

Sydney North Planning Panel Meeting 21 June 2023
13-19 CANBERRA AVENUE, ST LEONARDS

Subject: 13-19 Canberra Avenue, St Leonards
Record No: DA21/162-01 - 26548/23
Division: Environmental Services Division
Author(s): Greg Samardzic

Panel Reference	PPSSNH-380
DA Number	162/2021
LGA	Lane Cove Council
Proposed Development	Section 4.55(2) modification to an approved mixed-use development
Street Address	Nos. 13 to 19 Canberra Avenue, St Leonards
Applicant/Owner	Applicant: Simon Truong - HPG General P/L Owners: SLD P/L
Date of DA lodgement	13 March 2023
Total number of Submissions Number of Unique Objections	<ul style="list-style-type: none"> • 15 • 15 • All submissions have been forwarded to the SNPP
Recommendation	Refusal
Regional Development Criteria (Schedule 6 of the SEPP (Planning Systems) 2021)	Development has a capital investment value of more than \$30 million.
List of all relevant s4.15(1)(a) matters	<ul style="list-style-type: none"> • relevant environmental planning instruments <ul style="list-style-type: none"> - SEPP 65 – Design Quality of Residential Apartment Development; - SEPP (Building Sustainability Index) 2004; and - Lane Cove Local Environmental Plan 2009. • proposed instrument that is or has been the subject of public consultation under the Act and that has been notified to the consent authority <ul style="list-style-type: none"> - N/A • relevant development control plan <ul style="list-style-type: none"> - Lane Cove Development Control Plan 2009 • relevant planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4 <ul style="list-style-type: none"> - Planning agreement that the developer had offered to be entered into under Section 7.4 under the original development consent

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- **relevant regulations e.g. Regs 92, 93, 94, 94A, 288**
- Nil
- **coastal zone management plan**
- Nil
- other relevant plans**
- St Leonards South Section 7.11 Contributions Plan

List all documents submitted with this report for the Panel's consideration

Annex.	Document	Prepared By
1	Draft Reasons for Refusal	Lane Cove Council
2	ADG Assessment	Lane Cove Council
3	Development Control Plan Assessment	Lane Cove Council
4	Summary of Submissions	Lane Cove Council
5	NSROC DRP Minutes	NSROC Design Review Panel
6	Neighbour Notification Map	Lane Cove Council
7	Architectural Plans	SJB
8	Landscape Plans	Site Image
9	Statement of Environmental Effects	Planning Ingenuity
10	Design Verification Statement	SJB
11	Design Review Panel Reporting	-
12	Design Excellence Panel Reporting	-
13	Urban Design Report	SJB
14	Access Report	Accessible Building Solutions
15	Acoustic Report	PWNA
16	NatHERS and BASIX Report	Efficient Living
17	BCA Report	Credwell
18	Applicant's Legal Advice	Mills Oakley
19	Notification Plans	SJB
20	Operational Waste Management Plan	Elephants Foot
21	Traffic and Parking Assessment	TTPA
22	Wind Effects Response Report	Windtech
23	QS Report	Mitchell Brandtman
24	Briefing Note to the SNPP	Lane Cove Council
25	Kick Off Record of Briefing	SNPP
26	Applicant's Kick Off Briefing	Hycorp
27	Applicant's Design Review Panel Presentation	SJB
28	Approved Stamped Plans	Lane Cove Council
29	Original Assessment Report	Lane Cove Council

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	30	Alterations & Additions DA Assessment Report	Lane Cove Council
	31	Alterations & Additions DA Plans	SJB
Clause 4.6 requests	Not applicable		
Summary of key submissions	<ul style="list-style-type: none"> • Building Height • Number of Storeys 		
Report prepared by	Greg Samardzic		
Report date	21 June 2023		

Summary of s4.15 matters

Have all recommendations in relation to relevant s4.15 matters been summarised in the Executive Summary of the assessment report? **Yes**

Legislative clauses requiring consent authority satisfaction

Have relevant clauses in all applicable environmental planning instruments where the consent authority must be satisfied about a particular matter been listed, and relevant recommendations summarised, in the Executive Summary of the assessment report? **Yes**

e.g. Clause 7 of SEPP 55 - Remediation of Land, Clause 4.6(4) of the relevant LEP

Clause 4.6 Exceptions to development standards

If a written request for a contravention to a development standard (clause 4.6 of the LEP) has been received, has it been attached to the assessment report? **Not applicable**

Special Infrastructure Contributions

Does the DA require Special Infrastructure Contributions conditions (S7.24)? **Yes – condition imposed under original consent**
Note: Certain DAs in the Western Sydney Growth Areas Special Contributions Area may require specific Special Infrastructure Contributions (SIC) conditions

Conditions

Have draft conditions been provided to the applicant for comment? **No – refusal recommended**
Note: in order to reduce delays in determinations, the Panel prefer that draft conditions, notwithstanding Council's recommendation, be provided to the applicant to enable any comments to be considered as part of the assessment report

1. EXECUTIVE SUMMARY

The original consent (Development Consent No. 162/2021) was for the demolition of existing structures and construction of a mixed-use development containing demolition of existing structures and construction of a mixed-use development comprising 81 apartments, childcare centre for 60 children, community facility, restaurant/café and basement parking for 116 vehicles, pedestrian link and stratum/strata subdivision.

A maximum height of 43.5m and 12 storeys was proposed on the development site known as Area 5. However, the applicant stated that the approved development height is actually 44.7m which had breached the 44m LEP development standard by virtue of the SNPP imposing a condition (Condition A.2) requiring a provision of a 1.2m parapet on top of the proposed maximum 43.5m proposed building. This claim is disputed as the LEP excludes architectural roof features from height calculations.

The subject Section 4.55(2) Modification Application to Development Consent No. 162/2021 is as follows:

- Basement Level 3 is amended to provide an additional seven carparking spaces;
- The floor to ceiling height of Level 12 has been reduced from 4.6m to 3.1m;
- Construction of two new levels (storeys) which would accommodate four additional apartments;
- Level 13 is introduced and provides three (3) x 3-bedroom apartments;
- Level 14 is introduced which provides one (1) penthouse apartment containing 4 bedrooms; and
- A new roof is proposed above these new floors.

The justification for the proposed works is to ensure that the additional height has limited visual impact from the streetscape and surrounding properties and that overshadowing impacts are minimised. The proposal development remains below the maximum allowable FSR permitted under the Lane Cove LEP. In essence, the proposal aims to match the floor space available under the LEP to accommodate the public benefits to be delivered under the Incentive FSR scheme. To achieve this, it is proposed that the additional height that will exceed the maximum building height of 44m.

The proposal seeks to vary the maximum 44m LEP Incentive Building Height map by 4.16m (9.5%) under Clause 7.1 and the maximum 12 storeys DCP control by two storeys. The original proposal had complied with both with the height and number of storeys controls by all intents and purposes.

The first test of a Section 4.55 is whether the proposal is 'substantially the same' development. It is Council's view that the subject application does not meet this test and would also be inconsistent with the reasons for approval provided by the Sydney North Planning Panel (SNPP) under the original consent. The proposed variation to height is not supported on the basis that the development as amended exceeds the height limit under Clause 7.1 of the LEP. It is noted that applicant originally had proposed a breach in height under the original application and was amended to comply to address Council's concerns. It is recommended that the Panel does not grant approval to this proposed breach.

The proposed variation to the number of storeys is also not supported as Area 5 contains a maximum 12 storey DCP control and a maximum of 14 storeys is proposed. Again, full compliance should be achieved, and it is recommended that the Panel does not approve such a variation as the additional storeys proposed contributes to the above substantial height breach and other approvals within the precinct have achieved with full compliance with this control. The applicant also had originally proposed 14 storeys under the original application and was amended to comply to obtain a recommendation for approval to the panel which was fully aware of this background when granting consent originally.

The proposal is not supported due to its substantial non-compliant nature and a better planning outcome would not be necessarily achieved other than achieving more development yield for the developer or maximise the Floor Space Ratio (FSR) available on the site. Approval would be contrary to the other panel approved compliant developments within the precinct and is reported to the SNPP with a recommendation for **refusal**.

2. STRATEGIC CONTEXT

2.1 St Leonards South Precinct

The subject development site is located within the St Leonards South Precinct. The St Leonards South Precinct was brought into effect on **1 November 2020** through amendments to *Lane Cove Local Environmental Plan 2009* and *Lane Cove Development Control Plan 2009*. The precinct planning was finalised concurrently with the *St Leonards Crows Nest 2036 Plan*. Further information on the history prior to finalisation is available on [Council's website](#) and the [Department's website](#).

2.2 Location

The St Leonards South Precinct is bounded by Marshall Avenue to the north, Canberra Avenue to the east, Park Road to the west and River Road to the south as shown in **Figure 1** below. Key features of the locality within which the precinct is situated include the Pacific Highway, rail/metro to the east, a commercial centre (St Leonards Plaza and St Leonards Square) and Newlands Park and Gore Hill Oval.



Figure 1: St Leonards South Precinct



Figure 2: St Leonards South Precinct – Concept Photomontage

2.3 Vision

The vision of the St Leonards South Precinct is described within *Lane Cove Development Control Plan 2009 Part C – Residential Localities – Locality 8* as follows:

The desired future character of the St Leonards South Precinct is for a liveable, walkable, connected, safe, Precinct which builds upon the transit and land use opportunities of St Leonards and Metro Stations and commercial centre.

2.4 Planning Controls

The planning controls and mechanisms to achieve the vision of the Precinct are detailed and addressed later in this report.

The planning controls are principally contained within [Part 7 of Lane Cove Local Environmental Plan 2009](#) and supported by a precinct-specific part of *Lane Cove Development Control Plan 2009*, a Landscape Master Plan, a Section 7.11 Contributions Plan and designation as a Special Infrastructure Contribution area.

The Precinct is divided into 'Areas' which are the envisaged amalgamated development sites (**Figure 3**). The subject development site is known as Area 5.



Figure 3: St Leonards South Precinct – Area Designation

The key provisions of *Lane Cove Local Environmental Plan 2009* are summarised as follows:

i. Zoning

The Precinct is zoned R4 High Density Residential (with exception of a park and new road).

ii. Incentive Building Height and FSR

The planning scheme operates with an incentive building height and incentive floor space ratio control. The incentive maximum building height and floor space ratio are available only if the incentive provisions of Part 7.1(4) of *Lane Cove Local Environmental Plan 2009* are provided which are summarised as follows:

- **Unit Mix:** Minimum 20% of each 1, 2 and 3 bedroom dwellings (Part 7.1(4)(a)-(c);
- **Green Spine:** Setbacks to establish communal open space between buildings (Part 7.1(4)(d));
- **Minimum Site Area:** Site amalgamations (Part 7.1(4)(e) and Part 7.2);
- **Affordable Housing:** The provision of affordable housing (Part 7.1(4)(f) and Part 7.3);
- **Recreation Areas and Community Facilities:** The provision of recreation areas and community facilities (Part 7.1(4)(g) and Part 7.4); and
- **Pedestrian Links and Roads:** The provision of pedestrian links and roads (Part 7.1(4)(h) and Part 7.5).

Note: Unit mix, green spine and site area provisions apply to all sites. Affordable housing, recreation areas and community facilities, and pedestrian links and roads are allocated on a per site/area basis.

iii. No Clause 4.6 Variation Requests

The planning scheme precludes the use of Clause 4.6 to vary the incentive building height, incentive floor space ratio, incentive provisions (with exception of the minimum site area provision to allow for site hold-out scenarios) and design excellence provisions.

iv. Design Excellence

The planning scheme seeks to provide design excellence in relation to architectural, urban and landscape design. The criteria for achieve design excellence is listed in [Part 7.6 of Lane Cove Local Environmental Plan 2009](#). The consent authority cannot grant development consent unless it is satisfied that design excellence is achieved.

v. NSROC Design Review Panel

The North Sydney Region of Council's Design Review Panel was established to coincide with the commencement of the St Leonards South Precinct planning scheme. The Panel will provide advice on SEPP 65 and design excellence (Part 7.6 of LCLEP 2009) for development within the St Leonards South Precinct.

The Panel process occurs **prior to lodgement of the Development Application** aiming to resolve key issues and provide for higher quality lodgements. The NSROC Design Review Panel comments will assist Council and the Sydney North Planning Panel in determining SEPP 65 and design excellence.

Development Control Plan

A Precinct-specific Development Control Plan is contained within [Lane Cove Development Control Plan 2009 Part C – Residential Localities – Locality 8 – St Leonards South Precinct](#). The DCP guides infrastructure, access, built form (setbacks etc.), public domain, private domain, sustainability, and landscaping (including calling up the Landscape Master Plan).

i. Green Spines - Shared Communal Open Space

Green spines are a key feature of the St Leonards South Precinct. The green spine is a 24m wide shared communal open space between residential flat buildings.

Ordinarily a residential flat building development would provide communal open space for its own use only.

The green spines will combine the communal open space of multiple residential flat buildings with each contributing to, and sharing in, a larger communal open space area.

The shared communal open space will be grouped in accordance with **Figure 4** and is characterised by shared facilities and significant landscaping (50% minimum deep soil).



Figure 4: Green Spines (Shaded Green)

ii. Part Storey Control

The DCP includes a maximum number of storeys control. Importantly, the DCP includes the following in relation to calculating the number of storeys:

Part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey.

This is being applied where there is any part of a storey beneath the ground level (existing) resulting from (1) excavation of a steep slope **or** (2) including basement parking, the entire storey will not be counted as a storey.

As per Amendment 20 the definition of a part storey is:

- a) *“part storey means a storey where the floor level is partly more than 1 metre below ground level (existing) and where 50% of the space within the storey is used as non-habitable space (such as for car parking, vehicular access, plant rooms, mechanical services, loading areas, waste storage or the like) that is ancillary to the main purpose for which the building is use.”*

It is noted that at the same time as amending the definition of a ‘part storey’ Council also amended Clause 1.6 Savings Provisions to include a ‘note’ as shown in bold italics below:

Note : The provisions of this DCP as amended by Lane Cove Development Control Plan 2009 (Amendment No. 20) apply to development applications made both before and after Lane Cove Development Control Plan 2009 (Amendment No. 20) came into effect, despite any other provision of this DCP.

Landscape Master Plan

The private and public domain urban and landscape design are further detailed within the [St Leonards South Landscape Master Plan](#). The Landscape Master Plan provides design guidance to the **public domain** (materiality, lighting, street trees, road infrastructure etc.), **private domain** (green spine levels, green spine facilities and landscaping calculations) and **public/private domain interface** (such as ground floor apartment fencing/landscaping design).

St Leonards South Section 7.11 Plan

The provision of infrastructure is proposed to be facilitated in part through the [St Leonards South Section 7.11 Contributions Plan](#) which is now in force.

Special Infrastructure Contribution

The site is within the [St Leonards and Crows Nest Special Contributions Area](#) which requires the payment of a contribution to support the St Leonards and Crows Nest 2036 Plan.

2.5 Site in Future Envisaged Context

The subject site is centrally located within the northern-eastern part of the St Leonards South Precinct and is known as **Area 5**. The site in the future envisaged context would include provision of a child-care centre and community facility in a future residential flat building development. Further, it is envisaged that there be an east-west public pedestrian link along the southern boundary and the western portion be shared green spine with Area 6.



Figure 5: Subject Site in Future Envisaged Context

3. SITE AND SURROUNDS

3.1 Subject Site

The subject site is known as Nos. 13 to 19 Canberra Avenue, St Leonards with a total site area of 2,629.2m². The site is known as Area 5 within the St Leonards South Precinct planning scheme and located in the north-eastern part of the Precinct. The site is located on the western side of Canberra Avenue, south of its intersection with Marshall Avenue and west of Duntroon Avenue. The site had recently commenced construction works. The key site characteristics are summarised in below.

Site Characteristics of Nos. 13-19 Canberra Avenue	
Site Characteristic	Subject Site
Title Particulars	Nos. 13 to 19 Canberra Avenue - Lots 11-14 Sec 3 DP 7259
Total Site Area	2,629.2m ²
Site Frontage	Approx. 61.08m to Canberra Avenue (east) Approx. 60.96m to the western common boundary Approx. 41.37m to the northern common boundary Approx. 44.89m to the southern common boundary
Site width	Approx. 61m
Topography	Approx. 6.83m from north to south (RL65.10 to RL58.27)
Zoning	R4 High Density Residential

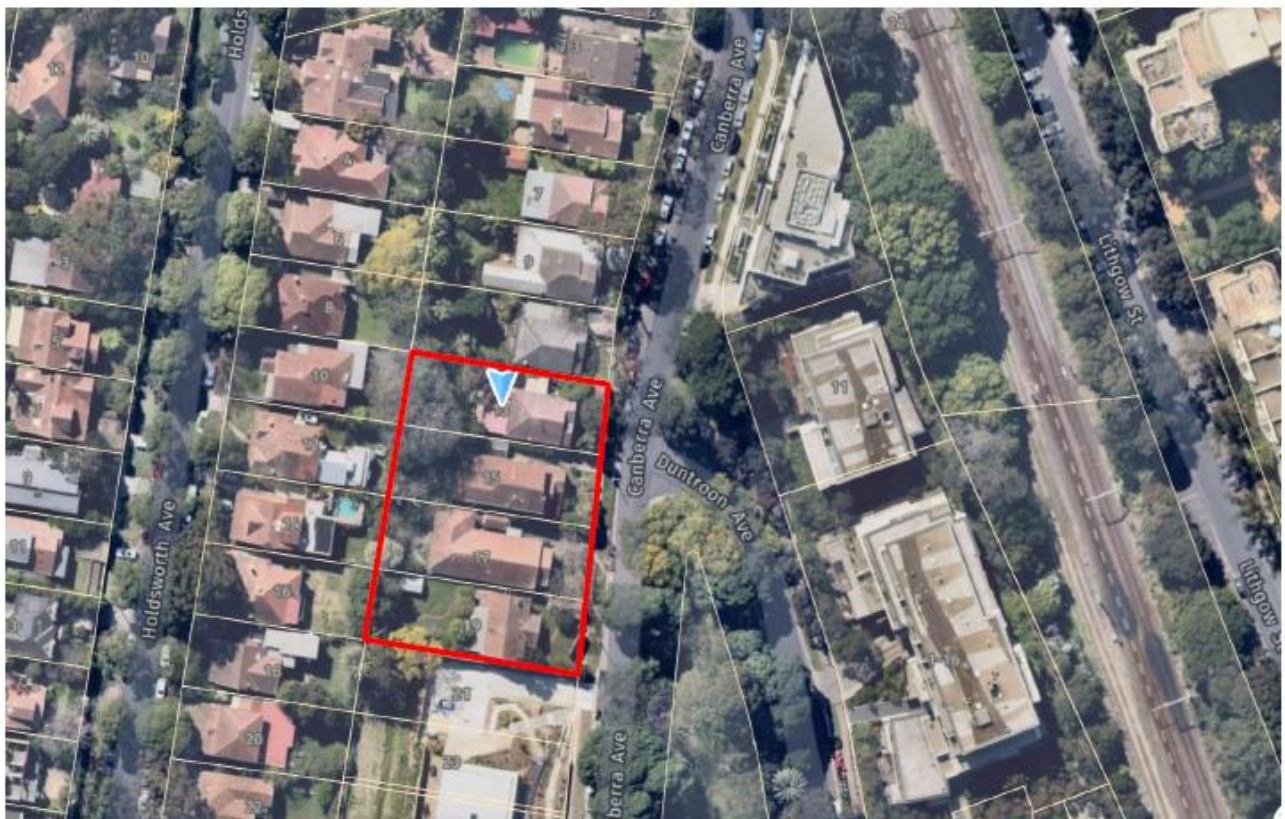


Figure 6: Subject Site

3.2 Adjoining/Surrounding Sites

The area or the precinct is in transition towards a desired future character which is reflected in the planning instruments and recently constructed developments. Recently constructed residential flat buildings adjoin the site to the north and east. There have been other approvals within the precinct as described below:

Land to the south comprising Areas 7-11 has obtained development consent (Development Consent No. 99/2021) for redevelopment from the Sydney North Planning Panel on 2 March 2022. Approval was granted for the demolition of existing structures and construction of five residential flat buildings (ranging from 6 to 10 storeys) comprising a total of 330 apartments and basement parking for 372 vehicles. This development site is currently under construction.

Land to the northwest comprising Areas 12 has obtained approval (Development Consent No. 187/2021) for demolition of the existing structures and construction of three residential flat buildings (ranging from 12 to 19 storeys) comprising a total of 232 apartments and basement parking for 348 vehicles.

Land to the north comprising Areas 1, 2 & 4 has obtained approval (Development Consent No. 79/2022) for demolition of the existing structures and construction of a part 10 and part 12 storey residential flat building comprising 96 apartments and basement parking for 110 vehicles.

Land to the southwest comprising Areas 18-20 has obtained development consent (Development Consent No. 60/2022) from the SNPP for the demolition of existing structures and construction of five residential flat buildings comprising a total of 230 apartments and basement parking for 411 vehicles.

Land to the east comprising Areas 16 & 17 had a Development Application No. 115/2022 for the demolition of existing structures and construction of a mixed-use development containing two buildings comprising a total of 130 apartments (including one affordable dwelling), childcare centre, community facility and basement parking for 180 vehicles. The application was refused from the SNPP based on the proposed variations to building height, number of storeys and building setbacks including setbacks to the east-west 15m wide pedestrian link.

Land further to the southwest comprising Areas 22 & 23 there is currently a Development Application (DA No. 154/2022) for construction four residential flat buildings with four levels of basement car parking, comprising a total of 314 dwellings and a proposed new road connecting Park and Berry Road. The application is yet to be determined.

Land further to the northwest comprising Areas 13-15 there is currently a Development Application (DA No. 56/2023) for construction of three residential flat buildings with four levels of basement carparking comprising 187 apartments and 249 vehicle spaces. The application is yet to be determined.

The development to the south-east comprises Newlands Park. Newlands Park is an open space area that incorporates play equipment and pedestrian paths of travel that link to Duntroon Avenue and River Road. It features natural landscaping comprising predominantly canopy tree planting. Beyond Newlands Park, Duntroon Avenue supports a range of contemporary multi-storey residential flat buildings addressing the park.

4. PROPOSAL

The original consent (Development Consent No. 162/2021) approved on 27 June 2022 by the SNPP was for the demolition of existing structures and construction of a mixed-use development comprising 81 apartments, childcare centre for 60 children, community facility, restaurant/café and basement parking for 116 vehicles, pedestrian link and stratum/strata subdivision. A maximum height of 43.5m and 12 storeys was proposed on the development site known as Area 5. This consent has been modified twice, which now comprising 80 apartments and 117 car parking spaces.

The subject Section 4.55(2) Modification Application to Development Consent No. 162/2021 is as follows:

- Basement Level 3 is amended to provide an additional seven carparking spaces;
- The floor to ceiling height of Level 12 has been reduced from 4.6m to 3.1m;
- Construction of two new levels (storeys) which would accommodate four additional apartments;
- Level 13 is introduced and provides three (3) x 3-bedroom apartments;
- Level 14 is introduced which provides one (1) penthouse apartment containing 4 bedrooms, and
- A new roof is proposed above these new floors.



Figure 7: Proposed Photomontage

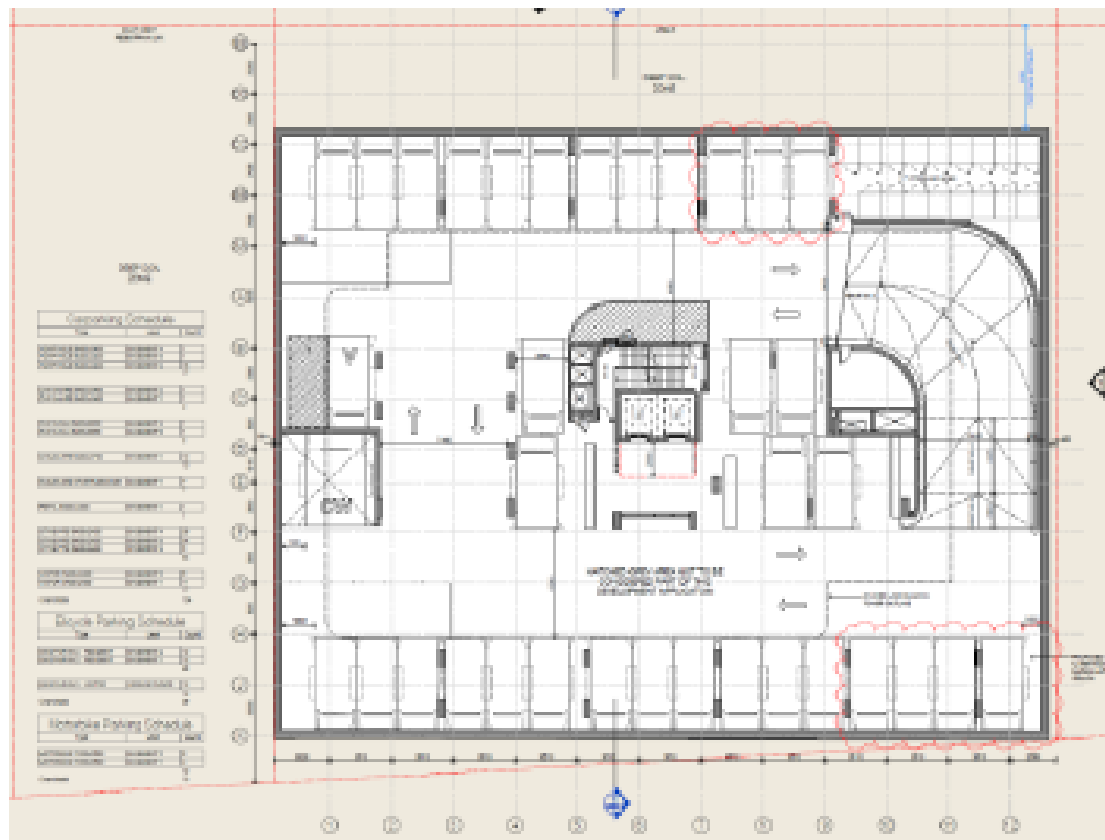


Figure 8: Basement Level 3 Amendments

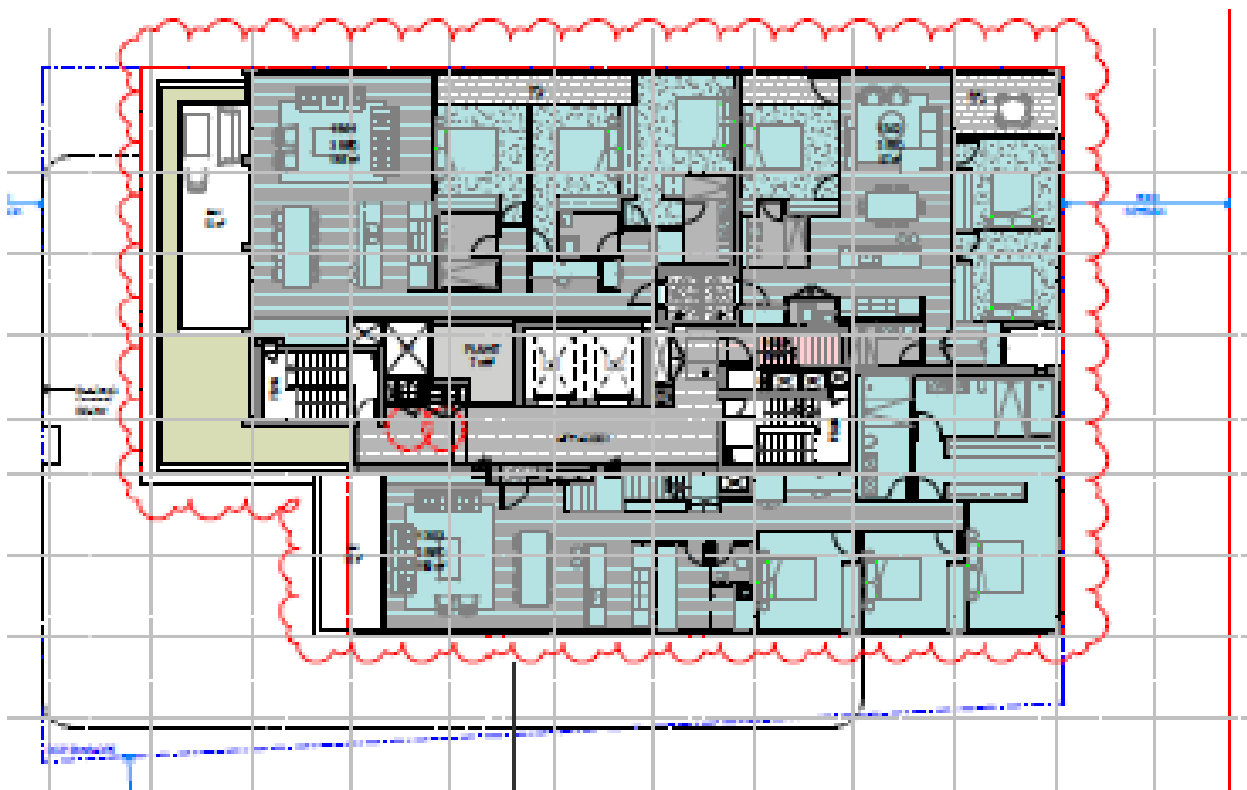


Figure 9: Proposed Level 13 Floor Plan

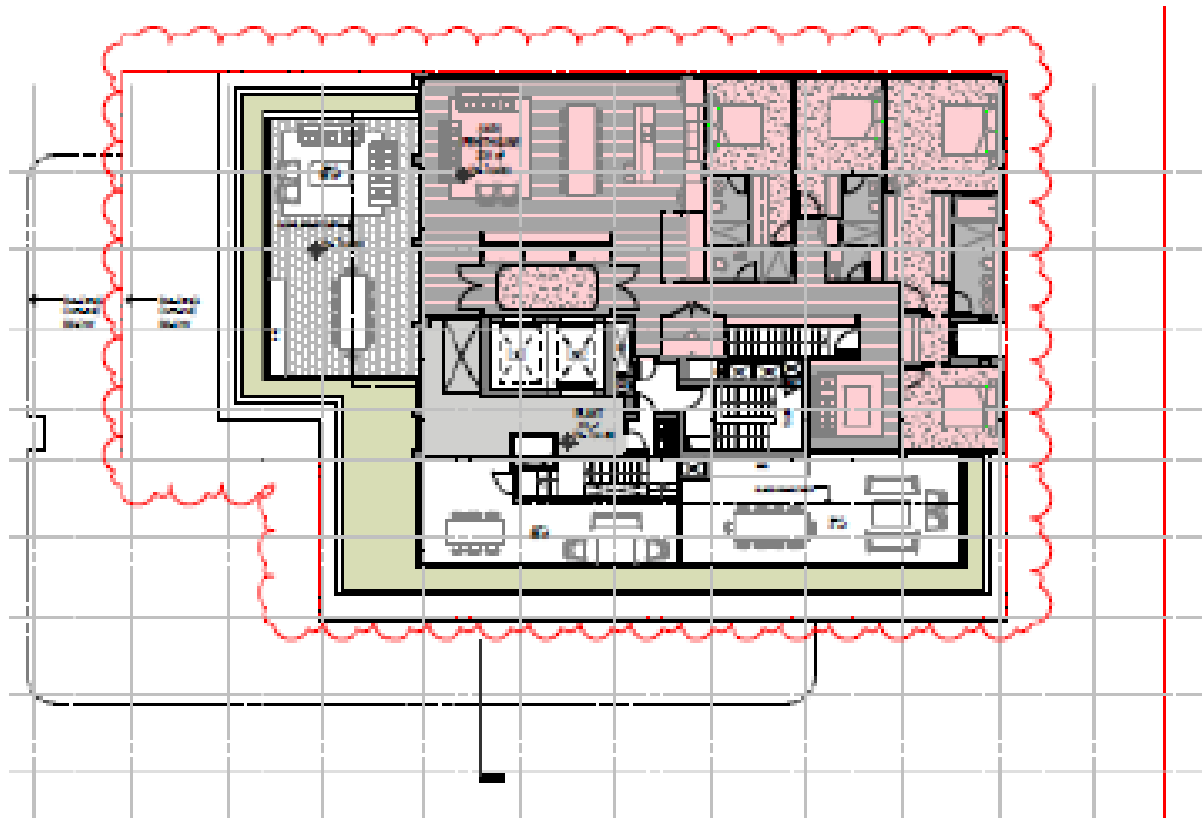


Figure 10: Proposed Level 14 Floor Plan



Figure 11: Proposed Eastern (Canberra Avenue) Elevation

The justification for the proposed works is to ensure that the additional height has limited visual impact from the streetscape and surrounding properties and that overshadowing impacts are minimised. The proposal development remains below the maximum allowable FSR permitted under the Lane Cove LEP. In essence, the proposal aims to match the floor space available under the LEP to accommodate the public benefits to be delivered under the Incentive FSR scheme. To achieve this, it is proposed that the additional height that will exceed the maximum building height of 44m.

The approved apartment mix was:

- **27 one-bedroom units;**
- **25 two-bedroom units; and**
- **28 three-bedroom units**

The amended mix is now:

- **27 one-bedroom units;**
- **25 two-bedroom units;**
- **31 three-bedroom units; and**
- **1 four-bedroom penthouse**

A maximum height of 48.16m including lift overrun and roof plant is now proposed. The applicant stated that the approved development height is actually 44.7m which had breached the 44m LEP Incentive Building Height development standard by virtue of the SNPP imposing a condition (Condition A.2) requiring a provision of a 1.2m parapet on top of the proposed maximum 43.5m proposed building. The approved FSR has been amended from **3:32:1** (8,726sqm) and the proposed amended FSR is now **3.58:1** (9,401sqm). It is proposed to increase the car parking to a total of 124 car parking spaces and to increase the number of basement storage spaces to account for the increased number of apartments.

There are no amendments to the approved deep soil areas and no changes are proposed to the landscaping scheme that was approved under the original consent, with exception of changes to the roof terrace landscaping to accommodate the two additional storeys. The proposed new landscaping for the two additional storeys is detailed in the submitted landscape plans.

Note: The above proposal or Modification Application is predicated on seeking to vary the LEP development standard {height} and the DCP control {storeys}. The first test of a Section 4.55 is whether the proposal is 'substantially the same' development.

The applicant understands if Council is of the view that the Section 4.55 is not 'substantially the same' development or if it is not supported by Council, the applicant will rely on a second Development Application which was separately lodged proposing the exact same works. This application is a new Development Application for alterations and additions to the approved development DA 162/2021. The applicant seeks to vary the LEP Building Height and Floor Space Ratio Development Standards by relying upon the Lane Cove LEP. The applicable development standards are as follows:

- **LCLEP - Height is 9.5m; and**
- **LCLEP – FSR is 0.5:1**

By relying on the LC LEP not the SLS Part 7 Incentive Clauses they are then able to utilise Clause 4.6 to seek to vary the LEP.

5. HISTORY

5.1 Assessment/History Timeline

The assessment/history timeline is provided in the table below.

Proposal/History Timeline	
Date	Description
27 June 2022	Development Consent No. 162/2021 approved by the SNPP for the demolition of existing structures and construction of a mixed-use development containing demolition of existing structures and construction of a mixed-use development (maximum 12 storeys) comprising 81 apartments, childcare centre for 60 children, community facility, restaurant/café and basement parking for 116 vehicles, pedestrian link and stratum/strata subdivision.
17 November 2022	Section 4.55(1A) Modification Consent approved by Council to combine approved units 1106 (three-bedroom unit) and 1107 (two-bedroom unit) into one larger three-bedroom unit with a total internal area of 191sqm and balcony area of 23sqm.
13 February 2023	<p>Section 4.55(1A) Modification Consent approved by Council to:</p> <p>Basement Level 4:</p> <ul style="list-style-type: none"> • Redesign the one-way lane to improve the manoeuvring and to avoid sharp turns. • Amended car parking layout (with one additional car parking space). • Redesign the storage cages. <p>Ground Floor:</p> <ul style="list-style-type: none"> • Redesign the bin room to comply with the original Development Application condition. • Redesign services to comply with detailed design requirements for BCA and Australian Standards including pump room, electrical room, tank zones, mechanical exhausts, fire corridors etc. • Managers room added. • Apartment design to improve the design and consideration of structural columns. <p>Upper Ground Floor:</p> <ul style="list-style-type: none"> • Cinema room redesign to improve the amenity. • Apartment redesign to improve the design and consideration of new structural columns. • Fire stairs adjusted to avoid access issues. <p>Levels 6 and 7</p> <ul style="list-style-type: none"> • Minor design adjustment on kitchens and bathrooms to improve the design and comply with visitable apartment requirements.
13 March 2023	Subject Section 4.55(2) Modification Application lodged and the separate Development Application (DA21/2023) proposing the same works lodged.

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14 March 2023	Public notification of the Modification Application for a period of 28 days.
4 April 2023	NSROC Design Review Panel Meeting (see Annexure 6 for their minutes and responses).
3 May 2023	Briefing of the Sydney North Planning Panel.

5.2 Design Amendments

No formal design amendments had occurred however the applicant had indicated that the following design amendment would occur to address part of the Design Review Panel (DRP) concerns with the proposal as follows:

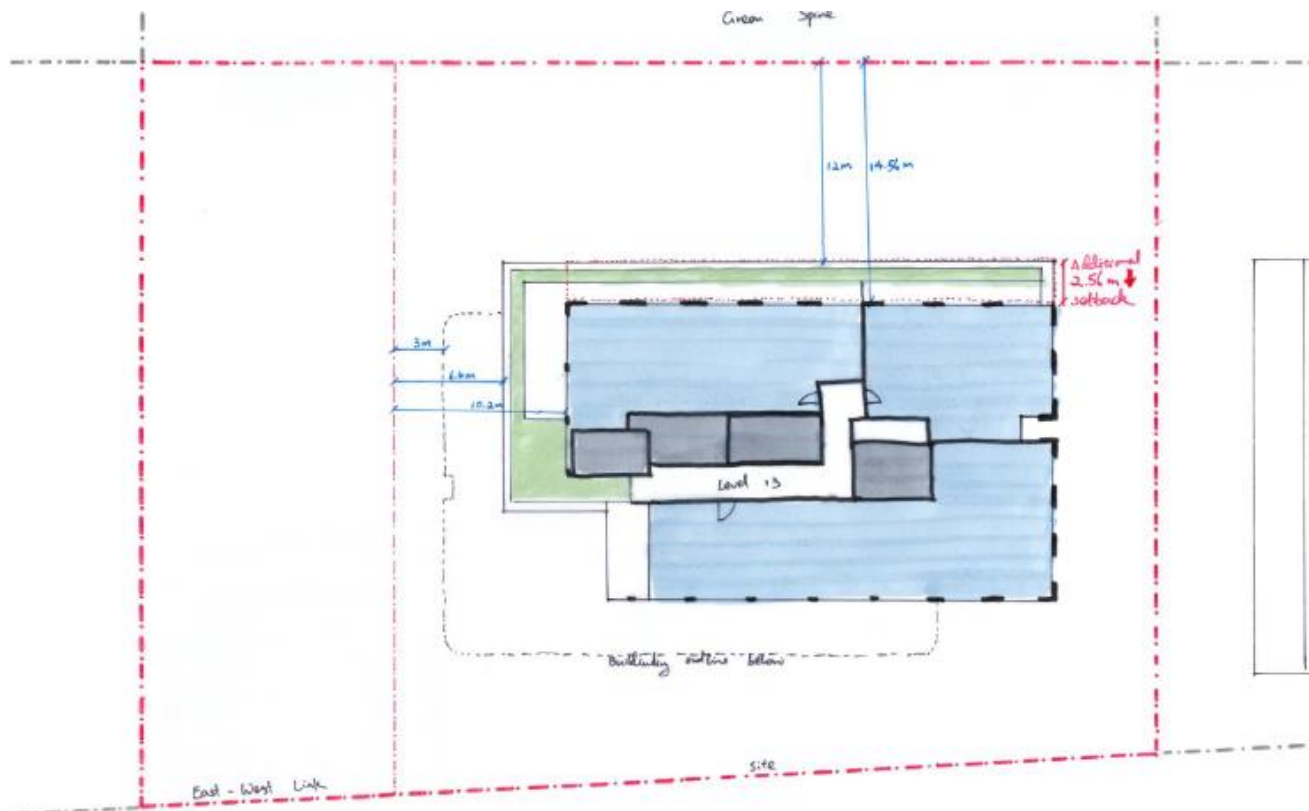


Figure 12: DRP – 2.5m Western Setback Recommendation

Note: Should the above design had been formally submitted, the proposal would have still been recommended for refusal due to the breaches in height and number of storeys.

As to be discussed in further detail in this report, it is contended that the panel would not be able to support such breaches.

6. SECTION 4.55 ASSESSMENT

Under the provisions of Section 4.55(2) of the Environmental Planning and Assessment Act, 1979, Council may, in response to an application, modify a consent granted, if the development, as modified, is 'substantially the same' development as originally approved. The first test of a Section 4.55 is whether the proposal is 'substantially the same' development. The following is the applicant's justification to the relevant modification principles applied to the proposal as amended:

The proposed modifications, which entail both amendments to the layout of the Level 3 basement carpark and the provision of an additional two (2) storeys, provide for a development that is

substantially the same as the development for which consent was granted. The consent authority can therefore consider the application pursuant to Section 4.55(2) of the EP&A Act. In reaching this conclusion, we have considered the modifications against the above principles.

A comparison between the development as modified and the development that is the subject of the original consent, can conclude that there is no significant difference in the built form, visual or physical appearance of the building as demonstrated in the Urban Design Report prepared by SJB Architects, and therefore the extent of the modification will be “essentially or materially having the same essence” as the approved development (Vacik endorsed in Michael Standley at 440 and Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]).

As detailed, the physical form of the building will be largely unchanged, except for changes to the building massing at the upper levels to accommodate the proposed additional storeys. The proposed changes have undergone a meticulous design to achieve the same outcome (as originally approved) when viewed from the public domain with minimal additional visual impacts and overshadowing proposed compared to that approved. The additional two storeys are recessed in part from the storeys below and the proposed modifications will enhance design and residential amenity for future occupants without impacting the amenity of adjoining properties.

The design will optimise the built form within the limits of the incentive floor space provision of the Lane Cove LEP 2009. There will be no change to the setbacks and building footprint and the building envelope changes only in terms of the additional height. Accordingly, there will be no significant change to intensity or density. Additional parking in the existing basement footprint will accommodate the parking needs generated by the additional apartments. The proposed modifications will still have the same essence as the original approval and the proposed modifications will “alter without radical transformation” (Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42, Michael Standley at 474, Scrap Realty at [13] and Moto Projects at [27]).

As detailed, the proposed modifications also do not alter the approved use of the land as a mixed use building. Whilst the intensity of use, of itself, is not sufficient to conclude the development is substantially the same, it is a relevant consideration which adds to the above analysis.

With consideration to the tests identified in Tipalea Watson Pty Limited v Ku-ring-gai Council, the proposal as modified will:

- (a) not significantly change to the nature or the intensity of the use with only a minor increase of four (4) apartments (still a mixed use development with a childcare centre, community facility and restaurant/café);*
- (b) not change the relationship to adjoining properties (maintains amenity, bulk and scale of the approved development);*
- (c) not adversely affect the amenity of neighbouring properties (in terms of privacy, overshadowing and views as discussed in Part 5.3.3 of this SEE);*
- (d) provide a mixed use building which is entirely compatible with the nature of residential flat buildings and mixed use developments in the streetscape and compatible with the high density desired future character of the area; and*
- (e) not significantly change the scale or character of the development or the locality as the building is entirely compatible with the scale of surrounding properties.*

As noted in Wolgan Action Group Incorporated v Lithgow City Council, an increase in environmental impacts is not a consideration as to whether or not a modification proposal is substantially the same. Nonetheless, in our view, the impact of the proposed modifications will be

minimal when set against the backdrop of the approved building envelope, especially in terms of design, solar access, privacy and views.

Finally, Moto Projects (No. 2) Pty Limited v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298, which outlines principles for determining whether a s4.55(2) application is 'substantially the same' as an originally issued development consent. The assessment of 'substantially the same' needs to consider qualitative and quantitative matters.

In terms of a quantitative assessment, the proposed modifications are limited to relatively modest increase to the building's form and scale, including increase in gross floor area and building height. However, the changes proposed do not occur outside of the approved setbacks and are related to internal reconfigurations and additional height that has been thoughtfully designed. With regards to landscaped area and deep soil planting, this will be unchanged as part of this application. The additional height has been meticulously designed to minimise impact on the amenity of adjoining properties, maintain the visual impact of the approved mixed use building and maintain its compatibility with the nature of future development in St Leonards.

Qualitatively, the proposal will retain the desired character of the mixed-use building as viewed from Canberra Avenue. The proposed modifications to the approved development will retain the aesthetic quality and architectural characteristics of the development. Overall, the form and scale of the approved development will not be transformed and is entirely compatible with the scale of other developments in the immediate locality including the approved development adjoining the site to the south and anticipated future redevelopment in accordance with the FSR and Height incentives in the LEP. In this regard, the proposal continues to achieve design excellence.

In conclusion, the modifications proposed by this application are considered to result in a development that is substantially the same as the development for which consent was originally granted. This proposal does not seek to alter the mixed use and largely retains the built form and impacts on adjoining properties and the public domain.

The proposal will continue to operate under all other conditions imposed under DA162/2021 and its subsequent modifications.

Comment: It is Council's view that the subject application does not meet this test. For the abundance of caution in that the panel should hold a differing view, the panel is reminded that the proposed variation to the LEP Incentive Height of Buildings map within Clause 7.1 cannot be supported on the basis that the development as amended now exceeds the height limit which cannot be varied under any circumstances. The operation and wording of both Clauses 4.3 and 7.1 would prohibit the granting of consent to buildings which would exceed such development standards.

Clause 7.1 operates to relax the height limit under Clause 4.3 however only on the basis if its criteria are met with. That clause was met under the original scheme and Clause 7.1 is no longer proposed to be complied with due to the proposed height breach within the LEP Incentive Height of Buildings map. Council would further argue that the power to vary the breach in Clause 4.6 would be confined to the grant of development consent not under a modification. A 4.55 modification is not the grant of development consent in accordance with the operation of Clause 4.55(4).

The proposal as amended would now breach Clause 4.3 and 7.1 which cannot be relaxed under a Modification Application as Clause 4.6 does not apply to Clause 7.1 except Clause 7.1(4)(e) – see Clause 4.6(8). The applicant is clearly attempting to circumvent this prohibition under a Section 4.55 Modification Application.

It is suspected that the applicant is fully aware of this prohibition and is the reason as to why it has lodged a separate Development Application proposing the same works to obtain the additional yield it currently seeks. Based on the above, the subject application must be refused. To be discussed in further detail in this report, it is also considered that the approved development would have a lesser impact than the modified scheme.

A maximum building height of 48.16m is now proposed. The applicant has stated that the approved development height is actually at 44.7m, which breached the 44m LEP development standard and had occurred by virtue of the SNPP imposing a condition (Condition A.2) requiring a provision of a 1.2m parapet on top of the proposed maximum 43.5m proposed building.

This claim is disputed as the LEP excludes architectural roof features from height calculations under Clause 5.6 – Architectural roof features which reads as follows:

5.6 Architectural roof features

- (1) *The objectives of this clause are as follows—*
- (a) to facilitate innovative design without significant impact on local amenity.*
- (2) *Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by clause 4.3 may be carried out, but only with development consent.*
- (3) *Development consent must not be granted to any such development unless the consent authority is satisfied that—*
- (a) the architectural roof feature—*
 - (i) comprises a decorative element on the uppermost portion of a building, and*
 - (ii) is not an advertising structure, and*
 - (iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and*
 - (iv) will cause minimal overshadowing, and*
 - (b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

Further, the proposal would also be inconsistent with the reasons for approval provided by the Sydney North Planning Panel (SNPP) under the original consent as required by Clause 4.55(3) which reads as:

- (3) 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.*

The reasons for approval by the panel is as follows:

The Panel determined to approve the application for the reasons outlined below and in Council's Assessment Report. The proposal is for the construction of a mixed-use development of 12 storeys comprising 81 apartments, childcare centre for 60 children, community facility, restaurant/café and basement parking for 116 vehicles, pedestrian link and stratum/strata subdivision.

The subject site is centrally located within the north-eastern part of the St Leonards South Precinct, is known as Area 5 and covers 2,629.2 square metres. The Precinct plan includes an east-west public pedestrian link along the southern boundary of Area 5 and a shared green spine with Area 6.

The St Leonards South Precinct was brought into effect in 2020 through amendments to Lane Cove LEP 2009 and Lane Cove DCP 2009. The precinct is zoned R4 High Density Residential (with the exception of a park and new road). The DCP includes a maximum number of storeys control and notes part storeys resulting from excavation of steep slopes or semi basement parking will not count as a storey.

The Panel notes the proposal has benefited from extensive consultation between the Applicant, Council and community and concurs with Council that the DA achieves the required standard for development with the St Leonards South Precinct.

During assessment and the public meeting there was considerable debate about compliance with the DCP's guideline setbacks. The proposed design setbacks were extensively canvassed during the assessment and design review process, in discussions with Applicant and Council and in the public meeting. The Panel notes the Applicant and Council consultations have resulted in the setback minor non-compliances being offset by significant community benefit in design excellence and facilities.

The Panel notes that a draft Voluntary Planning Agreement (VPA) was exhibited with the Development Application and a condition of consent has been recommended requiring that Council and the Applicant enter into the VPA prior to the issue of the first construction certificate.

The Panel recognised that the Applicant made further changes to the design in May 2022 to reduce the number of storeys to ensure height and storey compliance with Lane Cove's LEP and DCP.

The Panel also recognised that the final proposal flowed from extensive design refinement through the Northern Sydney Region of Council's Design Review Panel and Design Excellence Panel prior to the lodgement of the Development Application. The Panel concurs with Council that the final proposal exhibits design excellence as required for all development within the St Leonards South Precinct.

The Panel notes the proposal has been properly assessed against the relevant parts of Section 4.15 of the Environmental Planning and Assessment Act, 1979. The proposed development responds to the site constraints, is consistent with the planning controls, would provide for the planned density and achieve design excellence on one of the more constrained sites within the St Leonards South Precinct.

Consequently, the Panel believes approval of the DA would be in the public interest.

The original Development Application approval was for a maximum 12 storey mixed-use development. The modification to increase both the height and the numbers of storeys to a non-compliant nature would result in an outcome where refusal would have to be given under the circumstances of this case. It is not appropriate to adopt such variations in this instance.

As such it is Council opinion that the proposal does not satisfy the 'substantially the same' development criteria as it would alter the essence of the original consent. It is noted that applicant originally had proposed a breach in height and on the number of storeys under the original application and was amended to comply to address Council's and panel concerns.

It is recommended that the Panel does not grant approval to this proposal. On this basis it is recommended that the subject Section 4.55(2) Modification Application be refused.

7. SECTION 4.15 ASSESSMENT

The following assessment is provided against the relevant provisions of Section 4.15 of the NSW Environmental Planning and Assessment Act, 1979:

7.1 Any environmental planning instrument:

7.2 Lane Cove Local Environmental Plan 2009

7.3 Permissibility

The site is zoned R4 High Density Residential under LCLEP 2009. Residential flat buildings, restaurants or cafes, centre-based childcare facilities and community facilities are permissible with consent in the R4 High Density Residential zone.

The proposed development as amended remains permissible with consent.

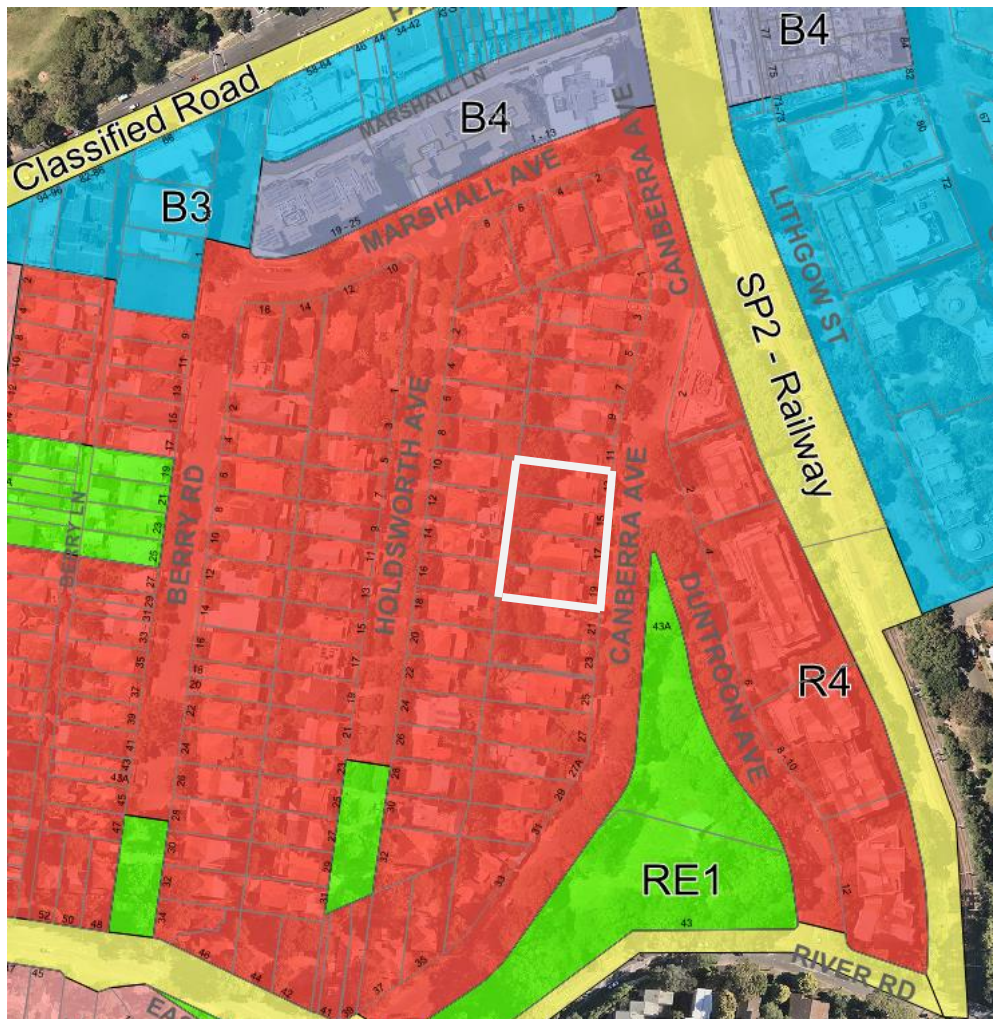


Figure 13: Zoning Map

7.4 Compliance with Incentive Provisions

An assessment against the relevant incentive activating provisions is provided in the table as follows:

Applicable Incentive Provisions			
Category	Requirement	Proposed	Compliance
Unit Mix	Minimum 20% of 1/2/3-bedroom units	27 x one-bedroom units (32%) 25 x two-bedroom units (30%) 31 x three-bedroom units (37%) 1 x four-bedroom unit (1%)	Yes
Green Spine Setbacks	The provision of setbacks to establish communal open space and green spines between buildings	Setbacks continued to be provided for the required and planned green spine widths	Yes
Pedestrian Link	The provision of a 15m wide pedestrian link in Area 5	Achieved	Yes
Minimum Site Area	The amalgamation of all required sites within the development area	Compliant	Yes
Recreation Areas and Community Facilities	450 square metres will be used for the purpose of a recreation area 600 square metres will be used for the purpose of a community facility The recreation area will be adjacent to the community facility	Achieved	Yes

The proposal complies with the provisions of 7.1(4) of LCLEP 2009 and accordingly the proposal can seek to utilise the incentive height and floor space ratio provisions.

7.5 Incentive Building Height and Floor Space Ratio Controls

The incentive building height (**Figure 14**) and incentive floor space ratio (**Figure 15**) apply to the development.

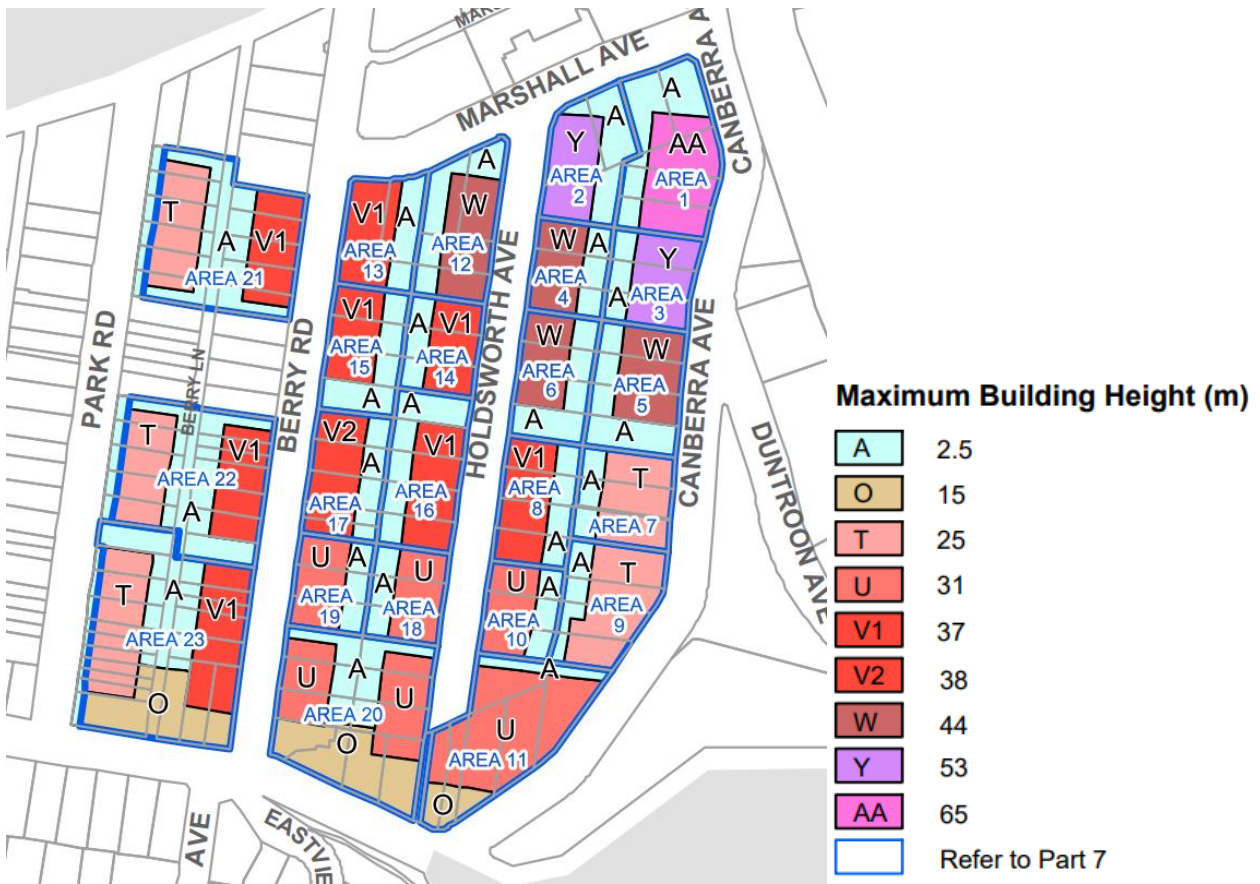


Figure 14: Incentive Height of Building Map – W (Max. 44m)

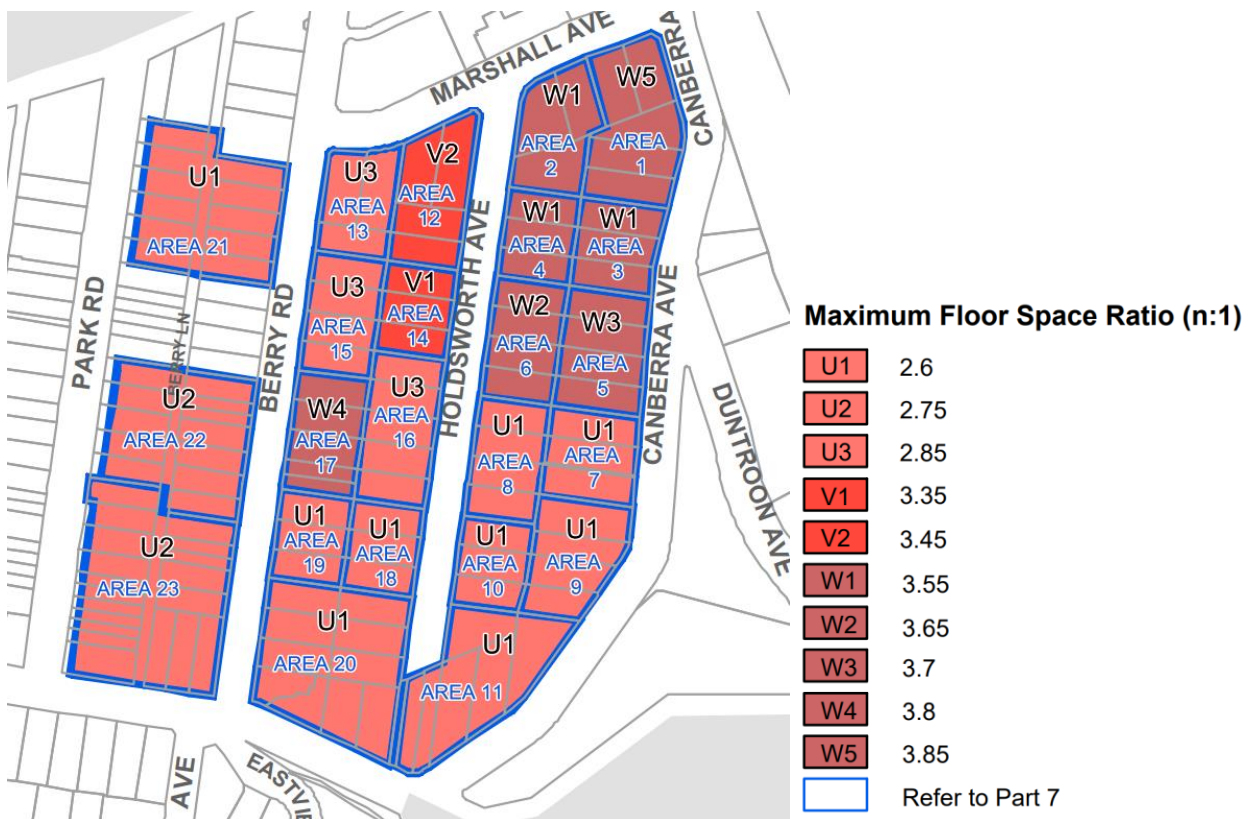


Figure 15: Incentive Floor Space Ratio Map – W3 (Max. 3.7:1)

7.6 Compliance with Incentive Building Height and Floor Space Ratio Controls

i. Floor Space Ratio

An assessment of the proposal against the incentive floor space ratio provisions is provided in the table below.

Compliance with Incentive Floor Space Ratio			
Category	Incentive FSR (Max.)	Total Proposed	Compliance
Area 5	3.7:1	3:32:1 (8,726sqm) - approved 3.58:1 (9,401sqm) – proposed	Yes

The proposal as amended is still considered satisfactory with respect to the maximum floor space ratio.

It is noted that the FSR development standard is a maximum standard, and it is considered that it is not an entitlement at the expense of complying with key standards of the South St Leonards precinct planning requirements.

ii. Building Height

An assessment of the proposal against the incentive building height provisions is provided in the table below.

Compliance with Incentive Building Height			
Category	Incentive Building Height (Max.)	Proposed	Compliance
Area 5	44m	Max. 43.5m (approved) Max. 48.16m (proposed)	No, refusal recommended

Note: The incentive building height map includes a 2.5m zone through the pedestrian link and green spine.

The proposal had complied with this provision as the proposed building was located completely outside of this zone.

It is noted that there was a 3.6m high childcare awning attached over the outdoor play to provide for appropriate weather protection and acoustic treatment in accordance with the requirements of State Environmental Planning Policy Transport and Infrastructure 2021 and the associated Child Care Planning Guidelines.

This 2.5m building height zone component remains unchanged under the subject application.

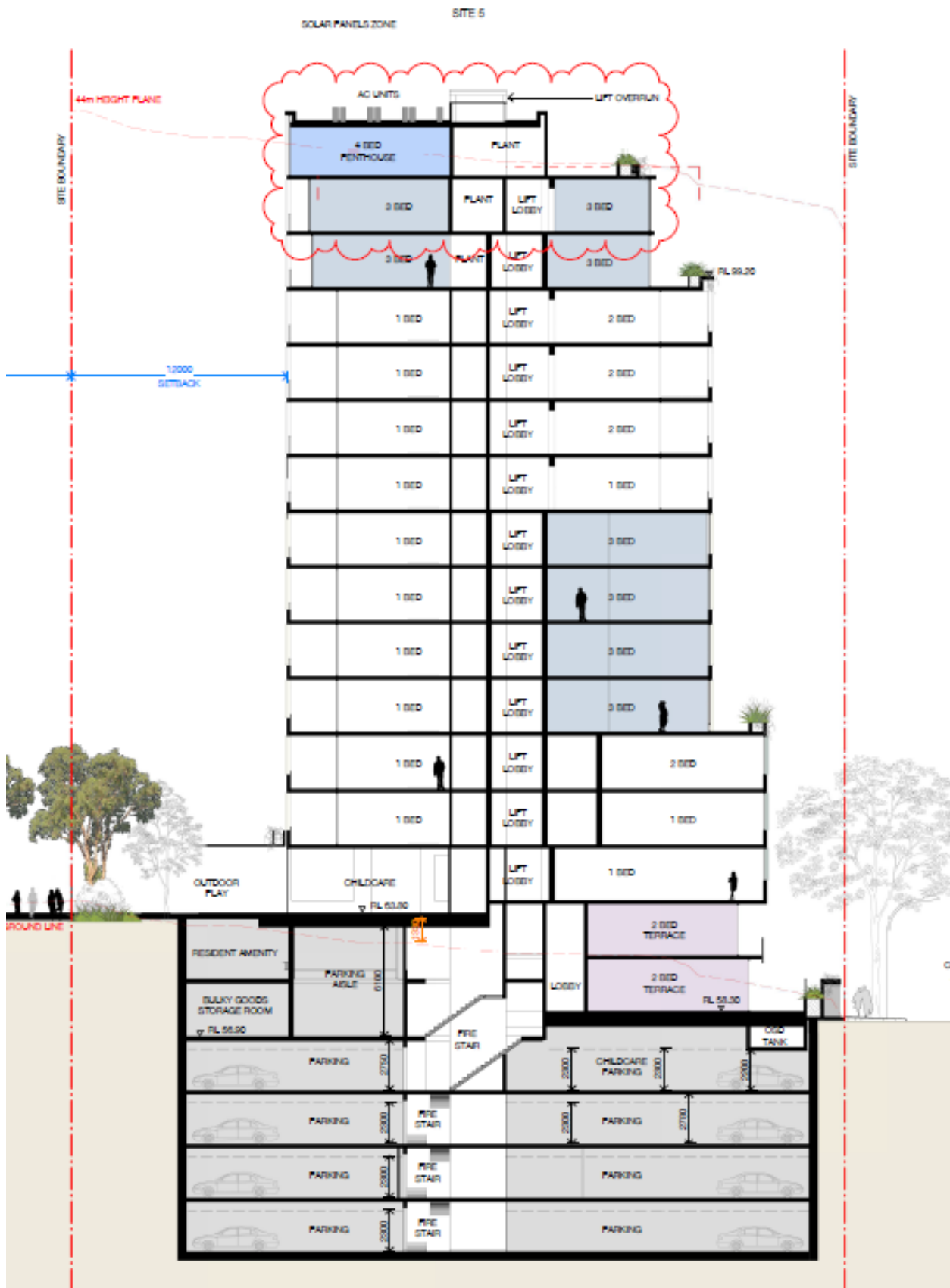


Figure 16: Proposed Breach to the Maximum 44m Building Height Plane



Figure 17: Approved Development that is Compliant with the Maximum 44m Building Height Plane

Building Height Development Standard

As advised above, the proposal as amended now contains a building height breach over the maximum 44m Incentive Building Height map and which would be contrary to the building height development standard under Clause 7.1(3)(a) of LCLEP 2009 (see Figure 13 above). The applicant and the panel have been advised that no approval should be granted to such a breach.

The applicant's justification is as follows:

The proposal will increase the height of the development from 44.7 metres (including a 1.2m parapet required by Condition A.2) to 48.16 metres, which breaches the maximum Incentive Height of Buildings control of 44 metres. This is a non-compliance of 4.16 metres to the Incentive Height of Buildings control and an increase of 3.46m above the previously approved building height.

In the NSW Land and Environment Court case of Gann & Anor v Sutherland Shire Council [2008], the Court held that there is a power to modify a development application (via a modification application) where the modification would result in the breach of development standard. The Court took the view that development standards within a LEP did not operate to prohibit the granting of consent if they were not complied with and no objection pursuant to SEPP No 1 (now relevant to Clause 4.6 variation) had been lodged. Notwithstanding, the Court held that despite a SEPP No 1 Objection (or Clause 4.6 variation) not being required, a Section 96 application (now a Section 4.55 of the EP&A Act) still requires the consent authority to take into consideration those matters referred to in Section 4.15. These matters were relevant to the application as assessed throughout this Statement.

Objectives of the Clause

The objectives of Clause 7.1 of Lane Cove LEP 2009 are as follows:

- The objective of this clause is to promote, by providing building height and floor space Incentives, residential development within the St Leonards South Area that provides for—*
- (a) community facilities, open space, including communal open space, and high quality landscaped areas, and*
 - (b) efficient pedestrian and traffic circulation, and*
 - (c) a mix of dwelling types in residential flat buildings, providing housing choice for different demographics, living needs and household budgets, including by providing affordable housing, and*
 - (d) the amalgamation of lots to prevent the fragmentation or isolation of land.*

The proposal, as amended, provides a building height that will have no additional adverse impact on solar access to either adjacent properties or to the public domain in the vicinity of the site. The proposed development provides for a well designed built form that responds to the local topography and reflects the built form outcomes that are anticipated by the planning controls that apply to the site.

Objectives of the Zone

It is also relevant to consider the proposal in light of the R4 High Density Residential zone objectives which are stated as follows:

- To provide for the housing needs of the community within a high density residential environment.*
- To provide a variety of housing types within a high density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

- To provide for a high concentration of housing with good access to transport, services and facilities.
- To ensure that the existing amenity of residences in the neighbourhood is respected.
- To avoid the isolation of sites resulting from site amalgamation.
- To ensure that landscaping is maintained and enhanced as a major element in the residential environment.

The proposed development will continue to be demonstrably consistent with the objectives of the Zone R4 as the development will provide for the housing needs of the community in a high density residential environment whilst providing for a range of housing types, in close proximity to transport and services and delivering a high quality landscape setting. Despite the minor increase in building height, the proposal will continue to provide a variety of housing types (1-bed, 2-bed and 3-bed) in proximity to the St Leonards railway station and local bus routes. The amended proposal will continue to provide a high quality residential development with short, medium and long term economic benefits to the St Leonards South precinct.

On “planning grounds” the modified proposal does not alter the degree which compliance with the zone objectives was achieved under the originally approved and amended development. As discussed above, the modifications will not increase the intensity of the development, create any substantial increase in bulk and scale and will retain the amenity of the surrounding locality. In fact, the extent of variation above the Height of Building development standard will not be readily visible to the casual observer by virtue of its location and minimal exceedance.

Although a variation statement pursuant to Clause 4.6 is not required in the circumstances of this application, the reasoning applied in *Wehbe v Pittwater Council* [2007] NSW LEC 827, is appropriate to rely upon to determine that the proposal is well founded despite the departure from clause 7.1 of Lane Cove LEP 2009. In the judgement, the Chief Justice set out five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. The current proposal is considered to be consistent with the first of these in that the objectives of incentive building height and the R4 zone are achieved notwithstanding the numerical variation proposed.

As such, the modified proposal continues to be entirely consistent in relation to the objectives of the building height/incentive building height development standard, despite the numerical variation proposed. Given that compliance with the zone and development standard objectives is achieved, insistence on strict compliance is considered to be unreasonable and unnecessary in the circumstances. The proposal is compliant with the relevant objectives, will create negligible environmental impacts and will provide for a variety of housing opportunities in a highly suitable location. The proposal is therefore justified on environmental planning grounds.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSW LEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a “better” planning outcome. Therefore, on balance, the proposal is considered to achieve a planning purpose of enhancing amenity and delivery of important public benefits and achieving the desired density for the site in the absence of any additional or new adverse impacts.

Clauses 7.4 and 7.5 Provision of Certain Public Benefits

Together both of these clauses impose requirements for the provision of certain public benefits including recreation area, community facility and a pedestrian link as part of the development. The approved development has made provision for all of the required public benefits despite the approved development not reaching the maximum FSR applying to the site.

It is widely understood that the St Leonards South precinct was master-planned to achieve a particular level of density to offset the costs associated with the delivery of key public benefits. The Lane Cove DCP and St Leonards South Contributions Plan both emphasise the importance of the full floor space being achieved to provide for the delivery of the suite of public benefits for the community. The precinct's planning documents indicate that the delivery of community infrastructure is vital for the precinct achieving the desired level of public amenity to support future population growth and urban renewal consistent with local and State planning strategies.

The proposed modification does not intend any changes to the design or location of the public benefits that were included in the approved development. This application does, however seek to increase the gross floor area (and as a consequence the FSR of the development) to achieve the site's development potential under the LEP. As demonstrated elsewhere in this application, this is achieved without any additional material adverse impacts.

Comment: Further to the above justifications, the arguments presented by the applicant are not supported in principle. It is noted that Clause 4.6(8)(cb) – Exceptions to development standards reads as:

(8) This clause does not allow development consent to be granted for development that would contravene any of the following—

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which [State Environmental Planning Policy \(Building Sustainability Index: BASIX\) 2004](#) applies or for the land on which such a building is situated,

(c) clause 5.4,

(caa) clause 5.5,

(ca) clause 4.1A,

(cb) Part 7, except clauses 7.1(4)(e) and 7.2.

As a result, no building height variations under Clause 4.6 are permitted under the Plan and cannot occur under the subject application as the applicant had clearly attempted to invoke or rely upon on the building height and FSR incentive clause under Part 7. The proposed amended design outcome now containing a 9.5% building height variation partly due to the increase in two storeys is not considered that strict compliance would be unreasonable or unnecessary and the justification by the applicant is not well founded. The justification is not supported or agreed with as other approved or proposed developments within the precinct have fully complied with this height requirement.

The additional visual impacts onto future adjoining developments and the additional shadow impacts onto adjoining and onto public domain areas including Newlands Park are not supported as the compliant scheme would involve a lesser impact when compared to the current scheme. To be discussed in greater detail within this report, it would be clear that the proposal would not satisfy relevant LEP objectives and there would insufficient environmental planning grounds available. Full compliance should be achieved, and the proposed two storey elements be deleted as they cannot be approved.

It is noted under the St Leonards 2036 Plan it states as an action to “*Minimise overshadowing of key open spaces, public places and adjoining residential areas. Solar height planes should be adhered to as indicated within the Solar Access Map*”. In its supporting text: “*The solar access controls protect these key places by requiring that new development in the area does not produce substantial additional overshadowing during specific hours in mid-winter (21 June)*”. It is advised that because the 2036 Plan is an action of the North District Plan, this can be considered as part of

the assessment of an application process under the public interest (Section 4.15 (1)(e) of the Act) head of consideration.

iii. **Clause 4.6 Prohibition**

The panel is reminded that the incentive provisions are excluded from the operation of Clause 4.6 of LCLEP 2009. The approved development did not seek to vary the incentive FSR or building height control as it could not seek to rely on Clause 4.6 of LCLEP 2009. The applicant is now attempting to use the Section 4.55(2) modification application or the separate concurrent Development Application process to circumvent this prohibition by now breaching the building height standard. It is considered that this approach undertaken by the applicant is not appropriate under the circumstances of the case as it would be contrary the operation or intent of the incentive clause to require full and strict compliance with the relevant building height map.

It is noted that under the separate concurrent Development Application, the submitted Clause 4.6 written justifications are not supported and refusal is recommended (see Annexure 30, Section of the assessment report completed for Lane Cove Local Planning Panel's consideration and determination).

7.7 **Design Excellence**

Clause 7.6(3) of LCLEP 2009 states that consent authority must not grant consent unless it considers the development exhibits design excellence. The relevant objective of Clause 7.6 Design excellence – St Leonards South Area reads as:

(1) The objective of this clause is to deliver the highest standard of architectural, urban and landscape design.

The applicant provided the following justification with respect to design excellence as follows:

This clause requires development to deliver the highest standard of architectural, urban and landscape design. The approved development was subject to an extensive design review process that culminated with Council's Design Review and Excellence Panel, Lane Cove Council and the Sydney North Planning Panel concluding that the design satisfied all of the applicable assessment criteria provided in clause 7.1(6) of Lane Cove LEP 2009 and found that design excellence was exhibited.

The proposed amendments to the approved design (as subsequently modified) maintain the same standard of design excellence exhibited by the approved development. The amended design does not have any additional impacts in terms of views and solar access. These matters are comprehensively addressed in the Urban Design Report that has been prepared by SJB Architecture and provided with the application.

The criteria and associated assessment have been provided in the table follows:

Compliance with Design Excellence Provisions			
Clause	Provision	Comment	Compliance
7.1.6(4)(a)	<i>whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved</i>	The proposal has been assessed by the Design Review Panel (DRP) and raised concerns with the intended approach of the subject application.	No, in part due to the inappropriate design of the development as amended

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		<p>However, this does not overcome to be discussed in greater detail in this report, the concerns with the proposed building height, number of storeys and minimal setbacks on the upper levels to the green spine area and to the northern boundary would not result in a high standard development within a new precinct that would expect to achieve design excellence. It is considered that the proposed building type, height, design, and location are not satisfactory in this instance.</p>	as a whole
7.1.6(4)(b)	<i>whether the form and external appearance of the development will improve the quality and amenity of the public domain,</i>	<p>Based on the inappropriate nature of the proposal described above, the perceived form and external appearance would not integrate appropriately with the public domain. The overall massing of the building would not improve the quality and amenity of the domain. The proposed built form does not successfully implement the intent of the existing masterplan planning requirements.</p> <p>The proposed substantial variations to the height, number of storeys and minimal setbacks would not provide a high-quality design. The variations would also contribute to additional unnecessary overshadowing onto the public domain areas.</p>	No
7.1.6(4)(c)	<i>whether the development protects and enhances the natural topography and vegetation including trees or other significant natural features,</i>	Remains unchanged under the subject application.	Yes
7.1.6(4)(d)	<i>whether the development detrimentally impacts on view corridors,</i>	The proposal as amended, would unnecessarily reduce available view corridors from future adjoining developments	No

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		within the precinct.	
7.1.6(4)(e)	<i>whether the development achieves transit-oriented design principles, including the need to ensure direct, efficient and safe pedestrian and cycle access to nearby transit nodes,</i>	Remains unchanged under the subject application.	Yes
7.1.6(4)(f)	the requirements of the Lane Cove Development Control Plan,	<p>The proposal has been assessed against the Lane Cove Development Control Plan and is unsatisfactory.</p> <p>The proposal does not comply with the required number of storeys requirements. The proposed maximum storeys and resultant maximum building height is not supported.</p>	No, the proposed DCP variations are not supported, and refusal is recommended
7.1.6(4)(g)	<p><i>how the development addresses the following matters—</i></p> <p>(i) <i>the suitability of the land for development,</i></p> <p>(ii) <i>existing and proposed uses and use mix,</i></p> <p>(iii) <i>heritage issues and streetscape constraints,</i></p>	<p>(i) Whilst the subject land would be ultimately suitable for the development, it is considered that a high level of care had not been taken in the design to ensure that it responds to site specific characteristics by introducing more non-complaint proposal as amended when compared to the original approved design.</p> <p>(ii) The proposed use/s (a high-density mixed-use development) remains the same and appropriate given the zoning and location. However, the overall design as amended of the development is not supported.</p> <p>(iii) The proposal does not include heritage items or a specific heritage interface, however the amended</p>	No, in part due to the unsatisfactory design or nature of the proposal

		streetscape presentation is not supported. The proposed additional storeys and setbacks are not appropriate. The design of the proposal had not ensured that an exceptional design quality would be provided for.	
	<p>(iv) the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,</p>	(iv) The setbacks, height, amenity, and urban form is not satisfactory. The interrelationship between the site and neighbouring sites have not been carefully managed. Reduced setbacks and compliant number of storeys and height should be provided for.	
	<p>(v) bulk, massing and modulation of buildings,</p>	(v) The proposal does not provide for massing and modulation in line with the LEP and DCP in relation to heights and number of storeys. The buildings are not appropriately stepped to the green spina area and to the northern boundary. It is considered that the proposal would not provide for a high-quality development consistent with Council's vision for the area.	
	<p>(vi) street frontage heights,</p>	(vi) The proposed additional storeys in a non-compliant scheme with respect to building heights and number of storeys which would not provide an appropriate bulk and scale for the future precinct.	
	<p>(vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,</p>	(vii) The environmental impacts have been considered however a compliant scheme would further assist in achieving better or improved	

	<p><i>(viii) the achievement of the principles of ecologically sustainable development,</i></p> <p><i>(ix) pedestrian, cycle, vehicular and service access, circulation and requirements,</i></p> <p><i>(x) the impact on, and any proposed improvements to, the public domain,</i></p> <p><i>(xi) the configuration and design of publicly accessible spaces and private spaces on the site.</i></p>	<p>sustainability levels. The proposed development would not ensure a high level of amenity for future residential users and to the public domain.</p> <p>(viii) ESD has been considered however again a compliant scheme with the LEP/DCP would assist.</p> <p>(ix) The visual impact of the development onto the pedestrian link and green spine area is not supported. Parking provision remains to be satisfactory.</p> <p>(x) The proposed height, number of storeys and setbacks involved would not provide for substantial improvements to the public domain.</p> <p>(xi) The visual impact of the development onto the pedestrian link and green spine area is not supported.</p>	
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As a result, it is considered the proposal as amended would not meet the above relevant objective of this clause in ensuring design excellence would be achieved. Based on the above concerns raised, the proposal does not meet the intent and the objective of Clause 7.1 which would allow for the building height and FSR incentives upgrades in the first instance. The intent is that full compliance with both height and FSR be achieved. The proposal seeks to circumvent this intent by now proposing a building height under the subject Section 4.55(2) Modification Application. Further, the proposal also does not meet the following LEP aims, zone and building height objectives as follows:

- *to establish, as the first land use priority, Lane Cove's sustainability in environmental, social and economic terms, based on ecologically sustainable development, inter-generational equity, the application of the precautionary principle and the relationship of each property in Lane Cove with its locality.*
- *to preserve and, where appropriate, improve the existing character, amenity and environmental quality of the land to which this Plan applies in accordance with the indicated expectations of the community.*
- *in relation to residential development, to provide a housing mix and density that—*
 - *is compatible with the existing environmental character of the locality, and*
 - *has a sympathetic and harmonious relationship with adjoining development.*

- *to ensure development allows for reasonable solar access to existing buildings and public areas.*
- *to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable.*
- *to seek alternative design solutions in order to maximise the potential sunlight for the public domain.*
- *to ensure that the existing amenity of residences in the neighbourhood is respected.*
- *To relate development to topography.*

The Section 4.55(2) Modification Application does not comply with Lane Cove Local Environmental Plan 2009 and refusal is recommended

8.1 SEPP 65 – Design Quality of Residential Development

The proposal was accompanied by a Design Verification Statement satisfying Clause 50 of the Environmental Planning and Assessment Regulation 2000. Clause 28(2) of SEPP 65 states that in determining a development application for consent to carry out development to which this Policy applies, a consent authority is to take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration) –

- (a) the advice (if any) obtained from the design review panel,
- (b) the design quality of the development when evaluated in accordance with the design quality principles, and
- (c) the Apartment Design Guide.

8.2 Design Review Panel

The Development Application was referred to the Northern Sydney Regional of Council's Design Review Panel on 4 April 2021. The minutes of the meetings are provided as **Annexure 5** of this report. The key comment from the panel was that:

The planning process for this audacious masterplan (undertaken by the Council) has featured a high degree of cooperation, coordination and good will between developers, our professional colleagues and the Design Review Panel. All the participants have been dedicated to achieving the highest aspirations of this remarkable precinct. During this process, it has occurred to most applicants that target densities – conceived at master planning stage – are not necessarily able to be met if a high-quality urban design outcome is to be achieved.

The Panel understands that Clause 4.55 variations are explicitly prohibited – a contract with the public who so gracefully agreed to the massive uplift that drives the master planning process. Understandably, Council is committed to this contract – as is the Panel – as it represents the same spirit of openness and collaboration that has characterised a very positive development process. Against this background, the current proposal - to add more bulk and scale to an approved scheme - appears to push back against these aims, objectives and generosity that the Panel has encountered so far.

No doubt, this proposal will disappoint and offend the many residents and stakeholders who have been part of the process, who would expect virtually all developers to follow suit. That would be highly regrettable. The Panel has determined the outcome of the DEP review and provides final direction to the Applicant as follows:

- *The Panel does not support the proposal for the reasons described.*

8.3 Design Quality Principles

The design quality of the development has been assessed in relation to the design quality principles contained within SEPP 65. The principles are quoted and then addressed in turn.

PRINCIPLE 1: CONTEXT AND NEIGHBOURHOOD CHARACTER

Good design responds and contributes to its context. Context is the key natural and built features of an area, their relationship and the character they create when combined. It also includes social, economic, health and environmental conditions. Responding to context involves identifying the desirable elements of an area's existing or future character. Well-designed buildings respond to and enhance the qualities and identity of the area including the adjacent sites, streetscape and neighbourhood. Consideration of local context is important for all sites, including sites in established areas, those undergoing change or identified for change.

Comment: The proposal as amended does not respond to its intended context and neighbourhood character of South St Leonards (SLS) precinct. The proposal in its design overall is not considered to contain responsive design elements that will contribute to the future character of the precinct. The proposed height, number of storeys and building setbacks would not contribute to the high design excellence criteria required to be met to enable for higher densities to be permitted on the development site. The proposed variations to the height and number of storeys would exacerbate the built form and bulk/scale concerns that exist for the subject development.

The development does not respond to the context into which it is placed. The proposed development represents as an overdevelopment due to the proposed development being non-compliant. The development does not conform to the future desired character of the newly adopted precinct and would affect its future intended built outcomes to be achieved. The proposed design does not satisfy Principle 1: Context and Neighbourhood Character.

PRINCIPLE 2: BUILT FORM AND SCALE

Good design achieves a scale, bulk and height appropriate to the existing or desired future character of the street and surrounding buildings. Good design also achieves an appropriate built form for a site and the building's purpose in terms of building alignments, proportions, building type, articulation and the manipulation of building elements. Appropriate built form defines the public domain, contributes to the character of streetscapes and parks, including their views and vistas, and provides internal amenity and outlook.

Comment: The proposed built form and scale does not reflect the anticipated built form specified in the LEP and DCP controls for the SLS precinct. The development does not comply with the maximum building height and the number of storeys controls. The proposal as amended should be refused as other approved developments within the precinct have either been designed or redesigned to fully comply. There remains a significant concern with the built form and scale. The height (including the number of levels) of the development overall is not acceptable in terms of future residential amenity impacts. The proposal does not respond to its context. Concerns are raised which results in an overdevelopment.

The proposed design does not satisfy Principle 2: Built Form and Scale.

PRINCIPLE 3: DENSITY

Good design achieves a high level of amenity for residents and each apartment, resulting in a density appropriate to the site and its context. Appropriate densities are consistent with the area's existing or projected population. Appropriate densities can be sustained by existing or proposed infrastructure, public transport, access to jobs, community facilities and the environment.

Comment: The proposed density of the development is below the maximum incentive floor space ratio and would not exceed the anticipated density envisaged for the subject development site. However, the proposal as amended relies on substantial variations to accommodate the proposed additional FSR at the expense of the intended outcomes within the precinct and the amended design do not provide for good planning outcomes in this instance. The proposed development as amended represents as a form of an overdevelopment. The development as amended would result in an unacceptable built form outcome. The proposed design does not satisfy Principle 3: Density.

PRINCIPLE 4: SUSTAINABILITY

Good design combines positive environmental, social and economic outcomes. Good sustainable design includes use of natural cross ventilation and sunlight for the amenity and liveability of residents and passive thermal design for ventilation, heating and cooling reducing reliance on technology and operation costs. Other elements include recycling and reuse of materials and waste, use of sustainable materials and deep soil zones for groundwater recharge and vegetation.

Comment: The aim of the project is to revitalise the Lane Cove precinct with a strong focus on sustainability to promote a healthier way of living not just for the present but in the years to come. Embedded in the design are a range of sustainable initiatives however the principal concern relates to the non-compliant scheme of the development that would not assist in the principle of achieving good sustainability outcomes. The proposed design satisfies Principle 4: Sustainability.

PRINCIPLE 5: LANDSCAPE

Good design recognises that together landscape and buildings operate as an integrated and sustainable system, resulting in attractive developments with good amenity. A positive image and contextual fit of well-designed developments is achieved by contributing to the landscape character of the streetscape and neighbourhood. Good landscape design enhances the development's environmental performance by retaining positive natural features which contribute to the local context, co-ordinating water and soil management, solar access, micro-climate, tree canopy, habitat values and preserving green networks.

Good landscape design optimises useability, privacy and opportunities for social interaction, equitable access, respect for neighbours' amenity and provides for practical establishment and long-term management.

Comment: The proposal as amended would not adversely affect the landscape scheme to the public domain and within the development. The proposed design as amended continues to satisfy Principle 5: Landscape.

PRINCIPLE 6: AMENITY

Good design positively influences internal and external amenity for residents and neighbours. Achieving good amenity contributes to positive living environments and resident wellbeing. Good amenity combines appropriate room dimensions and shapes, access to sunlight, natural ventilation, outlook, visual and acoustic privacy, storage, indoor and outdoor space, efficient layouts and service areas and ease of access for all age groups and degrees of mobility.

Comment: The design as amended does not provide for high levels of external amenity within the green spine and public domain areas which would have a sense of an unnecessary 'enclosing' impact on these spaces. All other approved developments within the precinct have either been designed or redesigned to fully comply with the relevant requirements of the precinct. The proposed building height and the number of storeys would not enhance the amenity of future public and private domain users due to the visual impact of the building would have on these areas due to the large variations being proposed. The overall building design compromises privacy and amenity of future residents given the building height, number of storeys and setbacks concerns.

The proposed design does not satisfy Principle 6: Amenity

PRINCIPLE 7: SAFETY

Good design optimises safety and security within the development and the public domain. It provides for quality public and private spaces that are clearly defined and fit for the intended purpose. Opportunities to maximise passive surveillance of public and communal areas promote safety. A positive relationship between public and private spaces is achieved through clearly defined secure access points and well-lit and visible areas that are easily maintained and appropriate to the location and purpose.

Comment: The proposal as amended would continue to provide for appropriate safety. The proposed design satisfies Principle 7: Safety.

PRINCIPLE 8: HOUSING DIVERSITY AND SOCIAL INTERACTION

Good design achieves a mix of apartment sizes, providing housing choice for different demographics, living needs and household budgets. Well-designed apartment developments respond to social context by providing housing and facilities to suit the existing and future social mix. Good design involves practical and flexible features, including different types of communal spaces for a broad range of people and providing opportunities for social interaction among residents.

Comment: The proposal as amended still provides for an appropriate apartment mix and sizes. The proposed design satisfies Principle 8: Housing Diversity and Social Interaction.

PRINCIPLE 9: AESTHETICS

Good design achieves a built form that has good proportions and a balanced composition of elements, reflecting the internal layout and structure. Good design uses a variety of materials, colours and textures. The visual appearance of a well-designed apartment development responds to the existing or future local context, particularly desirable elements and repetitions of the streetscape.

Comment: The proposed materiality is supported. Whilst the materiality is supported, the proposal as amended fails to provide for a highly integrated aesthetic development in relation to its proposed built form. Good design would be better achieved through a reduction in the number of storeys and a compliant building height. The proposed design does not satisfy Principle 9: Aesthetics.

8.4 Apartment Design Guide (ADG)

A SEPP 65 assessment against the ADG is provided as **Annexure 2** to this report.

The Section 4.55(2) Modification Application does not comply with SEPP 65 and refusal is recommended

9.1 SEPP BASIX 2004

A BASIX certificate accompanies the application and is provided as **Annexure 16** to this report.

The BASIX Certificate demonstrates compliance with the provisions of the SEPP.

The Section 4.55(2) Modification Application complies with SEPP BASIX 2004

10.1 SEPP Planning Systems 2021

The original Development Application was referred to the Sydney North Planning Panel for determination as the Capital Investment Value of \$33,564,432.00 (exceeding \$30 million) satisfied the requirements of SEPP Planning Systems 2021.

The subject Section 4.55(2) Modification Application is required to be rereferred back to the SNPP as it is a major modification and more than 10 submissions have been received which is a contentious development.

The Section 4.55(2) Modification Application complies with SEPP Planning Systems

11 Any proposed instrument (Draft LEP, Planning Proposal)

N/A

12 Any development control plan

12.1 Lane Cove Development Control Plan 2009

The Modification Application has been assessed against the relevant provisions of Lane Cove Development Control Plan (LCDCP) 2009 as detailed in **Annexure 3**. The assessment indicates that the proposal complies with all the relevant provisions with exception of the following:

Number of Storeys/Part Storey Controls

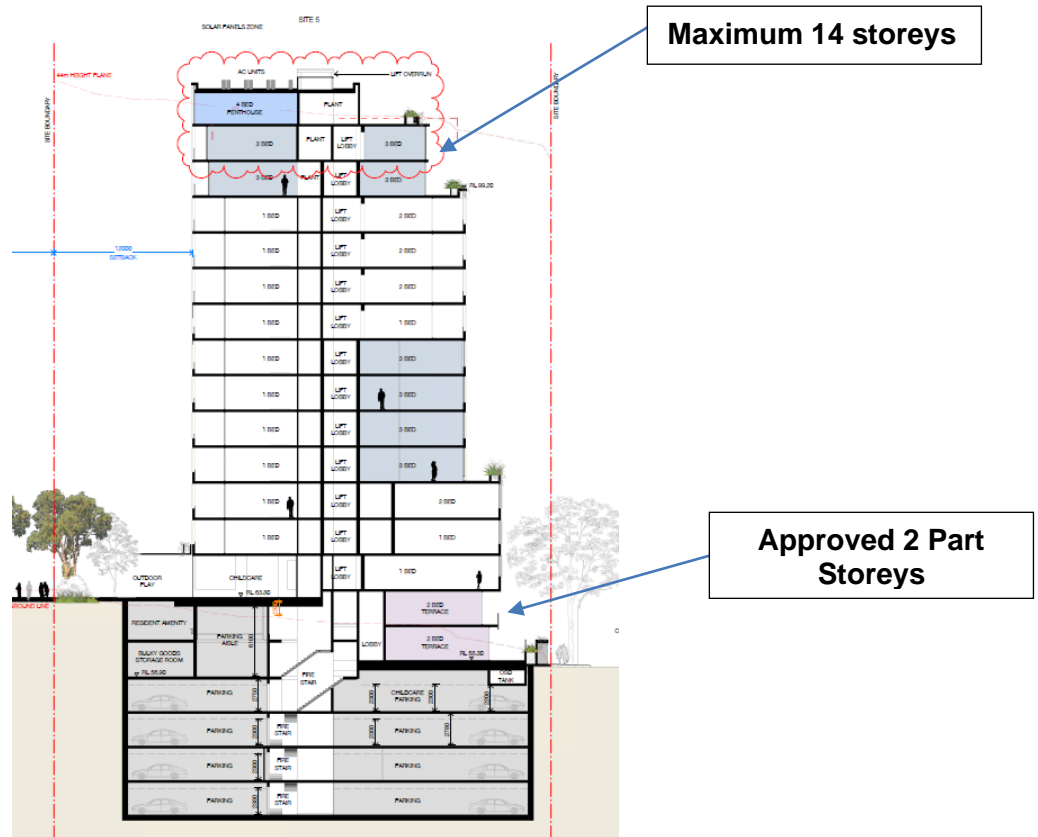
Part 7 – Built Form, Figure 10 – Height of Buildings (in storeys) or Control No. 7 under the ‘Building Envelope Table’ of Locality 8 – St Leonards South Precinct of Part C – Residential Localities LCDCP 2009 which permits a **maximum of 12 storeys** on the subject development site. It is noted the ‘Building Envelope Table’ states that ‘A part storey will not count as a storey’.



Figure 10: Height of Buildings (in storeys)

Figure 18 – Maximum 12 Storey DCP Control on Area 5

Based on the relevant ‘part storey’ definitions described above in this report and the maximum 12 storeys control, it is considered that the proposal as amended does not comply with the relevant number of storeys DCP controls. A **maximum of 14 storeys** is proposed.



The applicant has been advised that support for the proposed variation to the number of storeys would not be supported with a likely recommendation for refusal. The applicant is still seeking determination of the subject application and has provided the following justification:

Section 7 – Built Form of Part C8 of the DCP provides a maximum building height of 12 storeys for the subject site. In addition, the DCP indicates that part storeys that result from excavation of steep slopes or semi-basement parking do not count as a storey. The approved development, as modified, involves 12 storeys plus 2 x part-storeys/terrace levels at the front of the site and are the result excavation following the slope of the land.

The proposed amendments involve increasing the height of the building from the current 12 storeys to 14 storeys plus the two terrace levels that are part storeys. Although the proposed modification of the development will not comply with the DCP building height, measured in storeys, it is important that appropriate weight should be given to this requirement.

Section 3.43(5) of the Environmental Planning and Assessment Act 1979 makes it clear that a DCP provision that is substantially the same, inconsistent or incompatible with the provision of an environmental planning instrument applying to the land has not effect in respect of that provision. Given the DCP building height is substantially the same as the height of building development standard in the Lane Cove LEP 2009, the DCP provision should have no effect.

Nevertheless, the environmental impacts associated with the proposed additional two storeys (level 13 and level 14) are considered in Section 5.2.6.1 of this Statement. On the basis that the impacts of the non-compliance with the DCP building height is minor, the proposed variation is worthy of support

Comment: Full compliance should be achieved as other approved developments in the precinct have complied with this control and it is recommended that the subject Modification Application be refused on this basis. Full compliance would ensure that any approval would reflect the expectations of the community that Council's newly adopted site-specific or precinct wide DCP be fully complied with which went through an extensive strategic planning and community consultation process. Such a scheme would also contain the benefit of reducing the non-compliant components of the development in relation to its visual, bulk/scale, view and overshadowing impacts onto the public domain and/or from future adjoining developments.

Whilst a DCP can be interpreted flexibly however it is considered that the design of the proposed development as amended disregards key 'big ticket' item controls within the LEP/DCP such as the maximum permitted LEP incentive building height envelope and the number of storey controls to maximise its FSR potential on the development site. This sentiment is also shared by the Design Review Panel where they recommend that the proposal as amended should not be supported. It is recommended that the SNPP adopts the same recommendation for a refusal in this case.

It is noted that the SNPP has been appropriately briefed on the concerns raised by Council and with the applicant present where it fully understands the relevant issues or concerns at hand. Approval of the subject proposal as amended would result in an outcome that would be inconsistent with other forms of approved development within the new precinct and the proposed variation to the number of storeys is not supported in this instance.

Based on the above concerns raised with the proposed DCP variation involved, the proposal as amended does not meet with the following DCP vision, overall and built form objectives as follows:

- *The desired future character of the St Leonards South Precinct is for a liveable, walkable, connected, safe, Precinct which builds upon the transit and land use opportunities of St Leonards and Metro Stations and commercial centre.*
- *To ensure that all new development will achieve design excellence, as well as providing suitable transition and interfaces to adjoining zones and open space.*
- *Optimise solar access to all buildings, public domain and private open space.*

The Section 4.55(2) Modification Application does not comply with Lane Cove Development Control Plan 2009 and refusal is recommended

13 The likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality

The impacts of the development as amended have been considered and addressed where it is considered that there would be additional adverse impacts either to the natural and built environments, social and economic or amenity of the locality as detailed within this report.

14 The suitability of the site for the development

Whilst the subject land would be ultimately suitable for the development, it is considered that the proposed development as amended had not been designed in a manner to ensure that it responds to site specific characteristics as detailed above in this report.

15 Any submissions made in accordance with this Act or the regulations

The proposal was notified in accordance with Lane Cove Council's Notification Policy.

i. Notification Extent

The Development Application was notified to the extent shown in the Public Notification Map included as **Annexure 6** to this report.

ii. Notification Period

The notification period and the number of submissions received are summarised in the following table:

Public Notification			
Plan Revision	Lodgement Date	Notification Period	Submissions Received
DA Lodgement Revision	13 March 2021	14/03/2023 – 11/04/2023	15

iii. Summary of Submissions

The submissions received are summarised and addressed in **Annexure 4** to this report.

16 Public Interest

Approval of the subject proposal would be contrary to the public interest as the development would not meet the relevant objectives of the South St Leonards precinct planning scheme and the future intended desired character of the locality within a high-density residential environment.

17 Contributions

17.1 Special Infrastructure Contribution

The site is within the [St Leonards and Crows Nest Special Contributions Area](#) which requires the payment of a contribution to support the St Leonards and Crows Nest 2036 Plan – a relevant condition would have been imposed to reflect the amended change in unit numbers/mix had the subject application been recommended for approval.

18 CONCLUSION

The subject Section 4.55(2) Modification Application has been assessed in accordance with the Environmental Planning and Assessment Act, 1979 and it is not considered to be satisfactory in this instance. The proposed development as amended is not consistent with the relevant planning controls (with the proposed breach to building height and the number of storeys requirements). The proposal as amended would not achieve design excellence within Area 5 of the St Leonards South Precinct and the application is reported to the Sydney North Planning Panel with a recommendation for refusal.

RECOMMENDATION

That pursuant to Section 4.16(1)(b) of the Environmental Planning and Assessment Act, 1979 the Sydney North Planning Panel at its meeting of 21 June 2023 refuse Section 4.55(2) Modification Application DA162/2022 to an approved mixed-use development (see Annexure 1 for reasons for refusal).

Mark Brisby
Executive Manager
Environmental Services Division

ATTACHMENTS:

There are no supporting documents for this report.