



Response to Council Request for Information DA35/2024/2

1 Gatacre Avenue and 1-5 Allison Avenue,
Lane Cove

ON BEHALF OF

GATACRE LC PTY LTD

JULY 2025



Project

1 Gatacre Avenue and 1-5 Allison Avenue, Lane Cove

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Document Control				
No.	Version	Date	Author(s)	Approved by
1	First Draft	10/07/2025	Hannah Cameron, Senior Consultant	Naomi Ryan, Associate Director
2	Draft for Review	16/07/2025	Emma Fitzgerald, Associate Hannah Cameron, Senior Consultant	Naomi Ryan, Associate Director
3	Final for Submission	16/07/2025	Emma Fitzgerald, Associate Hannah Cameron, Senior Consultant	Naomi Ryan, Associate Director

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1 Introduction

This Report has been prepared on behalf of Gatacre LC Pty Ltd (the proponent) in response to a Request for Information (RFI) issued on 2 July 2025 by Lane Cove Council (Council) following notification of the section (s) 4.55(2) modification application to Development Application DA35/2024 (the project).

DA35/2024 was approved on 4 October 2024 by the Sydney North Planning Panel (Planning Panel) for the demolition of the existing multi-storey motel building and dwelling house and the construction of a part 4, part 5, and part 6 storey residential flat building with 43 apartments and two levels of basement parking.

The RFI sets out the following commentary:

The formal notification period has now finished.

You are required to review and address the submissions lodged with a view to provide for opportunities to positively respond to the issues raised considered. You should pay regard to all issues raised.

A detailed response to the community submissions received during the public notification period of the s4.55(2) modification application is set out in Section 3 of this Report.

1.1 Structure

This Report is structured as follows:

- **Chapter 1** – Provides an overview of the purpose of this Report;
- **Chapter 2** – Outlines the proposed modifications to the project as a result of the community feedback during the notification period;
- **Chapter 3** – Provides a summary of the response to the issues raised in the community submissions;
- **Chapter 4** – Demonstrates that the project remains substantially the same development; and
- **Chapter 5** – Sets out the conclusion and summary of the amended project.

1.2 Supporting Documentation

This Report should be read in conjunction with the following documentation:

- **Appendix 1** – Council Request for Information Letter; and
- **Appendix 2** – Amended Architectural Plans.

2 Proposed Modifications

Since the issuance of development consent for DA35/2024, careful and considered amendments have been made to the proposed development. These changes include those made in response to issues and comments raised by the original Design Review Panel, Council, and the general public, as well as adjustments made to enhance the development outcome. Approval for these proposed modifications has been sought through the lodgement of a s4.55(2) modification application.

This Chapter sets out the proposed modifications sought as part of this application, as well as additional proposed changes being sought post-public notification of the s4.55(2) modification application.

2.1 Proposed S4.55 Modifications (as originally submitted)

The s4.55(2) modification application was prepared for the following proposed amendments (as numbered on the revised Architectural Plans at **Appendix 2**):

1. Two (2) accessible parking bays have been relocated from Basement Level 1 to Basement Level 2;
2. The slab reduced levels (RL) has been lowered by 150mm to increase ceiling clearance;
3. The bike racks have been repositioned;
4. No changes in deep soil from the approved DA35/2024;
5. A new storage space has been added beneath the approved terraces on the Upper Ground Floor;
6. The entertainment area has been transformed into a fitness space, the cellar area has been reconfigured for improved functionality, and an accessible restroom has been added;
7. The mechanical fan exhaust has been relocated to the rooftop;
8. Apartment sizes have been expanded beneath the approved terraces on the Upper Ground Floor;
9. Interior layouts have been amended for uniformity across all apartments;
10. A previously non-trafficable terrace has been converted into a private open space for Units 205, 302, 401, and 402;
11. The barbeque area has been repositioned for improved accessibility and functionality, and the general utility sink and rubbish bins have been added;
12. Unit 205 has been expanded;
13. A highlight window has been added to the wall between the communal open space and Units 304 and 305 to improve solar amenity;
14. The air conditioning units have been moved to the roof level;
15. The number of solar panels has been reduced from 175 to 130, decreasing rooftop solar capacity from 78KW to 57KW; and
16. Larger trees have been introduced along the boundary with 7 Allison Avenue, the boardwalk has been realigned, and the timber D-fence has been amended to incorporate acoustically treated materials and metal posts.

2.2 Proposed Changes Post-Exhibition

Following notification of the s4.55(2) modification application, the following additional amendments have been made to incorporate feedback from the submissions received (as numbered on the revised Architectural Plans at **Appendix 2**):

17. The height of the rooftop plant area has been reduced from 1.8m to 1.2m;
18. The planter box on the terrace of Unit 205 and 302 on Level 3 has been extended by 35cm to further enhance privacy to downstream neighbours;
19. A new water filter and storage tank have been added to the Ground Floor; and
20. The layout of common and service areas has been revised for better functionality and circulation.

3 Response to Submissions

A total of 28 community submissions were received in relation to the s4.55(2) modification application. Upon review, it appears that 22 of the current objectors (79%) also objected to the original DA lodged for the site.

The most consistent concerns raised within the objections related to:

- Relocation of air conditioning units;
- Height exceedance;
- Terrace modifications;
- Privacy;
- Amenity;
- Visual impact;
- Bulk and scale;
- History of refusal;
- Noise; and
- Character.

Key issues raised within the submissions received and responses to these concerns are set out below.

3.1 Relocation of Air Conditioning Units

The s4.55(2) modification application includes the proposed relocation of the air conditioning units from a non-trafficable Level 3 roof to the rooftop of Building A.

A key concern raised in the public submissions was that this modification would result in poor visual impacts, create unsightliness, and contribute to the bulk and scale of the development.

In recognition of these, the design team has investigated all possible alternative avenues for the relocation of the air conditioning units. Assessment of these alternative locations concluded that the rooftop of Building A resulted in the best built form and performance outcomes, as follows:

- **Approved Level Three Location** – The existing approved location places 18 air conditioning units 12m from downstream neighbours to the south resulting in a visual and acoustic privacy conflicts. The approved location would result in elevated mechanical noise to future residents of the development as well as residents of 2A Gatacre and 7 Allison Avenues, which is considered to be a suboptimal development outcome;
- **Rooftop near Allison Avenue** – If relocated to the rooftop of Building B (near Allison Avenue), the air conditioning units would be situated too far from the apartments along Gatacre Avenue. This would result in performance inefficiencies and a loss in system effectiveness thereby rendering this option unfeasible from a mechanical engineering and sustainability perspective;
- **Apartment Terrace and Balcony areas** – The placement of the air conditioning units on the terraces and balconies of the apartments was considered inappropriate due to their close proximity to habitable spaces which would result in poor acoustic amenity for residents. This option would also introduce additional acoustic impacts to downstream neighbours which is a less desirable outcome. This option is also undesirable from a visual impact perspective as it can create visual clutter;
- **Ground Level** – The placement of the air conditioning units at the ground level above the entrance to the carpark was investigated; however this location is unable to accommodate the air conditioning units due to the lack of adequate natural ventilation required for the units proper functioning;

- **Basement Level** – Air conditioning units are not rated or warranted for basement use which raises significant warranty and compliance concerns. Accordingly, this option is not considered viable; and
- **Rooftop near Gatacre Avenue** – If relocated to the rooftop of Building A, the air conditioning units will be situated in an ideal location to maximise performance efficiencies and system effectiveness. As part of these investigations, the height of the rooftop plant area has been lowered from 1.8m to 1.2m which reduces the height exceedance to a maximum of 690mm. This location will be hidden from the public domain and improve acoustic outcomes for residents on Level 3 and downstream neighbouring properties.

Figure 1 and Figure 2 (overleaf) have been prepared to demonstrate that the proposed relocation will not be visible from the public domain or surrounding properties. The location of the air conditioning units is set back from the parapet of the building, therefore not discernible from the public realm. Based upon a review of the submissions, we concluded that most of the objectors were located downstream of the development and therefore will not be directly impacted from this aspect of the modification.

The quantity of air conditioning units proposed represents the consolidation of units from Building A basement and Level 3 rooftop.

3.2 Height Exceedance

A key concern raised in the public submissions was that this modification would introduce a minor contravention of the 15m the maximum height of building (HOB) development standard as prescribed by the *Lane Cove Local Environmental Plan 2009* (LCLEP 2009) resulting from the:

- Relocation of the air conditioning units from Level 3 to the rooftop of Building A; and
- Conversion of the previously non-trafficable terraces into private balconies which results in the proposed balustrades exceeding the height plane in some locations.

Initially, the application proposed a revised maximum building height of 16.29m measured to the top of the service plant fence, representing a 9% exceedance. As discussed in Section 3.1 of this Report, investigations into potential alternative locations determined that relocation to the rooftop of Building A was the most functional design outcome.

Nevertheless, the height of the rooftop plant area has been lowered from 1.8m to 1.2m which reduces the height exceedance by 600mm. As such, the revised maximum building height would be **15.69m**, representing a **4.6%** variation to the standard, as shown in Figure 3. This height exceedances are limited to rooftop plant and screening, and will not be perceptible from the public domain, as shown in Figure 4.

The proposed height exceedance relating to the Level 4 balustrades of up to 160mm representing a 1% exceedance of the maximum HOB. This exceedance reflects the existing ground level changes of the site which have a more than 2m level change close to this area, as shown in Figure 4.



Figure 1. View from Gatacre Avenue
Source: PBD Architects



Figure 2. View from 2A Gatacre Avenue
Source: PBD Architects



Figure 3. s4.55(2) Modified Height Plane Axonometric Facing Gatacre Avenue
Source: PBD Architects

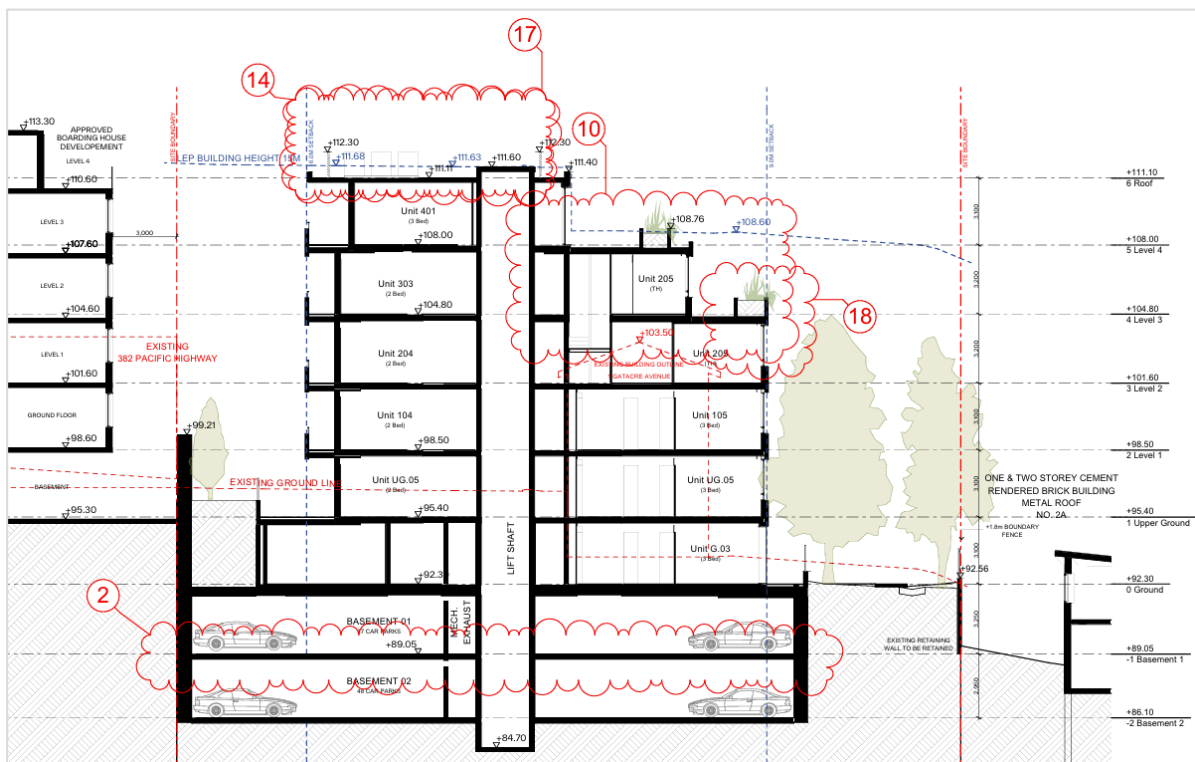


Figure 4. Section through Building A showing Height Exceedances
Source: PBD Architects

LEGISLATIVE CONSIDERATIONS

The height exceedance is predominantly a result of the relocation of the air conditioning units to the rooftop level of Building A. The site is subject to a maximum building height restriction of 15m, however clause (cl.) 4.6 of the LCLEP 2009 allows for exceptions to development standards in order:

- (a) *To provide an appropriate degree of flexibility in applying certain development standards to particular development; and*
- (b) *To achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The objective of this clause is to provide an appropriate degree of flexibility in applying certain development standards to particular developments in the essence of achieving better design outcomes for and from development.

Caselaw (*North Sydney Council v Michael Standley & Associates Pty Ltd* [1998] NSWSC 163) demonstrates that a s4.55 application, does not need to rely on cl. 4.6 as s4.55 of the *Environmental Planning and Assessment Act 1979* (EP&A Act 1979) enables a development to be approved notwithstanding any breach of development standards.

Section 4.55 is a broad power to approve, subject to its own stand-alone tests (such as the “substantially the same” test, and a requirement to consider all relevant s4.15 matters). Section 4.55 does not rely upon having a written cl4.6 written variation request in order to enliven its power to approve.

The modification report as amended by this Report demonstrates that the proposed development is substantially the same and appropriate for the setting. It is noted that the proposed non-compliance with the 15m HOB development standard has been decreased post public notification. Consideration of the impact of the proposed modification was detailed in Section 5 of the original modification application, as supplemented below.

OBJECTIVES OF CL.4.3 HEIGHT OF BUILDINGS

Despite the minor numerical contravention of the HOB, the development will still achieve the objectives of cl.4.3 Height of Buildings as shown in Table 1.

Table 1. Assessment Against cl.4.3 Height of Buildings	
Objective	Proponent Response
<i>(a) to ensure development allows for reasonable solar access to existing buildings and public areas,</i>	The proposed height exceedance will not unreasonably restrict solar access to existing buildings and public areas in the surrounding area. The proposed height exceedance will not result in any additional actual overshadowing of existing buildings or the public domain as demonstrated in this report. Refer to Figure 8 for shadow diagrams.
<i>(b) to ensure that privacy and visual impacts of development on neighbouring properties, particularly where zones meet, are reasonable,</i>	The proposed height exceedance will not impact the privacy or views of neighbouring properties. The air conditioning units will not be visible from the public domain or neighbouring properties as shown in Figure 1 and Figure 2. Furthermore, their relocation will move the source of mechanical noise further away from downstream neighbours, thereby improving acoustic amenity for downstream neighbouring properties and future residents on Level 3 of the development.
<i>(c) to seek alternative design solutions in order to maximise the potential sunlight for the public domain,</i>	As demonstrated in Section 3.1, a number of alternatives have been considered. However, this solution ultimately achieves the best design outcome for future residents and neighbouring properties. The proposed height exceedance will not reduce solar access in the public domain.

(d) to relate development to topography.	The site conditions were considered in the placement of the built form, to ensure the least disruption to neighbouring properties, and surrounding locality. The design and appearance of the building is considered satisfactory and will not impact on the amenity of the surrounding land uses in any way. It will not result in a noticeable change to the visibility and perception of the bulk and scale of the development or negatively impact views from the south as demonstrated in Figure 1.
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REASONABLE AND NECESSARY

As outlined above, this modification is considered reasonable and necessary to achieve an ideal built form outcome that will not cause environmental harm and is consistent with the objectives of the development standard.

The proposed modification will achieve several planning benefits, including:

- Consistency with the R4 High Density Residential Zone objectives and the objectives of cl. 4.3 Height of Buildings development standard;
- Reduced noise impacts for downstream neighbours associated with the operation of the air conditioning units;
- Negligible overshadowing or solar access impacts to neighbouring properties;
- No distinguishable changes to the bulk, scale, form, or dominance of the building compared to what was originally approved, as the air conditioning units will not be visible from the public domain (Figure 1);
- Improved amenity for future residents on Level 3;
- The proposed development will continue to be consistent with the desired built form of the surrounding locality;
- No adverse environmental impacts as a result of the height non-compliance; and
- The revised design is considered to be in the public interest and will improve the overall design outcomes associated with the development.

Considering the above assessment, compliance with the height standard is considered unreasonable and unnecessary given that it will not result in any unacceptable environmental impacts.

3.3 Terrace Modifications

The s4.55(2) modification application seeks to convert the previously non-trafficable terrace on Level 3 and Level 4 of Building A, into a private open space for Units 205, 302, 401, and 402. This modification raised concerns regarding the privacy and amenity of properties adjacent the development.

In accordance with 3F Visual Privacy of the Apartment Design Guidelines (ADG), minimum required separation distances from buildings to the site and rear boundaries are 9m for habitable rooms and balconies and 4.5m for non-habitable rooms for buildings with 5-8 storeys. Apartment buildings should have an additional increased separation distance of 3m when adjacent to a different zone that permits lower density residential development to provide for a transition in scale and increased landscaping.

The creation of additional habitable terrace spaces was incorporated in response to a suggestion set out by the Design Review Panel during their review of DA35/2024 to seek to maximise views to the south for future residents. Whilst this introduces a technical non-compliance against the ADG, the built form setbacks have not been altered despite the reclassification of the space from non-habitable to habitable.

The only compliance change is reflective of the use of an area changing to habitable space, without any associated setback changes. When viewed from neighbouring properties and/or the public domain there will be no perceptible change in the built form of the development or its setback to the boundary.

Notwithstanding the technical non-compliance with the Design criteria of 3F, the terraces remain consistent with Objective 3F-2 which states:

Site and building design elements increase privacy without compromising access to light and air and balance outlook and views from habitable rooms and private open space.

The Level 3 terraces will not be primacy outdoor spaces and have been envisaged for passive, private uses. Similarly, a careful planting palette has been selected with a variety of plantings growing up to a mature height of up to 1.5m to increase privacy will be placed along the edges of the terraces.

The proposed Level 3 planter boxes have been widened by 350mm to ensure that anyone using the terraces will not have direct lines of sight into the backyards or windows of habitable rooms of the neighbouring properties. As such, it will not result in any noticeable privacy, amenity, visual, solar access, noise, or overshadowing impacts.

Figure 5 demonstrates that the first dwelling visible from Unit 205's Level 3 terrace will be the roof of 8 Gatacre Avenue almost 60m away from the terrace. Figure 5 and Figure 6 demonstrate that the sightlines from these new terraces will not intrude on the privacy of neighbours.

The proposed terraces will result in materially improved amenity for future residents, whilst at the same time will not impact on the amenity of surrounding neighbours and are therefore considered to be appropriate and supportable on merit.



Figure 5. View from Level 3 Balcony of Unit 205

Source: PBD Architects

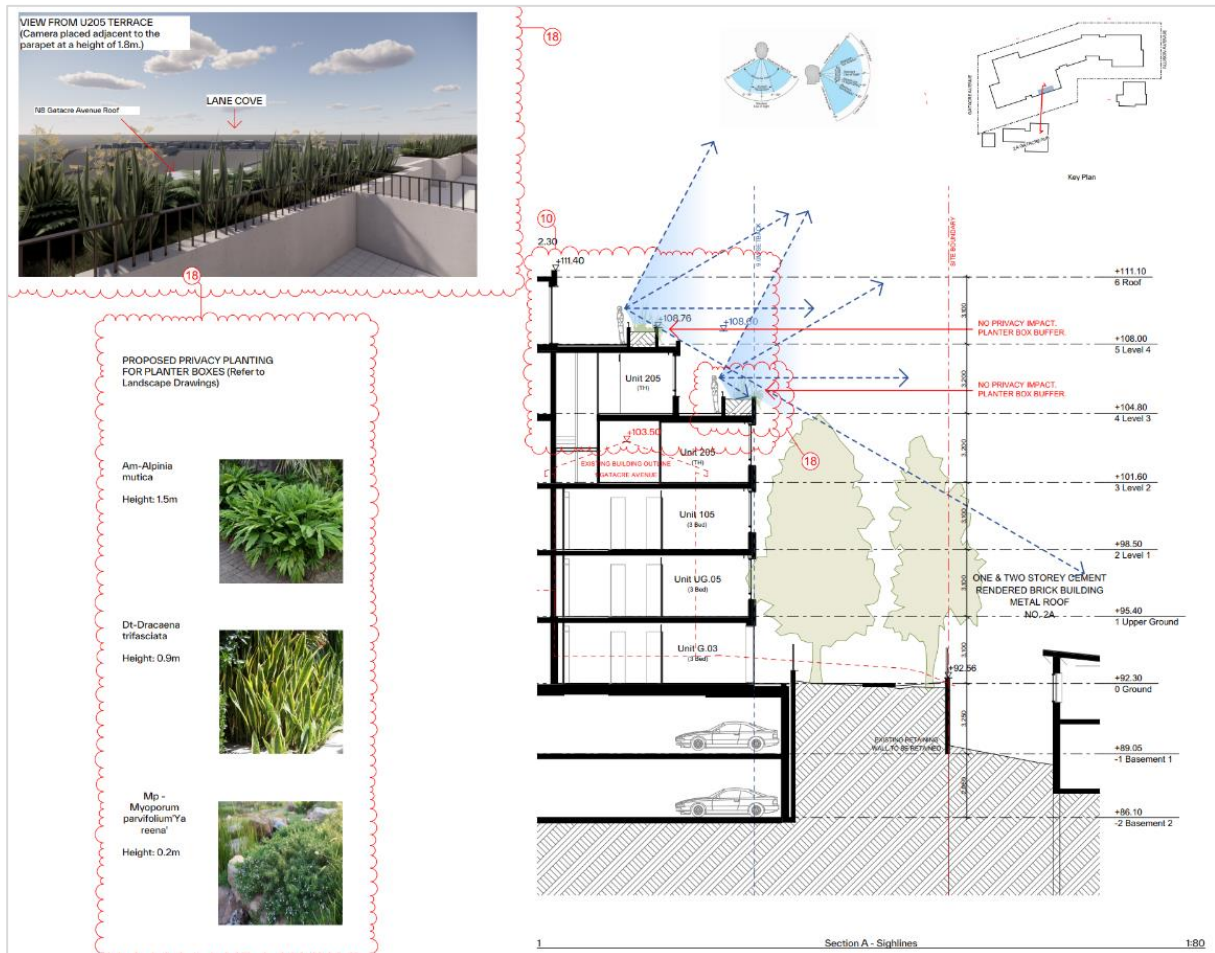


Figure 6. Sightline Diagram - Southern Private Open Spaces
Source: PBD Architects

3.4 Privacy

Potential privacy intrusions was a key concern raised within the submissions, specifically relating to the terrace modifications, expansion of Unit 205, and the revised window treatments.

As discussed in Section 3.3 of this Report and demonstrated in Figure 6, the proposed terrace modifications will not result in any loss of privacy or amenity to adjacent properties. The design and treatment of the balconies ensures that there will be no direct lines of sight into the backyards or habitable rooms of neighbouring properties. These balconies are envisioned to be used for passive, private uses that will not generate unacceptable noise levels. Furthermore, this change will not alter the built form, scale, bulk, or setbacks of the development and will not create additional overshadowing impacts or impede solar access.

As set out in the ADG, good apartment design requires balancing the amenity needs of future residents and existing surrounding neighbours.

The s4.55(2) modification application included a request to modify Condition 2A to apply only to habitable rooms along the southern external walls. This proposed modification is considered reasonable as only the oblique, diagonal facing windows from habitable rooms along the southern external walls require privacy measures. The oblique windows from the ensuite bathrooms in their current form (as operable with clear glazing) will not impact the privacy of residents at 7 Allison Avenue.

Figure 7 below clearly shows that views from the ensuite bathrooms do not allow for sightlines into the windows of 7 Allison Avenue and thus do not require privacy measures. Accordingly, the requirement for Condition 2A need only apply to **habitable rooms** with oblique, diagonal facing windows along the southern external walls. The privacy of residents at 7 Allison Avenue will not be impeded by this proposed modification.

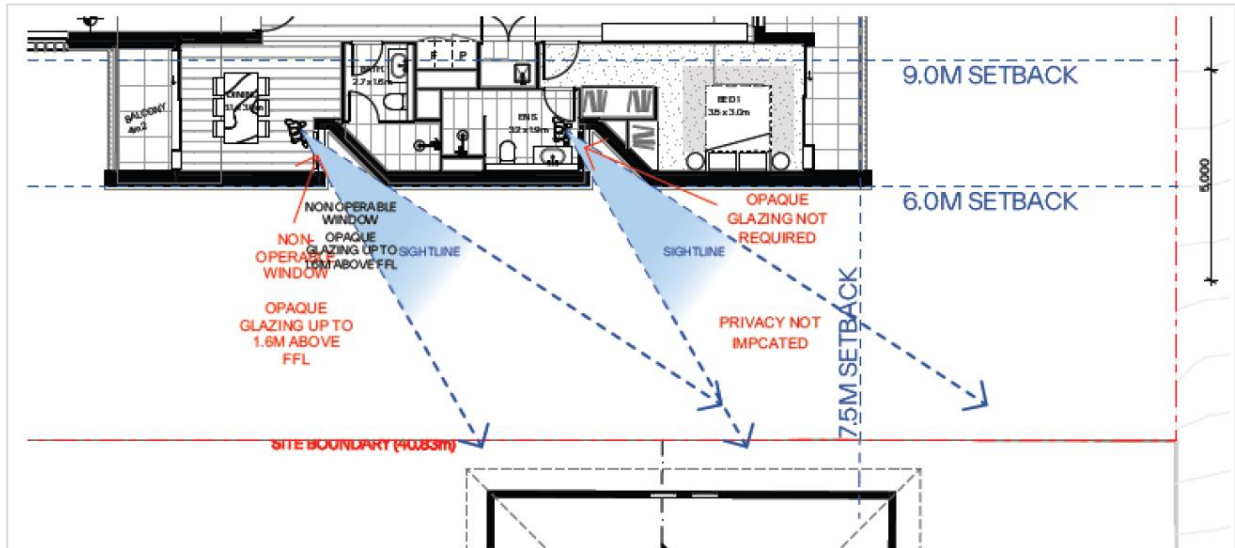


Figure 7. Sightline Diagram for Southern Oblique Windows
Source: PDB Architects

3.5 Amenity

The proposed modifications will not result in unacceptable outcomes for the neighbouring properties in regard to amenity, visual, solar access, noise, or overshadowing.

The transformation of the previously non-trafficable terraces into usable balconies for Units 205, 302, 401, and 402 will not compromise the privacy and amenity of adjacent properties. Figure 8 demonstrates that the proposed modifications to the development will result in an insignificant change to the overshadowing on neighbouring properties.

Whilst the proposed modification will technically result in minor additional overshadowing to the rear private open space for 7 Allison Avenue, it is important to consider the actual site conditions, which are heavily vegetated. When the existing and proposed landscaping are incorporated into the overshadowing model, there is **no additional overshadowing experienced to any property beyond what was approved under DA35/2024** as per Figure 8.

Furthermore, the relocation of the air conditioning units and shifting the barbeque further north within the Zen Garden area will result in improved outcomes for downstream neighbours in regard to noise concerns, by shifting potential sources of noise generation further away from the R2 zone interface.

Two (2) objections were raised regarding potential overshadowing impacts relating to the relocation of the air conditioning units and the expansion of Unit 205. The proposed modifications to the development will not result in any significant changes to overshadowing impacts on neighbouring properties.



Figure 8. Shadow Diagram – 22 June 9am-11am
Source: PBD Architects

3.6 Visual Impact

Concerns were raised that the proposed modifications would result in potential adverse visual impacts. In particular, that the proposed relocation of the air conditioning units would increase the visual dominance of the development and result in unsightliness. However, as demonstrated in Figure 1 and Figure 2 earlier in this Report, the air conditioning units located on the roof level will not be visible from the public domain or streetscape, despite the sloping topography.

This proposed relocation will result in an improved outcome for neighbouring residences by obscuring the air conditioning units out of sight, reducing unsightliness, and reducing noise.

Another concern raised was that the expansion of Unit 205 would result in a noticeable change in built form, creating increased overshadowing, increased building bulk and loss of visual amenity. As demonstrated in Section 3.11.2 of this Report, the proposed expansion of Unit 205 does not result in any significant changes to the scale or setbacks of the building. This proposed change will ultimately not increase the visual dominance of the building or result in unacceptable visual, amenity, overshadowing, or solar access impacts to neighbouring residences.

3.7 Bulk and Scale

As discussed above, the proposed relocation of the air conditioning units raised concerns regarding how this would affect the bulk and scale of the development. As discussed in Section 3.1 of this Report, the air conditioning units on the roof level would not be visible from the public domain and as such would not alter the perceived bulk and scale of the building.

3.8 History of Refusal

This is not a matter for consideration. This modification seeks to modify DA35/2024. The modification does not increase the intensity and scale of the proposal in line with the refused application.

Development Application DA65/2021 proposed the construction of a six-storey residential building with 61 apartments and 121 parking spaces. On 16 September 2021, the Lane Cove Planning Panel refused the application. The developer commenced a Class 1 appeal of the refusal and on 13 July 2023, Justice Moore concluded that *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 upslope.*

This approved development (DA35/2024) of 43 apartments comprises a substantially different design than what was originally proposed. The development has been designed to be sympathetic to the neighbouring properties to ensure it does not result in unreasonable view, privacy, amenity, solar access, or overshadowing impacts.

Whilst it is acknowledged that proposed development on the site has been subject to a history of refusal, each proposal and modification must be assessed on its individual merits while taking into account the context of the surrounding locality.

As demonstrated in the s4.55(2) modification application, the development remains substantially the same as the approved development (DA35/2024) despite the proposed modifications. Accordingly, the justification set forth by Justice Moore as to why the original development should be refused has been duly considered and resolved.

3.9 Noise

Seven (7) objectors raised concerns around increased noise relating to the relocation of the air conditioning units to the rooftop and the communal barbeque area in the 'Zen Garden'. The relocation of the AC units to the rooftop will result in an improved acoustic outcome for downstream neighbours, and has been further mitigated through the use of an acoustic screen.

The location of the barbeque within the Zen Garden has been shifted north (further away from downstream neighbours) and is considered to be an improved outcome when compared with the approved location.

An Acoustic Report was prepared by Acoustic Logic in support of the original application which demonstrated that the development is compliant with legislative requirements, subject to the adoption of identified mitigation measures. The relocation of the air conditioning units and the barbeque will result in an improved acoustic outcome for downstream neighbours. The proposed modifications do not alter compliance and thus no further acoustic modelling or reporting is required to support the application.

3.10 Character

The site is located on land zoned R4 High Density Residential. The R4 zone is designated for higher density land uses reflective of the zoning objectives set out in the LCLEP 2009. An assessment of the project against the relevant objectives of the R4 zone is set out in Table 2.

Table 2. Assessment Against the Objectives of R4 High Density Residential Zone	
Objective	Proponent Response
<i>To provide for the housing needs of the community within a high density residential environment.</i>	The project seeks to construct a high-density residential development comprising 43 new apartments, providing for the growing housing needs of the community.
<i>To provide a variety of housing types within a high density residential environment.</i>	The development contributes to the provision of a variety of housing types including 1-3 bedroom apartments, three bedroom townhouses, and adaptable dwellings.
<i>To provide for a high concentration of housing with good access to transport, services and facilities.</i>	The development allows for a high concentration of dwellings with good access to road connections, public transport, open spaces, employment, and commercial and retail facilities.
<i>To ensure that the existing amenity of residences in the neighbourhood is respected.</i>	The development and proposed modifications have been designed to protect the amenity of the surrounding residences and neighbourhood.
<i>To avoid the isolation of sites resulting from site amalgamation.</i>	The site amalgamates the two remaining undeveloped allotments within the R4 zone and will not result in any form of site isolation.
<i>To ensure that landscaping is maintained and enhanced as a major element in the residential environment.</i>	The development includes significant landscaping across the site and along frontages which will enhance the residential environment and landscape character.

The proposed modification retains the primary and critical elements of the approved development as a residential flat building which is permitted with consent in, and achieves the objectives of, the R4 High Density Residential Zone. The modifications sought under this application respond to the context of the site, to achieve a higher level of residential amenity for both residents of the site and surrounding properties.

The proposed does not seek significant modifications to the approved built form and scale of the building and will have no material impact on the character of the locality or give rise to any environmental or amenity impacts.

The proposal is considered to satisfy the objectives of the R4 zone which encourages additional housing and compatibility with the high density scale of the surrounding environment.

Further, the proposal continues to be sensitive to the R2 zone interface along its southern boundary. Due to this interface, the surrounding locality comprises a mix of residential developments varying from low to high densities. Development along the Pacific Highway and Longueville Road comprise emerging higher density developments, while land to the west and south of the site is reflective of lower density residential land.

Due to the designated land zoning and transitional character of the surrounding locality, the proposed development is reflective of the existing and desired character of the area. Nevertheless, the proposal has been designed to respect and respond to the privacy and amenity of adjacent low-density properties.

The proposal will ensure adequate solar access is achieved to both the apartments and adjoining properties, minimising overshadowing on the public domain. In terms of the visual impact, the proposal is considered as reasonable as the height exceedance will not cause undue view loss over that of the approved scheme, nor will it interrupt or alter important views.

Overall, the proposed modifications are considered to be substantially the same as the development previously approved under DA35/2024 and will remain sympathetic to surrounding context, resulting in no adverse impacts to the existing streetscape.

3.11 Other Concerns

3.11.1 Communal BBQ Area

Five (5) objections raised concerns about the relocation of the communal barbeque area due to potential increase in noise disturbances.

No changes are proposed to the functionality of the communal 'Zen Garden' space, however the location of the approved barbeque area has been shifted further north (away from the R2 zone interface). The relocation of the barbeque area will improve any perceived visual and acoustic privacy concerns which will ultimately be a positive outcome for downstream neighbours.

3.11.2 Expansion of Unit 205

One (1) objection was raised regarding the proposed expansion of Unit 205. Specifically, the objection cited that expansion of Unit 205 resulted in the proposed relocation of the air conditioning units and that the building should be setback 12m from the site boundary to comply with Part C of the LCDCP and the ADG *Part 2 – Developing the Controls*.

Provision 3.5.1 Front/Street of Part C of the LCDCP 2010 requires:

- a) The front setback of the building shall be consistent with the prevailing setback along the street (refer Diagram No.1). However, Special Residential Areas subject to Block Plans should comply with the setback stated therein. Where there is no predominant setback within the street, and no Block Plan for the locality, the setback should be a minimum of 7.5m.*
- b) The front setback area shall comprise terraces and gardens to the ground floor dwellings, deep soil zones, driveways and pathways.*
- c) For corner allotments, the secondary setback requirement is the same as the side setback requirement for the proposed development.*

Provision 3.5.2 Side and Rear of Part C of the LCDCP 2010 requires:

- a) To the boundary within the R4 zone, the minimum side and rear setback shall be: 6m up to 4 storeys, 9m for 5-8 storeys, 12m for 9 storeys and above.*
- b) To the boundary shared with R2 and R3 zones the minimum set back will be 9m if habitable rooms/balconies orient this side.*

As previously noted in Section 3.3 of this Report, although the use of the space results in a technical non-compliance against the ADG, the built form setbacks remain unaltered, and the proposal remains compliant with Part C of the LCDCP 2010. This is demonstrated by Figure 9, Figure 10, Figure 11, and Figure 12 below.

The relocation of the air conditioning units is not related to the expansion of Unit 205.

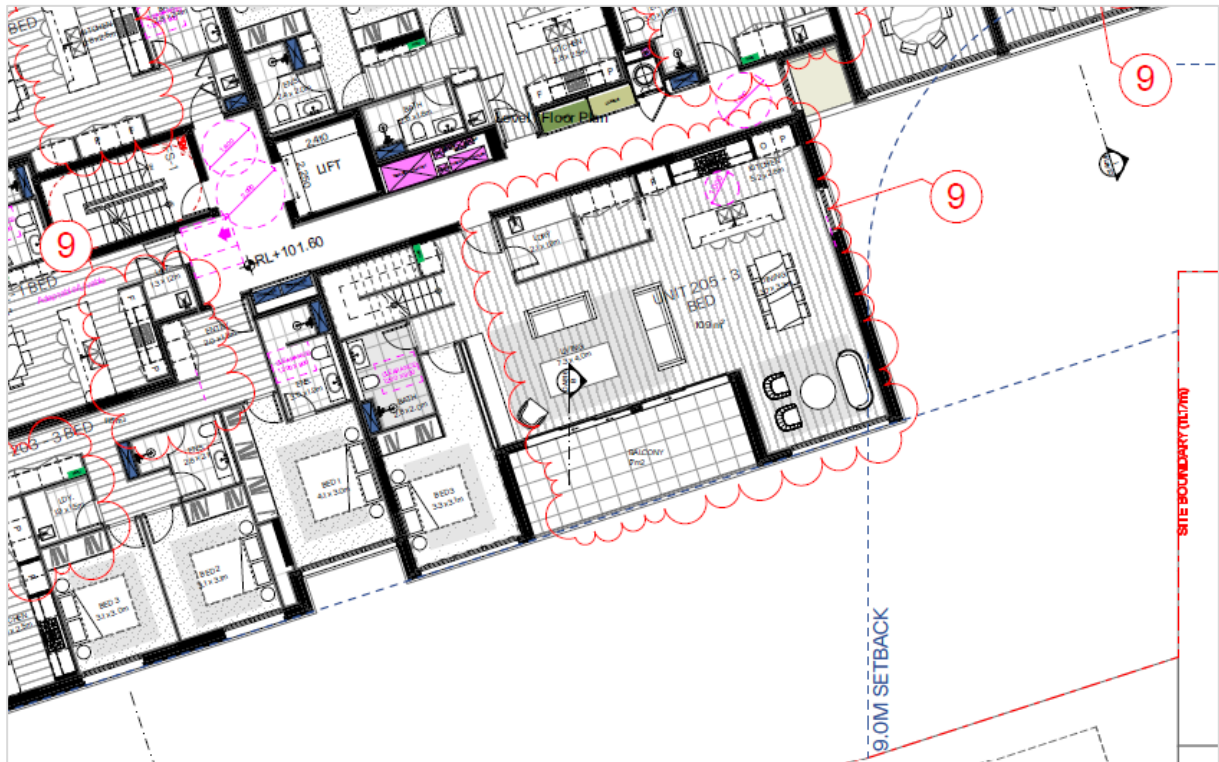


Figure 9. s4.55(2) Modified Plan - Level 2 Floor Plan (Unit 205)
Source: PBD Architects

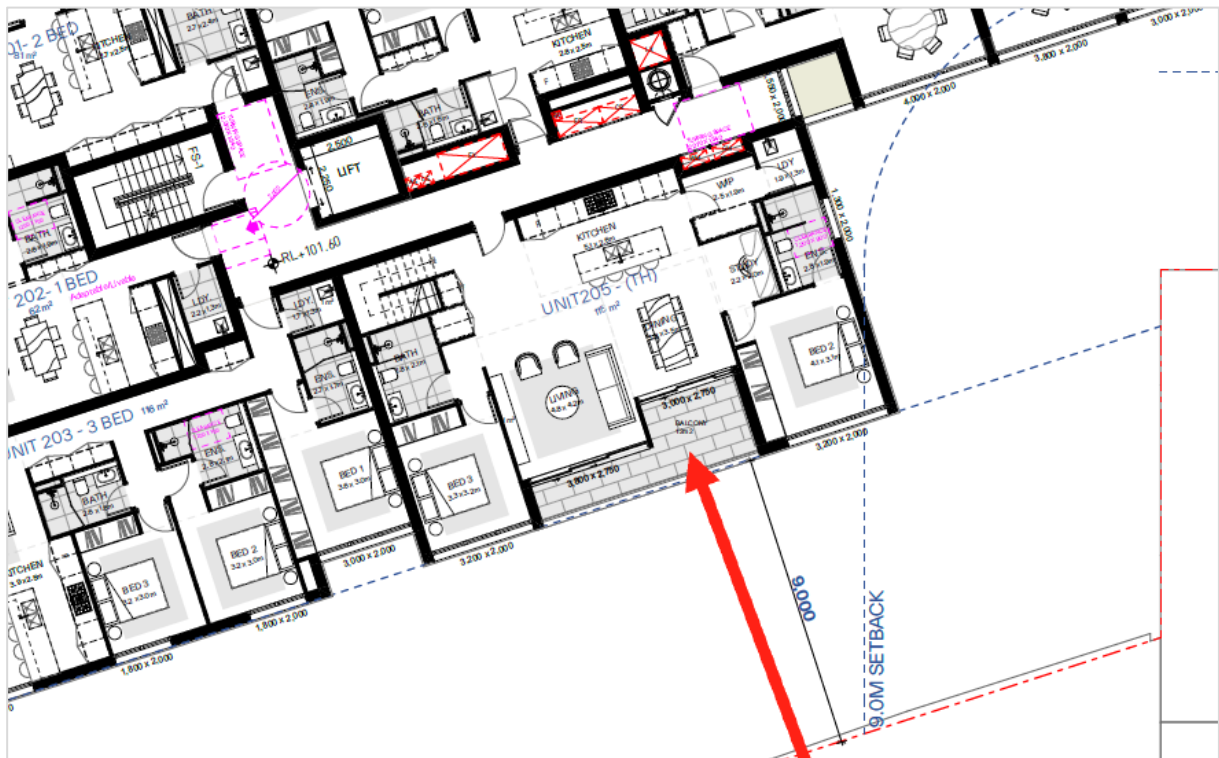


Figure 10. DA35/2024 Approved Plan - Level 2 Floor Plan (Units 205)
Source: PBD Architects



Figure 11. s4.55(2) Modified Plan - Level 3 Floor Plan (Units 205 and 302)
Source: PBD Architects

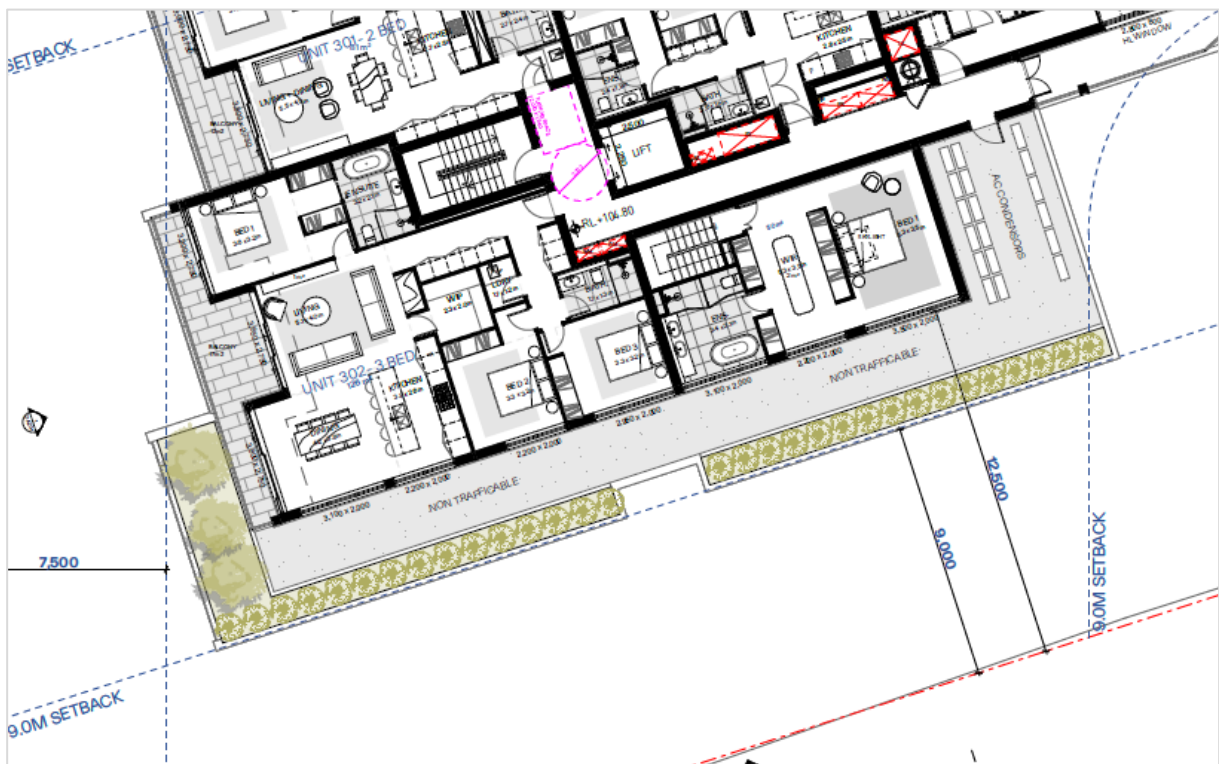


Figure 12. DA35/2024 Approved Plan - Level 3 Floor Plan (Units 205 and 302)
Source: PBD Architects

3.11.3 Commercial Greed

Two (2) objections received raised concerns that the proposed design modifications are being driven by commercial greed and maximising profit margins. Whilst consideration has been given to commercial viability, the overall project has been designed to ensure the long-term viability, quality, and liveability of the development.

This development has been designed to deliver a high level of amenity for future residents, seeking to maximise outlook, solar access, views, and flexibility. Its design is sympathetic to the surrounding locality and seeks to protect amenity, solar access, and privacy of neighbouring properties. Ultimately, this development will offer a mix of housing typologies to appeal to a wide range of household groups, contributing positively to local housing needs, availability, and affordability.

3.11.4 Lack of Engagement

Notification has occurred in line with Council's Community Participation Plan for the original DA and this subsequent modification.

There was one (1) objection received that raised concerns regarding the lack of engagement with Lane Cove Council for the original application. Extensive pre-lodgement engagement was undertaken by an Engagement Specialist prior to the lodgement of the original application in order to design a highly compliant scheme that reflected the sensitive location and context of the site.

3.11.5 Errors in Modification Application Report

One (1) objector raised concerns that there were errors in the prepared s4.55(2) Modification Report prepared. Specifically, the objection incorrectly claims that:

- An apartment is missing from the Lower Ground Floor of the Architectural Plans; and
- The Modification application Report incorrectly states 43 apartments are to be built.

The Notice of Determination issued on 9 October 2024 for DA35/2024 approves the construction of a *residential flat building with 43 apartments*. The modification application Report and modified plans are correct.

3.11.6 Errors in Architectural Plans

One (1) objector raised concerns that there were errors in the prepared Architectural Plans supporting the modification application. Specifically, the objection incorrectly claims that:

- Approved plan DA105 shows Units UG01, 101, 201, 301 and 401 with different northern walls to the approved plans;
- The proposed modifications do not indicate the distances to the site boundary; and
- Apartment 401 is depicted differently in the modified plans compared to the approved plans.

As demonstrated in Figure 13 and Figure 14, these errors were misidentified and in fact there have been no changes to the approved northern walls for Unit UG01, 101, 201, 301 and 401, or reduction in the approved 4.675m distance to the northern boundary.

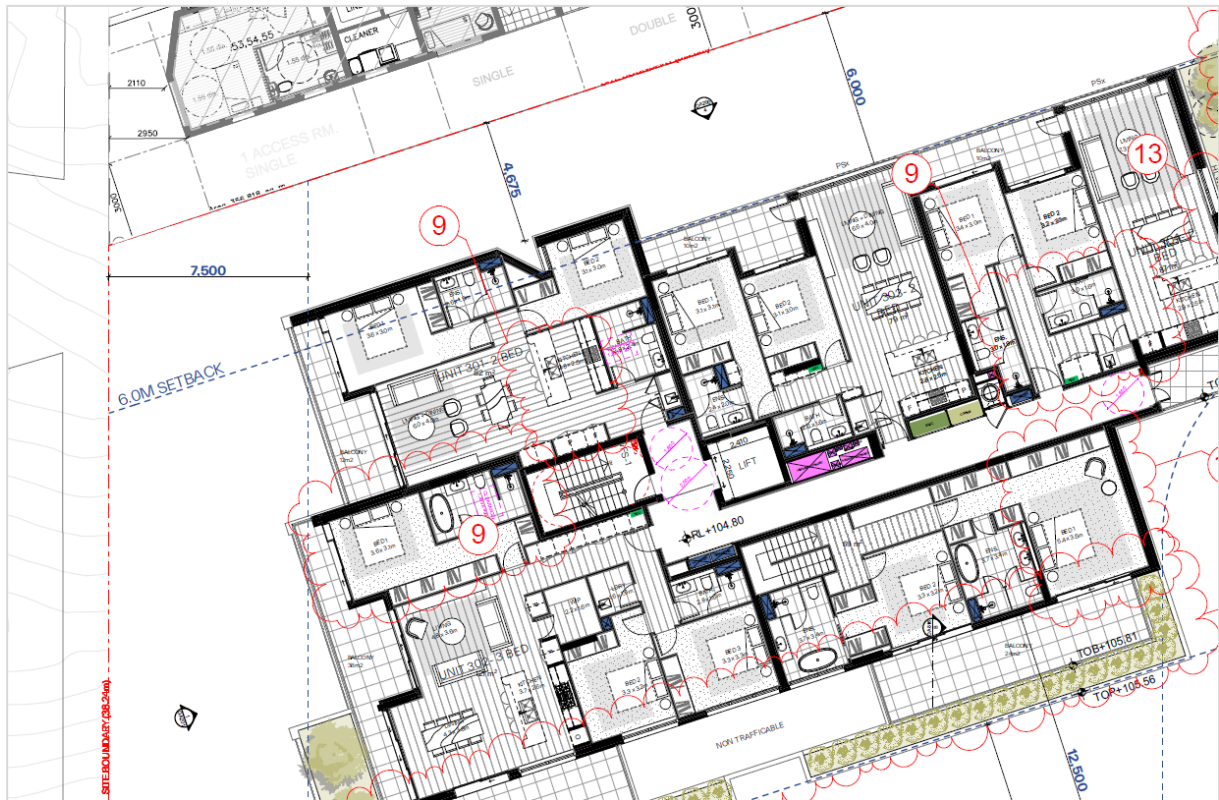


Figure 13. Modified Plan DA106
Source: PBD Architects

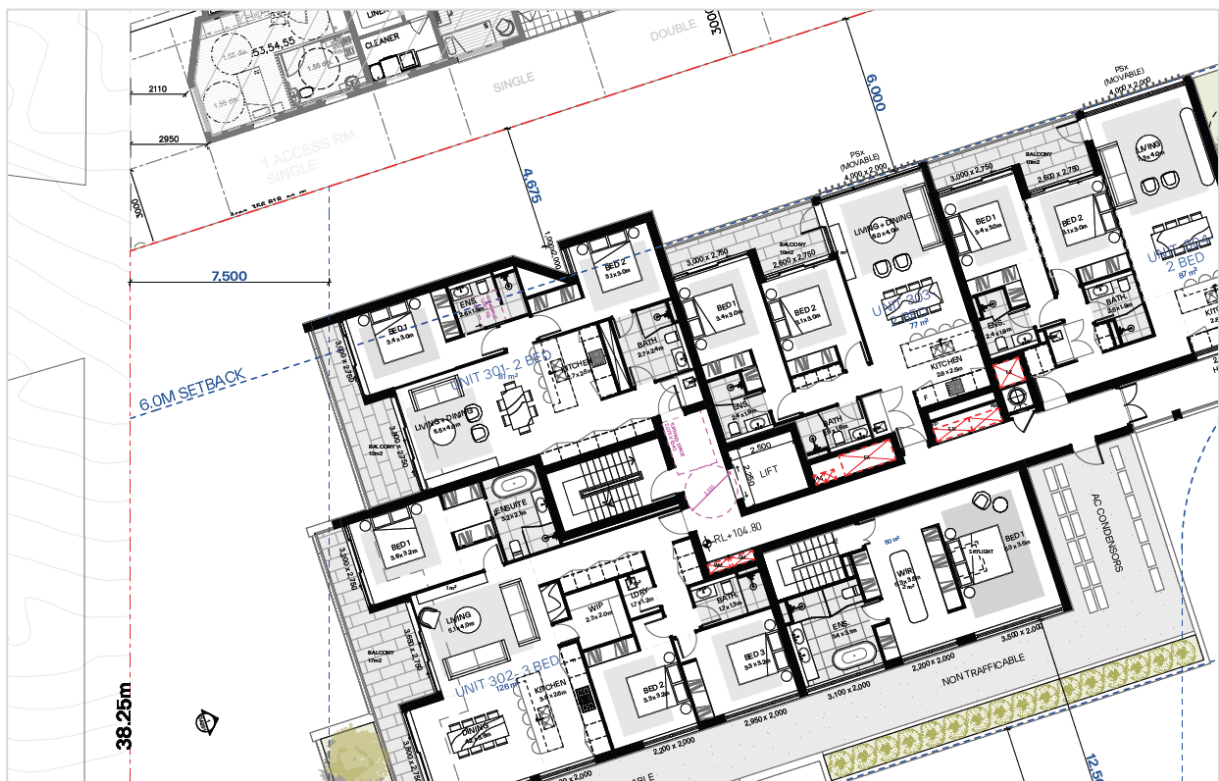


Figure 14. Approved Plan DA106
Source: Approved Plans DA35/2024

3.11.7 Solar Panels

One (1) objector raised concerns around the proposed reduction in solar panels. The *Lane Cove Development Control Plan 2010* (LCDCP 2010) requires solar panels to occupy no less than 60% of the roof area not occupied by cooling towers or communal open space or sized no less than 45 w/sqm of the total site area in one year. The proposed reduction in solar panels from 175 to 130 will still result in approximately 90% of the applicable roof area as PV panels. Sustainability remains at the core of the design response.

3.11.8 Balustrades

One (1) objector raised concerns regarding the proposed modification of the balustrades along the south facing balconies.

Condition 2F of the consent requires the balustrades of the south facing balconies of Units UG.05, 105 and 205 to be constructed with solid obscure finishes up to 1.2m above FFL. As demonstrated in Figure 15 below, the proposed treatment would not alter or enhance the privacy of residents at 2A Gatacre Avenue. Further to this, the removal of this condition would not result in additional noise pollution or amenity loss. The development would still comply with Part 3F of the Apartment Design Guide relating to visual privacy which requires a balance between a need for views and privacy.

As such, the provision of solid obscure finishes at these south facing balconies would not improve privacy or amenity for neighbouring properties and this treatment would undermine the design intent of the development.

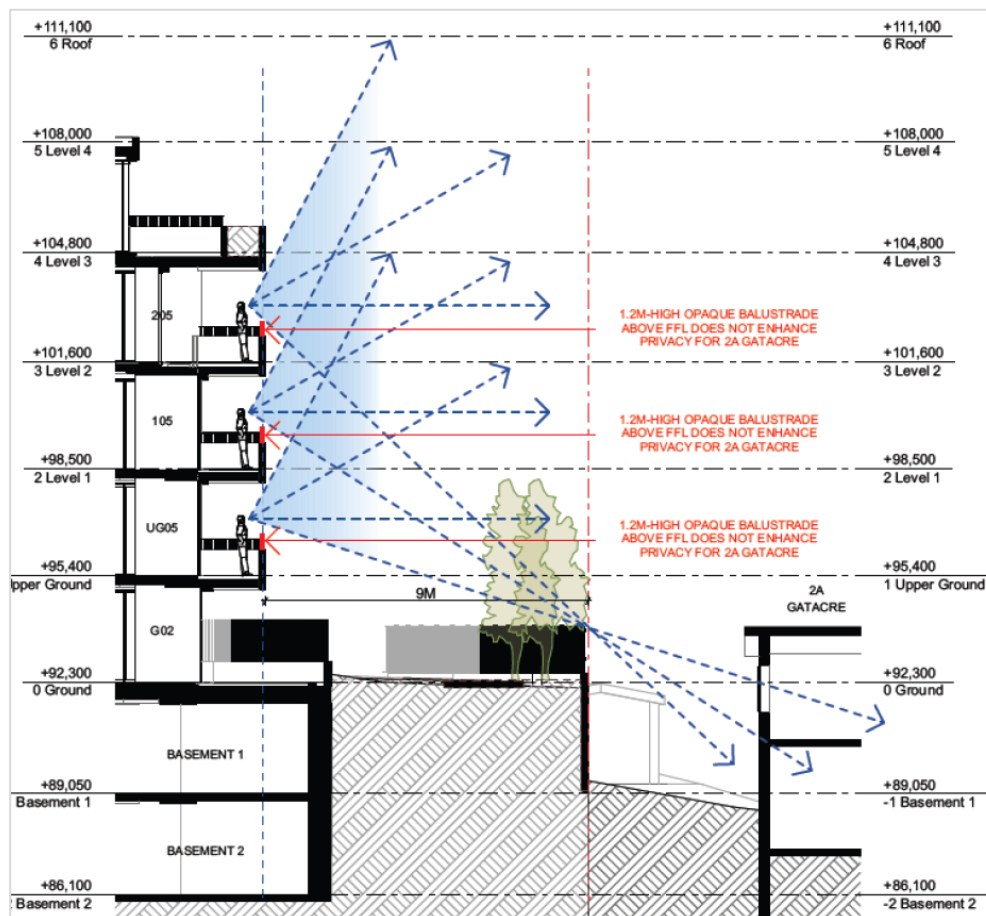


Figure 15. Sightline Diagram for Southern Balconies
Source: PBD Architects

3.11.9 Southern Boundary Treatment

One (1) objection was raised regarding a perceived failure to address conditions set out in the development consent for DA 35/2024 relating to the southern boundary treatment. Specifically, these included:

- **Condition 2G** – *Additional southern boundary sections with 7 Allison Avenue (at multiple intervals at the front yard, dwelling house, and rear yard) and 2A Gatacre (multiple intervals of the boundary retaining wall) are to be submitted demonstrating that the proposed boundary fence and retaining walls and associated footings in proximity to boundary will not adversely impact the dry-stone-wall and neighbouring trees;*
- **Condition 5** – *There is to be no additional load on the boundary retaining wall/easement shared between 1 and 2 Gatacre Avenue and the stone wall between 5 Alison and 7 Allison Avenue. Structural Engineers details are to be provided to the private certifier prior to the issue of the Construction Certificate confirming that there would be no load during excavation/demolition/construction to the boundary wall. Any damage to the boundary wall is to be repaired by the Applicant and all costs are to be borne by the Applicant; and*
- **Condition B.56** – *Before commencement of any works, a temporary safety barrier/fence must be erected and appropriately setback from the existing rock-wall adjoining 7 Allison Avenue, to restrict access to this area for the duration of demolition/construction stages.*

Conditions 2G, 5, and B.56 are required to be satisfied **prior to the issue of the relevant Construction Certificate**. The proponent will comply with all conditions set out as part of the development consent as required.

4 Substantially the Same Development

Section 4.55(2)(a) of the EP&A Act states that a consent authority may modify a development consent if *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).*

The proposed modifications being sought to development consent DA35/2024 warrant consideration of the provisions of section 4.55(2) of the EP&A Act. This is assessed in Table 3.

Table 3. Section 4.55(2) Assessment	
Clause	Proponent Response
<i>(2) Other modifications A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—</i>	
<i>(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</i>	As demonstrated throughout this Report, the proposed modifications will result in substantially the same development as what was approved under DA35/2024. The proposed modifications do not result in any significant alterations to the approved built form, nor will they result in unacceptable environmental impacts. Rather, these changes will improve the overall design outcome and improve privacy, amenity, acoustic, and visual outcomes for future residents and neighbouring properties.
<i>(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</i>	The proposal is not integrated development requiring concurrence, regardless it is expected that Council will reconsult with the relevant Minister, public authority or approval bodies where required.
<i>(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</i>	This Report has been prepared in response to Council's RFI which requested the preparation of a response to the submissions received during the public notification of this application.
<i>(5) (Repealed)</i>	Noted.

4.1 Realize

Out of an abundance of caution, this Report reconfirms that the proposal is substantially the same, in line with the modification report, as stepped through below.

In order to satisfy the requirements for the proposed development to be approved through a s4.55(2) application, it must satisfy the test of being substantially the same development.

As per the recent decision of the Chief Judge of the Land and Environment Court (LEC) in the case of *Canterbury-Bankstown Council v Realize Architecture Pty Ltd* [2024] NSWLEC 31 (Realize). The Chief Judge in his decision advocated for a 'balanced' approach based on 'instinct' or the 'look and feel' of the modified proposal when determining the test of substantially the same.

This involves the judgement passed down from the Commissioner, with whom the Chief Judge later agreed with. In reference to the Realize case, the Commissioner stated the following in her judgement:

"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."

Preston CJ confirmed that (at [7]) in determining whether the development as modified is substantially the same development as the development originally approved, three tasks need to be undertaken:

*"(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). 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:"*

An assessment of the 3-step formula acknowledged by the Chief Judge in Realize has been set out below in relation to the proposal.

THE FIRST STEP: FINDING THE PRIMARY FACTS

The overall intent of the modification proposed is to optimise the approved development in response to market demand, and to improve internal and external amenity for future residents. The development as modified will result in substantially the same development as the development for which consent was granted under DA35/2024 with no measurable environmental impacts beyond those identified in this report resulting from the modifications proposed. In summary, the proposed modifications generally comprise of the following:

1. Modification to basement;
2. Modification to internal layouts;
3. Modification to building height; and
4. Modification to landscaping.

THE SECOND STEP: INTERPRETING THE LAW

The 'traditional' approaches to undertaking the relevant comparisons to interpret the 'substantially the same' test has been undertaken below to assist in informing the second step of the process outlined by Preston CJ.

Comparing the “quantitative” and “qualitative” differences

Quantitative Assessment

Whilst it is acknowledged that the proposal does include some quantitative changes to the approved development, these are not considered to be substantial or comprise a critical element of the development. Further, from a qualitative perspective the development retains its identity as a residential flat building.

As discussed in Section 3 of this Report, the application initially proposed a revised maximum building height of 16.29m measured to the top of the service plant fence, representing a 9% exceedance. Whilst relocation to the rooftop of Building A is the most functional design outcome, further refinement has allowed the height of the rooftop plant area to be lowered from 1.8m to 1.2m which reduces the height exceedance by 600mm. As such, the revised maximum building height is **15.69m**, representing a **4.6%** variation to the standard. This 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.

This proposed non-compliance will not give rise to overshadowing impacts and will not be visible from the public domain, ensuring there is no visible change to the building bulk and scale.

Qualitative Assessment

The modification will not change the inherent nature of the development as the use of the site will remain solely for the purposes of a residential flat building, consistent with the approved development.

A qualitative assessment of the proposed modifications indicates that no additional amenity impacts over the already approved is likely in terms of solar access, traffic, parking and noise. This is evidenced by the supporting Architectural Plans (refer to **Appendix 2**). The parking provision and acoustic treatments under the originally approved design will continue to satisfactorily accommodate the modified development.

As such, it can be concluded that the proposed modified development is substantially the same as the approved development.

Comparing the “material and essential features” or “critical elements”

The phrase “material and essential features” or a “material and essential physical element” of the development, which has been adopted in several decisions derives from judicial interpretations of the statutory test that the modified development be “substantially the same” development as the originally approved development.

In terms of material and essential features or critical elements, the inherent nature of the development as a residential flat building, will not change because of the modification proposed, with key features of the original proposal retained.

The public benefits of the scheme, including the provision of a revitalised site for the purpose of providing 43 additional dwellings in the Lane Cove locality, will continue to be delivered by the modification.

Comparing the “consequences such as the environmental impacts”

The consequences and environmental impacts (and assessment response) are detailed in Section 3 above.

THE THIRD STEP: CATEGORISING THE FACTS

This final step is an “evaluative one” that “involves assigning relative significance or weight to the different facts and a balancing of the facts, as weighted.” In this sense, the final step involves a subjective element of opinion.

Noting the above, it is considered that having regard to the factual differences and the comparative assessment undertaken, the proposed modification is readily capable of being considered 'substantially the same' development as the development approved by the original consent for the following primary reasons:

- The modification remains a residential flat building which retains the approved primary land uses, and proposes no substantial change to this fundamental element of the approval;
- The modification will not result in an intensification of the approved building bulk, scale, design or use;
- There are no detrimental quantitative changes to the approved building bulk and scale that will impact the amenity of the proposed development (as modified);
- The internal reconfigurations to the building are not considered to inherently alter the primary operations of the building or affect the amenity of its residents; and
- The proposal would not adversely impact on neighbouring amenity of that of the public domain.

Through assessing the development in respect to the outcome of the Realize case, it is determined that the proposed development subject to this modification application would be substantially the same as the original development as detailed above.

5 Conclusion

This Report has been prepared in response to Council's RFI issued on 2 July 2025. This Report provides the additional information that has been requested by Council.

The s4.55(2) modification application to DA35/2024 seeks approval for modifications to the approved construction of a residential flat building at the site known as 1 Gatacre Avenue and 1-5 Allison Avenue, Lane Cove. The proposed development warrants support for the following reasons:

- The proposal as amended will offer a high standard of amenity and outlook for future residents;
- The modifications sought will have no material impact on the character of the locality or give rise to any adverse environmental or amenity impacts;
- The proposed relocation of the air conditioning units to the rooftop will improve amenity for future residents and downstream neighbours by reducing noise emissions associated with their operation;
- The proposed height exceedance will not result in adverse amenity, privacy, overshadowing, or noise impacts;
- Despite a contravention of the height control, the proposal remains largely consistent with the applicable State and local planning controls and represents an improved built form outcome and will not result in any adverse environmental or amenity impacts; and
- The refined proposal represents an improved built form outcome on the site that achieves a higher level of residential amenity for future residents of the development and the surrounding neighbourhood.

Having considered all community submissions, we are of the opinion that these concerns have been adequately addressed, and the proposed development remains suitable for the site and the public interest. We therefore request that Council proceed with its assessment of the application based on the information submitted and provide a recommendation of approval to the Planning Panel.



P A T C H

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