be retained.

Table 5: Concurrence and Referral Agencies

Agency	Concurrence / referral Trigger	Comments (Issue, resolution, conditions)	Resolved
Concurrence Requirements (s4.13 of EP&A Act)			
Water NSW	s90 of the Water Management Act 2000	Water NSW raised no objection to the proposed modifications and that the previous GTAs remain applicable.	Y
Transport for NSW (Sydney Light Rail)	S2.98 and 2.99 of the SEPP (Transport and Infrastructure) 2021	Requested that design amendments provided to address design standards for terraces facing Anzac parade light rail corridor in accordance with previous GTAs.	Y, 2m high glass balustrade detail shown to Anzac Pde communal terrace on western elevation.
Sydney Airport Corporation	s182 and 183 of the Airports Act 1996	Amended approval provided to reflect increased building height under modification.	Y, Condition 7 updated in recommendation section below.
NSW Police	Referral comment for	Existing conditions satisfactory and no further comment.	Y

5.2 Council Referrals

The modification application was referred to various Council officers for technical review as outlined **Table 6**. The main concerns raised by Council officers are considered in the Key Issues section of this report.

Table 6: Consideration of Council Referrals

Officer	Comments	Resolved
Engineering	Council's Development Engineer Coordinator reviewed the proposed modifications and raised no objection to the proposal with regards to stormwater management, traffic and parking, and waste management, subject to the provision of amended conditions to reflect the revised basement layout and that confirms the functionality of the potential carpark penetration zone with a Traffic Engineering Statement.	Y
Heritage	Council's Heritage Officer reviewed the subject application and raised no objection to the proposal, with the endorsed conditions remaining applicable to the subject modification.	Y
Environmental Health	Council's Environmental Health Officer raised no objection to the proposed modification, subject to the amendment of condition 22 for the inclusion of certification confirming the façade changes would not compromise the acoustic integrity of residential and commercial uses and the revision of Condition 123 to reflect the current NSW Environment Protection Authority Noise Policy for Industry 2017.	Y
Design Excellence Advisory Panel	The Panel raised no objection in principle to the revised scheme, subject to the below refinements: - Clarification on the substation location and treatment to preserve active frontages. - The deletion of the vertical landscape slot on levels 3 to 9 should be compensated with additional green element infrastructure elsewhere in the scheme. - The replacement of roof garden with communal library is accepted, however the clarity of gold-coloured ceilings on this level and throughout the scheme in the photomontage should be retained. - The informal visual "liveliness" of the various tower facades in the original render appears to have been diluted by a more regularised expression of the facade grid and deletion of sliding screens. The design team advised that this was more a problem with the lower quality of the updated render. The Panel suggested that the new render	Y, Applicant has submitted amended plans and information to address the panel's concerns. Noting that additional street wall screening has been provided to the substation, green areas have been provided to offset façade changes, communal open space will satisfy SEPP provisions and amended renders have demonstrated a comparable façade design outcome.

Officer	Comments	Resolved
	should therefore be brought up to the same quality of the previous so that an accurate comparison can be made. - The Panel queried the loss of communal open space by provision of a library, noting that minimum outdoor space requirements for residents should be provided. - The façade is proposed to be changed from a floor-to-floor infill system to a curtain wall. The Panel has no objection to this in principle, however the proposed construction details seem to be intent on retaining the “floor to floor” projected slab edge expression of the approved scheme. This may create cost, detail and waterproofing issues and a more conventional curtain wall expression on some elevations may be a better approach. - Deletion of the typical expressed slab edge band at the top of the building may provide a more refined parapet detail than is now proposed.	

5.3 Notification and Community Consultation

The modification application was notified in accordance with Council’s Community Participation Plan from 20 October 2022 until 17 November 2022. The notification included the following:

- A sign placed on the site.
- Notification letters sent to adjoining and adjacent properties, and to previous submitters and objectors.
- Notification on Council’s website.

In response Council received four submissions, with the key concerns outlined in the below **Table 7**.

Table 7: Submission Summary

Issue	Council Response	No. of times raised
Site Isolation of 118 – 120 Todman Avenue.	The proposed design has predominantly retained building separation distances, the driveway through site link and basement connection in accordance with the original LEC approval to	(1)

Issue	Council Response	No. of times raised
	enable continued integration with the adjoining properties in the case of future redevelopment. The proposed changes to the rear setback and basement connection point are not considered to materially impact the intent of the LEC approval as discussed within this report.	
Built form transition and setbacks to No. 118 – 120 Todman Avenue	The podium setback is unaltered under the subject modification. Notwithstanding, to facilitate façade design amendments, the proposed rear tower setback (lower levels 4 to 8) has been reduced by 220mm centrally and to the southern (Todman Avenue) portion of the floor plate. The northern portion has been increased by approximately 900mm. On balance the proposed amendment is imperceptible and in part increases separation to the adjoining semi-detached dwelling. This minor 220mm setback reduction also continues to the upper tower levels (levels 10-16) and level 17 and would be imperceptible to adjoining development or from the public domain.	(1)
Building Height	It is noted that the number of storeys is not being altered under the subject modification and that the revised design will remain compliant with the LEP building height maximum, despite the proposed increase.	(3)
The location of the through site link is inconsistent with the original precinct plan in 2016 and the K2K DCP block plans.	The K2K DCP illustrates that the connection location is situated within properties at 118 – 120 Todman Avenue. Notwithstanding, the location was amended in the original court approval to be accommodated within the driveway setback and building separation distances were also endorsed to facilitate this outcome. Accordingly, no change is proposed under the subject modification.	(1)
Student Accommodation Land use	The land use composition of the approved mixed-use development has not been amended as a part of the modification and is permissible within the B2 Local Centre Zone.	(2)
Insufficient transport capacity to support boarding house density	The number of boarding rooms remains consistent with the original approval and it is noted that the use is proximity to educational and employment opportunity zones.	(1)
Traffic generation and congestion impacts	The number of car and motorcycle parking spaces remains consistent with the original approval. The site's Kensington town centre context is afforded	(1)

Issue	Council Response	No. of times raised
	with services, employment hubs and public transport in walking distance.	
Overshadowing	The additional 1.8m height increase will remain within a compliant LEP height envelope, is predominantly limited to pop-up elements including access overruns and mechanical plant and does significantly alter shadow impact in comparison with the original approval.	(1)
Overdevelopment of the Kensington Precinct	The proposal retains general compliance with the building envelope anticipated by Council's LEP and K2K DCP.	(1)
Existing surplus capacity of rental accommodation	This is not a matter for consideration under the subject modification proposal.	(1)
Current buildings should be retained to preserve heritage value	The modified design will retain the heritage shopfronts on Anzac Parade as a part of the podium design. The proposal was also reviewed by Council's Heritage Planner, who raised no concern subject to recommended consent conditions.	(1)
Concern with the site's previous design competition brief and assessment process	This is not a matter for consideration under the subject modification proposal.	(1)
Concern with the preparation of the K2K DCP and the associated planning proposal	This is not a matter for consideration under the subject modification proposal.	(1)
Concern with the original assessment Section 34 agreement being reported to and endorsed by the Regional Planning Panel	This is not a matter for consideration under the subject modification proposal.	(1)
Lack of community infrastructure included in original approval.	This is not a matter for consideration under the subject modification proposal. It is noted that the community infrastructure contribution and VPA matters are not altered under the subject proposal. The Development contributions levy is being increased from the original proposal in	(1)

Issue	Council Response	No. of times raised
	accordance with the revised works cost.	
Vehicular access point not consistent with RMS comments to original proposal.	Access driveway location is not altered under the subject design.	(1)

6. KEY ISSUES

The following key issues are relevant to the assessment of this application having considered the relevant planning controls and the proposal:

6.1 Non-Residential FSR

Clause 6.19 of the Randwick LEP applies a non-residential FSR of 1:1 or 1,024sqm (site area) to the subject site within the Kensington town centre.

The current approved non-residential FSR of 1:1 (1,024sqm of GFA), complies with the development standard. The subject modification proposes to reduce this provision to 0.915:1 (937sqm of GFA), which is 8.5% (87sqm of GFA) below the minimum development standard. The proposal seeks to vary the development standard contained within the Randwick Local Environmental Plan 2012 (RLEP 2012) as follows:

Clause 6.19	Development Standard	Current approved	Proposal	Variation (%)
Non-residential Floor space ratio	1:1 (GFA 1,024sqm)	1:1 (GFA 1,024sqm)	0.915:1 (GFA 937sqm)	8.5% (87sqm)

Legal Framework for variations

It is noted that the proposed modification is not captured by the provisions of Clause 4.6 of the Randwick LEP.

The original approved development provided for a compliant non-residential FSR, as noted in the LEC orders stating that the development is consistent with the map at cl 6.19(2) of the RLEP 2012.

Whilst a clause 4.6 submission is not required for modification applications, consideration is given to relevant matters under clause 4.15 of the Act and whether the reasons for approval provided by the Court are eroded by the reduction in non-residential FSR as required by clause 4.56(1) of the Act. The assessment is provided below.

Assessment of the Objectives and the Applicant's Written Justification

A written request from the applicant that seeks to justify the contravention of the

development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

Further, the consent authority must be satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

In relation to the matters required to be demonstrated by subclause (3) there are various ways that may be invoked to establish that compliance with a development standard is unreasonable or unnecessary as discussed by Chief Justice Preston of the NSW Land and Environment Court in the case of *in Wehbe v Pittwater Council* [2007] NSWLEC 827.

In the *Wehbe* case, Justice Preston said the most commonly invoked way to establish that compliance with a development standard is unreasonable or unnecessary is to demonstrate that the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The objective of the non-residential Floor Space Ratio standard is outlined in 6.19(1) as follows:

(1) The objective of this clause is to ensure that a suitable level of non-residential floor space is provided to promote commercial and retail activity within the Kensington and Kingsford town centres.

The applicant's written justification for the departure from the development standard is outlined below:

Compliance with the development standard is unreasonable or unnecessary.

The common approaches to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 [Wehbe]. Further, case laws such as *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, *Randwick Council v Micaul Holdings Pty Ltd* [20176] NSWLEC 7 and, most recently, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, have confirmed that adopting the Wehbe principles remains an appropriate approach.

There are five alternatives set out in *Wehbe*, but only one need be satisfied as provided in the table below:

TABLE 1. WHEBE PRINCIPLES	
Principles	Response
The objective of the development standard is achieved notwithstanding non-compliance with the standard.	The objective of the development standard is achieved, as demonstrated below notwithstanding noncompliance with the standard. (1) <i>The objective of this clause is to ensure that a suitable level of non-residential floor space is provided to promote commercial and retail activity within the Kensington and Kingsford town centres.</i> Response: The Modified Proposal is considered to promote commercial and retail activity within the Kensington and Kingsford town centres. The Modified Proposal provides 937sqm of non-residential GFA. The non-residential GFA is distributed as follows: • 937sqm of retail and commercial GFA on the ground floor level, including: ○ 217sqm of retail GFA across Retail 1 and Retail 2 ○ 108sqm of commercial lobby and back of house servicing

TABLE 1. WHEBE PRINCIPLES	
Principles	Response
	612sqm of commercial GFA on Level 1 The proportion of non-residential GFA on the Site is considered to satisfy the objectives of the development standard in the following manner: - The Modified Proposal provides larger retail tenancies than those originally approved. Whilst the size of Retail 1 has been reduced from 143 to 102, the size of Retail 2 has been increased from 71sqm to 115sqm and therefore, there is an increase in retail GFA across the Site. The Modified Proposal provides an additional 5sqm of retail GFA across the Site. - The quality of the retail GFA on the ground floor level has been improved. The Modified Proposal provides 33.3 linear metres of active retail frontage to Anzac Parade and at the corner of Todman Avenue to support the visibility of the retail uses as illustrated on the ground floor activation diagram at Appendix 3. The approved development provided 28.2 linear metres of active retail frontage and therefore the Modified Proposal results in an increase of 5.1 linear metres of frontage at the crucial interface with Anzac Parade and the corner of Todman Avenue. - The approved commercial tenancy on Level 1 has been reduced in size from 638sqm to 612sqm. The loss of 26sqm results in a 4% reduction in commercial floor space. Notwithstanding, the reduced GFA is a result of enlarged voids to the ground floor level, which results in an overall improved amenity to the commercial tenancy. The intent of the development standard is further discussed in Part 5 of the K2K DCP, which provides the following explanation of intent: <i>"A minimum non-residential FSR is applicable to strategic node sites at the Todman Square, Kingsford Midtown and Kingsford Junction Precincts to ensure there is sufficient floor space available to accommodate employment, retail and commercial services. A concentration of non-residential floor space at these strategic sites would foster vibrant nodes of activity near light rail stops, providing for a mix of shops, hospitality related businesses, creative and innovation spaces and other commercial services to serve the needs of residents, workers and visitors"</i> In accordance with the above, the ground floor retail and Level 1 commercial GFA provides sufficient floor space to accommodate employment, retail and commercial services, providing for a mix of shops, hospitality related businesses, creative and innovation spaces and other commercial services to serve the needs of residents, workers and visitors. The Proposal provides 2 x retail tenancies that both now exceed 100sqm, and a generous commercial tenancy space on Level 1 that can be flexible and adapted to future commercial tenancy needs. Given the above, the Modified Proposal is considered to achieve the objective of the development standard notwithstanding non-compliance with the standard, and therefore compliance with the

TABLE 1. WHEBE PRINCIPLES	
Principles	Response
	development standard is unreasonable or unnecessary in the circumstances of the case,
The underlying objective or purpose of the development standard is not relevant.	Not applicable.
The underlying objective or purpose would be defeated or thwarted if compliance was required.	Not applicable.
The standard has been abandoned or destroyed.	Not applicable.
The zoning of the land was unreasonable or inappropriate	Not applicable.

Sufficient environmental planning grounds

There are sufficient environmental planning grounds, despite non-compliance with the development standard as follows:

- The Modified Proposal provides larger retail tenancies than those originally approved. Whilst the size of Retail 1 has been reduced from 143 to 102, the size of Retail 2 has been increased from 71sqm to 115sqm and therefore, there is an increase in retail GFA across the Site. The Modified Proposal provides an additional 5sqm of retail GFA across the Site.
- The quality of the retail GFA on the ground floor level has been improved. The Modified Proposal provides 33.3 linear metres of active retail frontage to Anzac Parade and at the corner of Todman Avenue to support the visibility of the retail uses. The approved development provided 28.2 linear metres of active retail frontage and therefore the Modified Proposal results in an increase of 5.1 linear metres of frontage at the crucial interface with Anzac Parade and the corner of Todman Avenue.
- The approved commercial floor space on Level 1 has been reduced in size from 638sqm to 612sqm. The loss of 26sqm results in a 4% reduction in commercial floor space. Notwithstanding, the reduced GFA is a direct result of enlarged voids to the ground floor level, which results in an overall improved amenity to the development and facilitates tree planting to the Scape lobby below.
- It is noted that the Proposal results in 3sqm additional retail floor space on the ground floor, and a reduction of 26sqm of commercial floor space on Level 1 and therefore the actual loss of retail/commercial floor space is negligible.
- The relocation of the substation from the basement level to the ground floor level results in a minor loss of non-residential GFA from the ground floor level amounting to approximately 25sqm. The relocation is to facilitate authority approval and is largely unavoidable.
- The expansion of the ground floor comms room, waste management rooms, and other service areas to provide sufficient space to be fit for purpose constitutes the remainder of the loss of non-residential GFA. The loss of GFA relates to the conversion of parts of the ground floor to areas excluded by GFA calculations to facilitate the efficient operation of the development and is unavoidable in this regard.

On balance, the proposed non-compliance is considered to achieve a planning purpose by providing a well-designed retail and commercial floor space in a suitable location. These benefits are in absence of any significant additional adverse streetscape or amenity impacts. Therefore, having regard to the above, there are sufficient environmental planning grounds to permit variation to the development standard for non-residential FSR.

As demonstrated, the proposed development, as modified, will comprehensively meet the objectives of the development standards for non-residential FSR and will continue to meet the zone objectives of the zone. The Modified proposal will generate the economic benefit of strengthening the employment area and supporting its viability.

Accordingly, the consent authority can be satisfied that it is in the public interest to vary the standard for the purpose of the Modified Proposal. There are no unreasonable impacts that will result from the proposed variation to the non-residential FSR development standard. The flexibility enabled by Clause 4.6 will, in this case, produce a better environmental planning outcome than would result from strict compliance.

Assessing Officer's Clause 4.6 Review:

Numerically the development will continue to provide two retail tenancies on the ground floor and a commercial space on the first floor. The modification has not substantially altered the land use composition of the building, with reductions predominantly related to the commercial lobby area and back of house zones on the ground floor. The retail tenancies are allocated with a minor increase to floor area when compared to the original approval and the extent of façade activation has also been enhanced along the Anzac parade frontage through the incorporation of additional retail frontage on this elevation. In addition, the proposed amendments will facilitate improved amenity through void connections to the first floor and ensure that adequate space is afforded for building services including an automated waste management system, an accessible substation to the secondary street frontage and required service areas.

The subject modification is generally consistent with the approved floor space allocation, with minor improvements incorporated to the lettable commercial and retail uses of the development. As such, the modification has demonstrated 'that a suitable level of non-residential floor space is provided to promote commercial and retail activity within the Kensington town centre' and that the intent of the previous LEC order will be upheld.

Accordingly, based on the above assessment, it is considered that the proposed development has demonstrated consistency with the objectives of the non-residential FSR standard as detailed by the applicant and will remain compliant with the relevant objectives of the B2 Local Centre Zone also applicable under the original assessment. Overall, it is considered that there are sufficient environmental planning grounds to justify contravening the development standard, the variation is not deemed contrary to the public interest and there is no public benefit in maintaining the numeric standard in this instance.

6.2 Site Isolation

The subject modification has predominantly retained building separation distances along the rear boundary interface with only a minor 220mm partial reduction of the tower façade to provide a glass curtain wall design. The lower podium levels remain unaltered to facilitate a potential laneway through site link from Todman Avenue to the north-eastern corner of the site.

The amendment of the basement layout has resulted in the future penetration connection point being reduced from a dual to single carriageway and relocated to the south-eastern corner of the site. The proposed configuration was reviewed by Council's Engineer, who raised initial concerns with the functionality of the penetration zone not facilitating dual carriageway access. In response, the Applicant's Traffic Engineer has provided a compliance statement that satisfactorily demonstrates the operation of the future penetration zone without the removal of any car and motorcycle parking or bicycle storage facilities.

Accordingly, Condition 35 has been amended to include reference to the Traffic Engineering Statement in support of the revised configuration, which has demonstrated the positioning of traffic signals and waiting bays on the ground floor and basement to facilitate potential two-way parking access with No.'s 118-120 Todman Avenue, Kensington. The proposed design has demonstrated an improved outcome that is no longer reliant on a second basement turntable to facilitate accessibility with the adjoining property.

Conditions requiring the Council approval of the final design at CC (Condition 35) and title registration prior to OC stage (Condition 140) are retained on the consent and as such the revised basement layout is not considered to materially impact the LEC approval.

7. CONCLUSION

This modification application has been considered in accordance with the requirements of the EP&A Act and the 2021 EP&A Regulation as outlined in this report. Following a thorough assessment of the relevant planning controls, issues raised in submissions and the key issues identified in this report, it is considered that the application can be supported.

It is recommended that the application to modify the approved development be approved for the following reasons:

- The proposed modifications are considered to result in a development that is substantially the same as the previously approved development.
- The modified development will not result in significant adverse environmental impacts upon the amenity and character of the locality.
- The proposal is generally consistent with the relevant objectives contained within the SEPP ARH, RLEP 2012 and the relevant requirements of the RDCP 2013 and the K2K DCP 2020.
- The proposal is consistent with the specific objectives of the B2 Local Centre zone in that it shall maintain its contribution to the range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area; encourage employment opportunities; maximises public transport, provide residential development that is well-integrated with, and supports the primary business function of, the zone; provides a high standard of urban design; and protects the amenity of surrounding residents.

The application is recommended for approval subject to the following amended conditions:

8. RECOMMENDATION

It is recommended that the Sydney Eastern City Planning Panel, grants development consent under Section 4.56 of the Environmental Planning and Assessment Act 1979, as amended, to Development Application No. DA/414/2020/A to amend the development consent granted by the NSW Land and Environment Court, where the development will remain substantially the same as the development that was originally approved at 172-180 Anzac Parade & 116R Todman Avenue, Kensington, in the following manner:

- **Amend Condition 1 to read:**

Approved Plans & Supporting Documentation

1. The development must be implemented substantially in accordance with the plans and supporting documentation listed below and endorsed with Council's approved stamp, except where amended by Council in red and/or by other conditions of this consent:

Plan No.	Rev No.	Drawn by	Dated
AR-A10-10-00	G	BVN	24/03/2021
AR-B20-00-00	U	BVN	20/04/2021
AR-B20-01-00	R	BVN	20/04/2021

AR-B20-02-00	Q	BVN	20/04/2021
AR-B20-03-00	M	BVN	24/03/2021
AR-B20-04-00	N	BVN	24/03/2021
AR-B20-08-00	N	BVN	24/03/2021
AR-B20-09-00	K	BVN	24/03/2021
AR-B20-14-00	G	BVN	24/03/2021
AR-B20-17-00	J	BVN	24/03/2021
AR-B20-18-00	N	BVN	24/03/2021
AR-B20-B1-00	Q	BVN	19/04/2021
AR-U10-00-00	J	BVN	19/04/2021
AR-C10-AA-00	M	BVN	24/03/2021
AR-C10-BB-00	O	BVN	19/04/2021
AR-C10-CC-00	O	BVN	07/04/2021
AR-C10-DD-00	N	BVN	24/03/2021
AR-C20-CC-00	D	BVN	07/04/2021
AR-C20-DD-00	D	BVN	07/04/2021
AR-D10-AA-01	K	BVN	24/03/2021
AR-D10-BB-01	K	BVN	24/03/2021
AR-E10XX-XX	B	BVN	24/03/2021
AR-E10-AA-00	D	BVN	24/03/2021
AR-E10-BB-00	D	BVN	24/03/2021
AR-E10-CC-00	C	BVN	24/03/2021
AR-E20-10-00	A	BVN	24/03/2021
LD-S34-000	1	Landform Studios	26/03/2021
LD-S34-100 (Materials & Planting Schedules)	1	Landform Studios	26/03/2021
LD-S34-100 (Landscape Plan Ground Plane & Public Domain)	1	Landform Studios	25/03/2021
LD-S34-100 (Level 2 Landscape Plan & Green Roof)	1	Landform Studios	25/03/2021
LD-S34-120	1	Landform Studios	25/03/2021
LD-S34-130	1	Landform Studios	25/03/2021
LD-S34-140	1	Landform Studios	25/03/2021
LD-S34-150	1	Landform Studios	25/03/2021
LD-S34-300	1	Landform Studios	25/03/2021
LD-S34-900	1	Landform Studios	25/03/2021

BASIX Certificate No.	Dated
1121323M_02	04/05/2021

EXCEPT where amended by:

- Council in red on the approved plans; and/or
- Other conditions of this consent; and/or
- The following Section 4.56 "A" plans and supporting documents only in so far as they relate to the modifications highlighted on the plans and detailed in the application:

Plan No.	Rev No.	Drawn by	Dated
AR-B20-00-00	2	Bayley Ward	13/03/2023
AR-B20-01-00	2	Bayley Ward	13/03/2023
AR-B20-02-00	2	Bayley Ward	13/03/2023
AR-B20-03-00	1	Bayley Ward	05/10/2022

AR-B20-04-00	1	Bayley Ward	05/10/2022
AR-B20-08-00	1	Bayley Ward	05/10/2022
AR-B20-09-00	1	Bayley Ward	05/10/2022
AR-B20-17-00	1	Bayley Ward	05/10/2022
AR-B20-18-00	1	Bayley Ward	05/10/2022
AR-B20-B1-00	1	Bayley Ward	05/10/2022
AR-C10-AA-00	2	Bayley Ward	13/03/2023
AR-C10-BB-00	1	Bayley Ward	05/10/2022
AR-C10-CC-00	2	Bayley Ward	17/02/2022
AR-C10-DD-00	2	Bayley Ward	17/02/2022
AR-C20-CC-00	2	Bayley Ward	13/03/2023
AR-C20-DD-01	2	Bayley Ward	13/03/2023
AR-D10-AA-01	2	Bayley Ward	17/02/2022
AR-D10-BB-01	1	Bayley Ward	05/10/2022
AR-D10-01-00	1	Bayley Ward	13/03/2023
AR-E10 XX-XX	1	Bayley Ward	05/10/2022
AR-E10-AA-00	1	Bayley Ward	05/10/2022
AR-E10-BB-00	1	Bayley Ward	05/10/2022
AR-E10-CC-01	1	Bayley Ward	05/10/2022
AR-E20-10-00	1	Bayley Ward	05/10/2022

BASIX Certificate No.	Dated
1121323M_04	01/08/2022

• **Amend Condition 7 to read:**

Sydney Airport

7. The condition from Sydney Airport shall be complied with as follows

In accordance with regulation 14, **I approve** the controlled activity for the intrusion of a building at 172-180 Anzac Parade & 116 Todman Avenue, Kensington NSW into prescribed airspace for Sydney Airport to a **maximum height of 86.15 metres AHD**.

In making my decision, I have taken into consideration the opinions of the Proponent, the Civil Aviation Safety Authority, Airservices Australia's advice number YSSY-CA-398 P2 and SACL.

In accordance with regulation 14(1)(b), I impose the following conditions on my approval:

1. The building **must not exceed** a maximum height of **85.6 metres AHD**, this **includes all** lift over-runs, vents, chimneys, aerials, antennas, lightning rods, any roof top garden plantings, exhaust flues etc.
2. The building **must be obstacle lit** by low intensity steady red lighting during the hours of darkness at the highest point of the building. Obstacle lights are to be arranged as per section 9.31 of the Civil Aviation Safety Regulations 1998 – Part 139 (Aerodromes) Manual of Standards 2019 (the MOS). Characteristics for low intensity lights are stated in section 9.32 of the MOS.
3. If at any time after the height of the building has reached 66 metres AHD, the crane(s) used to construct the building are removed and no other crane(s) are in place then the Proponent **must arrange** for the highest point of the building to be obstacle lit with a low intensity steady red lighting during the hours of darkness. Characteristics for low intensity lights are stated in section 9.32 of the MOS.

4. The proponent **must ensure** obstacle lighting is maintained in serviceable condition and any outage immediately notified to SACL.
5. The Proponent **must ensure** the obstacle lighting has a remote monitoring capability. For detailed requirements for the monitoring of obstacle lights within the aerodrome's OLS refer to section 9.36 of the MOS.
 - The proposed obstacle lighting system **must incorporate** an alarm system that will provide remote monitoring to notify the person responsible for the maintenance of the obstacle lighting. The designated person must be available 24 hours per day, 7 days per week. Action must be taken to repair the obstacle lighting within 12 hours of the light not operating. The contact details of the person responsible for the monitoring of the obstacle lighting must be sent to SACL prior to the obstacle lights operating and must be kept up to date. In the event of the obstacle lighting being inoperable, the person responsible for the maintenance of the obstacle lighting must immediately contact the Sydney Airport Airfield Operations Supervisor on 0419 278 208 or 9667 9824. Once the obstacle lighting is working again, the person responsible for the maintenance of the obstacle lighting must notify the Sydney Airport Airfield Operations Supervisor
6. Following completion of the building, the Proponent **must advise** SACL, in writing:
 - a) that the future owner(s)/manager(s) of the building **have been informed** of their **obligation to maintain** the obstacle lighting in accordance with conditions of this approval; and
 - b) the contact details of the person/position **responsible for the maintenance** of the obstacle lighting. These details **must be reviewed regularly** and kept up to date.
7. Separate approval **must be sought** under the Regulations for any equipment (i.e. cranes) required to construct the building. Construction cranes may be required to operate at a height significantly higher than that of the proposed controlled activity and consequently, may not be approved under the Regulations. Therefore, it is advisable that approval to operate construction equipment (i.e. cranes) be obtained prior to any commitment to construct.
8. The Proponent **must advise** Airservices Australia at least three business days prior to the controlled activity commencing by emailing ifp@airservicesaustralia.com and quoting YSSY-CA-398 P2.
9. On completion of construction of the building, the Proponent **must provide** the airfield design manager with a written report from a certified surveyor on the finished height of the building.

Breaches of approval conditions are subject to significant penalties under Sections 185 and 187 of the Act.

• **Amend Condition 13 to read:**

- Kensington and Kingsford Town Centre Section 7.12 Development Contributions**
13. In accordance with the Kensington and Kingsford Town Centre Development Contributions Plan 2019, based on the development cost of ~~\$37,012,800~~ **\$39,035,700.00** (incl GST) a s7.12 levy of ~~\$925,320~~ **\$975,892.50** must be paid to Council.

The levy must be paid in cash, bank cheque or by credit card prior to a construction certificate being issued for the proposed development. The development is subject to an index to reflect quarterly variations in the Consumer Price Index (CPI) from the date of Council's determination to the date of payment. Please contact Council on telephone 9093 6999 or 1300 722 542 for the indexed contribution amount prior to payment.

To calculate the indexed levy, the following formula must be used:

$$IDC = ODC \times CP2/CP1$$

Where:

IDC = the indexed development cost

ODC = the original development cost determined by the Council

CP2 = the Consumer Price Index, All Groups, Sydney, as published by the ABS in respect of the quarter ending immediately prior to the date of payment

CP1 = the Consumer Price Index, All Groups, Sydney as published by the ABS in respect of the quarter ending immediately prior to the date of imposition of the condition requiring payment of the levy.

- **Amend Condition 14 to read:**

Kensington and Kingsford Town Centre Community Infrastructure Contributions

14. In accordance with Clause 6.17 (Community infrastructure height of buildings and floor space at Kensington and Kingsford town centres) of the RLEP 2012, a monetary community infrastructure contribution (CIC) of ~~\$1,619,750~~ **\$1,621,175** must be paid to Council.

The CIC is calculated at \$475 x per square metre of additional residential floor space granted under the Alternative Height of Building Height Map applicable to the site under Clause 6.17 of the RLEP 2012.

The levy must be paid in cash, bank cheque or by credit card prior to a construction certificate being issued for the proposed development.

- **Amend Condition 22 to read:**

22. A report/correspondence prepared by a suitably qualified and experienced consultant in *acoustics* shall be submitted to Councils Manager Development Assessments and accepted **prior to a construction certificate being issued** for the development, which demonstrates that noise and vibration emissions from the development will satisfy the relevant provisions of the

- Protection of the Environment Operations Act 1997,*
- NSW Environmental Protection Authority (NSW EPA); Noise Policy for Industry and relevant Guidelines, and
- The adopted Council K2K DCP and development control measures as set out in Section 14 Acoustic Privacy and Section 26 Student Accommodation; and
- relevant conditions of consent (including any relevant approved acoustic report and recommendations), and
- Australian Standard AS2107:2016 "Acoustics - Recommended design sound levels and reverberation times for building interiors"
- Department of Planning *Development Near Rail Corridor and Busy Roads – Interim Guideline.*
- Demonstrate that the approved façade works under DA/414/2020/A do not compromise the acoustic integrity of the premise. The works must not interfere with the functionality of, or decrease the performance of, any pre-existing feature/s that were included in the original development to protect its occupants from noise. The premises must remain capable of complying with any relevant internal noise criteria evaluated as part of previous development application DA/414/2020.**

Note: *Suitably qualified Acoustic Consultant* means a consultant who possesses the qualifications to render them eligible for membership of the Australian Acoustical Society, Institution of Engineers Australia or the Association of Australian Acoustical Consultants at the grade of member.

- **Amend Condition 35 to read:**

Future Penetration Zone in Basement Carpark

35. Prior to a Construction Certificate being issued the applicant must submit to Council for approval, and have approved, a detailed strategy for creating a penetration through the eastern wall of the basement carpark to create a link with 118-120 Todman Avenue. **The final design must also consider the recommendations of correspondence titled: DA/4.55 RFI – DA/414/2020 – P2059 Scape Todman – Traffic Engineering Response, prepared by: Ason Group, dated: 31/03/2023.**

The strategy shall document removal of the basement wall, creation of any necessary rights of carriageway and shall fully consider staging of the works such that the basement is fully protected from groundwater during construction of the penetration.

The applicant must liaise with Council's Development Engineer prior to preparation of the strategy to obtain all of Council's requirements. All costs associated with the future connection from the development site (basement level) to 118-120 Todman Avenue must be met by the applicant.

- **Amend Condition 50 to read:**

50. Car parking, motorcycle parking and bicycle parking shall be provided in accordance with Drawing Number AR-B20-B1-00 ~~Issue Q~~ **Revision 1, dated 05/10/2022**. The Construction Certificate plans must demonstrate compliance with this requirement.

- **Amend Condition 115 to read:**

Kensington and Kingsford Town Centre Affordable Housing Contribution

115. An affordable housing contribution of ~~\$2,079,924.56~~ **\$2,080,897.70** is required to be paid to Council. The amount of the contribution is calculated in accordance with Clause 6.18 of the RLEP 2012, the Kensington and Kingsford Town Centres Affordable Housing Plan adopted by the Council on 10 December 2019 and is based on a residential floor area of ~~6,412~~ **6,415**m² and an Affordable Housing Contribution Rate of \$324.38 per square metre.

Payment of this contribution shall be made prior to the issue of the Occupation Certificate.

The levy must be paid in cash, bank cheque or by credit card prior to an Occupation certificate being issued for the proposed development. The development is subject to an index to reflect quarterly variations in the Consumer Price Index (CPI) from the date of Council's determination to the date of payment. Please contact Council on telephone 9093 6999 or 1300 722 542 for the indexed contribution amount prior to payment.

To calculate the indexed levy, the following formula must be used:

$$IDC = ODC \times CP2/CP1$$

Where:

IDC = the indexed development cost

ODC = the original development cost determined by the Council

CP2 = the Consumer Price Index, All Groups, Sydney, as published by the ABS in respect of the quarter ending immediately prior to the date of payment

CP1 = the Consumer Price Index, All Groups, Sydney as published by the ABS in respect of the quarter ending immediately prior to the date of imposition of the condition requiring payment of the levy.

- **Amend Condition 123 to read:**

123. A report, prepared by a suitably qualified and experienced consultant in acoustics, shall be submitted to the Principal Certifier and Council, which demonstrates and certifies that noise and vibration from the development satisfies the relevant provisions of the Protection of the Environment Operations Act 1997, ~~NSW EPA Noise Control Manual & Industrial Noise Policy~~ **NSW Environment Protection Authority Noise Policy for Industry 2017**, Council's conditions of consent (including any relevant approved acoustic report and recommendations), to the satisfaction of Council. The assessment and report must include all relevant fixed and operational noise sources. Sources may include but not limited to all plant and equipment such as air conditioning units, mechanical ventilation and audio-visual equipment for outdoor cinema.

9. Attachments to report:

Nil