

COUNCIL ASSESSMENT REPORT – MODIFICATION APPLICATION

SOUTHERN REGIONAL PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSSTH-402 – DAM0043/2024
PROPOSAL	Modification to DA0350/2022 (Two residential flat buildings and one mixed use building comprising 155 apartments and 360sqm of retail space) – Modification to increase the number of apartments from 155 to 178, relocation of Building B basement driveway, reconfiguration of building B basement, increase of communal space, modification to facade
ADDRESS	6 Civic Avenue, SHELL COVE NSW 2529 Lot 4006 DP 1219051 Lot 4204 DP 1254978 Lot 4205 DP 1254978
APPLICANT	Australand Corporation (NSW) Pty Ltd
OWNER	Shellharbour City Council
MOD LODGEMENT DATE	30 th April 2024
ORIGINAL DA DETERMINATION DATE	Approved 22 nd June 2023
APPLICATION TYPE	Modification Application under Section 4.55(2)
REGIONALLY SIGNIFICANT CRITERIA	Clauses 2 and 3 Schedule 6 of <i>State Environmental Planning Policy (Planning Systems) 2021</i> : General development over \$30 million, and Council related development over \$5 million
EDC	\$ 93,303,886 (excluding GST)
CLAUSE 4.6 REQUESTS	No 4.6 variation requests
KEY SEPP/LEP	Shell Cove Boat Harbour Concept Approval MP07_0027 Mod 1, Housing SEPP Shellharbour Local Environmental Plan 2013 SEPP (Resilience and Hazards) 2021 SEPP (Transport and Infrastructure) 2021

TOTAL & SUBMISSIONS ISSUES SUBMISSIONS	UNIQUE KEY IN	No submissions received.
DOCUMENTS SUBMITTED FOR CONSIDERATION		<p>Suite of Architectural Plans + Landscape Plans + Civil Drawings</p> <p>Modification Statement</p> <p>Updated Reports and Addendums:</p> <ul style="list-style-type: none"> • Urban Design Report • ADG Compliance Matrix • Waste Management Plan • Visual Impact Assessment and Addendum • Utilities Statement • Acoustic Assessment • Flood Management • Parking Plan • Shadow Diagrams • Acid Sulphate Soils Management Plan • Access Review • BASIX Certificate • Transport Statement • CPTED Report • Social Impact Assessment • Design Statement • Aquatic Drive Parking and Landscaping Sketch
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (\$7.24)		None required.
RECOMMENDATION		Approved
DRAFT CONDITIONS TO APPLICANT		Yes – no response received at the date of this report.
SCHEDULED MEETING DATE		13 December 2024
PLAN VERSION		11 November 2024 --- Various revisions numbers provided.
PREPARED BY		Jacob Lia
DATE OF REPORT		29 November 2024

EXECUTIVE SUMMARY

The modification application has been lodged pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979* ('EP&A Act') and seeks consent for amendments to a consent granted under DA0350/2022 approved by the SRPP on 22 June 2023. This consent approved the construction of two residential flat buildings and one mixed-use building, comprising a total of 155 apartments and 360sqm of retail space, at 5 and 6 Civic Avenue ('the site'). The modification application includes the relevant information required by Clause 100 of the *Environmental Planning and Assessment Regulation 2021* ('2021 EP&A Regulation').

The application is referred to the Southern Regional Planning Panel ('the Panel') as the development is '*regionally significant development*', pursuant to Section 2.19(1) and Clause 2 and 3 of Schedule 6 State Environmental Planning Policy (Planning Systems) 2021 as it comprises a residential flat building with a capital investment value over \$30 million, and due to Council being a landowner. The proposed modification satisfies the criteria to be considered by the Panel in the Instruction issued pursuant to Clause 275(2) of the EP&A Regulation 2021 (formerly CI 123BA of the Regulation 2000).

The proposed modification relates solely to changes to 'Building B', on 6 Civic Avenue. The changes include an increase in the number of apartments from 155 to 178, relocation of the Building B basement driveway, reconfiguration of the Building B basement, increase of communal open space, and modification to the façade. The proposed modification is considered to satisfy the substantially the same development test required by Section 4.55 of the EP&A Act.

The application was placed on public exhibition from 23rd May 2024 to 19th June 2024, with nil submissions received.

A briefing was held with the Panel on 19 June 2024 where key issues were discussed, including the appropriate assessment pathway, whether the proposal meets the substantially the same test, compliance with the Concept Approval, a parking deficit, design character, and compliance with the Apartment Design Guidelines.

The key assessment matters associated with the proposal included:

1. *Compliance with the Concept Approval* – the proposal results in a breach of the 'maximum indicative dwelling yield' of 250 dwellings for Precinct D in Shell Cove. The proposal is also reliant on exceedances to the maximum height (22m) and storeys (6) for the site. This serves as the primary assessment consideration, and the matter of being '*generally consistent*' with the Concept Approval is considered in detail in section 5 of this report.

The findings of this assessment indicate that the proposed modification is '*generally consistent*' with the Concept Approval. There is clear flexibility afforded in being '*generally consistent*' with the Concept Approval, which is demonstrated through legal precedent in the Land and Environment Court, and the requirement to be 'generally in accordance' with the Concept Approval documentation. The dwelling precinct yield is specifically noted as an 'indicative' figure that is 'flexibly' applied within the Concept Approval documentation and the project remains consistent with the overall dwelling cap. Further, the exceedances are minor in numerical variation, and are consistent with the design outcomes established in the Concept Approval with regard to locating

density in a well-located and well-serviced town centre location, with limited adverse visual impacts. All other development controls applied through the Concept Approval and referenced documentation are otherwise complied with, and notably, the proposed modification is consistent with the Statement of Reasons put forward by the Independent Planning Commission for approval of the Concept Approval Modification, which justified the original increase to dwelling caps, building height and storeys in the Concept Approval area. On the merit of these considerations, Council recommends the position that the proposed modification is generally consistent with the Concept Approval.

2. *Visitor Parking Deficit* – the proposed modification results in a 9-space visitor parking deficit for Building B, however the modification provides 14 additional public parking spaces elsewhere in the development (Building B driveway relocation and Aquatic Drive changes). The proposed modification therefore provides a net gain of 5 parking spaces. This is considered in full detail in section 5 of this report.

In summary, Council recommends supporting the variation on the merits of providing a net improvement for car parking provisions in Precinct D through a utilitarian parking solution, and that the quantum of visitor parking spaces that is provided is considered to sufficiently accommodate visitor parking demands.

3. *Design Character* – The proposal results in modifications along each façade of Building B. Throughout the assessment process, the proposal has been amended to demonstrate improved architectural expression. This matter is considered in detail in section 5 of this report.

In summary, the proposed amendments are considered to demonstrate suitable architectural, landscape and material expression along each façade, demonstrating consistency with each of the relevant controls, including the representation of a 'coastal character'. Whilst the design changes are noticeable from the original approval, their compliance with the ADG and UDG controls is the primary assessment matter. On this assessment matter, the proposal is suitably compliant through clear provision of positive design components, architectural variation, complementary landscaping and materials, coastal design functionality and visual appeal which contribute to a high-quality build with excellent architectural expression.

4. *Compliance with the Apartment Design Guidelines* – the proposed development has been amended through the assessment process to address the non-compliances identified, which are deep soil zone and solar access variations. This matter is considered in detail in section 5 of this report.

In summary, the proposed amendments are considered to retain suitable merit assessments. Specifically, the deep soil zone does not directly increase, and the merits of landscaping, stormwater management, open space provision, parking benefits, and design guidance within the ADGs remain satisfactory. With regard to solar access, the proposed solar access provisions increase in solar access non-compliance, however the merits of providing a COS with excellent solar access, site context (hotel overshadowing and marina views), design merits, and design guidance within the ADGs are considered satisfactory.

Following consideration of the matters for consideration under Section 4.15(1) and 4.55 of the EP&A Act, it is recommended that the proposed modification can be supported.

1. THE SITE AND LOCALITY

1.1 The Site

The approved development covers several sites:

- Lot 4006 DP 1219051, with a site area of 2896 square metres. This site contains Building B, of which modification is sought to several building components as part of this proposal.
- Lot 4204 DP 1254978, with a site area of 615.60 Square metres. This site contains the open-air carpark south of Building B, of which modification is sought to change the Building B basement access from here to the Civic Avenue road access.
- Lot 4205 DP 1254978, with a site area of 5395 Square metres. This site contains the approved Buildings A and C, of which no modifications are sought as part of this proposal.

The subject site is located within the Town Centre (Precinct D) of Shell Cove. The site includes the main entranceway to the Shell Cove Marina Development along Cove Boulevard.

Surrounding the site are existing wetlands and public open space to the north and west separated from the site by Aquatic Drive and Harbour Boulevard.

Notable development in proximity includes the retail and shopping complex (the Waterfront Centre) to the south-east, and the marina interface located to the east. The Shell Cove hotel/mixed use development is sited to the east. A library and community centre has been approved but not yet commenced to the east of the site.

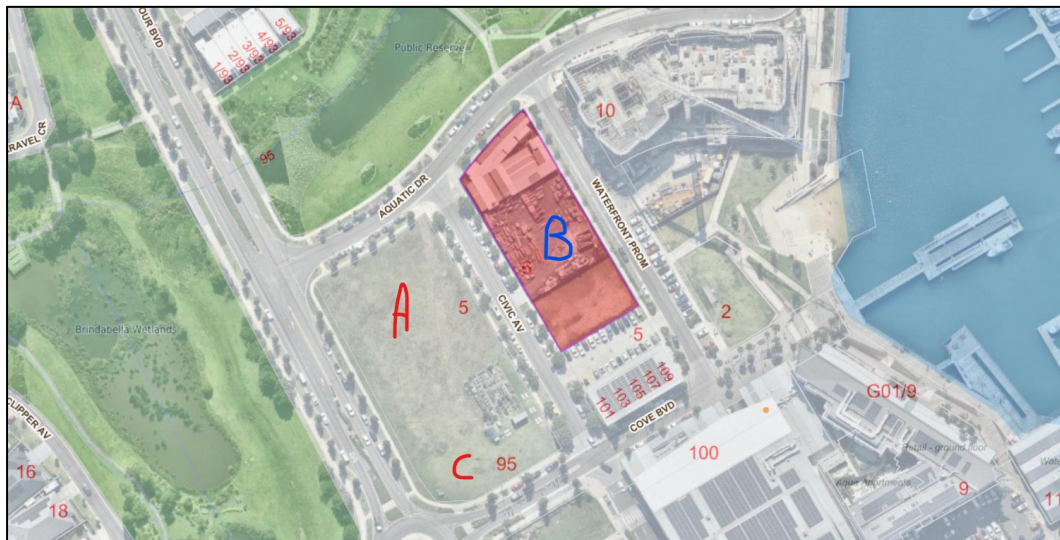


Figure 1: Aerial Imagery – annotations are included to depict the locations of Buildings A, B and C. The open air-car park is seen immediately south of the site area marked B.

The site forms part of a larger master planned area, within the Shell Cove Boat Harbour Concept Approval MP07_0027 Mod 1 (the Concept Approval). The Concept Approval is for a

mixed use development comprising residential, commercial, community, retail, hotel, business park, dry boat storage facility, open space and wetlands.

The Concept Approval comprises the following key elements to guide future development:

- Building height and number of storeys
- Number of dwellings
- Land uses
- Indicative street alignments and pedestrian networks
- Location of open space and wetlands

A subsequent modification to the Concept Approval (formally known as s75W) was submitted and approved by the Independent Planning Commission on 18 March 2019 (MP07_0027 Mod 1), and resulted in some fundamental changes to the key development controls within the Concept Approval. These include:

- An increase in the maximum number of dwellings in the Concept Approval area from 1,238 to 1,566;
- Revised housing density, typologies and building heights in certain areas of the Boat Harbour Precinct, including Precinct D;
- Removing the previous maximum residential gross floor area limit of 150,000sqm; and
- An 'indicative dwelling mix and yield' was introduced for each Precinct, being 200 – 250 dwellings for Precinct D.

Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017

The above Regulations apply to this development application as the Concept Approval was determined under the repealed Part 3A Major Projects provisions.

Under the transitional provisions, environmental planning instruments will apply, but only to the extent that they are consistent with the approved Concept Plan. The provisions of any environmental planning instrument or any development control plan do not have effect to the extent to which they are inconsistent with the terms of the Concept Approval.

The Regulations also require that a Consent Authority must not grant consent under Part 4 of the Act for the development, unless it is satisfied that the development is generally consistent with the Concept Approval (Schedule 2, Clause 3B).

Property Constraints

Council records identify the land as being affected by the following constraints:

- Aboriginal Heritage
- Shell Cove Flood Planning Area – Probable Maximum Flood Event

Restrictions on Title

There are restrictions on title burdening each lot, as described below:

Lot 4204 / DP 1254978 (Building B site)

Easements R and S are applicable, as detailed within DP 1219051.

Lot 4205 / DP 1254978 (Open-air car park site)

Easement for padmount substation 3.05 wide, as detailed within DP 1219051.

Easements R and S are applicable, as detailed within DP 1219051.

- (1) Easement for services 1.0 wide (K)
- (2) Easement for loading bay 3.7 wide (M)
- (3) Easement for overhanging structure 3.16 wide (N)
- (4) Easement for encroaching structure 0.36 and 0.72 wide (P)
- (5) Easement for carparking (whole of lot)

Lot 4006 / DP 1219051 (Building A and C site)

No restrictions applicable.

Excerpts and commentary against each applicable restriction are detailed in Attachment I below. In summary, the proposed development encroached some easements on site, however the development retained compliance with the terms of the easements.

The following easements were affected:

- Easements R and S apply to the open-air carpark immediately south of Building B. Some minor façade treatments are proposed within the easement, however these comply with the terms of fire-rating for these easements. The proposal has received a satisfactory endeavour energy referral response.
- Easement for carparking (whole of lot): the proposal includes relocation of the Basement B driveway, which affects this easement. The proposed modification retains compliance with the terms of this easement, in that the additional parking spaces and access through the site is specifically regarded in s11.1(a)(i), (ii), and (iii) of the easement.

An Excerpt of the Deposited Plan 1254978 which depicts Building B and the open-air car park is included below.

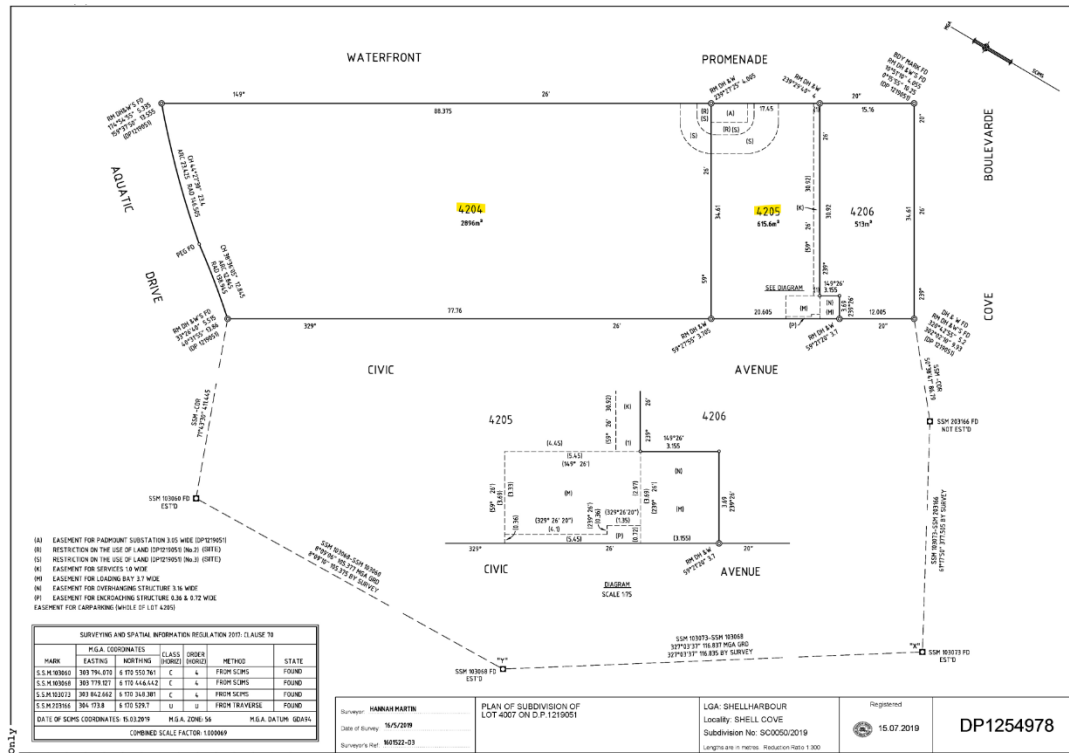


Figure 2: DP 1254978, with Lot 4204 (Building B), and Lot 4205 (open-air carpark).

2. THE PROPOSAL AND BACKGROUND

2.1 The Proposed Modification

The proposed modification is a s4.55(2) modification, consisting of the following changes to Building B located at 6 Civic Avenue:

- Increasing the number of apartments from 155 to 178. This includes a reduction of 1x one-bedroom apartment, 7x three-bedroom apartments, and 3x four-bedroom apartments, and an addition of 34x two-bedroom apartments throughout the floors of Building B. These changes have resulted in reconfiguration of the floor plans throughout Building B.
- Relocation of the Building B basement driveway from a southern entrance via the open-air car park, to a western entrance via direct access from Civic Avenue.
- Reconfiguration of the Building B basement, with the provision of 33 additional car parking spaces, and 18 additional bicycle parking spaces. The reconfiguration includes re-location of utility features, such as the pump room, air supply room, waste storage areas, and resident lobbies.
- Increase communal open space by 304sqm through provision of top-floor communal open space.

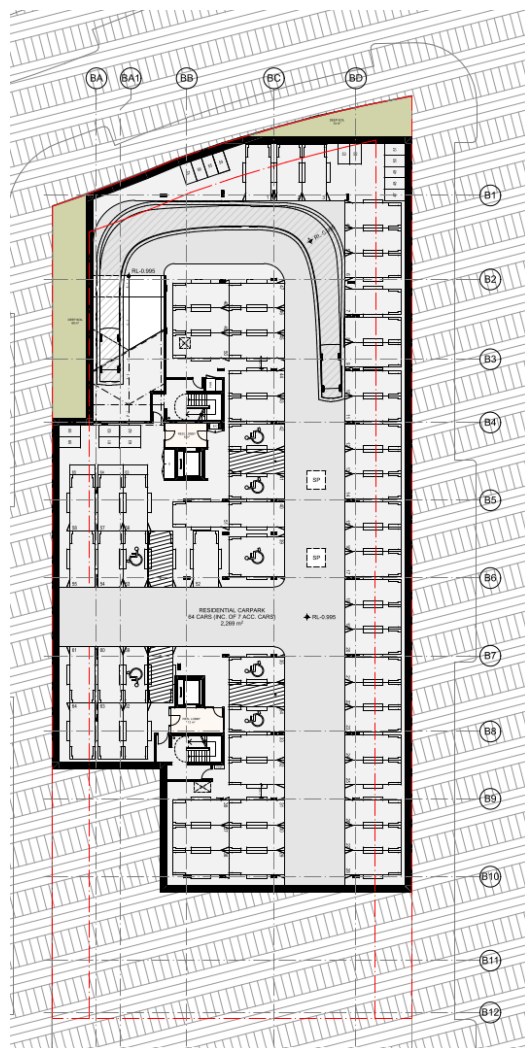
- Amendment to the Building B through-site link on the ground-floor.
- Modification to the Building B facades.
- Modifications were proposed to Aquatic Drive to provide an extra 12 parking spaces.

Key plans are included below, indicating comparisons between the original approval and proposed modifications. A full 'comparison table' is included in **Attachment C**.

Approved Plans

Basement 2 Overall Plan

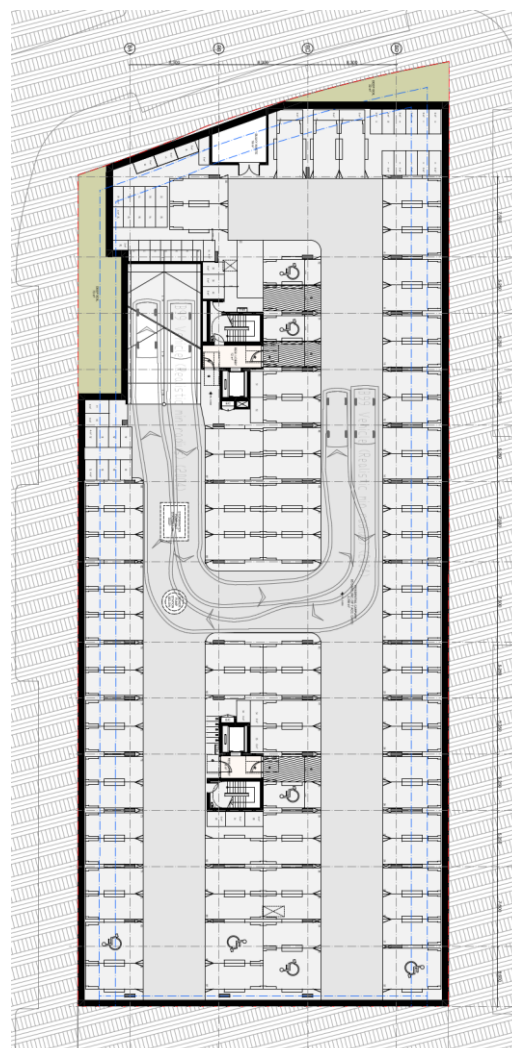
DA0350/2022 – Revision 13



Proposed Modification Plans

Basement 2 Overall Plan

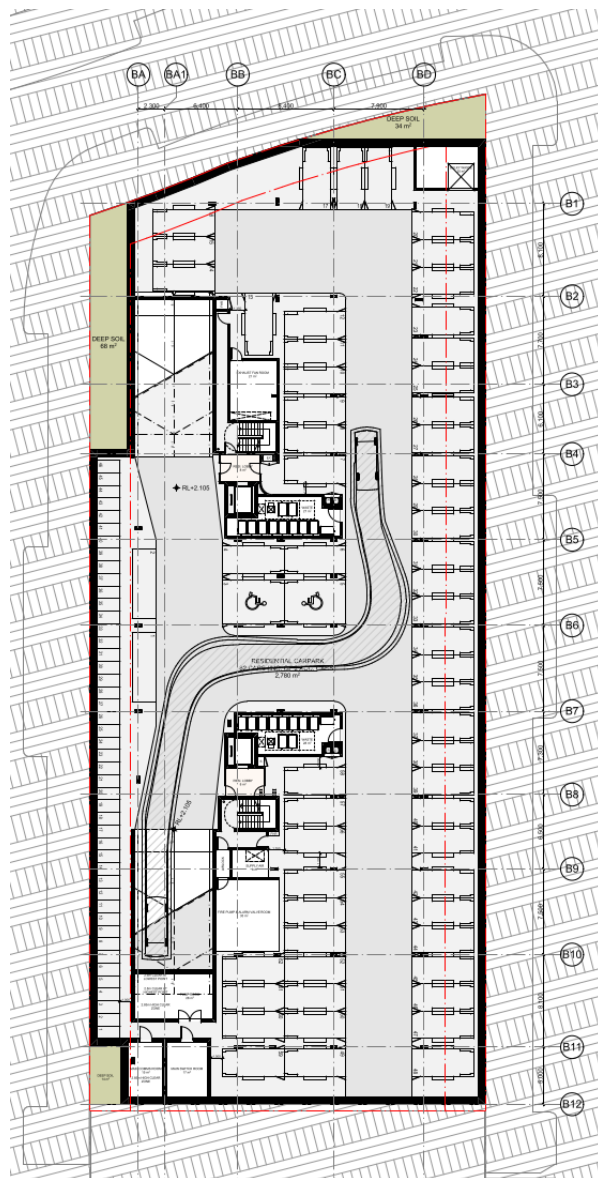
DAM0043/2024 – Revision 20



Comment: The proposed basement 2 overall plan captures the provision of additional basement parking, and a modified basement configuration. Of note, the basement entry is directed towards the centre of the build, and the basement floor area increases toward the south-east of the build.

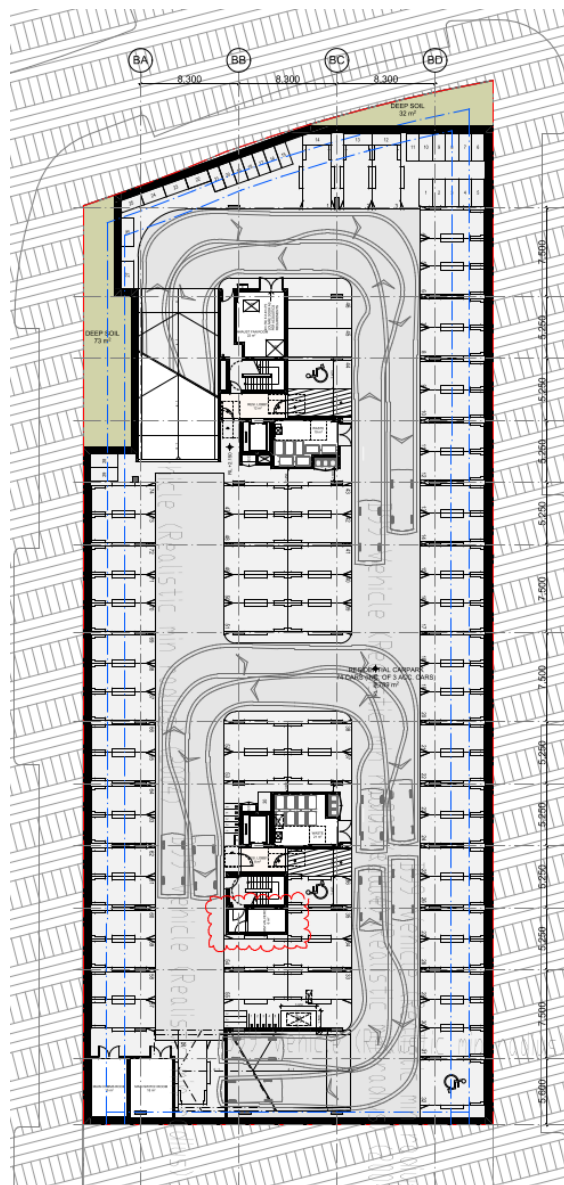
Basement 1 Overall Plan

DA0350/2022 – Revision 13



Basement 1 Overall Plan

DAM0043/2024 – Revision 17

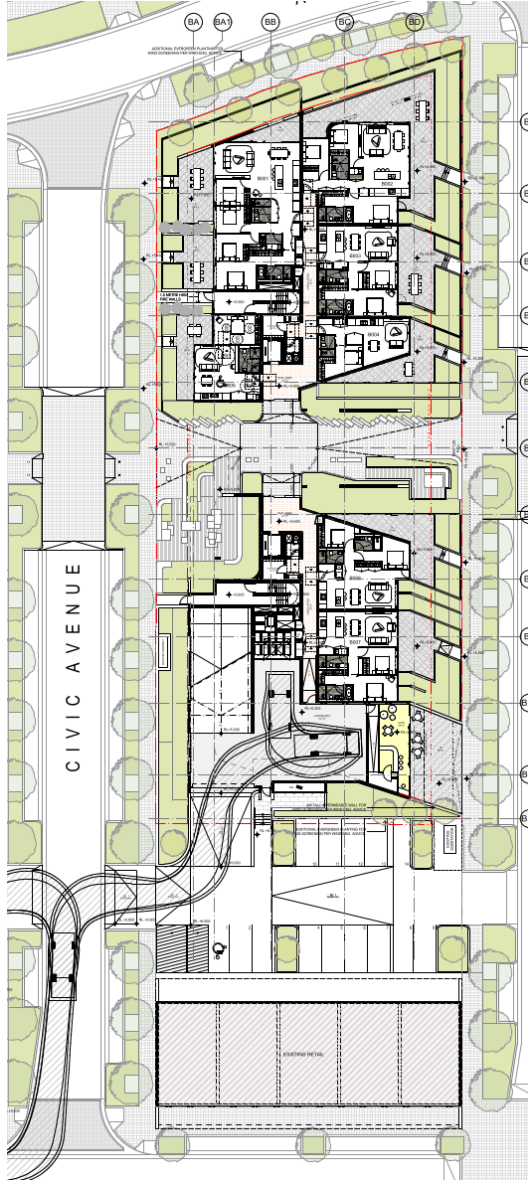


Comment: The Basement 1 Overall Plan captures changes to the basement configuration. Particularly, the entry access direction changes, as does the access to Basement 2. The west

side of Building B features an additional row of parking, and the storage compartments have been relocated primarily toward the north side of the basement 1.

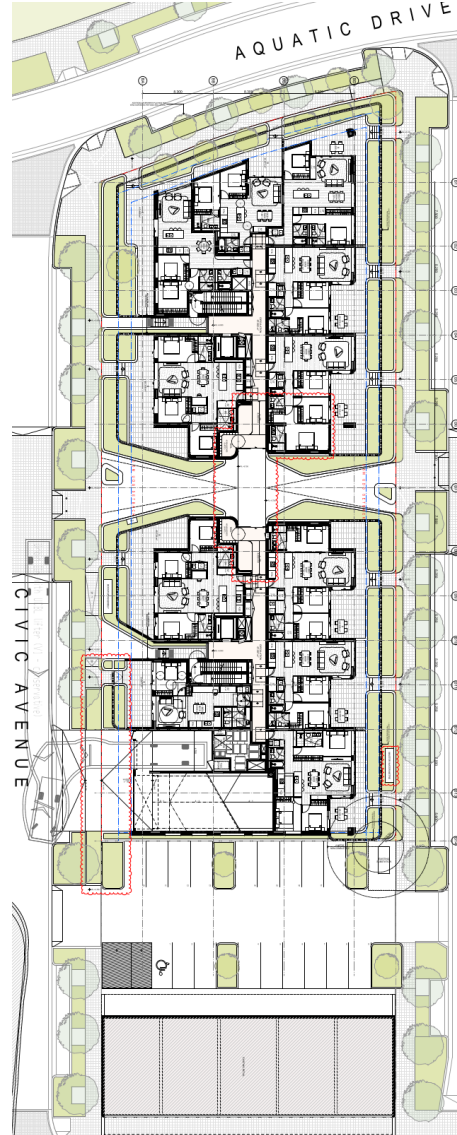
Ground Floor Overall Plan

DA0350/2022 – Revision 13



Ground Floor Overall Plan

DAM0043/2024 – Revision 17



Comment: The modified ground-floor plan captures numerous details:

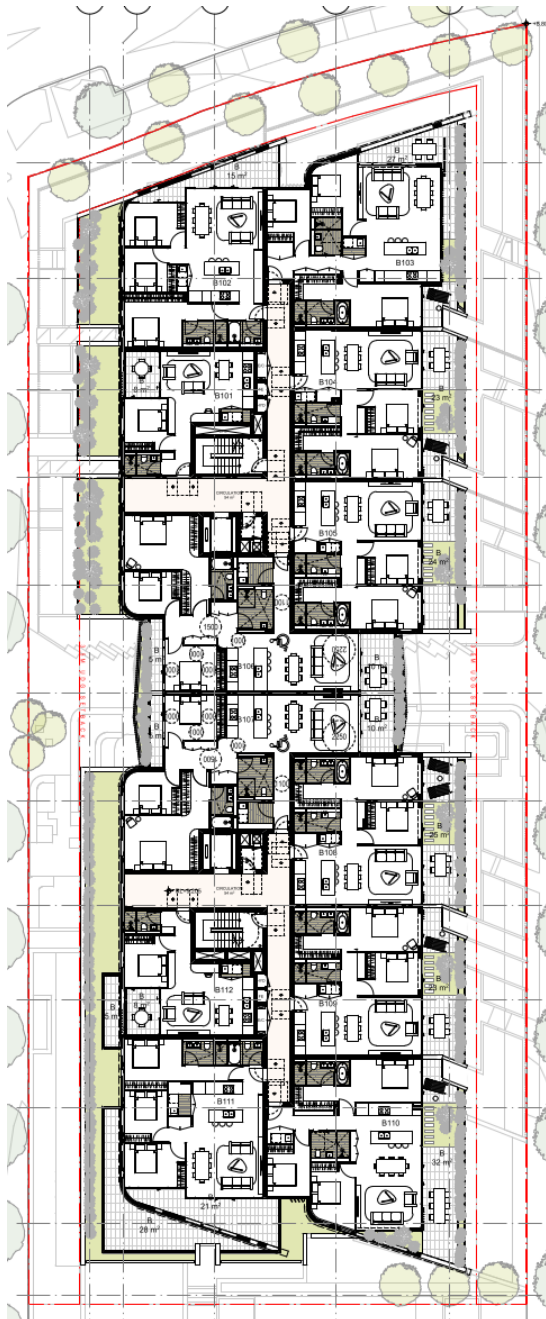
- The change in basement access from the open air carpark to Civic Avenue
- Change in design of the through-site access, between the north and south components of Building B.
- Change in the general floor plan configuration. This includes loss of communal open space in the south component (near the through-site access, and the cafe which was conditioned for use as communal open space. These features have been replaced with private apartment features).

- d. Changes to the architectural design located within the padmount substation easement (bottom right).

The total number of apartments on the ground-floor increases from 7 to 11

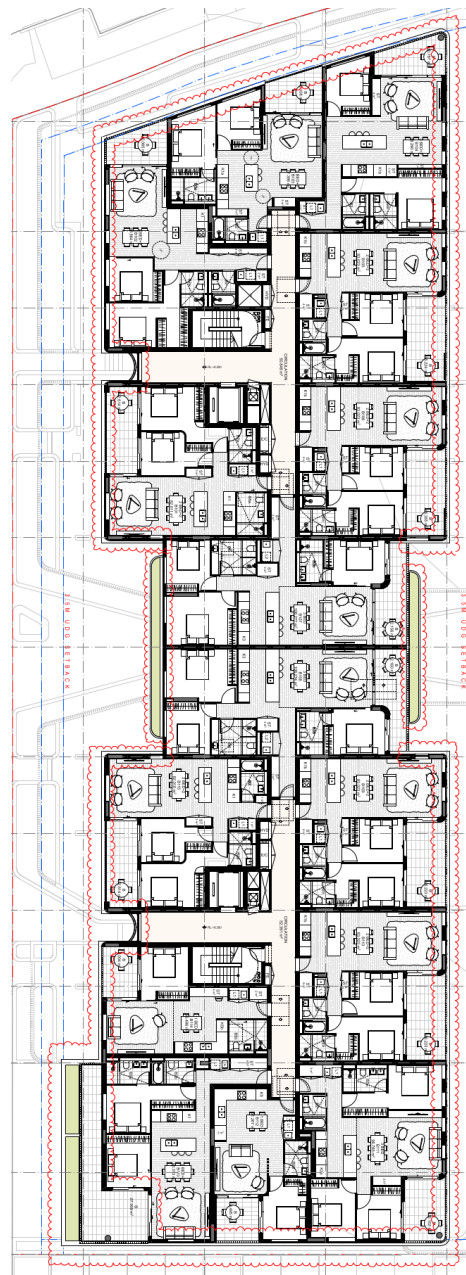
Level 1 Overall Plan

DA0350/2022 – Revision 13



Level 1 Overall Plan

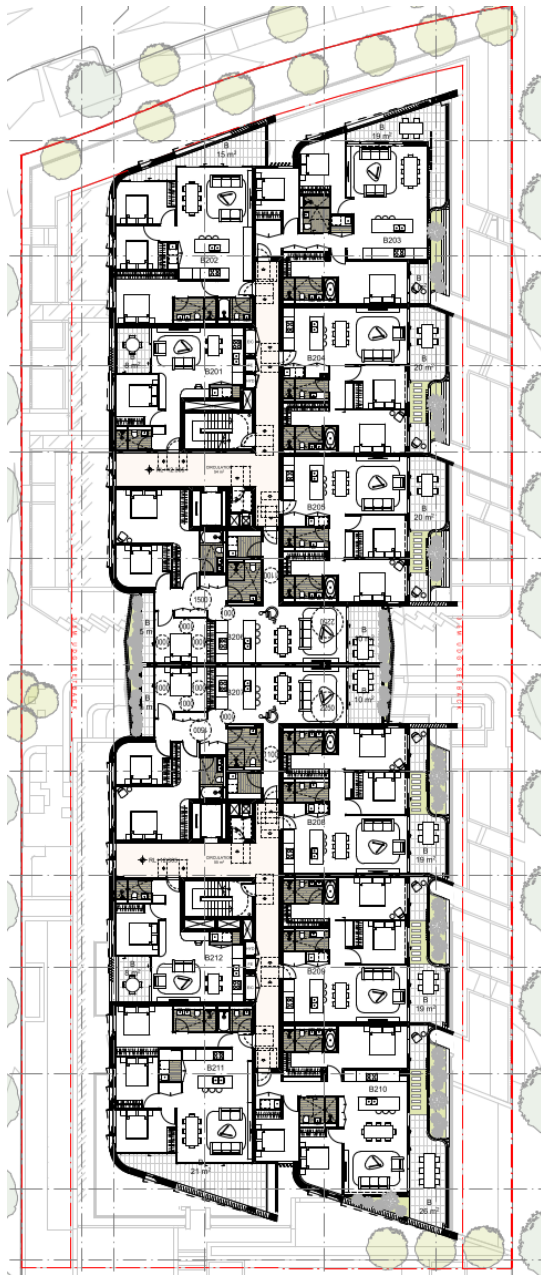
DAM0043/2024 – Revision 17



Comment: The modified Level 1 plan captures changes to the floor configuration, number of apartments, and façade details.

Level 2 Overall Plan

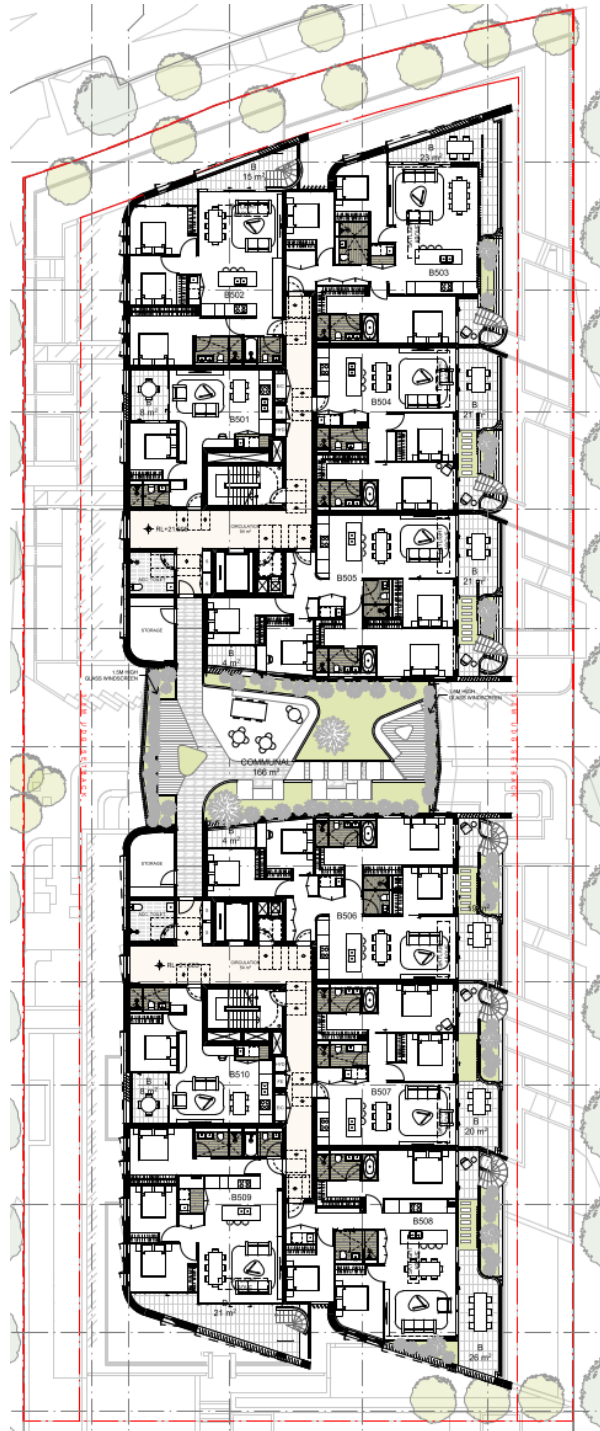
DA0350/2022 – Revision 13



Comment: The modifications to the Level 2 floor plan capture changes to the floor configuration from Levels 2 – 4 (typical floor plate), including an increase in apartment numbers, and changes to the façade details.

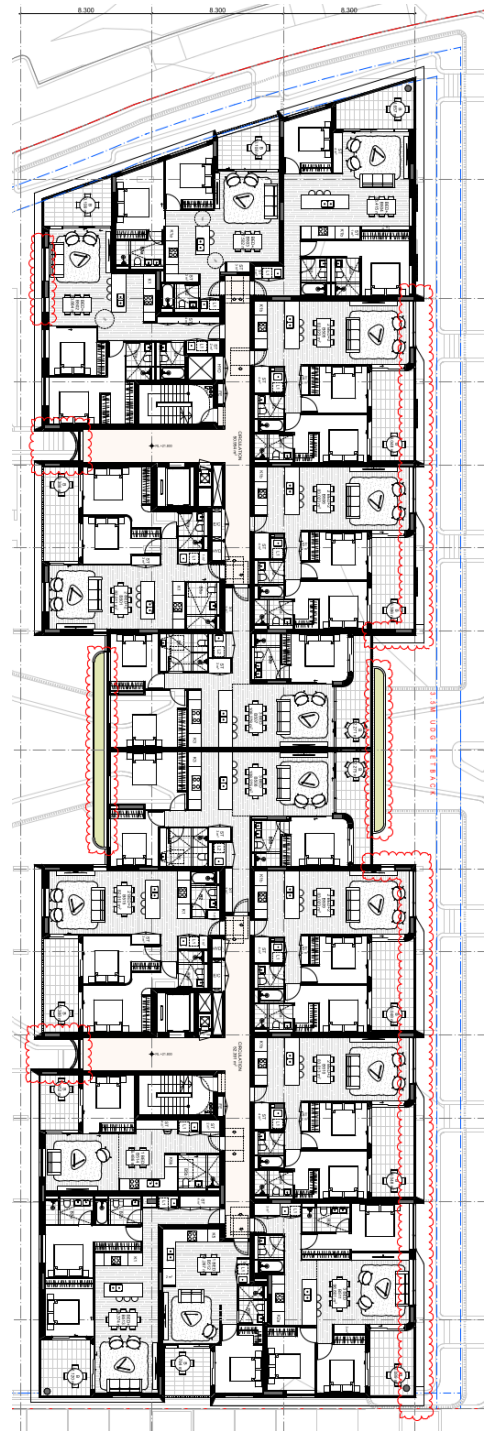
Level 5 Overall Plan

DA0350/2022 – Revision 13



Level 5 Overall Plan

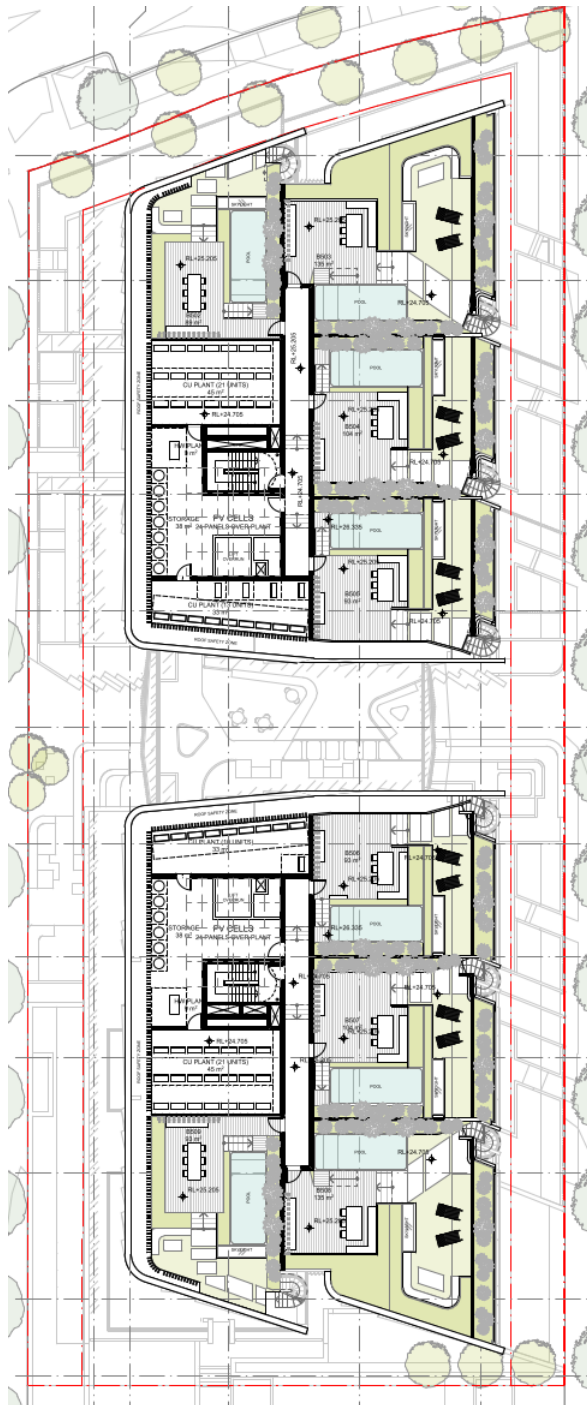
DA0043/2024 – Revision 17



Comment: The modifications to the Level 5 floor plan captures changes to the floor configuration, increase of apartment numbers, and changes to the façade details. Notably, the modification includes removal of communal open space in the centre of the floor plan; Level 5 has been altered to reflect the floor plan of all preceding levels.

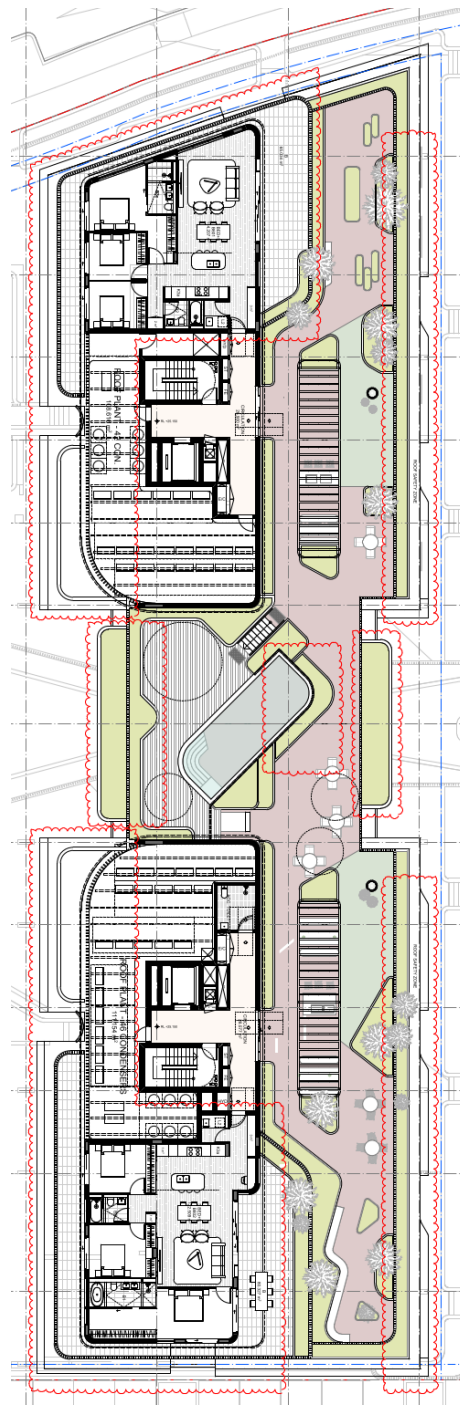
Rooftop Terrace

DA0350/2022 – Revision 13



Rooftop Terrace

DAM0043/2024 – Revision 17



Comment: There are significant modifications proposed to the rooftop terrace. The rooftop terrace is now connected to improve accessibility throughout the building. The rooftop has been reconfigured to remove each individual POS, and introduce a larger rooftop Communal Open Space, utilising one large swimming pool and a connected communal open space with excellent amenity features.

Two 3-bedroom apartment units have also been added to the top floor.

Elevations – North Full Site

DA0350/2022 – Revision 05

North Elevation – Building A&B



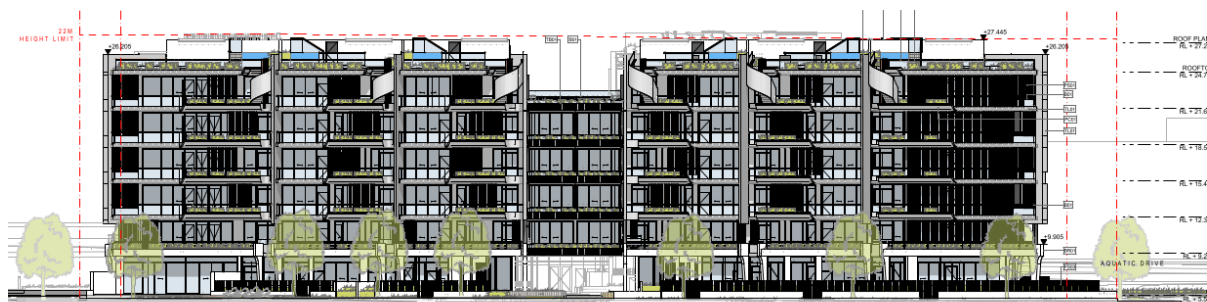
Elevations – North Full Site

DAM0043/2024 – Revision 09



Comment: The north elevation sheet captures modifications to the north façade of Building B. The Modifications include a redesign of the façade to remove tile cladding to incorporate additional windows and articulation features.

Elevations – East Full Site / DA0350/2022 – Revision 05 / East Elevation – Building A&B



Elevations – East Full Site / DA0350/2022 – Revision 10 / East Elevation – Building A&B



Comments: The modifications includes redesign of the East façade of Building B. The modification includes a reduction in some curved articulation features along the rooftop, provision of additional Level 5 central units, introduction of a recessed 'plinth' to Level 1, and introduction of some additional brick and clad features to the east elevation. There has been some reduction in windows along this elevation.

Elevations – South Full Site

DA0350/2022 – Revision 05

South Elevation – Building A&B

South Elevation – Building C

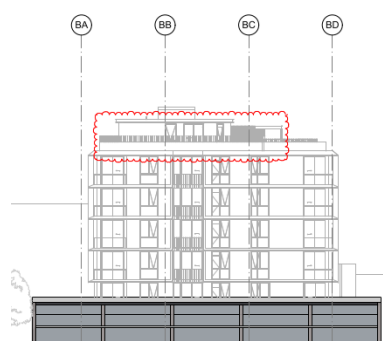


Elevations – South Full Site

DAM0043/2024 – Revision 10

South Elevation – Building A&B

South Elevation – Building C



Comment: The south elevation sheet captures changes to the south façade of Building B, with the removal of some tile cladding and batten screening, replaced with incorporation of additional windows and open articulation.

Elevations – West Full Site / DA0350/2022 – Revision 05 / West Elevation – Building B



Elevations – West Full Site / DAM0043/2024 – Revision 10 / West Elevation – Building B



Comment: The proposed modifications captured on the west elevation sheet depict changes to the west façade, including removal of some tile cladding features, incorporation of more open articulation, and a greater presence of the middle-section of Building B given the apartment floor reconfiguration and inclusion of additional apartment units.

Encroachment of the maximum building height of 22m is depicted on the modification plans.

Table 1: Proposed Changes to Conditions

A draft copy of the conditions as modified has been sent to the applicant for comments, no response received at the date of this report.

Condition No	Condition requirements	Change Proposed	Reason for Change
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3	Approved plans and documents	Modify architectural plans	Modify to update plans to reflect proposed modification.
7	Staged consent	Reconfigure staged consent as follows: Stage 1 – Construction of Building B and upgrades to car park and Aquatic Drive on-street parking spaces Stage 2 – Construction of Building A and C and carpark	This condition was initially structured for Building A & C to be built first, and subsequently Building B and carpark upgrades. The modified proposal necessitates reconfiguration of the staging to ensure adequate provision of parking spaces, with Building B and parking upgrades being staged together.
8	House Numbering	Additional house numbers on each floor	To accommodate additional apartments in Building B
9	Contributions	Increase in contributions payable.	Additional contributions payable due to increase in dwelling numbers.
13	Amended Plans	Removal of reference to café in Building B Landscaping and CPTED considerations	Café is no longer being proposed, and no longer requires replacement with COS Landscaping and CPTED improvements identified during the assessment process
14	Detailed Drainage Design	Updated to reference latest revision of stormwater management plans	Modify to update plans to reflect proposed modification
22	Car wash facility	Inclusion of car wash facility in Building B	As Building A & B no longer share site facilities and Building B may be constructed ahead of Building A, a designated car wash facility must be provided in Building B.
29	Parking Allocation	Increase in parking space allocation	Accommodating the proposed increase in parking spaces

29a	Aquatic Drive Parking Arrangements	Aquatic Drive on-street parking reconfiguration to be completed prior to CC	To ensure additional public parking spaces are provided prior to construction of Building B
33	Flood Planning Level	Additional flood considerations with regard to open car parking spaces	To ensure open car parking spaces are designed to be flood compatible
44a & 47a	Acid Sulfate Soil Management	Implementation of the ASSMP	To ensure implementation of ASSMP
50	Survey Certification	Survey of basement entry levels	To ensure basement levels are built to the approved design, to avoid flood-affectation
58	External materials and colours	Additional materials and colours schedule	To ensure the Building B materials and colours schedule is captured in the modified consent
76	Signs for visitor and public parking	Revised Building B entry location is appropriately signed	To ensure the condition captures the revised Building B basement entry driveway, which has been relocated onto Civic Avenue
82	Operational Management Plan	No longer require shared use of the Building A COS	Building B now features a designated rooftop COS, and does not require shared use of the Building A COS
5 & 104	Endeavour Energy	Updated Endeavour Energy referral advice	To capture updated referral advice

Table 2: Development Data

Control	Original	Proposal – Modification
Site area	8,904.6 sqm	8,904.6 sqm
GFA	18,067 sqm	19,384 sqm
FSR (retail/residential)	Residential & Retail = 2.1:1	Residential & Retail = 2.34:1
Clause 4.6 Requests	<p>Not applicable – Shell Cove Concept Approval prevails over Shellharbour Local Environmental Plan floor space ratio, minimum lot size and height of building clauses.</p> <p>The proposal features an increase in building height non-compliance, a new building storey non-compliance, and a new non-compliance with the Precinct D Dwelling Yield. These non-compliances are considered in terms of</p>	

	<i>consistency with the Shell Cove Concept Approval in section 5 and Attachment D.</i>	
No of apartments	Total = 155 Building A – 77 Building B – 65 Building C – 13	Total = 178 Building A – 77 Building B – 88 (additional 23 from approved plans) Building C – 13
Max Height 22m 6 storeys	22.15m (lift overrun, partition walls, plant equipment) 6 storeys	24m (lift overrun) 23.1m (privacy screening) 22.95m (dwelling roof) 7 storeys
Precinct D Dwellings <i>Maximum dwelling yield of 250</i>	Precinct D total = 242	Precinct D total = 265 (+15 over maximum permitted)
Landscaped area	722 sqm	667 sqm (re-calculate)
Car Parking spaces	Total = 313 Building A – 187 - 169 residential / visitor - 10 retail - 8 public Building B – 126 - 126 residential / visitor	Total = 360 Building A – 187 - 169 residential / visitor - 10 retail - 8 public Building B – 159 - 159 residential/visitor (deficit of 9 visitor parking spaces) Additional parking spaces – 14 - a net gain of 2 public parking spaces from re-locating the Basement B driveway (-2 on Civic Avenue, +4 in open-air car park) - a net gain of 12 parking spaces along Aquatic Drive
Setbacks	3.5m+ for external walls, 2m+ for articulation zone	3.5m+ for external walls, 2m+ for articulation zones

2.2 Background

The proposed modification DAM0043/2024 was lodged on 12 April 2024. A chronology of the development application since lodgement is outlined below:

Table 3: Chronology of the Modification Application

Date	Event
22 July 2023	DA0350/2022 approved by Southern Regional Planning Panel
12 April 2024	DAM0043/2024 lodged (PPSSTH-402) - first modification to DA0350/2022.
3 May 2024	DA modification referred to Sydney Water, Endeavour Energy, and internal referrals.
9 May 2024	DA modification placed on exhibition. Notification period 23 May – 19 June.
3 June 2024	Request for information letter sent from Council to applicant Issues raised as follows: <ul style="list-style-type: none"> • Precinct D dwelling yield breach • Encroachment of height and storey limit • Parking deficit • East façade design character • Increases upon ADG non-compliances: deep soil zone and solar access • Cross-ventilation non-compliance • Acoustic privacy clarification • Clarification of apartment and POS dimensions • Addendum to utility statement requested • Design statement requested
19 June 2024	Panel briefing Advice: <ul style="list-style-type: none"> • Assessment Pathway and Consistency with the Concept Approval • Does the development meet the substantially the same test in s4.55(2) of the EP&A Act 1979 • ADG and UDG non-compliances. • Design Review Panel Requirements
2 August 2024	Additional Information response received from applicant, including: <ul style="list-style-type: none"> • amended architectural plans, • design statement, • utilities statement, and • clarification of matters

19 August 2024	Following completion of waste referral, RFI sent for waste handling configuration, and outstanding issues (i.e. parking).
13 September 2024	Meeting between Council and Applicant, resolution agreed upon for parking and waste matters.
18 October 2024	Revised parking and waste handling configuration provided to Council. Ongoing discussion on parking configuration, discuss resolution of aquatic drive parking reconfiguration.
November 2024	Council conducts full re-assessment and prepares recommendation for SRPP
13 December 2024	SRPP Determination Meeting

3. STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in s4.55(2) of the EP&A Act in relation to modification of consents provisions, Section 4.15(1) of the EP&A Act in relation to matters for consideration for applications and Part 5 of the 2021 EP&A Regulation in relation to information requirements and notification. These matters are considered below.

3.1 Section 4.55(2) of the EP&A Act

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if a number of matters are satisfactorily addressed pursuant to Section 4.55(2) of the EP&A Act. The matters include the following:

- (a) *It is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all) (s4.55(2)(a)), and*

Comment:

The test to determine if the development is 'substantially the same' development is to consider those changes qualitatively and quantitatively. This logic is drawn from *Moto Projects (No.2) Pty Limited v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298, where Bignold J described the process as follows:

The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified, rather, the comparison

involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

Quantitative Assessment:

In terms of quantitative assessment, the relevant elements to assess the comparisons include changes to the number of apartment units, floor space, parking space provision, number of storeys, height and setbacks of buildings. The following assessment is provided to quantify these elements:

- i. The number of buildings remains at three, with one mixed-use building, and two residential flat buildings.
- ii. The number of residential units throughout the development has increased from 155 to 178, an increase of twenty-three (23) units.
- iii. The unit mix has shifted in Building B with an increase in 2-bedroom units. The unit mix has changed as follows: 1 decrease in 1-bedroom units (12 -> 11), 34 increase in 2-bedroom units (21-> 55), 7 decrease in 3-unit bedroom units (29 -> 22), and 3 decrease in 4-bedroom units (3 -> 0). The total number of bedrooms in Building B has increased from 153 to 187 (34 bedrooms), or an increase of 18%.
- iv. In the context of all the residential units which formed the original development application, including Buildings A, B and C, there has been an increase from 354 bedrooms to 388 bedrooms, representing a percentage increase upon the original of 9.6%.
- v. The gross floor area has increased from 18,067sqm to 19,384sqm, representing a total increase of 1,317sqm. This represents an increase in GFA of 7% upon the original. The FSR has increased from 2.18:1 to 2.34:1.
- vi. The residential / visitor parking spaces in Building B has increased from 126 to 159, representing an increase of 33 spaces. This represents an increase of 26% upon the original parking spaces in Building B. Situated within the context of the entire development (Buildings A, B and C), this is an increase from 305 to 338 parking spaces, or an increase of 10.8%.
- vii. The number of storeys in Building B has increased from 6 storeys to 7 storeys, however the 7-storey component only represents 14% of the rooftop area.
- viii. The maximum height of Building B has increased from 22.15m to 24m.
- ix. The setbacks of Building B has primarily remained the same.

Qualitative Assessment:

In terms of a qualitative assessment, the essential elements for justification of the similarities of the approved and modified developments include land use / classification, location of the built form, vehicle access points, bulk and scale of built form and compliance with relevant legislation. These criteria are detailed as follows:

- i. Land use for the modified development remains as approved, with Building C remaining mixed-use (shop-top housing), and Buildings A and B remaining residential (residential flat buildings).
- ii. The built form modifications are located within the same building footprint as approved. There are no substantial changes to the ground plane in terms of use or design changes.

- iii. Vehicle access for Building B has shifted from the public car park immediately south, to access from Civic Avenue at the south-west. The access configuration is essentially from the same direction and built component.
- iv. The bulk and scale of the proposed modification is suitably comparable with the approved development. While there has been a sizeable increase in bedrooms, apartment numbers and parking spaces in Building B, this has not translated to significant bulk and scale impacts. The parking spaces have been provided within existing basement levels, with slight expansion of the basement levels. The bedroom and apartment numbers have been provided primarily within the existing storeys, with only 2 units provided on the rooftop / 7th-storey as well as an additional 'infill' between the 2 building forms at level 5.
- v. Amendments to the Building B façade and through-site link retain the same purpose, functionality, and architectural expression. While changes are noticeable, the design changes do not radically transform any fundamental elements of the approved development.
- vi. While the modification proposes an additional 'storey', this is composed of two units and a 740sqm communal open space, with the rooftop composition featuring a mix of 6th storey and 7th storey components. This rooftop modification reflects the initial design, with the Building B rooftop originally featuring private open space and rooftop facilities.

The proposed modifications to the development do not substantially change the current approved development. The modified development is compatible with the scale of the approved development, and the architectural character is suitably consistent,

The proposed quantitative differences are of generally small percentage increases when factoring in the scale of the originally approved development (throughout Buildings A, B and C), thus are not considered to radically transform the development. Even so, quantitative changes in Building B do not radically transform Building B's use, architectural expression, or bulk and scale, with only slight expansion to some architectural components.

Fundamentally, Building B still remains characterised as a multi-storey residential flat-building, which forms part of a larger development for two residential flat buildings and a shop-top housing in Shell Cove. With consideration given to these factors, the assessment recommends that the proposed development is considered substantially the same as that approved.

- (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 (s4.55(2)(b)), and*

Comment:

The original DA did not require concurrence or general terms of approval from any external agency.

The development application has been allocated to the Southern Regional Planning Panel (SRRP) as the consent authority due to the Council interest in the site (landowner).

- (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 (s4.55(2)(c)), and*

Comment:

The application was notified in accordance with Shellharbour Council's Community Participation Plan 2021. No submissions were received.

- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be (Section 4.55(2)(d)).*

As above, no submissions were received.

- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified (Section 4.55(3)).*

The matters required to be considered include:

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

Reasons for Grant of Consent

The SOUTHERN REGIONAL Planning Panel granted consent to the original development in a notice of determination dated 22 June 2023. The reasons outlined in the Statement of reasons for this decision included the following:

- The prerequisites for the grant of consent had been met;
- The proposal was generally consistent with the Concept Plan applicable to the Precinct;
- The matters raised by the Panel at its meeting of 14 June 2023 had been satisfactorily addressed;
- A thorough assessment in terms of Section 4.15 of the *Environmental Planning and Assessment Act 1979* had been undertaken; and
- The development was deemed to be in the public interest.

It is considered that the proposed modification is consistent with these reasons for the decision on this consent, in that the proposed development is considered generally consistent with the planning controls and expectations for the site. Notably, detailed assessment of the

consistency with the Concept Approval and variations to the ADGs are considered in section 3.2 below. A response to each item raised in the Panel Briefing for the DA modification is included in consideration of the key issues, in section 5 of this report.

3.2 Section 4.15(1) of the EP&A Act

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.55(3), which are of relevance to the application.

These matters include the following, which are considered in detail below:

- (a) *the provisions of—*
 - (i) *any environmental planning instrument, and*
 - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
 - (iii) *any development control plan, and*
 - (iiia) *any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
 - (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph),*
- (b) *that apply to the land to which the development application relates,*
- (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) *the suitability of the site for the development,*
- (d) *any submissions made in accordance with this Act or the regulations,*
- (e) *the public interest.*

3.2.1 **Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations**

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

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

The following Environmental Planning Instruments are relevant to this application:

- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Sustainable Buildings) 2022
- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- State Environmental Planning Policy (Housing) 2021
- Shell Cove Boat Harbour Concept Plan 07_0027 Mod 1
- Shellharbour Local Environmental Plan 2013

A summary of the key matters for consideration arising from these State Environmental Planning Policies are outlined in **Table 4** and considered in more detail below.

Table 4: Summary of Applicable State Environmental Planning Policies (Preconditions in bold)

EPI	Matters for Consideration	Comply (Y/N)
SEPP (Sustainable Buildings) 2022	No compliance issues identified subject to imposition of conditions on any consent granted.	Yes
SEPP (Housing) 2021	<p>Chapter 4: Design of residential apartment development</p> <ul style="list-style-type: none"> Pursuant to s144, this chapter applies to the proposed modification of the residential apartment building. Pursuant to s146(2), the modification is accompanied by a statement from a qualified designer or designed the original development. Therefore, there is no requirement to refer the modification application to the relevant design review panel. Pursuant to s147 the quality of the design of the development has been considered in accordance with the design principles in Schedule 9 and an assessment against the Apartment Design Guidelines is included in Attachment F, whereby Council has concluded in a satisfactory assessment stance. 	Yes
SEPP (Planning Systems) 2021	<p>Chapter 2: State and Regional Development</p> <ul style="list-style-type: none"> The original development application was declared to be regionally significant development in accordance with schedule 7 of this SEPP, as it comprises development with a CIV over \$30 million, and is development on Council land with a CIV over \$5 million. Pursuant to the <i>Instruction of functions exercisable by Council on behalf of Sydney District or Regional Planning Panels – Application to Modify Development Consents</i>, the proposed development meets the criteria for a conflict of interest and is required to be determined by the SRPP as the consent authority. 	Yes
SEPP (Resilience & Hazards) 2021	<p>Chapter 4: Remediation of Land</p> <ul style="list-style-type: none"> Section 4.6 – Remediation matters are as per the original assessment, with no additional concerns raised from the proposed modification. 	Yes

State Environmental Planning Policy (Transport and Infrastructure) 2021	Chapter 2: Infrastructure <ul style="list-style-type: none"> Section 2.48(2) (Determination of development applications—other development) – electricity transmission - the proposal is satisfactory subject to conditions. The modification was referred to Endeavour Energy who provided a conditionally satisfactory referral response. 	Yes
Shell Cove Boat Harbour Concept Plan 07_0027 Mod 1	Assessment against the Concept Approval is included in Attachment D of this assessment report, with a key assessment matter being the consistency of the proposal with the Concept Approval. Council concludes in a satisfactory assessment in this regard, supporting the proposal as being generally consistent with the Concept Approval.	Yes
Shellharbour Local Environmental Plan 2013	Assessment against the SLEP 2013 is completed to the extent applicable, noting the Concept Approval prevails to the extent of any inconsistencies with the SLEP 2013.	Yes

State Environmental Planning Policy (Resilience and Hazards) 2021

As per original assessment.

The former Council Landfill on the Shell Cove site (3.7 ha) was remediated in 2009 and the Site Audit Statement by Environ (03/11/2009) confirmed that the remediation was successful and the land is suitable for low to medium residential use.

The site of proposed development is not mapped within contaminated land, and the Contaminated Land Comment (Douglas Partners, 2018) prepared as part of the original subdivision applications and submitted along with the original application confirms that no further assessment is required on site. The design changes within the modification application do not cause reason for any further assessment with regard to land contamination. Council has considered whether the land is contaminated as detailed and is satisfied that the land has no contamination issues and the proposed development and modification is suitable on this site.

A contamination unexpected finds protocol condition will be retained in the consent.

State Environmental Planning Policy (Sustainable Buildings) 2022

The original development application was assessed against the SEPP (Building Sustainability Index – BASIX) 2004. The development application modification was accompanied by a revised BASIX Certificate, which achieves compliance with the original SEPP, and the SEPP (Sustainable Buildings) 2022 which has replaced the aforementioned SEPP. Suitable conditions have been recommended to ensure compliance, as per the original assessment.

State Environmental Planning Policy (Planning Systems) 2021

The original development application was declared to be regionally significant development in accordance with Schedule 7 of the SEPP (Planning Systems) 2021.

Regionally significant development is required to be determined by the regional planning panel in accordance with Part 4, Division 4.2, Section 4.5 (b) of the *Environmental Planning and Assessment Act 1979*. The original development application was determined by the Southern Regional Planning Panel.

The '*Instructions of functions exercisable by Council on behalf of Sydney District or Regional Planning Panels – Application to Modify Development Consents*' requires a DA modification upon a SRPP determination to be determined by the SRPP if the development is located on Council land, as this meets conflict of interest criteria within the instructions.

Therefore, the DA mod has been referred to the Southern Regional Planning Panel for determination, with Council providing a recommendation within this report.

State Environmental Planning Policy (Housing) 2021

Chapter 4 of the SEPP (Housing) 2021 applies to the proposed development. Pursuant to s144, this Chapter applies to development that consists of erection of a new building, or the substantial redevelopment or substantial refurbishment of an existing building, where the building is at least 3 storeys and contains at least 4 dwellings.

This characterisation applies to the proposed development application modification; the 'Building B' has been approved, however is not yet erected. Further, in the case where it is erected under the existing DA0350/2022, the modification can be considered substantial redevelopment of an existing building. Building B consists of 6 storeys, and contains over 4 dwellings.

Assessment against the Apartment Design Guidelines is included in **Attachment F**.

Key variations identified in the ADG assessment include:

- **Deep Soil Zones** – Objective 3E-1

This objective requires developments to provide 7% of the site area as a deep soil zone. The original DA0350/2022 was approved with a variation providing 3.4% of the site area as a deep soil zone, and justified on the merits of landscaping provided on site (722 sqm) and in the Shell Cove Concept Approval area more broadly.

The proposed modification maintains a deep soil zone of 3.4%, however reduces landscaping on-site to 692 sqm. The reduction in landscaping is minor, and the justifications from the original approval remain applicable. The parking benefits from provision of basement area, the provision of healthy landscaping, and siting within a Concept Approval area with extensive public open space continue to justify the variation.

Further to this, the proposed deep soil zone is considered compliant with the design guidance offered within the ADGs. Specifically, where a site location and building typology, such as a high-density build in a town centre, restricts the practicality of achieving deep soil zone requirements, a reduced deep soil zone with acceptable stormwater management and alternative planting (i.e. planting on structures) is considered satisfactory.

- **Solar and Daylight Access** – Objective 4A-1

This objective requires at least 70% of apartments to achieve complaint solar access (3hrs between 9am-3pm midwinter), and a maximum of 15% of apartments to receive no solar access. The original DA0350/2022 was approved with a variation to solar access for the living area (38%) and POS (43%), and for the percentage of apartments with no solar access (29%).

The proposed modification decreases all metrics of compliance, including solar access to living areas (32%), POS (39%), and units with no solar access (36%). However, the proposal demonstrates numerous merits in design which justify the variation. The proposed modification includes provision of abundant COS in Building B with excellent solar access. The site also remains constrained by overshadowing from the 11-storey hotel to the east, whilst also positioning balconies to the east to maximise view amenity over the Marina – this demonstrates compliance with the design guidance in the ADGs. The proposal retains generous window and glass door sizes, and maximises daylight access through open-living arrangements sited along the external face of the development. Finally, the design demonstrates that despite significant constraints, the design provides reasonable solar access amenity within the 8am – 4pm period (extended), with only 14% of units receiving no solar access, and 57% of units POS receiving at least 2 hours of solar access. On the balance of considerations, the proposed variation is considered to remain acceptable on merit.

Pursuant to section 145 of the SEPP, the original development application was accompanied by a design statement, and referred to the design review panel.

Pursuant to section 146 of the SEPP, the modification application requires submission of a design statement to determine whether referral to the design review panel is required. The applicant has provided a design statement, and Council does not recommend referral to the design review panel on the basis of architectural merit and similarity to the originally approved design on substantial architectural components.

State Environmental Planning Policy (Transport and Infrastructure) 2021

The proposed modifications are located adjacent an electricity padmount substation. Pursuant to Subdivision 2, section 2.48 of the SEPP (Transport and Infrastructure) 2021, the development application requires referral to the electricity supply authority for the area in which the development is to be carried out.

The subject development was referred to Endeavour Energy in accordance with the requirements of this section. A referral response was received on 5 May 2024, and indicated that the proposed modifications do not require any additional conditions or design changes. In this regard, the original Endeavour Energy referral advice provided on 22 August 2022 for DA0350/2022 remains applicable.

Shell Cove Boat Harbour Concept Plan 07_0027 Mod 1

Assessment against the Concept Approval is included in **Section 5 and Attachment D** of this assessment report, and forms one of the key assessment matters for the proposed modification. The key considerations focus on consistency with the concept approval,

particularly Conditions 1 and 2. Conditions 1 and 2 are as follows, with assessment matters highlighted for emphasis:

Condition 1.

- (a) **Up to 1,566 dwellings comprising single dwellings, medium density and apartments**
- (b) *A business park with a maximum gross floor area of 30,000sqm*
- (c) *Retail/commercial and community facilities with a maximum gross floor area of 14,830sqm*
- (d) *A mixed use landmark (hotel) building of up to 11 storeys:*
- (e) *Public open space and wetlands*

Associated drainage, stormwater infrastructure and roads.

Condition 2. Approved Plans and Documentation

The project shall be generally in accordance with the following plans and documentation:

- (a) *Shell Cove Boat Harbour Precinct Concept Plan Application and Environmental Assessment, dated 26 February 2010, prepared by LFA (Pacific) Pty Ltd, including Volumes 1 and 2 and Appendices A to P except where amended by **the Section 75W Modification Application report**, dated 8/08/2017, prepared by Ethos Urban;*
- (b) *Shell Cove Boat Harbour Precinct Preferred Project Report, dated November 2010 prepared by LFA (Pacific) Pty Ltd, including Appendices 1 and 2; and*

Statement of Commitments (Schedule 4) as amended by the Section 75W Modification Application, dated 8/08/2017.

except as otherwise provided by the terms of this approval.

Condition 1 enforces a dwelling cap of 1,566 dwellings in the total Concept Approval area.

Condition 2, through the requirement to be 'generally in accordance with' the Section 75W Modification Application Report, enforces a Precinct D dwelling yield (200-250 dwellings), a maximum building height (22m), and maximum storeys permitted (6 storeys) for Building B. Consideration of these matters is summarized briefly in the table below.

Table 5: Consideration of the Concept Approval Controls

Control	Requirement	Proposal	Comply
Condition 1 – Concept Approval Dwelling Cap	1,566 total dwellings	Will not result in a breach of the total dwelling cap. Thusfar, a total of 1,542 dwellings are planned or approved in Shell Cove, including the additional apartments within the subject modification.	Yes

		The proposed development will not encumber surrounding precincts, or otherwise indirectly result in a breach of the 1,566 dwelling cap.	
Condition 2 – Precinct D dwelling yield	200-250 dwelling yield	265 apartments proposed (+15 over).	Discussed in section 5 of this report
Condition 2 – Maximum Building Height	22m	Various height exceedances proposed: 24m – lift overrun 23.1m – rooftop privacy screening 22.95m – rooftop dwelling wall and roof features	Discussed in section 5 of this report
Condition 2 – Maximum storeys permitted	6 storeys	7 storeys, consisting of two rooftop dwellings, for 14% of the rooftop space	Discussed in section 5 of this report

Consistency with the Concept Approval is considered in full detail in the 'key assessments' section of this report, in Section 5, and in **Attachment D**. The proposal is considered to retain consistency with the Concept Approval.

Shellharbour Local Environmental Plan 2013

Assessment against the SLEP 2013 is included in **Attachment G** of this assessment report. It is important to note that the Concept Approval prevails to the extent of any inconsistencies between the SLEP 2013 and the Concept Approval. Whilst the SLEP 2013 features zoning, building height, floor space ratio, and zoning permissibility and objectives, these are essentially overridden by the development controls within the Concept Approval.

Otherwise, assessment matters for consideration include:

- Clause 5.21 – Flood Planning: the proposed modification is considered to remain satisfactory with regard to flood planning. Importantly, the Building B basement entry has been reconfigured, and remains free from flood affectation.
- Clause 6.1 – Acid Sulfate Soils: the site is not mapped as acid sulfate soils, however the original development application, and proposed modification is accompanied by an Acid Sulfate Soils Management Plan which provides management options in the event that acid sulfate soils are discovered. This is considered satisfactory.
- Clause 6.2 – Earthworks: the proposed modification increases the amount of cut from 40135m³ to 42508m³, representing an increase of 6% cut. The existing geotechnical report is considered to suitably apply to the modified earthworks. This has been confirmed by Councils Engineering Officer.

The proposal suitably complies with the requirements of the SLEP 2013, to the extent applicable.

(b) Provisions of any Proposed Instruments (s4.15 (1)(a)(ii))

There are no proposed instruments applicable to the proposal.

(c) Provisions of any Development Control Plan (s4.15(1)(a)(iii))

The following Development Control Plans are relevant to this application:

- Shellharbour Development Control Plan 2013
- Shell Cove Precinct D Urban Design Guidelines – Amendment 2

The main controls for consideration are considered below. A full assessment of both development control plans is considered in **Attachment E (UDGs) and H (SDCP 2013)**.

Shell Cove Precinct D Urban Design Guidelines – Amendment 2

- These guidelines include controls which echo the development requirements of the concept approval, i.e. maximum height and storey encroachment, which are considered in full detail in Section 5 – Key Issues, within this report.
- Section 4.3.6, Design Guideline 1 details parking and access requirements. The proposed increase in dwellings has necessitated an increase in parking requirements for Building B. The proposal provides a total of 159 residential / visitor parking spaces for Building B, which is 9 spaces short of the required 168 parking spaces for Building B.

This parking deficit is proposed as 9 visitor parking spaces. Council and the applicant have worked closely to identify potential solutions, and have agreed on reconfigurations which provide a total of 14 public parking spaces elsewhere, resulting in a net gain of 5 parking spaces. This is provided through relocation of the Building B basement driveway, providing a net gain of +2 parking spaces (-2 on Civic Avenue, +4 in open-air car park), and a net gain of +12 parking spaces along Aquatic Drive (-8 parallel parking spaces, +20 90-degree angle parking spaces).

It is important to note that these parking provisions were considered acceptable by Ason, the project traffic engineers, on the merit of parking provisions against the Shell Cove UDGs which require a higher visitor car parking rate than other LGAs. Specifically, the Shell Cove UDGs require one visitor parking space for every 2.1 apartments, in comparison to most other regional LGAs which, on average, require one visitor parking space for every 5 apartments.

The proposed modification therefore achieves a surplus of 5 parking spaces, providing an improvement in the car parking provisions in the precinct, particularly when accounting for the parking rates in other LGAs. The proposal is considered to demonstrate a satisfactory parking solution.

The following contributions plans are relevant pursuant to Section 7.18 of the EP&A Act and have been considered in the recommended condition:

- Local Infrastructure Contributions Plan 2019

This Contributions Plan has been considered, and recommended conditions on adjustments to contributions payable have been included within the draft consent.

(d) Planning agreements under Section 7.4 of the EP&A Act (s4.15(1)(a)(iia))

There are no planning agreements entered into or any draft agreement offered to entry into under s7.4 which affects the development.

(e) Provisions of Regulations (s4.15(1)(a)(iv))

Section 61 of the 2021 EP&A Regulation contains matters that must be taken into consideration by a consent authority in determining a development application, with the following matters being relevant to the proposal:

- The proposal involves demolition, and relevant conditions have been recommended with regard to the provisions of AS 2601.
- The proposal does not relate to land which is the subject of a subdivision order under Schedule 7 of the EP&A Act 1979.
- The subject development does not relate to a manor house or multi-dwelling housing (terraces).

Section 62 (consideration of fire safety) and Section 64 (consent authority may require upgrade of buildings) of the 2021 EP&A Regulation are not relevant to the proposal.

These provisions of the 2021 EP&A Regulation have been considered and are addressed in the recommended draft conditions where necessary.

3.2.2 Section 4.15(1)(b) - Likely Impacts of Development

The likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above and the Key Issues section below.

The consideration of impacts on the natural and built environments includes the following:

- Context and setting – The proposal is considered to be generally consistent with the context of the site. The proposed modifications do not radically transform the development, and the development remains suitable for the setting of Shell Cove and Precinct D, which is defined by apartment buildings, town centre facilities including retail and commercial units, hotel, library and visitor centre and a public park. The Building B modifications remain cohesive with this context, and contributes positively toward the town centre setting.
- Access and traffic – The proposed modification provides suitable facilities to accommodate traffic, parking and access demand. Notably, the proposal achieves numerical parking compliance, on the technicality of providing surplus public parking

spaces in lieu of some visitor parking spaces. This is considered a favourable outcome in terms of the utility value of parking spaces for the site. The development is otherwise sited in proximity to public transport options, and the modification is not anticipated to generate unreasonable strain on traffic generation and capacity of the road network.

- **Public Domain** – The proposal retains positive contributions toward the public domain. Notably, the proposal provides numerous pedestrian crossings, which provide good connectivity between the development, town centre, and waterfront facilities. The modification specifically alters the Building B through-site link, however retains positive amenity and accessibility outcomes for the public domain. A key assessment criteria has been visibility, bulk, and amenity impacts of the proposed height and storey encroachments for Building B, which have been deemed to have limited adverse impacts upon the public domain.
- **Utilities** – The proposal has all utilities available at the site. This formed a key assessment consideration, as the proposal included a breach of the Precinct D dwelling yield. Correspondence from Sydney Water has confirmed that all wastewater and water servicing utilities will be available for the additional dwellings proposed and will not result in undue pressure on the infrastructural services in the Precinct or Concept Approval area generally.
- **Heritage** – The site does not contain any heritage items. The site is mapped as Aboriginal Heritage area on Councils records, however suitable assessments were undertaken for the Concept Approval assessment and subdivision assessments for the application, with no adverse impacts anticipated as part of the subject application.
- **Land resources** – There are no adverse impacts anticipated upon land resources, such as the water catchment, or nearby mining or agricultural industry.
- **Water/air/soils impacts** – No adverse water, soil or air impacts are anticipated as part of the proposed modification. Notably, a contamination statement accompanied the original development application, and the proposed modifications do not trigger any additional contamination concerns.
- **Flora and fauna impacts** – The proposal does not include tree or vegetation removal, or otherwise affect threatened species or biodiversity values in the area.
- **Natural environment** – The proposal does not involve significant changes to the natural contours of the site. An accessible pedestrian area is maintained at ground-level, with good accessibility provided to the basement levels. The development provides suitable deep soil zones, and landscaping in the public domain and within each development.
- **Noise and vibration** – Construction and operational impacts are suitably mitigated through conditions of consent.
- **Natural hazards** – Whilst the site is flood-affected in the Probable Maximum Flood Event, the proposed modification does not result in any flood concerns. Notably, the basement entry access is relocated to the street (Civic Avenue), however remains above Council's flood affectation models, thus flood-free.

- Safety, security and crime prevention – The proposed modification was accompanied by a CPTED assessment, and reviewed by Council's Community Life team, such that positive safety, security and crime prevention principles have been implemented throughout the design.
- Social impact – The proposal is anticipated to contribute toward positive social impacts on the area, including proximity to town centre and community facilities, including walking and cycling options. The proposal contributes toward a positive sense of place in Shell Cove, forming part of the Town Centre precinct in an amenable manner. The development integrates well within the existing community context for the area, being master-planned and well-located.
- Economic impact – The proposal is anticipated to contribute toward positive economic impacts in the form of employment generation for construction and operation, business and property investment opportunities, and proximity to the Shell Cove town centre and tourist facilities will boost customer activity for these local facilities.
- Site design and internal design – The proposed development includes site design and internal design characteristics which mitigate potential impacts. Notably, the rooftop features are well-recessed, and feature articulative features which assist to reduce building bulk and visibility to the public domain, indicating positive design quality outcomes. The site layout is otherwise receptive to potential adverse impacts, i.e. has been designed to retain good solar access to adjoining properties, minimises conflict between pedestrians and waste servicing vehicles, and maintains positive architectural expression in this key location.
- Construction – Potential construction impacts will be adequately mitigated through conditions of consent, i.e. hours of construction, site management and traffic management requirements.
- Cumulative impacts – The proposed development is not anticipated to result in any adverse cumulative impacts. The development is generally consistent with the applicable planning controls, subject to extensive assessment considerations for any variations.

Accordingly, it is considered that the proposed modification will not result in any significant adverse impacts in the locality as outlined above.

3.2.3 Section 4.15(1)(c) - Suitability of the site

The proposed development is considered suitable for the site. Notably, the proposal fits within the locality of the area, being cohesive with surrounding development, and resulting in limited adverse impacts upon the public domain. The proposal is serviced by adequate transport infrastructure, parking, open space, and town centre facilities in the vicinity. Affection from natural hazards, i.e. flooding, have been adequately addressed in the application. The site attributes are generally conducive to the development, noting proximity to the waterfront, marina, hotel, and town centre facilities, which promote the siting of high-density builds on the site. There are no adjoining uses that are considered inconsistent with the proposal.

3.2.4 Section 4.15(1)(d) - Public Submissions

No submissions have been received for the DA modification.

3.2.5 Section 4.15(1)(e) - Public interest

The proposed development is considered to be in the public interest. This is demonstrated through the assessment considerations of the proposal. Notably, the development is considered generally consistent with the Concept Approval for the area, and sites high-density residential development in close proximity to town centre facilities, in a high amenity area. The development is serviced by adequate utility and parking infrastructure, and will provide positive economic and social benefits to the region. The development is considered to provide health and safety benefits to the public through a comprehensive CPTED assessment, and promoting a walkable, healthy, and activated town centre in Shell Cove. The proposal is considered consistent with the public interest.

3.3 Part 5 of the 2021 EP&A Regulation

There are a number of matters required to be addressed in an application for modification of development consent pursuant to Division 1, 2 and 3 of Part 5 of the 2021 EP&A Regulation. These matters are considered in **Table 6** below.

Table 6: Consideration of the Requirements under the Regulation

Matter	Comment	Comply
Clause 100 Application for modification of development consent		
May be made by— (a) the owner of the land to which it relates, or (b) another person, with the consent of the owner of the land (CI 98(1))	The application has been made by Australand Corporation (an umbrella company of Frasers), a development company, with consent from the landowner (Shellharbour Council). Australand Corporation and Shellharbour Council have collaborated on the Shell Cove development project for the lifetime of the development.	Yes
NSW Aboriginal Land Council consent required for land owned by a Local Aboriginal Land Council (CI 98(6)).	The land is not owned by a Local Aboriginal Land Council and consent is not required.	N/A
Form approved by Planning Secretary and on portal (CI 99).	The application has been provided in accordance with the Regulation.	Yes
Applicant details (CI 100(1)(a))	Provided on the NSW Planning Portal ('the Portal'), i.e. Australand Corporations.	Yes
Description of the development (CI 100(1)(b))	Provided on the Portal and outlined in Section 2 of this Report.	Yes
Address and title details (CI 100(1)(c))	Provided on the Portal and outlined in Section 1 of this Report.	Yes
Description of the proposed modification (CI 100(1)(d))	Provided on the Portal and outlined in Section 2 of this Report.	Yes
Whether to correct a minor error, mis-description or miscalculation, or some other effect (CI 100(1)(e))	The proposed modification is to modify the original consent under Section 4.55(2) to allow an increase in apartment numbers, reconfiguration	Yes

	of the Building B basement and driveway, increase in communal open space, and modifications to the façade. The proposal is not to correct a minor error, misdescription or miscalculation.	
Description of the expected impacts of the modification (CI 100(1)(f))	<p>The proposed modification is unlikely to result in significant impacts. Whilst the modification is comprised of changes to the built form of Building B, including the façade and rooftop features, the changes are noted as generally positive, and suitable for the character of the area. Appropriate design features have been incorporated to mitigate potential adverse impacts. The proposed increase in density is able to be adequately serviced, and with good proximity to the Shell Cove town centre, will contribute toward an active and walkable town centre.</p> <p>Refer to the 'key issues' section within this report (Section 5) for commentary against consistency with the concept approval, and other assessment matters.</p>	Yes
Undertaking that modified development will remain substantially same as development originally approved (CI 100(1)(g))	The modified development will remain substantially the same development as that originally approved. Refer to Section 3.1 of this Report.	Yes
If accompanied by a Biodiversity development assessment report, the biodiversity credits information (CI 100(1)(h))	Not applicable.	N/A
Owner's consent (CI 100(1)(i))	An undertaking has been provided on the Portal.	Yes
Whether the application is being made to the Court (under section 4.55) or to the consent authority (under section 4.56) (CI 100(1)(j)).	This Application is made to the consent authority pursuant to Section 4.55(2) of the EP&A Act.	Yes
BASIX Certificate (CI 100(3))	The proposed modification does involve BASIX development and an updated BASIX Certificate has been provided.	Yes
Penrith Lakes Development Corporation (CI 101)	The proposed modification does not involve the Penrith Lakes Development Corporation.	N/A
Qualified designer statement for residential apartment development (CI 102)	The proposed modification does involve residential apartment development and a qualified designer statement has been provided.	Yes
Mining and petroleum development consents (CI 102)	The proposed modification does not include mining and petroleum development consents.	N/A

Notification and exhibition requirements (CII 105-112)	Refer to Section 4.3 of this report. Requirements undertaken in accordance with the Shellharbour CPP.	Yes
Notification of concurrence authorities and approval bodies (CI 109) (to be undertaken by Council)	The modification application has been referred to the relevant concurrence and approval bodies as outlined in Section 4.1 of this Report.	Yes

4. REFERRALS AND SUBMISSIONS

4.1 Agency Referrals and Concurrence

The modification application was referred to Endeavour Energy and Sydney Water as required by the EP&A Act and Clause 109 of the EP&A Regulations 2021 and outlined in **Table 7**.

Table 7: Concurrence and Referral Agencies

Agency	Concurrence/referral Trigger	Comments (Issue, resolution, conditions)	Resolved
Referral/Consultation Agencies			
Electricity supply authority	S2.48 of the <i>State Environmental Planning Policy (Transport and Infrastructure) 2021</i>	The proposal was referred to Endeavour Energy due to proximity to electricity infrastructure (padmount substation). A response was received on the 5 th of May 2024 advising a conditionally satisfactory referral response. The recommended conditions will be included within the draft consent.	Yes
Sydney Water	S78 of the Sydney Water Act 1994	The proposal was referred to Sydney Water due to an increase in dwelling numbers, to ascertain whether the current infrastructure is adequate to service an increase in dwellings. A response was received on the 1 st of August 2024 which indicates that water and wastewater servicing should be available for an additional 23 apartments, subject to a section 73 application. Recommended conditions were included within the draft consent.	Yes

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4.2 Council Referrals

The modification application was referred to various Council officers for technical review as outlined **Table 8**. The outstanding issues raised by Council officers are considered in the Key Issues section of this report.

Table 8: Consideration of Council Referrals

Officer	Comments	Resolved
GIS	Council's GIS Officer has reviewed the proposal with regard to address numbering for additional apartments and provided recommended conditions which have been included with the draft consent.	Yes
Contributions	Council's Contributions Officer has reviewed the proposal with regard to the changes to gross floor area and number of dwellings, and provided a conditionally satisfactory referral response. Recommended conditions have been included within the draft consent.	Yes
Engineering	Council's Engineering Officer has reviewed the proposal with regard to parking, transport and access configuration and provided a conditionally satisfactory referral response. Recommended conditions have been included within the draft consent.	Yes
Environment	Council's Environment Officer has reviewed the proposal with regard to the acid sulphate soil requirements, and provided a conditionally satisfactory referral response. Recommended conditions have been included within the draft consent.	Yes
Waste	Council's Waste Officer has reviewed the proposed and provided commentary on the servicing of bins, particularly on the modified servicing configuration which requires waste trucks to reverse onto Civic Avenue from Building B. In the course of assessment, this design has been considered satisfactory from Council's Waste team, subject to landscape and road reserve amendments which obstruct pedestrian access across this driveway. In this regard, Council's Waste Officer has provided a conditionally satisfactory referral response. Recommended conditions have been included within the draft consent.	Yes

Community Life	Council's Community Life Officer has reviewed the proposal with regard to Crime Prevention Through Environmental Design requirements, and provided commentary with regard to social impact, access, passive surveillance, access control, territorial reinforcement, and environmental maintenance. The matters raised and conditions recommended have been considered in detail, and each matter acknowledged by Council's Town Planner, or otherwise conditioned where required, to achieve a conditionally satisfactory referral response. Recommended conditions include suitable landscaping and lighting to maintain passive surveillance and visibility, locks, access cards, and removal of climbable features for access control, and graffiti removal within a timely manner.	Yes
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4.3 Notification and Community Consultation

The modification application was notified in accordance with Shellharbour Council's Community Participation Plan 2021 from 23rd May 2024 until 19th June 2024. The notification included the following:

- A sign placed on the site;
- Notification letters sent to adjoining and adjacent properties (6 letters sent);
- Notification on the Council's website.

The Council received a total of zero (0) unique submissions.

5. KEY ISSUES

The proposed modification includes several key issues which warrant detailed assessment consideration. These key issues were discussed during the Panel Briefing meeting on 12 April 2024, therefore commentary has been structured in accordance with Panel Briefing comments.

The key issues are listed below, then discussed in detail within the following sections:

- a. Assessment Pathway and Consistency with the Concept Approval
 - Condition 1 – Concept Approval Dwelling Cap
 - Condition 2 – Precinct D Dwelling Yield
 - Condition 2 – Maximum Building Height
 - Condition 2 – Maximum Number of Storeys
- b. Does the development meet the substantially the same test in s4.55(2) of the EP&A Act 1979
- c. ADG and UDG non-compliances:
 - Visitor Parking Deficit
 - Changes to the Built Form and Façade Expression
 - Solar Access

- Deep Soil

d. Design Review Panel Requirements

a. Assessment Pathway and Consistency with the Concept Approval

The Panel raised concerns that the DA modification should instead be facilitated through a modification to the Shell Cove Concept Approval, to modify the development controls in the Concept Approval (i.e. precinct dwelling cap, height, number of storeys), in order to ensure the proposal retains consistency with the Concept Approval. The requirement to retain consistency with the concept approval is pursuant to section 4.24(2) of the EP&A Act 1979, which requires *'while any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site'*.

Detailed assessment of the proposed DA modification has brought Council to a position where we can support the proposed DA modification as a s4.55(2) modification. Whilst the proposal features numerical variations from the Concept Approval, specifically on the Precinct D dwelling cap, building height, and number of storeys, the proposal is able to demonstrate **consistency** with the Concept Approval. A detailed assessment against each assessment matter is included in the Concept Approval assessment in **Attachment D** below, however in summary:

Concept Approval Dwelling Cap

- With regard to Condition 1 of the Concept Approval, which limits the Shell Cove Concept Approval to 1,566 dwellings, the proposed development will not result in a breach of the 1,566 Concept Approval dwelling cap. The proposal will breach the Precinct D dwelling yield (250), however this will not directly or indirectly result in a breach of the Concept Approval dwelling cap (1,566), such as by encumbering development in other precincts. This has been verified with the applicant (Frasers), who have provided evidence that 1,542 dwellings are currently planned for the Concept Approval area, including the proposed modification dwellings. The proposal also demonstrates adequate provision of numerical parking and traffic requirements, and infrastructural servicing through satisfactory Sydney Water advice, with Precinct D having the capacity to accommodate 23 additional dwellings in the manner proposed. The proposal retains consistency with Condition 1 of the Concept Approval.

Preface to Consideration of Condition 2

- The below preface is applicable to the consideration of consistency with Condition 2, specifically noting a variation to the Precinct D Dwelling Yield, the building height limit and storey limit.
- With regard to Condition 2 of the Concept Approval, which requires *'the project shall be generally in accordance with the following plans and documentation: (a) Shell Cove Boat Harbour Precinct Concept Plan Application and Environmental Assessment, dated 26 February 2010, prepared by LFA (Pacific) Pty Ltd, including Volumes 1 and 2 and Appendices A to P except where amended by the Section 75W Modification Application report, dated 08/08/2017, prepared by Ethos Urban...'*
 - The referenced document *'Section 75W Modification Application report'*, informally referred to as the 'Cox Report', sets the key development controls for

the site. This includes the Precinct D Dwelling Yield (200-250 dwellings in precinct D – non-compliant), the height (22m – max of 24m proposed – non-compliant), and the number of storeys (6 storeys permitted, 7 storeys proposed – non-compliant).

- Whilst the proposed development features variations to the abovementioned controls, it is important to note that the proposal is compliant with the majority of the development controls set out by the Cox Report, including the land use (Apartments), the site access, street and public domain framework, Marina views and vistas, overshadowing, the 'SEPP 65 Preliminary Analysis', and the Precinct D description. In considering consistency with Condition 2, it is important to consider that the design remains directly compliant with a majority of the development controls set out in the Cox Report.
- There is legal precedence which has established a clear degree of flexibility is permitted in achieving consistency with a Concept Approval.
 - The Court has held that (former) Part 3A promotes 'inherent' and 'appropriate and inevitable' flexibility, given it applied to projects of a scale that are complex, extensive and multi-staged (per *Ulan Coal Mines Ltd v Minister for Planning* [2008] NSWLEC 185 at [78] to [80]; *Elite Constructions NSW Pty Limited v Coffs Harbour City Council* [2018] NSWLEC 201 at [57]).
 - This measure of flexibility has been applied by the Court liberally to find that proposed development can be 'generally consistent' with a concept approval, even where the detailed development exceeded matters such as a building storey limit and precinct dwelling cap whilst remaining compliant with an overall dwelling cap (per *Church Street Property Investments Pty Ltd v Council of the City of Ryde* [2021] NSWLEC 1517 at [23]).
- Whether a proposed development of a site is '*generally consistent with*' the terms of the Modified Concept Approval turns on a proper construction of the development that was approved under the Modified Concept Approval. That is, regard must be had to the Modified Concept Approval as a whole. Condition 2 of Schedule 2 of the Concept Approval provides that the project shall be '*generally in accordance with*' the specified plans and documentation contained within that condition. This phrasing, in addition to the requirement to be '*generally consistent*', suggests a degree of flexibility in the interpretation of the terms Cox Report which establish the height, storey and precinct dwelling cap requirements for the site.
 - Further to this, Page 32 of the Cox Report, which discusses the dwelling yield control, specifically notes: '*the plan represents an **indicative** upper yield mix and will be subject to review and change with the development of detailed design for each precinct*'.
 - The dwelling yield control also specifically states that '*within each precinct, a **flexible** dwelling target is proposed, allowing the proponent to adjust as the development evolves over time without exceeding the maximum dwelling cap of 1,566*'.
 - The documentation referred to in Condition 2 affords a clear and intentional flexibility to the application of the precinct dwelling yields.

- Consideration of the '*Statement of Reasons for Decision*' document, which justified the Independent Planning Commission's decision to approved the Concept Approval modification highlights consistencies between the proposed modification and vision of Shell Cove, despite numerous exceedances with Condition 2. This includes reasoning to the effect of:
 - The *Illawarra Shoalhaven Regional Plan 2015* included objectives to increase housing supply and provide a variety of housing choices; this was used as a justification to increase the dwelling cap in the Concept Approval (Paragraph 23). The proposed modification contributes positively toward this objective, locating density in a positive manner: in an area planned for apartment buildings, and in close proximity to the Shell Cove Town Centre and public transport services.
 - The statement of reasons justified an increase in the dwelling cap from 1,238 dwellings to 1,566 dwellings by introduction of Precinct dwelling yields, in Paragraph 36: '*The (Cox Architecture) review identified the potential for each precinct to provide minimum and maximum dwelling targets dependent on the dwelling types that are delivered, up to a maximum of 1,566 dwellings on the site*'. However, a minor breach of the Precinct D dwelling yield will not prevent the total dwelling cap from being reached, nor prevent each precinct from meeting their minimum dwelling yield. This is based on the rationale that each precinct features an 'indicative' dwelling yield range, with Precinct D having a range of 200 – 250 dwellings. If all precincts were to reach their maximum dwelling yield, this would result in 1,770 dwellings in Shell Cove, being well over the total dwelling cap for the Concept Approval area (1,566). Vice versa, if all precincts were only to reach their minimum dwelling cap range, this would result in 1,351 dwellings in Shell Cove. It is therefore considered impossible to require each precinct to meet their maximum dwelling yield, and that the Concept Approval affords clear flexibility to dwelling yields, provided the total dwelling cap set in Condition 1 is not breached.
 - The statement of reasons document justified an increase to maximum building heights and storeys in the Concept Approval area following the reasoning in Paragraph 57 that '*in the context of the entire Concept Approval, the additional one to two storey heights in central parts of the site would not be significant, and would not materially change the character of the overall (concept approval) development*'. Further, paragraph 23 of the statement of reasons states '*the proposed building heights are considered appropriate noting the areas of increased heights are located centrally on the site and they do not result in adverse visual or amenity impacts*'. In this regard, the proposed height and storey exceedances are considered to retain appropriate scale and cohesion with the surrounding built form, with minimal bulk and visual amenity impacts to the public domain. The proposed height and storey exceedances are consistent with the assessment stance for additional height or storeys stated within the statement of reasons.

Precinct D Dwelling Yield

- Whilst the proposal will result in Precinct D having a total of 265 dwellings, which is 15 above the 'indicative dwelling yield' shown in the Cox Report, the proposal

will not result in a breach of the total Concept Approval dwelling cap enforced through Condition 1 of the Concept Approval (1,566). The proposed breach is a minor numerical variation (6%) to the Precinct D indicative dwelling yield.

- There is one vacant lot within Precinct D which has no approved development. This lot is identified as residential/potential mixed use. This lot is not intended to include residential development and various uses are being considered by Council who are the land owners of the site.
- As established above, there is a clear and intentional flexibility afforded to the 'indicative' dwelling yield, which has been presented as a 'flexible dwelling target'.
- The proposed Precinct D dwelling yield breach assists to locate density in a positive manner, in a well-serviced town centre location with excellent access to amenities and facilities, and with adequate traffic and infrastructure servicing. This reflects consistency with the housing objectives of the *Illawarra Shoalhaven Regional Plan 2015* and the *Statement of Reasons for Decision* regarding the Concept Approval Modification.

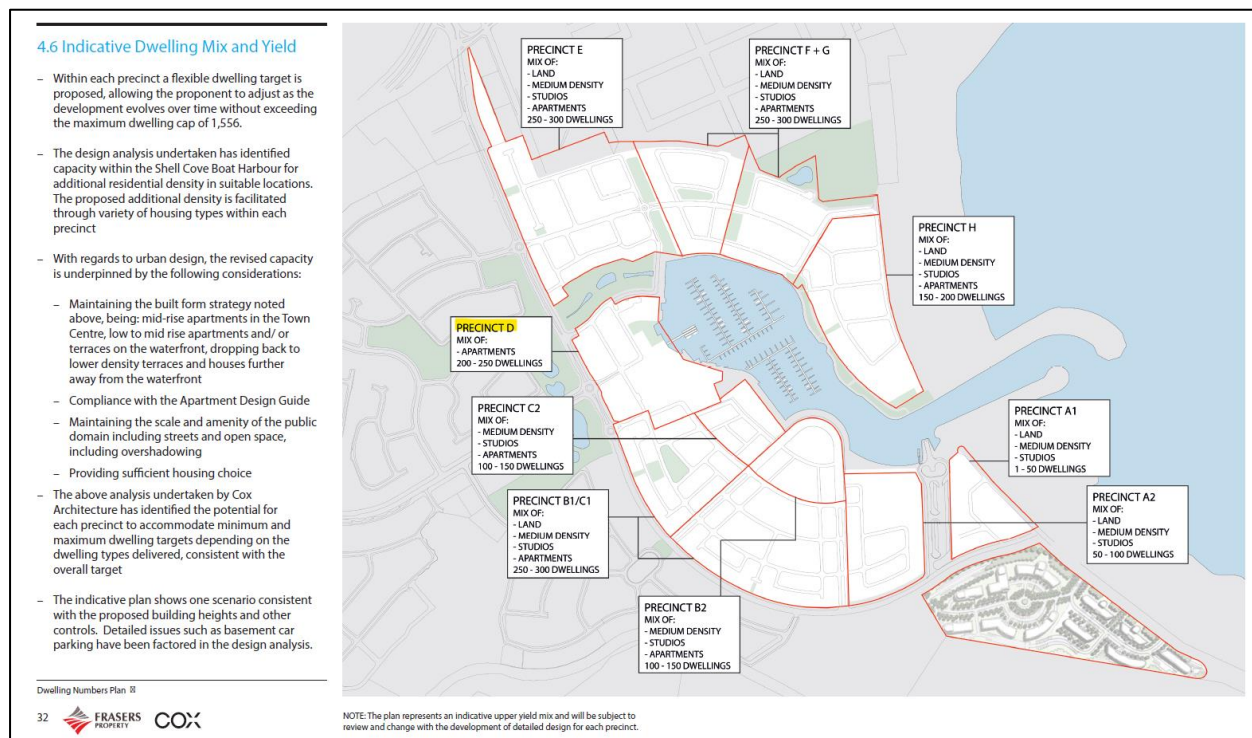


Figure 3: An excerpt from the COX Report, showing the Precinct D 'Indicative Dwelling Mix and Yield' figure.

Maximum Building Height

- The proposal results in several height encroachments for Building B. The site is limited to a maximum building height of 22m, and the modification seeks approval for a height of 24m (lift overrun), 23.1m (privacy screening feature), and 22.95m (dwelling walls and roofs).



Figure 4: An excerpt from the suite of plans, depicting the building height encroachments above the red-dashed horizontal line.

- The proposed height, notwithstanding the variation proposed, achieves consistency with the aims of the Cox Report height limits, i.e. to locate apartments near the town centre, and to not overshadow adjoining development.
- The original proposal included a height exceedance of 150mm for the Building B lift overrun. Whilst the lift overrun is now 2m above the height limit, it retains limited visibility, bulk or amenity impacts, similar to the original DA. The lift overrun is not visible at all within 3D rendering or the Visual Impact Assessment Addendum.



Figure 5: An excerpt from the 3D rendering, depicting no visibility of the lift overrun from the public domain.

- The proposed dwelling roof height and privacy screen height exceedances are considered minor, with 22.95m and 23.1m being a 4% - 5% variation. The height exceedances are well-recessed, and the Visual Impact Assessment Addendum demonstrates limited visibility or bulk impacts to the public domain, and positive visual amenity impacts. This reflects consistency with the *Statement of Reasons for Decision* for the Concept Approval Modification.

Maximum Number of Storeys

- The proposal includes 2 rooftop apartments, resulting in a technical non-compliance of 7-storeys (6 identified for this lot in the Concept Approval). The 7th-storey occupies 236sqm of the rooftop (being 14% of the 1659sqm space). The amount of roof plant and circulation space between the approved DA and proposed modification is essentially the same, and this space was not considered to constitute a 7th-storey in the original approval. The 7th-storey features provide limited visibility or bulk impacts to the public domain, and within the context of the site area, are considered appropriate, i.e. achieving a cohesive scale with the surrounding built form, featuring an 11-storey hotel immediately east.
- With regard to both building height and storey encroachments, in the course of assessment, the visual impact of the build has been lessened through increased setback to rooftop features, introduction of a solid base wall and screening to obscure visibility of 7-storey features, and a visual impact assessment addendum which demonstrates limited visibility or bulk impacts from the added height. The east and west facades retain setbacks beyond the minimum requirements, mitigating potential bulk impacts to the public domain.
- The proposed storeys retain limited visibility or bulk impacts, and demonstrates positive visual amenity. The design reflects consistency with the *Statement of Reasons for Decision* for the Concept Approval Modification.

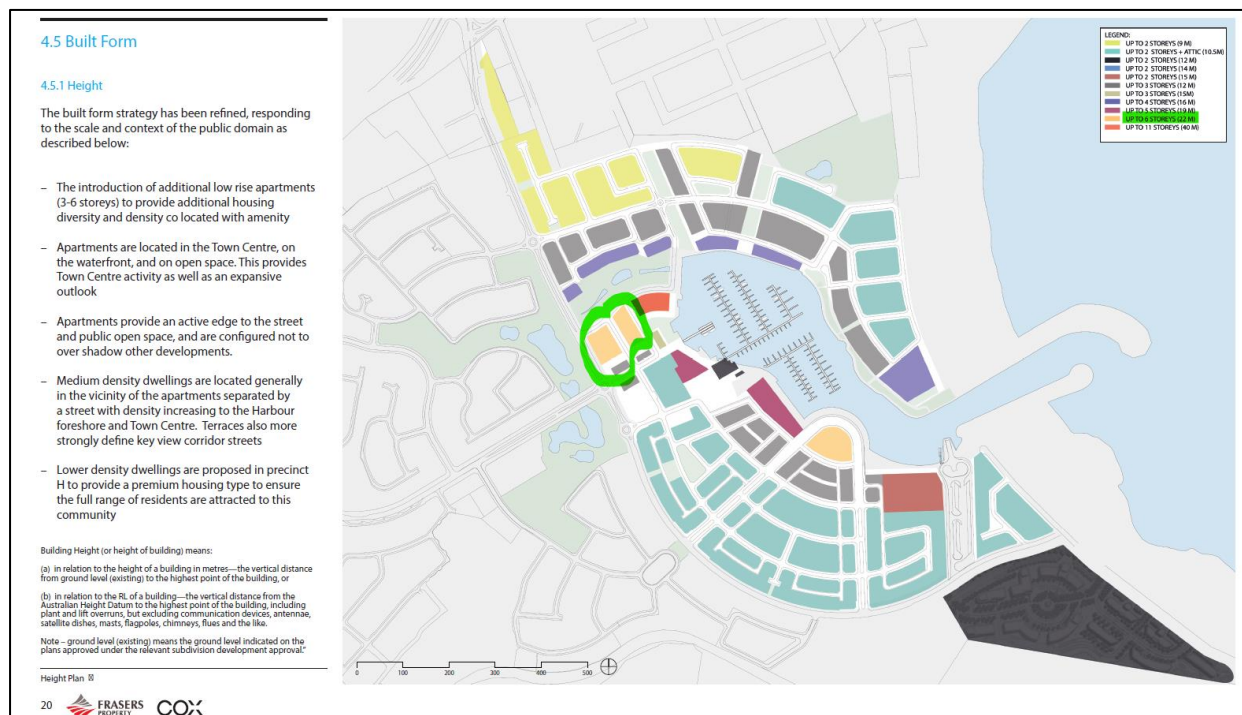


Figure 6: An excerpt from the COX Report depicting the maximum height and storeys permitted for the development site.

On the merit of these assessment considerations the proposed development modification remains directly compliant with Condition 1. The proposed development modification results in several exceedances to the development controls established in documentation referenced in Condition 2, however it is clear that the design remains generally in accordance with the approved documentation. It is important to note that in achieving **consistency** with Condition 2, the condition requirement to be 'generally in accordance' with the Cox Report documentation affords clear flexibility to the development controls, and the variations are otherwise consistent with the design outcomes established in the approved documentation, i.e. locating density in a well-located and well-serviced town centre location, with limited adverse impacts. The exceedances are relatively minor in numerical deviation, demonstrate limited scale impacts, and all other development controls applied through the Cox Report remain directly compliant. Notably, the proposed modification is consistent with statement of reasons put forward by the Independent Planning Commission in the Concept Approval modification, which originally justified an increase to dwelling caps, building height and storeys in the Concept Approval area. Council therefore recommends Panel support the position that the proposed modification is consistent with the Concept Approval.

b. Does the development meet the substantially the same test in s4.55(2)?

It is Council's opinion that the proposed DA modification satisfies the 'substantially the same' test as required by s4.55(2) of the EP&A Act. This has been considered on qualitative and quantitative metrics, in addition to a holistic sense, as per the logic drawn from *Moto Projects (No. 2) Pty Limited v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298, as follows:

The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

Both quantitative and qualitative metrics are considered in full detail in section 3.1 of this report.

c. Apartment Design Guideline (ADGs) and Urban Design Guideline (UDGs) Non-compliances

Numerous key issues were discussed during the Panel Briefing with regard to ADG and UDG non-compliances. Matters raised included a visitor parking deficit, changes to the built form and façade expression, solar access requirements, and deep soil requirements. Commentary on each matter is included below:

- **Visitor Parking Deficit:** Pursuant to the UDGs, section 4.3.6 'Parking and Access', Design Guideline 1 establishes the parking requirements for development in Shell Cove. This control requires 347 parking spaces to be provided in the development, being 337 residential / visitor parking spaces for Buildings A, B and C, and 10 retail parking spaces for Building C.

The proposed modifications have satisfactorily provided 169 residential / visitor parking spaces, and 10 retail parking spaces for Buildings A/C. The proposal only provides 159 residential / visitor parking spaces to Building B, with a shortfall of 9 visitor parking spaces (168 spaces required).

Council and Frasers have worked closely to develop a solution to the parking deficit of 9 visitor parking spaces for Building B. Following meetings involving Council's Transport Engineer and Planning team, Frasers have agreed to provide an additional 12 public parking spaces along Aquatic Drive (north of the development site), in addition to a net gain of 2 parking spaces by relocating the Building B basement driveway. As a result, whilst the modification features a deficit of 9 visitor parking spaces which is a variation from section 4.3.6 in the UDGs, the modification also provides 14 public parking spaces, resulting in a net gain of 5 parking spaces (**Table 9**). Council considers this a favourable and utilitarian solution to the visitor parking deficit, particularly considering the likelihood of public parking spaces on-street being used, and serving the public, over visitor parking spaces located in the Building B basement. The changes to Aquatic Drive are to be included as a condition of consent prior to issue of the Construction Certificate.

Beyond the parking surplus discussed above, it is important to contextualise the visitor parking deficit through comparison with other similar LGAs. The applicant has noted that the visitor parking deficit was considered acceptable by Ason, the project traffic engineers, due to the following reasons:

'The visitor car parking, when averaged, equates to a rate of one (1) space for every 2.7 apartments, which is a minor variation to the UDG which, requires one (1) space for every 2.1 apartments.'

The UDG visitor car parking rates is very high having regard to the site location... the visitor parking rate is significantly higher than Shoalhaven, City of Wollongong, Port Macquarie Hastings, City of Coffs Harbour, City of Newcastle, Mid-Coast, Lake Macquarie and Byron Shire LGAs, which on average specifies the need for visitor parking at a rate of one (1) space for every five (5) apartments'.

Therefore, on the basis of a net gain in parking spaces, and a quantum of parking spaces that is considered to sufficiently accommodate visitor parking demands, the variation to section 4.3.6 in the UDGs is supported by Council.

Table 9: A record of the public parking and visitor parking space deficits, and provisions to address deficits

	Parking Deficit	Parking Provisions
Public Parking Spaces	Building B driveway removes 2 parking spaces on Civic Avenue	4 public parking spaces provided to the Building B open car-park from relocating the Building B basement driveway 12 public parking spaces added to Aquatic Drive through proposed parking reconfiguration

Visitor Parking Spaces	9 visitor parking space deficit in Building B as a result of proposed modification	
Total	Total deficit of 11	Total gain of 16 (net gain of 5)

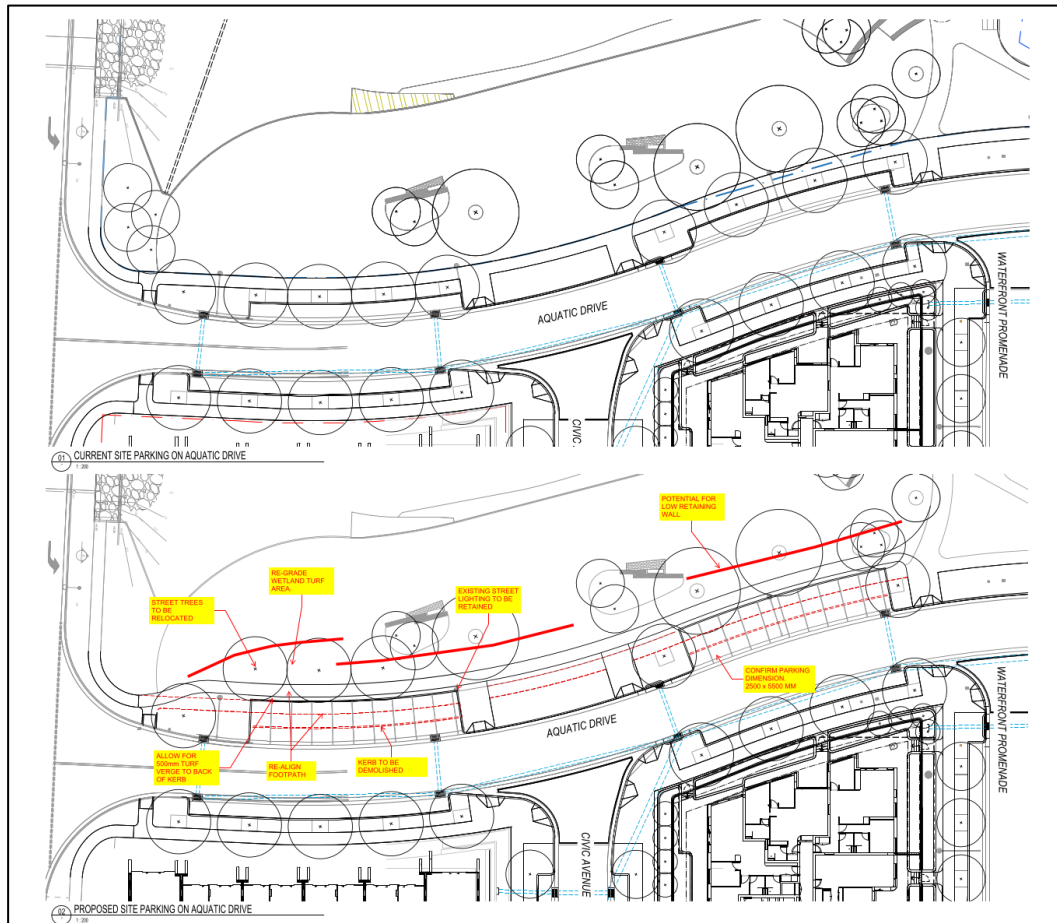


Figure 7: A sketch plan provided by the applicant demonstrating the current on-street parking on Aquatic Drive (top), and the proposed on-street parking configuration for Aquatic Drive (bottom).

- Changes to the Built Form and Façade Expression:** There are several design controls throughout the Precinct D UDGs, and the ADGs which require a high standard of coastal-influenced architecture, landscaping and materials at the site. The east façade design character was raised as a concern in Council's RFI dated 3rd June 2024, and the applicant has responded with amendments to the architectural design, which have demonstrated improved architectural expression to each façade, including the east elevation. Whilst the proposed architectural modifications are noticeable, they are required to be assessed on compliance with the relevant controls for the purpose of the ADGs and UDGs, rather than through a comparative assessment with the original design. It is this assessment which has led Council to be supportive of the proposed façade changes. The relevant controls and design components are discussed below:

- With regard to architectural expression, the Precinct D UDGs, sections 3.2, 4.1.2, and 4.3.3 require a 'coastal character' of high quality, including materials, planting, and architectural diversity to be provided.

Precinct D UDGs 3.2 Residential Area – 'Buildings have a high quality, coastal influenced architecture'

Precinct D UDGs 4.1.2 Materials and landscaping / DG1 – 'Materials, planting and design detail celebrate and represent the coastal character'

Precinct D UDGs 4.3.3 Architectural Design / PC1 – 'Provide architectural diversity complementary to the coastal setting'.

- With regard to landscaping, the ADGs include Objectives 4O-1 and 4P-3 which require a high standard of landscaping that is complementary to the architectural composure of the design.

ADGs Objective 4O-1 'Landscape design contributes to the streetscape and amenity'

ADGs Objective 4P-3 'Planting on structures contributes to the quality and amenity of communal and public open spaces'

- With regard to materials, the Precinct D UDGs, section 4.3.7 requires materials of high standard to complement the coastal vernacular.

Precinct D UDGs 4.3.7 Materials / PC1 – 'Buildings are to be constructed with materials that reflect the coastal vernacular'

Precinct D UDGs 4.3.7 Materials / DG1 – 'Buildings are to be generally constructed using primarily timber, ply, steel and glazing on the external façade. This does not preclude the use of other materials that reflect the coastal vernacular where appropriate. Indicative building materials are illustrated in Figures 23 and 24 below'.

The design has been amended through the assessment process and is considered to demonstrate the following merits of architectural, landscaping and material expression:

- The proposed design features a positive blend of architectural variation, with a variety of materials including various brickworks, metal cladding, and large glazed window designs.
- The proposed design is complementary to the coastal character through provision of large windows with vistas to the Shell Cove Marina, provision of articulated design components which prevent any 'domineering' appearance and assist in framing the development, and excellent use of balconies to enhance streetscape presence and outdoor functionality value.
- The design includes landscaping on the central components of Building B, and addressing the pedestrian connection to the Town Centre, contributing positively toward the streetscape amenity. The communal open space introduces excellent landscaping on-structure, improving amenity of the communal open space and occupant enjoyment of the coastal area through outdoor amenity. The design retains excellent street landscaping through street tree and planter beds throughout the development.
- The north, west and south elevations feature a reduction in cladding with a domineering appearance, in favour of a more varied and articulated design composed of increased presence of windows, brickwork and architectural expression. The choice to reduce cladding is positive with regard to reducing maintenance issues and improving the

longevity of materials, being located in a coastal setting with high weathering potential. The provision of brickwork increases visual appeal and provides a greater sense of craftsmanship to the design. In combination with the east façade, the design is considered to present a varied and articulated architectural expression to a high-quality standard.

- A distinct podium plinth and recessed level 1 has been provided, improving the visual appeal and assisting to break up each façade. These design components contribute toward an interesting and high-quality architectural expression.
- The design primarily utilises steel, glazing and brickwork, which is generally consistent with the materials required by the UDGs.
- 3D rendering of the west and east facades have been included below, which assist to show dimensional features of the architectural expression that are not captured through the 2D elevations. This highlights features such as curvilinear edges, and how the architectural expression complements the landscaping and pedestrian environment in the location.
- Comparisons of each façade are included below for visual consideration.

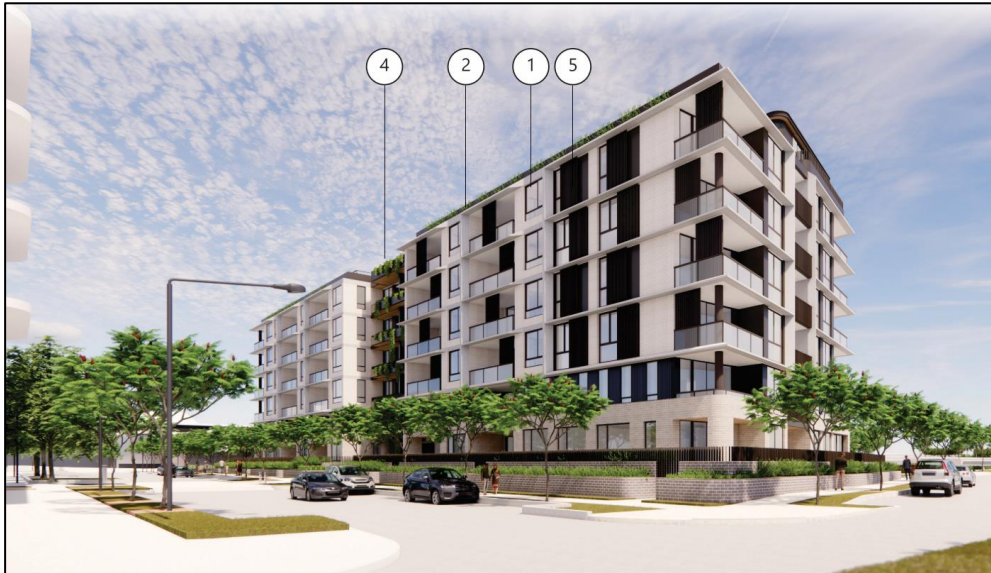
West Façade



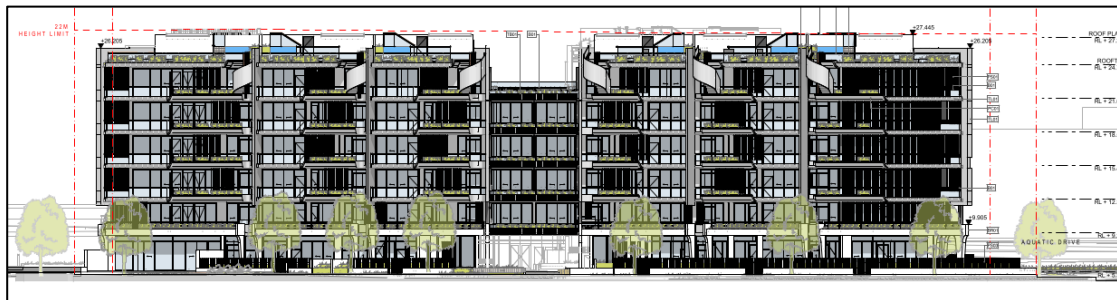


East Façade





East Elevation – Original Approval



East Elevation – Proposed Modification



West Elevation – Original Approval

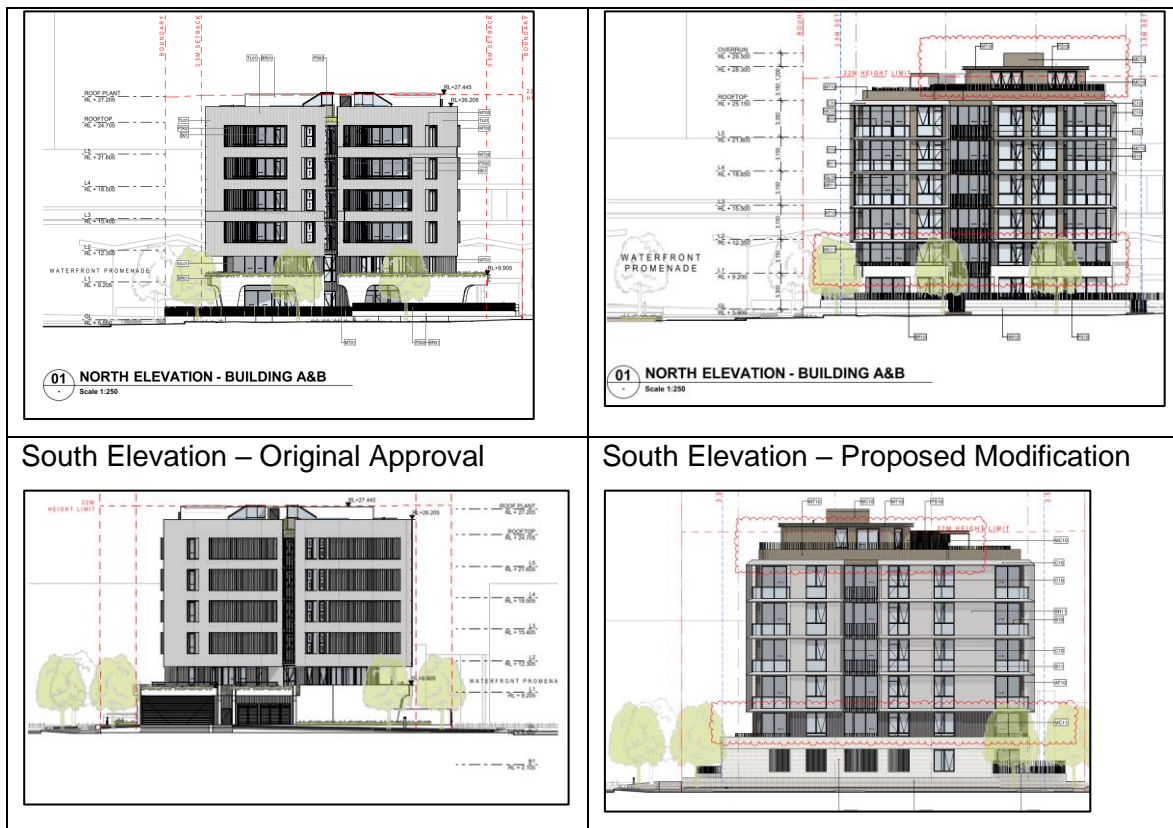


West Elevation – Proposed Modification



North Elevation – Original Approval

North Elevation – Proposed Modification



In this regard, the proposed amendments are considered to demonstrate suitable architectural, landscape and material expression along each façade, demonstrating consistency with each of the relevant controls, including the representation of a 'coastal character'. There is clear provision of positive design components, architectural variation, complementary landscaping and materials, coastal functionality, and visual appeal which contribute to a high-quality build with excellent architectural expression. Whilst the façade design changes are certainly noticeable between the original approval and proposed modification, their consistency with the aforementioned ADG and UDG controls is considered suitably compliant, and lead to Council's recommendation to support the proposed façade changes.

- **Solar Access Requirements:** The proposed modification has resulted in an increase to solar access non-compliance. Pursuant to ADG Objective 4A-1, 70% of apartments are required to achieve compliant solar access (3hrs between 9am – 3pm midwinter), while a maximum of 15% of apartments are permitted to receive no solar access between 9am-3pm midwinter. The original DA0350/2022 was approved with a variation to solar access for Building B, for the living area and POS, and for the percentage of apartments with no solar access. The proposed modification increases the non-compliances for solar access to living areas (32%, decrease of 6%), POS (39%, decrease of 4%), and no solar access (36%, increase of 7%). The following factors are considered to determine that the adjusted solar access provisions are considered acceptable on merit:
 - The proposed modification includes abundant provision of communal open space on the rooftop of Building B, with compliant solar access provisions to the COS. The rooftop provides an excellent opportunity for all residents to enjoy

solar access in an alternative open space setting within the building. In the original approval the main COS was provided within Building A and to be shared with Building B residents.

- The proposed modification retains compliance with the design guidance for ADG Objective 4A-1 *'achieving the design criteria may not be possible... where significant views are oriented away from the desired aspect for direct sunlight'*. This design guidance introduces an appreciation of the site context which may justify solar access variations. The original approval justified its solar access variations due to siting of the 11-storey hotel east of the site, and due to marina views being positioned on the east side of the site. The site context creates a circumstance where it is desirable to locate balconies along the east elevation to maximise view amenity, despite overshadowing effects from the hotel. This justification remains applicable to the proposed modification, as the hotel still obstructs the aspect for direct sunlight, however the modification retains large windows and balconies along the east elevation to maximise view amenity to the Marina.
- The original approval included the justification that *'high levels of daylight are provided directly through generously sized windows and glass doors'*. This justification is considered to remain applicable to the proposed modification, particularly noting the improvement in window areas along the general elevations. It is noted there appears to be a reduction in window area along the east elevation, however large windows are generally retained.
- The original approval included the justification that *'the proposal retains the majority of living areas along the external face of the development to maximise daylight access and views over the Shell Cove Marina and to the ocean to the east'*. This justification remains applicable to the proposed modification, with living area windows and POS sited in a similar manner.
- The original approval included the justification that the *'apartment layouts are functional and will be organised to provide a high level of internal comfort'*. Whilst the average size of apartments and balconies have reduced, all apartments retain compliant dimensions, and remain well organised in open-living arrangements to maintain internal occupant amenity. Notably, the provision of COS is considered an acceptable trade-off for reduction in excess balcony space.
- When extending the solar access hours to 8am – 4pm, and considering which units achieve at least 2 hours of solar access, Building B performs much better, with only 14% of units receiving no solar access, and 57% of units POS receiving at least 2 hours of solar access. Whilst not achieving compliance, it is important to consider that the design provides solar access amenity despite significant site constraints.
- The NSW Productivity Commission Report 'Review of housing supply challenges and policy options for New South Wales' recommends the relaxation of solar access requirements where clear design quality and merit-based deviations are demonstrated. The proposed modification is considered to demonstrate a justified variation in this regard.

On the balance of these considerations, Council has reached the position that the proposed solar access provisions are acceptable on merit. This position is reached through considering the context of the original approval justifications, the site

context, design merits, provision of COS with excellent solar access, and retaining compliance with the design guidance for ADG Objective 4A-1.

- **Deep Soil Requirements:** The proposed modification has resulted in a weakening of the deep soil zone variation. Pursuant to ADG Objective 3E-1, developments are required to provide 7% of the site area as a deep soil zone. The original DA0350/2022 was approved with a variation providing 3.4% of the site area as a deep soil zone. The original justification detailed that landscaping on site will permit healthy plant and tree growth despite the variation, providing 722m² of landscaping on site (8.7% of site area), including planting on structure.

The proposed modification retains a deep soil zone at 3.4% of the site area. The proposed modification initially reduced the landscaping area to 667m², however this has been amended to 692m² landscaping on site (7.7% of site area). Whilst the strength of the original justification is slightly weakened, it is important to note that:

- The proposal forms part of a concept approval and broader precinct which includes 43 hectares of public open space that residents will benefit from. This includes the Brindabella Wetlands and Public Reserve immediately north and west of the development site, in close proximity and with excellent amenity provisions.
- The reduction in landscaping provision is minor.
- The justifications for a variation within the original approval are still applicable: the provided landscaping will allow healthy plant and tree growth, the basement levels will provide benefits to the development and streetscape which outweigh the requirement for additional deep soil zones, and the development forms part of a larger master planned project which includes significant and substantial planting.
- The Deep Soil Zone percentage remains unchanged.
- The design achieves compliance with the design guidance for ADG Objective 3E-1 in that the building is a high-density build sited in a town centre, where the building typology and location have limited potential for deep soil access. Despite this limitation, the proposal provides acceptable stormwater management, and provides alternative forms of planting, including abundant planting on structure and in the public domain.

On the balance of these considerations, the proposed deep soil zone variation is considered to remain acceptable on merit.

- d) **Design Review Panel:** The SRPP had recommended that the DA modification be considered for referral to the Shellharbour Design Review Panel in the Panel Briefing meeting. The reasoning for this followed concerns that the modification was not consistent with the DRP's initial advice, and due to the nature of non-compliances with the ADGs and UDGs. With Council reaching a supportive position on ADG and UDG non-compliances, statutory requirements and the original DRP advice is considered below.

Pursuant to section 146(2) of the *State Environmental Planning Policy (Housing) 2021*, the applicant is required to provide a design statement to accompany the modification application. The design statement has verified that the qualified designer was involved and responsible for the design in the original DA approval, and the proposed

modification. Therefore, the DA modification is not required to be referred to the Design Review Panel.

Pursuant to section 146(3) of the *SEPP (Housing) 2021*, the consent authority may elect to refer a DA modification for a residential apartment to the relevant design review panel for advice before determining the DA modification. In this case, Council has elected not to refer the DA modification to the Shellharbour Design Review Advisory Panel. This decision was made after reviewing the original DRP comments and development assessment, with each DRP comment considered to have been satisfactorily addressed. The table below details how the DRP advice was considered (**Table 10**).

Council's Shellharbour Design Review Advisory Panel Policy specifically allows for staff discretion as to whether modified development is re-referred to the DRP.

The NSW Productivity Commission Report 'Review of housing supply challenges and policy options for New South Wales' also encourages leniency in the use of design panels, particularly where design quality is otherwise assured through use of a registered design practitioner and design quality regulations, which have been applied to the proposed modification.

With consideration of statutory requirements, all original DRP comments being satisfactorily addressed, and discretion and leniency afforded in choosing whether to refer a DA modification to the DRP, Council recommends that the SRPP supports the position to proceed without further DRP advice.

Table 10: Design Review Panel Advice and Commentary

DRP Comment	DA0320/2022 Comments	DAM0043/2024 Comments
Further development of building D3 (now identified as Building C) interface with public car park	Pockets of landscaping have been added to the parking area adjoining the retail units within the building. These landscaped areas will sit adjacent to the two access points to the car park, leading to steps and a ramp which provides access to the rear of the retail units, apartment lobby and the main pedestrian footpath along Civic Avenue.	No further comment – not relevant to proposed modification.
Improved communal open space to be provided throughout development	The details of communal open space provided with the application have been assessed. The communal open space is of a standard to be expected for the development including a variety of facilities and areas for residents.	The proposed development provides additional communal open space on the Building B rooftop, contributing positively towards the DRP advice.

Detail development of undercroft for Building D2 (now known as Building B)	Details of the undercroft area within Building B have been provided within the floor plans and landscape plans. The undercroft area will provide a pedestrian link through the site to the marina, public park and future community centre/library.	The proposed modification retains details on the undercroft area for Building B, i.e. through-site link, pedestrian accessibility, building entrances.
Further development of building D2 (now known as Building B) to meet ADG solar access and cross ventilation requirements	Non-compliance for solar access within Building B has been proposed and assessed as part of the application. During the pre-lodgement discussions the applicant has presented different options for the development of Building B, however due to the limits in height and number of storeys as required by the Concept Approval and the limitations of the future development to the north east of the site (hotel) the proposed design was considered the most appropriate and had the highest compliance rate in terms of solar access. Building B as proposed complies with cross ventilation requirements.	<p>The proposed modification achieves the following with regard to DRP advice:</p> <ul style="list-style-type: none"> - The proposal achieves compliant cross-ventilation for Building B - The site constraints noted in the original justification (hotel and marina views) still apply to the development, and affect compliance with solar access. - The proposed modification has increased potential for occupant amenity and solar access through provision of a rooftop Communal Open Space, which was previously private open space for individual units. - Upon re-assessment in Attachment F (ADGs), Council has reached a satisfactory assessment stance on the provision of solar access for Building B, thus requiring no further modification to the design in line with DRP advice, and Council's initial justifications.
Building D3 (now identified as Building C) to be development to provide a retail presence to the adjoining public car park	The retail units in Building C successfully turn the corners of the site at both the western and eastern ends. The back of house areas addressed the public car park which is reasonable for such small retail units. There is suitable pedestrian access	Not applicable – proposal does not modify Building C.

	from the car park to the Cove Boulevards elevation of Building C. This is compliant with the Design Guidelines as required by the Concept Approval.	
Detail refinement to improve amenity	Provided and considered acceptable	The proposed amendments to Building B are considered to provide a high level of detail and amenity, similar to the original DA approval.
Further detail information to document building materials/aesthetic resolution	Provided and considered acceptable	Details on the building materials have been provided for Building B façade modifications, and considered suitable. It's notable that the modifications have removed a lot of cladding, which is typically prone to weathering and deterioration, especially in a coastal location such as Shell Cove. The cladding has been replaced mostly with brickwork, which is anticipated to age better, and present better craftsmanship and visual appeal. The design is otherwise considered to present a high-quality architectural expression.

6. CONCLUSION

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

The key issues centre on consistency with the concept approval with regard to dwelling yield, building height and stories, and ADG and UDG non-compliances whereby satisfactory solutions or assessment stances have been reached in the course of assessment. Ancillary issues for consideration include whether the proposal meets the substantially the same test, and whether the proposal requires referral to the DRP, of which Council has reached a satisfactory assessment stance on both matters. On balance of these considerations, the proposed modification is considered suitable with regard to the site and locality, consistent with the Concept Approval, and suitably compliant with the relevant development controls.

It is considered that the key issues as outlined in Section 5 have been resolved satisfactorily through amendments to the proposal and/or in the recommended draft conditions at **Attachment A**.

7. RECOMMENDATION

It is recommended:

- That the Modification Application DAM0043/2024 for Modification to DA0350/2022 (Two residential flat buildings and one mixed use building comprising 155 apartments and 360sqm of retail space) – Modification to increase the number of apartments from 155 to 178, relocation of Building B basement driveway, reconfiguration of Building B basement, increase of communal open space, and modification to façade at 6 Civic Avenue be approved pursuant to section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, subject to the draft conditions of consent attached to this report at **Attachment A**.
- Pursuant to Clause 118 of the *Environmental Planning and Assessment Regulation 2021*, a notice of determination is to be prepared by Council following the Panel's determination of this modification application.

The following attachments are provided:

- Attachment A: Draft Conditions of consent
- Attachment B: Modified Plans
- Attachment C: Plan Comparison Table
- Attachment D: Shell Cove Concept Approval Assessment Table
- Attachment E: Shell Cove Precinct D Urban Design Guidelines Assessment Table
- Attachment F: Design Principles for Residential Apartment Development and Apartment Design Guidelines (SEPP (Housing) 2021) Assessment Table
- Attachment G: Shellharbour Local Environmental Plan 2013 Assessment Table
- Attachment H: Shellharbour Development Control Plan 2013 Assessment Table
- Attachment I: Restrictions on Title