PLANNING INGENUITY

SECTION 4.56

STATEMENT OF ENVIRONMENTAL EFFECTS

Section 4.56 Application to modify LDA2020/0199

1-5A, 9-11, 13-17, 18-20 Railway Road and 50 Constitution Road
MEADOWBANK

Prepared for: APT

REF M180330
DATE: 28 August 2024

Contents

FIGURES

TABLES

ANNEXURES

1. Introduction & Background

We act on behalf of the Applicant to modify the approved mixed-use development at Nos. 1-5A, 9-11, 13-17, 18-20 Railway Road and 50 Constitution Road, Meadowbank.

On 12 June 2020, a Development Application (LDA2020/199) was lodged with City of Ryde Council for the following development on the subject site:

> *Demolition of existing structures and construction of a mixed use development comprising four x 6 to 7 storey buildings containing 133 apartments, 162 boarding rooms and commercial floor space with basement parking at 1-20 Railway Road, and 50 Constitution Road, Meadowbank.*

The application was refused by the Sydney North Planning Panel on 29 July 2021.

On 4 August 2021, an appeal was lodged with the Land and Environment Court regarding the refusal of LDA2020/199. The appeal was upheld, and development consent was granted on 18 July 2022.

The development consent will lapse on 18 July 2027.

Pursuant to Section 4.56, it is proposed to modify the approved development with regard to the operation and function of the approved residential apartments, by way of changes to the conditions of consent. The Applicant intends to retain the approved apartments under single ownership, to be professionally managed as rental housing stock. The units will not be strata subdivided in the future, will be retained as rental products, and a condition of consent will be imposed in this regard. The proposed residential apartments will continue to be characterised as shop-top housing despite the applicant's election to formally restrict the apartments to rental tenure. The original approval did not preclude use of the residential apartments for rental stock only. Accordingly, a formal change of use is not proposed, or required, and instead the operational characteristics of providing long-term rental stock is to be delivered by way of the voluntary imposition of conditions of consent to achieve this outcome.

Furthermore, if the consent authority is not satisfied with the imposition of a condition of consent to restrict the use of the property for rental housing, the Applicant would accept alternative options to ensure the restriction would be effectively imposed to the consent authority's satisfaction, as detailed in the legal advice prepared by *Baker & Mackenzie* provided at **Annexure A**.

There are no changes proposed to the approved building envelope, however, to facilitate the changed housing product, a reduction is parking and storage is proposed in response to the lesser parking and storage rates. As such, the proposal seeks to remove Basement Level 03 from the approved development. Furthermore, internal layout changes are proposed at the Ground Floor and Level 1 of the development to provide communal areas to support the rental units.

The proposed changes will reconfigure the internal layout of commercial/retail tenancies on the ground floor of Building A to provide a new lobby/reception, gym and toilets. The changes will slightly increase the FSR of the approved development since the lobby/reception, gym and toilets will replace areas of the building footprint previously allocated for plant room/services, which does not constitute gross floor area. The increase in gross floor area will result in a non-compliance with the maximum FSR permitted on the site, however, the proposed changes are located entirely within the approved building envelope and relate to internal layout amendments only.

At Level 1 of Building A, a new communal room is proposed within the approved building footprint. The communal facility will remove Units 101, 102, 107 and 108 of Building A, reducing the overall total of units to 129.

No changes are proposed to the 162 approved boarding rooms.

Overall, the proposal will retain the approved building envelope and will maintain a similar quantum of residential and commercial floor area as approved.

The purpose of this Statement is to address the planning considerations associated with the modified proposal and specifically to assess the likely impact of the development on the environment in accordance with the requirements of Sections 4.56 and 4.15 of the EP&A Act.

2. Site Description

The subject site is known as Nos. 1-5A, 9-11, 13-17, 18-20 Railway Road and 50 Constitution Road, Meadowbank. The location of the subject site is shown edged red in the aerial image provided at **Figure 1** below.

Figure 1 Aerial photograph of subject site (source SixMaps)

The site is an irregular shape and comprises a total of 16 allotments, legally described as set out below:

- Lots 1 to 8 of DP 13637;
- Lots 4 and 5 of DP 7533;
- SP 35053;
- Lots 1 and 2 of DP 384872; and
- Lots 9, 10 and 11 of DP 7533.

The site has four street frontages, comprising of a 59.905m northern boundary to Constitution Road, a 42.88m southern boundary to Underdale Lane, a 139.415m western boundary to Railway Road, and a 136.84m eastern boundary Faraday Lane. The site has a total area of 7,773m^2.

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The site falls approximately 4.8m from east to west, with a steep fall on the western side of the site (down to Railway Road). It also falls approximately 3.3m from north to south, through the centre of the site. Adjacent to the north of the site is a rock face which is raised approximately 3.6m above the street level on Constitution Road. Public stairs access street level from a pathway located adjacent to the north-western corner of the site.

The site is currently occupied by a mixture of industrial and retail buildings. Occupying the northwest corner of the site is a two storey brick building fronting Railway Road with a mixture of retail uses at ground level and associated office/storage space above. Further to the south of that building is a separate two storey brick building also containing retail premises at ground level and associated office/storage space above. A vehicular access separates the two buildings and provide access to a bitumen parking area to the rear of the buildings.

To the east of the retail buildings is a brick warehouse building fronting Faraday Lane and associated parking along the frontage. A large gravel car park associated with the warehouse uses on site is also located in the northwest corner of the site, with access provided from Faraday Lane. Two further warehouse buildings occupy the centre and southern part of the site. This includes a part one (fronting Railway Road), part two (fronting Faraday Lane) storey brick and metal building through the centre of the site, and a two storey brick warehouse buildings on the southern side of the site with vehicular accesses provided from Faraday Lane and Underdale Lane.

The site is almost entirely built over by either buildings or hard surfacing. Limited amounts of trees and vegetation across the site, with the majority of trees in situ through the centre and on the northern end of the site. A number of street trees are also located adjacent to the southwest of the site.

The site is located within the Shepherd's Bay, Meadowbank locality, an area that formerly comprised of generally industrial sites but has undergone significant redevelopment in recent years, evolving into a mixed use area.

3. Details of Proposed Modification

Pursuant to Section 4.56, it is proposed to modify the approved development with regard to the operation and function of the approved residential apartments, by way of changes to the conditions of consent.

The Applicant intends to retain the approved apartments under single ownership, to be professionally managed as rental housing stock. The units will not be strata subdivided in the future, will be retained as a rental product, and a condition of consent will be imposed in this regard. Alternatively, the Applicant would accept a deed with Council or a covenant on title to ensure the restriction would be effectively imposed to the consent authority's satisfaction, as detailed in the legal advice prepared by *Baker & Mackenzie* provided at **Annexure A**.

The proposed operational changes essentially create a Build-to-Rent (BTR) housing product.

A formal change of use is not proposed, or required, and instead the BTR equivalent is to be delivered by way of the voluntary imposition of conditions of consent to achieve this outcome.

It is relevant to consider on a merit basis, the nature of BTR provisions within the NSW planning framework, particularly in relation to the application of car parking requirements.

There are no changes proposed to the approved building envelope, however, to facilitate the changed housing product, a reduction in parking is proposed in response to the lesser parking rates required for rental housing. The parking provision has also been amended to address the reduction in retail NLA and the more recent parking requirements for boarding houses. As such, the proposal seeks to remove Basement Level 03 from the approved development. Subsequently, changes are proposed to Basement Level 02 to provide the services and facilities that were previously located within Basement Level 03.

Furthermore, internal layout changes are proposed at the Ground Floor and Level 1 of the development to provide communal areas to support the rental units. The proposed changes will reconfigure commercial/retail tenancies on the ground floor of Building A to provide a new lobby/reception, gym and toilets. At Level 1 of Building A, a new communal room is proposed within the approved building footprint. The communal facility will remove Units 101, 102, 107 and 108 of Building A, reducing the overall total of units from 133 to 129.

No changes are proposed to the 162 approved boarding rooms.

The modifications proposed are clearly shown on the Architectural Plans prepared by Curzon + Partners and submitted with the application, and are described below:

<u>Basement Level 03</u>

- Deleted.

<u>Basement Level 02</u>

- Building D storage added and building services reconfigured to suit detailed services coordination;
- Building D secure bicycle and motorcycle parking relocated from Basement Level 03;
- Building D laundry relocated from Basement Level 03;
- Coles lift relocated;
- Relocated BTR parking spaces;
- Building B lift lobby reconfigured to suit detailed services coordination;

- Relocated Building A, B & C bicycle parking spaces;
- Removal of car parking spaces due to travellator above;
- Building A lift lobby reconfigured to suit detailed services coordination;
- Building C lift lobby reconfigured to suit detailed services coordination;
- Retail car parking spaces overflow from Basement Level 01;
- Provision of car wash bays;
- 600mm DIA Gatic Access lib relocated from Basement Level 03;
- Building B storage relocated;
- Fire pump room relocated from Basement Level 03; and
- Airlock relocated from Basement Level 03.

Basement Level 01

- Extra retail car space; and
- RWT/OSD updated as per detailed services coordination.

Ground Floor (Building A)

- Reconfiguration of commercial/retail tenancies to provide a lobby/reception, gym and toilets.

Level 1 (Building A)

- Removal of Units 101, 102, 107 and 108; and
- New communal room added.

No changes are proposed to Buildings B, C or D.

The modification will require amendment to the description of the development as follows:

> *Demolition of existing structures and construction of a mixed use development comprising four x 6 to 7 storey buildings containing ~~133~~ **129 rental** apartments, 162 boarding rooms and commercial floor space with basement parking at 1-20 Railway Road, and 50 Constitution Road, Meadowbank*

In addition, the following consent conditions require amendment:

General Conditions

- No. 1 to reference the modified plans.

Operational Conditions

- No. 220 to reflect the amended parking provision as follows:

> ***Parking Allocation**. Both the owner and occupier of the development must provide and maintain the required parking allocation as follows;*
>
> *Basement Level 1*
>
> - *A minimum ~~144~~ **132** retail parking spaces.*
> - ***4 residential car share spaces.***

- *Any staff and long term parking spaces must be located in the western most parking aisle, commencing from the boom gate entry onwards.*
- *Minimum ~~8~~ **12** bicycle parking spaces*

Basement Level 2~~ & 3~~

- ***5 retail parking spaces***
- *~~28 visitor spaces~~*
- *~~165~~ **108** residential spaces*
- ***~~82~~ 16** spaces for the boarding house (including 1 staff / management space)*
- ***2 boarding house car share spaces***
- ***4 residential care share***
- *~~13~~ **11** bicycle spaces (residential)*
- *33 bicycle and 33 motorcycle spaces (boarding house)*

The proposal also necessitates the imposition of a new condition of consent, following Condition No. 15, to preclude strata subdivision of the residential apartments to the effect of the following:

> *Strata subdivision of the residential apartments is not permitted. Any future proposal to modify this condition would require a Development Application.*

It is understood that the consent authority may place additional conditions on the proposed development, specifically in relation to the operation and functioning of the residential apartments for the purpose of rental products only.

4. Statutory and Policy Compliance

4.1 SECTION 4.56

Section 4.56 of the *Environmental Planning & Assessment Act 1979* contains provisions relating to the modification of development consents issued by the NSW Land and Environment Council, and states:

> *(1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:*
>
> *(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and*
>
> *(b) it has notified the application in accordance with:*
>
> *(i) the regulations, if the regulations so require, and*
>
> *(ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
>
> *(c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and*
>
> *(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.*
>
> *(1A) 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.*
>
> *(1B) (Repealed)*
>
> *(1C) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.*
>
> *(2) After determining an application for modification of a consent under this section, the consent authority must send a notice of its determination to each person who made a submission in respect of the application for modification.*
>
> *(3) The regulations may make provision for or with respect to the following:*
>
> *(a) the period after which a consent authority, that has not determined an application under this section, is taken to have determined the application by refusing consent,*
>
> *(b) the effect of any such deemed determination on the power of a consent authority to determine any such application,*

(c) the effect of a subsequent determination on the power of a consent authority on any appeal sought under this Act.

(4) (Repealed)

The proposal is the subject of a Section 4.56 modification which relates to minor modifications to a Court approved application as outlined in Section 3 above. The proposed modifications will not alter the approved building envelope on the site and instead will facilitate the proposed changes to the operation of the approved residential apartments. The proposed modifications maintain the approved use of the site and will not result in an increase in intensity beyond that of the approved scheme.

The proposal does not require a new development application as the proposal is substantially the same as the approved development given that the proposal does not seek to alter the use, or materially change the appearance or form of the approved buildings. Furthermore, the proposed modification will have minor environmental impact as discussed in this Statement.

Importantly, whether the development will be "substantially the same" as the original consent is a mixed question of fact and law. This decision can be guided by principles and tests established in the Courts.

Decisions of the Land and Environment Court support the proposition that the main elements of the proposal are matters substantially the same as the existing development consent, as outlined below.

Modification Principles Established by the Courts

The traditional 'test' as to whether or not a development as modified will be "substantially the same" development as that originally approved was applied by J Stein and the Court of Appeal in *Vacik Pty Limited v Penrith City Council [1992] NSWLEC 8* and endorsed by J Bignold in *Moto Projects (No 2) Pty Ltd V North Sydney C [1999] NSWLEC 280*.

J Stein stated in the Vacik case: *"In my opinion 'substantially' when used in the section [s102, the predecessor of s4.55] means essentially or materially having the same essence".*

J Bignold expressed in the Moto case: *"The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified … not merely a comparison of the physical features or components of the development … rather … involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted)."*

J Bignold came to deal with the matter of "substantially the same" again in *Tipalea Watson Pty Limited v Ku-ring-gai Council [2003] NSWLEC 253*. From this Judgement, one can distil a list of matters or 'tests' to consider, being whether the modification involves the following:

(a) significant change to the nature or the intensity of the use;

(b) significant change to the relationship to adjoining properties;

(c) adverse amenity impacts on neighbours from the changes;

(d) significant change to the streetscape; and

(e) change to the scale or character of the development, or the character of the locality

In 2015, the principles regarding Section 96(2)(a) (now Section 4.55(2)(a)) were summarised in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75* where Pepper J set out the legal principles that apply as follows:

The applicable legal principles governing the exercise of the power contained in s 96(2)(a) of the EPAA may be stated as follows:

1. first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 475 and Scrap Realty Pty Ltd v Botany Bay City Council [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (Michael Standley at 440);

2. the modification power is beneficial and facultative (Michael Standley at 440);

3. the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (Scrap Reality at [16]);

4. the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8);

5. the term "substantially" means "essentially or materially having the same essence" (Vacik endorsed in Michael Standley at 440 and Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);

6. the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (Scrap Realty at [19]);

7. the term "modify" means "to alter without radical transformation" (Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42, Michael Standley at 474, Scrap Realty at [13] and Moto Projects at [27]);

8. in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (Vacik);

9. the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (Moto Projects at [56]); and

10. a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (Moto Projects at [52]).

In the case of *Arrage v Inner West Council [2019] NSWLEC 85*, Preston J found that there was no legal obligation to consider the circumstances in which the development consent was granted when comparing the approved development and the proposed modified development, or to consider the material or essential elements of the original development consent, neither of which are mandatory relevant matters. Rather it is the statutory provision of Section 4.56 which provides the relevant test.

In *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council [2022] NSWLEC 64*, Duggan J stated that in determining whether a development is substantially the same, it is not only important to ascertain that a development is for the same use, but also to consider the way in which the development is to be carried out. Furthermore, Duggan J sets out the need to establish significance of an alteration to understand whether a development is substantially the same, as follows:

"The significance of a particular feature or set of features may alone or in combination be so significant that the alteration is such that an essential or material component of the development is so altered that it can no

longer be said to be substantially the same development – this determination will be a matter of fact and degree depending upon the facts and circumstances in each particular case. Such an exercise is not focussing on a single element, rather it is identifying from the whole an element which alone has such importance it is capable of altering the development to such a degree that it falls outside the jurisdictional limit in s 4.56."

Furthermore, another key decision to consider is that of the Chief Judge of the Court in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2024] NSWLEC 31* which seeks to apply a balanced approach to determining whether or not a development as modified will be substantially the same as that originally approved. The decision sets out the balanced approach that should be applied to answer the substantially the same test, which is as follows:

> *7. In deciding whether or not the development as modified is substantially the same development as the development for which consent was originally granted, the Commissioner needed to undertake three tasks:*
>
> *a) Finding the primary facts: This involves drawing inferences of fact from the evidence of the respects in which the originally approved development would be modified. These respects include the components or features of the development that would be modified, such as height, bulk, scale, floor space, open space and use, and the impacts of the modification of those components or features of the development.*
>
> *b) Interpreting the law: This involves interpreting the words and phrases of the precondition in s 4.55(2) as to their meaning.*
>
> *c) Categorising the facts found: This involves determining whether the facts found regarding the respects in which the development would be modified fall within or without the words and phrases of the precondition in s 4.55(2). American jurist, Karl Llewellyn termed such descriptions of words and phrases as "abstract fact-categories": Karl Llewellyn, The Bramble Bush: On Our Law and Its Study (Oceana Publication 1960) 80. In the Australian authorities, they are commonly referred to as "statutory descriptions" or "statutory criteria": see, for example, The Australian Gas Light Company v The Valuer-General (1940) 40 SR (NSW) 126 at 137-138; Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 at 156; Randwick Municipal Council v Manousaki (1988) 66 LGRA 330 at 333. The decision-maker's task is to determine whether the facts found fall within or without the statutory description, "according to the relative significance attached to them" by the decision-maker: The Australian Gas Light Company v The Valuer-General at 138.*

Whether or not there will be increased environmental or neighbourhood amenity impacts under a proposed modified development is not a consideration as to whether or not a modification proposal is substantially the same under Section 4.55 of the EP&A Act. Authority for this position is set out in a decision of Talbot J in *Wolgan Action Group Incorporated v Lithgow City Council [2001] NSWLEC 199 [43]* in which he provides:

> *"Even if the present applicant is correct in that there will be a significant increase in the environmental impact … that, nevertheless, does not necessarily preclude a conclusion that the development, to which the consent as modified relates, is substantially the same development as that already permitted. The extension … alone does not change the inherent character of the development itself. There may be some additional environmental impact but that is a matter to be considered as part of the deliberations on the merits."*

Modification Principles Applied to the Proposal

The proposed modification, which entails the amendment to the potential tenure of the approved residential apartments (as rental stock), provides for a development that is substantially the same as the development for which consent was granted. 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 difference in the built envelope, visual or physical appearance of the building since all physical changes are internal to the approved building envelope, 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 unchanged from the approved development under LDA2020/0199. The proposed modification will not alter approved height, setbacks and envelope of the development, and the only physical changes relate to internal reconfiguration of floor space to provide a new lobby/reception, gym, communal room and amenities which will result in a slight reduction of commercial floor space and a reduction of four (4) residential units and a minor increase in the FSR. Despite the increased FSR, the building envelope will remain unchanged and therefore the change will have no bearing on the visual bulk or scale of the approved development. Furthermore, the proposed modification will not alter the size or layout of the remaining residential apartments. Accordingly, there will be no significant change to the intensity or density of the development approved under LDA2020/0199. The proposed modification will still have the same essence as the original approval and the proposed modification 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 modification does not alter the approved use of the land as a mixed use development with residential apartments (in the form of shop-top housing) and a boarding house, and only seeks to modify the operational arrangements (or tenure) of the residential apartments. Specifically in relation to the residential component, the proposal will not alter the approved boarding house, and will retain the approved use of residential apartments, only seeking to provide these apartments as rental housing. It is important to acknowledge that all residential apartments which are approved under the EP& A Act, 1979 are potentially rental stock, and the proposal to limit this does not require a consideration of, or change to characterisation of the use. This is akin to infill affordable rental housing under the Housing SEPP where the land use for such remains a residential flat building. Accordingly, the proposed modification is not overwhelming in relation to determining the use of the site which definitively remains as a mixed use development containing residential apartments and a boarding house. Furthermore, the proposal will not significantly alter the number of residential apartments provided on the site and will provide the same number of boarding rooms. 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 change the overarching nature or the intensity of the use as a mixed use development, and will not change the size or layout of dwellings and not significantly change the number of dwellings;
(b) the approved residential flat building (in the form of shop-top housing) component will remain as the same land use;
(c) not change the development's relationship to adjoining properties (maintains amenity, bulk and scale of the approved development);
(d) not lead to any adverse impacts on the amenity of neighbouring properties in terms of view loss, overshadowing or aural and visual privacy as no physical changes to the approved built form are proposed;
(e) not alter the development's relationship with streetscape since there are no changes proposed to building's visual bulk or scale; and
(f) not alter the development's form or appearance.

Importantly, *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 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 quantitative assessment, the development as modified in essence will be substantially the same to that which has been granted approval. The proposal will maintain the following approved components:

- the approved residential flat building (in the form of shop-top housing) component will remain as the same land use in the modified proposal. The original approval did not preclude leasing of the residential apartments and it would have been open to do so, however not required;
- The building envelope remains unchanged from the approved development, with no changes proposed to the height of the development or the approved building setbacks.
- The development will appear the same as the approved when viewed from the streetscape and adjoining properties.
- Total Gross Floor Area (GFA) provided by the proposal is materially the same to the approved development – approved GFA is 21,962m^2 and proposed is 21,995m^2 (an increase of only 33m^2 across the entire development). The FSR will however exceed the maximum permitted on the site by 28m^2, which is discussed in detail below.
- The proposal will not alter the size of apartments and will provide the same apartment mix, with the exception of a reduction of four (4) units.
- The amount of private and communal open space will remain the same as the approved development.
- The quantum of retail space for the Coles supermarket will remain the same as the approved development.
- The proposal will visually appear as four (4) buildings.
- The internal separation between the approved buildings will remain the same.
- Solar access to the neighbouring remains the same as the approved development.

The core quantitative differences relate to the proposed reduction in car parking spaces and storage within the basement, and a reduction in commercial/retail space and apartment units. The proposed internal layout changes will slightly increase the approved GFA, however, no changes are proposed to the approved building envelope, and the development, as modified, will sit at the same bulk and scale as approved for the site. The proposed variations are contextually insignificant and are not considered to render the development as modified substantially different or radically transformed.

In terms of qualitative assessment, the development as modified will be similar for the following reasons:

- The proposal will not change the essence of the approved development, being four (4) residential (Buildings A – C) and co-living (Building D) blocks on the site, all of which are located over a ground floor containing commercial and retail land uses.
- In relation to building scale the proposal will remain unchanged, with no changes proposed to the building envelope. Specifically, the proposal will not alter the building height, setbacks or footprint of the approved development.
- Visually the form of the development remains the same as previously approved.
- Modifications to the ground floor to provide a lobby/reception will slightly alter the building façade at the Railway Road frontage. The new lobby/reception will continue to address the street frontage and will not change the essence of the approved development when viewed from the streetscape.
- The internal layout changes are proposed to facilitate the change in housing product and would not be readily noticeable from the adjoining properties or when viewed from the public domain by the casual observer.
- The internal layout changes do not impact the amenity of the approved apartments for future occupants.
- Impacts on the adjoining properties will the same since no changes are proposed to the approved building envelope.

- From each street frontage, the building will appear the same with car parking and pedestrian access points provided in the same locations, and retail tenancies presenting to each street frontage. The provision of a reception/lobby will slightly alter the Railway Road street façade, however, the lobby will continue to address the street frontage and provide a streetscape appearance which is substantially the same as approved.
- The proposal will not change the central communal open space at Level 1, which separates Buildings A and B from Building C and D.

The approved mix of land uses is maintained within the proposed modifications. Although the proposal will modify the operation of the residential apartments to establish them as rental products, the development, as modified, will continue to provide a mix of residential and commercial development which will continue to be characterised in the same way and is substantially the same as that approved. The proposal will not impact the approved boarding house on the site. The approved residential flat building (in the form of shop-top housing) component will remain as the same land use in the modified proposal. The original approval did not preclude leasing of the residential apartments and it would have been open to do so, however not required.

In addition, as discussed in further detail in this Statement, the proposal will not give rise to any material impacts in terms of aural and visual privacy.

On the basis of the foregoing, in qualitative terms, the modified development is substantially the same as the originally approved development. The proposal as modified is capable of complying with all operational conditions imposed under LDA2020/0199.

With regard to *Hunter Development Brokerage Pty Limited trading as HDB Town Planning and Design v Singleton Council [2022] NSWLEC 64,* the way in which a development was carried out in regard to its use was identified as a consideration for determining whether a development is substantially the same, and whether this has a weight of significance so that it can no longer be said that it is substantially the same as that approved. Whilst the proposal will include an operational condition that limits the tenure of the residential apartments to provide them as rental housing product, the modification will not change the characterisation of the use as a residential flat building (in the form of shop-top housing). The proposal will not alter their core or overarching use as residential apartments, and instead focuses on a specific and minor element of the use. Indeed, all residential apartments are rental properties if so desired, and the original approval provided no impediment to this fulfilment. Therefore the proposal only seeks to formalise this potentiality for a set period of time. In the consideration of the development as a whole, the proposal does not alter the approved use to a degree that would be considered outside the scope of a modification application.

Furthermore, as set out in *Realize Architecture Pty Ltd v Canterbury-Bankstown Council [2024] NSWLEC 31,* an important step of determining whether a development passes the substantially the same test, is an evaluative one to assign significance to different aspects of a development. As detailed above, the proposal will not alter the key quantitative aspects of the development in terms of built form, and as a result will not alter the key qualitative aspects of the development in terms of its environmental impacts on the site and locality. The physical aspects of the approved development to be modified are internal and have no bearing on the appearance or form of the approved development. The proposal does also seek to modify the operation of the residential apartments to be rental housing, but the significance of this change is not considered to outweigh the retention of all other aspects of the development, including the overall use of the site as a mixed-use development including residential apartments (that in their original approved form could be offered to the market only as rental stock). As such, on a balanced approach, the proposal is considered to be adequately categorised as a modification given it is substantially the same as that approved on the site.

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, there will be no environmental impact from the proposed modification when set against the backdrop of the approved building envelope, in terms of design, solar access, privacy and views, since no external physical changes are proposed.

For the reasons explained above, 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. The proposed development will not have any significant or adverse environmental impacts on the locality and the application is appropriately categorised as a S4.56 application.

4.2 SECTION 4.15 ASSESSMENT

Pursuant to Section 4.56(1A), 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 relevant matters for consideration under Section 4.15(1)(a) of the EP&A Act, 1979, are identified under the relevant subject headings below.

4.2.1 State Environmental Planning Policy (Resilience and Hazards) 2021

State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP) commenced on 1 March 2022, repealing and replacing three former SEPPs related to coastal management, hazardous and offensive development and remediation of land, including SEPP 55 (Remediation of Land).

The provisions of SEPP 55, which have now been transferred to the Resilience and Hazards SEPP, were considered in the assessment of the original development application, and the necessary investigations were undertaken to address the criteria of the Resilience and Hazards SEPP, specifically in relation to Chapter 3 Hazardous and Offensive Development. Both a Detailed Site Investigation (DSI) and a subsequent Remediation Action Plan (RAP) were submitted with the original development application. Importantly, the RAP outlined the remediation strategy, as well as remediation works and validation necessary to make the site suitable for the development. Subject to the implementation and validation of the RAP, it was concluded that the site could be made suitable for the development.

The proposed modifications do not alter the approved land uses, or their intensity, and will reduce the extent of excavation required as a result of the removal of Basement Level 03. As such, the proposed modifications will not affect the conclusions of the DSI or RAP and further assessment of the SEPP is not considered necessary.

4.2.2 State Environmental Planning Policy (Transport and Infrastructure) 2021

State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) commenced on 1 March 2022, repealing and replacing four former SEPPs related to infrastructure, transport, education and childcare, including SEPP (Infrastructure) 2007.

The relevant provisions of the SEPP (Infrastructure) 2007, which have been transferred to the Transport and Infrastructure SEPP, were considered in the assessment of the original development application. The proposed modifications do not alter any conclusions made in the original assessment.

Despite the reduction in parking spaces proposed, the development, as modified, will continue to be classified as traffic-generating development pursuant to Schedule 3 of Transport and Infrastructure SEPP, since it will continue to provide a car park which has more than 200 car parking spaces. As such, Clause 2.122 of the SEPP continues to apply to the development.

The consent authority is therefore required to refer the application to Transport for NSW (formerly RMS), however, it is unlikely that any issues will be raised since the accessibility of the site and any potential traffic safety, road congestion or parking implications of the development, were assessed under the original development application, and the proposal will only reduce these implications due to the reduction in parking, and effectively a reduction in traffic generation to and from the site.

4.2.3 State Environmental Planning Policy (Sustainable Buildings) 2022 [Section 4.15(2)]

State Environmental Planning Policy (Sustainable Buildings) 2022 came into effect on 1 October 2023, replacing and repealing the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.

In accordance with the provisions of the SEPP, a revised BASIX Certificate is submitted with the modification application and confirms that the development as modified (once operational) will comply with the water, thermal comfort and energy efficiency requirements of the Policy.

4.2.4 State Environmental Planning Policy (Housing) 2021 [Section 4.15(2)]

State Environmental Planning Policy (Housing) 2021 (Housing SEPP) commenced on 26 November 2021, repealing and replacing five former SEPPs related to housing, including the State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP).

Despite this, Schedule 7A of the Housing SEPP stipulates savings and transitional provisions where the new policy does not apply, and the provisions of the ARH SEPP and SEPP 65 remain relevant and applicable. In accordance with Schedule 7A, the policy does not apply to a development consent granted on or before the commencement date, which includes LDA2020/0199, and as such, the ARH SEPP and SEPP 65 are addressed at Section 4.2.5 and 4.26 below.

We do also note, that whilst SEPP (Housing) 2021 does not apply to the residential apartments, since no formal change of use to build-to-rent (BTR) is sought, the BTR provisions under SEPP (Housing) 2021 should be considered on a merit basis only in relation to storage and parking for these apartments given we seek to utilise the apartments as rental housing product only. As a rental housing product, we consider application of the storage and parking requirements under the ADG to be excessive and not reflective of the need of renters.

Nevertheless, the proposed parking arrangements do not rely on the provisions of SEPP (Housing) 2021, and instead a number of planning grounds and justifications specific to the context of the site are submitted to support the proposed parking arrangements.

It must be made clear that SEPP (Housing) 2021 is not the applicable planning instrument to the proposed modification, however, given the nature of the modifications to provide rental housing product, it is considered appropriate to contemplate the BTR storage and parking requirements, for which SEPP (Affordable Rental Housing) 2009 did not contain controls, to inform a reasonable approach to the type of housing stock proposed.

Further assessment of the proposal against the Housing SEPP is not considered necessary since the proposal does not formally seek a change of use to a housing type in which the Housing SEPP applies.

4.2.5 SEPP No.65 Design Quality of Residential Apartment Development [Section 4.15(2)]

The proposed modifications do not alter the developments compliance with the provisions of the ADG. The proposal does not alter the approved apartment sizes, private open space, building separation, or any other physical aspects of the boarding rooms or residential apartments. Furthermore, the proposal will not alter the approved communal open space, and all apartments and rooms will continue to receive the same amount of natural ventilation and solar access as per the approved development.

The only changes proposed that relate to the provisions of the ADG are in relation to the reduction of parking and storage for the residential apartments which are proposed to be operated as rental housing products only.

Whilst the proposed development does not seek a formal change of use to build-to-rent (BTR) housing, it is considered appropriate to refer to the provisions of Part 4 of the Housing SEPP to guide a merit based assessment to understand suitable requirements for both parking and storage for rental housing.

Indeed, as a rental housing product, we consider application of the storage and parking requirements under the ADG to be excessive, and instead have utilised the storage and parking requirements for BTR under SEPP (Housing) 2021 to inform a more appropriate scheme, on a merit basis.

Clause 75 of Part 4 of the Housing SEPP relates to build-to-rent housing, particularly the application of the ADG to build-to-rent housing development. As per Clause 75(2), a consent authority must "be flexible in applying the design criteria set out in the ADG, including, in particular, the design criteria set out in Part 4, items 4E, 4G and 4K".

Item 4G of the ADG relates to storage requirements for residential development, and therefore the provision of storage for the rental apartments should be flexibly applied.

As shown in the amended storage schedule, all apartments are provided with between 3.1m^2 and 9m^2 of internal storage space depending on apartment size, and 3.9m^2 of external storage space within the basement levels. The storage provision is considered appropriate for the apartments since they will be utilised as rental housing only, and do not significantly differ from the storage requirements of the ADG.

In relation to onsite parking, the requirements of the Housing SEPP, as well as a number of merit based arguments, are provided to justify the proposed parking provision, as addressed in Section 4.3.3 below.

Furthermore, a statement prepared by Curzon + Partners is submitted with the modification application which verifies that the proposed modifications do not diminish or detract from the design quality of the development for which consent was originally granted.

There are no further provisions of the ADG which need to be considered as part of this application.

4.2.6 State Environmental Planning Policy (Affordable Rental Housing) [Section 4.15(2)]

State Environmental Planning Policy (Affordable Rental Housing) 2009 (ARH SEPP) commenced on 31 July 2009 and aims to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility and floor space ratio bonuses. As previously stated, despite being repealed, the ARH SEPP continues to apply to the proposed development in accordance with the savings provisions within Schedule 7A of the Housing SEPP.

The proposed modifications will have no impact on the approved boarding house with no changes proposed to the boarding rooms, boarding house parking provision, landscaped area or private open space, and the building height of the development will remain as approved. The proposal will however alter the laundry room and storage provided for the boarding house, and increase the approved gross floor area (GFA) on the site, as detailed below.

Laundry Facilities

The boarding house laundry, as approved, had an area of 84m^2. The approved laundry was excessive to accommodate the required number of washers/dryers, and as such the proposed modifications seek to reduce the laundry size to 58.3m^2.

A total of 162 boarding (co-living) rooms are provided (consistent with the approval), and as such 16.2 washers and dryers are required in accordance with Condition 133 of the development consent under LDA2020/0199. As shown on the Architectural Plans, a total of 17 washer/dryers can be accommodated within the laundry, as modified, which satisfies Condition 133.

Also, to ensure a high level of amenity for all boarding (co-living) room and residential apartment occupants, a washer/dryer will be provided in each room/unit.

Storage

The approved development provided 251.3m^3 of storage for the boarding house, whilst the proposed modification seeks to provide 78m^3 of storage. The proposed reduction in storage is proposed since 251.3m^3 was excessive for boarding rooms when considering a minimum storage requirement under the ARH SEPP does not apply. Furthermore, the Applicant has had significant experience with rental properties and has provided storage in accordance with what is required by renters, which in their experience is not significant.

Part 3.5 of the Ryde DCP 2014 contains the controls applicable to boarding house developments. There are no minimum storage requirements for boarding houses within Part 3.5.

Gross Floor Area

The proposed modifications will increase the approved gross floor area (GFA) on the site by a total of 82m^2. Under the ARH SEPP, the approved development utilised the additional 20% FSR permitted under Clause 29(1)(c)(ii) of the SEPP and as such was permitted a maximum GFA of 21,967m^2. The approved development complied with the maximum permissible GFA under the ARH SEPP and provided a total gross floor area of 21,962m^2.

The additional GFA which results from the proposed internal modifications will create a minor non-compliance with the maximum FSR permitted on the site of 28m^2 equating to a variation of 0.12%.

Despite the FSR non-compliance, the proposed modifications do not alter the approved building envelope, and the additional GFA is a result of converting approved service areas, which are excluded from GFA calculations to communal spaces to support the residential apartments. The proposed non-compliance will not have any material impacts on the locality, with the streetscape appearance of the development to remain as approved.

FSR Justification

As identified above, the amended proposal seeks a departure from the applicable floor space ratio control. In this regard, the approved internal layout of Building A is being slightly amended to provide a gym and reception/lobby within the approved building footprint. The new spaces will cover floor space which was previously excluded from GFA calculations and as a result increases the GFA of the development by 28m^2, resulting in an incredibly minor variation of 0.12%.

In *Parker Logan Property Pty Ltd v Inner West Council [2018] NSWLEC 1339*, Gray considers the application of Clause 4.6 of the LEP to the proposed Affordable Housing development and the relationship of Clause 4.6 with Clauses 29(1) and (2) of the SEPP ARH, which set out a number of "do not refuse" criteria that preclude a consent authority from refusing the application on certain grounds if those criteria are met. Relevantly, Clause 29(1)(c) provides that the application cannot be refused on the ground of floor space ratio if the floor space ratio is not more than the existing maximum floor space ratio for residential accommodation permitted on the land plus 20% of the existing maximum floor space ratio permitted. Notwithstanding this, cl 29(4) of the SEPP ARH allows the consent authority to grant development consent "whether or not the development complies with the standards set out in subclause (1) or (2)".

Gray found that there is no inconsistency and cl 4.6 applies to the height and FSR development standards, stating (paragraph 42):

> *"As such, the only way the consent authority, or the Court exercising the functions of the consent authority, can grant consent to development that contravenes a development standard is through cl 4.6 of the MLEP 2011. There is nothing in cl 29(4) of the SEPP ARH that is inconsistent with the terms of cl 4.6. That is:*
>
> - *Clause 29(4) of the SEPP ARH makes it clear that the discretion to grant consent remains despite a non-compliance with (1) or (2), and;*
> - *Clause 4.6 of the MLEP 2011 makes it clear that consent cannot be granted if there is a breach of a development standard in the MLEP 2011 unless certain pre-conditions are met.*

In accordance with this judgement, a variation of Clause 29(1)(c) of the ARH SEPP is proposed under this modification application.

Importantly, in the NSW Land and Environment Court case of *Gann & Anor v Sutherland Shire Council [2008],* the Court held that there is power to modify a development application where the modification would result in the breach of development standards. The Court took the view that development standards within an 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 a 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, Section 96(AA) application (now a Section 4.56 of the EP&A Act) still requires the consent authority to take into consideration those matters referred to in Section 4.15. These matters, where relevant to the application are assessed throughout this Statement.

There are no stated objectives to Clause 29(1)(c) of SEPP ARH. However, it can be assumed the objectives would be to control the bulk and scale of development, similar to the objectives of the FSR development standard under Clause 4.4 of the Ryde LEP 2014 which are as follows:

> *"(a) to provide effective control over the bulk of future development,*
>
> *(b) to allow appropriate levels of development for specific areas*
>
> *(c) in relation to land identified as a Centre on the Centres Map – to consolidate development and encourage sustainable development patterns around key public transport infrastructure."*

The proposed modifications, despite resulting in a slight increase in GFA, will not alter the approved building envelope on the site, and therefore will retain the bulk and scale of development on the site, as approved. The proposal will provide a similar mix of commercial and residential development on the site and will not increase the approved intensity of development on the site. The proposed modifications will not alter the essence of the approved development, which will continue to provide a sustainable mixed use development within a highly accessible location.

It is thus considered that the development, as modified, is consistent with the assumed objective of the development standard, despite the minor numerical non-compliance.

Although an objection pursuant 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 29(1)(c) of the ARH SEPP. In the judgement the Honorable Brian Preston, Chief Justice of the Land and Environment Court, set out 5 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 assumed objective of the standard and the objectives of the MU1 zone are achieved notwithstanding the numerical variation proposed.

Given that compliance with the zone and development standard objectives is achieved, insistence on strict compliance with the FSR standard 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 continue to provide for additional business floor space and housing within 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] NSWLEC 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:

> *86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard*

in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

The external appearance of the building will remain contemporary and appropriate to the site's Town Centre context. The proposed modifications will not alter the approved building envelope on the site and instead will facilitate the proposed changes to the operation of the approved residential apartments. The proposed non-compliance will have no material impacts and will continue to present as four (4) residential and co-living blocks on the site, all of which are located over a ground floor containing commercial and retail land uses. For the reasons above, the proposal is consistent with the requirements of Clause 4.6(2).

4.2.7 Ryde LEP 2014 [Section 4.15(2)]

Under Ryde LEP 2014 (RLEP 2014), the subject site is within Zone MU1 Mixed Use. The development is characterised as a mixed use development comprising of *commercial premises*, *shop top housing* and *boarding house* land uses which are permissible with consent in Zone MU1. The development as modified will continue to meet the objectives of Zone MU1 in that the proposal contributes to the mixture of compatible land uses, providing residential, retail and commercial development, in an area that is highly accessible.

The proposed modifications will not alter the approved building height on the site and does not alter compliance with the relevant provisions of the RLEP 2014.

With regard to FSR, the approved development was granted a bonus FSR under the ARH SEPP. As such, the additional gross floor area proposed under this modification application is addressed above in relation to the ARH SEPP.

There are no further LEP provisions that require consideration as part of this modification application.

4.2.8 Ryde DCP 2014 [Section 4.15(2)]

The site is subject to the controls and provisions contained within Ryde DCP 2014. The amendments proposed by this modification application are consistent with the relevant objectives and controls prescribed within Ryde DCP 2014. Key development controls are addressed at **Table 1** over page**.**

Table 1 Ryde DCP 2014

Clause	Requirement	Proposed	Complies?
Part 9.3 Parking Controls			
2.1 General	h. A Traffic and Parking Impact Assessment Report will be required by Council, where:	A Traffic and Parking Impact Statement has been submitted with this application to assess the proposed modifications to parking.	Yes

Table 1 Ryde DCP 2014

	i. development is likely to generate significant traffic and / or parking.		
2.2 Residential Land Uses	Car parking spaces are to be provided on-site in accordance with the following requirements:		
	Boarding Houses – accessible area: At least 0.2 parking spaces / boarding room (1 space /5 boarding rooms). Not more than 1 parking space for each person employed in connection with the development.	No change is proposed to the approved number of parking spaces allocated to the boarding house use. The number of boarding house parking spaces will be retained at 82.	Yes
	Residential Development - High Density (Residential Flat Buildings) - 0.6 to 1 space / one bedroom dwelling - 0.9 to 1.2 spaces / two bedroom dwelling - 1.4 to 1.6 spaces / three bedroom dwelling - 1 visitor space / 5 dwellings	The proposed modifications will restrict the approved residential apartments on the site to be used for the purpose of rental housing only. As such, the parking rates for residential flat buildings, in which units are bought and sold under separate ownership, is not considered to be the most suitable parking provision. Instead, the parking rates which apply to rental housing under the Housing SEPP have been applied as the most appropriate rate for the development, as modified.	On Merit
2.3 Non-residential Land Uses	a. Car parking spaces are to be provided on-site in accordance with the following requirements: Retail Premises and Industrial Retail Outlet - 1 space / 25 m2 GFA	No change is proposed to the approved number of parking spaces allocated to the commercial and retail premises. The number of retail parking spaces will be retained at 144.	Yes
2.7 Bicycle Parking	a. In every new building, where the floor space exceeds 600 m2 GFA (except for dwelling houses and multi unit housing) provide bicycle parking equivalent to 10% of the required car spaces or part thereof.	No change is proposed to the bicycle parking provision for commercial/retail and the boarding house, which will be retained at 8 and 33 spaces respectively.	Yes
		In relation to the residential apartments which are to be rental housing, a new bicycle parking provision of 11 is allocated. The number of bicycle parking spaces is considered appropriate, particularly given the Housing SEPP does not contain any bicycle parking requirement for BTR housing.	On Merit
	g. End of trip facilities accessible to staff (including at least 1 shower and change room) are to be provided in all commercial, industrial and retail developments.	End of trip facilities in Basement Level 01 are retained as approved.	Yes
	h. Provide secure bicycle storage in all residential developments where the floor space	Secure bicycle parking is provided at basement level for both rental apartment and co-living occupants.	Yes

Table 1 Ryde DCP 2014			
	exceeds 600 m2 GFA except for dwelling houses and multi-unit housing.		
3.2 Desing of Parking Areas	a. All parking areas shall be designed in accordance with Australian Standards AS2890.1, AS2890.2 and AS2890.6	The basement car parking will continue to comply with applicable Australian Standards.	Yes

4.3 IMPACT OF PROPOSED MODIFICATION

4.3.1 Visual Impacts

The external appearance of the building will remain largely unchanged, and the development will retain the four (4) residential (Buildings A – C) and co-living (Building D) blocks on the site, all of which are located over a ground floor containing commercial and retail land uses. The proposed modifications will not alter the approved building envelope with the physical changes relating to internal layout and removal of a basement level.

As a result of the amended internal layout at the ground floor, the pedestrian entries off the Building A façade fronting Railway Road will be slightly modified to accommodate the new lobby/reception. The extent of the modifications proposed are minor and the streetscape appearance of the development will remain substantially the same as the approved development.

As such, there will be no visual impacts of the proposal.

4.3.2 Amenity Impacts

The proposal will not give rise to any additional adverse amenity impacts beyond the approved development or what is anticipated by development within the locality that is encouraged by the planning controls.

As outlined at Section 4.3.6 of this report, the development will continue to achieve a high level of compliance with SEPP No. 65 and the Apartment Design Guide and will therefore create good levels of amenity for the future occupants.

4.3.3 Traffic and Parking Impacts

The proposal maintains the approved pedestrian and vehicular access to and from the approved development. The proposal will reduce the parking provision on the site in response to the conversion of the approved residential apartments to rental housing only. Furthermore, the parking provision for the retail and boarding house have also been revised in response to changes to the retail NLA and the current standard parking rates for boarding houses.

Part 3J of the Apartment Design Guide requires development within 800m of a railway station, which includes the subject site, to provide the minimum car parking requirement for residents and visitors set out in the Guide to Traffic Generating Developments, or the car parking requirement prescribed by the relevant council, whichever is less.

Section 5.4.3 of the Guide to Traffic Generating Developments requires the following parking provision for high density residential developments:

- *0.6 spaces per 1 bedroom unit.*
- *0.9 spaces per 2 bedroom unit.*
- *1.40 spaces per 3 bedroom unit.*
- *1 space per 5 units (visitor parking).*

Part 9.3 of the Ryde DCP 2014 requires the following parking provision for high density residential developments:

- *0.6 to 1 space / one bedroom dwelling*
- *0.9 to 1.2 spaces / two bedroom dwelling*
- *1.4 to 1.6 spaces / three bedroom dwelling*
- *1 visitor space / 5 dwellings*

As above, the parking requirements under the Guide to Traffic Generating Developments and the Ryde DCP are the same, but for the range offered by the DCP rate. As such, the requirement with the 'lesser rate' is technically the Guide to Traffic Generating Developments and is therefore the applicable rate.

In accordance with the Section 5.4.3 of the Guide to Traffic Generating Developments, the proposed development, consisting of 30 x 1 bed, 71 x 2 bed and 28 x 3 bed apartments, would be required to provide 148 parking spaces, including visitor parking.

The proposed development will provide a total of 108 standard parking spaces for the residential apartments, and therefore will not comply with the applicable parking requirement. Notwithstanding this, the proposal also seeks to provide car share spaces to make up for the numerical shortfall. The proposal will provide a total of 8 car share spaces for the residential units, which results in a total equivalent number of spaces of 148, achieving the ADG requirement.

The proposal also seeks to make amendments to the boarding house parking provision by reducing the number of standard spaces and providing a total of 2 car share spaces to account for the shortfall. The proposal will continue to provide an equivalent number of spaces of 32 which is consistent with the most recent parking provisions for boarding house developments. This is addressed in detail within the Traffic & Parking Assessment prepared by PDC and submitted with this application.

Importantly, the proposed development continues to achieve the objectives and/or criteria for the applicable parking requirements as set out below.

Apartment Design Guide

The proposed parking provision, despite the numerical non-compliance, satisfies the objective of the design criteria under Section 3J of the ADG, which is as follows:

> *Objective 3J-1*
>
> *Car parking is provided based on proximity to public transport in metropolitan Sydney and centres in regional areas*

As previously stated, the site is situated within a highly accessible location, adjacent to the Meadowbank Railway Station, and therefore is an ideal location to provide for higher density development given the significant levels of accessibility afforded by the Railway Station, and other public transport services, including bus services from stops within 100m of the site, and the ferry service from the Meadowbank Ferry Wharf within 600m walking distance of the site.

Guide to Traffic Generating Developments

Whilst the Guide to Traffic Generating Developments does not prescribe any objectives for the parking requirements, the following is included at Section 5.2 of the Guide which establishes the basis for the recommended provisions:

> *Adequate off-street parking is the main criterion in the assessment of parking areas provided for developments. Adequate provision of off-street parking discourages on-street parking, thereby maintaining the existing levels of service and safety of the road network.*

The proposed development is considered to provide adequate off-street parking within the basement parking levels. The proposed parking provision is supported by the Traffic & Parking Assessment prepared by PDC and submitted with this application.

Furthermore, the location of the site is significant to determining an adequate parking provision for the site. The site is situated within a highly accessible location, adjacent to the Meadowbank Railway Station, and therefore the parking provision is appropriate given the number of residents, employees and visitors to the site who will utilise the public transport options available.

The proposal will also combat the technical parking non-compliance with the provision car share spaces that will be allocated to EV car share which will be operated by a Third Party such as GoGet who will be responsible for supplying the EV car share along with its ongoing service and maintenance. The vehicles will be exclusive to residents only and booked on demand using the third-party app. This is detailed within the Plan of Management that has been prepared by Apt to accompany this application.

Most importantly, the proposed parking provision is considered acceptable since rental housing is not expected to provide the same parking provision as standard residential apartments. Indeed, studies on rental housing have found that car use is consistently lower for renters when compared to owner occupiers, as evidenced by the BTR parking provisions under the Housing SEPP.

Ryde DCP

Whilst the provisions within Part 9.3 of the Ryde DCP are not technically the applicable parking rate, they are consistent with the rates under the Guide to Traffic Generating Development, but for the range offered by the DCP, and therefore the objectives of the Part 9.3 of the DCP are considered relevant and are addressed in turn below.

1. *To minimise traffic congestion and ensure adequate traffic safety and management.*

The proposed development will reduce the number of vehicles on the site and therefore will reduce traffic congestion on the surrounding road network and will result in an improved traffic outcome for operation of the site's development compared to the approved development.

2. *To ensure an adequate environmental quality of parking areas (including both safety and amenity).*

No changes are proposed to the approved car park access arrangements at Faraday Lane. The volume of traffic utilising the access will be reduced by the proposed modification, namely the reduction in total on-site car parking spaces.

Thus, the approved access arrangements would satisfactorily accommodate the traffic generation of the proposed modifications.

The proposed basement car parking areas are essentially the same as the approved car parking layouts. The changes to the car parking are simply the removal of the lowest basement level (Basement 3) and the associated vehicle circulation and ramp connections between Basement 2 and 3.

The proposed basement car parking layout will retain security measures to limit retail (customer) parking to Basement 1.

As such, the proposed development will have no impact on the quality of the approved parking areas, despite the parking non-compliance.

3. *To minimise car dependency for commuting and recreational transport use, and to promote alternative means of transport - public transport, bicycling, and walking.*

The proposed development will reduce the number of vehicles on the site and therefore will minimise the car dependency for residents and encourage the use of public transport to and from the site, which is appropriate given the sites highly accessible location.

4. *To provide adequate car parking for building users and visitors, depending on building use and proximity to public transport.*

Despite the ADG requirement, the proposed modification will restrict the approved residential apartments on the site to be used for the purpose of rental housing only, and therefore the parking rates for residential flat buildings, in which units are bought and sold under separate ownership, is not considered to be the most suitable parking provision to inform the proposal.

Instead, whilst the parking rates under SEPP (Housing) 2021 do not technically apply to the proposal as a formal change of use is not sought, we believe it is logical to consider the rental housing parking rates to help justify the proposed parking provision, particularly since the Applicant will be restricted by a condition of consent, or restriction on title, to use these apartments for rental products for a period of 15 years, as would be required for BTR housing under the Housing SEPP.

Whilst the proposal will result in a parking shortfall with the ADG, the proposed shortfall is considered acceptable since rental housing is not expected to provide the same parking provision as standard residential apartments. Indeed, studies on rental housing have found that car use is consistently lower for renters when compared to owner occupiers, as evidenced by the BTR parking provisions under the Housing SEPP.

Furthermore, it is important to highlight that the apartments to be used as rental housing are to be available to the general public. There is no requirement to provide affordable or social housing on the site.

Importantly, the site is situated within a highly accessible location, adjacent to the Meadowbank Railway Station, and therefore the parking provision is appropriate given the number of residents, employees and visitors to the site who will utilise the public transport offered to the site.

The proposal will also combat the technical parking non-compliance with the provision car share spaces that will be allocated to EV car share which will be operated by a Third Party such as GoGet who will be responsible for supplying the EV car share along with its ongoing service and maintenance. The vehicles will be exclusive to residents only and booked on demand using the third-party app. This is detailed within the Plan of Management that has been prepared by Apt to accompany this application.

5. *To minimise the visual impact of car parking when viewed from the public domain and adjoining sites.*

As per the approved scheme, all parking is located at the basement level and will not be visible from the public domain or adjoining sites. The proposal will remove Basement Level 3, however, this modification will not have any impact on the visual appearance of the development, as approved.

6. *To maximise opportunities for consolidated areas of deep soil planting and landscaping.*

The proposed parking provision will have no impact on the approved deep soil and landscape area on the site.

7. *To reduce congestion in the Macquarie Park Corridor by restricting parking for commercial and industrial development to work towards achieving a target of a 70% private vehicle mode share by 2031.*

This objective does not apply to the subject site.

Overall, the proposed development satisfies the objectives of each of the relevant guidelines and policies which dictate the parking requirement for the site, despite the numerical non-compliance.

It is also important to stress that the Applicant has not revisited the VPA for the approved development which Council will recall sought to offset the traffic generation caused by the development. The proposed modification will reduce the total parking provision by 148 spaces, significantly reducing the traffic generated by the development on the site. The proposal will of course reduce traffic generation when compared with the original approval, whilst not seeking any reduction to the monetary contributions required by the VPA.

Following the above justification for the parking non-compliance, it is important to highlight that the Housing SEPP specifies 'non-discretionary development standards' for build-to-rent' development within an accessible area within the Greater Sydney Area to be:

- *0.2 parking spaces for each dwelling.*

In accordance with the above parking rate, the total required car parking provisions for the modified development are reduced from 419 to 252 car parking spaces, inclusive of the retail parking requirement.

The proposed provision of 271 car parking spaces, exceeds the minimum requirement of the Housing SEPP.

The proposal also seeks to make amendments to the boarding house parking provision by reducing the number of standard spaces and providing a total of 2 car share spaces to account for the shortfall. The proposal will continue to provide an equivalent number of spaces of 32 which is consistent with the most recent parking provisions for boarding house developments as provided above. This is addressed in detail within the Traffic & Parking Assessment prepared by PDC and submitted with this application.

As such, there are no anticipated impacts in terms of traffic generation or parking.

5. Conclusion

The proposed modifications will result in a development that is substantially the same as that originally approved under development consent LDA2020/0199.

The proposal continues to be permissible with consent, pursuant to SEPP (Housing) 2021 and SEPP (Affordable Rental Housing) 2009 and satisfies the relevant requirements and/or objectives of these instruments. Furthermore, the development as modified does not offence the application of the provisions of the Ryde Local Environmental Plan 2014 and is consistent with the Ryde Development Control Plan 2014. It will not result in any adverse impacts in terms of visual, amenity or traffic and parking impacts.

Accordingly, we respectfully request that the Planning Panel approve the modification of the development consent, as described within this application.

ANNEXURE A

BM Advice to APT Residential –
Dated 1 July 2024