

Central Coast

Local Planning Panel

Central Coast
Local Planning Panel Meeting
Supplementary Business Paper
23 June 2022



Meeting Notice

**The Local Planning Panel Meeting
of Central Coast
will be held remotely - online,
Thursday 23 June 2022 at 2.00 pm,**
for the transaction of the business listed below:

3 PLANNING REPORTS

- 3.1 DA/47946/2015 -10-16 Painters Lane, Terrigal - Modification of Consent for Commercial Premises and Shop Top Housing 4

Donna Rygate
Chairperson

Supplementary Agenda Version History

Version	Date published	Details
1 (this version)	20/06/2022	Supplementary agenda published to include two pages (pgs.26 and 27) and subsequent repagination of report, to correctly reflect the report content. These pages were inadvertently not included during the creation of the agenda papers, but were part of the finalised report.

Note: Whole of Meeting Agenda published 16/06/2022 and available online:
<https://centralcoast.infocouncil.biz>

Item No: 3.1
Title: DA/47946/2015 -10-16 Painters Lane, Terrigal -
Modification of Consent for Commercial Premises
and Shop Top Housing

Department: Environment and Planning

23 June 2022 Local Planning Panel Meeting

Reference: DA/47946/2015/A - D14970574
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Executive: Alice Howe, Director Environment and Planning

Summary

An application has been received for modification of consent for DA/47946/2015 for Commercial Premises and Shop Top Housing on 10-16 Painters Lane, Terrigal. The application has been examined having regard to the matters for consideration detailed in section 4.15 and 4.55 of the *Environmental Planning and Assessment Act 1979* and other statutory requirements with the issues requiring attention and consideration being addressed in the report. The application is recommended for refusal.

The application is required to be referred to the Local Planning Panel due to the number of public submissions in excess of 10. Twenty-two submissions have been received.

Applicant	J Hancock
Owner	D Seraglio
Application No	47946/2015/2
Description of Land	Lot 23 DP 1204364, Lot 2 DP 349187, Lot B DP 347709, Lot 8B DP 412722, Lot C DP347823, No 10-16 Painters Lane, Terrigal
Proposed Development	Modification of consent
Site Area	2212.6m ²
Zoning	B2 Local Centre
Existing Use	Vacant
Employment Generation	No
Estimated Value	\$9,800,000.00

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Recommendation

- 1 That the Local Planning Panel refuse consent to DA47946/2015/2 for modification of commercial premises and shop top housing on 10-16 Painters Lane Terrigal for the reasons in the attached schedule and having regard to the matters for consideration detailed in Section 4.15 and 4.55 of the Environmental Planning and Assessment Act 1979.**
- 2 That Council advise those who made written submissions of the Panel's decision.**

Key Issues

- Whether the proposed modification is substantially the same development.
- Floor space ratio
- Building bulk and scale
- View/visual impact
- Issues raised in public submissions

Precis:

Proposed Development	Commercial premises and shop top housing
Permissibility and Zoning	Permissible with consent under B2 zone
Relevant Legislation	<ul style="list-style-type: none"> • <i>Environmental Planning & Assessment Act 1979 – Sections 4.15 and 4.55</i> • <i>Local Government Act 1993 – Section 89</i> • <i>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</i> • <i>State Environmental Planning Policy (Coastal Management) 2018</i> • <i>Gosford Local Environmental Plan 2014</i> • <i>Gosford Development Control Plan 2013</i> • <i>State Environmental Planning Policy (SEPP) No 65 - Design Quality of Residential Apartment Development</i>
Current Use	Vacant
Integrated Development	No
Submissions	Twenty-two (22)

Variations to Policies

Clause 4.3 and 4.4	Height of Building and Floor Space Ratio
Standard	RL 23.6m and 2.3:1
LEP/DCP	Gosford Local Environmental Plan 2014
Departure basis	Nil to 2.42m or 10.2% (Lift Overrun)

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The Site and Surrounding Development

The site is located on the south-eastern side of Painters Lane and adjoins other holdings that together comprise the "Rapedo" site, which is the subject of a previous masterplan. The larger Rapedo holdings have an area of approximately 7,658m², and contain a number of separate development sites with frontage to Painters Lane and Campbell Street, Terrigal along with lesser frontages to Terrigal Esplanade.

The development area, subject of this application, is identified as Buildings 3 & 4 (refer to Figure 1), which have a frontage of 53.04m to Painters Lane, and a combined area of 2,212.6m².



Figure 1 - Rapedo Masterplan

The site has frontage to Painters Lane with access to Campbell Crescent via a right of way over the adjoining sites which form part of the wider Rapedo development.

The site falls from about RL 16 at Painters Lane to about RL 6.5 at the rear boundary with the right of way.

Adjoining the development site to the north-east is (Figures 2 and 3):

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- Proposed Building 2 (DA47945/2015), which is located at a lower level down Painters Lane.
- Beyond that is proposed Building 1 (DA47944/2015), a residential unit development and retail/ commercial development fronting Terrigal Esplanade.
- To the south-east there are two existing residential/commercial buildings fronting Campbell Crescent.
- To the south-west is the vacant land with approval for serviced apartments.
- To the north-west, on the opposite side of Painters Lane, is residential development including residential flat developments and elevated dwelling houses.

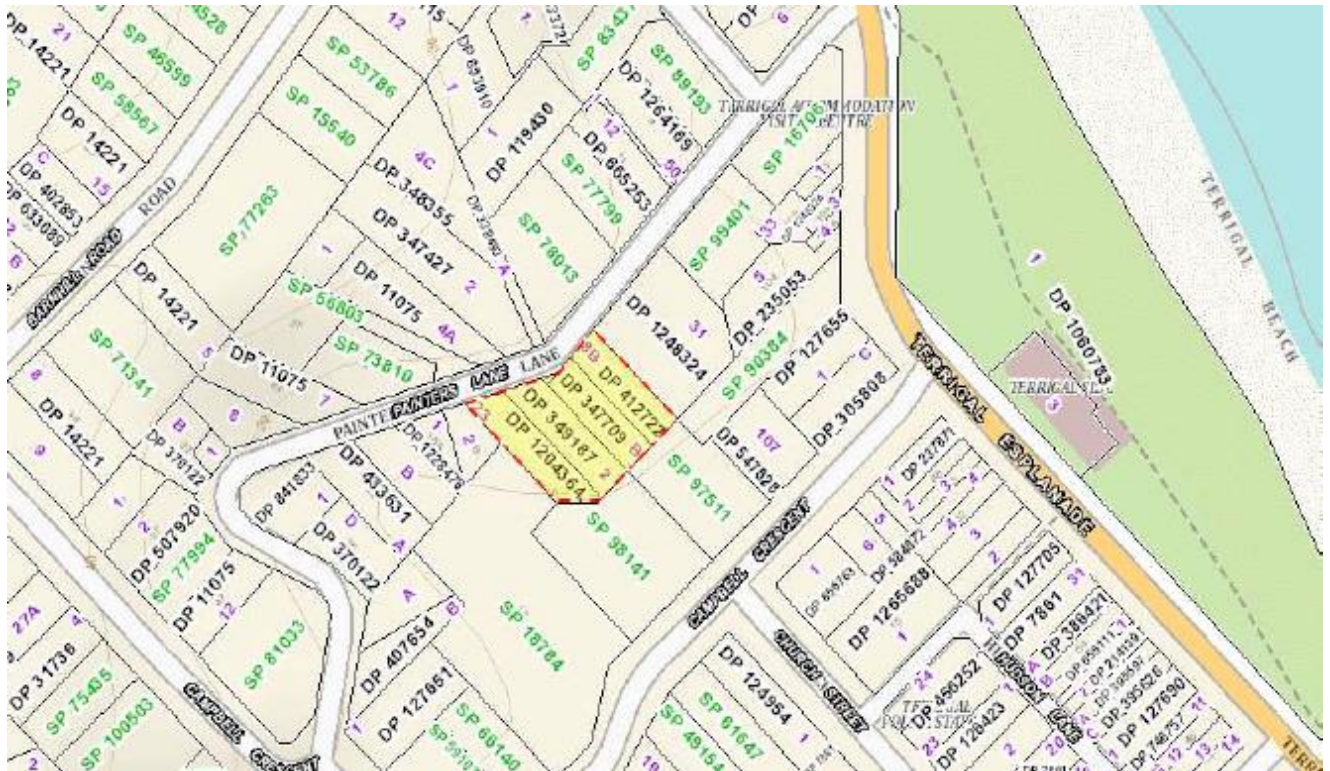


Figure 2 - Land Subject to Proposed Development



Figure 3- Aerial Photo

History

Zoning history

Until 2002, the entirety of the Rapedo site, including the land the subject of this application, was zoned to permit residential flat buildings and other development to a maximum height of 10m, with design requirements under the [then] *Gosford Development Control Plan No. 100*. These statutory controls extended across much of the area surrounding Terrigal Central Business District and examples of development approved under these controls include the 'Star of the Sea' residential resort complex.

In 2000-2001, the whole of the Rapedo Site was subject of detailed urban design investigations culminating, initially, in the gazettal of *Local Environmental Plan Amendment No. 489* in 2002. That LEP amendment introduced a site specific maximum height control of 23.6m AHD and a floor space ratio (FSR) of 2.3:1.

By its gazettal, *Gosford Local Environmental Plan 2014 (GLEP 2014)* zoned the whole of the Rapedo land B2 – Local Centre. The site retains its FSR (2.3:1) and height (23.6m AHD) controls for the whole of the Rapedo Lands under *GLEP 2014*.

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Development approvals

There have been multiple development schemes over the years for the larger Rapedo site.

The current approach to developing the site is for separate development applications for separate development sites, which are primarily residential, with retail/commercial along Terrigal Esplanade and the ground floor of the Campbell Crescent frontage:

- Approvals have been issued for two residential flat buildings fronting Campbell Crescent, with ground floor retail space. These developments have been completed and are each six storeys with a vehicular driveway in between the buildings providing access to car parking and waste collection for a number of buildings on the site.
- A three storey serviced apartment development with two units has been approved on No. 18 Painters Lane.
- At 100–102 Terrigal Esplanade, a three storey development with retail/commercial and a top floor residential apartment has been constructed.

Previous development applications over the subject land are set out below:

DA47946/2015 (Approved on 17 December 2015)

The approved development was for a mixed use development with 31 shop top housing units above a 145.7m² commercial office space (Figures 4 and 6). The approved development consists of two separate buildings located over combined lower levels containing car parking and the commercial premises. The development presents as two storeys to Painters Lane and there is an additional residential level below that which is located partly below the street level. There are two parking levels below that, which are oriented to the south-west and Campbell Crescent. The elevation to the south-east, toward Campbell Crescent is five storeys. Vehicular access is provided from Campbell Crescent via an access driveway and parking is provided for 61 cars, including 10 stacked spaces (5 x 2 spaces).

The shop top units are located on levels above the commercial space, with entry provided from Painters Lane. The approved proposal consists of 14 units in Building 3 and 17 units in Building 4, comprising 1 x 4 bedroom unit, 2 x 2 bedroom + study units, 19 x 2 bedroom units and 9 x 1 bedroom units.

Buildings 3 and 4 have an internal separation of 6.5m and the buildings maintain the same setbacks at each level.

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The Proposed Development (Modification to Approved DA/47946/2015)

The original application lodged and exhibited proposed a reduction in building setbacks as well as the reduction in separation of the buildings and the addition of a lift between Building 3 and Building 4.

Upon preliminary review, Council advised that the proposed modification to the development was unlikely to be supported.

The applicant amended the plans to retain or increase the building setbacks but not the separation between them. The amended plans were not advertised as the amendments were considered to be relatively minor, made an improvement to the overall design and addressed some of the issues raised in public submissions.

The proposed modifications, for consideration, include (Figures 5 and 7):

- a reduction of residential units from 31 to 23
- relocation of four residential units to the ground floor level
- increasing excavation and providing parking spaces in an additional basement level
- increasing commercial office space for adaption to the demands of the 'work from home' executive
- changes to architectural features including a glass framed lift well from Level 1 to roof top, improved articulation and building elevations

The assessment is based on the amended plans in Attachment 1.

A set of approved and proposed comparison plans are included in Attachment 2.



Figure 4 – Approved Elevation Painters Lane

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Figure 5 - Proposed Elevation Painters Lane



Figure 6 - Approved Eastern Elevation



Figure 7 - Proposed Eastern Elevation

ASSESSMENT

Having regard for the matters for consideration detailed in Section 4.15 and Section 4.55 of the *Environmental Planning and Assessment Act 1979* and other statutory requirements, the assessment has identified the following key issues.

Section 4.55(2) Assessment Considerations

The proposal is required to be assessed having regard to Section 4.55(2) of the *Environmental Planning and Assessment Act 1979*, which enables a consent authority to modify a development consent upon application being sought by the applicant or any person entitled to act on the consent, provided that the consent authority:

- (a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*
- (c) *it has notified the application in accordance with—*
 - (i) *the regulations, if the regulations so require, or*
 - (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*
- (d) *it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

Therefore, Council's assessment of the application to modify the subject development consent must consider the following issues:

1. Is the proposed development as modified substantially the same development approved by Council?
2. Consultation with other authorities.
3. Responses to notification of proposed modification in accordance with relevant policies.
4. Consideration of relevant matters under section 4.15(1) of the *Environmental Planning and Assessment Act 1979*.

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Each of these matters is dealt with separately below.

CONSIDERATION 1 - Is the proposed development as modified substantially the same development approved by Council?

Section 4.55(2) of the *Environmental Planning and Assessment Act 1979* provides that a consent authority may, on application being made by the applicant, modify a development consent if it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted.

The Land and Environment Court (LEC) consistently describes Section 4.55 (formerly Section 96) of the *Environmental Planning and Assessment Act 1979* modification provision as "*beneficial and facultative*". It is designed to assist the modification process rather than to act as an impediment to it:

'It is to be construed and applied in a way that is favourable to those who seek to benefit from the provision' (North Sydney Council v Michael Standley & Associates Pty Limited [1998]).

Therefore, the modification power is there for a reason, namely, to avoid the full development application process that is always otherwise available.

Nevertheless, there are legal tests that need to be satisfied before a modification application can be considered on its merits. Firstly, a proposal can only be regarded as a modification if it involves '*alteration without radical transformation*' (Sydney City Council v Ilenace Pty Ltd [1984]). If the proposed changes result in a '*radical transformation*', they will need to be dealt with as a new development application, rather than a modification application. The term '*radical transformation*' is a very broad term, leaving much scope to change a development consent via Section 4.55.

Secondly, the consent authority must also be '*satisfied*' that the modified development will be '*substantially the same development*' as authorised by the original development consent. A threshold exercise requirement that the consent authority be satisfied as to a subjective matter before it proceeds further with its merit assessment is to compare the proposed modified development against the development as it was originally approved.

In addition, the environmental impacts of the proposed modification are relevant to the legal question of whether it is '*substantially the same development*'. This means it is possible for some issues that might be characterised as '*merit*' issues, to also arise in addressing the '*substantially the same*' test.

In the case *Moto Projects (No 2) Pty Ltd v North Sydney Council* 1999, the LEC said that any comparison exercise cannot be undertaken in a sterile vacuum. Rather, the comparison involves consideration of quantitative and qualitative elements of the development. These

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elements must be considered in their proper contexts – which include the circumstances in which the development consent was granted (i.e. all of the changes to the consent should be considered, not just changes to plans.)

The task of comparing the modified and originally approved development involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison will need to involve both *'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)'* (Moto Projects (No.2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; 106 LGERA 298 at [56]).

Chief Justice Preston reiterated the statutory approach, with reference to relevant sections of the *Environmental Planning & Assessment Act 1979* in *Arrage v Inner West Council* [2019] NSWLEC 85 at paragraphs [24-28]. Those paragraphs are outlined below:

24. *'First, the essential elements to be identified are not of the development consent itself, but of the development that is the subject of that development consent. The comparison required by s 4.55(2) is between two developments: the development as modified and the development as originally approved: see Scrap Realty Pty Ltd v Botany Bay City Council (2008) 166 LGERA 342; [2008] NSWLEC 333 at [16].*
25. *Second, the essential elements are not to be identified "from the circumstances of the grant of the development consent"; they are to be derived from the originally approved and the modified developments. It is the features or components of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development.*
26. *The choice of language in the judicial decisions of "material and essential features" or a "material and essential physical element" of the development (see, for example, Moto Projects at [58], [59] and [64]) derives from judicial interpretations of the statutory test that the modified development be "substantially the same" development as the originally approved development. In Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8, p 2 Stein J interpreted the word "substantially" in the former s 102(1)(a) of the EPA Act to mean "essentially or materially or having the same essence". That interpretation of the word "substantially" was accepted in North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 475 by Mason P (with whom Sheppard AJA agreed at 403) and at 481-482 by Stein JA and in Moto Projects by Bignold J at [30] and [55].*

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27. *This interpretation of the statutory test that the modified development be substantially the same development as the originally approved development, that the modified development be “essentially or materially” the same or “having the same essence” as the originally approved development could support an inquiry to identify the material and essential features of the originally approved and modified developments in order to undertake the comparative exercise required, but it does not demand such an inquiry.*
28. *That is one way, probably in most cases the most instructive way, to identify whether the modified development is substantially the same development as the originally approved development, but it is not the only way to ascertain whether the modified development is substantially (in the sense of essentially or materially) the same development as the originally approved development. For example, comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development: see Moto Projects at [62] and Tipalea Watson Pty Ltd v Ku-ring-gai Council (2003) 129 LGERA 351; [2003] NSWLEC 253 at [17].*

A qualitative and quantitative analysis between the development as originally consented to and the proposed modification is required, and the modification must render the altered development ‘essentially’ or ‘materially’ the same.

Having regard for paragraphs 24 and 25 above, the proposed modifications to the development as originally approved and proposed are as follows (refer to Attachment 2 for comparison of the approved and proposed plans):

Development	Approved	Proposed Modification	Difference
Site Area	2053.7m ²	2212.6m ²	158.9m ²
No. of Units	31	23	-8
Unit Types	9X1 bedroom 11X2 bedroom 11X3 bedroom	3X1 bedroom 4X2 bedroom 10X3 bedroom 4X4 bedroom 2X5 bedroom	-6 -7 -1 +4 +2
Commercial Area	129.9m ²	280.7m ²	+ 150.8m ²

3.1

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Development	Approved	Proposed Modification	Difference
GFA	2757.9m ²	4626.2m ² (includes 687.5m ² excess car parking.	+1868.3m ²
Building Height-Roof	RL23.6	RL23.6	Nil
Building Height Lift overrun	RL 26.0m	RL 26.02m	+0.02m
Number of storeys	5	5	Nil
Floor Space Ratio	1.34:1	1.78:1 (2.09:1 Including excess car parking)	+0.75:1
Landscape Area		452.6m ² (20.4%)	
Deep Soil planting		171.6m ² (7.75%)	

In addition to the amendments set out in the table above, every floor of the approved development design is proposed to be modified as part of the current application. A summary of the amendments for each level of the development, is listed in the table below page (refer to Attachment 2 for the comparison plans).

Level	Approved	Proposed
Basement	No Basement	22 car spaces
Lower Ground Level	29 car spaces No car lift 129.9sqm office 1 lobby Lift for each separated building 1 Vehicular Access	26 car spaces Car lift 202sqm office space (including fit out) 2 Lobby areas Relocation of 1 passenger lift to the central location Two vehicular accesses
Ground floor	32 car spaces No units No balconies	12 car spaces 4 units Balcony design changes Façade changes in materials and design
Level 1	9 units	8 units Relocation of services Redesign of whole floor in term so cross ventilation, access, privacy Walkways and central lift Façade changes in materials and design
Level 2	11 units Lift located in each separate block.	6 units Balcony redesign, Façade changes in materials and design

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Level	Approved	Proposed
Level 3	11 units	5 units Balcony redesign, Façade changes in materials and design
Roof level	Roof top terrace	No terrace

The modification proposes to reduce the number of units (from 31 to 23) which reduces the car parking requirements. However, the proposal aims to reduce parking by one space (from 61 spaces to 60), and alter the design from one vehicular entry to two. It could be argued that the additional parking and amendment to vehicular access points is beneficial to the design overall, but in the context of determining whether the proposed development is substantially the same. This amendment only emphasises that the design amendment results in significant modifications - highlighting that the proposal is not substantial the same development.

In conjunction with the increase the commercial floor space, the additional basement level, the reduction in the building separation and the lift tower and walkways all add to the bulk and scale of the proposed development. Although there is no change in overall height, there is a change in the visual bulk and building footprint.

The change in design to now block the 'view corridor' between the two buildings (with a lift and pedestrian walkways) is a significant change to the design and goes against the approved plans to keep this corridor open. This corridor was highlighted in the original approval in both the separation distance of 6.5m and also under the view assessment as important aspect of the original design (refer page 9 of original assessment report, at Attachment 5). The installation of a lift tower does not itself result in a significant impacts itself, but it is the design of the lift tower represents a significant change in the design.

The reconfiguration of the development increases FSR, while reducing unit numbers. Gross Floor Area (GFA) is significantly increased (by more than 1,868m²).

The cumulative changes to the original approved development are considered to result in a substantially different development to that which was originally approved and are considered to alter the essential elements of the originally approved development.

The consequences of carrying out the modified development, compared to the originally approved development, will be noticeable, particularly in relation to the overall scale, the reduction in setbacks and the lift tower between the buildings, resulting in loss of the 'view corridor' between the buildings that was a key design feature.

It is considered that the bulk and scale of the development as perceived from surrounding viewpoints from both public and private property will significantly and materially change

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under the proposed modifications. The scale and external appearance of the proposal are different that originally approved.

As a result, it is considered the proposed modification is not substantially the same development, as the proposed changes have additional impacts on adjoining developments and the locality due to increase in bulk and scale and FSR.

A quantitative and qualitative assessment of the proposed modification concludes that the proposal is not substantially the same development.

CONSIDERATION 2 - Consultation with other authorities.

No consultation was required with other authorities.

CONSIDERATION 3 - Notification of proposed modification.

The proposed modification was notified and 22 public submissions were received. The issues raised have been are considered (refer to the Public Submissions section later in this report).

CONSIDERATION 4 - relevant matters under section 4.15(1) of the EP&A Act 1979

Section 4.55 (3) reads:

'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) requires the consent authority to consider matters referred to in Section 4.15(1) as are relevant to the application for modification of the development consent. The modification has been assessed against the matters for consideration under Section 4.15 of the Act and found to be unsatisfactory with regard to impacts including, visual impacts and bulk and scale impacts and compliance with planning controls. These are discussed further in the report. Additionally, consideration must be given to the reasons for the granting of the original approval.

Although there were no formally specified reasons for the granting of the original consent, a review of the report for the originally approved application has been undertaken and the conclusion and findings of that original assessment have been taken into consideration as part of the assessment of the subject application.

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State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

The application is supported by an amended BASIX certificate which confirms the proposal will meet the NSW Government's requirements for sustainability, if built in accordance with the commitments in the certificate.

The proposal is considered to be consistent with the requirements of *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*.

State Environmental Planning Policy (Resilience & Hazards) 2021

The subject land is located within the 'coastal environment area' and 'coastal use area' as identified in the *NSW Coastal Management Act 2016*.

A such, the provisions of Chapter 2 of *State Environmental Planning Policy (Resilience & Hazards) 2021* requires Council to consider the matters set out in Section 2.10 of the SEPP (with regard to development in the coastal environment area) and Section 2.11 of the SEPP (with regard to development in the coastal use area)

The relevant matters have been considered in the assessment of this application. The application is considered consistent with the stated aims and objectives.

The original application was assessed under the provisions of the former *State Environmental Planning Policy No. 71 – Coastal Protection* (SEPP 71). The proposed amendments do not alter the assessment of the application against the relevant provisions of the former SEPP or raise any additional issues.

State Environmental Planning Policy (SEPP) No 65 - Design Quality of Residential Apartment Development

This policy applies as the building is a residential flat building more than three storeys in height. The application has been considered by Council's architect with the following key points noted:

The amended application proposes the following:

- Increase in the site area from 2057m² to 2212m² achieved by moving the laneway boundary further to the south west.
- An additional basement carpark level for 22 cars accessed by a car lift.
- Enlarging units and reducing unit numbers from 31 to 23, increasing the building footprint on the south and increasing FSR from 1.34:1 to 2.09:1.

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- Addition of pedestrian bridges on the first, third and roof levels between the two buildings and the addition of a central lift between the buildings.

Context and Neighbourhood Character

The approved application provided a 6.5m-wide gap between the buildings to provide a view corridor from Painters Lane and to disguise the bulk and scale of the development.

The addition of a lift, connecting walkways and enlargement of balconies on levels 1 and 2 have eliminated this view corridor and increased bulk and scale and the amended application is now considered inconsistent with the desired character and the approved application.

Built Form and Scale

Proposed side setbacks are approximately 3m, which is 50% non-complying with the Apartment Design Guidelines (ADG), but consistent with the approved application and therefore considered acceptable.

The south western boundary has been moved further south towards the adjoining site. This has reduced the proposed building separation has been increased to approximately 9metres with landscaped screening added to improve privacy and outlook and is now considered acceptable.

An external lift and pedestrian bridges are now proposed within the 6m gap between the two buildings. This originally provided a view corridor between the buildings and disguised the visual scale. The proposed bridges and lift obstruct any views between the buildings and add visual bulk and scale and are not supported.

Density

Has been increased from 1.34:1 to 2.09:1. Though this complies, when combined with the loss of the view corridor and other detrimental impacts on adjoining sites, it indicates the application is an overdevelopment of the site.

Sustainability

BASIX certificate supplied indicating compliance with minimum sustainability requirements.

Landscape

The landscaping between public and private spaces on level one is located on the slab and is unlikely to achieve the size necessary to provide screening or disguise the bulk and scale resulting from increased building footprint, FSR and the removal of the view corridor.

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Amenity

Inadequate building separation results in visual and acoustic privacy conflicts between adjoining sites and between units within the site.

Safety

Acceptable. Upper level units have windows and balconies overlooking the entry and street to increase surveillance of public areas.

Housing Diversity and Social Interaction

The application provides a mix of one, two, three and four bedroom units and adaptable units for different needs of occupants.

Aesthetics

Acceptable subject to addressing issues raised under Built Form and Scale. The stepped profile recessed and articulated facade and variations in material and colours attempt to break up and disguise the scale resulting from non-compliance but are not an adequate response to this problem.

Conclusion & Recommendation from Council's architect

The addition of the external lift and walkways within the former through site link is a major change to the approved application. It results in significant loss of amenity for adjoining sites, adds to bulk and scale and is inconsistent with the desired character.

The increase in FSR and built area could only be considered if the external lift and walkways are removed and the approved through site link is fully restored.

Detrimental impacts resulting from non-compliance are not supported. The application should comply with approved setbacks on all boundaries.

The amended application is not supported.

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Gosford Local Environmental Plan 2014 - Permissibility

The subject site is zoned *B2 Local Centre* under the provisions of *GLEP 2014*.

The proposed development is defined as '*commercial premises*' and '*shop top housing*'.

The proposed development is permitted with development consent.

Gosford Local Environmental Plan 2014 - Zone Objectives

The objectives of the B2 Local Centre zone are:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To provide for residential uses, but only as part of a mixed use development.*
- *To ensure that development is compatible with the desired future character of the zone.*
- *To promote ecologically, socially and economically sustainable development.*
- *To ensure that the town centres of Erina and Woy Woy are recognised as providing a higher level, and greater diversity, of services and facilities to serve a wide population catchment from numerous localities and as key public transport nodes, secondary to Gosford City Centre.*
- *To ensure that village centres such as Avoca, East Gosford, Ettalong Beach, Kincumber, Lisarow, Niagara Park, Terrigal, Umina Beach, West Gosford and Wyoming are recognised as providing a broad range of services and facilities to serve the population of the locality.*
- *To ensure that villages are recognised as providing local level services and facilities and are developed at a scale that reflects their population catchment and as a focus for public transport routes.*
- *To ensure that the different roles of villages are recognised with some villages being key tourist destinations with boutique activities in addition to serving the needs of local residents, while other villages are purpose-built centres to serve the needs of the local population.*
- *To encourage the residential population of villages and town centres to contribute to the vitality of those locations.*

The proposed modified development is incompatible with the desired future character of the zone in this location proposed modifications which result in addition bulk and impacts on the approved open corridor between the buildings.

The modified scale and external appearance of the proposal is not respectful of future expected development on surrounding land, particularly land that is upslope of the subject site. The proposed modification to close in the open corridor between the buildings results in additional bulk and impacts negatively to the external appearance of the proposal.

Gosford Local Environmental Plan 2014 – Development Standards

The following table provides an analysis against the development standards (Height of Buildings and Floor Space Ratio) as set out in GLEP 2014.

Development Standard	Required	Approved	Proposed	Variation to development standard	Compliance with Objectives
Clause 4.3 Height	RL 23.6m	Roof-RL 23.6m (Lift overrun RL 26.0m)	Roof-RL23.6m (Lift Overrun RL24.7m and 26.02m)	Yes	Yes
Clause 4.4 FSR	2..3:1	1.34:1	2.09:1	Yes	Yes

Height

The current approved building height is 23.6m with lift overrun to RL 26.0m. This was a variation to the development standard of up to 2.4m or 10.1%. The current application to modify the approved development results in an increase in height of 0.02m to the lift overrun. The lift overruns coverage is approximately 0.5% only of the site area.

The increase in height to the approved development is minor or negligible.

In considering the additional building height, there is established case law that a variation to development standards is not required for a modification under Section 4.55. (NSW Court of Appeal *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998), and the Land and Environment Court *Gann v Sutherland Shire Council* (2008)). However, Council is still required to undertake an assessment of the variation and its impact under Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

In this case:

- The proposed increase in height results in no increase in overshadowing; and
- The increase in height and the lift overruns is only over a total area of about 12.1m² towards the centre of the roof area has no increase in shadow impact on the adjoining sites.

It is noted that although the height does, in itself, not cause any impacts, the design of the lift tower is not supported.

Floor Space Ratio

In considering the additional Floor Space Ratio (FSR), as discussed above there is established case law that a variation to development standards is not required for a modification under

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Section 4.55. However, Council is still required to undertake an assessment of the variation and its impact under Section 4.15 of the *Environmental Planning and Assessment Act 1979*.

The proposal results in a significant increase in floor space and FSR due to the additional levels and increase in car parking. The increase in FSR, reduction in distance between Building 3 and Building 4 and the addition of the lift /connection between the two buildings add to the bulk and scale of the proposed building particularly when viewed from Painters Lane and Campbell Crescent.

Draft Central Coast Local Environmental Plan 2018

Draft Central Coast Local Environmental Plan 2018 (Draft CCLEP 2018) was adopted by Council at its meeting of 14 December 2020. Gazettal is anticipated in mid-2022, and has been considered during the assessment of the application.

Draft CCLEP 2018 does not propose a change to the zoning of the site or significant change to other relevant statutory matters.

Gosford Development Control Plan 2013

Chapters 2 and 4.3 and the environmental and parking controls under GDCP 2013 are relevant to the application.

The land is located in the 'Mainstreet Centre' character area, which encourages on going mixed use, including accommodation for residents and visitors, with high levels of street activity and improved standards of amenity and design.

The location of the site is on the fringe of the commercial area, at an interface with residential areas, and is not a primary 'mainstreet' location.

The proposed modification is not consistent with the desired character as:

- The lift tower and walkways result in an intrusive building form that impacts adversely on the *views that are enjoyed from surrounding hillside dwellings* and on the *informal scenic qualities of the foreshore setting*.
- The building form does not step the top level back from all site boundaries in accordance with that required in the DCP.
- The modified development is not sensitive to the topographic or scenic context, does not respect visual amenity nor maintain the pedestrian friendly scale of existing one and two storey shop front developments being visible as a backdrop.

Gosford Development Control Plan Chapter 4.3 – Terrigal Village Centre

GDCP 2013 Chapter 4.3 has the following objectives:

- *Ensure that future buildings neither dominate this coastal setting nor intrude unreasonably onto coastal and ocean views that are available from surrounding residential hillsides, and*
- *Promote the highest standards of urban and architectural design quality.*

The proposal does not meet the intent of these objectives in that design modifications intrude upon the views from surrounding properties and do not contribute to a high standard of design suitable for the scenic qualities of a foreshore setting.

Clause 4.3.4.3 (Controls – Desired character of buildings)

This clause states development should:

Provide a backdrop that is appropriate to the scenic quality of this coastal setting

- Limit overall height to maintain existing street-level amenity and to prevent unreasonable obstruction of coastal and ocean views that are available from surrounding residential hillsides*
- Vary the profile and silhouette of buildings within a framework set by height and building envelope controls*

The proposal does not satisfy the above controls as the design modifications and floor area obstructs views that are available from surrounding properties and the proposal does not conform to the framework set by the FSR and building envelope controls.

Side Setbacks

The approved development approved a variation to the side setbacks under the DCP. A 4m setback is required at lower levels to residential development, stepping in at upper levels. The approved north-eastern side setback from Building 3 is 3.1m, the rear setback is 6m (which complies) and the south-west side setback from Building 4 is 3m. There is a setback of 6.5m between Buildings 3 and 4. The proposed side setbacks were considered acceptable given the orientation of the units and the treatment of the interface of buildings to the side boundaries.

The proposed modification generally retains or increases the boundary setbacks. The proposed modification reduces the building separation between Buildings 3 and 4 from 6.5m to 6m and adds a lift which impacts the bulk and scale of the proposed development. This is not supported.

Public Submissions

The application was advertised from 27 October 2021 to 24 November 2021 and 22 public submissions were received.

The following is a summary of the issues raised in the submissions, with comments where appropriate:

1. The lift overrun changes the look, bulk and scale of the building.

Comment: The addition of lift and walkways (and other design modifications) result in the building appearance being amended so as to be different than that which was initially approved. Significantly, the proposal has substantially removed the building separation and 'visual corridor' that was a key component of the originally approved design. Assessment staff are of the view that the amended development, as proposed, does 'change the look' of the building.

2. The additional lower levels may be underground with impacts on amenity.

Comment: The residential units on the ground floor are orientated to Campbell Crescent and not the excavation behind.

3. The proposal backs onto a residential street and is visible from many residential units which overlook the site.

Comment: The proposed building will appear as a two storey building when viewed from Painters Lane (Figure 8). However, the reduction in separation distance between Buildings 3 and 4 from 6.5m to 6.0m and the addition of a lift structure between the buildings adds to the bulk and scale to that previously approved.

Land on the western or opposite side of Painters Lane rises significantly in height above the subject site. See below photograph looking easterly along Painters Lane.



Figure 8: View looking east along Painters Lane. Subject land to the right of frame.

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4. The lift structures will take the building height above what is permitted under the LEP by about 3m which will allow access to future development and roof top garden. This will encourage other developers to seek similar exemptions.

Comment: The variation to height due to the lift overrun is minor and not significant. The overall design of the lift structure is not supported.

5. The lift is not an architectural roof feature and is an eyesore.

Comment: The addition of the lift and reduction in separation between Buildings 3 and 4 does add to the bulk and scale of the building.

6. The proposal differs significantly from the current approved development.

Comment: The proposed modification has been assessed under the principles of Section 4.55(2) and is considered to not be substantially the same development.

7. Height limits are already too high in Terrigal.

Comment: This is not a relevant submission. The height limits under the current planning instrument were determined after public consultation.

8. Council has previously rejected lift overruns. The proposal will reduce air space between the 2 buildings and impact view loss.

Comment: Lift overruns have been approved on other development in Terrigal and other areas.

9. The proposal is not in character with the area and not consistent with the natural and built environment.

Comment: The modification to the approved development is not considered to be consistent with existing and likely future character of the Terrigal area. The further variations to FSR and addition to the bulk and scale are not supported in the proposed form.

10. The proposal is not consistent with the planning objectives and development standards.

Comment: The modification to the approved development is not considered consistent with the planning objectives, the significant increase in FSR, additional level, reduction in separation and increase in bulk and scale are not substantially the same development.

Contributions

The land is subject to contribution plan for Terrigal. The modifications would require an update to the contributions specified in condition 2.2 applicable for open space, footpaths, town centre improvements and stormwater and flood mitigation.

Internal Consultation

The following internal consultations have been undertaken:

Traffic Engineer	Supported without conditions.
Development Engineer	Supported subject to amended conditions 1.1 and 2.10. See comments below.
Architect	Not supported. See SEPP 65 comments.
Waste Services	Supported subject to conditions.
Water and Sewer	Supported subject to conditions

Development Engineer

Road works

The existing development consent requires the construction of road works, footway formation and concrete footpath within Painters Lane. The proposed Section 4.55 amendment does not alter these existing development consent requirements.

Access

The existing development approval is accessed from Campbell Crescent via existing right of access arrangements over SP98141 (7 Painters Lane) and SP97511 (5 Painters Lane). This arrangement will remain unaltered with the proposed Section 4.55 modification.

Within the development site, access and parking arrangements are being modified to now propose the following:

- Ground Floor
This level is accessed from the proposed eastern ramp arrangement adjoining the existing right of access. This level accommodates 12 car parking spaces including four accessible spaces.
- Lower Ground Floor
This level is accessed directly off the existing right of access near the southern area of the site. A modified 'lower ground floor' level with access at the southern end of the site accommodating 26 car parking spaces including two accessible spaces is proposed together with a car lift within the level of car parking for access to the basement level. An access ramp is proposed from the right of access arrangements at the eastern end of the site to provide access to the ground floor level. The residential waste bin storage room is retained on the Lower Ground Floor level.
- Basement Level:

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Addition of a basement car parking level which will involve additional bulk excavation works to provide 22 car parking spaces together with secure tenant storage and plant room, lifts and bicycle parking. This level will be accessed via a car lift from the Lower Ground Floor Level.

The proposed access and parking modifications appear to generally comply with *AS2890 - Parking Facilities*.

Waste

The application indicates waste collection is to be undertaken by garbage trucks (9.8m in length), with separate collection areas located within the right of way, adjacent to the respective car park access driveways. Although this truck size is less than the standard 12.5m heavy rigid vehicle (HRV) to be designed for waste servicing, this arrangement appears to be consistent with the existing development consent which allowed the 9.8m vehicle in this instance.

Traffic

A 'Traffic and Parking Assessment Report' prepared by Varga Traffic Planning Pty Ltd (Ref 21481 dated 6 September 2021) was submitted with the application. This traffic assessment report indicates:

- The proposed modifications would result in a reduction in traffic generation of 1.3 peak hour trips compared to the existing development consent.
- The access and parking arrangements have been designed to comply with the relevant requirements specified in the *Standards Australia publication Parking Facilities Part 1 - Off-Street Car Parking AS2890.1:2004* and *Parking Facilities Part 6 - Off-Street Parking for People with Disabilities AS2890.6* in respect of ramp grades & transitions, driveway & aisle widths, parking bay dimensions and overhead clearances.
- The vehicular access arrangements have been designed to accommodate the swept turning path requirements of the B99 design vehicle as specified in *AS2890.1:2004 - Parking Facilities – Off Street Car Parking*, allowing them to enter and exit the car lift without difficulty, and to enter and exit the site in a forward direction at all times.

Flooding

Council's records do not indicate the site as being affected by flooding.

Drainage

The water management of the development associated with the existing development consent was based on the Water Cycle Management Report prepared by SRB Consulting Civil Engineers (Project No 21518b Issue 1 dated May 2015) as reflected in parts 'b', 'c', & 'd' of

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condition 2.10 of the development consent. As supporting documentation for this Section 4.55 application, a Water Cycle Management Plan prepared by SRB Consulting Civil Engineers (Project 21316 Issue 2 dated August 2013) together with plans prepared by SRB Consulting Civil Engineers (Project No 21316, Sheets 1, 2, & 3, all Issue B dated 6 August 2013) were lodged, however, these details are associated with DA/43874/2013 and DA/44795/2013 for an adjoining (completed) developments on 3-5 and 7-9 Campbell Crescent Terrigal and were not relevant to the subject DA (DA/47946/2015) for the purposes of internal water cycle management requirements within this site.

In response to Council's request for additional information, a revised Water Cycle Management Plan prepared by CUBO Consulting (Ref: 21120_WCMP_1.0 dated 7 December 2021) was submitted to address the water cycle management controls related to on-site detention, stormwater pollution controls and retention requirements for the altered development design. In this regard the revised measures propose a combination of 3,000L rainwater tank, a 52m³ retention tank, and 10 'Ocean Protect Storm Filters (or similar)'. This revised WCMP is acceptable for the purposes of the Section 4.55 assessment.

It is recommended that parts 'b', 'c', & 'd' of Condition 2.10 are revised to reflect the reference of the Water Cycle Management Plan prepared by CUBO Consulting (Ref: 21120_WCMP_1.0 dated 7 December 2021).

Ecologically Sustainable Principles

The proposal has been assessed having regard to ecologically sustainable development principles and is considered to be consistent with the principles.

The proposed development is considered to incorporate satisfactory stormwater, drainage and erosion control and the retention of vegetation where possible and is unlikely to have any significant adverse impacts on the environment and will not decrease environmental quality for future generations. The proposal does not result in the disturbance of any endangered flora or fauna habitats and is unlikely to significantly affect fluvial environments.

The proposal has been assessed having regard to ecologically sustainable development principles and is considered to be consistent with the principles; however, the proposal is not supported on other grounds.

Other Matters for Consideration

View Impact Assessment

The original application was supported by a Visual Impact Assessment, which addresses view impacts from the public domain and in relation to surrounding private properties.

The proposed modification reduces the distance between Buildings 3 and 4 and with the addition of a lift significantly adds to the bulk and scale and reduces views through the site

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from opposite sites. The previous visual impact assessment submitted with the original application has not been updated to take into account the lift tower. An amended visual assessment was not requested due to the concerns raised at lodgement of the modification with the lift tower. As the lift tower design was not altered in the amended plans and as it was not supported from the beginning an additional visual impact assessment was not requested. The lift tower and walkways will result in blocking the open corridor but due to the location of the development there are limited views to water so it is not a specific view loss impact but rather the openness that the corridor provided.

Likely Impacts of the Development:

Acid Sulfate Soils

This land has been identified as being affected by the Acid Sulfate Soils Map (Class 5) and the matters contained in Clause 7.1 of GLEP 2014 have been considered.

Climate Change and Sea Level Rise

Climate change and sea level rise have been considered in the assessment of this application, and refusal of this application is not warranted on these grounds.

The Public Interest:

The application is considered contrary to the local and community interest, as detailed throughout this report.

Conclusion

This application has been assessed against the heads of consideration of Section 4.15 of the *Environmental Planning and Assessment Act 1979* and all relevant instruments and policies. The increase in FSR, reduction in separation between Buildings 3 and 4, and addition of a lift between the buildings impacts the bulk and scale of the proposal. The proposed modification is not substantially the same development.






Accordingly, the application is recommended for refusal pursuant to Section 4.16 of the *Environmental Planning and Assessment Act 1979*.

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Reasons for Refusal

- 1 The proposed modification is not substantially the same development for which consent was originally granted.
- 2 The proposed modification results in additional unreasonable impacts as a result of additional floor space and reduction in distance between buildings as required under SEPP 65 and Apartment Design Guidelines.
- 3 The proposed modification has not suitably responded to the concerns raised in public submissions and is not in the public interest.

Attachments

 1 PTI Plans_PAN-147069	D15158873
 2 220510_Comparison Set_PAN-147069	D15158874
 3 SEE__DA47946_2015_S4.55_2_Revised 020522_10_16 Painters Lane, Terrigal_PAN-147069	D15147518
 4 PUBLIC SEPP 65 Design verification Statement 16 Painters Lane TERRIGAL DA/47946/2015/2	D14855448
 5 GOV.177 DA47946/2015 Applicant: SJH Planning & Design Proposed Shop Top Housing (31 Units) & Office (Buildings 3 & 4) on Various Lots, No 10 - 16 Painters Lane & No 3 -9 Campbell Crescent Terrigal (IR 21781971)	ECMD20434761

