

Sydney North Planning Panel Meeting 06 August 2025
S4.55(2) at 1 Gatacre Avenue and 5 Allison Avenue Lane Cove

Item No:

Subject: S4.55(2) at 1 Gatacre Avenue and 5 Allison Avenue Lane Cove

Record No: DA24/35-01 - 42170/25

Division: Planning and Sustainability Division

Author(s): Christopher Shortt

DA Number	Council Reference: DA35/2024 Portal Reference: PPSSNH-660
Proposed Development	s4.55(2) modification to approved development for demolition of existing structures, lot consolidation and construction of a Part 4, Part 5 and Part 6 residential flat building with 43 apartments and two levels of basement parking with 85 parking spaces.
Street Address	1 Gatacre and 5 Allison Avenue Lane Cove
Applicant	Patch Planning
Owner	Gatacre LC Pty Ltd
Date of DA Lodgement	22 May 2025
Public Notification	Notification Period: 22 May 2025 to 7 June 2025
Total number of unique Submissions Received	27 unique submissions. All submissions forwarded to the SNPP for consideration.
Recommendation	Approval :- In part - subject to recommended draft conditions requiring design changes.
Regional Development Criteria	The proposal is referred to the Sydney North Planning Panel as more than 10 public submissions were received as a result of the notification period. Under section 3.3 <i>Classes of regionally significant development in the Sydney District & Regional Planning Panels Operational Procedures</i> , The Planning Panels must determine applications to modify a development consent for regional significant development under S4.55(2) of the EP&A Act which seek to modify: <i>development that subject to 10 or more unique submissions by way of objection.</i>
List of all relevant s4.15(1)(a) matters	• relevant environmental planning instruments • SEPP (Housing) 2021 and Apartment Design Guide (ADG); • SEPP (Biodiversity and Conservation) 2021; • SEPP (Resilience and Hazards) 2021; • SEPP (Sustainable Buildings) 2022; • SEPP (Transport and Infrastructure) 2021; 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

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	• relevant development control plan • Lane Cove Development Control Plan 2010 • relevant regulations - Section 61 – Demolition of Structures • other relevant plans • Lane Cove Section 7.11 Contributions Plan		
List all key documents submitted with this report for the Panel’s consideration			
	Attachment	Document	Prepared By
	1	Draft Conditions	Lane Cove Council / Patch Planning
	2	Architectural Plans (Amended)	PBD Architects
	3	Landscape Plans (Amended)	Arcadia
	4	S4.55(2) Report	Patch Planning
	5	Architectural Design Statement	PBD Architects
	6	Response to RFI	Patch Planning
	7	BASIX Certificate	JHA
8	Public Notification Map	Lane Cove Council	
Clause 4.6 requests	• Nil		
Summary of key submissions	• Building Height • Privacy • Shadows		
Report prepared by	Christopher Shortt: Senior Planner Lane Cove Council		
Report date	6 August 2025		

Summary of s. 4.15 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 matter been listed, and relevant recommendations summarised, in the Executive Summary of the assessment report?	Yes
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?	N/A
Conditions	
Have draft conditions been provided to the applicant for comment?	Yes

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1. EXECUTIVE SUMMARY

1.1 Proposed Development

A section 4.55(2) modification to Development Application is for the demolition of the existing multi-storey motel building and dwelling house and construction of a part 4, part 5, and part 6 storey residential flat building development comprising 43 apartments (5 x 1 bedroom, 18 x 2-bedroom, 18 x 3 bedroom, and 2 x 3-bedroom townhouse), and two levels of basement parking for 85 vehicles, on land known as 1 Gatacre Avenue and 5 Allison Avenue, Lane Cove.

1.2 Public Exhibition and Submissions

The Development Application was publicly exhibited with a total of 27 unique submissions. The primary concerns raised relate to additional balconies, additional building height related to the AC condenser plant and screening, shadows and over development of the site.

1.3 Compliance

The proposed development has been assessed having regard to the relevant heads of consideration under Section 4.15(1)(a) of the *Environmental Planning and Assessment Act, 1979*.

Table 1 provides a summary of the statutory pre-conditions for which the Sydney North Planning Panel must be satisfied prior to the granting of development consent.

Table 1: Summary of Statutory Pre-Conditions		
EPI	Statutory Pre-Condition	Comply
SEPP (Biodiversity & Conservation) 2021	<u>Chapter 6: Sydney Harbour Catchment</u> Section 6.6-6.9 – Pre-conditions relating to water quality and quantity, aquatic ecology, flooding, recreation and public access.	Yes
SEPP (Resilience & Hazards) 2021	<u>Chapter 4: Remediation of Land</u> Section 4.6 – Pre-condition relating to contamination, remediation and site suitability for proposed use.	Yes
SEPP (Sustainable Buildings) 2022	<u>Chapter 2 – Standards for residential development – BASIX</u> - Section 2.1(5) – Pre-condition relating to quantifying embodied emissions attributable to the development. <u>Chapter 3 – Standards for non-residential development</u> - Section 3.2(2) – Pre-condition relating to quantifying embodied emissions attributable to the development.	Yes

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1.4 Variations

ADG – Apartment Design Guide

The proposed trafficable balcony on level 3 (5th storey) would not comply with the ADG Part 2F – separation. This element is not supported by Council.

As discussed later in this report, the proposed level 4 terrace would result in a variation to minimum separation distance in the Apartment Design Guide (ADG) Part 2F - separation. This element of the proposal not supported.

Lane Cove Local Environmental Plan 2009

The proposed development includes a variation to the height of building within *Lane Cove Local Environmental Plan 2009* (LEP). The building height development standard under the LEP is 15m where a maximum height of 15.69m is proposed. The building height variation is considered satisfactory in this instance for reasons outlined in this report.

1.5 Referrals

The Development Application was referred to internal departments. No objections are raised to the proposed development subject to the existing conditions

1.6 Recommendation

This report recommends that the Sydney North Planning Panel could be satisfied in relation to the relevant matters under Section 4.15 of the EP&A Act and exercise its functions as the consent authority to grant consent of the s4.55(2) modification subject to the draft conditions including design change conditions at **Attachment 1**.

1.7 Assessment Timeline

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

Table 2 - Proposal/History Timeline	
Date	Description
22 May 2025	Section 4.55 modification application lodged.
22 May 2025	Public notification of Development Application commences.
7 June 2025	Public notification of Development Application concludes.
2 July 2024	RFI Letter sent to applicant requiring the concerns raised in the public submissions be addressed.
16 July 2025	Response to submissions report sent with revised architectural plans. Height variation reduced from 9% to 4.6%. Reduction of trafficable area to proposed balcony on level 3 (5 th storey)
6 August 2024	Determination meeting with SNPP.

2. SITE

2.1 SITE

The site of the proposed development is known as 1 Gatacre and 5 Allison Avenue, Lane Cove.

The key site characteristics are summarised in **Table 2** below.

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Table 3 – Site Characteristics of 1 Gatacre and 5 Allison Avenue	
Site Characteristic	Subject Site
Title Particulars	Lot A DP 415448 Lot 45 DP 11416 Lot 46 DP 11416
Site Area	2,965.8m ²
Site Frontage	Gatacre Avenue: 38.25m Allison Avenue: 27.43m
Site Depth	Depth: 92.11m
Topography	5m – Gatacre to Allison Avenue (West to East) 6m – Gatacre Avenue (North to South) 4m – Allison Avenue (North to South)
Zoning	R4 High Density Residential
Existing Structures	1 Gatacre Avenue: The site contains an existing part 2 storey and part three storey motel building. With at grade hardstand communal car parking. 5 Allison Avenue: Dwelling house
Existing Use	The site was previously as a motel and single dwelling house.
Vehicular Access	Vehicular access is currently from Gatacre and Allison Avenue.

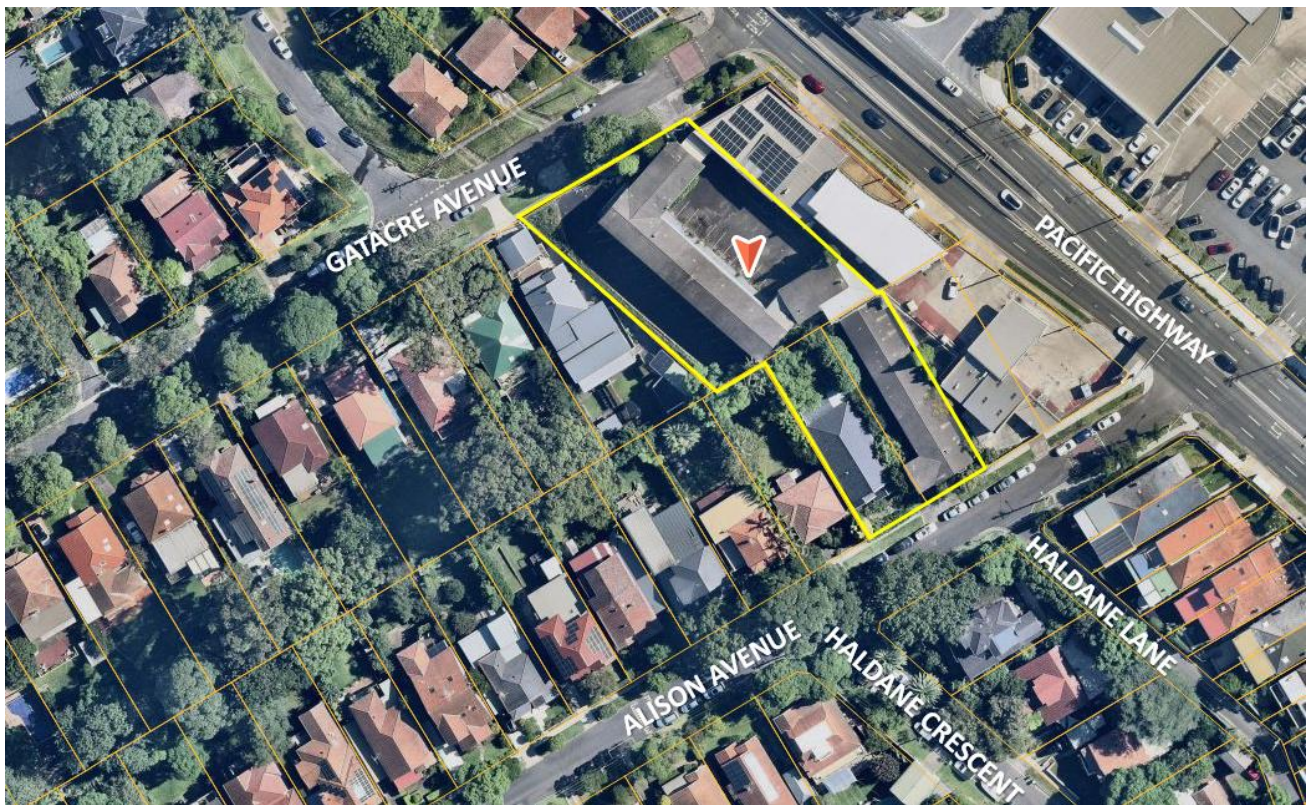


Figure 1: Location Plan. (Source Nearmap)

2.2 Adjoining Development.

Refer to table 3 below for details of adjoining development.

Table 3 – Adjoining Sites	
Direction	Description
North	To the north of the site is Gatacre Avenue. Further to the north are single storey dwelling houses located within the R4 high density residential zone. Further north are 8 storey residential flat buildings 390 – 392 Pacific Highway.

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East	To the northeastern eastern boundary adjoins 382-386 Pacific Highway which is currently a part 1 and part 2 commercial building (99 Bikes) which has been approved for redevelopment as a 5-storey boarding house with basement car parking from Gatacre Avenue. Also, east of the site is 378 Pacific Highway occupied by a single storey commercial building occupied by Shell Petrol Station.
South	To the southwestern boundary of the site is 7 Allison Avenue which contains part 1 and 2-storey residential dwelling. Further south is Allison Avenue and single and 2-storey dwellings on the other side.
West	To the western boundary of the site is a part single and 2 storey dwelling house at 2A Gatacre Avenue which are below natural ground level. Further west includes single and 2 storey dwelling houses Zoned R2 residential low density.

3. SITE / APPLICATION HISTORY

3.1 Timeline

On **3 June 2021**, a DA was **lodged** for the Demolition of Existing Structures, Lot Consolidation and Construction of a Part 5 / Part 6 Storey Residential Flat Building with 60 Apartments and Two Levels of Basement Parking with 113 parking spaces. (Ref: DA65/2021)

On **16 September 2021**, the Lane Cove Local Planning Panel (LPP) exercising the functions of Council as the consent authority, **refused** Development Application (Ref: DA65/2021). Reasons for refusal included:

1. **Remediation:** *The submitted documentation does not adequately assess the site and whether it would be, or is capable after remediation, of being used for the proposed use under SEPP 55 – Remediation of Land.*
2. **Building Height:** *The proposed building height variation and the submitted Clause 4.6 written request does not establish sufficient environmental planning grounds or that the standard is unreasonable or unnecessary.*
3. **Design Quality of Residential Apartment Development:** *The nine design quality principles of SEPP 65 have not been met as established by the NSROC Design Review Panel and confirmed in the assessment report.*
4. **Building Separation:** *The proposed building separation is unsatisfactory to the northern boundary, resulting in poor internal amenity for the proposed apartment, and the southern boundary, resulting in an unsatisfactory transition to the adjoining R2 Low Density Residential zone.*
5. **Solar Access:** *The solar access assessment relies on secondary living rooms and balcony spaces to achieve minimum compliance which is considered contrary to the objectives of the ADG.*
6. **Natural Ventilation:** *The natural ventilation provided to the building and the implications of required mechanical ventilation (due to road noise) has not been detailed/demonstrated.*
7. **Common Circulation:** *The common circulation provided to the western sector is not provided with satisfactory amenity with no daylight and natural ventilation to this area.*

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8. **Apartment Size and Unit Mix:** *The submitted storage schedule is incomplete and it has not been demonstrated suitable internal/external storage is provided to each unit.*
9. **Storage:** *The submitted storage schedule is incomplete and it has not been demonstrated suitable internal/external storage is provided to each unit.*
10. **Basement Setbacks:** *The basement setback encroachments result in a development that does not provide for the street landscape character or landscaping to assist in the desired spatial proportions between buildings.*
11. **Front Setbacks:** *The proposed front setback does not conform to the predominant front setback within Allison Avenue and Gatacre Avenue and would result in a building that is not in alignment and overbearing within its context.*
12. **Side Setbacks:** *The proposed side setbacks do not provide the spatial proportions envisaged by Lane Cove Development Control Plan 2010.*
13. **Design Rooftop Areas:** *The submitted design of rooftop areas is considered unsatisfactory as it does not detail rooftop mechanical plant and the swimming pool design conflicts with the apartment level below.*
14. **Solar Access:** *The submitted solar access diagrams are inaccurate and lack detail on the impact on adjoining properties and the shadow diagrams do not appear to take into account the topography of the locality.*
15. **Landscaping:** *The proposed landscaping does not comply with a number of controls and objectives of Lane Cove Development Control Plan Part J – Landscaping and The Apartment Design Guide.*
16. **Stormwater Management:** *The proposed Stormwater Management Plan discharges to the kerb rather than connecting to Council's pipe system.*
17. **Waste Management:** *The proposed method of waste management to the eastern sector of the proposed residential flat building development does not satisfy Lane Cove Development Control Plan 2010 – Part Q – Waste Management and Minimisation.*
18. **Environmental Health:** *The environmental management plan does not address how excavation water will be treated or controlled.*
19. **Accessibility:** *The proposal is unsatisfactory in relation to the accessibility requirements in relation to travel distances to a lobby and visitor parking allocation.*
20. **Environmental Impacts:** *The impacts on both the natural and built environments of the locality are unsatisfactory.*
21. **Site Suitability:** *The proposed development does not respond appropriately to the site constraints and therefore the site is not suitable for the development.*
22. **Public Interest:** *The proposal is not in the public interest as it provides for an overdevelopment of the site that departs from the envisaged future development of this transitional site which should respond to, and be informed by a more sensitive building transition, an enhanced landscaped character, and reduced height.*

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On **27 September 2021** the applicant **lodged a Class 1 Appeal** in the Land and Environment Court.

On **13 July 2023** the **appeal was dismissed** by the Commissioner. The main reasons for refusal can be summarised as:

It transpires that, in the final analysis, there are three separate and sufficient reasons why the Company's proposed development must be refused development consent. These reasons are:

- (1) *The unacceptable visual impact on the neighbouring residence at 2A Gatacre Avenue;*
- (2) *The unacceptable visual impact on the neighbouring residence at 7 Allison Avenue; and*
- (3) *The fundamentally flawed and unacceptable design of the lowest elements of the Company's proposed development in its Gatacre Avenue corner adjacent to the site of an approved boarding-house site, a site which fronts the Pacific Highway (the Highway) upslope.*

On **9 October 2024**, consent was granted by the North Sydney Planning Panel for Demolition of existing multi-storey motel building and dwelling house and construction of a Part 4, Part 5, and Part 6 residential flat Building with 43 apartments and two levels of basement parking.

4. PROPOSAL

4.1 S4.55(2) modifications to approved residential flat at 1 Gatacre and 5 Allison Avenue.

Table 4: Levels	S4.55(2) Amendments
Basement 2	2 accessible parking bays relocated from basement 1 to basement 2.
Basement 1	Slab RL lowered by 150mm to increase ceiling clearance from RL89,200 to RL 89,050.
Basement 1	Relocation of bike racks (residential and visitor) to basement 1.
Ground Floor	Shoring wall (cleaners' room) aligned with levels 1 and 2 basement below.
Ground Floor	Additional storage areas below terraces of units UG06, UG07.
Ground Floor	Modified communal facilities (Media room, wine storage cellar, fitness area with sauna, and accessible bathroom). Resulting in 5sqm of additional GFA.
Upper Ground Floor	Sizes standardized for units UG.01, UG.02, UG.03, UG.06, UG.07, UG.08, UG.09.
Level 2	Internal area and balcony of Unit 2.05 (lower level) increased from 12 sqm in area to 17sqm in area.
Level 3	Non-trafficable areas to be converted to balconies for units 3.02 and unit 2.05 (upper level) and AC units approved on non-trafficable are to be related to roof top.
Level 3	Amenities of level 3 outdoor rooftop communal area repositioned including BBQ area and utility sink and rubbish bin.
Level 3	Highlight windows added to units 3.04 and 3.05 facing onto rooftop communal open space
Level 4	Non-trafficable areas to be converted to balconies for units 4.01 and unit 4.02 (upper level)
Roof Level	Air conditioning units and mechanical exhaust fan relocated to rooftop. As a result the amount of approved solar panels is reduced from 175 to 130
Amend condition 2.A Design Amendments.	<i>2.A All oblique, diagonal facing windows on the southern external walls must be non-operable and be an obscure finish up to 1.6m above finished floor level.</i>

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	Proposed amendment of condition 2.A to require only <u>habitable rooms</u> to require obscure finish up to 1.6m above FFL.
Delete condition 2.F Design Amendments.	<i>2.F The balustrades of the south facing balconies of Units UG.05, 105 and 2.05 are to be constructed with solid obscure finishes up to 1.2m above FFL.</i>

5. STATUTORY CONSIDERATIONS

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

5.1 Any environmental planning instrument - Section 4.15(1)(a)

5.1.1 The Apartment Design Assessment Guide (ADG)

The proposal included a Housing SEPP + Design Verification Statement relating to the changes in the s4.55(2) which provides an assessment against the Schedule 9 Design Quality Principles as required by Chapter 4 of the Housing SEPP.

5.2.1 Lane Cove Local Environmental Plan 2009

5.2.2 Development Standards

Building Height

The site is subject to a maximum building height development standard of 15m under Clause 4.3 of the LEP (**Figure 1A**).

Floor Space Ratio (FSR)

The site is subject to a maximum FSR development standard of 2.4:1 under Clause 4.4 of the LEP (**Figure 1B**).

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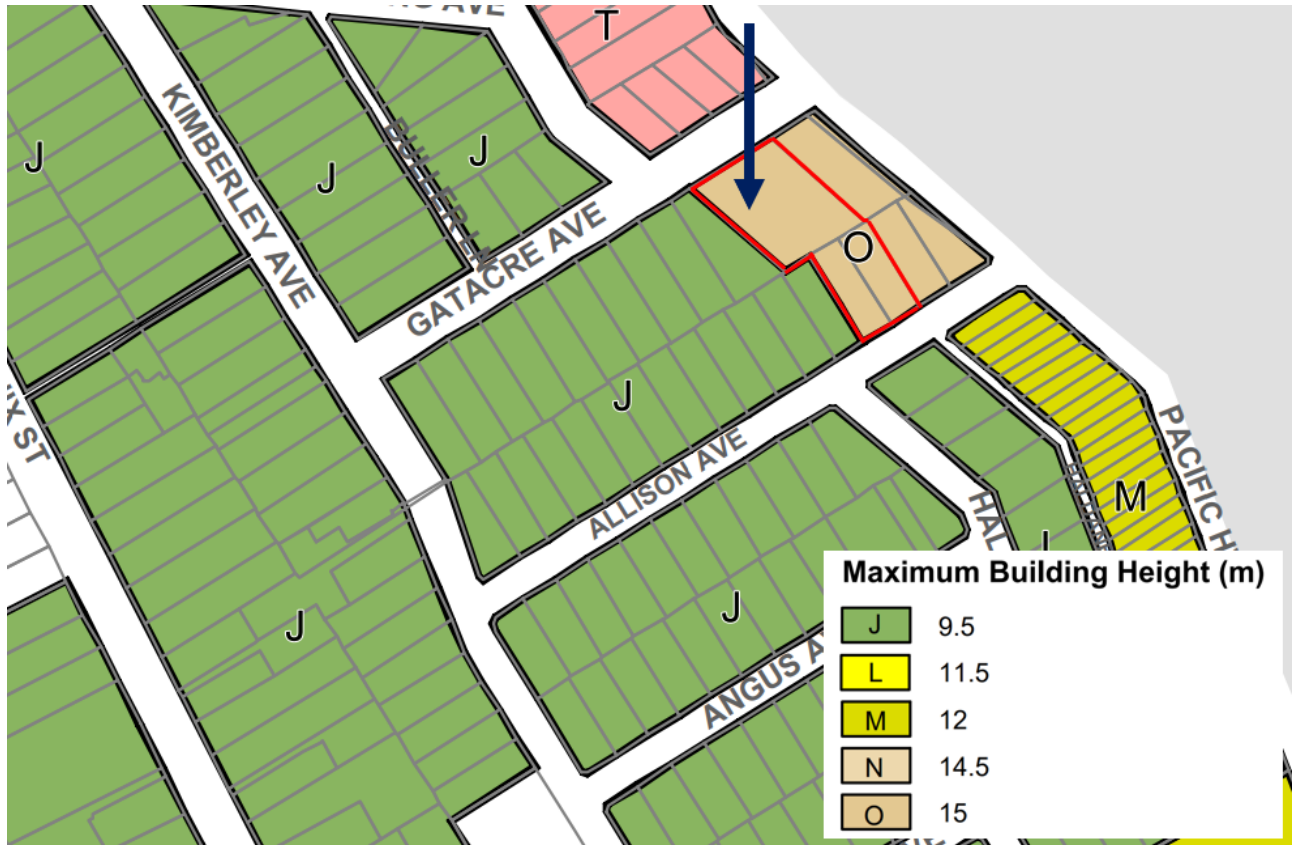


Figure 1A: Excerpt of Height Map (Source LEP 2009)

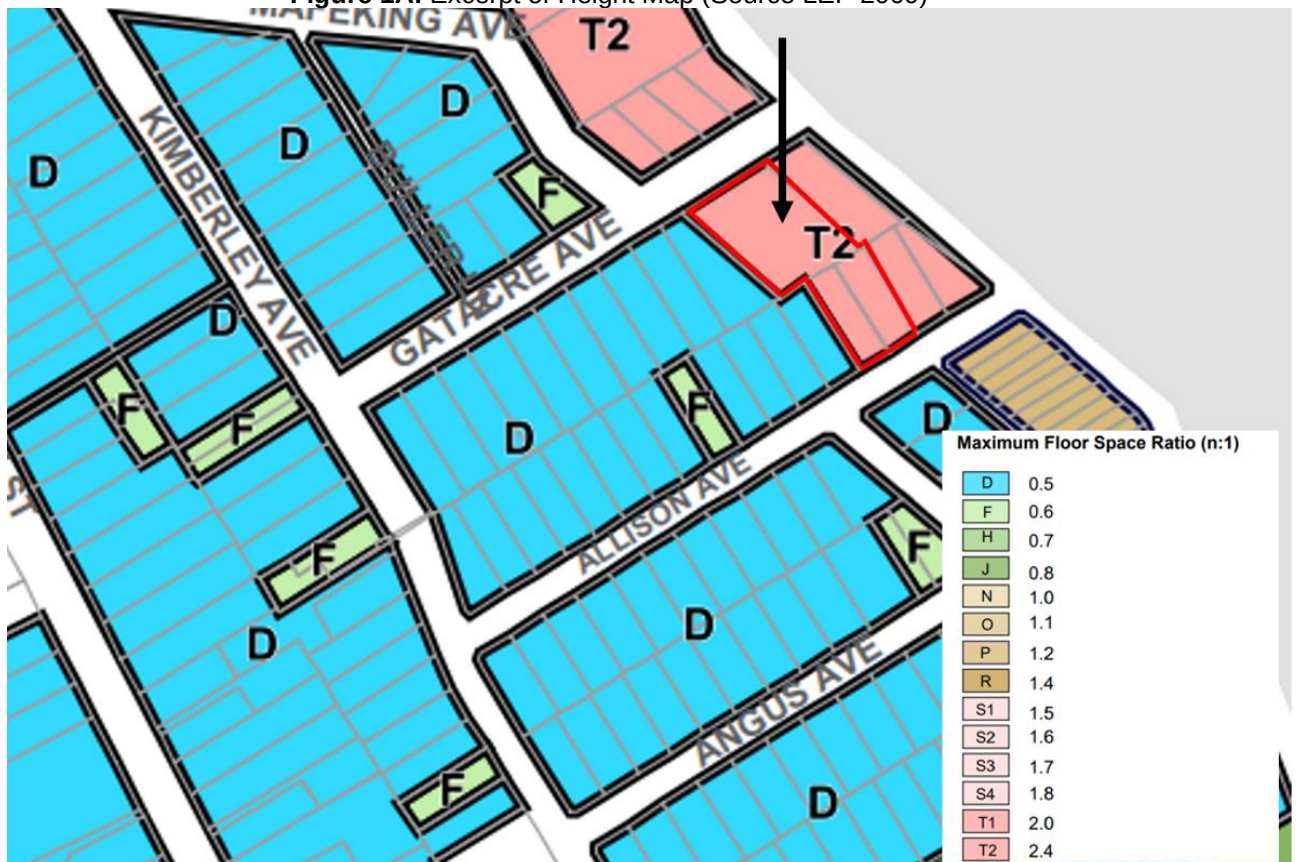


Figure 1B: Excerpt of FSR Map (Source LEP 2009)

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Table 5 - LEP table				
	Standard	Approved	s4.55 Proposal	Complies
Floor Space Ratio (max)	2.4:1	1.69:1 (GFA 5020sqm)	1.69:1 (GFA 5025sqm)	Yes
Height of Buildings (max)	15m	14.99m	15.69m (0.69m variation)	No (Refer to Sections 6.1 – 6.1.6)

5.3.1 SECTION 4.55 OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979

Section 4.55(2) In accordance with Section 4.55 (2), Council may modify a consent provided:

5.3.2 s4.55(2)(a) Is the modified development substantially the same?

SECTION 4.55 ASSESSMENT

The application is made under section 4.55(2) of the *Environmental Planning and Assessment Act, 1979*. This section relates to “other modifications” and provides that the consent authority may modify the consent if:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) *it has notified the application in accordance with—*
 - (i) *the regulations, if the regulations so require, or*
 - (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*
- (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.*

As per section 4.55(2) (a), the test is whether the development as proposed to be modified is substantially the same development as the development for which consent was originally granted. The relevant citations are provided below in a brief outline of the principles.

- (a) The comparison to be undertaken is between the proposed development as modified and the original approved development.
- (b) In particular, the recent decision of the Chief Judge of the Land and Environment Court in the case of *Canterbury-Bankstown v Realize Architecture Pty Ltd* [2024] NSWLEC 31 (Realize) simplified the approach by the consent authorities in the assessment of modification applications.

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- (c) Previous caselaw answered the question of whether a development is substantially the same as that which was originally approved is a question of fact and degree depending on the specific circumstances of each matter which will reasonably admit different conclusions: *Scrap Realty Pty Limited v Botany Bay City Council* (2008) 166 LGERA 342 at [13].
- (d) Previous caselaw established the meaning of "substantially the same" is "essentially or materially having the same essence": *Vacik Pty Limited v Penrith City Council* [1992] NSWLEC 8, Stein J; supported by Mason P in *North Sydney Council v Michael Standley & Assoc Pty Ltd* (1998) 43 NSWLR 468; 97 LGERA at 440.

5.3.3 Canterbury-Bankstown v Realize Architecture Pty Ltd [2024] NSWLEC 31 (Realize)

The above judgment passed down by the commissioner included the following statement:

"Whilst the development will alter the building envelope and to a certain degree, the appearance, the development will remain as a multi-storey, mixed-use development with ground floor commercial uses and communal open spaces and residential floor area above. Importantly, the overall architectural character of the development will not be adversely modified and the proposed changes will maintain the approved design language."

5.3.4 Substantially the same test - Consent

Using the same method as that in the *Realize* judgment, Council is required to be satisfied that the proposed modification is 'substantially the same' as the approved development. The question of whether the development is substantially the same is not a question which is capable of scientific or mathematical precision, but rather is a judgment based on an overall quantitative and qualitative assessment: *Moto Projects No. 2 Pty Limited v North Sydney Council* (1999) 106 LGERA 298 Bignold J at [56]. This means that it must be a comparison not only of the physical changes, but an appreciation of the qualitative impacts of the development as approved.

The Chief Judge in *Realize* noted that the consent authority was to continue to assess any modification application using appropriate rationale in this method. The Chief Judge recommended a **'balanced' approach** to any assessment based on 'instinct' or the **'look and feel'** of the modified proposal.

This rationale is summarised in the following three steps.

1. Identifying the aspects of the approved development which proposed to be modified.
2. Interpreting the words and phrases in the substantially the same test in clause 4.55(2) of the Act. The Chief Judge in *Realize* stated that section 4.55(2) of the Act does not refer to 'critical elements' or even 'elements' of the two developments (at [38]) and that in relation to the task identifying "the material and essential features of the originally approved and modified developments", in fact s4.55(2) "does not demand such an enquiry" (at [41] and [42]).
3. Determining whether the aspects (identified in the first step) fall within the 'substantially the same test'. The Court described this step [at (30)] as "an evaluate once" that involves assigning relative significance or weight to the different facts and balancing the facts as weighted. This categorisation can be instinctive synthesis and not articulated expressly.

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A Section 4.55(2) Modification Application can only be applied where an existing active Development Consent exists. As noted previously, Development Consent DA35/2024 which granted approval for the demolition of existing structures, lot consolidation and construction of a Part 4, Part 5 and Part 6 residential flat building with 43 apartments and two levels of basement parking with 85 parking spaces applies to the site has not lapsed for the purposes of the EP&A Act.

Step 1: The proposal includes the following external aspects of the approved development to be modified:

- Relocation of A/C condenser unit and other plant to rooftop. This would result in an area of the roof increasing building height by 69cm;
- Modification to a number of non-trafficable balconies to become trafficable private open space;
- Changes to windows and communal amenities on level 3 rooftop;
- Minor internal changes on basement 2, 1, ground 1st and second floors; and
- Amendments to design changes condition.

Step 2: Interpreting the words and phrases in the 'substantially the same' test.

In context to the *Canterbury-Bankstown v Realize Architecture Pty Ltd* case, the Chief Judge stated that section 4.55(2) of the EP&A Act **does not refer** to "critical elements" or even "elements", of the two developments" (at [38]) and that in relation to the task of identifying "the material and essential features of the originally approved and modified developments", in fact s4.55(2) "does not demand such an enquiry" (at [41] and [42]).

Step 3: Determining if the proposed modifications fall within the 'substantially the same' test.

As per the *Canterbury-Bankstown v Realize Architecture Pty Ltd* case an evaluation is required to decipher which elements of the modification should be assigned the most weight or significance. The modification in the *Realize* case included:

- 100% increase in the overall size of the communal opens space;
- Two additional floors to approved development;
- Additional 2,368sqm (9.8%) of additional (GFA);
- 10 additional units to 1 additional flat building.

In comparison, the subject modification include:

- No change to overall size of communal open space;
- 0.69m of additional height (4.6% increase) for A/C units and enclosure structure;
- Additional Gross Floor Area of 5m² (no change to FSR);
- The total number of dwellings or vehicle spaces would not change.

5.3.5 Substantially the same test – Land Use

The land use in the approved Development Consent DA35/2024 is for 'a residential flat buildings', this aspect of the approved development will not change in terms of how the development is viewed or interpreted in terms of the built form. The modifications would not alter the essence of the overall development.

5.3.6 Substantially the same test – Built Form

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The scheme remains a part 4, 5 and 6 storey residential development with communal open space, and associated landscaping. There would be no changes to the approved setbacks of the buildings. Whilst the development will slight increase the height of a limited area of rooftop AC condenser units, the established ground footprint of the buildings would not be extended in the proposed levels.

The development would remain as a residential flat building.

As per the *Canterbury-Bankstown v Realize Architecture Pty Ltd* case, the Court acknowledged that there are quantitative differences between the original development and the proposed modification. Despite this, the focus of the s4.55(2)(a) test is to analyze and balance the two developments holistically. In regard to the subject site, **the 'qualitative' similarities between the two schemes are considered enough to override the minor numerical (quantitative) differences.**

5.3.7 Conclusion

Accordingly, the Panel can be satisfied that the proposed modification is of minimal adverse environmental impact and is substantially the same development as the development for which the consent was originally granted.

Accordingly, the Panel can be satisfied in relation to s4.55 of the *Environmental Planning and Assessment Act, 1979*.

s4.55(2)(b) Consultation with the relevant Minister, public authority or approval body

There is no requirement to consult with any Minister, public authority or approval body as a result of the proposal.

s4.55(2)(c) Notification of application to modify consent

The modification application was notified as per the DA and included those that had lodged a submission previously.

s4.55(2)(d) Consideration of submissions

A total of **27 unique** public submissions were received. The submissions are addressed later in this report.

s4.55(3) Assessment of the proposed modification

An assessment of the proposal is required in relation to s4.15(1) of the Act. This assessment follows.

6. ASSESSMENT

6.1 Proposed rooftop plant and variation to the height control.

The proposal includes additional works which vary the 15m LEP height control.

A clause 4.6 variation statement is not relevant in this instance as:

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- The requirement to justify departures to development standards under clause 4.6 only applies when development consent is granted, not when a modification application is made.
- The decision of *North Sydney Council v Michael Standley & Associates Pty Ltd (1998)* 43 NSWLR 468 provides that a consent authority is not precluded from granting approval to a modification application in circumstances where the modified development would result in an exceedance of a development standard.

Despite the above, Council has undertaken an assessment against the relevant provisions within clause 4.6. This has been to not assist as an evaluation tool in forming an opinion on whether the height increase above the 15m LEP control is acceptable on merit.

6.1.1 Whether compliance with the development standard would be unreasonable or unnecessary in the circumstances of the case.

A Clause 4.6 variation is required to justify that it is unreasonable or unnecessary to require strict compliance with the development standard for the following reasons:-

- *The objectives of the standard are achieved notwithstanding the non-compliance with the numerical standard (First Method established in Wehbe v Pittwater Council [2007] NSW LEC 287).*

6.1.2 Environmental planning grounds to justifying contravening the development standard.

The decision in *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* demonstrates that the requirement in Clause 4.6(3)(b) of the LEP to justify there are sufficient environmental planning grounds for the variation, requires identification of grounds particular to the circumstances of the proposed development, and not simply grounds that apply to any similar development on the site or in the vicinity.

The SEE states that:

- *“As a result of relocating the air conditioning plant from Level 3 to the roof of Building A the maximum building height of the development has been marginally increased, resulting in a maximum RL112.90, a varying increase of 1.27m to 1.29m and a revised maximum building height of to 16.290m measured at top of service plant fence. This represents a 9% exceedance. There are sufficient environmental planning grounds to justify the contravention of the height of buildings development standard”.*
- *The above will not result in a noticeable change to the built form, bulk or scale of the proposal when compared to that which was originally approved. The proposed non-compliance will be concentrated to only the rooftop chiller plant and the balustrades to new private open spaces, and will continue to not give rise to overshadowing impact and provide a negligible contribution to the building bulk and scale.*

It is noted that the design of the roof top plant and enclosure has been amended since lodgement. The total variation to the height control has been reduced by approximately 60cm. The maximum variation would be 0.69m resulting in a total height of 15.69m or an RL.112.30.

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The building massing from the relocated AC units and screening would not result in unacceptable impacts to the neighboring low density residential properties. The environmental planning grounds provided are considered satisfactory and supported. Clause 4.6(3)(b) is considered to be satisfied.

6.1.3 Consistency with the zone objectives and objectives of the development standard

Under the original DA, development consent could not be granted to vary a development standard unless a consent authority is satisfied that the proposed development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. An assessment against the objectives of building height and the R4 High Density Residential zone contained within LCLEP 2009 are provided as follows:

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

6.1.4 Height of Building Objectives

Clause 4.3 (1) provides the following objectives:-

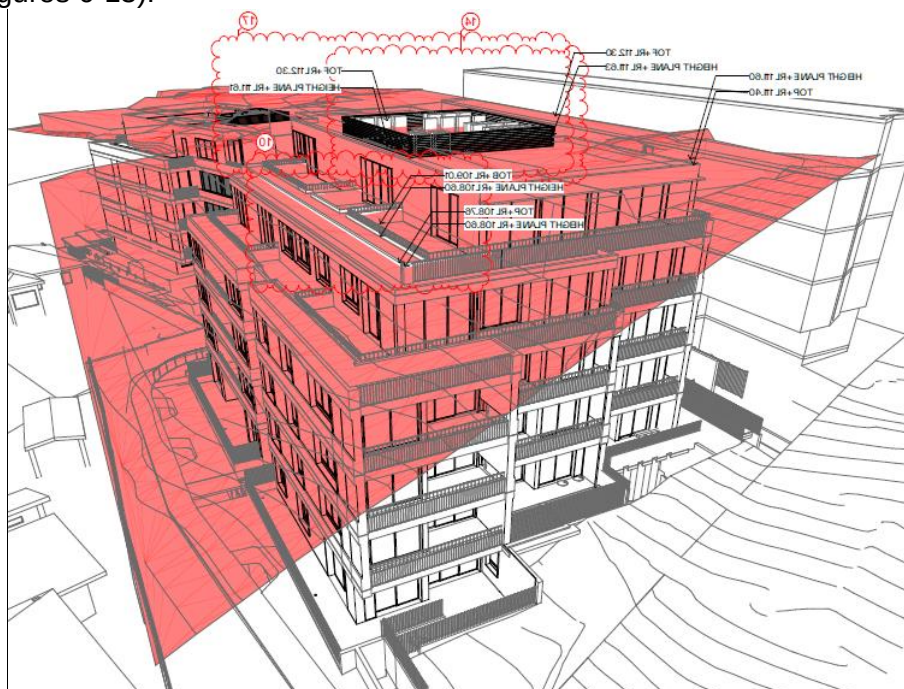
- (a) *to ensure development allows for reasonable solar access to existing buildings and public areas;*

Comment: The applicant has provided shadow diagrams from 9.00am through to 3.00pm in mid-winter. The diagrams demonstrate the level of overshadowing the proposed modifications would have on the existing surrounding residential properties.

The shadow diagrams have been submitted as 2 versions.

1. shadows from the development excluding existing vegetation/tree shadows, &
2. including existing vegetation/tree shadows.

(Refer to figures 6-13).



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Figure 2: Height Plane Plan (Source: PBD)



Figure 3: Approved southern elevation (no additional rooftop plant) (Source: PBD)



Figure 4: Lodged s4.55 southern elevation (rooftop plant 1.29m in height) (Source: PBD)



Figure 5: Updated southern elevation (rooftop plant reduced to 69cm in height) (Source: PBD)

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KEY:

Blue = shadow cast from the approved original DA.

Green = shadow reduction from existing motel building

Yellow = shadow additions from s4.55.

Grey = shadows from existing buildings (and) vegetation

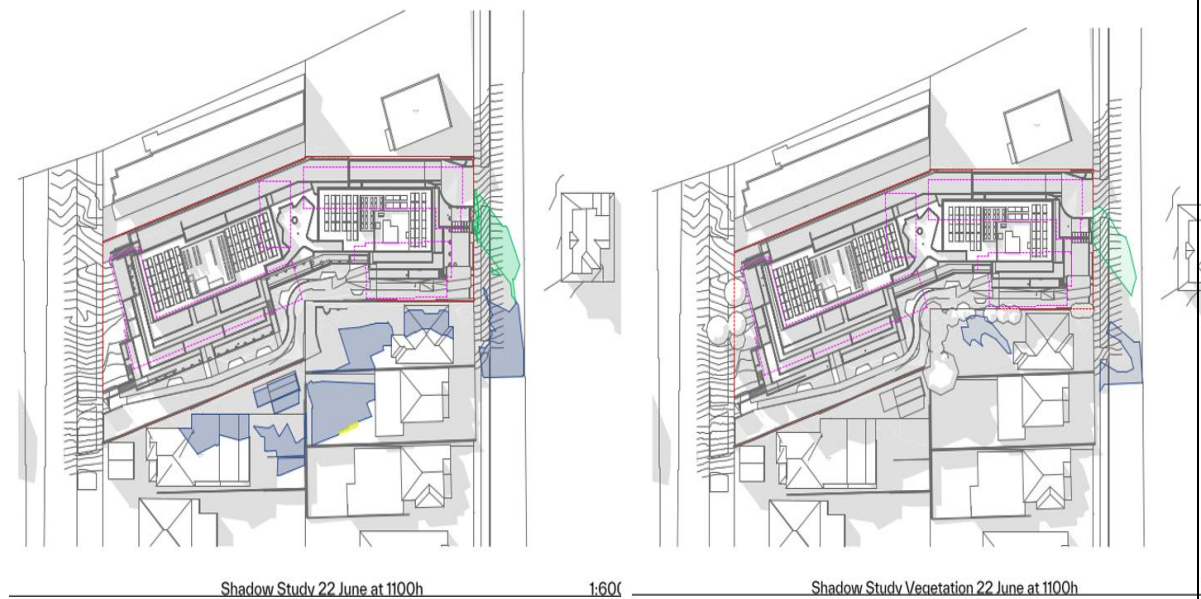


Figure 6:

Figure 6: Mid-winter 11am. Discounting the shadows cast from existing vegetation, a small portion of additional shadow to rear yard of 9 Allison Avenue. The rear yard would still achieve an area of approximately 37sqm of solar access.

Figure 7:

Figure 7: Mid-winter 11am. Shadows cast by the modification would fall within existing shadows cast by trees and vegetation.



Figure 8:

Figure 8: Mid-winter 12pm. Discounting the shadows cast from existing vegetation, a small portion of additional shadow to rear yard of 9 Allison Avenue. The rear yard would still achieve an area of approximately 103sqm of solar access

Figure 9:

Figure 9: Mid-winter 12pm. Shadows cast by the modification would fall within existing shadows cast by trees and vegetation.

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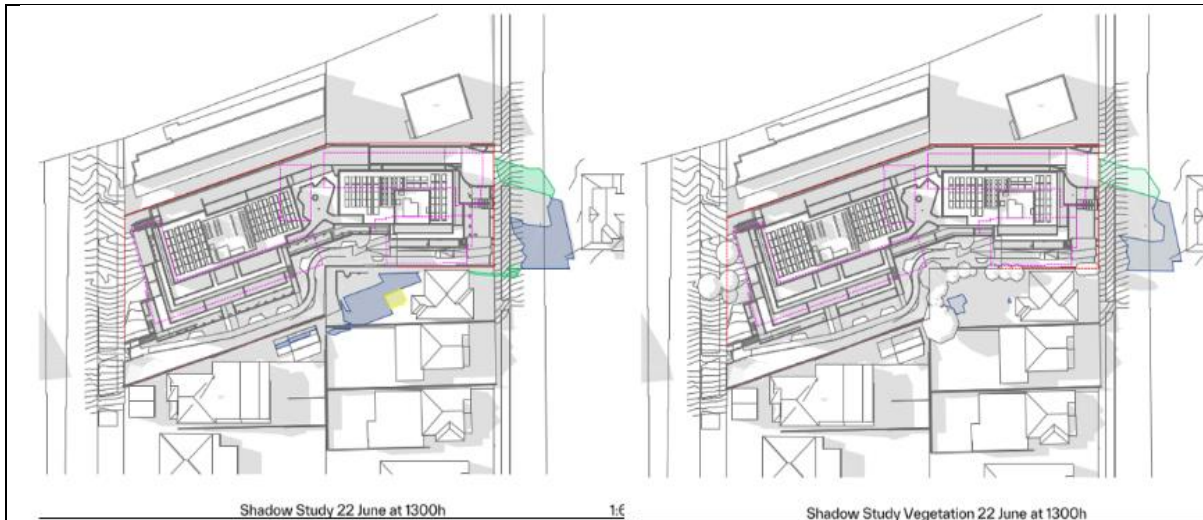


Figure 10:

Figure 10: Mid-winter 1pm. Discounting the shadows cast from existing vegetation, a small portion of additional shadow to rear yard of 7 Allison Avenue. The rear yard would still achieve an area of approximately 40sqm of solar access.

Figure 11:

Figure 11: Mid-winter 1pm. Shadows cast by the modification would fall within existing shadows cast by trees and vegetation.

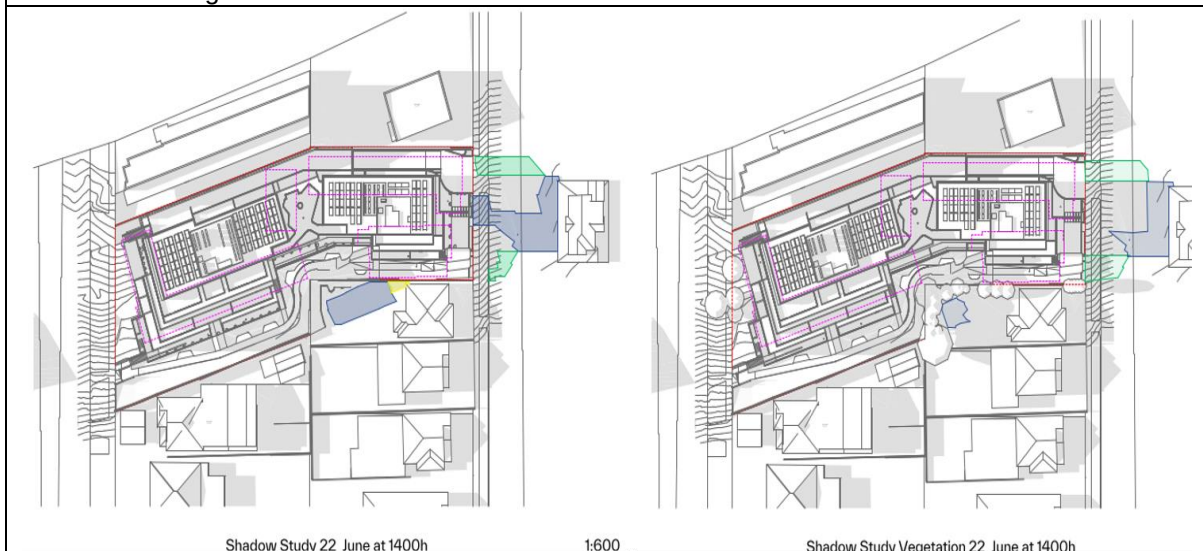


Figure 12:

Figure 12: Mid-winter 2pm. Discounting the shadows cast from existing vegetation, a small portion of additional shadow to rear yard of 7 Allison Avenue. The rear yard would still achieve an area of approximately 100sqm of solar access.

Figure 13:

Figure 13: Mid-winter 2pm. Shadows cast by the modification would fall within existing shadows cast by trees and vegetation.

The variation to the height control is limited to a mechanical plant acoustic enclosure and the AC condenser units within enclosure on the roof and 7m from the northern boundary. The variation of an additional 69cm would not result in unacceptable overshadowing impacts compared to the approved building envelope as demonstrated in the shadow diagrams.

- (b) *to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable;*

Comment: The variation to the height control relates to the relocation of mechanical ventilation enclosure to the roof top. The roof enclosure would be located approximately 19.5m from the southern boundary and the building steps in with the topography of the site at the 5th

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and 6th level below. Therefore, it would not be highly visible from the R2 zone properties to the south. The rooftop mechanical plant area is not trafficable as a communal open space and would not result in additional privacy impacts to the R2 zone properties to the south. The screening would be setback from the building edges and would not be highly visible from either street frontage

The approved boarding house to the north has a condition requiring *All south-facing bedroom and living room windows (facing 1 Gatacre and 5 Allison) are to include an obscure finish up to 1.6m above finished floor level, and all south-facing bathrooms are to include full height obscure finishes.*

- (c) *to seek alternative design solutions in order to maximise the potential sunlight for the public domain; and*

Comment: The shadows resulting proposed modification for a centrally located rooftop enclosure for rooftop plant and AC condensers would not result in any shadows on the public domain.

- (d) *to relate development to topography*

Comment: The site is subject to a moderate slope from north to south of an average of 5m at the Gatacre Avenue western end and 1.5m slope at the Allison Avenue eastern end. The roof enclosure is proposed to be located adjacent to the northern boundary R4 zone and 19.5m away from lower southern boundary to relate to the topography.

6.1.5 R4 High Density Residential Zone Objectives

The R4 High Density Residential Zone objectives are as follows:

- *To provide for the housing needs of the community within a high-density residential environment*

Comment: The approved development provides 43 apartments to meet the housing needs of the growing community in accordance with the established strategic planning for the locality. No changes are proposed to approved number of units.

- *To provide a variety of housing types within a high-density residential environment.*

Comment: The approved development provides for a variety of unit types within a high-density residential environment (5 x 1 bedroom, 18 x 2-bedroom, 18 x 3 bedroom, and 2 x 3-bedroom townhouses). No changes are proposed to the unit mix.

- *To enable other land uses that provide facilities or services to meet the day-to-day needs of residents.*

Comment: Not applicable.

- *To provide for a high concentration of housing with good access to transport, services and facilities.*

Comment: The approved development provides 43 new dwellings with good access to the Pacific Highway and associated public transport services. The site has good access to a public reserve including sporting and child play equipment facilities at the Kimberly Park and playground.

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- *To ensure that the existing amenity of residences in the neighbourhood is respected.*

Comment: The approved building design has regard to the existing amenity of residences in the neighbourhood and in particular residential land and properties to the south. The additional height is limited to the rooftop plant and enclosure. The shadow diagrams demonstrate no unreasonable additional shadow impacts to existing neighbouring properties. Other impacts of the development relating to new balconies and windows which do impact privacy are addressed later in this report.

On the approved plans the AC condenser units are located on the non-trafficable terrace on the 5th storey and do not include any acoustic/visual screening. The condenser units were approximately 12.5m distance from the property boundary of 2 and 2A Gatacre. The s4.55 modification would relocate the AC units to the roof of the 6th storey and 19.5m distance from 2 and 2A Gatacre which is significantly further away. The condenser units would also be screened by an acoustic/visual enclosure.

- *To avoid the isolation of sites resulting from site amalgamation.*

Comment: The proposal does not result in isolation of any site. The site is the amalgamation of 3 lots.

- *To ensure that landscaping is maintained and enhanced as a major element in the residential environment.*

Comment: The proposal provides for landscaped areas well in excess of Apartment Design Guide requirements (41.49% at ground floor where the ADG only requires 15%) including appropriate significant buffer zone planting along southern boundary. The resulting landscape scheme would contribute to local amenity and the broader landscaped character of the residential environment.

In accordance with the above, the development complies with the LEP 2009 objectives for the R4 High Density Residential zone.

6.1.6. Conclusion

The variations to the height standard of LCLEP 2009 are considered justified and supported in the circumstances of this case. The development would satisfy the objectives of the control despite the non-compliance with the height control. The elements of the building which vary the height controls do not result in unacceptable shadow impacts as compared to the approved development but would ensure the approved AC condenser Units would be further away from the neighbouring properties in R2 zone and would be enclosed within an acoustic /visual screen. The development satisfies the objectives and the criteria outlined in clause 4.6. As such, the variation is considered well founded, results in a better planning outcome and is in the public interest.

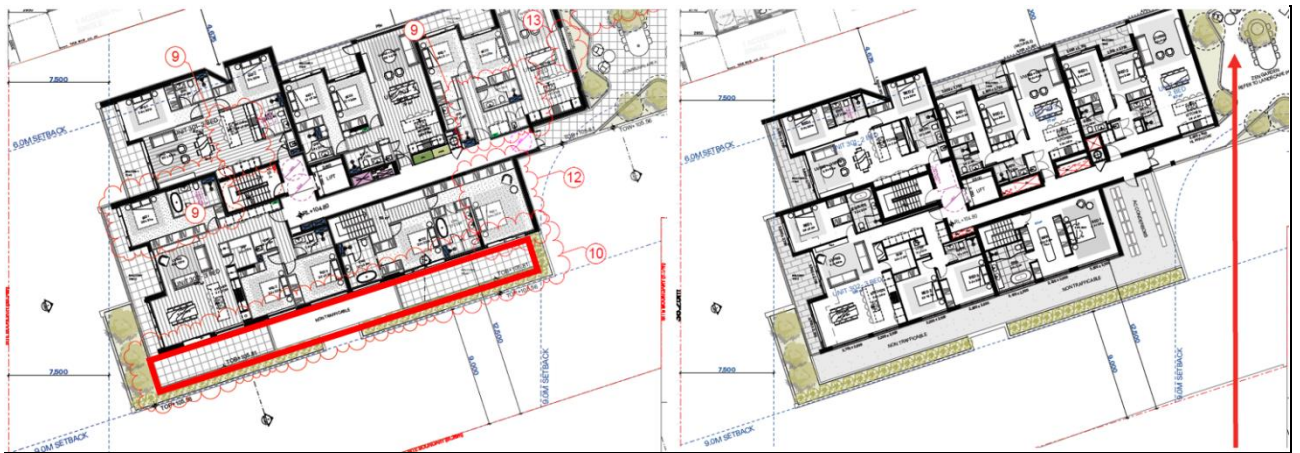
6.2.1 Proposed external changes – modified and additional balconies.

The s4.55(2) proposal includes modified and additional south facing balconies on levels 2, 3 and 4.

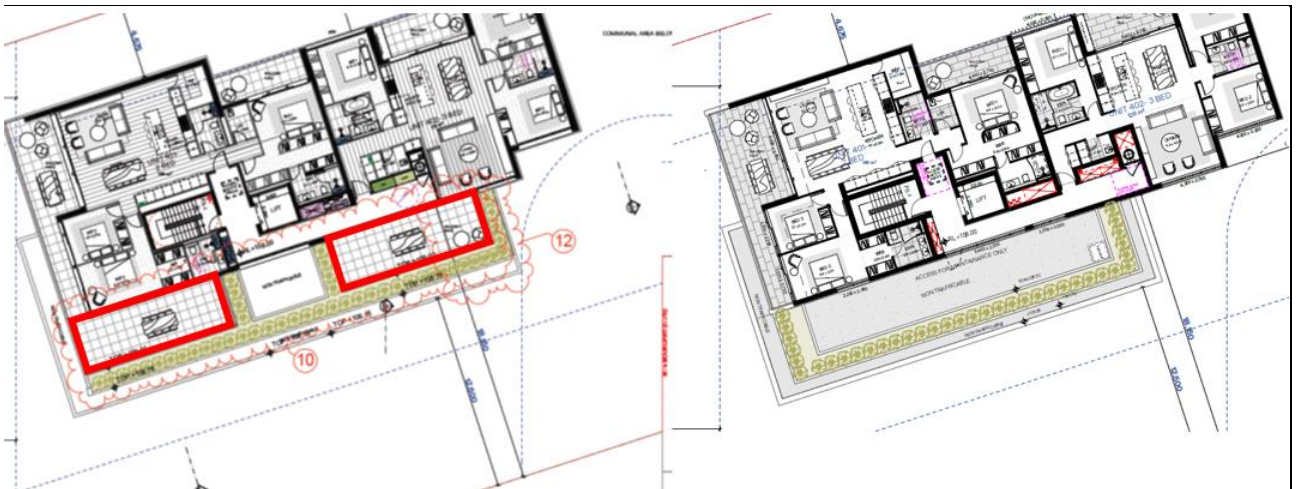
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Figures 14 and 15: Excerpt of level 2 (4th storey) proposed (left) and approved (right). (Source: PBD)



Figures 16 and 17: Excerpt of level 3 (5th storey) proposed (left) and approved (right). (Source: PBD)



Figures 18 and 19: Excerpt of level 4 (6th storey) proposed (left) and approved (right). (Source: PBD)

6.2.2 Assessment against Apartment Design Guide (ADG) Part 2F - separation.

1. Separation between windows and balconies is provided to ensure visual privacy is achieved. Minimum required separation distances from buildings to the side and rear boundaries are as follows:

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Up to 12m (4 storeys):
- Habitable room: 6m - Non habitable room: 3m
Up to 25m (5-8 storeys):
- Habitable room: 9m - Non habitable room: 4.5m

Design Guidance: Apartment buildings should have an **increased separation distance of 3m (in addition to the requirements set out in design criteria 1)** when adjacent to a different zone that permits lower density residential development to provide for a transition in scale and increased landscaping. **Design Guidance:** No separation is required between blank walls.

Comment: The approved development included minimal outdoor private open space on the southern elevation. The limited interface would minimise the potential for adverse visual and acoustic privacy impacts to the neighbouring properties to the south.

The approved development:

- 4th storey (2F) Unit 2.05- lower floor of townhouse included a balcony setback of 9m from the boundary of 2 and 2A Gatacre.
- 5th storey (3F) Unit 3.02 and Unit 2.05 upper floor of townhouse included a building setback of 12.5m to the boundary with a non-trafficable (maintenance only) outdoor area beyond. Approved balconies orientated west towards Gatacre Avenue and away from the southern boundary.
- 6th storey (4F) included an approximate 18.5m building setback from the boundary with a non-trafficable (maintenance only) outdoor area beyond. Approved balconies orientated west towards Gatacre Avenue and away from the southern boundary.

The s4.55 modification proposes to modify the non-trafficable areas to become south-facing balconies.

- 4th storey (2F) trafficable balcony would be setback approximately 9m from the boundary of 2 and 2A Gatacre; The balcony would increase in area from 12sqm to 17sqm by reducing the depth of the open plan kitchen/dining/living room behind;
- 5th storey (3F) trafficable balconies would be setback approximately 10.35m from the boundary 2 and 2A Gatacre; and
- 6th storey (4F) trafficable balconies would be setback approximately 14.8m from the boundary of 2 and 2A Gatacre.

Table: 6 – ADG Separation distance to 2 & 2A Gatacre Avenue				
Levels	Setback Control + R2 zone	Approved	Proposed	Complies
2F (4 th)	6m+3m =9m (habitable)	9m (habitable)	9m (no change)	Yes
3F (5 th)	9m+3m =12m (habitable)	=12.5m (habitable)	10m (Amended plans were submitted with an increased setback of 10.35m)	No
4F (6 th)	9m+3m =12m (habitable)	=18.5m (habitable)	14.8m	Yes

Recommendation.

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- 4th storey (2F): The s4.55 would not change to approved setback. The balcony depth of 2.6m would not increase. The changes are considered acceptable.
- 5th storey (3F): The s4.55 would result in a non-compliant 10.35m separation distance between the balcony on 5th floor and the property boundary. This is **not supported**, and a condition will be recommended requiring **the balconies to be deleted and be retained as non-trafficable**. (Refer to condition 2. (I) Design Amendments.)
- 6th storey (4F): The s4.55 would result in a 14.8m separation distance. While this complies with the required ADG separation distance, it would result in an additional south facing balcony and potential accumulative amenity impacts. The balconies would be approximately 3.2m in depth. The proposal is **not supported in its current form**. It is recommended that a **draft condition requiring increasing the depth of the non-trafficable raised planter box by a further 1.2m**. (Refer to condition 2. (J) Design Amendments.) The remaining trafficable area would be reduced to maximum depth of 2m. A minimum trafficable 2m depth would comply with section 3.11(a) Private Open Space – Balconies and terraces of Part C - Residential Development in the Lane Cove DCP. This would result in a reduced area being not capable of being used as an entertaining area and potential noise impacts. (See Figure 20).

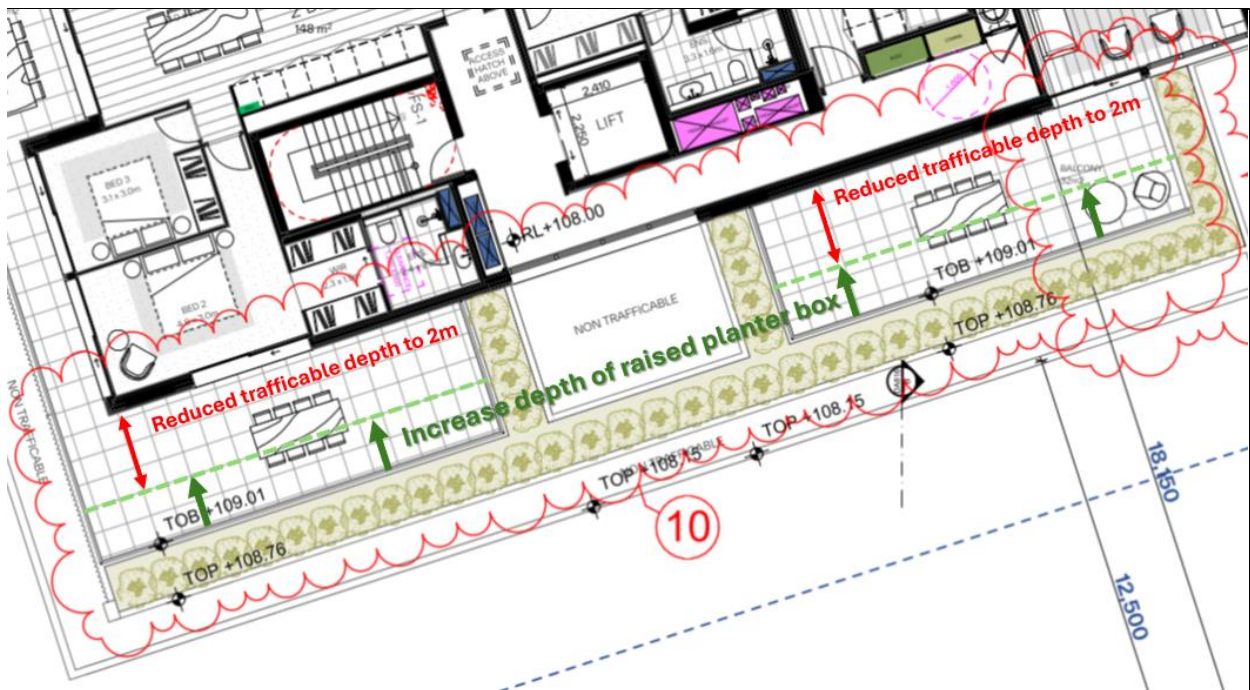


Figure 20: Recommended reduction in trafficable area of proposed balconies on 6th storey. (Source: PBD)

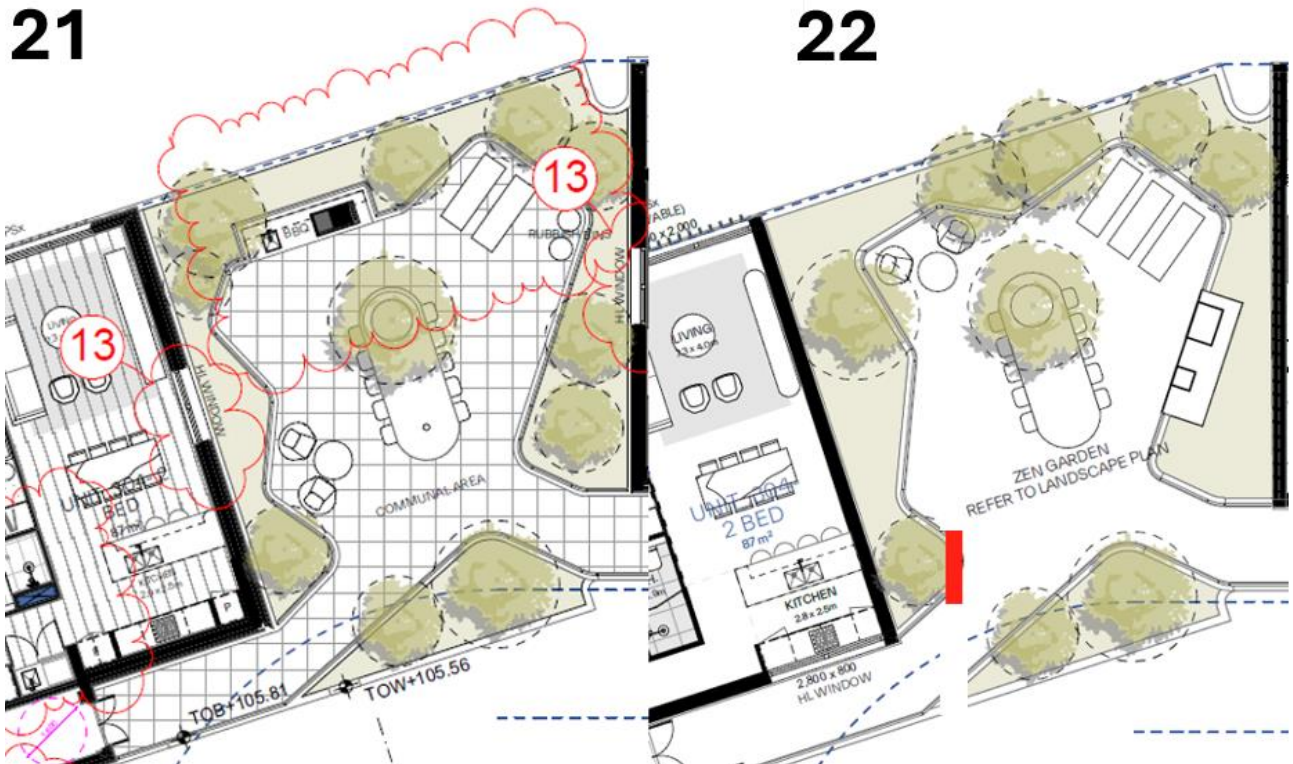
6.3.1 Proposed changes to level 3 communal open space and adjoining units

The s4.55 modification includes changes to the approved Level 3 communal open space including:

- Relocation of the approved BBQ bench to the northern end;
- Additional rubbish bins; and
- Relocation of approved chair seating (2 chairs + 1 table).

Refer to Figures 21 and 22.

Recommendation: The changes are negligible in impact and are supported by Council.



Figures 21 and 22: Proposed roof top communal area (21) and approved roof top communal area (22). (Source: PBD)

Proposed highlight windows on units 3.04 and 3.05 would have sill height of 1.7m above finished floor level and would face onto the level 3 communal open space. These windows would result in additional sources of natural light to the associated bedrooms without compromising their amenity. See Figure 23 below.

Recommendation: The additional high-sill windows are negligible in impact and are supported by Council.

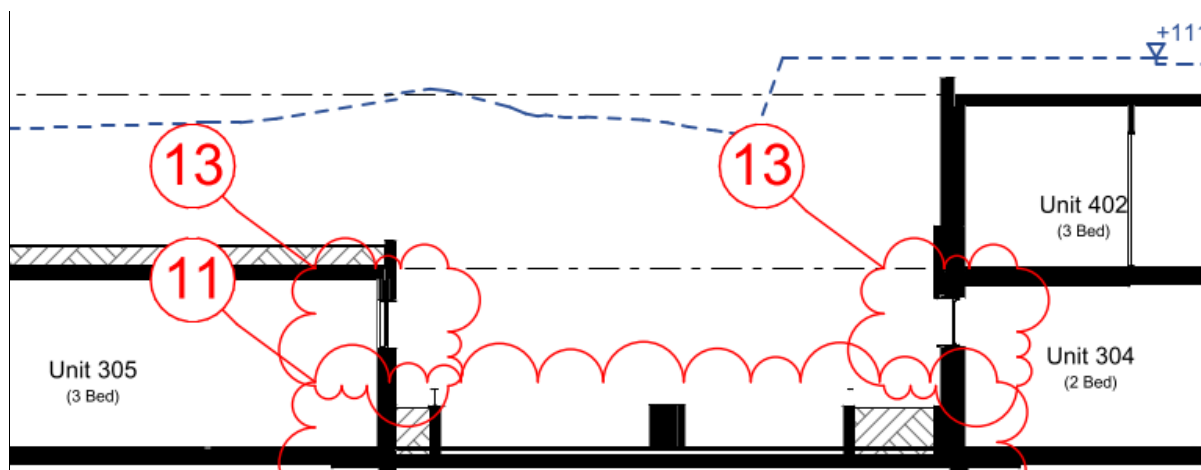


Figure 23: Proposed high-sill windows on Unit 304 and Unit 305 on communal area. (Source: PBD)

6.4.1 Proposed internal and below-ground changes.

The proposed internal and below-ground modifications including:

- Relocation of two accessible parking bays within the basement,

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- lowering the RL slab height of the basement 1 by 150mm,
- relocating bicycle racks within the development,
- Shoring wall alignment at lower ground floor,
- Additional storage areas below the upper ground floor terraces,
- Reconfiguration of communal entertainment area and replace with fitness area with accessible bathroom at lower ground floor (resulting in an additional 5sqm of GFA)
- Modifications to increase the area of units G03 and G04 at lower ground floor,
- Changes to standardize the internal apartment layouts on upper ground floor,
- Changes to standardize internal apartment layouts on level 1,
- Changes to standardize internal apartment layouts on level 2,
- Changes to standardize internal apartment layouts on level 3.

Recommendation: The changes are negligible in impact and are supported by Council.

6.5.1 Proposed changes to Condition 2 Design Amendments.

The application s4.55(2) requests to amend Condition 2 Design Amendments in the development consent.

2. Design Amendments.

- (d) *All oblique, diagonal facing windows on the southern external walls must be non-operable and be an obscure finish up to 1.6m above finished floor level.*



Figures 24 and 25: Oblique diagonal facing windows in plan & elevation. (Source: PBD)

Applicants comment: The proponent is seeking to amend sub condition 2A, as it has been demonstrated that only the oblique, diagonal facing windows from habitable rooms on the

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southern external walls require privacy measures, as per Figure 26. The oblique windows from the ensuite bathrooms in their current form (operable with clear glazing) will not impact 7 Allison Avenues privacy.

The applicant provide sightline diagrams to justify their position.

Proposed amendment of condition 2.A to require only habitable rooms to require obscure finish up to 1.6m above FFL. And allow the bathrooms to have clear operable windows.

As per figures 24 and 25 above, the eastern-most oblique windows on levels 3, 4 and 5 are associated with bathrooms. The western-most oblique diagonal windows on levels 3, 4 and 5 are associated with a bedroom (level 3) and dining rooms (levels 4 and 5).

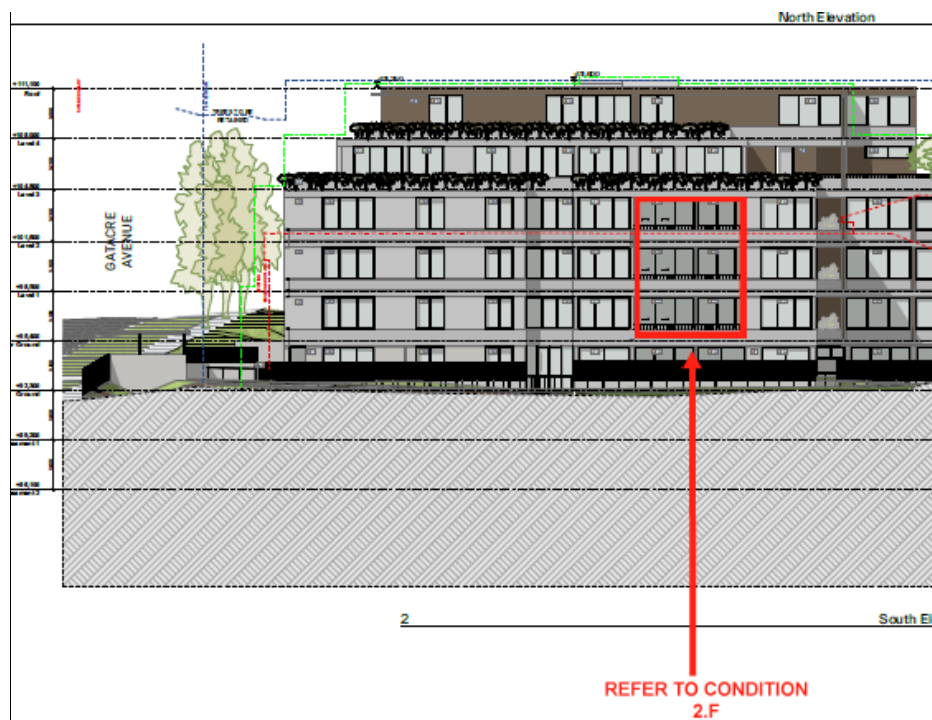
Comment: Allowing the diagonal oblique bathroom windows to be clear would result in sightlines to and from 7 Allison Avenue. The windows are permitted to be clear and operable above 1.6m above FFL to allow natural ventilation which is considered to be a balanced and reasonable outcome.

Recommendation: It is recommended that this condition requiring all diagonal oblique windows to be obscure inoperable up to 1.6m above FFL be retained.

6.5.3 Proposed deletion of condition 2.F

The applicant argues that the constructing the balustrades with solid obscure finishes would not increase privacy affordable to the neighbours of 2A Gatacre. The applicant provided sightline diagrams and has argued that the proposed landscaping would obscure views to 2A Gatacre due to the fall in natural ground level. Condition 2 (f) currently reads.

- (f). *The balustrades of the south facing balconies of Units UG.05, 105 and 2.05 are to be constructed with solid obscure finishes up to 1.2m above FFL.*



Figures 26: Approved elevation and balcony balustrades conditioned (Source: PBD).

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Comment: The condition was included in the original consent to minimise the amenity impacts on the southern interface of the RFB and the low-density dwellings. This relates to both perceived and actual visual and acoustic privacy impacts. In the event that the landscaping does not reach mature height, or trees die, the obscure finishes up to 1.2m height to the balustrades provide an additional privacy buffer to the neighbouring residents. The obscure balustrades would not impact on the unit's ability to obtain civic views to the west.

Recommendation: It is recommended that this condition requiring the balustrades as solid and obscure be retained.

6.6.1 Additional Modification

The applicant has not proposed to amend Condition 56 Hours of Work in the submitted documentation. However, Council argues that there is a connection and nexus between the approved works and the proposed alterations and additions to the residential flat buildings

The scope of changes in the proposal is considered to meet the nexus required to permit changes to hours of work condition. The proposed s4.55(2) includes alterations and additions to all levels of the approved development. The approved basement level at ground floor would increase approximately in an excavation footprint of additional 100sqm in proximity to the northeastern boundary. Beyond this, the intensification and cumulation of building works through an introduced variation to the height control would permit the reassessment of the construction hours condition.

It is noted that Condition 56. Hours of Work in the original determination stated construction hours between:

- 7.00am to 4.00pm on Saturdays. These hours relate to dwelling houses and are not applicable in this instance for 1 Gatacre and 5 Allison Avenue.
-

Council recommends the condition be modified to alter the hours of work on Saturdays to between:

- 8.00am to 12.00pm on Saturdays (standard construction hours for residential flat buildings). This would result in a 'construction-free' respite period prior to 8.00am and after 12.00 noon on Saturdays which would significantly increase amenity to the surrounding community during the construction phase.

Condition 56 currently reads:

56. Hours of work

All demolition, building construction work, including earthworks, deliveries of building materials to and from the site to be restricted as follows:-

- *Monday to Friday (inclusive) 7.00am to 5.30pm*
- *Saturday 7.00am to 4.00pm*

High noise generating activities, including rock breaking and saw cutting be restricted between: -

- *8.00am to 5.00pm with a respite period between 12.00pm to 1.30pm Monday to Friday, & Saturday between 8.00am to 12 noon.*

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- *with NO high noise generating activities, including excavation, haulage truck movement, rock picking, sawing, jack hammering or pile driving to be undertaken. Failure to fully comply will result in the issue of a breach of consent P.I.N.*
- *A Notice/Sign showing permitted working hours and types of work permitted during those hours, including the applicant's phone number, project manager or site foreman, shall be displayed at the front of the site.*

The principal certifier must ensure building work, demolition or vegetation removal is not carried out on Sundays and public holidays, except where there is an emergency. Unless otherwise approved within a construction site management plan, construction vehicles, machinery, goods or materials must not be delivered to the site outside the approved hours of site works. Note: Any variation to the hours of work requires Council's prior written approval.

Reason: To protect the amenity of the surrounding area.

Recommendation: It is requested that the Sydney North Planning Panel endorse an amendment to condition 56 to reflect the standard construction hours for residential flat buildings.

This would result in a 'construction-free' respite period prior to 8.00am and after 12.00 noon on Saturdays and would significantly increase amenity to the surrounding community during construction.

- *Monday to Friday (inclusive) 7.00am to 5.30pm*
- *Saturday ~~7.00am to 4.00pm~~ 8.00am to 12.00pm*

PROVISIONS OF ANY LEP, DCP, SEPP OR REGULATION (Section 4.15(1)(a))

The proposal is permissible and does not raise any issues in regard to the Lane Cove Local Environmental Plan 2009.

The proposal complies with the Floor Space Ratio development standard. The section s4.55 modification would vary the Height 15m development standard by a total of 69cm. The variation is supported in this instance as addressed earlier in this report.

OTHER PLANNING INSTRUMENTS

SEPP (Resilience and Hazards) 2021

The subject site and adjoining sites are zoned for residential purposes. Given the types of uses permissible within the residential zones, it is unlikely that the site would be contaminated.

APPLICABLE REGULATIONS

The Environmental Planning and Assessment Regulation 2021 indicates that the standards for demolition and removal of materials should meet with AS 2601-2001 and therefore any consent would require the application of a relevant condition seeking compliance with this Standard.

REFERRALS

Development Engineer – Part O – Stormwater Management

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No additional draft conditions required.

Tree Assessment Officer – Part J – Landscaping

Amended landscaping plans generally comply with requirements in design changes condition with the exception of deciduous tree species level 3. A notation will be added on the plans to update the species.

IMPACTS OF DEVELOPMENT (Section 4.15(1)(b))

The proposal would not adversely impact neighbouring properties or the public domain in terms of overshadowing, visual privacy, acoustic privacy, or traffic and parking. The proposal presents a development outcome that is consistent with the objectives of the relevant planning controls.

SUITABILITY OF SITE (Section 4.15(1)(c))

The subject site would be suitable for the proposed development as the proposed use is permissible within the Zone. The proposed development would positively contribute to the amenity of the surrounding area and the subject site constrain the development or neighbouring sites.

RESPONSE TO NOTIFICATION (Section 4.15(1)(d))

The proposal was notified in accordance with Council's policy and a total of 27 unique submissions were received. Concerns raised in the submissions are summarized below.

Concerns with variation to the 15m height control.	Comment: The lodged s4.55 proposal would result in a 1.29m (9%) variation to the 15m height control. After discussions with Council and reviewing the public submissions, the applicant submitted amended plan which reduced the height of the rooftop plant by 60cm. This resulted in a reduced variation of 69cm or 4.6% above the 15m height control. As discussed earlier in this report, the elements of the building which vary the height control are limited to relocated AC condenser units and the structure enclosing them. The additional height would not result in unacceptable shadow impacts as compared to the approved development but would ensure the approved AC condenser units would be further away (19m) from the property boundary from the R2 zone. They would also be enclosed within an acoustic /visual screen. The screening was further reduced in height and would be setback from the building edges and would not be visible from either street frontage.
Acoustic concerns about the relocation of AC condenser units.	Comment: The approved plans included 24 AC condenser units on the non-trafficable outdoor area on the southern edge of level 3 5 th floor). The original DA included an acoustic assessment report and the notice of determination included associated conditions including: • Condition 43. C.20.EH - Compliance with recommendations acoustic report

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	<i>The Construction Certificate drawings shall demonstrate compliance with the recommendations contained in the Acoustic Report, prepared by Acoustics Logic, 20240128.1 Revision 1, dated 25/03/2024.</i> <i>The Report is to include details of the specified AC plant and any other plant equipment for which details are unknown at the DA stage.</i> Condition 44. C.21EH- Noise Control - Residential Air Conditioning Units -<i>To minimise the impact of noise from the air conditioning unit, it shall be located 3 meters from the boundary and/or attenuated so that noise generated does not exceed 5db(A) above the ambient background level between 7am and 10pm on weekdays and 8am and 10pm on Weekends and Public Holidays. Any noise emitted by the air conditioning unit shall not be audible within a room of any residential dwelling or sole occupancy unit at any time within the hours of 10pm and 7am on weekdays and 10pm and 8am on weekends and public holidays.</i> The s4.55 modification would relocate the AC condenser units on level 3 (5th storey) to the roof top of the level 4 (6th storey). The revised location would be further away from the southern edge of the building and the nearest dwelling houses. The relocated units would also be set behind a 1.7m high acoustic wall. In this regard no additional acoustic assessment is required as the existing conditions and acoustic would ensure the proposal would comply with the relevant Australian Standards.
Privacy Concerns with additional balconies facing towards the R2 zone. Concerns with reduced setbacks to terraces of units 205, 302, 401 and 402.	4th storey (2F): The s4.55 would not change to approved setback. The balcony depth of 2.6m would not increase. The changes are considered acceptable. 5th storey (3F): The s4.55 would result in a non-compliant 10m separation distance between the balcony on 5th floor and the property boundary. This is not supported, and a condition will be recommended requiring this level to be retained as non-trafficable. 6th storey (4F): The s4.55 would result in a 14.8m separation distance. While this complies with the ADG separation distances, it would result in an additional south facing balcony and potential accumulative amenity impacts. The balconies would be approximately 3.2m in depth. The proposal is not supported in its current form. It is recommended that a draft condition requiring increasing the depth of the non-trafficable raised

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	planter box by a further 1.2m. The remaining trafficable areas would be reduced to maximum depth of 2m.
Concern that the changes would not be substantially the same development under s4.55 of the Act.	Comment: An assessment against the provisions of s4.55(2) of the <i>Environmental Planning and Assessment Act, 1979</i> . Reference is made to the recent decision of the Chief Judge of the Land and Environment Court in the case of <i>Canterbury-Bankstown v Realize Architecture Pty Ltd</i> [2024] NSWLEC 31 (Realize) simplified the approach by the consent authorities in the assessment of modification applications. The proposal relates to changes consistent with being classified as substantially the same development.
Concerns about changes to level roof top communal area.	Comment: The approval plan included a BBQ bench. The s4.55 relocated the BBQ bench away from boundaries of the R2 Zone. The other changes to the communal space are the inclusion of a waste bin and minor reduction of seating. The changes to the approved level 3 communal open space do not result in any intensification in use or additional privacy impacts.
Concerns relating to increased shadow impacts.	Comment: The applicant provided solar access diagrams which demonstrated that no unacceptable shadow impacts would occur as a result of the A/C condenser unit a screen onto the rooftop.
Concerns with proposed oblique diagonal windows to bathrooms to be converted to clear and operable.	Comment: Council does not support the amendment of this condition and recommends that it be retained by the SNPP.
Concerns with proposed removal of condition requiring balustrades to be constructed with solid an obscure finishes.	Comment: Council does not support the removal of this condition and recommends that it be retained by the SNPP.
Concerns with reduction of solar capacity for the building.	Comment: The number of photovoltaic (PV) panels has been reduced from 175 to 130, lowering total solar capacity from 78kW to 57kW. This is considered acceptable as the proposal complied with Part S Environmental Sustainability of the Lane Cove DCP. Greater than 85% of the available roof of both buildings covered with solar panels. The requirements of the DCP is a minimum of 25% coverage.

PUBLIC INTEREST (Section 4.15(1)(e))

The proposal would not have an unreasonable impact on neighbouring properties or the public domain with regard to the Lane Cove LEP 2009, Lane Cove DCP 2009 or any other environmental planning instruments subject to recommended conditions including *Condition 2. Design Amendments*. Therefore, approval of this parts of the amended application would not be contrary to the public interest.

CONCLUSION

The matters in relation to Section 4.15 of the Environmental Planning and Assessment Act 1979 have been satisfied.

The s4.55(2) modification application generally complies with the design criteria of the Apartment Design Guide subject to a design condition.

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The s4.55(2) modification application complies with the Floor Space Ratio development standard of the Lane Cove LEP 2009. The proposal includes a variation to the height of building development standard under the LEP. This is considered acceptable in this instance based on the assessment earlier in this report.

The application generally meets with the Part C Residential Development Objectives of the Lane Cove Development Control Plan 2009.

The submissions received have been considered and do not warrant total refusal of the Development Application. On balance parts of the proposed development would be reasonable it is therefore recommended for partial approval.

RECOMMENDATION

That pursuant to Section 4.16(1)(a) of the *Environmental Planning and Assessment Act, 1979* the Sydney North Planning Panel at its meeting of 6 August 2025 **partially** approve the s4.55(2) modification to the Development Application DA35/2024 for the Demolition of Existing Structures, Lot consolidation and construction of a Part 4, Part 5 and Part 6 residential flat Building with 43 apartments and two levels of basement parking with 85 parking spaces, at 1 Gatacre Avenue and 5 Allison Avenue Lane Cove.